[Cite as *Muhammad v. Serpentini Chevrolet, Inc.*, 2006-Ohio-3970.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86864

MARIETTA MUHAMMAD	:	
	:	
Plaintiff-appellee	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
SERPENTINI CHEVROLET, INC., et al.	:	
	:	
Defendant-appellant	:	

DATE OF ANNOUNCEMENT OF DECISION	:	AUGUST 3, 2006
CHARACTER OF PROCEEDING	:	Civil appeal from Cuyahoga County Common Pleas Court Case No. 546884
JUDGMENT	:	REVERSED AND REMANDED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant, Serpentini Chevrolet, Inc., appeals from a common pleas court order overruling his motion to stay proceedings pending arbitration. Serpentini claims that the court erred by finding that it waived the right to enforce the arbitration clause, and that the arbitrator, not the court, should have decided this issue.

Procedural History

{¶ 2} Plaintiff-appellee Marietta Muhammad filed her complaint on November 4, 2004 and amended it on January 7, 2005, before an answer was filed.[1] She alleged that she purchased a 2002 Chevrolet from Serpentini on August 16, 2004 on credit. She signed two Retail Installment Sales Contracts, the first of which reflected that interest would accrue at the rate of 17.18% and the second of which reflected an 18.41% interest rate. Plaintiff claimed that although her payments on the vehicle were current, Serpentini repossessed the vehicle on October 18, 2004. Plaintiff demanded specific performance of the sales contract, including the return of the repossessed vehicle to her, acceptance of the 1997 Mercury Sable plaintiff agreed to trade for the Chevrolet, reimbursement of

[1]The complaint and amended complaint also listed as a defendant Household Automotive Finance Company ("HAFC"). HAFC moved the court to dismiss the complaint against it for failure to state a claim. Plaintiff did not oppose this motion, and the court granted it. Consequently, HAFC is no longer a party to these proceedings.

payments she made for the Sable since August 16, 2002, and payment of the balance due for the Sable. She further alleged that Serpentini violated the Retail Installment Sales Act, R.C. 1317.01, et seq., and committed unfair, deceptive and unconscionable trade practices in violation of the Consumer Sales Practices Act, R.C. 1345.02(A) and 1345.03(A).

{¶ 3} Serpentini moved the court to stay proceedings pending arbitration. In its motion, Serpentini alleged that plaintiff executed an Agreement to Binding Arbitration as part of the sales contract. This agreement provided, in pertinent part:

{¶ 4} "As a material inducement to enter into a Retail Purchase or Retail Lease of the vehicle identified in Retail Buyer's Order or Retail Lease Order to which this document is incorporated and integrated into [sic], the Purchaser (shall also mean lessee) and Dealership agree to voluntarily, knowingly, irrevocably and unconditionally waive any right to a trial in any state or federal court to resolve any dispute and will submit any dispute to binding arbitration. Binding arbitration shall include all disputes whether based on contract, tort, state or federal statute laws or otherwise, and whether for money damages, penalties, declaratory relief, or equitable relief arising out of or in any way related to this consumer transaction. ****"

{¶ 5} Serpentini argued that this provision required that plaintiff arbitrate her claims. Plaintiff responded, urging, among

other things, that Serpentini had waived the arbitration provision by repossessing the vehicle. The parties agreed to submit the matter to the court on the briefs.

{¶ 6} On July 18, 2005, the court denied Serpentini's motion to stay the proceedings "for the reason that defendant waived its right to arbitration" by repossessing the vehicle rather than pursuing arbitration itself. Serpentini now appeals from this ruling. See R.C. 2711.02(C) (order denying a motion to stay pending arbitration is an appealable final order).

Law and Analysis

{¶ 7} In its first assignment of error, Serpentini contends that the court erred by deciding that it had waived its right to arbitrate this matter because waiver was an issue for the arbitrator to decide. Serpentini did not raise this argument before the trial court. In addressing plaintiff's argument that Serpentini waived its right to arbitrate, Serpentini asserted only that plaintiff's argument was "inaccurate" and that Serpentini "retained its right to repossess the vehicle if Plaintiff's financing was denied." We will not address issues on appeal which were not raised before the trial court. See, e.g., *State ex rel. Quarto Mining Co. v. Foreman*, 78 Ohio St.3d 78, 81, 1997-Ohio-71; *State ex rel. Martin v. Cleveland*, 67 Ohio St.3d 155, 157, 1993-Ohio-192. Therefore, the first assignment of error is overruled.

