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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001235-MR

JOHNNY MARRS AND
SHERRY MARRS — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 10-CI-00786

WALTERS AUTOMOBILES, INC.
D/B/A WALTERS CHEVROLET BUICK — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND JONES, JUDGES.

CAPERTON, JUDGE: The Appellants, Johnny and Sherry Marrs (hereinafter "Marrs") appeal from the Pike Circuit Court's confirmation of the arbitrator's January 18, 2012, findings of fact, conclusions of law, and judgment dismissing the complaint in its entirety, as modified on May 18, 2012. After our review of the parties' arguments, the record, and the applicable law, we conclude that this matter

was properly ordered to arbitration and that the circuit court did not err in confirming the arbitrator's decision. Finding no error, we affirm.

Marrs went to Walters Automobiles, Inc., d/b/a Walters Chevrolet Buick (hereinafter "Walters") to buy a Ford F150 after seeing an advertisement in a local newspaper. The advertisement was for a Ford F150, with a V8, for $10,995. Marrs test-drove and expressed interest in purchasing the F150. They had a 2001 Ford Ranger with 160,000 miles on it to trade toward the purchase. Marrs owed $3,757.03 on the Ranger still and according to Walters, Marrs "was upside down on the truck" and had extremely poor credit due to two past bankruptcies.

Marrs claimed that they did not discover the F150 was a V6 until after Johnny signed the paperwork and drove off the lot. Walters' salesman, James Mullins, said that Marrs advised Mullins that the F150 was a V6 and not a V8; Marrs did not object to this and continued the deal. Walters claims that the advertisement for a V8 was a mistake, and it is unknown if this mistake was made by Walters or the newspaper.

The parties entered into negotiations. Walters asserts that due to Marrs having extremely poor credit and were "upside down by thousands on their high mileage Ford Ranger" they had to not put the sale price of $10,995 on the paperwork and instead had to put the original price of the F150 of $13,990 and the difference between the two prices was added to the value of Marrs' trade in. This was done so that Marrs could obtain financing. Following completion of the Retail

Buyers Order and the Retail Installment Sale Contract, Walters' Finance and Insurance Manager, Matt Sturgill, submitted the paperwork to three or four financing companies. Santander, a subprime lender, was the only lender that would approve the loan, at a rate of 19.05%. Sturgill then went through the Retail Buyers Order and Retail Installment Sale Contract with Marrs.

At issue, the Retail Buyers Order contained an arbitration clause, whereby the buyer, by signing the document, agreed and acknowledged "that any dispute arising between/among the parties of any nature whatsoever, including, but not limited to, the validity of the contract, shall be submitted to binding arbitration…." The arbitration agreement further provided that if the parties could not agree on an arbitrator, then Pike Circuit Court shall appoint an arbitration; that any arbitration proceeding would occur in Pikeville; and that the dispute would be governed by the laws of the Commonwealth of Kentucky.

The Retail Buyers Order also stated that "this order shall not become binding until accepted by dealer or his authorized representative…." At the bottom of the contract, Marrs signed next to "Purchaser's Signature." No representative from Walters signed next to "Accepted: Dealer's Signature." Both parties signed the Retail Installment Sale Contract, which did not contain an arbitration agreement.

Marrs did not attempt to dispute the transaction until ten months later. A revocation and rejection of acceptance letter was sent by Marrs' counsel to

Walters' counsel on November 22, 2010. Marrs continued to drive the F150 and make his payments through the date of arbitration.

Marrs filed their complaint in the circuit court on May 20, 2010, asserting violations of Kentucky Revised Statutes (KRS) 367.170. On July 19, 2010, Walters filed a motion to dismiss and enforce the arbitration agreement. The court conducted a hearing on the matter and entered an order granting Walters' motion to enforce arbitration.

A conference call was conducted with the attorneys and the arbitrator, Thomas M. Smith, on October 6, 2010. Marrs alleged violation of KRS 367.170 and sought the following damages: overpaying for purchase of the F150, excess finance charges, humiliation, damage to credit, damage to reputation, and punitive damages. In addition, Marrs sought attorney fees.

