IN THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT
STATE OF FLORIDA

CASE NO.: 3D15-381

Lower Tribunal No. 14-23649 CA

JOSE ARRASOLA AND VANESSA ARRASOLA,

Appellants,

vs.

MGP MOTOR HOLDINGS, LLC,
d/b/a KENDALL MITSUBISHI

Appellee.

Appellants' Reply Brief

Appeal of Non-Final Order Concerning Arbitration

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REPLY BRIEF

I. Contract principles of construction against drafter and equitable estoppel outweigh contractual policy favoring arbitration

The "policy in favor of enforcement of arbitration agreements is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism." *Aberdeen Golf & Country Club v. Bliss Const., Inc.*, 932 So. 2d 235, 240 (Fla. 4th DCA 2005) (quoting *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005)). Thus, contract principles apply and operate to negate the contract-based policy favoring enforcement of arbitration agreements. *Id.* Two such applicable contractual principles are: (i) the contract must be construed against the drafter and (ii) equitable estoppel prohibits parties from disclaiming the existence of a contract when advantageous only to later enforce it when it behooves them. *Vargas v. Schweitzer-Ramras*, 878 So. 2d 415, 417 (Fla. 3d DCA 2004) (interpreting arbitration provision against drafter to deny motion to compel); *Koechli v. BIP Intern., Inc.*, 870 So. 2d 940, 944–46 (Fla. 1st DCA 2004) (holding it inequitable to allow company to both rely on agreement in action to compel and to selectively repudiate it when seeking to resist enforcement).

Under the construction-against-drafter principle, courts should construe arbitration documents strictly against the drafter and liberally in favor of the consumer. *See Auto-Owners Inc. Co. v. Anderson*, 756 So. 2d 29, 33–34 (Fla.

2000); *Vargas*, 878 So. 2d at 417. Courts should also read the documents' provisions as a whole. *Id.* at 34. Under the principle of equitable estoppel, a party cannot hold another party to certain terms of an agreement while simultaneously trying to avoid other terms; fairness dictates that the party cannot have it both ways. *Marcus v. Fla. Bagels, LLC*, 112 So. 3d 631, 634–35 (Fla. 4th DCA 2013); *Koechli*, 870 So. 2d at 944–46.

Here, these principles outweigh any contract-based policy favoring enforcement of arbitration agreements. In reviewing Kendall Mitsubishi's proffered arbitration agreement in the buyer's order, the Court should note that Kendall Mitsubishi as drafter has failed to comply with the mandatory mediation provision of the buyer's order, while insisting that the Court should nevertheless enforce the arbitration provisions therein against the Arrasolas. [App. 19 at ¶ G]. This interpretation would contradict the rule requiring that the buyer's order be read as a whole and construed against Kendall Mitsubishi.

Further, the Court should note that Kendall Mitsubishi readily disclaimed enforcement of the buyer's order and its alternative dispute resolution ("ADR") terms when the Arrasolas confronted Kendal Mitsubishi in July 2014, abandoning the buyer's order, issuing an apology letter, and foregoing mediation and arbitration of the dispute at that time [App. 2–7; 34–40]. Kendall Mitsubishi now requests that this Court enforce the buyer's order piecemeal, ignoring the

mediation provisions or Kendall Mitsubishi's prior repudiation. However, under principles of equitable estoppel, Kendall Mitsubishi cannot have it both ways. *Allscripts Healthcare Solutions, Inc. v. Pain Clinic of N.W. Fla., Inc.*, 158 So. 3d 644, 646 (Fla. 3d DCA 2014). As such, the Court should hold Kendall Mitsubishi to its abandonment and repudiation and reverse the order compelling arbitration.

II. Kendall Mitsubishi fails to address how abandonment affects contract formation and existence rather than validity

The Arrasolas dispute the formation and existence of an enforceable agreement to arbitrate. [App. 4–7; 21; 23–32; 34–38; 40; 55–56; 58–62; 64–68; 74–78]. Kendall Mitsubishi acknowledges as much in its brief: "[the Arrasolas] assert the parties abandoned the contract and therefore no arbitration agreement *exists* to enforce in the first place." [Ans. at 12] (emphasis added).