{¶ 8} Second, Serpentini asserts that the court erred by finding that it waived its right to enforce the arbitration clause. Arbitration is a favored method of dispute resolution, but the right to arbitrate can be waived if it is established that the party knew of its right to arbitrate and acted inconsistently with that right. *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 413; *Phillips v. Lee Homes, Inc.* (Feb. 17, 1994), Cuyahoga App. No. 64353. "Because of the strong public policy in favor of arbitration, the heavy burden of proving waiver of the right to arbitration is on the party asserting a waiver." *Griffith v. Linton* (1998), 130 Ohio App.3d 746, 751.

{¶ 9} There is no dispute that Serpentini knew of its right to arbitrate. The only issue is whether its repossession of the vehicle was an act inconsistent with that right. As Serpentini correctly notes, most of the Ohio cases that discuss alleged waivers of the right to arbitrate concern parties' conduct in litigation. We were unable to find any Ohio case law concerning an alleged waiver resulting from the defendant's repossession of the property at issue. However, courts in other states have held that the use of self-help measures such as repossession do not constitute a waiver of the right to arbitrate. *Doleac v. Real Estate Professionals, LLC* (Miss. 2005), 911 So.2d 496, *Russell v. Performance Toyota, Inc.* (Miss. 2002), 826 So.2d 719, 724 (collecting authorities); *Ex parte Dickinson* (Ala. 1998), 711 So.2d

984, 988.[2] We agree with these cases. Self-help measures like repossession are remedies in themselves, not dispute resolution processes. The use of such measures does not waive the right to arbitrate.

{¶ 10} The arbitration agreement itself amended a retail installment contract which provided Serpentini with the right to repossess in the event of default. We must construe the parties' contract so as to give effect to every provision of their agreement, where possible. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 362, 1997-Ohio-202. Our construction of the agreement here gives effect to both the contractual right to repossess and the agreement to arbitrate.

{¶ 11} The common pleas court's order presumed that the parties had a valid agreement to arbitrate and determined that Serpentini had waived the right to arbitrate. Having determined that repossession of the vehicle does not waive the right to arbitrate, we reverse and remand with instructions for the court to enter an order staying this action pending arbitration.

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[2]We found no distinction among the cases in which the right to repossess was contractual, as in this case, see *Doleac*, or statutory, see *Russell*. More important, we have found no authority from other jurisdictions holding that repossession constitutes a waiver of the right to arbitrate. Concededly, in many of the cases, the arbitration agreement expressly provided that the use of self-help measures did not waive the right to arbitrate. We decline to speculate about the outcomes of these cases in the absence of this provision.

Reversed and remanded with instructions.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JUDGE
KENNETH A. ROCCO

JAMES J. SWEENEY, P.J. CONCURS

DIANE KARPINSKI, J. DISSENTS
(SEE ATTACHED DISSENTING OPINION)

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86864

MARIETTA MUHAMMAD Plaintiff-appellee v. SERPENTINI CHEVROLET, INC., et al. Defendant-appellant	:	DISSENTING OPINION

DATE: AUGUST 3, 2006

KARPINSKI, J., DISSENTING:

{¶ 12} I respectfully dissent from the majority opinion because I believe there is sufficient evidence that defendant by its actions waived arbitration.

{¶ 13} This case arises out of plaintiff's purchase of a used vehicle from defendant in August 2004. As part of the transaction, defendant took plaintiff's 1997 vehicle as a trade-in. That car still had an outstanding balance of $2,263.00, which amount was to be added to the financed amount of the new car plaintiff was buying. Plaintiff signed two loan contracts. One of the contracts was the Retail Installment Contract ("the Contract"), which made

plaintiff's purchase of the vehicle contingent upon her obtaining credit and financing approval.

