SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4593-16T4

LARRY L. HAYNES, On Behalf of Himself and Others Similarly Situated,

Plaintiff-Respondent,

v.

DCN AUTOMOTIVE LIMITED LIABILITY COMPANY, t/a BRAD BENSON HYUNDAI,

Defendant-Appellant.

Argued January 30, 2018 – Decided April 2, 2018

Before Judges Yannotti, Leone and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4993-16.

Rosaria A. Suriano argued the cause for appellant (Brach Eichler LLC, attorneys; Rosaria A. Suriano, of counsel and on the briefs; David J. Klein, on the briefs).

Matthew S. Oorbeek argued the cause for respondent (The Wolf Law Firm, LLC, attorneys; Matthew S. Oorbeek, on the brief).

PER CURIAM

Defendant DCN Automotive Limited Liability Company t/a Brad Benson Hyundai (DCN) appeals from an order dated June 27, 2017, which denied its motion to dismiss plaintiff's complaint and to compel plaintiff to arbitrate his claims individually and not as a class action. We reverse.

The record reveals the following. On August 26, 2016, plaintiff filed a class action complaint on his own behalf and others similarly situated. Plaintiff alleged DCN is an auto dealership in Monmouth Junction that is engaged in the sale of motor vehicles. According to the complaint, plaintiff saw an advertisement on the Internet, which indicated that a certain vehicle was for sale at DCN, for a specific price.

Plaintiff traveled to DCN, intending to purchase the car. He showed the advertisement to a salesperson and attempted to negotiate a lower price. One of DCN's employees indicated that DCN could only sell the car at the Internet price, plus all applicable taxes and fees. Plaintiff agreed to pay the advertised price, and the applicable taxes and fees.

Plaintiff alleges that DCN's employee shook his hand and said they "had a deal." Plaintiff then was taken to the office of the DCN "finance manager" to sign the paperwork needed to complete the sale. According to plaintiff, the "finance manager" had him sign

the documents, but did not explain the "terms" set forth in the papers he was signing. Plaintiff claims he was not afforded sufficient time to review the documents before he signed them. The "finance manager" allegedly stated he understood plaintiff would be making a $10,000 down payment for the purchase. Plaintiff claims no one at DCN had discussed a down payment with him, although it had been agreed plaintiff would receive $1000 for his trade-in vehicle.

Plaintiff claims one of the documents he signed indicated the price of the car was $20,121, and that he would be charged $5000 for a tire and wheel protection plan (TWPP), and $2300 for a service contract (SC). Plaintiff alleges he had not previously discussed the TWPP or the SC with anyone at DCN. He claims DCN charged him $459 for "used car reconditioning," and $495 for sales tax, registration, and title fees. According to plaintiff, the total purchase price was $29,275.50.

Plaintiff further alleges the $1000 he was paid for the trade-in car was credited towards the $10,000 down payment. Plaintiff also signed a retail installment sales contract (RISC) to finance the balance of the purchase, at an annual interest rate of 14.89 percent. Plaintiff claims the RISC stated that the total sales price, including the down payment, the amount financed, and the finance charges, was $40,444.40.

Plaintiff claims that after he had a chance to read the documents, he realized he had been charged $5000 for the TWPP, and $2300 for the SC. He alleges he was charged $2246 more for the car than the advertised and agreed-upon price. He called DCN and spoke with an employee to complain. He said he wanted to cancel the contracts for the TWPP and SC.

The DCN employee allegedly said he would "[take] care of" these additional charges. About two months passed and plaintiff did not hear anything from DCN regarding the cancellation of the TWPP and SC. Plaintiff then contacted the administrators for the TWPP and the SC, and he was told they had no record of him, his vehicle, or the contract. Plaintiff still had not heard from DCN and did not receive a refund.

Plaintiff retained an attorney who sent DCN a demand letter, which stated that plaintiff had been overcharged. Eventually, DCN cancelled the TWPP and SC, and refunded the purchase price and sales tax paid on those two agreements. Plaintiff claims he was forced to pay interest of $387.43 on the cost of the TWPP and SC before these contracts were cancelled.

Plaintiff thus alleges he sustained ascertainable losses consisting of: (1) the difference between the advertised price of the car and the base price of the car, as well as the interest that had accrued on the difference; (2) the purchase price of the

TWPP and the SC and the associated sales taxes; (3) the interest that accrued and was paid on the TWPP and SC before those agreements were cancelled; and (4) the attorney's fees plaintiff incurred when he retained counsel.

Plaintiff asserted claims under the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -206. He alleges DCN is subject to the regulations governing motor vehicle advertising practices (MVAP), N.J.A.C. 13:45A-26A.1 to -10. He claims DCN's Internet advertisements are advertisements under the CFA and the MVAP regulations.

Plaintiff alleges DCN sold vehicles to him and others similarly situated at base unit prices that exceed the advertised prices for the vehicles, not including taxes and fees. Plaintiff claims DCN engaged in a "bait and switch" scheme and did not sell vehicles to plaintiff and others in accordance with the terms advertised.

