IP 08-1433-C h/k Agnew v. Honda
Judge David F. Hamilton Signed on 05/20/09

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MEAGEN AGNEW,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:08-cv-01433-DFH-TAB
	)	
HONDA MOTOR CO., LTD.,	)	
AMERICAN HONDA MOTOR CO., INC.,	)	
XM SATELLITE RADIO INC.,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MEAGEN AGNEW, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	CASE NO. 1:08-cv-1433-DFH-TAB
HONDA MOTOR CO., LTD.; AMERICAN HONDA MOTOR CO., INC.; and XM SATELLITE RADIO INC.	)	
Defendants.	)	

ENTRY ON MOTION TO COMPEL ARBITRATION

Plaintiff Meagen Agnew sued Honda Motor Company, Ltd., American Honda Motor Co., XM Satellite Radio Inc., and her car dealer, Dan Young Motors, based on advertisements claiming that the Honda Civic hybrid she bought was "XM ready." Agnew assumed that all she would be required to purchase was an XM radio subscription, but she also needed to pay for additional equipment and labor. She pleads claims for breach of express and implied warranties, violation of a state deceptive consumer sales statute, unjust enrichment, fraud, and constructive fraud. She seeks to represent a class of similarly situated individuals.

Agnew filed suit in an Indiana state court. Defendant American Honda properly removed the case to this court under the Class Action Fairness Act. 28 U.S.C. §§ 1332(d), 1453. Agnew has since dismissed her claims against the dealer, Dan Young Motors.[1] American Honda has moved to stay this action and to compel arbitration, a motion that was joined by XM.[2] The purchase agreement between Agnew and Dan Young Motors included a broad arbitration clause that cover all claims arising from or relating to the agreement or the relationships that result from the agreement. American Honda and XM are not parties to the purchase agreement, but, as explained below, Agnew is equitably estopped from avoiding enforcement of the arbitration clause of the contract upon which all of her claims depend. The court grants the motion to stay and compel arbitration. The court denies without prejudice XM's separate motion challenging the specificity of the pleading of the fraud claims. The court leaves that issue to the arbitrator.

Discussion

Agnew bought a Honda Civic Hybrid from Dan Young Motors on September 11, 2006. The parties to the contract were Agnew and Dan Young Motors. Agnew alleges that all the defendants – American Honda, XM, and Dan

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[1]Dan Young Motors was doing business as Penske Honda, the actual party to the contract. To differentiate the dealer from American Honda, the court refers to the dealer as Dan Young Motors.

[2]The record does not reflect service of process on Honda Motor Company, Ltd., the Japanese parent company.

Young Motors – advertised, marketed, and sold the auto and its audio system and misrepresented that the auto was "XM Ready," so that only an XM subscription was needed to use satellite radio. According to Agnew, additional hardware and labor were needed to prepare the auto and audio system to handle satellite radio.

The purchase agreement between Agnew and Dan Young Motors included a broad arbitration clause stating in pertinent part:

> All disputes, claims or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire Contract, shall, at the election of either party, be resolved by binding arbitration . . . This arbitration agreement is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1, *et seq*. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. . . . The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accordance with this Contract. Any claim or dispute is to be arbitrated on an individual basis, and not as a class action; and, you expressly waive any right you may have to arbitrate a class action. The parties agree and understand that the arbitrator shall have all powers provided by the law and this Contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

Within ten days after defendants removed the case, Agnew voluntarily dismissed her claims against Dan Young Motors. Two weeks later, American Honda moved to stay this action and to compel arbitration. XM joined the motion.

Plaintiff Agnew concedes that the clause would call for arbitration in a dispute between her and Dan Young Motors. She argues that the arbitration

clause does not apply because Dan Young Motors is no longer a party and because neither American Honda nor XM is a party to the contract containing the arbitration clause. American Honda and XM argue that they are entitled to rely on the arbitration clause, or at least that the issue of arbitrability should be decided by the arbitrator. American Honda and XM also contend that Agnew is equitably estopped from avoiding arbitration because her claims against them depend on the contract that includes the arbitration clause.

I. *Arbitration With Third Parties*

The first issue is whether American Honda and XM, which are not parties to the contract, can enforce the arbitration clause. The Seventh Circuit's decision in *Stone v. Doerge*, 328 F.3d 343 (7th Cir. 2003), shows that this question depends on state law. Indiana courts would not treat American Honda and XM as third-party beneficiaries entitled to enforce the arbitration clause. See *DaimlerChrysler Corp. v. Franklin*, 814 N.E.2d 281 (Ind. App. 2004).