{¶ 14} The Contract states as follows:

> As a material inducement to enter into a Retail Purchase or Retail Lease of the vehicle identified in Retail Buyers Order or Retail Lease Order to which this document is incorporated and integrated into, the Purchaser (shall also mean lessee) and Dealership agree to voluntarily, knowingly, irrevocably and unconditionally waive any right to a trial in any state or federal court to resolve any dispute and will submit any dispute to binding arbitration. Binding arbitration shall include all disputes whether based on contract, tort, state or federal statute laws or otherwise, and whether for money damages, penalties, declaratory relief, or equitable relief arising out of or in any way related to this consumer transaction. **Binding arbitration shall be used to resolve all claims arising from the purchase or lease of the vehicle, financing,** warranties, repairs, attempting to obtain financing, the purchase of any optional insurance, service or maintenance agreements, or aftermarket products, or any document or relationship established in this transaction or related transaction

regardless of whether the transactions were consummated.

(Emphasis added).

{¶ 15} Defendant acted inconsistently with its known right to arbitrate under the Contract and thus waived its right to compel arbitration.

> Waiver is the voluntary surrender or relinquishment of a known legal right or intentionally doing an act inconsistent with claiming that right. *Marfield v. Cincinnati, D & T Traction Co.* (1924), 111 Ohio St. 139, 145, 2 Ohio Law Abs. 438, 144 N.E. 689. Moreover, a party may waive the right to literal compliance with the terms of a contract by engaging in actions or a course of conduct inconsistent with literal compliance.

Hausser & Taylor, LLP v. Accelerated Sys. Integration, Inc., Cuyahoga App. No. 84748, 2005-Ohio-1017, ¶26.

> "The essential question is whether, based on the totality of the circumstances, the party seeking arbitration has acted inconsistently with the right to arbitrate." *Thornton v. Haggins,* Cuyahoga App. No. 83055, 2003-Ohio-7078, quoting Harsco Corp. v. Crane Carrier Co. (1997), 122 Ohio App.3d 406, 410, 701 N.E.2d 1040. **In order to determine whether a defendant acted inconsistently with arbitration, the court should consider:** " *** **(4) whether the non-requesting party has been prejudiced by the requesting party's inconsistent acts."** Id. quoting *Phillips v. Lee Homes, Inc.* (Feb. 17, 1994), Cuyahoga App. No. 64353, 1994 Ohio App. LEXIS 596, citing *Rock v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (1992), 79 Ohio App.3d 126, 606 N.E.2d 1054; *Brumm v. McDonald & Co. Securities, Inc.* (1992), 78 Ohio App.3d 96, 603 N.E.2d 1141. (Emphasis added).

Chapman Excavating Co. v. Fortney & Weygandt, Inc., Cuyahoga App. No. 84005, 2004-Ohio-3867, ¶39; *Med. Imaging Network, Inc. v. Med. Resources,* Mahoning App. No. 04 MA 220, 2005-Ohio-2783, ¶22-¶23.

{¶ 16} "No rigid rule exists as to what constitutes acts inconsistent with the right to arbitrate. Instead, the issue depends on the totality of facts and circumstances of each particular case." *Phillips v. Lee Homes*, Cuyahoga App. No. 64353, 1994 Ohio App. LEXIS 596, citing *Oak Hills Educ. Assoc. v. Oak Hills Ed. of Edn.* (Dec. 8, 1975), Hamilton App. No. 75402, unreported.

{¶ 17} Further,

> "'prejudice is the touchstone for determining whether the right to arbitration has been waived.'" *Supervalu,* 1998 Ohio App. LEXIS 3506, [WL] at *4, citation omitted. "'Whether inconsistent actions constitute prejudice is determined on a case-by-case basis. *** Prejudice may result from lost evidence, duplication of efforts, use of discovery methods unavailable in arbitration, * * * or litigation of substantial issues going to the merits, ***. Additionally, **a party's failure to assert a prelitigation demand for arbitration may contribute to a finding of prejudice because the other party has no notice of intent to arbitrate.** (Emphasis added.)

Household Realty Corp. v. Rutherford, Montgomery App. No. 20183, 2004-Ohio-2422, ¶¶25-26, citing *Supervalu Holdings, Inc. v. Schear's Food Centers, Inc.*, (June 26, 1998), Montgomery App. No. 16881, 1998 Ohio App. LEXIS 3506, *11.

