



**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

ANITA JOHNSON,)	
)	
Respondent,)	
)	
v.)	WD73990
)	
JF ENTERPRISES, LLC., et al.,)	Opinion filed: March 27, 2012
)	
Appellants.)	

**APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
The Honorable Wesley Brent Powell, Judge**

Before Division Two: Gary D. Witt, Presiding Judge,
Joseph M. Ellis, Judge and Mark D. Pfeiffer, Judge

JF Enterprises, LLC, d/b/a Jeremy Franklin's Suzuki of Kansas City, and Jeremy Franklin (collectively "Appellants") appeal from a judgment entered by the Circuit Court of Jackson County denying their motion to compel arbitration. For the following reasons, the judgment is affirmed.

On December 29, 2007, Respondent Anita Johnson purchased a new vehicle from Appellants' dealership. In the course of purchasing that vehicle, Respondent signed an arbitration agreement ("the Arbitration Agreement") and a retail installment contract and security agreement ("the Retail Installment Contract"). The Arbitration

Agreement provides that all claims or disputes arising between Appellants and Respondent are to be resolved through arbitration. The Retail Installment Contract sets forth the terms and conditions for the purchase of the vehicle. Both documents were signed and dated December 29, 2007.

On December 13, 2010, Respondent filed a petition in the Circuit Court of Jackson County. Respondent subsequently filed an amended petition on April 8, 2011. In the amended petition, Respondent made claims of negligent misrepresentation and general negligence against Appellants. The amended petition also included a claim against American Suzuki Motor Corporation, the manufacturer of the vehicle, for violating the Missouri Merchandising Practices Act.

On April 15, 2011, Appellants filed a motion to compel arbitration pursuant to the Arbitration Agreement that Respondent signed when she purchased the vehicle. Respondent opposed the motion, arguing that the Retail Installment Contract, which does not include an arbitration provision or reference the Arbitration Agreement, sets forth the entire agreement between the parties. The trial court denied Appellants' motion to compel arbitration "pursuant to *Krueger v. Heartland Chevrolet, Inc.*, 289 S.W.3d 637, 638 (Mo. Ct. App. 2009)." Appellants bring two points on appeal.

In their first point, Appellants assert that the trial court erred in denying their motion to compel arbitration because *Krueger v. Heartland Chevrolet* is distinguishable from the case at bar. Appellants aver that, even though the Retail Installment Contract contains a merger clause, Respondent failed to demonstrate that the Arbitration Agreement was subject to that merger clause because she presented no evidence that

the Arbitration Agreement was executed prior to the Retail Installment Contract. "The issue of whether the motion to compel arbitration should have been granted is a legal question subject to our *de novo* review." ***Krueger v. Heartland Chevrolet, Inc.***, 289 S.W.3d 637, 638 (Mo. App. W.D. 2009).

When Respondent purchased the vehicle from Appellants, she signed two documents: the Arbitration Agreement and the Retail Installment Contract. The Arbitration Agreement provides, in pertinent part, that:

Any claim or dispute whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Agreement, 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, your purchase or financing contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase or financing contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

The Arbitration Agreement makes no reference to the Retail Installment Contract. The Retail Installment Contract sets forth the terms and conditions for the purchase of Respondent's vehicle and contains the following merger clause:

Oral agreements or commitments to loan money, extend credit or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable. To protect you (borrower(s)) and us (creditor) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it.

The Retail Installment Contract does not contain an arbitration provision nor does it reference the Arbitration Agreement.

Under nearly identical circumstances, this court affirmed a trial court's denial of a dealership's motion to compel arbitration. See *Krueger v. Heartland Chevrolet, Inc.*, 289 S.W.3d 637, 639 (Mo. App. W.D. 2009). In *Krueger*, the Kruegers executed three documents in the purchase of a used vehicle from a dealership: a retail buyer's order, an arbitration addendum, and a retail installment contract. *Id.* at 638. After the Kruegers brought suit against the dealership, the dealership sought to compel arbitration pursuant to the terms of the arbitration addendum. *Id.* The Kruegers opposed the motion, arguing that "the vehicle was ultimately purchased and financed pursuant to the Retail Installment Contract, which did not reference or incorporate the Arbitration Addendum." *Id.* The trial court subsequently denied the dealership's motion to compel arbitration. *Id.* On appeal, we noted that the Retail Installment Contract did not reference or incorporate the arbitration addendum and that it contained a merger clause stating that it was the complete and exclusive agreement between the parties. *Id.* at 638-39. In light of those factors, we concluded that the parties intended the Retail Installment Contract to supersede the buyer's order and arbitration addendum in situations where the vehicle is purchased on a credit basis; therefore, the Kruegers could not be compelled to arbitrate their claims. *Id.* at 639.

