



**In the
Missouri Court of Appeals
Western District**

LOBEL FINANCIAL INC.,	)	
	)	
Appellant,	)	WD81461
	)	
v.	)	OPINION FILED: December 4, 2018
	)	
DAN BOTHEL,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Saline County, Missouri
The Honorable W. Page Bellamy, Judge

Before Division Three: Gary D. Witt, Presiding Judge, Cynthia L. Martin, Judge and
Anthony Rex Gabbert, Judge

Lobel Financial Inc. ("Lobel") appeals from a judgment confirming an arbitration award which found that Lobel could not elect to arbitrate its claim for a deficiency judgment once it chose to pursue that claim in court, and which referred Lobel's deficiency claim and Dan Bothel's ("Bothel") related counterclaim back to the trial court for disposition. Lobel argues that the trial court erred in confirming the arbitration award because the arbitrator exceeded her powers. Finding no error, we affirm.

Factual and Procedural Background

On October 10, 2014, Bothel purchased a car from Car Barn in Columbia, Missouri. On the same day, Bothel signed a Retail Installment Contract and Security Agreement ("RICSA") reflecting agreed upon terms to finance Bothel's purchase. The RICSA contained an arbitration provision. On the same date, Car Barn executed a provision on the last page of the RICSA assigning its rights to "Lobel Financial."

Lobel repossessed Bothel's vehicle after Bothel allegedly breached the RICSA by failing to make required payments. Lobel thereafter sold Bothel's vehicle at a private sale, and received proceeds that were less than the amount Bothel owed.

On May 23, 2016, Lobel filed a petition¹ against Bothel in the Saline County Circuit Court to collect the deficiency. On July 7, 2016, Bothel filed a motion to dismiss the petition, arguing that Lobel's failure to strictly comply with requirements of the Uniform Commercial Code ("UCC") defeated Lobel's right to recover a deficiency as a matter of law. On the same day, Bothel also filed an answer and counterclaim which defended Lobel's claim for a deficiency judgment on the same basis raised in the motion to dismiss, and which asserted an affirmative claim for the recovery of statutory damages, attorney's fees, and punitive damages for Lobel's alleged violations of the UCC and of a statute

¹Lobel's petition identified itself as "Lobel Financial Inc." Inexplicably, in later pleadings, Lobel changed the case caption to refer to itself as "Lobel Financial Corporation." There is no indication in the record that the trial court permitted a substitution of parties, or of any other explanation for Lobel's change in the caption. Although subsequent pleadings, including various orders and judgments entered by the trial court in this action, use a case caption that refers to Lobel as "Lobel Financial Corporation," the official case caption continues to refer to Lobel as Lobel Financial Inc. We have elected to use the official case caption in connection with this appeal.

The assignment of Car Barn's interests to Lobel on the RICSA identified the assignee as "Lobel Financial," making it unclear whether the assignee was "Lobel Financial Inc." or "Lobel Financial Corporation." Regardless, the trial court's judgment from which this appeal is taken, and this opinion, bind Lobel, whether it refers to itself as Lobel Financial Inc. or Lobel Financial Corporation.

addressing the calculation of interest. A few days later, Bothel filed an amended answer and counterclaim alleging individual and class complaints seeking damages, injunctive relief, and a declaratory judgment for Lobel's alleged violations of the UCC and of a statute addressing the calculation of interest.

On July 26, 2016, Lobel filed a motion to compel arbitration and stay proceedings ("Motion to Compel") relying on the arbitration provision in the RICS. In the Motion to Compel, Lobel asked the trial court "to enforce the arbitration agreement between the parties, **to compel arbitration of all pending claims**, and to stay all proceedings in this action, including [Bothel's motion to dismiss], pending resolution of arbitration." (Emphasis added.) Lobel's Motion to Compel alleged "this Court is not an appropriate forum for the resolution of [Lobel's] and [Bothel's] claims. This Court should stay this case and compel [Bothel] to arbitrate his claims and [Lobel's] deficiency claim per the Federal Arbitration Act and Section 435.355.1 RSMo." The trial court entered a judgment on December 31, 2016, granting Lobel's Motion to Compel.