Plaintiff also alleges DCN violated the CFA by engaging in unconscionable commercial or deceptive practices in connection with the sale of merchandise, which includes motor vehicles. He claims DCN failed to cancel and refund the full purchase price of the TWPP and SC and/or other similar contracts for a period of time after plaintiff requested cancellation. He alleges DCN failed to refund the interest that plaintiff and others were charged for

the TWPPs and SCs between the cancellation requests and the cancellations of these agreements.

In addition, plaintiff asserted a claim under the Truth in Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18. He claims DCN violated TCCWNA by offering or giving consumers written contracts or notices that violate the consumers' rights and DCN's responsibilities under New Jersey and federal law.

In the complaint, plaintiff also stated that he would be seeking certification of two classes. The first class consists of all consumers who, at any time within six years prior to the date the complaint was filed, resided in New Jersey, purchased a vehicle from DCN, and whose retail order and other sales documents listed a base purchase price higher than the price listed in the advertisement for the vehicle. The second class consists of all consumers who at any time within six years prior to the date the complaint was filed, financed the purchase of a vehicle from DCN and also purchased a TWPP, SC, or other additional plan similar to those sold to plaintiff, and who cancelled or attempted to cancel the plans and/or contracts.

DCN filed a motion in the trial court to dismiss the complaint and to compel plaintiff to submit his individual claim to arbitration pursuant to the arbitration clause in plaintiff's

purchase agreement. The arbitration clause provides in pertinent part that:

> AGREEMENT TO ARBITRATE ANY CLAIMS. READ THE FOLLOWING ARBITRATION PROVISIONS CAREFULLY, IT LIMITS YOUR RIGHTS, INCLUDING THE RIGHT TO MAINTAIN A COURT ACTION.
>
> The parties to this agreement agree to arbitrate any claim, dispute, or controversy, including all statutory claims and any state or federal claims, that may arise out of or relating to the sale or lease identified in this agreement. By agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes. Consumer Fraud, Used Car Lemon Law, and Truth-in-Lending claims are just three examples of the various types of claims subject to arbitration under this agreement. The parties also agree to waive any right (i) to pursue any claims arising under this agreement including statutory, state or federal claims, as a class action arbitration, or (ii) to have an arbitration under this agreement consolidated with any other arbitration or proceeding. The arbitration shall be administered by the American Arbitration Association under its Commercial Arbitration Rules, and the Consumer Related Disputes Supplementary Procedures to the extent applicable before a single arbitrator who shall be a retired judge or attorney . . . . If any part of this arbitration clause, other than waivers of class action rights, is found to be unenforceable for any reason, the remaining provisions shall remain enforceable. If a waiver of class action and consolidation rights is found unenforceable in any action in which class action remedies have been sought, this entire arbitration clause shall be deemed unenforceable, it being the

> intention and agreement of the parties not to arbitrate class actions or in consolidated proceedings. . . . THIS ARBITRATION PROVISION LIMITS YOUR RIGHTS, INCLUDING YOUR RIGHT TO MAINTAIN A COURT ACTION. PLEASE READ IT CAREFULLY, PRIOR TO SIGNING.

The trial court denied DCN's motion. The court determined that the arbitration provision was confusing as to whether plaintiff and those similarly situated were waiving their rights to bring a class action in court. The court therefore determined that there was no enforceable agreement to arbitrate. The court memorialized its decision in an order dated June 27, 2017. DCN appeals.

On appeal, DCN argues the trial court erred by failing to enforce the arbitration provision in the parties' agreement. DCN contends that, taken as a whole, the agreement is not ambiguous. DCN argues that a valid arbitration agreement exists between the parties.

The validity of an arbitration agreement is a question of law; therefore, we review the trial court's order denying DCN's motion to compel arbitration de novo. Barr v. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 605 (App. Div. 2015) (citing Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013)).

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 - 16, and the New Jersey Arbitration Act (NJAA), N.J.S.A. 2A:23B-1 to -32,

reflect federal and state policies that favor arbitration of disputes. Indeed, the FAA preempts state laws "that single out and invalidate arbitration agreements." Roach v. BM Motoring, LLC, 228 N.J. 163, 174 (2017) (citing Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996)). Therefore, a court "'cannot subject an arbitration agreement to more burdensome requirements than' other contractual provisions." Ibid. (quoting Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 441 (2014); and Leodori v. CIGNA Corp., 175 N.J. 293, 302 (2003)).

Consequently, arbitration agreements are governed by principles of contract law, and the terms of the agreement must be "given their plain and ordinary meaning." Ibid. (quoting M.J. Paquet v. N.J. DOT, 171 N.J. 378, 396 (2002)). When interpreting a contract, we must discern the intent of the parties. Ibid. (citing Kieffer v. Best Buy, 205 N.J. 213, 223 (2011)). If the meaning of an arbitration provision is ambiguous, it should be construed against the party who drafted the provision. Ibid. (citing Kieffer, 204 N.J. at 224).

