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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOSEPHINE ALVARADO, Plaintiff and Respondent, v. MILLER-DM, INC., Defendant and Appellant.	B239918 (Los Angeles County Super. Ct. No. BC434856)

APPEAL from an order of the Superior Court of Los Angeles County, Ralph W. Dau, Judge. Affirmed.

Molino & Berardino, Anthony A. Molino and Steven R. Berardino, for Defendant and Appellant.

Rosner, Barry & Babbitt, LLP, Hallen D. Rosner, Christopher P. Barry and Angela J. Patrick, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Miller-DM Inc., doing business as Mercedes-Benz of Beverly Hills, appeals from a February 27, 2012 order. The February 27, 2012 order was issued after defendant's third arbitration-related petition or motion was litigated. Defendant's first petition to compel arbitration sought to compel plaintiff, Josephine Alvarado, to arbitrate her causes of action in her first amended complaint. Defendant's first petition to compel arbitration was denied. Defendant then filed a second petition to compel arbitration. In its second petition, defendant expressly agreed not to seek arbitration of plaintiff's class claim under the Consumers Legal Remedies Act (the act). (Civ. Code, § 1750 et seq.) Nearly one year later, defendant filed a third request. This time, defendant sought to compel arbitration of plaintiff's class claim under the act. This is the precise claim defendant had expressly stated previously that it would not seek to arbitrate. We find defendant expressly waived its right to arbitrate plaintiff's class claim under the act.

II. PROCEDURAL HISTORY

A. Amended Complaint

Plaintiff filed her complaint on March 30, 2010 against defendant asserting 10 individual claims arising from her purchase of a used car. On June 14, 2010, plaintiff filed an amended complaint, converting the tenth cause of action into a class claim for violating the act. Plaintiff alleges she purchased a 2006 Mercedes-Benz C 230K from defendant on May 29, 2007. The Mercedes-Benz was advertised and sold as a certified pre-owned car. Defendant allegedly did not disclose that the Mercedes-Benz had been a rental car. Also, defendant allegedly failed to provide plaintiff with a completed inspection report as required by Vehicle Code section 11713.18. After plaintiff purchased the car, she experienced problems with its air conditioning system and brakes. Later, she experienced "significant problems" with: blown engine mounts; smoke; an

inoperable lighter; sunroof failure; and engine rattling noises. In addition, the Mercedes-Benz allegedly misfired on a regular basis.

Plaintiff asserts 10 causes of action against defendant. Plaintiff's nine individual causes of action include claims for violations of: the act; Business and Professions Code sections 17200 et seq. and 17500 et seq.; Vehicle Code sections 11713 and 11713.18; and the Song-Beverly Warranty Act. Plaintiff also asserts claims for: declaratory relief; fraud and concealment; and negligent misrepresentation. Plaintiff's tenth cause of action is an individual and class claim for equitable and injunctive relief under the act. The proposed class includes all persons who purchased a pre-owned automobile within four years of the complaint's filing, where defendant had not disclosed prior rental car company ownership.

B. Defendant's Petition To Compel Arbitration

On May 14, 2010, defendant filed its first petition to compel arbitration. Defendant cited to the arbitration provision under the Retail Installment Sale Contract which states: "1. Either you or we may choose to have any dispute between us decided by arbitration and not in court or by jury trial. [¶] 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 arbitrations. [¶] 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. [¶] Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arise out of or relate 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. 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 . . . (www.arbforum.org), the American Arbitration Association . . . (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."

The arbitration provision also states: "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 unless the Creditor-Seller is a party to the claim or dispute, in which case the hearing will be in the federal district where this contract was executed. We will advance your filing, administration, service or case management fee and your arbitrator and hearing fee all up to a maximum of $1500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. 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 clause, then the provisions of this 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."

In addition, the arbitration provision states: "You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in

small claims court for disputes or claims within that court's jurisdiction, unless that action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This clause shall survive any termination, payoff, or transfer of this contract. If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this arbitration clause shall be unenforceable." The arbitration provision, set in 10-point type, appeared on the reverse side of the one-page document sales contract near the end of the page. On the front page of the sales contract, to the right of a no-cooling period warning notice, is the following provision in 8-point, all-capitalized type: "YOU AGREE TO THE TERMS OF THIS CONTRACT. YOU CONFIRM THAT BEFORE YOU SIGNED THIS CONTRACT, WE GAVE IT TO YOU, AND YOU WERE FREE TO TAKE IT AND REVIEW IT. YOU ACKNOWLEDGE THAT YOU HAVE READ BOTH SIDES OF THIS CONTRACT, INCLUDING THE ARBITRATION CLAUSE ON THE REVERSE SIDE, BEFORE SIGNING BELOW. YOU CONFIRM THAT YOU RECEIVED A COMPLETE FILLED-IN COPY WHEN YOU SIGNED IT." On June 21, 2010, defendant's first petition to compel arbitration was denied because it failed to submit an authenticated copy of the sales contact.