The arbitrator conducted a hearing on January 29, 2011, and issued his findings of fact, conclusions of law, and judgment favorable to Walters, which was later modified on May 18, 2012, but remained favorable to Walters. Walters filed a motion to accept arbitrator's judgment and motion to dismiss. Marrs filed a response and a motion to stay arbitration or in the alternative vacate the award, or to modify and correct the award. Marrs asserted that the arbitration was not valid. After more motions were filed reiterating the issues, the court entered its order of July 5, 2012, whereby it denied Marrs' motion to vacate the arbitration award and instead confirmed the award as modified on May 18, 2012. Marrs' complaint was dismissed with prejudice. It is from this order that Marrs now appeals.

Marrs presents three arguments on appeal, namely: (1) the circuit court did not have jurisdiction to enforce an arbitration clause that was not contained in the retail installment sales contract[1] as required by KRS 190.100 and KRS 417.050, between Marrs and Walters; (2) the arbitration clause is unconscionable;[2] (3) the arbitrator exceeded his powers by failing to render his award based on evidence and facts presented. In response, Walters argues (1) waiver;[3] (2) the court had jurisdiction to order arbitration since the arbitration clause satisfies the requirements under KRS 417.050 or 417.200 and, thus, the

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[1] This argument has been resolved by *Hathaway v. Eckerle*, 336 S.W.3d 83, 90 (Ky. 2011). We do not believe that a second arbitration clause had to be contained in the Retail Installment Sale Contract in addition to the one in the Retail Buyers Order, as Marrs is seeking to litigate their claims against Walters and not the lender. The arbitration clause at issue *sub judice* covers any dispute that may arise between the parties and, thus, the court properly submitted the matter to arbitration as discussed *infra.*

[2] We do not believe that Marrs' Consumer Protection Act claims were incompatible with arbitration. *See Hathaway* at 89. *Hathaway* addressed the doctrine of unconscionability and how it is:

> used by the courts to police the excesses of certain parties who abuse their right to contract freely. It is directed against one-side, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain. An unconscionable contract has been characterized as one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other.

Hathaway at 88 (internal citations omitted).

Sub judice we do not believe that the arbitration clause in question rises to the level of unconscionability.

[3] We do not believe that Marrs waived their jurisdictional arguments by failing to present them to the trial court. "It is well-established that the issue of subject matter jurisdiction can be raised at any time, even sua sponte, as it cannot be acquired by waiver, consent, or estoppel." *Gossett v. Kelley*, 362 S.W.3d 379, 380 (Ky. App. 2012) (quoting *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005) (footnotes omitted)). *See also Cox v. Cox,* 170 S.W.3d 389 (Ky. 2005).

arbitration agreement is valid and enforceable; and (3) the arbitrator did not exceed his statutory authority.

We believe that the arguments presented by the parties are more properly condensed into two issues: (1) did the trial court properly submit this matter to arbitration, and (2) did the trial court err in confirming the arbitration award? Accordingly, we now turn to the two issues before this Court.

First, we must assess whether the trial court properly submitted this matter to arbitration. While it is true that Kentucky law generally favors the enforcement of arbitration agreements, the existence of a valid arbitration agreement is a threshold matter which must first be resolved by the court. *Mt. Holly Nursing Center v. Crowdus,* 281 S.W.3d 809, 813 (Ky. App. 2008) (internal citations omitted) and *General Steel Corp. v. Collins*, 196 S.W.3d 18, 20 (Ky. App. 2006) (internal citations omitted). The burden of establishing the existence of an arbitration agreement that conforms to statutory requirements rests with the party seeking to enforce it. *Dutschke v. Jim Russell Realtors, Inc.,* 281 S.W.3d 817, 824 (Ky. App. 2008).