Arbitration proceeded pursuant to the Consumer Arbitration Rules of the American Arbitration Association ("AAA"). Lobel filed a Request for Arbitration Clause Construction, to which Bothel filed a response, and both parties filed replies.² Lobel alleged in its reply that:

Lobel seeks to arbitrate ALL pending claims. As discussed above, it is undisputed and, in fact, admitted by Bothel that Lobel must plead compliance with the same UCC pre-sale notice statute that is the primary focus of Bothel's claims in order to recover on Lobel's deficiency claim. Contrary to

²Lobel's Request for Arbitration Clause Construction is not in the record on appeal. Bothel's response to the Request, and both parties' replies, are in the record on appeal.

Bothel's argument, his claims are not entirely independent of Lobel's claims and require reference to the contract. Clearly, these claims are related and are not independent of the contract, particularly when the existence and sufficiency of the pre-sale notice is a common and critical question of law in both claims.

Lobel's reply further argued "[h]ere, pending before the arbitrator are two interdependent and inextricably intertwined claims, Lobel's deficiency claim under the UCC and Bothel's claims for violation of the statutes, both of which depend upon whether the UCC pre-sale notice was sufficient." In addressing whether a moratorium imposed by the AAA on debt collection arbitration programs should be applied, Lobel argued that "[a]pplication of the moratorium would result in an inefficient and bifurcated litigation of this matter, with Lobel's claim for deficiency balance being heard in the Saline County case, and Bothel's Counterclaim being heard in this proceeding."

Among other things, Bothel argued in its responsive pleadings to Lobel's Request for Arbitration Clause Construction that Lobel was not entitled to choose arbitration after electing to file a court action.

On October 3, 2017, the arbitrator conducted a telephonic hearing. On October 6, 2017, the arbitrator issued Order #2 which stated that the purpose for the October 3, 2017 hearing had been to allow the parties to orally present their positions on Lobel's Request for Arbitration Clause Construction. The arbitrator's order summarized the pleadings submitted by the parties for the arbitrator's consideration. The arbitrator ruled:

Having reviewed and considered the RICSAs, the filings submitted by the parties and the arguments made during the hearing, the Arbitrator finds that Lobel had the right to elect arbitration in connection with its deficiency claim against Bothel but chose instead to pursue that claim in court by filing suit in the Saline County, Missouri Associate Circuit Court. Under the terms of the

RICSA, once Lobel chose to pursue its deficiency claim in court, Lobel no longer had the right to pursue the claim in arbitration. **See *Triarch Industries, Inc. v. Crabtree***, 158 S.W.3d 772 (Mo. banc 2005).

The Arbitrator did not find it necessary to decide Bothel's challenge to the validity or enforceability of the arbitration provision premised on rescission, lack of mutuality or unconscionability or whether his claims fall outside the scope of the arbitration provision.

Accordingly, **IT IS HEREBY ORDERED** that this matter is returned to the Circuit Court of Saline County, Missouri for final disposition.

On October 10, 2017, Bothel filed a motion asking the trial court to lift its stay and to confirm the arbitrator's order. Lobel objected, and filed a competing motion to vacate the arbitration order. On January 22, 2018, the trial court entered its judgment ("Judgment") denying Lobel's motion to vacate the arbitration order, and granting Bothel's motion to lift its stay and to confirm the arbitration order. Specifically, the trial court ruled that "the award of Arbitrator . . . , Order #2 dated October 6, 2017, is **CONFIRMED** in all respects and that judgment be and is hereby entered in conformity therewith." The Judgment placed the disputes framed by Lobel's petition and Bothel's amended answer and counterclaim "back on the Court's regular docket for further proceedings."

Lobel filed its notice of appeal on February 1, 2018. The trial court thereafter stayed further proceedings pending the disposition of this appeal.

Standard of Review

"An appeal may be taken from . . . [a]n order confirming or denying confirmation of an [arbitration] award." Section 435.440.1(3).³

³All statutory references are to RSMo 2016 as supplemented unless otherwise noted.

