[Cite as *Villio v. Fred Martin Ford, Inc.*, 2021-Ohio-2361.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

MARY A. VILLIO,

Plaintiff-Appellant,

v.

FRED MARTIN FORD, INC.,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0090

Civil Appeal from the
Mahoning County Court, Area No.4 of Mahoning County, Ohio
Case No. 2019CVF00658

BEFORE:
Carol Ann Robb, Cheryl L. Waite, Judges and Sean C. Gallagher, Judge of the Eighth District Court of Appeals, Sitting by Assignment.

JUDGMENT:
Affirmed.

Atty. Michael Rossi, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, Ohio 44482 for Plaintiff-Appellant and

Atty. Robert Konstand, P.O. Box 0009, Bath, Ohio 44210 for Defendant-Appellee.

Dated: June 22, 2021

Robb, J.

{¶1} Plaintiff-Appellant Mary A. Villio appeals the decision of the Mahoning County Court, Area No. 4, granting summary judgment in favor of Defendant-Appellee Fred Martin Ford, Inc. The arbitration agreement in the parties' contract named an arbitration organization and allowed Appellee to substitute another organization if the one named was unable or unwilling to provide arbitration. Appellant contends Appellee failed to substitute an arbitration organization after the one named in the contract disclosed its inability to provide arbitration in the matter, and she says this failure constituted a violation of the Consumer Sales Practices Act (CSPA). The trial court disagreed and concluded all claims were subject to arbitration. For the following reasons, Appellant's arguments are without merit, and the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On June 18, 2019, Appellant filed a complaint against Appellee in the county court related to her purchase of a used vehicle, setting forth claims for: violation of the CSPA (alleging deceptive practices as to a contractual representation about affiliation with an arbitration organization); breach of warranty (with regard to the vehicle's limited warranty); and fraud (alleging a misrepresentation about the tires). The purchase agreement attached to the complaint showed Appellant bought a 2007 Ford Focus with 86,340 miles for $5,899 from Appellee on December 10, 2015. The limited warranty was also attached.

{¶3} The front page of the purchase agreement contained a clause entitled, "JURY WAIVER AND AGREEMENT TO BINDING ARBITRATION," which was specified as a material inducement to Appellee entering the contract and incorporated into certain other agreements. The arbitration clause provided in pertinent part:

> In addition, the parties voluntarily, knowingly, irrevocably and unconditionally agree that any dispute between them, whether based on contract, tort, under a statute or otherwise, and whether for money

> damages, penalties or declaratory or equitable relief, shall be resolved by binding arbitration.
>
> The arbitration shall be conducted by the National Arbitration Forum ("NAF"), under the Code of Procedure in effect at the time the Claim is filed. Rules and forms of the National Arbitration Forum may be obtained and Claims filed at any National Arbitration Forum office, www.arb-forum.com, or [address provided], telephone [number provided]. If the NAF is unwilling or unable to act as arbitrator, we may substitute another nationally recognized, independent arbitration organization that uses a similar code of procedure. Any arbitration proceedings will take place within Mahoning County. * * *
>
> If any part of this Arbitration Section is found to be invalid or unenforceable, the remainder of this Arbitration Section shall be enforceable without regard to such invalidity or unenforceability. * * *

Purchase Agreement (12/10/15).[1]

{¶4} Appellant also attached to her complaint a May 25, 2017 letter she received from the NAF stating it no longer accepts arbitration claims involving private individuals or consumers. Appellant's complaint resulted in Mahoning County Case No. 2019-CVF-658, which is the case on appeal herein.

{¶5} Appellee's answer set forth a res judicata defense, citing two prior cases (Mahoning County Case Nos. 2017-CVI-297 and 2017-CVI-749) filed by Appellant in the court's small claims division. Appellant previously raised a CSPA violation, breach of warranty, and misrepresentation, but the actions were dismissed due to the mandatory arbitration clause. The answer further said Appellant failed to submit the matter to arbitration after a substitute arbitration organization was named, pointing to emails between the parties' attorneys from June through August 2018.

[1] The parties agree the term "we" means Appellee in the phrase: "we may substitute another nationally recognized, independent arbitration organization that uses a similar code of procedure." Any theory that it referred to both parties would serve to weaken Appellant's argument.

{¶6} The email chain was attached (and subsequently verified as summary judgment evidence). In an email on June 14, 2018, Appellee's attorney said the local Auto Dealers Association recommended the American Arbitration Association. He said to let him know *if* Appellant wished to use some other arbitration organization (and he would check with his client as to whether any alternative recommendation was acceptable).