Once the existence of a valid arbitration agreement is found by the trial court, then enforcement of the agreement is required, under both federal law and Kentucky law, unless valid grounds for revoking a contract are established:

> Whether state or federal law governs makes little practical difference, however, because the Kentucky Uniform Arbitration Act (KUAA) contained in Kentucky Revised Statutes (KRS) Chapter 417 is similar to and has been construed consistently with the FAA. Furthermore,

> both the FAA and KUAA state that arbitration agreements must be enforced unless valid grounds for revoking any contract are established.

American General Home Equity, Inc. v. Kestel, 253 S.W.3d 543, 550 (Ky. 2008) (internal footnote omitted). *See also Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004) (noting "we have interpreted the KUAA consistent with the FAA….").

Sub judice Marrs signed the Retail Buyers Order which contained an arbitration clause, whereby the buyer, by signing the document, agreed and acknowledged "that any dispute arising between/among the parties of any nature whatsoever, including, but not limited to, the validity of the contract, shall be submitted to binding arbitration…." While the representative from Walters failed to sign the Retail Buyers Order, acknowledging the dealer's acceptance of the contract, we do not believe that this precludes arbitration in this instance. First, our law is clear that a written agreement, duly executed by the party to be held to its terms (here Marrs), who had an opportunity to read it, will be enforced according to its terms. *Conseco Finance Servicing Co. v. Wilder*, 47 S.W.3d 335, 341 (Ky. App. 2001).

While the doctrine of unconscionability does provide a narrow exception to that rule, we find nothing unconscionable about the form of the agreement in this instance. The arbitration agreement was properly set forth, encompassing all statutory requirements. Second, we believe that Walters clearly accepted the contract between the parties. The Retail Buyers Order stated that

"this order shall not become binding until accepted by dealer or his authorized representative…."

While the Retail Buyers Order stated, "Accepted: Dealer's Signature" the contract did not explicitly limit the dealer's acceptance to a signature. Marrs left the dealership with the F150, Walters took Marrs' trade in, the parties negotiated and Walters did formalize the acceptance of the transaction with a signature on the Retail Installment Sale Contract. *See* KRS 355.2-206:

> (1) Unless otherwise unambiguously indicated by the language or circumstances
>
> > (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances…."

Thus, we agree with the trial court that a valid arbitration agreement existed and the matter was properly submitted for arbitration.

Turning to the second issue before this Court, whether the arbitration award was properly confirmed by the trial court, we note that judicial review of an arbitration award is circumscribed by KRS Chapter 417. Moreover, judicial review of a decision rendered by an arbitrator must be highly deferential. *Conagra Poultry Co. v. Grissom Transp., Inc.,* 186 S.W.3d 243, 244 (Ky. App. 2006) citing *3D Enterprises Contracting Corporation v. Lexington-Fayette Urban County Government*, 134 S.W.3d 558 (Ky. 2004). An arbitrator's resolution of factual

disputes and the application of the law are not subject to review by the courts. *Conagra Poultry Co.* at 245. Extensive judicial inquiry into the merits of the issues before the arbitrator is not appropriate. *Housing Authority of Louisville v. Service Employees Intern. Union, Local 557,* 885 S.W.2d 692, 695 (Ky. 1994).

Essentially, enforcement of an arbitration agreement is a matter of contract law as "under the arbitration acts a dispute within the scope of an arbitration agreement is subject thereto unless the agreement may be avoided 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Wilder* at 341.

As a general rule, "an arbitrator's award is not reviewable by a court." *Taylor v. Fitz Coal Co., Inc*., 618 S.W.2d 432, 432 (Ky. 1981) (internal citations omitted). This is attributable to the fact that "settlement of disputes by arbitration is favored in the law of this Commonwealth." *Lombardo v. Investment Management and Research, Inc.*, 885 S.W.2d 320, 322 (Ky. App. 1994) (internal citations omitted). "Generally, much judicial latitude and deference are accorded to an arbitration decision. It will not be disturbed by the courts merely because it was unjust, inadequate, excessive or contrary to law." *Id*. (internal quotations and citation omitted). "Without a transcript of the arbitration proceedings, the court was required to assume that the evidence supported the arbitrator's decision." *Conagra Poultry Co.* at 245 citing *Dillard v. Dillard*, 859 S.W.2d 134, 137 (Ky. App. 1993). Moreover, the sufficiency of the evidence supporting an arbitration award is specifically nonreviewable. *Taylor,* 618 S.W.2d at 432 (internal citations

omitted). "This is so because when a court examines the evidence and imposes its view of the case it substitutes the decision of another tribunal for the arbitration upon which the parties have agreed, and in effect sets aside their contract." *Id*. at 433 (internal citation omitted).

