IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

CAR CREDIT, INC.,	)	
	)	
Respondent,	)	
	)	
v.	)	WD84054
	)	
CATHY L. PITTS,	)	Opinion filed: August 24, 2021
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
THE HONORABLE JENNIFER M. PHILLIPS, JUDGE

Division Three: Edward R. Ardini, Jr., Presiding Judge,
Mark D. Pfeiffer, Judge and W. Douglas Thomson, Judge

Cathy Pitts ("Pitts") appeals the judgment of the Circuit Court of Jackson County confirming an arbitration award finding in favor of Respondent Car Credit, Inc. ("Car Credit"). This action arises from Pitts's 2011 automobile purchase and related financing from Car Credit. As part of that transaction, Pitts signed an arbitration agreement in which she and Car Credit agreed to arbitrate disputes before the National Arbitration Forum ("NAF"). Car Credit subsequently repossessed the vehicle due to Pitts's failure to remain current with the terms of the financing agreement and initiated a breach of contract action in the trial court. Pitts counterclaimed alleging Car Credit engaged in unlawful practices relating to vehicle repossession and collection of alleged deficiencies and sought class certification. Car Credit voluntarily dismissed its claim and moved to compel arbitration of Pitts's counterclaim. The trial court granted the motion and ordered Pitts's

counterclaim be arbitrated before the American Arbitration Association ("AAA"), as NAF was unavailable.

We reverse the judgment of the trial court confirming the award entered by the AAA arbitrator. Because the parties agreed to arbitrate before—but only before—NAF, the AAA arbitrator was without authority to arbitrate Pitts's claims.

Factual and Procedural Background

In July 2011, Pitts entered into a Retail Installment Contract and Security Agreement with Car Credit for the purchase and financing of an automobile. As part of that transaction, Pitts executed an arbitration agreement, which provided that:

> You and we [Car Credit] agree that if any Dispute arises, either you or we may choose to have the Dispute resolved by binding arbitration under the rules then in effect of the Arbitration Organization shown below (if no Arbitration Organization is shown below, the Arbitration Organization shall be the National Arbitration Forum). If such rules conflict with this Arbitration Agreement, the terms of this Arbitration Agreement shall apply.

At the bottom of the one-page arbitration agreement was a blank line, under which the following was typed:

> Arbitration Organization (If none listed, the Arbitration Organization is the National Arbitration Forum) See reverse side for addresses and phone numbers of arbitration organizations.[1]

No arbitration organization was identified on that line.

As relevant here, the term "Dispute" was defined in the agreement as "any controversy or claim . . . arising from or relating to the vehicle lease, loan or financing agreement (the 'Obligation') you have entered into with us on the date shown above," and included "any question regarding whether a matter is subject to arbitration under this Arbitration Agreement."

[1] The reverse side of the arbitration agreement is not included in the legal file, and the record and parties' briefing indicate that it was never presented to the trial court or arbitrator. In its brief, Car Credit concedes that "the back of the Agreement could not be located[.]"

The parties agreed that "this Arbitration Agreement shall be subject to and governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as amended."

In 2015, Car Credit sent Pitts a Notice of Repossession and Plan to Sell Property, advising that her vehicle had been repossessed due to her failure to make payments, Car Credit intended to sell the vehicle after a lapse of ten days, and she could "get the collateral back" by paying Car Credit "the full amount [she] owe[d] (not just past due payments) including [Car Credit's] expenses." One month later, Car Credit sent Pitts a Notice of Deficiency Balance Due, stating that Pitts's vehicle had been sold for $800 and she owed Car Credit a "Net Deficiency Balance" of $4,896.03.

In November 2015, Car Credit initiated this action by filing a Petition for Breach of Contract Damages against Pitts. Pitts filed an answer and counterclaim. In her First Amended Counterclaim, Pitts asserted a "consumer class action . . . seeking relief to redress an unlawful and deceptive pattern of wrongdoing followed by Car Credit regarding collection, enforcement, repossession and disposition of collateral, and collection of alleged deficiencies." In May 2016, Car Credit filed a Notice of Dismissal, voluntarily dismissing its petition against Pitts without prejudice and leaving Pitts's counterclaim as the only pending claim in this action.

