81616

51,616 B

RELEASED FOR PUBLICATION BY ORDER OF
THE COURT OF APPEALS

THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

WILLIAM E. NEIGHBORS, Appellant, vs. LYNN HICKEY DODGE, INC., a foreign corporation, Appellee.	)	No. 85,676 FOR PUBLICATION

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

Honorable James B. Blevins, Trial Judge

Plaintiff, William E. Neighbors, brought this action against Defendant, Lynn Hickey Dodge, Inc., seeking rescission of a contract to purchase a used vehicle from Defendant and damages. In response, Defendant filed an application to compel arbitration based on a Dispute Resolution Election clause contained in the Sales Order signed by Plaintiff. The trial court ordered the parties to arbitration and stayed further proceedings in the lawsuit. The arbitrator entered an award in favor of Plaintiff and against Defendant. The trial court confirmed the arbitration award and entered judgment. Plaintiff appeals the trial court's order compelling arbitration and staying the state court action.

REVERSED AND REMANDED WITH INSTRUCTIONS

Tomme J. Fent
Community Legal Services
of Oklahoma City, P.C.
Oklahoma City, Oklahoma — For Appellant

Byrona J. Maule
C. Craig Cole
C. Craig Cole & Associates
Oklahoma City, Oklahoma — For Appellee

A. Daniel Woska
Woska, Hasbrook, Dowd
& Underwood, P.C.
Oklahoma City, Oklahoma — Amicus Curiae For Appellant, AARP

SUMMARY OPINION

RAPP, C.J.

Trial court plaintiff, William E. Neighbors, appeals the trial court's order granting the application for arbitration of trial court defendant, Lynn Hickey Dodge, Inc.; denying Plaintiff's motion for rehearing; and confirming the arbitrator's award.

Plaintiff purchased a used automobile from Defendant on March 4, 1994, for the price of $5,988. As part of the transaction, Plaintiff executed a Sales Order. The Sales Order was a standardized, pre-printed form that contained a Dispute Resolution Election clause near the bottom of the document in print smaller than the rest of the document.[1] The Sales Order provided five places for the buyer to sign, which were indicated by an "X."

[1] Examination of the contract shows the Sales Order is printed with three different colors, which makes reading the Sales Order a concentrated effort.

Here, Plaintiff states Defendant did not discuss the pre-printed terms of the Sales Order with him. Plaintiff also states that once the parties agreed on a price for the car, the salesman completed the Sales Order and told Plaintiff the places to sign. Specifically, Plaintiff states Defendant failed to explain the Dispute Resolution Election clause of the Sales Order to Plaintiff or that it contained such a clause, which Defendant does not deny. Plaintiff also maintains Defendant did not give him a copy of the Sales Order at the time of the sale.

In response, Defendant asserts that it gave Plaintiff an opportunity to read the Sales Order before he signed the document. Defendant also points out that of the five places to sign on the Sales Order, one signature is required indicating acceptance of the Dispute Resolution Election and another signature verifies that the buyer has read the form and received a copy. Plaintiff signed in each of the five places where the salesman told him to sign.[2]

Plaintiff began experiencing mechanical problems with the automobile three days after the sale. Plaintiff took the vehicle to Defendant for service at least eight times in the first sixty days after the sale. Plaintiff was also required to have other service departments work on the automobile.

---

[2] While Defendant argues that Plaintiff is responsible for what he signs, it is of interest to note that even Defendant's salesman could not complete the Sales Order properly, as evidenced by the lack of date in the acknowledgement.

In May 1994, Plaintiff learned that the vehicle had been wrecked in the latter part of 1993, damaging the car's front end.[3] Defendant had failed to disclose the wreck or its damage to Plaintiff prior to the sale.

Plaintiff notified Defendant of his revocation of acceptance of the automobile on May 31, 1994, and demanded Defendant return all sums he had paid to purchase, as well as repair, the car. Defendant refused.

Plaintiff filed an action in the District Court of Oklahoma County, Oklahoma, on June 15, 1994, seeking rescission and damages. In response, Defendant filed an Application to Compel Arbitration and Stay Proceedings and Supporting Brief. The trial court granted Defendant's application, ordered the parties to arbitration, and stayed further proceedings in the lawsuit.[4] Plaintiff filed a motion to reconsider,[5] which the trial court denied.

