STATE OF MICHIGAN

COURT OF APPEALS

WILSON MOTORS INC., Plaintiff-Appellant,	UNPUBLISHED March 22, 2011
v	No. 295409 Oakland Circuit Court
CREDIT ACCEPTANCE CORPORATION, Defendant-Appellee.	LC No. 2009-101337-CZ

Before: K.F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant, under MCR 2.116(C)(7), on the ground that plaintiff's claims are barred by an agreement to arbitrate. On appeal, plaintiff argues that the trial court erred when it concluded that all of plaintiff's claims are subject to arbitration. Plaintiff also argues that there exists a "disputed issue of material fact" regarding whether an agreement between the parties is enforceable. Plaintiff finally argues that even where some of plaintiff's claims are subject to arbitration, the trial court should hear all of the claims in the interest of "judicial economy." For the reasons set forth in this opinion, we reject plaintiff's claims of error and affirm.

Plaintiff is a motor vehicle dealer operating in Union County, Ohio. Plaintiff and defendant, a Michigan corporation, entered into a series of agreements whereby defendant would provide financing both for plaintiff to purchase vehicles to show and sell as well for consumers who purchased the vehicles from plaintiff on installment contracts.

The parties entered into a Servicing Agreement on April 25, 1996. Under this agreement, defendant financed the purchase of vehicles from plaintiff on an ongoing basis. Defendant would give plaintiff an advance payment at the time of a sale as well as a portion of each customer's future installments—called "back end payments." The 1996 Servicing Agreement provided the following arbitration clause: "Any disputes and differences arising between the parties in connection with or relating to this Agreement or the parties[']relationship with respect hereto shall be settled and finally determined by arbitration. . . ." A very similar Dealer Servicing Agreement was signed by the parties on May 8, 2003. The 2003 Dealer Servicing Agreement expressly superseded any prior agreements between the parties and specified that prior transactions would be serviced according to the new agreement. The 2003 Dealer Servicing Agreement contained an arbitration provision identical to the 1996 Servicing

Agreement. On August 13, 2001, the parties entered into a Floor Plan Financing Agreement whereby defendant would provide financing for plaintiff on its inventory of show room vehicles. This agreement does not contain an arbitration provision. A fourth agreement, entitled a Cross Collateral Agreement was also signed by the parties on March 14, 2003, providing that defendant could "set off" payments owed to plaintiff under the Floor Plan Financing Agreement by funds owed to defendant under the 2003 Dealer Servicing Agreement. These four agreements form the basis of the dispute between the parties to this appeal.

In 2003, defendant alleged that plaintiff breached the Floor Plan Financing Agreement and, as a result, defendant repossessed 11 vehicles from plaintiff's lot and sold them. Defendant also began making "set offs" on its payments due to plaintiff under the 2003 Dealer Servicing Agreement for additional funds it claimed it was owed by plaintiff due to the breach.

Plaintiff filed an initial complaint and then filed an amended complaint, separating its claims for an accounting and breach of contract into separate claims for the Floor Plan Financing Agreement and for the servicing agreements. Plaintiff also specified that its claims for conversion, fraud and unjust enrichment were applicable to the "back-end payments" to be made by defendant pursuant to the servicing agreements. Finally, plaintiff added claims for "various violations" of the Uniform Commercial Code, fraud, and promissory estoppel, flowing from defendant's actions in repossessing plaintiff's vehicles and making set offs from payments owed to plaintiff. Defendant countered with a motion for summary disposition alleging that all of plaintiff's claims were subject to the arbitration clause contained in the 1996 and 2003 agreements. The trial court issued an opinion on October 19, 2009, concluding that all of the claims in plaintiff's amended complaint relate to the servicing agreements containing arbitration clauses. The trial court noted that the "back end" payments due to plaintiff pursuant to the servicing agreements formed the factual basis for all of plaintiff's claims. The trial court further noted that plaintiff acknowledged that some of the claims are subject to arbitration and "it would not be sound logic to maintain part of the action here and allow a separate part of the action to proceed to arbitration." This appeal then ensued.

