Cite as 2013 Ark. App. 337

ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-12-994

ASBURY AUTOMOTIVE GROUP, INC., and ASBURY ATLANTA JAGUAR, L.L.C. APPELLANTS V. ROBERT FLOYD McCAIN, JR., and TAFTA J. McCAIN APPELLEES	**Opinion Delivered** May 22, 2013 APPEAL FROM THE ASHLEY COUNTY CIRCUIT COURT [NO. CIV-11-89-3] HONORABLE ROBERT BYNUM GIBSON, JR., JUDGE REVERSED AND REMANDED

ROBIN F. WYNNE, Judge

Asbury Automotive Group, Inc., and Asbury Atlanta Jaguar, L.L.C., appeal from the Ashley County Circuit Court's denial of their motion to compel arbitration of a lawsuit brought against them by appellees Robert McCain and Tafta McCain. We reverse and remand.

In May 2009, appellees, who are residents of Arkansas, entered into an agreement to purchase a 2008 GMC Acadia from Asbury Atlanta Jaguar in Roswell, Georgia, via the Internet. According to appellants, Asbury Atlanta Jaguar does business as Nalley Jaguar-Roswell (Nalley Jaguar), and Asbury Automotive Group (Asbury) is its parent company. The contract provided that appellees purchased the vehicle "as is," along with the remaining balance of the limited factory warranty; that the law of Georgia would govern all actions arising from the agreement; that venue would lie in the county of the seller's domicile; and

that it was not binding unless signed by an officer or manager of the seller. Appellees signed the contract but the seller did not.

The contract also provided for arbitration:

> 1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
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> 2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATION.
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> 3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.
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> Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim [unreadable] This Arbitration Clause shall not apply to such claim and dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arbforum.com), the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605-0191 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.
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> Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you

> reside. The arbitration hearing shall be conducted in the federal district in which you reside, unless you reside more than 100 miles from the dealership, in which event the arbitration shall be held in the county where the dealership is located. We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $1500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. However, in no event shall you be responsible for a filing fee of more than the cost of a filing fee for initiating litigation in a state of federal court. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Clause, then the provisions of this Arbitration clause shall control. The Arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs. Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration.

Immediately after delivery, appellees experienced significant problems with the vehicle and were unsuccessful in getting it repaired. In June 2011, they sued Asbury; Holt Auto Group, LP (a local dealer that performed repair work on the vehicle); and General Motors Corporation. Asbury moved to dismiss because it had not sold the vehicle; at the same time, it moved to compel arbitration. Appellees filed an amended complaint that added Nalley Jaguar as a defendant. Appellants moved to dismiss and to compel arbitration under the Federal Arbitration Act (FAA) and Georgia law. Appellees filed a second amended complaint against appellants; Holt Auto Group; General Motors Corporation; General Motors Company; and General Motors, LLC. They asserted claims for breach of implied and express warranties, Arkansas's lemon law, the Magnuson-Moss Warranty Act, Arkansas's product-liability statutes, negligence, and misrepresentation. Appellants filed another motion to compel

arbitration and to dismiss. Asbury argued that, as the parent company of Nalley Jaguar, it was not liable for its subsidiary's actions.

At the hearing on the motion to compel arbitration, appellees' attorney argued that the arbitration agreement was not enforceable because the contract had not been signed by an officer or manager of the seller. He also contended that it was unconscionable that he would have to go to Atlanta or New York to arbitrate this action. The trial court stated that it would deny the request for arbitration because the contract lacked mutuality as a result of Nalley Jaguar's failure to sign the contract and the fact that there was nothing between Asbury and appellees. The court entered an order denying arbitration "for lack of mutuality and lack of contractual obligation." Appellants then pursued this interlocutory appeal.

An order denying a motion to compel arbitration is an immediately appealable order. *Phillippy v. ANB Fin. Servs., LLC*, 2011 Ark. App. 639, 386 S.W.3d 553; Ark. R. App. P.–Civ. 2(a)(12) (2012). We review a circuit court's order denying a motion to compel arbitration de novo on the record. *Id.* In a de novo review, we analyze the evidence and the law without giving deference to the trial court's ruling. *Id.*

The parties agree that the FAA, which Congress enacted to overcome judicial resistance to arbitration, *HPD, LLC v. Tetra Technologies, Inc.*, 2012 Ark. 408, 424 S.W.3d 304, applies to this dispute. When the underlying dispute involves interstate commerce, the FAA applies. *Phillippy*, *supra*. State courts have concurrent jurisdiction with the federal courts to enforce rights granted by the FAA. *Id.* There is a strong national policy favoring the enforcement of arbitration agreements. *Id.* Arbitration is a matter of contract between parties.