Per KRS 417.150, "Upon application of a party, the court shall confirm an award unless, within the time limits hereinafter imposed, grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in KRS 417.160 and 417.170."[4]

With this said, the Kentucky Uniform Arbitration Act (hereinafter "KUAA") - specifically KRS 417.160 - provides that a court may vacate an arbitration award pursuant to five specific grounds:

> (1) Upon application of a party, the court shall vacate an award where:
>
> (a) The award was procured by corruption, fraud or other undue means;

[4] KRS 417.170 states:

> (1) Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:
>
> (a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
> (b) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
> (c) The award is imperfect in a matter of form, not affecting the merits of the controversy.
>
> (2) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.
> (3) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

> (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
> (c) The arbitrators exceeded their powers;
> (d) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of KRS 417.090, as to prejudice substantially the rights of a party; or
> (e) There was no arbitration agreement and the issue was not adversely determined in proceedings under KRS 417.060 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm the award.

KRS 417.160(1)(a)-(e).

With respect to all arbitration agreements entered into after the effective date of the KUAA - July 13, 1984 - a court may only set aside an arbitration award pursuant to those grounds set forth in KRS 417.160. *3D Enterprises Contracting Corp. v. Lexington-Fayette Urban County Government* at 562-63. *Sub judice* we cannot discern any grounds for application of the aforementioned criteria which would permit a court to vacate or modify the arbitration award. Accordingly, the Pike Circuit Court correctly confirmed the arbitration award and denied Marrs' motion to modify or vacate said award.

Finding no error, we affirm.

CLAYTON, JUDGE, CONCURS.

JONES, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JONES, JUDGE, DISSENTING: Respectfully, I dissent. For the reasons more fully explained below, I believe that the trial court incorrectly sustained Walters' motion to enforce the arbitration agreement contained in the Retail Buyers Order ("RBO").

The Legislature has determined that the sale of vehicles in this Commonwealth is a matter of public interest and welfare. KRS 190.015. To this end, the Legislature promulgated the Kentucky Motor Vehicle Sales Act ("the Act"). By its terms, the Act is designed "to prevent frauds, impositions, and other abuses upon its citizens, and to protect and preserve the investments and properties of the citizens of this state." *Id.*

The Act contains special provisions devoted to retail installment sales of vehicles in this Commonwealth. Under the Act, a retail installment sale is defined as "any sale . . . wherein retail buyer agrees to buy and retail seller agrees to sell a motor vehicle at a time sale price payable in two (2) or more installments." KRS 190.090(2). The Act requires that a contract for a vehicle retail installment sale conform to certain statutory mandates. *See* KRS 190.100.

The version of the statute in effect at the time Marrs signed the retail installment sales contract ("RISC") at issue required that: "(1) (a) Every retail installment contract shall be in writing in at least eight (8) point type, ***shall contain all the agreements of the parties***, shall be signed by the retail buyer, and a copy

thereof shall be furnished to such retail buyer at the time of the execution of the contract."[5] (Emphasis added).

According to the terms of RISC, Marrs agreed to pay the purchase price with a one-time down payment of $1,387.24 and sixty monthly payments of $353.68 beginning March 20, 2010. Thus, by definition, the transaction at issue qualifies as a retail installment sale.

Standing alone, the RBO cannot qualify as a retail installment sales contract under KRS 190.100 as it plainly fails to include certain essential terms that the Act requires, such as disclosures regarding insurance. KRS 190.100. Since the Act states that the RISC "shall contain all the agreements of the parties" the question then becomes whether the RBO, which is the only document containing an arbitration clause, can be considered part of the RISC.