We will affirm the trial court's Judgment confirming the arbitration award "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *State ex rel. Greitens v. Am. Tobacco Co.*, 509 S.W.3d 726, 735 (Mo. banc 2017) (citing *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 431 (Mo. banc 2015)). The parties agree that the Federal Arbitration Act ("FAA"), codified at 9 U.S.C. section 1, *et seq.*, applies to this case, and thus "provides the governing standard for this Court's review of the [arbitrator's award]." *Id.*

Bothel sought confirmation of the arbitrator's award pursuant to 9 U.S.C. section 9, which provides that a party to an arbitration may apply to the appropriate court "for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." Lobel moved to vacate the arbitrator's award pursuant to 9 U.S.C. section 10(a)(4) which authorizes a court to vacate the arbitrator's award "where the arbitrators exceeded their powers" "Whether [the arbitrator] exceeded [her] powers is a legal question subject to *de novo* review." *State ex rel. Greitens*, 509 S.W.3d at 735.

To establish that the arbitrator exceeded her powers, Lobel "must clear a high hurdle." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010). "It is not enough for [Lobel] to show that the [arbitrator] committed an error--or even a serious error." *Id.* "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] [her] own brand of industrial justice that [her] decision may be unenforceable." *Id.* (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (*per curiam*)). "In that situation, an arbitration decision

may be vacated under [section] 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [her] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." *Id.* at 672; *see also Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013) ("Only if 'the arbitrator act[s] outside the scope of his contractually delegated authority'--issuing an award that 'simply reflect[s] [her] own notions of [economic] justice' rather than 'draw[ing] its essence from the contract'--may a court overturn [her] determination." (quoting *E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000))). "So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether [she] got its meaning right or wrong." *Oxford Health Plans LLC*, 569 U.S. at 569. "'Because the parties bargained for the arbitrator's construction of . . . their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a courts view of its (de)merits.'" *State ex rel. Greitens*, 509 S.W.3d at 736 (quoting *Oxford Health Plans LLC*, 569 U.S. at 569).

Analysis

In its single point on appeal, Lobel argues that the trial court erred in confirming the arbitrator's award because Lobel's motion to vacate the award should have been granted as the arbitrator exceeded her powers. Specifically, Lobel argues that the arbitrator exceeded her powers because the award "did not draw its essence from the parties' arbitration agreement, did not enforce or apply the agreement including the class-action waiver, and did not construe or interpret the agreement."

We address the latter contention first. It is uncontested that the arbitrator was charged with construing the parties' arbitration agreement. The arbitration agreement

expressly provides that "the validity, scope, and interpretation of the arbitration provision are to be decided by neutral, binding arbitration," and that "[t]he arbitrator will decide any dispute regarding the arbitrability of a [c]laim." Consistent with these unambiguous provisions of the arbitration agreement, Lobel filed a request asking the arbitrator to construe the arbitration agreement. The arbitrator's award expressly did so, after the arbitrator heard arguments and considered the parties' written submissions. It is disingenuous for Lobel to argue that the arbitrator's award "did not construe or interpret the [arbitration] agreement." Plainly, it did.

Lobel nonetheless argues that the arbitrator exceeded her powers because in ruling on Lobel's Request for Arbitration Clause Construction, she ignored unambiguous provisions of the arbitration agreement which permitted Lobel "to elect arbitration of Bothel's claims," [Appellant's Brief, p. 19], and which waived class-action relief for arbitrated claims. [Appellant's Brief, p. 27] Lobel argues that even though vacation of an arbitration award is not proper where an arbitrator even arguably construes an arbitration agreement, an arbitrator cannot be said to have construed an arbitration agreement if the arbitrator exceeds her powers by ignoring unambiguous provisions of the agreement. *See State ex rel. Greitens*, 509 S.W.3d at 738 (holding that "[a]n arbitrator may interpret ambiguous language, but the arbitrator cannot 'disregard or modify unambiguous contract provisions,'" and that "[i]f an arbitrator 'interprets unambiguous language in any way different from its plain meaning, the arbitrator amends or alters the agreement and acts without authority'" (quoting *Mo. River Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 855 (8th Cir. 2001))).