Under Florida law, a difference exists between the *validity* of an arbitration agreement and the *formation* and *existence* of it; the trial court, rather than an arbitrator, must resolve questions of formation and existence. *Operis Group, Corp. v. E.I. at Doral, LLC*, 973 So. 2d 485, 489 (Fla. 3d DCA 2007) (holding that a challenge to whether any agreement was concluded is a matter for the trial court); *HHH Motors, LLP v. Holt*, 152 So. 3d 745, 748 (Fla. 1st DCA 2014) ("A

difference exists, however, between the validity of a contract and the formation of a contract.").[1]

To determine the proper formation and existence of an arbitration agreement, the Court must examine the underlying circumstances, including events and conduct after execution of documents. *Id.* For example, in *HHH Motors, LLP v. Holt*, the First District Court of Appeal affirmed denial of a car dealership's motion to compel arbitration through an executed buyer's order, given the parties' acts after execution of the buyer's order. *Holt* at 748. Even though no dispute existed whether the consumer had signed the buyer's order, "subsequent action by the parties" rendered the buyer's order and the arbitration provision therein nugatory, "support[ing] the conclusion that no agreement to arbitrate was formed." *Id.*; *see also, e.g., Basulto v. Hialeah Automotive*, 141 So. 3d 1145, 1156 (Fla. 2014) (where there is no meeting of the minds between car buyer and dealership, there has been no proper making of an enforceable arbitration agreement).

Here, the Arrasolas have challenged proper formation and existence of the arbitration agreement in the buyer's order, given that the subsequent acts of the

[1] *See also Crystal Motor Car Co. of Hernando, LLC v. Bailey*, 24 So. 3d 789, 791 (Fla. 5th DCA 2009) (holding dealership's identity theft during car purchase created factual issue on contractual formation for court determination); *Tandem Health Care of St. Petersburg, Inc. v. Whitney*, 897 So. 2d 531, 532–33 (Fla. 2d DCA 2005) (holding disputed issues on making of arbitration agreement requires court determination); *Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 992 (11th Cir. 2012) ("The issue of the contract's validity is different from the issue whether any agreement . . . was ever concluded.") (quoting *Buckeye*).

Arrasolas and Kendall Mitsubishi constituted abandonment. Thus, the effect of abandonment on formation and existence of the agreement are properly before the Court. *Id.*

Kendall Mitsubishi fails to negate that abandonment prohibits specific enforcement of the arbitration provision in the buyer's order. *Silverman Wender Koonin Epstein Garcia & Rosencwaig, P.A. v. Dennis*, 937 So. 2d 1221, 1222 (Fla. 3d DCA 2006) (denying arbitration given that where a contract is no longer in effect, the arbitration provision therein is not enforceable); *Gustafson v. Jensen*, 515 So. 2d 1298, 1301 (Fla. 3d DCA 1987) (finding that once abandoned, a contract may not be specifically enforced). Accordingly, the Court should reverse the trial court's order granting arbitration and remand for further proceedings.

III. Kendall Mitsubishi fails to address how unconscionability affects contract formation and existence rather than validity

There are several distinct doctrines rendering an arbitration clause unenforceable, one of which unconscionability. *See Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1142 (11th Cir. 2010) (citing *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1023 (Fla. 4th DCA 2005)). Unconscionability goes to formation and enforceability, rather than validity. *Id.*; *see also, e.g., Basulto*, 141 So. 3d at 1152, 1156–57 (discussing that even if a valid arbitration agreement existed, it may be unenforceable due to procedural and substantive unconscionability or other contractual defenses going to formation).

Florida courts regularly apply the unconscionability doctrine to find imperfect formation and decline enforcement of dealerships' motions to compel arbitration of car purchaser lawsuits. *See, e.g., Basulto*, 141 So. 3d at 1157; *Bailey*, 24 So. 3d at 790–91 (holding substantial issue existed as to making of car dealer's arbitration agreement); *Palm Beach Motor Cars Ltd., Inc. v. Jeffries*, 885 So. 2d 990, 992–93 (Fla. 4th DCA 2004) (holding auto purchase arbitration provision unconscionable given the manner in which the contract was entered).

Here, the Arrasolas challenged the unfair making and formation of the arbitration agreement and the enforcement of its unjust terms, under the unconscionability doctrine. [App. 27–32]. Although Kendall Mitsubishi erroneously alleges that the Arrasolas somehow waived the right to have the Court determine unconscionability [Ans at 14], a determination of unconscionability is not expressly reserved for an arbitrator under the buyer's order [App. 19] (which the Court must construe against Kendall Mitsubishi as drafter). Thus, the Court rather than the arbitrator must determine unconscionability here. *Basulto*, 141 So. 3d at 1160–61 ("When analyzing unconscionability, courts must bear in mind the bargaining power of the parties involved . . ."). Given that Kendall Mitsubishi failed to negate the unconscionability of the arbitration agreement, the Court should reverse the trial court's order and remand for further proceedings.

