Ch 6 (00)

STATE OF MISSOURI )
) SS
CITY OF ST. LOUIS )

***MISSOURI CIRCUIT COURT***
**TWENTY-SECOND JUDICIAL CIRCUIT**
**(City of St. Louis)**

WILLIE J. SMITH, )
)
Plaintiff, )
) Cause No. 22062-00533
vs. )
) Division No. 2
GRAND IMPORTS, LTD., d/b/a )
IMPORTS LTD., )
)
Defendant. )

FILED
AUG 07 2006
MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

**ORDER**

This matter comes before the Court on Defendant's Motion to Compel Arbitration. The Court now rules as follows.

Plaintiff brought the present action against Defendant for violations of the Missouri Merchandising Practices Act, § 407.020 RSMo. Specifically, Plaintiff alleges that in November 2004, she cosigned for credit in order for her daughter, Billie Brown, to purchase a vehicle from Defendant. The credit application was approved, and Plaintiff was listed as owner and obligor on the loan. The vehicle experienced numerous mechanical problems, however, and in March 2005, Ms. Brown traded in the car to purchase another vehicle from Defendant. Both Plaintiff and Ms. Brown advised Defendant that Plaintiff would not cosign for the new car. Nevertheless, Plaintiff alleges, Defendant unlawfully used the credit information obtained on the November 2004 application on a credit application for the new vehicle, without Plaintiff's approval. Plaintiff alleges that she has received

notices of adverse action from two credit unions, based on the March 2005 credit request and has sustained damages as a result.

Defendant seeks an order compelling arbitration and staying the action pending arbitration pursuant to arbitration clauses contained in a Retail/Lease Buyers Order, a Retraction of Sale Agreement (Bailment), and an Auto Sale Closing Statement, all executed on November 5, 2004, in connection with Ms. Brown's purchase of the first vehicle, a 1999 Land Rover. The Retail/Lease Buyers Order contains the following arbitration provision:

> **Claim Resolution Procedure.** Every claim, dispute or controversy (hereinafter "claim") between Buyer and Company arising out of or relating to this Agreement, Buyer's purchase, or any warranty, if any, from the Company to Buyer, regardless of the nature of the claim (including without limitation every breach of contract claim, warranty claim, tort claim, and statutory claim), shall be decided by the following three-step claim resolution procedure. Step 1: the parties shall attempt to resolve the claim through direct discussions. Step 2: If no resolution is reached during Step 1, the claim shall be mediated in St. Louis, Missouri in a mediation administered by the "administrator" as defied herein. Step 3: If no resolution is reached during Step 2, the claim shall be finally decided by binding arbitration in St. Louis, Missouri. ... The parties agree that this transaction between Company and Buyer is a transaction involving interstate commerce, so that the arbitration provisions herein are enforceable under the Federal Arbitration Act.
>
> THIS AGREEMENT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

The Retraction of Sale Agreement and Auto Sale Closing Statement recite on the reverse of the forms the same arbitration clause that appears in the Retail/Lease Buyers Order. Both of the latter documents reference the arbitration clause on the front of the page.

Plaintiff acknowledges that the documents executed in November 2004 contained arbitration clauses. However, she counters that these arbitration clauses do not apply to her claim, which arises out of the March 2005 purchase, a different transaction than that which involved the signing of the sale documents in November 2004. Further, Plaintiff maintains, the scope of the arbitration clauses does not extend to the March 2005 transaction, in which no agreement containing such an arbitration clause was ever signed.

A court must stay a suit on the basis of an arbitration clause after a party moves for such relief and after the court determines that the issue is arbitrable under the agreement. McIntosh v. Tenet Health Systems Hosp., 48 S.W.3d 85 (Mo.App. E.D. 2001). Arbitration is strictly a matter of contract, and a party can be compelled to arbitrate only when it has agreed to do so. AJM Packaging Corp. v. Crossland Const. Co., 962 S.W.2d 906 (Mo.App. 1998); Greenwood v. Sherfield, 895 S.W.2d 169, 174 (Mo.App. 1995). The party resisting arbitration bears the burden of showing that there is no agreement to arbitrate and that the arbitration act is not triggered. State ex rel. PaineWebber, Inc. v. Voorhees, 891 S.W.2d 126, 128 (Mo. 1995).

The FAA differs from the Missouri Act in that, among other things, it does not preclude enforcement of arbitration agreements found within adhesion contracts. McCarney v. Nearing, Staats, Prelogar and Jones, 866 S.W.2d 881, 887 (Mo.App. W.D. 1993). Form contracts of adhesion are widely used and are not inherently unenforceable. Swain v. Auto Services, Inc., 128

S.W.3d 103, 107 (Mo.App. E.D. 2003). A provision is unconscionably unfair and unenforceable if it fails to comport *with the reasonable expectations of the parties.* Id. The test for conscionability and thus enforceability is an objective test of the reasonable expectations of the average member of the public. Id.; see also, Heartland Health Systems, Inc. v. Chamberlin, 871 S.W.2d 8, 11 (Mo.App. W.D. 1993).

The scope of the arbitration clause set forth in the November 2004 documents is "[e]very claim, dispute or controversy ... between Buyer and Company arising out of or relating to *this Agreement, Buyer's purchase, or any warranty* ... from the Company to Buyer, regardless of the nature of the claim." (Emphasis added.) The reasonable expectation of a buyer signing such an agreement is that the clause extends to those claims that arise from the transaction referred to in the documents, not to a possible future transaction with the same company involving a different vehicle.

The language cannot be read as broadly as Defendant suggests. Unlike a general release, the above arbitration clause does not extend to all past, present, and future claims, known and unknown; and, unlike an employment contract, which does not constitute a single purchase but a continued relationship, the *arbitration clause contemplates one purchase transaction related* to a single vehicle. Thus, the arbitration provision is limited in its language to claims related to the transaction that existed at the time the parties entered into the agreements, that is, the purchase of the 1999 Land Rover. The transaction upon which

Plaintiff has sued is a subsequent transaction, involving a different sale of a different vehicle, and necessitating the execution of new sale contracts. The only thing held in common between the two vehicle purchase transactions is the allegedly misappropriated credit information. Nothing in the November 2004 documents containing the arbitration clauses contemplates the use of such credit information for any purpose other than for the purchase. Accordingly, the Court concludes that Plaintiff's claim is not within the scope of the arbitration provisions contained in the November 2004 documents.

ORDER

WHEREFORE, IT IS ORDERED that Defendant's Motion to Compel Arbitration is hereby denied.

SO ORDERED:

Thomas C. Grady, Judge

Dated: 8.7., 2006

cc: Debra K. Lumpkins, Attorney for Plaintiff
Michael C. Todt, Attorney for Defendant