Lobel's contention is without merit, as the arbitrator did not disregard or modify unambiguous provisions of the arbitration agreement. In relevant part, the arbitration agreement provides:

- EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN YOU AND US DECIDED BY ARBITRATION, AND NOT BY A COURT OR BY JURY TRIAL.
- YOU GIVE UP ANY RIGHT THAT YOU MAY HAVE TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER IN ANY CLASS ACTION OR CLASS ARBITRATION AGAINST US IF A DISPUTE IS ARBITRATED.

....

You or we (including any assignee) may elect to resolve any Claim by neutral, binding arbitration and not by a court action. "Claim" means any claim, dispute or controversy between you and us or our employees, agents, successors, assigns or affiliates arising from or relating to:

1. the credit application;
2. the purchase of the Property;
3. the condition of the Property;
4. this Contract;
5. any insurance, maintenance, service or other contracts you purchased in connection with this Contract; or
6. any related transaction, occurrence or relationship.

This includes any Claim based on common or constitutional law, contract, tort, statute, regulation, or other ground. To the extent allowed by law, the validity, scope, and interpretation of this arbitration provision are to be decided by neutral, binding arbitration.

If either party elects to resolve a Claim through arbitration, you and we agree that no trial by jury or other judicial proceeding will take place. Rather, the Claim will be arbitrated on an individual basis, and not on a class or representative basis.

....

. . . . The arbitrator will decide any dispute regarding arbitrability of a Claim.
. . .

. . . .

You or we can do the following without giving up the right to require arbitration:

- Seek remedies in small claims court for Claims within the small claims court's jurisdiction, or
- Seek judicial provisional remedies.

If a party does not exercise the right to elect arbitration in connection with any particular Claim, that party still can require arbitration in connection with any other Claim.

This arbitration provision survives . . . (ii) any legal proceeding by you or us to collect a debt owed by the other

Construing these provisions, the arbitrator's award determined that Lobel no longer had the right to seek arbitration to determine its deficiency because it had already elected to seek that remedy in a court. This determination is consistent with the unambiguous language of the arbitration agreement. Lobel plainly had the right to "elect to resolve [its deficiency claim] by neutral, binding arbitration and not by a court action." However, Lobel did not, in the first instance, elect arbitration to resolve its deficiency claim. It elected a court action. There is no provision in the arbitration agreement that permits Lobel to change its initial election. In fact, and to the contrary, although the arbitration agreement says the arbitration provision survives "any legal proceeding by you or us to collect a debt owed by the other," it also unambiguously provides that an election to seek judicial relief will not be viewed as "giving up the right to require arbitration" in only two scenarios, neither of which apply to this case: where remedy is sought in small claims court, or where judicial

provisional remedies are sought. And the arbitration agreement unambiguously provides that "[i]f a party does not exercise the right to elect arbitration in connection with any particular Claim, that party still can require arbitration in connection with any **other** Claim." (Emphasis added.) The arbitrator did not exceed her powers by concluding, based on the unambiguous language of the arbitration agreement, that "[u]nder the terms of the RICSA, once Lobel chose to pursue its deficiency claim in court, Lobel no longer had the right to pursue the deficiency claim in arbitration."⁴

Lobel tacitly concedes this point. In the argument portion of its Brief, Lobel does not argue that it had the right to seek arbitration of its deficiency claim after electing to file that claim in a court. Instead, Lobel argues that it had the right to require Bothel to arbitrate his counterclaim and that the arbitrator's award disregarded this right. Of course, Lobel never sought to compel arbitration of only Bothel's counterclaim. Lobel's Motion to Compel asked the trial court to "enforce the arbitration agreement between the parties, [and] **to compel arbitration of all pending claims,**" and argued that the trial court "is not an appropriate forum for the resolution of [Lobel's] and [Bothel's] claims," such that the