{¶7} Appellant's attorney responded, "If Fred Martin selects the American Arbitration Association, we will so submit the claim; however, please understand that Mary is indigent and can pay no part of any AAA review and disposition." Appellee's attorney replied the same day, asking whether there was a settlement demand and whether counsel knew of a local arbitrator they could use (presumably seeking an arbitrator within the arbitration organization being discussed in the emails).

{¶8} Two weeks later, Appellant's attorney replied to the inquiry on settlement by itemizing the alleged damages related to the vehicle and requesting attorney's fees for the CSPA claim. He also noted the basis for the CSPA claim was that Appellee had not yet substituted another arbitration organization. On August 15, 2018, Appellee's counsel submitted a counteroffer and added: "Otherwise your client can initiate an arbitration proceeding with AAA, or such other neutral that I would agree upon."

{¶9} Appellant sought partial summary judgment on her CSPA claim filed under R.C. 1345.02(B)(9). Factually, she said the emails showed Appellee did not substitute another arbitration organization. She also quoted from Appellee's answer and acknowledged the action she filed in March 2017 (Case No. 2017-CVI-297) was dismissed by the trial court based on the mandatory arbitration clause in the parties' contract. There was no mention of the other dismissed 2017 action. Suggesting the within 2019 action was a refiled action, Appellant said she filed "this Consumer Sales Practices Act action (2018-CVF-220)" after Appellee failed to substitute a new arbitration organization. She apparently voluntarily dismissed the 2018 action.

{¶10} Appellant's affidavit, dated September 27, 2019, stated: after the court's decision in the first action, she tried to submit her claim to the NAF; she received the (attached) May 25, 2017 letter saying the NAF was unwilling to arbitrate the claim; and she brought this action because Appellee failed to substitute another arbitration

organization *between the time of the NAF letter and the time she attempted to file a complaint in November 2017*. She noted she attempted to file the 2018 action in November 2017, but the clerk did not accept it until March 2018 due to an issue with a cost deposit.[2]

{¶11} Legally, Appellant's motion for summary judgment said it was incumbent on Appellee to substitute another arbitration organization to hear her claim after she received the NAF letter. She argued Appellee's failure to substitute constituted a deceptive act under the CSPA because Appellee contractually represented it had "sponsorship, approval, or affiliation" with an arbitration organization for resolution of any dispute arising under the parties' agreement. *Citing* R.C. 1345.02(B)(9) (it is a deceptive act or practice to represent "the supplier has a sponsorship, approval, or affiliation that the supplier does not have").

{¶12} Appellee filed a response in opposition and a motion for summary judgment, which incorporated the arguments from its response. Raising res judicata, Appellee pointed out the court previously dismissed Case Nos. 2017-CVI-297 and 2017-CVI-749 on the grounds that the claims relating to the sale of the vehicle were subject to mandatory arbitration. Appellee pointed out Appellant did not appeal those dismissals and did not seek an order enforcing the arbitration clause (such as a petition to compel arbitration or an application to appoint a substitute arbitrator).[3] To demonstrate a substitute arbitration organization was named in mid-2018, the affidavit of Appellee's attorney incorporated the aforementioned email chain between himself and Appellant's attorney. His affidavit said Appellant did not then submit her claim to arbitration.

---

[2] Appellant made no mention of notifying Appellee about the NAF letter during the time period covered by her affidavit. We also note Appellant submitted a March 29, 2018 letter from her attorney to Appellee's attorney stating the CSPA claim was being filed because Appellee did not substitute an arbitration organization after Appellant received the attached rejection letter from the NAF. This letter was simply appended to the motion without being mentioned in it or incorporated in an affidavit.

[3] A motion to compel arbitration or appoint an arbitrator can only be filed in the Common Pleas Court. R.C. 2711.03(A) (party aggrieved by a failure to perform an arbitration agreement may petition *the common pleas court* for an order directing arbitration to proceed); R.C. 2711.04 (if the contractual method for naming an arbitrator is not followed or there is a lapse in naming an arbitrator or filling a vacancy, then *the common pleas court* shall appoint an arbitrator on the application of any party). *See also* R.C. 2711.16 ("Jurisdiction of judicial proceedings provided for by sections 2711.01 to 2711.14, inclusive, of the Revised Code, is generally in the courts of common pleas"). We also note the case did not involve a motion to stay pending arbitration. *See* 2711.02(B).