"Whether a particular issue is subject to arbitration is a matter of contract interpretation, because 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.*, 174 F.3d 907, 909 (7th Cir. 1999), quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). In deciding whether the parties agreed to arbitrate the dispute in question, courts generally apply ordinary principles of state contract law. *First Options of Chicago, Inc. v.*

Kaplan, 514 U.S. 938, 944 (1995). "Nothing in the Federal Arbitration Act overrides normal rules of contractual interpretation." *Stone v. Doerge*, 328 F.3d at 345.

In *Stone*, the Seventh Circuit considered the question here: whether state or federal law should govern the ability of a third party to enforce an arbitration clause. An investor had signed an agreement with broker-dealer Bear Stearns. That agreement included a clause requiring arbitration of any controversies between the investor and Bear Stearns and any related entities for which Bear Stearns acted as a clearing agent. Another clause made other broker-dealers third-party beneficiaries of the arbitration clause. A dispute arose between investor Stone and another broker-dealer (Balis) arising from transactions in which Bear Stearns played no role. Balis tried to compel arbitration by relying on the clause in the agreement between Stone and Bear Stearns. The district court rejected the request to compel arbitration, and the Seventh Circuit affirmed.

In concluding that Balis was not entitled to enforce the arbitration clause in a contract to which it was not a party and with respect to a transaction in which the contract party (Bear Stearns) was not involved, the Seventh Circuit explained that it was applying state contract law, not the Federal Arbitration Act:

> When reaching this conclusion, the district judge referred to New York law, to which the contract itself points. Balis nevertheless contends that any dispute about the scope or meaning of an arbitration clause must be resolved under federal law, starting with the text of the Federal Arbitration Act and continuing with federal common law to the extent that the Act does

> not resolve a given controversy. If this were so, however, then any demand for arbitration would arise under federal law, supporting jurisdiction under 28 U.S.C. § 1331; yet it is settled that federal courts have jurisdiction over suits seeking to compel arbitration (or enforce awards) only if the parties are of diverse citizenship, or some grant of jurisdiction other than § 1331 applies. See, e.g., *Minor v. Prudential Securities, Inc.*, 94 F.3d 1103, 1104-05 (7th Cir. 1996). Thus most interpretive disputes must be resolved under state law.

Stone v. Doerge, 328 F.3d at 345.[3] The Seventh Circuit then added an important qualification: the rules and principles of state contract law must not give special treatment disfavoring arbitration. *Id.*, citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and 9 U.S.C. § 2; accord, *Furgason v. McKenzie Check Advance of Indiana Inc.*, 2001 WL 238129, *4-5 (S.D. Ind. Jan. 3, 2001) (holding that consumer loan agreement dispute was arbitrable under FAA despite state law excluding consumer loans from state arbitration law).

Indiana addressed a case very similar to this one in *DaimlerChrysler Corp. v. Franklin*, 814 N.E.2d 281 (Ind. App. 2004). In that case, the plaintiff had purchased a new car from a dealer. The buyer was unhappy with the quality of the car, and repairs were unsuccessful. When the buyer tried to return the car, the dealer refused and the buyer sued. The purchase agreement, like the one at

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[3]*Stone* disagreed on this point with the footnote that defendants rely upon from *Hoffman v. Deloitte & Touche, LLP*, 143 F. Supp. 2d 995, 1004 n.4 (N.D. Ill. 2001) (stating that federal law controlled whether non-parties could enforce an arbitration clause). Nevertheless, there is some tension on this point between *Stone* and Supreme Court and other Seventh Circuit decisions directing federal courts to apply a federal substantive law of arbitrability. See, *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); *Gingiss International, Inc. v. Bormet*, 58 F.3d 328, 331 n.3 (7th Cir. 1995).

issue here, was between the dealer and the consumer. The agreement included a broad arbitration clause that applied to claims arising out of or related to the transaction, including "any resulting transaction or relationship (including such relationship with third parties who do not sign this contract)." 814 N.E.2d at 284. The buyer sued the manufacturer for breach of warranties, for violation of an Indiana consumer protection law, and to force rescission. The manufacturer sought to compel arbitration, relying on the reference to relationships with third parties who did not sign the contract. The trial court refused, a jury awarded damages to the buyer, and the appellate court affirmed.

The appellate court applied general principles of Indiana contract law and held that the manufacturer did not qualify as a third-party beneficiary who was entitled to enforce the arbitration clause in the buyer's purchase agreement with the dealer: "the body of the contract and the arbitration agreement between [the dealer] and Franklin does not reference Daimler and does not show a clear intent to benefit it. Accordingly, Daimler could not have been an intended third-party beneficiary of the contract, and it may not rely on the arbitration provision." 814 N.E.2d at 286. The Indiana Court of Appeals determined that only parties to a contract, third-party beneficiaries, or those in privity with a party could benefit from the contract. *Id*. at 285-86.

There is no indication in *DaimlerChrysler* that the state court was applying any special rule disfavoring arbitration, so that problem with the FAA was avoided.