⁴After reaching this conclusion, the arbitrator's award cited to the Missouri Supreme Court's decision in *Triarch Industries, Inc. v. Crabtree*, 158 S.W.3d 772 (Mo. banc 2005). Lobel argues that the arbitrator's reliance on *Triarch* was erroneous. We disagree. In *Triarch*, our Supreme Court noted the difference between the right to arbitrate as a matter of contract construction and waiver of the right to arbitrate based on principles of estoppel. *Id.* at 776-77 (holding that judicially determined waiver of the right to arbitrate where a party knows of the right to arbitrate, and acts inconsistently with that right to the prejudice of the other party, is to be distinguished from whether an arbitration contract affords the right to compel arbitration in the first place). Here, the trial court's initial judgment compelling arbitration found that Lobel had not judicially waived its right to compel arbitration, even though it knew of the right and acted inconsistently with it, because Bothel was not prejudiced by Lobel's filing of a court action. The arbitrator's citation to *Triarch* after finding that Lobel did not have the contractual right to elect to arbitrate its deficiency claim signposted the arbitrator's recognition that her finding that Lobel no longer had the right to elect to arbitrate its deficiency claim based on the plain language of the RICSA was distinguishable from the trial court's determination that Lobel had not judicially waived the right to compel arbitration by first filing a court action.

trial court "should stay this case and compel [Bothel] to arbitrate his claims and [Lobel's] deficiency claim." (Emphasis added.) The trial court afforded Lobel precisely the relief Lobel requested. In the arbitration proceedings, Lobel's written submissions to the arbitrator continued to demand arbitration of "ALL pending claims." Lobel cannot complain that the arbitrator's award deprived it of the right to insist only on the arbitration of Bothel's counterclaim when Lobel never sought to enforce that alleged right.

In any event, Lobel's argument presumes that Lobel would have been entitled to compel arbitration of only Bothel's counterclaim. Though the arbitration agreement does provide that a decision **not** to elect arbitration of a claim will not foreclose a party from insisting on arbitration of "any **other** Claim," Lobel urged the arbitrator to construe Lobel's claim for deficiency and Bothel's counterclaim as "not entirely independent," and as "two interdependent and inextricably intertwined claims," the separation of which would result in "inefficient and bifurcated litigation of this matter." In entering Order #2, the arbitrator obviously agreed with Lobel, as once the arbitrator determined that Lobel had waived its right to elect to arbitrate its deficiency claim, she referred the entire matter, including Bothel's "interdependent and inextricably intertwined" counterclaim, back to the trial court for disposition. The arbitration agreement describes a "Claim" as "any claim, dispute or controversy between you and us . . . arising from or relating to . . . this Contract . . . includ[ing] any Claim based on common . . . law, contract, tort, statute, regulation, or other ground." As Lobel argued before the arbitrator, Lobel's right to recover a deficiency under the RICS A depended on its compliance with statutes Bothel argued had been violated, affording Bothel a right of recovery. The arbitrator did not exceed her powers by treating

Lobel's claim and Bothel's counterclaim as a single integrated "Claim" as that term is defined by the arbitration agreement.

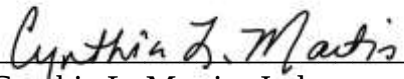
Undeterred, Lobel attempts on appeal to differentiate between its claim to recover a deficiency and Bothel's counterclaim. It is true that once Lobel filed its deficiency claim in a court, the Missouri Rules of Civil Procedure required Bothel to assert any corollary right to recover from Lobel in a separate compulsory counterclaim. However, the Missouri Rules of Civil Procedure are of no relevance to construction of the arbitration agreement, as the arbitration agreement expressly provides that it is "governed by the FAA to the exclusion of any different or inconsistent state or local law." The definition of "Claim" in the arbitration agreement includes no reference to differentiating claims based on whether they were required to be pled separately in a court action.

The arbitrator did not exceed her powers in referring Lobel's claim and Bothel's counterclaim back to the trial court for disposition.

Point denied.

Conclusion

The trial court's Judgment confirming the arbitrator's award, and denying Lobel's motion to vacate the award, is affirmed.


Cynthia L. Martin, Judge

All concur