IV. Kendall Mitsubishi misstates the law requiring an evidentiary hearing

Contrary to Kendall Mitsubishi's erroneous contention, long-standing Florida law requires that the trial court conduct an evidentiary hearing before ruling on a motion to compel arbitration where the underlying facts are in dispute. *Metropcs Comm'ns., Inc. v. Porter*, 114 So. 3d 348, 348 (Fla. 3d DCA 2013) (reversing for an evidentiary hearing on the threshold issue of whether the arbitration clause was contained in a binding agreement between the parties.).[2]

In proceedings to compel arbitration, there are four ways that parties can demonstrate an existing dispute on the making of an arbitration agreement, thereby requiring an expedited evidentiary hearing: (1) arguments of counsel at a hearing; (2) filing a written response opposing arbitration; (3) filing affidavits; and (4) furnishing documents. *Linden v. Auto Trend, Inc.*, 923 So. 2d 1281, 1283 (Fla. 4th DCA 2006).

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[2] *See also King's Acad., Inc. v. Doe*, 29 So. 3d 439, 440 (Fla. 4th DCA 2010) (The court is required to hold an evidentiary hearing on a motion to compel arbitration where the plaintiff raises an unconscionability challenge and the parties dispute the circumstances surrounding the contract); *FL-Carrollwood Care Ctr., LLC v. Jaramillo*, 36 So. 3d 180, 182–83 (Fla. 2d DCA 2010) (holding failure to hold an evidentiary hearing on the issue of whether an arbitration agreement was procedurally unconscionable was not justified); *Curcio v. Sovereign Healthcare of Boynton Beach L.L.C.*, 8 So. 3d 449, 450–51 (Fla. 4th DCA 2009) (reversing order granting arbitration where court failed to hold evidentiary hearing on unconscionability); *Bailey*, 24 So. 3d at 790 (reversing order on motion to compel arbitration where trial court failed to hold evidentiary hearing); *Whitney*, 897 So. 2d at 532 ("[Plaintiff's] counsel requested an evidentiary hearing as 'the next stage of this process,' but the trial court declined to grant the request. This was error.").

Disputing formation of an arbitration agreement through these means triggers the need for an evidentiary hearing, rather than obviating it. *Id.* Here, Kendall Mitsubishi and the Arrasolas disputed the circumstances surrounding the formation and existence of the arbitration agreement, its abandonment, and its unconscionability. [App. 16; 20–32; 40; 44–82]. Thus, the Arrasolas were entitled to an evidentiary hearing. *Id*.

Despite Kendall Mitsubishi's allegation that the trial court had sufficient evidence to make its determination without an evidentiary hearing, the trial court made no findings on: (i) the admissibility, credibility, or weight of any evidence; or (ii) whether it based its findings on any particular evidence. Additionally, the Arrasolas were not given the opportunity to provide any further evidence on the disputed issues or to counter (through cross examination or otherwise) the allegations made by Kendall Mitsubishi at the February 10, 2015 non-evidentiary hearing. Most importantly, the Arrasolas' provision of argument, documents, and affidavits disputing formation triggered the need for an evidentiary hearing, rather than obviating it. *Linden*, 923 So. 2d at 1283.

Although Kendall Mitsubishi cites *Fi-Evergreen Woods, LLC v. Robinson*, for the proposition that the Revised Florida Arbitration Code expressly removed the requirement of an evidentiary hearing altogether, the *Robinson* court instead expressly stated that "[w]e do not reach the issue of whether the [revised code]

obviates the requirement of an evidentiary hearing." *Fi-Evergreen Woods, LLC v. Robinson*, 135 So.3d 331, n.4 (Fla. 5th DCA 2013). Moreover, post-revision decisions in Florida have continued to reiterate and reinforce the evidentiary hearing requirement. *See, e.g., FI-Tampa, LLC v. Kelly-Hall*, 135 So. 3d 563, 567 (Fla. 2d DCA 2014) ("the plaintiff, at an evidentiary hearing, must show the expected costs of arbitrating [are substantially unconscionable]").

V. Kendall Mitsubishi fails to address waiver-by-abandonment

The party seeking to rely upon a contractual right to arbitration must safeguard that right by not acting inconsistently with it to effect a waiver. *Saldukas*, 896 So. 2d at 711 (holding waiver of right to arbitrate does not require proof of prejudice). The essential question in determining waiver of an arbitration agreement is whether, under the totality of the circumstances, the moving party has acted inconsistently with the arbitration right. *Aberdeen Golf & Country Club*, 932 So. 2d at 240.