The arbitration clause in this case is no more explicit than the one in that case. Under the reasoning of *DaimlerChrysler*, then, American Honda and XM are not entitled to enforce the arbitration clause in the purchase agreement between Agnew and Dan Young Motors based on a third-party beneficiary theory.[4]

II. *Equitable Estoppel*

Defendants offer a different and more persuasive theory for sending this case to arbitration, the doctrine of equitable estoppel. Defendants contend that Agnew is trying to claim the benefits of the contract while repudiating the arbitration clause in it. For support, the defendants rely on *Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836 (7th Cir. 1981), in which the Seventh Circuit compelled arbitration in a construction dispute. The plaintiff in that case wanted to deny the right of a third party to compel arbitration where that third party was not a signatory to the contract requiring arbitration. The Seventh Circuit found that the plaintiff's claims were based on the third party's duties under the contract at issue. As a result, arbitration was appropriate. Where the plaintiff was relying on breaches of obligations in the

[4]As defendants note, the privity analysis in *DaimlerChrysler* was overruled by the Indiana Supreme Court in *Hyundai Motor America, Inc. v. Goodin*, 822 N.E.2d 947 (Ind. 2005) (holding vertical privity is not required in a suit by a consumer against a car manufacturer for economic loss based on breach of the implied warranty of merchantability). The applicability of *DaimlerChrysler* is not based on its privity analysis since American Honda specifically asserts that it is not in privity with Agnew.

agreement requiring arbitration, it was "estopped from repudiating the arbitration clause of the agreement, upon which it relies." *Id*. at 841.

Under the approach of *Hughes Masonry*, Agnew must arbitrate her claims against American Honda and XM if her claims rely on the terms of her purchase agreement with the dealership. The complaint does not differentiate among the defendants (including Dan Young Motors), and any relevant duties that American Honda and/or XM had toward Agnew arise under her contract with Dan Young Motors. The claims for breach of express and implied warranties necessarily assume that the warranties were provided as part of the Dan Young Motors sale to Agnew. See *Hyundai Motor America, Inc. v. Goodin*, 822 N.E.2d 947, 959 (Ind. 2005) (allowing suit to proceed against car manufacturer for implied warranty because "Indiana law does not require vertical privity between a consumer and a manufacturer as a condition to a claim by the consumer against the manufacturer for breach of the manufacturer's implied warranty of merchantability").

The reasoning of *Hughes Masonry* is not limited to claims for breach of contract. The claims in that case were pled as tort claims. The Seventh Circuit determined that the plaintiff had "merely attempted to characterize alleged failures to perform various construction management duties . . . as tortious inference with its contractual relations." 659 F.2d at 840. The claims were therefore based on the contract that required arbitration. Similarly here, Agnew's purchase of the auto was essential to all of the other claims. Those claims all assume that

American Honda and XM took upon themselves a duty to ensure that the auto was truly "XM Ready," so the reasoning of *Hughes Masonry* applies to the other claims.

To avoid *Hughes Masonry*, Agnew argues that the Seventh Circuit mistakenly applied federal common law to the issue. She observes that if Indiana law supported the equitable estoppel theory, it should have been applied in *DaimlerChrysler*, yet the Indiana Court of Appeals affirmed without even mentioning the doctrine. In light of the Seventh Circuit's reliance upon state law in *Stone v. Doerge*, discussed above, Agnew's point has some force. Yet it is difficult to see a principled distinction between this case and the Seventh Circuit's application of equitable estoppel in *Hughes Masonry*. Recognizing the tension in the relevant case law, the better course for this district court is to follow the Seventh Circuit case most closely on point, and that is *Hughes Masonry*. Accord, *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (applying equitable estoppel to order arbitration of claims against third party where all claims referred to or presumed existence of agreement with an arbitration clause); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993) (same); *Viets v. Andersen*, 2003 WL 21525062, *6 (S.D. Ind. June 26, 2003) (following *Hughes Masonry* to order arbitration of claims arising under partnership agreement, despite plaintiff's argument that partnership itself was not a party to the agreement).

One final note: Agnew has chosen to dismiss her claims against the party to the purchase agreement, Dan Young Motors. But under Agnew's theory, she would be free to sue American Honda and XM in court while she pursued parallel claims against Dan Young Motors through arbitration. That wasteful prospect also tends to weigh against Agnew's theory.

Conclusion

For the foregoing reasons, American Honda's motion to compel arbitration (Dkt. No. 18) is granted. XM's motion to dismiss counts III-VI of the complaint (Dkt. No. 23) is denied without prejudice to future consideration of the issue by an arbitrator or the court, and all proceedings in this action are hereby stayed pending the outcome of arbitration.

So ordered.

Date: May 20, 2009

DAVID F. HAMILTON, CHIEF JUDGE
United States District Court
Southern District of Indiana

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