Appellants concede that the Retail Installment Contract signed by Respondent contained a merger clause stating that it was the complete and exclusive agreement between Appellants and Respondent. Appellants aver, however, that Respondent has to prove that the Arbitration Agreement was executed prior to the Retail Installment Contract because, implicit in the holding of *Krueger*, is a finding that the retail

installment contract superseded the arbitration addendum because the retail installment contract was executed subsequent to the arbitration addendum. We find no merit in Appellants' argument.

In determining the retail installment contract was the controlling agreement between the parties, the court in *Krueger* did not examine the order in which the documents were executed; rather, the court took an in-depth look at the language contained in the retail installment contract and found that it superseded the arbitration addendum because it did not refer to or incorporate any of the other documents executed by the parties and had a merger clause that clearly stated it was the complete and exclusive statement of the agreement between the parties. *Id.* at 639. Thus, the court based its conclusion upon the content of the retail installment contract, not upon when the retail installment contract was executed in relation to the other documents signed by the Kruegers.

Appellants further contend that language found in the Arbitration Agreement and the Retail Installment Contract evidences the parties' intent that the Arbitration Agreement be read as an agreement executed subsequent to or modifying the Retail Installment Contract. Appellants assert that the Retail Installment Contract intimates that the parties intended subsequent agreements to be executed after the Retail Installment Contract because the merger clause states that the Retail Installment Contract is the complete and exclusive agreement "except as we may later agree in writing to modify it." They then suggest that the Arbitration Agreement is one such subsequent agreement because the Arbitration Agreement states that it applies to all

claims or disputes arising out of relating to "your purchase or *financing contract* or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase or *financing contract*)."

"The existence of a merger clause is a strong indication on the face of the contract that the writing is intended to be complete." ***CIT Group/Sales Financing Inc. v. Lark***, 906 S.W.2d 865, 868 (Mo. App. E.D. 1995). Thus, although the Arbitration Agreement references a "financing contract," such language does not compensate for the fact that the Arbitration Agreement fails to reference or incorporate the Retail Installment Contract in any fashion or indicate that it is an agreement modifying the Retail Installment Contract. Additionally, the merger clause in ***Krueger*** contained the exact same language regarding future modifications by the dealership, and we found such language indicative of the parties' intent that the retail installment contract be the complete and exclusive agreement between the parties. See ***Krueger***, 289 S.W.3d at 639.

"Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate." ***Dunn Indus. Group, Inc. v. City of Sugar Creek***, 112 S.W.3d 421, 435 (Mo. banc 2003). Therefore, it is axiomatic that "[b]efore a party may be compelled to arbitrate under the FAA, a court must determine whether a valid agreement to arbitrate exists between the parties and whether the specific dispute falls within the substantive scope of that agreement." ***Id.*** at 427-28.

In this case, Appellants could have included or incorporated the separate Arbitration Agreement into the Retail Installment Contract. But Appellants, who were

responsible for drafting the documents, chose not to reference or incorporate any other documents executed between the parties in the Retail Installment Contract. Therefore, because the Retail Installment Contract contains a merger clause and does not incorporate or reference the Arbitration Agreement, the Retail Installment Contract supersedes the Arbitration Agreement, as this is a situation in which Respondent purchased the vehicle on a credit basis. Accordingly, there was no agreement to arbitrate applicable to this case. As such, Respondent cannot be compelled to arbitrate her claims, and the trial court did not err in denying Appellants' motion to compel arbitration.¹

Judgment affirmed.

Joseph M. Ellis, Judge

All concur.

¹ Because we find that the trial court properly denied Appellants' motion to compel arbitration pursuant to *Krueger*, point one is dispositive of the appeal, and there is no need to address Appellants' second point that the "trial court erred by denying Appellants' motion to compel arbitration, because that denial cannot be upheld upon any of the alternative grounds raised in Respondent's suggestions in opposition to the motion to compel arbitration, in that the Arbitration Agreement is not unconscionable, does not limit her ability to bring claims or seek recovery under the Missouri Merchandising Practices Act, and Respondent's claims fall within the scope of the Arbitration Agreement."