Generally, Kentucky recognizes the doctrine of incorporation by reference. However, there are several problems with attempting to incorporate the RBO into the RISC. First, neither document refers to the other. Second, and more importantly, the Act required that the parties' entire agreement to be stated in the RISC. The arbitration provision is not contained in the RISC, but in a separate document.

In *Twin City Fire Ins. Co. v. Terry*, 472 S.W.2d 248, 249 (Ky. 1971), the court considered whether to apply the doctrine of incorporation by reference to

[5] The parties entered into the RISC at issue on February 18, 2010. KRS 190.100 has been amended twice since that time, first in 2010 and again in 2012.

add additional terms to an insurance contract where the Kentucky statute at issue required that the insurance policy must contain the entire contract. The court ultimately held that the doctrine of incorporation by reference did not apply. The court reasoned: "It seems plain that the legislative policy in this jurisdiction . . . requires that all terms of an insurance contract be 'plainly expressed' in the policy itself. This would appear to foreclose the possibility of incorporation by reference as related to insurance policies." *Id.* at 250.

Like statutes governing insurance policies, at the time Marrs entered into the RISC with Walters, Kentucky law required that all the parties' agreements regarding the sale of a vehicle under an installment plan be contained in a single RISC.[6] Had the parties' transaction been a cash sale, no other document beyond the RBO would have been required. In such a case, the RBO would have remained in effect and the arbitration provision would be enforceable. However, this was not a cash transaction, it was an installment sale. The parties executed a RISC, as required by statute. The RISC itself states that in executing the contract, the buyer agreed "to buy the vehicle on credit under the agreements on the front and back of the contract." The RISC did not incorporate the RBO or include an arbitration provision as one of its terms.

[6] KRS190.100 was amended effective July 12, 2012, to add a provision allowing for the parties' agreements to appear on subsequent pages. *See* KRS 190.100(1)(b) ("A retail installment contract need not appear on a single page and a contract that includes a provision incorporating agreements that appear after the buyer's signature, including without limitation, terms, and conditions on the back or on subsequent pages, shall be deemed in compliance with KRS 446.060(1)."). This provision was not in existence at the time Marrs and Walters entered into the RISC at issue on February 18, 2010.

I see no basis to conclude that the arbitration provision as set forth in the RBO is, in fact, part of or to be included in the RISC. Walters' argument that all documents are to be read together in a commercial transaction as part of one agreement cannot overcome the contract language or the applicable statute. Walters, the party responsible for preparing the documents, could have included the arbitration provision in the RISC, but it did not do so, as required by the statute that was in effect at that time.[7]

Furthermore, while the majority relies on *Hathaway v. Eckerle*, 336 S.W.3d 83, 90 (Ky. 2011), I do not believe it is dispositive in this instance. While the facts of *Hathaway* are similar, the Hathaway court made no mention of the Act or its requirement that the parties include all their agreements in the RISC.

I believe that the doctrine of incorporation by reference is inapplicable where the statute in force at the time required all the parties' agreements to be contained in the RISC and neither the RISC nor the RBO referred to one another. Thus, in this situation, I believe that the RISC, the contract Marrs filed suit on, should have been deemed to contain the parties' entire agreement regarding the sale of the truck at issue. Since the RISC does not contain an arbitration clause, I do not believe that the trial court had jurisdiction to enforce the arbitration provision against Marrs.

[7] It is worth noting under the current version of KRS 190.100, Walters could have validly incorporated the RBO by reference into the RISC. However, under the 2008 version of KRS 190.100, all agreements had to be contained in the RISC. In effect, the RISC supersedes the RBO.

I would reverse the trial court's August 24, 2010, Order enforcing the arbitration agreement contained in the RBO, vacate the arbitrator's January 18, 2012, judgment, and remand this claim back to the trial court to adjudicate Marrs' complaint against Walters.

BRIEFS FOR APPELLANTS:

Stephen L. Hogg
Pikeville, Kentucky

BRIEF FOR APPELLEE:

William J. Baird
Pikeville, Kentucky