{¶13} On December 3, 2019, the magistrate issued a decision granting summary judgment for Appellee. The magistrate said the two 2017 cases were dismissed (at the plaintiff's cost) because of the mandatory arbitration clause and no objections or appeals were filed from those dismissals.[4] The magistrate opined the prior rulings applied to the claims for breach of warranty, fraud, and part of the CSPA claim. The magistrate opined Appellant was basing a new CSPA claim on the subsequent failure to substitute after the NAF rejection but was not challenging the validity of the arbitration clause.

{¶14} In addressing Appellant's reliance on R.C. 1345.02(B)(9) in her partial motion for summary judgment, the magistrate found Appellant's issue with naming an arbitration organization would not qualify as a representation that the supplier had a "sponsorship, approval, or affiliation that the supplier does not have." The magistrate observed:

> Sponsorship, approval, or affiliation would normally encompass another entity being involved in the sale of the subject goods or services and not a named entity being mentioned for resolution should a dispute arise. Indeed, one can hardly imagine a party having a "sponsorship, approval, or affiliation" with an entity, here an arbiter, envisioned to be neutral in the resolution of any dispute by and between the parties. To find otherwise would be illogical.

The magistrate also said the emails showed the selection of AAA as the substitute arbitration organization and Appellant's agreement to submit her claim to AAA if Appellee selected that organization.

{¶15} In addition to division (B)(9), it was pointed out Appellant's complaint also cited R.C. 1345.02(B)(10) (deceptive practice by representing the transaction involves a warranty or other rights when the representation is false). The magistrate found the arbitration clause was applicable to any CSPA claim brought by Appellant in this action, noting the arbitration clause specifically stated, "any dispute between them, whether

[4] Contrary to a suggestion in Appellee's response, the magistrate pointed out the 2017 dismissals were not decisions on the merits of the claims that were still subject to arbitration.

based on contract, tort, under a statute or otherwise, and whether for money damages, penalties or declaratory or equitable relief, shall be resolved by binding arbitration."[5]

{¶16} In granting Appellee's motion for summary judgment, the magistrate concluded all claims were subject to arbitration rather than court litigation. The trial court signed the magistrate's decision the day after the magistrate signed it and explained the right to file objections.

{¶17} Appellant filed timely objections to the magistrate's decision. She claimed the magistrate erred in failing to find Appellee misrepresented it had a certain sponsorship, approval, or affiliation where Appellee: named an arbitration organization with which it had no affiliation, offered to substitute a similar organization, and then did not substitute. Without explaining what she believed substitution entailed, Appellant said Appellee "purported to provide a substitute arbitration forum that never occurred." The objections also said the magistrate erred by not finding Appellee was equitably estopped from asserting "the efficacy of the arbitration provision by its own conduct of never substituting" a new arbitration organization.

{¶18} On July 15, 2020, the trial court entered judgment overruling the objections and sustaining the magistrate's decision. Appellant filed a timely appeal, and this court held the appeal in abeyance with a limited remand for issuance of an order which specified the rights, duties, and obligations of the parties. On November 2, 2020, the trial court entered a judgment which: found the magistrate's decision contained no error; overruled the objections; adopted the magistrate's decision as the permanent order of the court; and recited the contents of the magistrate's decision, including the grant of summary judgment for the defendant. Appellant amended her notice of appeal and attached this judgment.

ASSIGNMENT OF ERROR

{¶19} Appellant's sole assignment of error contends:

"The trial court erred in granting Defendant-Appellant's summary judgment motion and dismissing the Complaint."

---

[5] *See, e.g., Smith v. Whitlatch & Co.*, 137 Ohio App.3d 682, 685, 739 N.E.2d 857 (11th Dist.2000) (a transaction covered by the CSPA is subject to arbitration where the parties contractually agreed to settle any dispute through arbitration without excepting CSPA claims)

{¶20} A summary judgment movant has the initial burden of stating why the movant is entitled to judgment as a matter of law and showing there is no genuine issue of material fact. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-294, 662 N.E.2d 264 (1996). The non-movant then has a reciprocal burden. *Id.* The non-movant's response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing there is a genuine issue of material fact for trial and may not rest upon mere allegations or denials in the pleadings. Civ.R. 56(E). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Byrd*, 110 Ohio St.3d 24 at ¶ 12.

{¶21} In her statement of the issue presented for review, Appellant summarizes her argument in support of this assignment of error as follows:

> Whether an RC Chapter 1345 supplier who provides a particular forum as the exclusive forum for consumer dispute resolution; retains the power to substitute another exclusive forum where the particular forum is unavailable; and then fails to so substitute when the consumer's legal action is dismissed, by operation of the exclusive dispute resolution provision and the particular forum is unavailable to resolve the parties' dispute, constitutes a "sponsorship [or] approval [or] affiliation" with a dispute resolution forum that it does not have within the meaning of RC 1345.02(A) and (B)(9), a deceptive act or practice.