---

[3] Defendant states in its brief that Plaintiff's first six facts are "mere allegations." Defendant does not deny the wreck, its failure to disclose the wreck to Plaintiff, or the entry of an award against it by the arbitrator.

[4] In ordering arbitration, the trial court stated:

> THE COURT: Did you want to go to mediation?
> MS. FENT: No.
> THE COURT: Would you like arbitration better:
> MS. FENT: No.
> THE COURT: I'm going to sustain the Defendant's Application for Arbitration.

Transcript, July 29, 1994, pp. 16-17.

[5] We treat Plaintiff's motion to reconsider as a motion for new trial.

Plaintiff and Defendant agreed to allow an arbitrator to enter an award for an agreed sum. The arbitrator entered his award in favor of Plaintiff and against Defendant for $3,900 on February 3, 1995. Plaintiff subsequently filed a response to Defendant's motion to confirm arbitrator's award and enter judgment. Plaintiff asserted in his response that: (1) he continued to maintain that a valid arbitration agreement did not exist between the parties; (2) he entered into the agreed arbitration award to move the matter to an appealable posture; and (3) he agreed to the trial court's order confirming the award with exceptions.

The trial court confirmed the arbitration award on May 12, 1995, and entered judgment. Plaintiff appeals the trial court's order compelling arbitration and staying the state court action.

The question presented is whether the Dispute Resolution Election clause, which required the parties to arbitrate their dispute and precluded Plaintiff's state court action, is enforceable.[6] The question is one of law and our review is de novo. First Options of Chicago, Inc. v. Kaplan, ____ U.S. ____, 115 S. Ct. 1920, 1924 (1995). We find the dispute resolution provision unenforceable for three reasons.

We first note that allegations of fraud in the inducement raise a cognizable basis for attack upon the contract, including the alternative dispute resolution provision. The Uniform

---

[6] Acknowledgment is made of the assistance provided by the AARP's Amicus Brief.

Arbitration Act, as adopted by the Oklahoma legislature, provides arbitration agreements are "valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract." 15 O.S.1991, § 802(A). Thus, courts must determine whether "such grounds as exist at law or in equity" require revocation of an arbitration agreement. Here, the record indicates that Defendant failed to disclose to Plaintiff that the automobile had previously been wrecked[7] and it did not provide Plaintiff with a salvage title. Indeed, the arbitration award granting Plaintiff $3,900, a sum in excess of sixty percent of the original market value, is indicative of a possible violation of 47 O.S. Supp. 1995, §§ 1105(A)(1) and 1111(N).[8]

---

[7] See note 3, supra.

[8] 47 O.S.1995, § 1105(A)(1), states in pertinent part:

> 1. "Salvage vehicle" means any vehicle which is within the last ten (10) model years and which has been damaged by collision or other occurrence to the extent that the cost of repairing the vehicle for safe operation on the highway exceeds sixty percent (60%) of its fair market value, as defined by Section 1111 of this title, immediately prior to the damage.

47 O.S.1995, § 1111(N), states:

> N. Any owner of a titled vehicle who has knowledge that the title is not the proper type for the vehicle, and with intent to misrepresent the vehicle, fails to make the appropriate title changes shall be guilty of a misdemeanor. Any person who has knowledge that the title is not the proper type for the vehicle, and with intent to misrepresent the vehicle, buys or receives any vehicle for which the appropriate title changes have not been made as required by this act shall be

Thus, there was a prima facie case made for rescission based upon the "grounds as exist at law" derived from obtaining the consent of the rescinding party through fraud. 15 O.S.1991, § 233(1). We also note that there was a requirement by the trial court under 15 O.S.1991, § 802(A), to resolve allegations of fraud in the inducement prior to compelling arbitration, Shaffer v. Jeffery, 915 P.2d 910, 917 (Okla. 1996), which the trial court here failed to do and erred.