For example, in *Aberdeen*, the Fourth District Court of Appeal held that after an initial dispute arises, a party's refusal to initiate mediation as a precondition to arbitration and to adhere to the contract as to making payments could be deemed a voluntary and intentional relinquishment of the known right to arbitration. *Id.* The *Aberdeen* court also held that failure to adhere to the contract or its ADR provisions after a dispute arises supports denial of a motion to compel arbitration

under anticipatory repudiation, which empowers a party to forego performance of the contract's various provisions, including the ADR provisions. *Id.*

Here, the arbitration agreement put forth by Kendall Mitsubishi required that should a dispute arise, the parties first mediate. [App. 19 at ¶¶ G and H]. Kendall Mitsubishi not only abandoned this ADR obligation, but it immediately abandoned every other part of the buyer's order. As drafter of the buyer's order, Kendall Mitsubishi had knowledge of any purported rights thereunder, yet took actions inconsistent with them. These acts constitute a known waiver, which the trial court cannot unilaterally rescind. *See Johnson v. Harrell*, 922 So. 2d 1056, 1057–58 (Fla. 1st DCA 2006) (holding that party waived right to arbitration by failing to submit matter to arbitration after other party invoked contractual termination provision); *Allscripts Healthcare Solutions, Inc.*, 158 So. 3d at 646 (trial court cannot rescind arbitration waiver). Given that Kendall Mitsubishi has failed to negate the waiver effect of this abandonment, the Court should reverse the order granting arbitration and remand for further proceedings.

VI. The Arrasolas' action is not arbitrable under *King Motor Co. of Fort Lauderdale v. Jones*

Kendall Mitsubishi's arbitration agreement is not a catch-all for everything—some disputes between it and the Arrasolas are not arbitrable. In interpreting nearly identical arbitration provisions in nearly identical circumstances, the Fourth District Court of Appeal held that a car buyer's lawsuit

based on a car dealership's theft of the customer's identity and misuse of the customer's financial information were not arbitrable, despite the car dealership's broad arbitration provisions. *King Motor Co. of Fort Lauderdale v. Jones*, 901 So. 2d 1017, 1020 (Fla. 4th DCA 2005).

In denying arbitration, the *Jones* court discussed how: (i) the case involved tort claims based on the dealership's failure to properly handle the customer's financial information; (ii) the customer's claims did not implicate contractual duties created or governed by the contract, but concerned duties generally owed to the public; (iii) none of the allegations required reference to or construction of any portion of the purchase and sale or financing agreement between the parties; and (iv) the action was predicated on legal theories unrelated to the rights and obligations of the contract. *Id.* Thus, the action did not have a sufficient relationship to the agreement as to fall within the broad arbitration provision. *Id.*

Similarly here, the Arrasolas' action involves tort claims based on Kendall Mitsubishi's failure to properly handle the customer's financial information; the claims do not implicate contractual duties created or governed by the buyer's order, instead concerning duties generally owed to the public; none of the allegations required reference to or construction of any portion of the buyer's order; and the action was predicated on legal theories unrelated to the rights and obligations of the buyer's order, which were immediately abandoned. In fact,

counsels and the trial court discussed in the February 10, 2015 hearing that the Arrasolas action was not on the buyer's order and that the document was not even attached to the Complaint. [App. 60 at ll. 13–25]. Accordingly, the Court has ample grounds to hold that the action did not have a sufficient relationship to the agreement as to fall within the broad arbitration provision.

CONCLUSION

Kendall Mitsubishi has failed to directly address the effect of abandonment on formation, existence, and waiver. Kendall Mitsubishi has also failed to directly address unconscionability. Thus, along with contract construction principles, equitable estoppel, and the limitations on arbitrability, the Court has ample grounds to hold that the Arrasolas' action is not subject to arbitration through the buyer's order. Accordingly, the Court should reverse the trial court's order granting arbitration, and remand this case with instructions for the trial court to permit the Arrasolas to proceed in court. In the alternative, this Court should remand for an evidentiary hearing on contract formation, abandonment, and unconscionability.

Respectfully submitted,

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CERTIFICATES OF SERVICE

I CERTIFY that, in accordance with Fla. R. Jud. Admin. 2.516, a copy of this document was served by email and U.S. mail on May 15, 2015, to:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing document is in compliance with the Rule's font requirements [Times New Roman 14].

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