{¶22} The only law cited in Appellant's brief is R.C. 1345.02(A) and (B)(9). Pursuant to R.C. 1345.02(A): "No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction." Division (B) defines various deceptive acts or practices, such as when a supplier represents: "(9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have * * *." R.C. 1345.02(B)(9).

{¶23} Appellant challenges the trial court's ruling to the extent it applies to her (B)(9) CSPA claim based on Appellee's alleged failure to substitute an arbitration

organization. She specifies that her CSPA action arises out of Appellee's conduct or lack thereof *after her small claims action was dismissed*. (Apt.Br. 4). She claims *the failure to substitute* (under the contractual circumstances involving a named arbitrator with power to substitute) was a deceptive act because Appellee represented having "a sponsorship, approval, or affiliation that the supplier does not have" under R.C. 1345.02(B)(9). Appellant's brief mentions her prior actions in support of her argument that Appellee deprived her of the forum anticipated in the trial court's 2017 decisions.

{¶24} Appellee states the trial court properly applied res judicata due to the prior dismissals based on the arbitration clause and the lack of appeals. A final judgment on the merits bars subsequent actions based on claims arising out of the occurrence that was the subject of the prior action. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995). A primary consideration is the identity of the evidence relevant to proving the claim in each action. *Id.* at 382-383. Yet: the trial court stated the (B)(9) CSPA claim (based on a lack of substitution) in the 2019 action was different than the claims in the 2017 actions; the 2018 action was voluntarily dismissed with no decision by the court; and the alleged facts concerning lack of substitution relied upon in the 2019 action arose after the 2017 decision.

{¶25} As to the pertinence of Appellant's arguments against the trial court's observations on R.C. 1345.02(B)(9), the trial court concluded that all claims, including this one, were subject to arbitration. There is a lack of briefing on this particular result. Appellant may be presuming if her (B)(9) CSPA summary judgment argument had merit and there was never a substitution by Appellee, then the arbitration clause would be avoided. Yet, there is no challenge to the trial court's finding that the validity of the arbitration clause was not being contested, and Appellant does not mention on appeal the estoppel argument she briefly presented in her objections (or mention waiver when suggesting an untimely substitution). This court will not attempt to formulate arguments for a party or guess at an appellant's path for finding one argument dispositive. *See* App.R. 16(A)(7) (the argument section of the brief must contain "the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies").

{¶26} Likewise, Appellant fails to explain certain conclusory statements she espouses in support of her appeal. For instance, Appellant asserts: "To this day, Fred Martin has never substituted an arbitration forum in consequence of NAF's unwillingness to arbitrate the dispute." (Apt.Br. 7). As below, there is no explanation of the rationale behind this statement. Her brief does not discuss the emails between her attorney and Appellee's attorney wherein: Appellee essentially said it was naming AAA as the substitute arbitration organization, unless Appellant wished to recommend a different organization (in which case she was to voice this desire); Appellant agreed to submit the claim to AAA (if this organization was selected by Appellee); Appellant later expressed a belief that Appellee did not yet finalize the substitution; and Appellee responded by informing Appellant that if she rejected the settlement offer, then she could initiate arbitration *with AAA*. *See* Statement of the Case, supra (for further specifics on the emails.)

{¶27} It is not until the reply brief that Appellant suggests the naming of another arbitration organization is not the same as the contractual requirement to "substitute another national recognized, independent arbitration organization." Appellant's reply states, "the contract language is that Appellee 'may substitute,' not that Appellant 'can initiate' the substituted forum." (Apt. Reply Br. 3). However, a party cannot wait to raise substantive arguments in the reply brief or use it to rectify omissions in an appellate brief, especially in a civil case. *Oxford Mining Co. LLC v. Ohio Gathering Co. LLC*, 7th Dist. Belmont No. 19 BE 0016, 2020-Ohio-1363, ¶ 72-73.

{¶28} Additionally, as Appellee points out, the objection to the magistrate's finding on substitution of the arbitration organization lacked specificity. The objections say the magistrate erred because Appellee "substituted nothing" and "purported to provide a substitute arbitration forum that never occurred." Yet, there was no explanation as to the basis for this statement, no reference to the undisputed emails between the attorneys, and no argument as to the effect of the email exchange.