There are other defects in the Dispute Resolution Election clause. The clause provides:

> This sale and any financing contract or agreement executed by Buyer in conjunction with the sale of the herein described vehicle, in the event of any dispute between Buyer and Seller regarding the sale or related matters, shall be subject to mandatory mediation and/or Arbitration at the option of Seller.
>
> If a dispute arises, Seller may notify Buyer of its election [to] impose mediation of the dispute. Pursuant to Court Rule 7-90-5 of the District courts of Oklahoma County and Title 12 O.S. § 1801 et seq. [sic]
>
> If mediation of the dispute between Buyer and Seller is not successful in resolving the issues between Buyer and Seller, Seller may at its option, notify Buyer of

---

> guilty of a misdemeanor. Any person found guilty in accordance with the provisions of this subsection shall be punished by a fine of not more than One Thousand Dollars ($1,000.00) for the first offense or Five Thousand Dollars ($5,000.00) for the second or subsequent offense, or by imprisonment in the county jail for a term not exceeding six (6) months, or by both such fine and imprisonment.

> Seller's election to submit the dispute to arbitration. If Seller elects to submit the issue to Arbitration, the Arbitration shall be conducted in conformity with the rules of the American Arbitration Association.

The placement of the modifying phrase "at the option of Seller," and other language, including the lack of a specified time to exercise the option, causes the clause to be susceptible to several interpretations and ambiguous. See Littlefield v. State Farm Fire and Casualty Co., 857 P.2d 65, 69 (Okla. 1993). When an ambiguity exists, basic contract construction requires that the contract be construed most strongly against the party who drafted the contract, in this case Defendant. 15 O.S.1991, § 170; Cities Service Oil Co. v. Geolograph Co., 208 Okla. 179, 185, 254 P.2d 775, 782 (1953). Guided by that rule of construction, this court simply cannot find that the parties agreed to arbitrate all disputes. See McNeer v. Thomson McKinnon Securities, Inc., 731 F. Supp. 1021 (D. Kan. 1990).

Here we are also faced with a dispute resolution provision which purports to grant a unilateral right to elect to mediate, arbitrate, or litigate. In that regard, "[a]rbitration is the referral of a dispute by the voluntary agreement of the parties to one or more impartial arbitrators for a final and binding decision as a determination of the dispute." Voss v. City of Oklahoma City, 618 P.2d 925, 927 (Okla. 1980). Parties may voluntarily waive the right to jury trial, which otherwise is decreed inviolate by the Oklahoma Constitution. The Oklahoma Constitution provides: "The right of trial by jury shall be and

remain inviolate, except in civil cases wherein the amount in controversy does not exceed One Thousand Five Hundred Dollars ($1,500.00), ..." Okla. Const. art. 2, § 19. However, it has been held that "[o]ne party may not unilaterally decide to have someone other than a jury determine the issues and thereby destroy the other's right to a jury trial." Massey v. Farmers Ins. Group, 837 P.2d 880, 884 (Okla. 1992).

The effect of the language granting seller, but not buyer, the option of electing alternative dispute procedures is that the seller may or may not elect mediation/arbitration procedures, as the seller determines what will be in its own best interests. Such one-sided agreements have been held unenforceable. See R.W. Roberts Const. Co. v. St. Johns River Water Mgt. Dist., 423 So. 2d 630 (Fla. Dist. Ct. App. 1982)(court did not err in denying motion to compel arbitration when contract clause required only subcontractor's claims to be arbitrated, but not general contractor's claims); Arcata Graphics Corp. v. Silin, 399 N.Y.S.2d 738 (N.Y. App. Div. 1977).

Because of the special guarantee of jury trials granted by our constitution, we hold that a contractual provision purporting to grant a unilateral right to elect alternative dispute resolution procedures is not enforceable against the party demanding a jury trial.

Based upon the prima facie showing of fraud in the inducement, the ambiguity of the Dispute Resolution Election clause, and the unilateral nature of the clause contained in the Sales

Order, we conclude that the trial court erred in holding the arbitration agreement enforceable.[9]

The trial court order confirming the arbitration award and entering judgment thereon is reversed and the case remanded for further proceedings consistent with this decision.

REVERSED AND REMANDED WITH INSTRUCTIONS.

TAYLOR, P.J., and STUBBLEFIELD, J. (sitting by designation), concur.

---

[9] Defendant's motion to dismiss Plaintiff's appeal is moot because of this reversal.