In June 2016, Car Credit filed a Motion to Compel Arbitration and Stay Trial Court Proceedings. Among other arguments raised in opposition, Pitts asserted that "[t]he forum designated by the arbitration agreement—the National Arbitration Forum (NAF)—is no longer available" and that "[a]rbitration should not be compelled due to [its] unavailability[.]"[2] The trial court denied the motion to compel without stating its basis for the ruling.

[2] "In July 2009, the Minnesota Attorney General sued NAF, alleging consumer fraud, deceptive trade practices, and false advertising." *A-1 Premium Acceptance, Inc. v. Hunter*, 557 S.W.3d 923, 925 (Mo. banc 2018). "The complaint alleged NAF worked with creditors behind the scenes to ensure positive outcomes for creditors in intentionally and

In May 2017, Pitts filed a Motion for Class Certification, seeking to certify a class of Car Credit consumers and a Missouri subclass of such individuals. In December 2017, the trial court granted the motion and certified the class and Missouri subclass.

In April 2018, prior to the mailing of any class notice, Car Credit filed a Renewed Motion to Compel Arbitration, based on "[t]wo very recent cases since [the trial court's] prior ruling."[3] Car Credit argued that, pursuant to these recent decisions, "the language in the Pitts arbitration agreement unambiguously delegates to the arbitrator all the gateway issues of formation, interpretation, scope or validity of the arbitration agreement, and whether an issue is arbitrable[.]" In response, Pitts argued that "no arbitrator is available to decide issues delegated to the NAF and [Car Credit's] renewed motion must be denied." Pitts also advised that the Missouri Supreme Court had recently granted transfer in a case involving an arbitration agreement designating NAF as the arbitrator—*A-1 Premium Acceptance v. Hunter*—and that argument was set to be heard in that case within a few days.[4]

On June 26, 2018, the trial court granted Car Credit's renewed motion. The trial court acknowledged that *Hunter* had been transferred to the Missouri Supreme Court, but found the reasoning of this Court's earlier *Hunter* opinion persuasive. The trial court ordered Pitts, "if she wishe[d] to proceed further on her claims, [to] . . . file a claim, as an individual claimant, in

consistently one-sided arbitrations." *Id.* "Three days after suit was filed, NAF entered into a consent decree requiring it immediately to stop providing arbitration services for consumer claims nationwide[.]" *Id.*

[3] The cases were *Ford Motor Credit Company, LLC v. Jones*, 549 S.W.3d 14 (Mo. App. W.D. 2018) and *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36 (Mo. banc 2017). Neither of these cases involved NAF or an unavailable arbitrator.

[4] Prior to the Missouri Supreme Court accepting transfer, this Court held that the arbitration agreement was enforceable notwithstanding its designation of NAF as the arbitrator. *See A-1 Premium Acceptance v. Hunter*, WD79735, 2017 WL 3026917, at * 5 (Mo. App. W.D. July 18, 2017) (Witt, J., dissenting).

arbitration before the American Arbitration Association (AAA), pursuant to its consumer arbitration rules for arbitration[.]"

In October 2018, the Missouri Supreme Court handed down its decision in *A-1 Premium Acceptance v. Hunter*, holding that because the parties agreed to arbitrate before—but only before—NAF, the trial court could not order arbitration before a different organization, notwithstanding NAF's unavailability. 557 S.W.3d 923, 929 (Mo. banc 2018).

In January 2019, the AAA arbitrator entered an order concluding that he had authority to arbitrate Pitts's claim, specifically finding that the arbitration agreement was valid and enforceable, the class claims were not subject to arbitration,[5] Car Credit had not waived its right to invoke arbitration, Pitts's claim was included within the term "Dispute" in the arbitration agreement, and that AAA could be substituted for NAF as the arbitration organization.

In April 2019, Pitts filed with the trial court a Motion to Reconsider Order Granting Renewed Motion to Compel Arbitration and a Motion to Vacate Order of Arbitrator Regarding Jurisdiction, citing the *Hunter* decision. The trial court denied the motions. Thereafter, Pitts sought writs of mandamus in this Court and the Missouri Supreme Court, which were denied.

