2015 IL App (5th) 140495-U

NO. 5-14-0495

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PATRICK KAVENY and FANNIE MAE KAVENY, Individually and on Behalf of All Others Similarly Situated,	)	Appeal from the Circuit Court of Madison County.
Plaintiffs-Appellees,	)	
v.	)	No. 14-L-531
ONEMAIN FINANCIAL, INC., and CITIFINANCIAL, INC.,	)	Honorable Donald M. Flack,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Presiding Justice Cates and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's denial of the defendants' motion to compel arbitration is reversed as the question of substantive arbitrability should be determined by the arbitrator; however, the cause is remanded to the circuit court to determine if the defendants are affiliates under the arbitration agreement.

¶ 2 BACKGROUND

¶ 3 On November 25, 2008, the plaintiffs borrowed money from CitiFinancial Services, Inc., and secured their repayment obligations under this loan with the title to their automobile. As part of this loan agreement, the plaintiffs and CitiFinancial

Services, Inc., executed an arbitration agreement. This agreement could be enforced by CitiFinancial Services, Inc., or "its past, present or future respective parents, subsidiaries, affiliates, predecessors, assignees, [and] successors." Under this agreement, the plaintiffs and CitiFinancial Services, Inc., agreed that either party could insist on binding arbitration in accordance with the Federal Arbitration Act (FAA) on any claim arising under the loan. The arbitration agreement specified, however, that neither party could require arbitration in any agreement "to the extent necessary to obtain a judicial order for the purpose of *** establishing, perfecting or clearing title, with respect to an interest in property."

¶ 4 On March 3, 2013, the plaintiffs, as part of their chapter 7 bankruptcy proceeding, entered into a reaffirmation agreement with OneMain Financial, Inc., as the creditor. Although not explained in the record, this was apparently the indebtedness secured by their automobile originally with CitiFinancial Services, Inc., as lender and security interest holder. The plaintiffs tendered the final payment of $1,650 on this loan to OneMain Financial, Inc., on February 11, 2014. On February 13, 2014, OneMain Financial, Inc., deposited the payment. On February 17, 2014, OneMain Financial, Inc., returned $165 of this payment to the plaintiffs as an overpayment. According to the defendants' loan documentation, this loan was listed as "paid" on February 21, 2014. On March 31, 2014, CitiFinancial, Inc., an unexplained third entity, provided the plaintiffs with a release of security interest in the automobile that had secured the loan.

¶ 5 On April 3, 2014, the plaintiffs filed the instant case, asserting that the defendants violated section 3-205 of the Illinois Vehicle Code (625 ILCS 5/3-205 (West 2012)) by

failing to release their lien and/or deliver a certificate of title to the plaintiffs within 21 days of the lien's being satisfied. On June 9, 2014, the defendants filed a motion to compel arbitration, alleging that the claim fell within the scope of the arbitration agreement. The defendants claimed that, although CitiFinancial Services, Inc., is the named party to the arbitration agreement, the agreement applied to OneMain Financial, Inc., and CitiFinancial, Inc., because the three "are affiliates, by reason of the ultimate corporate ownership by Citigroup Inc." The defendants presented a June 2, 2014, affidavit of Teresa Baer as evidence of this affiliation. Baer stated that she was an assistant secretary of both CitiFinancial Credit Company and CFNA Receivables (DE), Inc. According to her, CitiFinancial Credit Company wholly owns OneMain Financial, Inc., and Citibank, NA, wholly owns CitiFinancial Services, Inc., which is now known as CFNA Receivables (DE), Inc. Baer also stated that CitiFinancial, Inc., was merged into CitiFinancial Services, Inc., effective October 1, 2013. Further, she attested that CitiFinancial Services, Inc., is wholly owned by CitiFinancial Credit Company. Lastly, she stated that both CitiFinancial Credit Company and Citibank, NA, are affiliates and wholly owned by Citigroup Inc.

¶ 6 On August 20, 2014, the plaintiffs filed their response and objection to the defendants' motion to compel arbitration. On September 5, 2014, the circuit court heard arguments on the motion to compel arbitration and denied it. On September 30, 2014, the defendants timely filed their notice of interlocutory appeal.

¶ 7 ANALYSIS

¶ 8 The defendants argue that the circuit court erred in holding that the defendants could not force arbitration of this dispute because the defendants were not named in the arbitration agreement. Further, the defendants argue that the arbitrability of this dispute should be decided by an arbitrator and not by the courts. Lastly, the defendants argue that, even if the circuit court could properly determine arbitrability, the circuit court should have held that this matter is arbitrable.