We are convinced that the trial court erred by finding that the arbitration clause at issue is ambiguous and unenforceable. As noted, the introduction and conclusion to the arbitration clause state in capital letters that the agreement limits "YOUR RIGHTS, INCLUDING THE RIGHT TO MAINTAIN A COURT ACTION." The clause states

without qualification that the parties agree "to arbitrate any claim, dispute, or controversy, including all statutory claims . . . that may arise out of or relating to the sale or lease identified in this agreement." The arbitration clause makes clear that the parties agree they are waiving their right to maintain "other available resolution processes, such as a court action."

The arbitration clause further provides that the parties agree that they are waiving the right to pursue claims arising under the agreement "as a class action arbitration," or to have an arbitration under the agreement "consolidated with any other arbitration or proceeding." This section of the arbitration clause does not state that the parties are waiving the right to pursue a class action in court; however, there is no need to do so. The agreement clearly and unequivocally states that by agreeing to arbitration, the parties waive their rights to maintain an action in court.

The absence of any specific waiver of class actions in court is not confusing, and there is no inconsistency between the waiver of the right to pursue court actions and the waiver of the right to "class action arbitration." The waiver of the right to maintain a "class action arbitration" only applies to the arbitration process. This section of the arbitration clause plainly indicates that a party's claim must be arbitrated individually, and may not

be pursued in a "class action arbitration" or consolidated with other arbitrations.

Moreover, the intent of the parties as reflected in the plain language of the arbitration clause is clear. The parties agreed to arbitrate all claims arising under the agreement, and there can be no class action arbitration or consolidation of claims for arbitration. The court must enforce the agreement as written. McMahon v. City of Newark, 195 N.J. 526, 545-46 (2005) (citing Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)).

Furthermore, we cannot interpret the clause as precluding court actions of individual claims and class action arbitrations, but allowing class actions of similar claims in court. Such an interpretation would be contrary to established principles of contract interpretation, and represent the impermissible imposition of a more burdensome rule of interpretation than is applied to other contracts. Roach, 228 N.J. at 174 (citing Atalese, 219 N.J. at 441; Leodori, 175 N.J. at 302).

We therefore conclude that the arbitration clause at issue here represents a clear and unequivocal waiver of the right to pursue any claim arising under the agreement in a court action, and that the clause includes a waiver of the right to maintain a class action in court. The terms of the arbitration clause are "stated with sufficient clarity and consistency to be reasonably

understood by the consumer who is being charged with waiving [his or] her right to litigate a dispute in court." NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 428 (App. Div. 2011).

In support of his arguments on appeal, plaintiff cites a paragraph of NAACP which states:

> The potential for confusion is still further compounded by the third and final sentence of paragraph seven of the [separate arbitration document (SAD)], which recites: "You and we further agree that there shall be no class action arbitration pursuant to this agreement." (Emphasis added). By restricting its reference to a class action "arbitration," this third sentence could easily lead a purchaser to believe that [he or] she would be free to take part in a class action lawsuit either as a named representative or simply as a class member.
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> [Id. at 434-45.]

However, this paragraph in NAACP indicated the sentence referencing "class action arbitration" merely "compounded" the potential for confusion created by other provisions in the arbitration agreement. Ibid.

Indeed, in NAACP, there were "multiple arbitration provisions" which were "spread across three different documents, namely, the [retail installment contract (RIC)], the SAD, and the Addendum." Id. at 430. We held that, "[v]iewed in their totality, the arbitration provisions scattered among the RIC, the Addendum,

and the SAD are too plagued with confusing terms and inconsistencies to put a reasonable consumer on fair notice of their intended meaning." Id. at 431. We held that the three conflicting arbitration agreements were unclear and inconsistent regarding "the nature and locale of the arbitration forum," "the time limit in which arbitration must be initiated," "the costs of the arbitration and who is to bear them," which agreement "would take precedence over any other agreements in the event of a dispute," and the conflicting "class waiver provisions in the three key documents [which were] . . . collectively riddled with vague and inconsistent provisions." Id. at 431-35.

We stated that it was "unreasonable to expect a layperson to pore through the many arbitration provisions scattered within these multiple documents and discern which provisions are operative and exactly what they mean." Id. at 437. We concluded that "[i]n sum, the cumulative effect of the many inconsistences and unclear passages in the arbitration terms within the RIC, the Addendum, and the SAD compel us to declare them unenforceable[.]" Id. at 438.

Here, by contrast, we have only one arbitration clause, that has no alleged source of confusion other than the class action arbitration provision, which we find is clear in the context of this single, uncomplicated, internally-consistent arbitration

clause. Therefore, we conclude the trial court erred by dismissing with prejudice DNC's motion to enforce. The court erred by refusing to enforce the arbitration clause and allowing plaintiff to maintain his class action in court.

Reversed and remanded to the trial court for entry of an order dismissing plaintiff's complaint without prejudice, and requiring plaintiff to arbitrate his claim against DCN individually and not as part of a class action arbitration. We do not retain jurisdiction.