{¶ 18} Because defendant never made a demand for arbitration but simply repossessed plaintiff's car, plaintiff was prejudiced by having to file this case. She has already spent money on the filing fee and she has spent money opposing defendant's motion to

stay. Similarly, plaintiff is prejudiced because of the limited litigation devices available to her in arbitration.

{¶ 19} Plaintiff also significantly suffered prejudice when her car was repossessed. Although neither parties' brief is clear on what the problem was with plaintiff's financing, they do agree that defendant **did not** make a pre-litigation demand for arbitration, it simply repossessed plaintiff's car. After defendant took possession of her vehicle, plaintiff filed this case.

{¶ 20} Whether arbitration is a condition precedent to self-help/repossession depends on the express language of the contract. As noted by the Ohio Supreme Court:

> In construing the terms of a written contract, the primary objective is to give effect to the intent of the parties, which we presume rests in the language that they have chosen to employ. *Saunders v. Mortensen,* 101 Ohio St.3d 86, 2004-Ohio-24, at P9, 801 N.E.2d 452, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E.2d 411, paragraph one of the syllabus. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander*, 53 Ohio St.2d 241, 7 O.O.3d 403, 374 N.E.2d 146, at paragraph two of the syllabus. Where the terms are clear and unambiguous, a court need not go beyond the plain language of the agreement to determine the rights and obligations of the parties. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920, 923. Where possible, a court must construe the agreement to give effect to every provision in the agreement. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 362, 1997-Ohio-202, 678 N.E.2d 519, quoting *Farmers Natl. Bank v. Delaware Ins. Co.* (1911), 83 Ohio St. 309, 94 N.E. 834, 8 Ohio L. Rep. 607, paragraph six of the syllabus.

In re All Kelley & Ferraro Asbestos Cases, 104 Ohio St.3d 605, 2004-Ohio-7104, ¶29, 821 N.E.2d 159.

{¶ 21} In the case at bar, the Contract explicitly states that defendant's sole remedy relating to any issues of financing required it to go to arbitration. Defendant admits, moreover, that plaintiff's financing did not receive approval. The Contract states that arbitration is the remedy to all claims relating to financing or any "relationship established in this transaction or related transaction **regardless of whether transactions were consummated**." Indeed, defendant specifically averred: "Here the consumer transaction was the conditional purchase of the Chevrolet and Plaintiff's attempt to obtain financing." The language of the contract is quite inclusive and specific; there is no need to go beyond the language of the contract.

{¶ 22} Instead of relying on the contracts, however, the majority turns to two Mississippi cases and an Alabama case: *Doleac v. Real Estate Professionals, LLC* (Miss. 2005), 911 So.2d 496, *Russell v. Performance Toyota, Inc.* (Miss. 2002), 826 So.2d 719, and *Ex parte Dickinson* (Ala. 1998), 711 So.2d 984. The majority cites these cases for the proposition that repossession as a form of self-help is not a waiver of one's right to arbitrate. All these cases are non-binding and non-persuasive authority here in Ohio. Moreover, none of the arbitration clauses in these cases had the

same language as the relevant provision in the case at bar. Here, the language of the contract controls.

{¶ 23} The Contract requires arbitration specifically for "claims arising from financing" regardless of "whether the transactions were consummated." The Contract also includes a repossession clause. As a result, arbitration, as described in the Contract, clearly functioned as a condition precedent to any act of repossession. According to the explicit language of the Contract, defendant "voluntarily, knowingly, irrevocably and unconditionally" agreed to arbitrate **any** dispute between the parties. Whether defendant had the right to repossess plaintiff's vehicle is an obvious dispute here. The all-inclusive language of the Contract leaves no room for an exception, such as the majority would carve out for self-help/repossession by styling it a home-made remedy. By repossessing plaintiff's vehicle instead of demanding arbitration first, defendant acted inconsistently with its right to arbitrate and thus waived arbitration. Accordingly, the trial court properly overruled defendant's motion to stay proceedings pending arbitration.