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FILED
SAN MATEO COUNTY
MAY - 6 2013
Clerk of the Superior Court
By
DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO

UNLIMITED JURISDICTION

GENE CONDON, an individual, and on behalf of himself and all others similarly situated,

Plaintiff,

v.

DALAND NISSAN, INC., a California corporation; NISSAN MOTOR ACCEPTANCE CORPORATION, a California corporation; FEDERATED MUTUAL INSURANCE COMPANY, a Minnesota corporation; and DOES 1 through 20, inclusive,

Defendants.

Case No.: CIV517002

ORDER GRANTING DEFENDANTS DALAND NISSAN, INC.'S AND FEDERATED MUTUAL INSURANCE COMPANY'S PETITION TO COMPEL BINDING ARBITRATION PURSUANT TO CONTRACT AND TO STAY THE INSTANT ACTION

Date: April 19, 2013
Time: 9:00 a.m.
Dept: 4

Complaint Filed: September 28, 2012
Trial Date: None

Defendants DALAND NISSAN, INC.'s and FEDERATED MUTUAL INSURANCE COMPANY's petition to compel binding arbitration pursuant to contract and to stay the instant action was set for hearing for April 19, 2013, at 9:00 a.m. in Department 4 of the above-captioned court. The Honorable Joseph E. Bergeron issued a tentative ruling granting the petition. As the tentative ruling was uncontested, it became the order of the Court.

The petition is GRANTED.

A. Procedural Unconscionability

Procedural unconscionability was found in *Natalini v. Import Motors, Inc.* (2013) 213 Cal.App.4th 587, based on specific evidence demonstrating that the plaintiff was prevented from

reading the arbitration provision. In contrast, Plaintiff in the present action merely stated that he was not shown the provision and was unable to read or understand it. (Declaration of Condon, ¶¶ 3-6 & 10, ¶¶ 12-17; 21-25.)

The Plaintiff in this action states that "I did not *believe* I could negotiate," "was *unable* to read the document," "was not *asked*...," "was not *given* the opportunity...," "was not *given* the option...," and so forth. Plaintiff describes actions that did not occur. Plaintiff's declaration does not describe any action that would have hindered the ability to see, read, or understand the contract. (See *Vasquez v. Greene Motors, Inc.* (2013) --- Cal.App.4th --- at 5 [plaintiff "does not claim [Defendant] actively interfered with its review ... [or] was prevented from doing so, or asked to take the Contract to an attorney for review and was refused the opportunity, or was presented with a contract in a language he did not understand, or was told the sale was conditioned on his acceptance of the contract without review. Nor did [Defendant] attempt to coerce him into signing the contract by suggesting he could get no better terms elsewhere. Similarly, he does not claim any affirmative misrepresentations about the terms of the contact"].) Similarly, here, Plaintiff does not identify any act by Defendant that contributed to Plaintiff's inability to know about or understand the arbitration provision. (See *Natalini* at 595 [salesperson "spent only enough time on the contract to point out where to sign;" plaintiff "not allowed to read the back of the contract"].)

The arbitration provision was in normal size type, emphasized in a box. Plaintiff does not contend that Defendant did anything to prevent him from seeing the arbitration provision. Further, the face of the contract contains language informing the buyer that contractual provisions are contained on both sides of the page and instructing the buyer not to sign the agreement before reading it. Finally, the front of the agreement, just above the signature line, contains language informing the buyer that the contract has an arbitration clause. The evidence does not support a finding that the arbitration clause was a surprise or otherwise procedurally unconscionable.

B. Substantive Unconscionability

"A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience." (*Pinnacle*

Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 246.) "Accordingly, one-sidedness, standing alone, is not sufficient to qualify an arbitration clause as substantively unconscionable." (*Vasquez* at 9.) In order to "shock the conscience," the arbitration provisoin must be more than simply one-sided. Rather, the one-sidedness must lack any kind of "business justification." (*Vasquez* at 9 [quoting *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 117-118].)

1. *The Right to Appeal Does not Shock the Conscience*

a. Appeal of Awards Exceeding $100,000

Although the right to appeal an award of $100,000 or more is a benefit for the seller, the *Natalini* case ignores that a $0 award is very likely to be against the buyer. Both parties have rights to appeal. Further, the case on which *Natalini* relied was asymmetrical because it did not allow appeal of awards of $0. (See *Natalini* at 597; see also *Vasquez* at p.11.)

b. Appeal of Injunctive Relief

The *Natalini* court ignores that a business justification exists for allowing appeal of injunctive relief, in that injunctive relief could affect a dealership's future actions towards future customers. Injunctive relief could affect Defendant's business operations. (*Vasquez* at 11 ["we find the allowance of an appeal in the event of injunctive relief to be justified by 'business realities.'" (*Armendariz*, 24 Cal.4th at 117)].) *Vasquez* also concluded that the right to appeal injunctive relief was not necessarily one-sided, since denial of injunctive relief (normally not appealable) would likely be accompanied by a $0 monetary award, which is appealable.

The Court also concluded that the right to appeal injunctive relief is not one-sided enough to "shock the conscience." (*Vasquez* at 12 ["Because a claimant denied injunctive relief will, as a practical matter, ordinarily be entitled to request a second arbitration, the actual one-sidedness of this aspect of the provision is sufficiently minimal that it cannot be said to shock the conscience"].)

2. *Exempting Repossession Does not Shock the Conscience*

Natalini found that the provision exempting self-help remedies from arbitration was unconscionable because the customer does not have any self-help remedies. (*Natalini* at 599.) *Vasquez* examines the issue more deeply by comparing it with the exemption of small claims.

(*Vasquez* at 13 ["Exempting small claims, however, would appear to balance this provision by benefitting buyers at least as much as sellers, since many buyers' disputes will have a relatively small monetary value"].) The court also explained that "sufficient justification" existed for exempting repossession from arbitration, which is that repossession is an extra-judicial procedure that is not subject to litigation to begin with. Therefore, it ought not to be part of arbitration either. (*Vasquez* at 13.) Thus, exempting repossession, which benefits the seller, is not one-sided because it is balanced by exemption of small claims, which benefits the buyer.

IT IS SO ORDERED.

DATED: 5/3, 2013

By: J Bergeron
HON. JOSEPH E. BERGERON
Judge of the Superior Court

Approved as to form:

DATED:

LIBERTY & ASSOCIATES, A PLC

By: _____
LOUIS A. LIBERTY
MICHELE M. TUMAN
Attorney for Plaintiff
GENE CONDON