{¶29} "An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). If a party fails to object to a specific factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b), then the party is prohibited from assigning an error on appeal about the trial court's adoption of the

finding or conclusion. Civ.R. 53(D)(3)(b)(iv) (except for plain error). Appellant's objections did not clearly inform the trial court she believed a selection by naming was not a substitution or she believed Appellee should have initiated an arbitration proceeding for her.

{¶30} In any event, the argument lacks merit. Appellant does not allege the substitution provision in the arbitration clause was ambiguous. In construing terms used in an agreement, "common words appearing in a written instrument are to be given their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 245-246, 374 N.E.2d 146 (1978) (after stating the construction of a written contract is a matter of law). In this general context, the verb "substitute" generally means "to put or use in the place of another." Merriam-Webster's Online Dictionary.

{¶31} Appellant acknowledges the arbitration organization named in the contract was unwilling or unable to arbitrate and the contract therefore allowed Appellee to substitute a new arbitration organization. The contractual language on substitution of another arbitration forum clearly did not require the initiation of an arbitration action *by the non-aggrieved party*.[6] Appellee was not required to initiate an arbitration action *against itself* in order to substitute another organization after being notified the NAF was unable or unwilling to arbitrate Appellant's claim. *See Ohio Plumbing Ltd. v. Fiorilli Construction Inc.*, 2018-Ohio-1748, 111 N.E.3d 763, ¶ 19 (8th Dist.) ("it would be nonsensical to require a defendant to commence arbitration of a claim against himself"). In such circumstances, where Appellant submitted a claim to arbitration but the named organization was unwilling or unable to proceed, the act of substituting the organization by the other party was clearly to occur by the naming of a substitute organization. The substitution of a name in a written contract, as permitted by the contract, can be performed through writings exchanged by the attorneys for the parties as occurred here.

[6] If *Appellee* wished to file a claim against Appellant, it could have substituted the NAF by initiating an arbitration proceeding at a new similar organization (as Appellant admits Appellee had the sole authority to substitute). However, Appellee was not the aggrieved party here.

{¶32} Appellant agreed in writing she would submit her claim to AAA if Appellee "selects" that organization. She did not dispute AAA satisfied the contractual requirement that the substitute be "another nationally recognized, independent arbitration organization that uses a similar code of procedure." The fact Appellee offered her an additional opportunity to suggest a different organization for Appellant's approval did not mean AAA was not provided as the substitute arbitration organization, and Appellant does not argue otherwise. The evidence provided to the trial court did not show Appellee "never" satisfied its obligation to "substitute another nationally recognized, independent arbitration organization that uses a similar code of procedure."

{¶33} And, as the trial court said in finding Appellant was not entitled to summary judgment on her claim under R.C. 1345.02(B)(9), her allegation would not fall under R.C. 1345.02(B)(9). Naming a preferred arbitrator (in a contract containing the right to substitute if that arbitrator is unwilling or unable to preside) is not a representation "[t]hat the supplier has a sponsorship, approval, or affiliation that the supplier does not have * * *." R.C. 1345.02(B)(9). The contract expressly anticipated a potential need to substitute the named arbitration organization by stating: "we may substitute another nationally recognized, independent arbitration organization that uses a similar code of procedure." This also expressly indicated the named organization was independent and any successor would be independent as well.

{¶34} To the extent Appellant's argument builds on the original naming of an arbitration organization in the contract, a business does not claim it is sponsored by an independent arbitrator, has the approval of an independent arbitrator, or is affiliated with an independent arbitrator merely by naming it in the contract as the preferred organization. This would be especially evident for a yet-to-be named arbitration organization, which is the focus of Appellant's contention on appeal. The very absence of a named successor arbitration organization in the contract clearly demonstrates there was no contractual representation that Appellee had the sponsorship, approval, or affiliation of a potential entity who may be substituted in the future if the need were to arise. Thus, to the extent Appellant believes R.C. 1345.02(B)(9) was her path to avoiding the arbitration clause, the particular argument fails.

{¶35} In any event, there was substitution of the arbitration organization. And, the trial court granted judgment for Appellee because Appellant agreed all claims were subject to arbitration, including any substitution timeliness claim which she believes is covered by the CSPA. The significance of that holding is not reviewed in Appellant's brief on appeal; instead, the brief focuses on disputing the trial court's observations that there was substitution of an arbitration organization and the matter does not implicate (B)(9). The arguments presented in support of Appellant's assignment of error are without merit.

{¶36} Accordingly, the trial court's judgment is affirmed.

Waite, J., concurs.

Gallagher, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Mahoning County Court, Area No. 4 of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.