In January 2020, the AAA arbitrator entered an award on the merits of Pitts's claims, finding in favor of Car Credit. Thereafter, Pitts filed in the trial court a Renewed Motion to Reconsider Order Compelling Arbitration and a Motion to Vacate the Arbitration Award, and Car Credit filed a Motion for Confirmation of Arbitration Award, Entry of Judgment Consistent with the Arbitration Award, and to Lift of [sic] the Stay to Decertify the Class. In June 2020, the trial court denied Pitts's motions and entered an order confirming the arbitration award and decertifying the class. In September 2020, the trial court entered its judgment confirming the arbitration award

[5] The arbitration agreement provided that "[n]o class action arbitration may be ordered under this provision[.]"

and finding in favor of Car Credit and against Pitts "on all issues, claims, counterclaims, and/or causes of action in accordance with the January 21, 2020, arbitration award." This appeal followed.

Pitts asserts on appeal—in three points relied on—that the trial court erred in entering the judgment confirming the AAA arbitrator's award. Although the arguments raised in her points overlap, the grounds for each point are essentially: (1) the trial court erroneously granted Car Credit's renewed motion to compel arbitration in that "if issues of arbitrability could be delegated to any arbitration forum, the National Arbitration [Forum] was the exclusive forum"; (2) the trial court erroneously denied Pitts's motion to reconsider in that *Hunter* "vindicated Pitts's opposition to the renewed motion"; and (3) the arbitrator exceeded his authority "in that he disregarded and modified the plain language of the arbitration provision" in finding arbitration by AAA permissible under the agreement.

We find Point III dispositive, and agree that the AAA arbitrator exceeded his authority, and thus the trial court erred in entering judgment confirming the arbitration award.

Analysis

"The Federal Arbitration Act (FAA) sets forth the grounds for which a court may vacate an arbitration award." *Groceman v. Pulte Homes Corp*., 53 S.W.3d 599, 601-02 (Mo. App. W.D. 2001) (citing 9 U.S.C. § 10) (internal citation omitted). Under the terms of the FAA, the trial court must confirm an arbitration award unless one of the grounds "prescribed in sections 10 and 11" applies. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008). Pitts has invoked § 10(a)(4), which allows for vacatur of an arbitration award "where the arbitrators exceeded their powers . . . ." 9 U.S.C. § 10(a)(4). "Whether the [arbitrator] exceeded [his] power is a legal question subject to *de novo* review." *State ex rel. Greitens v. Am. Tobacco Co*., 509 S.W.3d 726, 735 (Mo. banc 2017).

An arbitrator derives his or her powers from the arbitration agreement, and "must give effect to the contractual rights and expectations of the parties." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (internal marks omitted). "[P]arties are generally free to structure their arbitration agreements as they see fit," and courts have held "that parties may agree to limit the issues they choose to arbitrate," "may agree on rules under which any arbitration will proceed," and "may choose ***who will resolve specific disputes***." *Id.* at 683 (emphasis added) (internal marks omitted); *see also Greitens*, 509 S.W.3d at 741 (Parties "may limit the scope of arbitration, select the rules under which the arbitration is to proceed, and establish qualifications for arbitrators."). To that end, arbitrators exceed their powers if they decide matters which "were clearly not submitted to them," *Behnen v. A.G. Edwards & Sons, Inc*., 285 S.W.3d 777, 779 (Mo. App. E.D. 2009), or if "the method of their appointment provided in the agreement has not been followed," *Crawford Grp., Inc. v. Holekamp,* 543 F.3d 971, 976 (8th Cir. 2008).

Here, the parties agreed to arbitrate disputes before—but only before—NAF, and thus any other arbitration organization lacked power to hear their disputes. *See Hunter*, 557 S.W.3d at 926-29. In *Hunter*, the Missouri Supreme Court identified two types of arbitration agreements: "(1) agreements in which the parties agree to arbitrate regardless of the availability of a named arbitrator, and (2) agreements in which the parties agree to arbitrate before—but ***only*** before—a specified arbitrator." *Id.* at 926 (emphasis in original). "If the former, section 5 of the FAA[6] authorizes and requires courts to name a substitute arbitrator when the agreement fails to identify

[6] 9 U.S.C. § 5 provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein[.]