¶ 9 " 'An order [granting or denying a motion] to compel arbitration is injunctive in nature and is appealable under Supreme Court Rule 307(a)(1).' " *Hollingshead v. A.G. Edwards & Sons, Inc.*, 396 Ill. App. 3d 1095, 1098-99 (2009) (quoting *Carter v. SSC Odin Operating Co.*, 381 Ill. App. 3d 717, 719-20 (2008)). Appeals from a denial of a motion to compel arbitration without an evidentiary hearing are reviewed *de novo*. *Id*. at 1099.

¶ 10 "[I]n an appeal from an interlocutory order granting or denying a motion to compel arbitration, the only issue before the reviewing court is whether there was a showing sufficient to sustain the order of the trial court granting or denying the motion." *Travis v. American Manufacturers Mutual Insurance Co.*, 335 Ill. App. 3d 1171, 1174 (2002). "When presented with a motion to stay litigation pending arbitration under section 3 of the FAA, the court's inquiry is limited to whether an agreement to arbitrate exists and whether it encompasses the issue in dispute." *Jensen v. Quik International*, 213 Ill. 2d 119, 123 (2004).

¶ 11 The plaintiffs have not disputed that the arbitration agreement exists between the plaintiffs and CitiFinancial Services, Inc. Thus, this court must determine whether the plaintiffs' cause of action is encompassed by the arbitration agreement. Under the FAA, "[a] written provision in *** a contract evidencing a transaction involving commerce to settle by arbitration a controversy *** arising out of such contract *** shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). As the United States Supreme Court has explained, "The FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Therefore, "[t]he FAA thereby places arbitration agreements on an equal footing with other contracts [citation] and requires courts to enforce them according to their terms." *Id.* "In determining whether the parties agreed to arbitrate a particular issue, the court should apply state law regarding the formation of contracts." *Ford Motor Credit Co. v. Cornfield*, 395 Ill. App. 3d 896, 906 (2009) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

¶ 12 "The primary objective in construing a contract is to give effect to the intent of the parties." *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). "A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent." *Id.* at 233. "If the language of the contract is susceptible to more than one meaning, it is ambiguous." *Id.* "Ordinarily, the arbitrability of a given issue is for courts, not arbitrators, to determine." *Kinkel v. Cingular Wireless, LLC*, 357 Ill. App. 3d 556, 561 (2005). However, in *Donaldson, Lufkin & Jenrette*

Futures, Inc. v. Barr, 124 Ill. 2d 435 (1988), the Supreme Court of Illinois set clear exceptions to this general rule that take effect when parties to an arbitration agreement broadly agree to arbitrate most disputes. "Where the language of the arbitration agreement is clear, and it is apparent that the dispute sought to be arbitrated falls within the scope of the arbitration clause, the court should decide the arbitrability issue and compel arbitration." *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 445 (1988). "Similarly, if it is apparent that the issue sought to be arbitrated is not within the ambit of the arbitration clause, the court should decide the arbitrability issue in favor of the opposing party, because there is no agreement to arbitrate." *Id*. However, "when the language of an arbitration clause is broad and it is unclear whether the subject matter of the dispute falls within the scope of arbitration agreement, the question of substantive arbitrability should initially be decided by the arbitrator." *Id.* at 447-48. Under federal law, "any doubt concerning the scope of the arbitration clause is resolved in favor of arbitration." *Gore v. Alltel Communications, LLC*, 666 F.3d 1027, 1032 (7th Cir. 2012).

¶ 13 In this case, the arbitration agreement is generally applicable to all claims arising out of the initial contract between the plaintiffs and CitiFinancial Services, Inc. However, the arbitration agreement specifically exempts actions "establishing, perfecting or clearing title, with respect to an interest in property" from arbitration. The defendants argue that the arbitration agreement is broad and that, due to the wording of the exemption, it is unclear whether this claim falls within the scope of the agreement. Therefore, under *Donaldson*, the issue of arbitrability should be decided initially by an arbitrator. The plaintiffs argue that their claim, arising from the defendants' alleged

failure to release the lien on or deliver clear title to the plaintiffs' vehicle within 21 days, clearly falls under the exception as an action clearing title. Thus, the plaintiffs argue that their claim is not within the ambit of the arbitration clause and the circuit court rightfully decided the arbitrability issue in favor of the plaintiffs under *Donaldson*. The circuit court, in ruling on this issue, stated that the plaintiffs' claim "is not necessary to clear title, but it relates to the clearing of the title." Therefore, the circuit court held that the plaintiffs' claim was exempted by the arbitration agreement. While the agreement specifically exempts actions "establishing, perfecting or clearing title" from the arbitration agreement, that exemption only applies to actions "to the extent necessary to obtain a judicial order for the purpose of *** clearing title."