On July 22, 2010, defendant filed a second petition to compel arbitration of most of plaintiff's claims in the amended complaint. Defendant excluded from its second petition to compel arbitration, plaintiff's: injunctive relief cause of action; declaratory relief claim; and the class claim under the act. Defendant stated, "Likewise as to the tenth cause of action for class treatment of the Consumer[s] Legal Remedies Act claim, [defendant] does not suggest that the [arbitration clause] applies to that claim." Defendant submitted the declaration of Mark J. Barsoomian, its general sales manager, to authenticate the sales contract.

In opposition, plaintiff argued: defendant's second petition to compel arbitration should have been a reconsideration motion under Code of Civil Procedure section 1008, subdivision (b); the class action waiver of her unwaivable statutory rights under the act was unenforceable; and since the class action waiver was unenforceable, the entire arbitration provision was void under the "poison pill" clause. That clause provides, "If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this arbitration clause shall be unenforceable." Plaintiff also contended her injunctive relief claims under the Unfair Competition Law and the act were not arbitrable citing *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316.

Plaintiff further argued the arbitration provision was procedurally and substantively unconscionable. Plaintiff contended the arbitration provision was substantively unconscionable because: defendant retained its repossession remedies while requiring plaintiff to arbitrate her claims; she cannot afford the arbitration costs; under the arbitration provision, plaintiff is required to pay arbitration fees and costs in excess of $1,500; the arbitration provision contravenes Code of Civil Procedure section 1284.3, subdivision (a) because it requires her to pay defendant's costs if she loses in arbitration; and the "appeal" clause in the arbitration provision is one-sided, not mutual, and unfair. The "appeal" clause states, "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." Plaintiff argued she cannot appeal the arbitration award unless she is awarded $0 while defendant is assured the right to a new arbitration if it feels the award is too high.

In addition, plaintiff argued the arbitration provision was procedurally unconscionable. Plaintiff argued: the arbitration provision was in tiny font on the reverse side of a preprinted, lengthy purchase contract; the contract was presented to her on a "'take-it-or-leave-it'" basis and she was not told about the arbitration provision; she

was not given the opportunity to read through all the documents and negotiate the contract terms; she did not understand arbitration; and was unaware of the arbitration organizations or their rules and procedures. Plaintiff submitted a declaration in support of her unconscionability argument. She declared: defendant did not show her the arbitration provision; she was unaware the arbitration provision was on the back side of the sale contract; she did not know what arbitration entailed or its costs; she was not given an opportunity to read the terms and they were not explained to her; she was not provided copies of the rules and procedures of the American Arbitration Association or the National Arbitration Forum; she was rushed through the paperwork signing because the finance manager had other customers waiting to buy more expensive cars; the finance manager became irritated and rude when she asked questions; she was led to believe the preprinted terms of the sale contract were not negotiable; and she could not afford to pay thousands of dollars in fees to file her claims or pay defendant's costs if she lost the arbitration because her annual income was about $35,000.

In reply, defendant expressly reiterated it was not seeking to arbitrate the class action claim under the act. Defendant argued it was only seeking to arbitrate the non-class claims under the act which were subject to arbitration. Defendant argued the arbitration provision does not limit plaintiff's right to seek injunctive relief under the Unfair Competition Law. Defendant asserted it had clearly stated that it sought to sever injunctive relief and the class action claims. Defendant also argued the arbitration provision was neither procedurally nor substantively unconscionable.

On September 28, 2010, defendant's second petition to compel arbitration was granted except for the injunctive relief and class claims under the act. As to the injunctive relief and class claims, trial of those matters was stayed. The trial court found the so-called "poison pill" clause was inapplicable because "there has been no effort to arbitrate" the class allegations.

On August 2, 2011, nearly one year later, defendant moved for an order lifting the stay and sought to compel arbitration of plaintiff's class claim under the act. As noted, this was defendant's third arbitration-related request. Defendant argued plaintiff's class

claim was subject to arbitration based on *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 1, ___ [131 S. Ct. 1740, 1750-1751] (*AT&T Mobility*). In opposition, plaintiff argued: the act prohibited enforcement of a class action waiver; defendant waived its right to request arbitration by waiting four months after the *AT&T Mobility* decision to file its third petition; and the arbitration provision was procedurally and substantively unconscionable.