one or fails to provide a means for naming a substitute." *Id.* "If the agreement is of the latter type, however, nothing in the FAA authorizes (let alone requires) a court to compel a party to arbitrate beyond the limits of the agreement it made." *Id.*

Like the agreement in *Hunter*, Pitts's agreement was of the latter type. Pitts's agreement twice specified the parties' sole chosen forum by stating that "the Arbitration Organization shall be the National Arbitration Forum" and that "the Arbitration Organization is the National Arbitration Forum." And similar to the *Hunter* agreement, Pitts's agreement also specified that disputes would be resolved by the NAF rules then in effect. *Cf. Hunter*, 557 S.W.3d at 924-25 ("[A]ny claim or dispute . . . shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect."). Contrary to Car Credit's argument, we find that the agreement between Pitts and Car Credit did not contemplate the use of other arbitration organizations. *See* Resp. Br. 18 (arguing the agreement in *Hunter*, "unlike here, did not contemplate that any other arbitration forum could be utilized"). In fact, the parties squarely rejected the use of a different arbitration organization. Indeed, the agreement clearly provided the parties the opportunity to identify an organization other than NAF, and, with equal clarity, the parties unambiguously declined to do so, thereby demonstrating their unequivocal intent to arbitrate before—and only before—NAF.

We find Car Credit's other attempts to distinguish *Hunter* similarly unconvincing. First, Car Credit argues "the parties' intent to allow arbitrator substitution" is found in their agreement that the FAA governs their arbitration agreement, which, Car Credit asserts, "had the effect of incorporating Section 5 of the FAA into the parties' contract." But the agreement in *Hunter*, too, expressly stated it was subject to the FAA, *see* 557 S.W.3d at 925, and no "intent to allow arbitrator substitution" was imputed on the parties by virtue of such provision.

Car Credit also attempts to distinguish this case from *Hunter* by pointing to (what Car Credit has termed) a "Supremacy Clause" in Pitts's agreement. The "Supremacy Clause" is the provision that states: "If [NAF] rules conflict with this Arbitration Agreement, the terms of this Arbitration Agreement shall apply." While such a clause was not present in the *Hunter* agreement, we fail to comprehend how this conflict-of-rules provision could be construed to evidence the parties' intent to arbitrate before an organization other than NAF.

Finally, Car Credit asserts that here, unlike in *Hunter*, the parties entered into their arbitration agreement after NAF ceased arbitrating consumer claims. However, this fact does not alter our analysis. *See Salsman v. Leonard*, 568 S.W.3d 434 (Mo. App. W.D. 2019). In *Salsman*, the parties agreed to arbitrate any dispute under the rules and procedures of "Construction [A]rbitration Services"; however, that entity "had stopped providing arbitration services approximately six years prior to the formation" of the parties' agreement. 568 S.W.3d at 437. Relying on *Hunter*, we concluded that the parties had agreed to arbitrate only before Construction Arbitration Services, and thus we affirmed the trial court's refusal to compel arbitration before another entity. *Id.* at 442-43. In doing so, we noted that the defendant, as the drafter of the contract, "had the ability to draft an agreement that contained an appointment method that would allow them to select . . . nearly any arbitrator of their choosing," and we declined to "provide [the defendant] the benefit of a bargain that it did not secure itself." *Id.* Nor will we provide Car Credit—the drafter of the agreement here—with such a benefit.

For the reasons described above, the AAA arbitrator had no power to arbitrate this dispute; thus he exceeded his power in doing so and the award he rendered must be vacated pursuant to 9 U.S.C. § 10(a)(4). *See PoolRe Ins. Corp. v. Organizational Strategies, Inc.*, 783 F.3d 256, 262-65 (5th Cir. 2015) (affirming trial court's vacatur of arbitration award under 9 U.S.C. § 10(a)(4) where

the arbitrator "had not been selected according to the contract-specified method" and failed to arbitrate under the specific set of rules required by the arbitration agreement (internal marks omitted)). Point III is granted.[7]

Conclusion

We reverse the judgment of the trial court confirming the arbitration award and remand with instructions to vacate the award and any orders inconsistent with this opinion.

EDWARD R. ARDINI, JR., JUDGE

All concur.

[7] Because we grant Point III, we need not address the other points Pitts has raised in this appeal.