Id. In deciding whether a party has entered into an agreement to arbitrate under the FAA, courts are to apply general state-law principles, giving due regard to the federal policy favoring arbitration. *Id.* The threshold question is whether there is a valid arbitration provision, which is a question of state law. *Id.* The same rules of construction and interpretation apply to arbitration agreements as apply to contracts generally. *Id.* The liberal federal policy favoring arbitration agreements requires that any doubts regarding arbitrability should be resolved in favor of coverage under the agreement unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Sterne, Agee & Leach, Inc. v. Way*, 101 Ark. App. 23, 270 S.W.3d 369 (2007).

In their first point on appeal, appellants argue that the arbitration clause is sufficiently broad to encompass any dispute between the parties regarding the sale of the vehicle, including the claims asserted in this action. We agree. The next question is whether there is a valid arbitration agreement. In their second point, appellants argue that the trial court erred in ruling that the contract lacked an essential term—mutuality—because they did not sign the document. Appellants are correct.

The FAA does not require that an arbitration provision be signed by the parties, even though it does require the agreement to be written. *Tinder v. Pinkerton Sec.*, 305 F.3d 728 (7th Cir. 2002); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000); *Valero Refining, Inc. v. M/T Lauberhorn*, 813 F.2d 60 (5th Cir. 1987); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185 (9th Cir. 1986); *Med. Dev. Corp. v. Indus. Molding Corp.*, 479 F.2d 345 (10th Cir. 1973). Georgia law does not require parties to sign a contract

in order to be bound by it. As in Arkansas,[1] parties may become bound by the terms of the contract even if they do not sign it, if their assent is otherwise indicated, such as by the acceptance of benefits under the contract or by the acceptance of the other's performance. *Lankford v. Orkin Exterminating Co.*, 597 S.E.2d 470 (Ga. Ct. App. 2004); *Comvest, L.L.C. v. Corporate Sec. Grp.*, 507 S.E.2d 21 (Ga. Ct. App. 1998).

Appellees contend that appellants are not parties to the agreement, and that it places no legal obligations on them. This argument has no merit in light of the facts that appellees paid the purchase price; that the dealership accepted the purchase price and delivered the Acadia to appellees; and that appellees, who did sign the contract, have sued appellants on the contract, asserting that both had sold the vehicle. Appellees included claims for breach of express and implied warranties created by the contract in their complaint and obviously viewed the contract as valid and binding upon both appellants. Although no representative from the dealership signed the contract, it performed by delivering the Acadia to appellees. In Georgia, mutuality is an essential element of a contract, *Rushing v. Gold Kist, Inc.*, 567 S.E.2d 384 (Ga. Ct. App. 2002); however, part performance can furnish the required consideration and mutuality. *Rowe v. Law Offices of Ben C. Brodhead, PC.*, 735 S.E.2d 39 (Ga. Ct. App. 2012).The contract, including its arbitration clause, is therefore binding on the parties, and the trial court erred in refusing to compel arbitration. *See Int'l Paper Co.*, *supra*.[2]

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[1]*Sterne*, *supra*.

[2]We note that, in Georgia, an arbitration provision is not unconscionable because it lacks mutuality of remedy; a contract can provide one party (such as a payday lender) the alternative remedy of enforcing payment obligations through the judicial system, even though

In their third point, appellants argue that Asbury is entitled to enforce the arbitration agreement as a third-party beneficiary to it. Because the trial court did not rule on whether Asbury is a third-party beneficiary under the contract, we will not address appellants' argument on this point. *Wilson v. Dardanelle Dist. of Yell Cnty. Dist. Ct.*, 375 Ark. 294, 300, 290 S.W.3d 1, 4 (2008) ("We will not review a matter on which the circuit court has not ruled, and a ruling should not be presumed.").

Reversed and remanded.

HARRISON and WHITEAKER, JJ., agree.

Wright, Lindsey & Jennings LLP, by: *Regina A. Young* and *Gary D. Marts, Jr.*, for appellants.

James W. Haddock, P.A., by: *James W. Haddock*, for appellees.

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the other party is limited to arbitration. *Crawford v. Great Am. Cash Advance, Inc.*, 644 S.E.2d 522 (Ga. Ct. App. 2007); *Saturna v. Bickley Constr. Co.*, 555 S.E.2d 825, 827 (Ga. Ct. App. 2001).