On appeal, plaintiff argues that some of its claims arise out of either a separate agreement that contains no arbitration provision or out of no agreement at all and, therefore, should not be subject to arbitration.

A decision to grant a motion for summary disposition is reviewed de novo. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court considers all documentary evidence submitted by the parties. *Regan v Washtenaw Rd Comm'n*, 249 Mich App 153, 157; 641 NW2d 285 (2002).

Further, the question of whether an arbitration agreement exists is a question of contract. *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 590-591; 637 NW2d 526 (2001). The construction of a contract is a question of law this Court reviews de novo. *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004). Finally, whether a dispute is arbitrable is also a question of law reviewed de novo. *Madison Dist Pub Sch*, 247 Mich App at 594-595.

As previously noted, the parties' business relationship began in 1996 with a Servicing Agreement whereby defendant would provide financing for customers of plaintiff, a motor vehicle dealer, when they purchased vehicles on an installment contract. In 2001, the relationship expanded with a Floor Plan Financing Agreement whereby defendant would provide financing to *plaintiff* for the vehicles plaintiff was displaying on its showroom floor. In 2003, another Dealer Servicing Agreement was allegedly signed. Shortly thereafter, defendant, concluding that plaintiff had breached the Floor Plan Financing Agreement, repossessed and sold 11 of plaintiff's vehicles. Defendant also began reducing the "back end payments" owed to plaintiff under the servicing agreements by "set offs" to account for further debt owed to defendant as a result of the breach. Plaintiff sued for an accounting of these payments, for breach of both contracts, for violations of the Uniform Commercial Code (UCC), fraud and promissory estoppel.

"To ascertain the arbitrability of an issue, the court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." *Madison Dist Pub Sch*, 247 Mich App at 595. Further, "Michigan courts clearly favor keeping all issues in a single forum." *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163-164; 742 NW2d 409 (2007). "The court should resolve all conflicts in favor of arbitration." *Id*.

There is no dispute that the 1996 and the 2003 servicing agreements, which plaintiff takes to be enforceable for purposes of this issue, contain the following identical arbitration provision: "Any disputes and differences arising between the parties in connection with or relating to this Agreement or the parties[']relationship with respect hereto shall be settled and finally determined by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association." There are no exemptions listed. Thus, the dispute in this issue is whether the issues that plaintiff claims arise only out of the Floor Plan Financing Agreement are "within the arbitration clause." *Id*.

Specifically, plaintiff claims that six of its claims are not subject to arbitration. Count I seeks an accounting of financial transactions occurring between the parties with respect to the Floor Plan Financing Agreement, including "[a]mounts credited to [plaintiff] based on set-off by [defendant] of amounts owed to [plaintiff]." Count II alleges defendant breached the Floor Plan Financing Agreement when it repossessed plaintiff's vehicle. Count III alleges defendant breached the Floor Plan Financing Agreement when it sold the repossessed vehicles without notice and failed to provide an accounting of the sale. Count IV alleges that defendant violated multiple sections of the UCC when it failed to provide notice of or an accounting of the sale of the repossessed vehicles. Count V alleges that defendant fraudulently reassured plaintiff that defendant would continue to do business with plaintiff after plaintiff's alleged breach of the Floor Plan Financing Agreement. Finally, count VI alleges that these same reassurances support a claim for promissory estoppel.

We conclude that the trial court did not err when it concluded that all of plaintiff's claims are subject to arbitration. The arbitration provision of the servicing agreements is very broad. It only requires that the dispute *be related* to the agreement *or* the parties' relationship with respect to the agreement. The factual allegations of this dispute involve both the Floor Plan Financing

Agreement and the servicing agreement because defendant, according to plaintiff's own recitation of the facts, pursued remedies for an alleged breach of the Floor Plan Financing Agreement by altering its performance of the servicing agreements. This intermingling is reflected in plaintiff's claims, at least half of which directly refer to the servicing agreements. As this Court stated in *Rooyakker*, "the court should resolve all conflict in favor of arbitration." *Rooyakker*, 246 Mich App at 163. To the extent that plaintiff's complaint creates any conflict regarding whether all of its claims should be subject to arbitration—and not just the claims it concedes are related to the servicing agreements—they should clearly resolve in the favor of arbitration thereby enforcing this Court's preference for keeping all issues in a single forum further buttresses this conclusion. *Id*.