In reply, defendant argued the class action provision in the act was preempted by the Federal Arbitration Act pursuant to *AT&T Mobility*. Defendant also argued it did not waive its right to arbitrate because it filed no answer and propounded no discovery. On October 31, 2011, defendant's motion to compel arbitration of plaintiff's class claim was granted.

On November 10, 2011, plaintiff sought reconsideration of the order lifting the stay and compelling arbitration of the class claim. Plaintiff relied on *Sanchez v. Valencia Holding Co., LLC* (2011) 201 Cal.App.4th 74, review granted March 21, 2012, S199119 (*Sanchez*). In *Sanchez*, our colleagues in Division One held a virtually identical arbitration provision was procedurally and substantively unconscionable. In opposition, defendant argued *Sanchez* was in conflict with the *AT&T Mobility* holding. In addition, defendant contended the American Arbitration Association minimizes the arbitration costs by limiting arbitration fees to $375 for a consumer claim the size of the present one.

On February 27, 2012, plaintiff's reconsideration motion was granted. Upon reconsideration, the trial court denied defendant's motion to compel arbitration of the class claim under the act. In addition, the trial court sua sponte ordered a hearing for reconsideration of its September 28, 2010 arbitration order. On March 20, 2012, defendant filed its notice of appeal from the February 27, 2012 order denying arbitration of plaintiff's class claim under the act.

III. DISCUSSION

A. Arbitration Waiver

Code of Civil Procedure section 1281.2, subdivision (a) provides in pertinent part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement. . . . " Under both the Federal Arbitration Act and state law, the party seeking to establish arbitration waiver bears the burden of proof. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195; *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 782.)

Waiver may be express or implied from the parties' conduct. (*St. Agnes Medical Center v. PacifiCare of California, supra,* 31 Cal.4th at p. 1195, fn. 4; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 982-983; *Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389.) Our Supreme Court has stated, "[N]o single test delineates the nature of the conduct that will constitute a waiver of arbitration." (*St. Agnes Medical Center v. PacifiCare of California, supra,* 31 Cal.4th at pp. 1195-1196; see *Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 983; *Cinel v. Barna, supra*, 206 Cal.App.4th at p. 1390.) Our Supreme Court explained: "'In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the "bad faith" or "willful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citation.]'" (*Engalla*

v. Permanente Medical Group, Inc., supra, 15 Cal.4th at p. 983, quoting *Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 425-426; accord *St. Agnes Medical Center v. PacifiCare of California, supra,* 31 Cal.4th at pp. 1196.)

Defendant expressly waived its right to arbitrate the class action claim. Defendant's second petition for arbitration expressly sought not to arbitrate plaintiff's injunctive and declaratory relief causes of action under the act. Defendant intentionally, with full knowledge of the facts, relinquished, i.e., waived, the right to arbitrate plaintiff's class claim in July 2010. (*In re S. B.* (2004) 32 Cal.4th 1287, 1293, fn. 2; *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 211; *Waller v. Truck Ins. Exchange* (1995) 11 Cal.4th 1, 31.) Defendant stated in its second petition, "Likewise as to the tenth cause of action for class treatment of the Consumer[s] Legal Remedies Act claim, [defendant] does not suggest that the [arbitration clause] applies to that claim." In reply to plaintiff's opposition to the second petition, defendant again stated it was not seeking to the arbitrate the class action claim under the act. At the September 28, 2010 hearing, the trial court granted defendant's second petition, finding the "poison pill" clause was inapplicable because "there has been no effort to arbitrate the class allegations" under the act. Moreover, defendant waited almost four months after *AT&T Mobility* opinion was filed before filing its third arbitration-related petition. Because defendant expressly waived its right to arbitrate the class claims under the act, we need not address any implied waiver issues. Further, we do not need to discuss the parties' preemption contentions. (*AT&T Mobility LLC v. Concepcion, supra,* 563 U.S. at p. ___ [131 S. Ct. at p. 1748].) Also, we need not discuss whether the arbitration clause is procedurally or substantively unconscionable.

IV. DISPOSITION

The February 27, 2012 order denying arbitration of the Consumers Legal Remedies Act class action claim is affirmed. Plaintiff, Josephine Alvarado, shall recover

her costs on appeal from defendant, Miller-DM, Inc., doing business as Mercedes-Benz of Beverly Hills.

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TURNER, P. J.

We concur:

KRIEGLER, J.

FERNS, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.