¶ 14 The circuit court specifically stated that the plaintiffs' cause of action was "not necessary to clear title." However, the circuit court denied the defendants' motion to compel arbitration because the plaintiffs' claim "relates to the clearing of the title." The arbitration agreement clearly states that the exemption applies to actions "to the extent necessary to" clear title. As the defendants have argued, it is ambiguous whether a claim that is not necessary to clear title but is related to the clearing of title falls within the scope of the agreement. Because of this ambiguity, under *Donaldson*, the issue of arbitrability should be determined by an arbitrator and not by the courts. Therefore, the circuit court did not have the authority to determine whether the plaintiffs' cause of action fell within the scope of the arbitration agreement.

¶ 15 Even though the question of arbitrability could not be decided by the circuit court, the circuit court must determine whether the arbitration agreement applies because the

defendants are not named parties under the agreement. The arbitration agreement was an agreement by and between the plaintiffs and CitiFinancial Services, Inc., but neither of the defendants was a party to the agreement. The defendants argue that they can enforce the agreement as affiliates of CitiFinancial Services, Inc. "Where it is shown that the signatories to the agreement intended that the nonsignatories were to derive benefits from the agreement and where the arbitration clause itself is susceptible to this interpretation, then arbitration is proper." *Dannewitz v. Equicredit Corp. of America*, 333 Ill. App. 3d 370, 373 (2002). The arbitration agreement does provide that CitiFinancial Services' "past, present or future respective parents, subsidiaries, affiliates, predecessors, assignees, successors, and their respective employees, agents, directors, and officers" can enforce the arbitration agreement. However, the circuit court held that it would not force arbitration on an agreement that did not have any named defendant on it.

¶ 16 The defendants argue that, in doing so, the circuit court ignored "uncontroverted and unchallenged" evidence showing that both the defendants (OneMain Financial, Inc., and CitiFinancial, Inc.) were affiliated with CitiFinancial Services, Inc. It should first be noted that the circuit court has conducted no evidentiary hearing to determine whether or not the three companies are affiliated. Until such a hearing takes place, it is premature for this court to make factual findings on this allegation. However, this court has reviewed the "uncontroverted and unchallenged" evidence, which consists of the affidavit of Teresa Baer, an assistant secretary of CitiFinancial Credit Company and CFNA Receivables (DE). In paragraph 5 of this affidavit, Baer "attest[s] that CitiFinancial, Inc., a Kentucky corporation no longer exists as it merged into CitiFinancial Services, Inc., a

Minnesota corporation effective October 1, 2013." As noted earlier, CitiFinancial, Inc., provided the plaintiffs with a release of security interest in the automobile that had secured the loan on March 31, 2014, several months after Baer claims CitiFinancial, Inc., ceased to exist. Further, in paragraph 4 of the affidavit, Baer attests "that Citibank, NA wholly owns CitiFinancial Services, Inc., n/k/a CFNA Receivables (DE), Inc." However, in paragraph 6 of the affidavit, Baer "attest[s] that CitiFinancial Services, Inc., a Minnesota corporation, is wholly owned by CitiFinancial Credit Company."

¶ 17 At oral argument before this court, the defendants stated that the March 31, 2014, release was actually signed by CitiFinancial Services, Inc., formerly known as CitiFinancial, Inc. Kentucky. The defendants presented no evidence to the circuit court explaining this discrepancy. The defendants argued that this court should not be concerned with any discrepancies in the Baer affidavit because those concerns go to the merits of the case and, therefore, should be resolved in arbitration. However, this court, like the circuit court, has to consider these discrepancies in order to determine if the defendants are affiliates of CitiFinancial Services, Inc., and can therefore enforce the arbitration agreement. Before this case can be sent to arbitration, the defendants must prove that they are affiliates of CitiFinancial Services, Inc. *Cf. Sabo v. Dennis*, 408 Ill. App. 3d 619, 628-29 (2011) (circuit court found that several third-party defendants were "affiliates" according to an arbitration agreement and thus could compel arbitration prior to compelling arbitration).

¶ 18 The defendants have yet to explain how CitiFinancial Services, Inc., can be wholly owned by two companies as alleged in Baer's affidavit, and they have not presented

evidence to the circuit court explaining the discrepancy regarding the March 31, 2014, release. In short, the defendants' "uncontroverted" evidence is internally inconsistent and not supported by any additional documentation to clarify the inconsistencies. It is unclear how a fact finder could determine that the defendants are affiliates of CitiFinancial Services, Inc., based on this affidavit alone. The defendants have thus failed to prove that they are affiliates of CitiFinancial Services, Inc. However, because the circuit court has not yet held a hearing or made findings of fact regarding whether or not the defendants are affiliates under the agreement, we remand for additional proceedings on that issue.

¶ 19 CONCLUSION

¶ 20 For the reasons stated, we reverse the judgment and remand to the circuit court for further proceedings.

¶ 21 Reversed and remanded.