Plaintiff next argues that the arbitration provision of the 2003 Dealer Servicing Agreement is not applicable to transactions that occurred before that agreement was signed. However, this argument fails to take into account the 1996 Servicing Agreement which contains an identical arbitration provision to the 2003 Dealer Servicing Agreement. The 1996 Servicing Agreement would govern any transaction from before the 2003 Dealer Servicing Agreement even if the 2003 Dealer Servicing Agreement did not, although the 2003 Dealer Servicing Agreement also purports to apply to any existing transactions between the parties. Therefore, the arbitration provision of the 1996 Servicing Agreement applies.

Plaintiff next argues that the 1996 Servicing Agreement is not enforceable because it "lacks mutuality of obligation" because only defendant may be awarded costs and fees in the event it is the prevailing party in a dispute. We first note that "mutuality of obligation" is not a "principle of substantive contract law" but is, rather, "a rule of construction" overlaid on the well-known requirement of consideration. *Toussaint v Blue Cross Blue Shield of Michigan*, 408 Mich 579, 600; 292 NW2d 880 (1980); see also *Hall v Small*, 267 Mich App 330, 334-335; 705 NW2d 741 (2005) (quoting and applying *Toussaint*). Indeed, plaintiff has failed to provide any case citation regarding "mutuality of obligation," instead citing the requirement for mutual assent. Plaintiff's argument, however, has nothing to do with mutual assent. Moreover, this court has expressly rejected the argument that differing access to costs and attorney fees in the event of a dispute renders an otherwise enforceable agreement unenforceable. *Bancorp Group, Inc v Michigan Conf of Teamsters Welfare Fund*, 231 Mich App 163, 171; 585 NW2d 777 (1998). Consequently, we find that plaintiff's argument is without merit.

Plaintiff next argues that there exists a factual dispute regarding the validity of the 2003 Dealer Servicing Agreement that precludes granting summary disposition in favor of defendant. Plaintiff challenges the validity of the 2003 Dealer Servicing Agreement on two grounds. First, plaintiff avers that plaintiff's principal "does not recall" signing the agreement. Further, plaintiff notes that the alleged agreement was signed only two months after defendant's repossession of plaintiff's vehicles and plaintiff's principal "doubts [it] would have entered into" the agreement at that time. Summary disposition under MCR 2.116(C)(7) is inappropriate where "a question of fact exists to the extent that factual development could provide a basis for recovery." *Dybata v Wayne Cty*, 287 Mich App 635, 638; 791 NW2d 499 (2010).

As defendant notes, plaintiff has not actually presented any evidence that the 2003 Dealer Servicing Agreement was invalid. However, plaintiff's allegations must be accepted as true by the court "unless specifically contradicted by the affidavits or other appropriate documentation

submitted by the movant." *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). In this case, defendant proffered a signed copy of the agreement. Plaintiff has not presented any evidence to counter defendant's evidence. Plaintiff has merely averred in its briefs that plaintiff's principal does not recall signing the document and does not think he would have signed the document. Further, plaintiff has not provided any theory—forgery, mistake, etc.—regarding how defendant acquired the alleged "false agreement." Therefore, plaintiff has failed to provide this Court with a "factual development [which] could provide a basis" for plaintiff to recover on this ground. *Dybata*, 287 Mich App at 538.

Finally, plaintiff argues that judicial economy requires that all of plaintiff's claims be adjudicated in circuit court. Plaintiff's argument is predicated on prevailing on the foregoing issues, establishing that at least some of its claims are not subject to arbitration. Because we have concluded that all of plaintiff's claims are properly subject to arbitration, this argument is unavailing.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause