

[Cite as *Klimaszewski v. Ganley, Inc.*, 2007-Ohio-3766.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88762

JANINA KLIMASZEWSKI

PLAINTIFF-APPELLANT

VS.

GANLEY, INC.

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-589365

BEFORE: Stewart, J., Calabrese, P.J., and Boyle, J.

RELEASED: July 26, 2007

JOURNALIZED:

[Cite as *Klimaszewski v. Ganley, Inc.*, 2007-Ohio-3766.]

ATTORNEYS FOR APPELLANT

Ronald L. Burdge
Elizabeth A. Wells
2299 Miamisburg Centerville Road
Dayton, OH 45459-3817

ATTORNEY FOR APPELLEE

Russell W. Harris
13215 Detroit Avenue
Lakewood, OH 44107

[Cite as *Klimaszewski v. Ganley, Inc.*, 2007-Ohio-3766.]

MELODY J. STEWART, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the Cuyahoga County Court of Common Pleas and the briefs of counsel. Plaintiff-appellant Janina Klimaszewski appeals from a court order which ordered her to arbitrate her breach of contract and Consumer Sales Practices Act complaint against defendant-appellee Ganley, Inc. She maintains that the arbitration provision in the new car sales contract is unconscionable.

{¶ 2} The assignment of error is sustained on authority of *Olah v. Ganley Chevrolet, Inc.*, Cuyahoga App. No. 86132, 2006-Ohio-694 and *Felix v. Ganley Chevrolet, Inc.*, Cuyahoga App. Nos. 86990 and 86991, 2006-Ohio-4500. The arbitration clause at issue here is functionally identical to those clauses found wanting in the cited cases. As in *Olah*, we remand back to the court to conduct a hearing on whether the arbitration provision is either substantively or procedurally unconscionable.

{¶ 3} This cause is reversed and remanded for proceedings consistent with this opinion.

It is, therefore, ordered that said appellant recover of said appellee her costs herein taxed.

It is ordered that a special mandate be sent to said 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.

MELODY J. STEWART, JUDGE

MARY J. BOYLE, J., CONCURS IN JUDGMENT
ONLY WITH SEPARATE OPINION

ANTHONY O. CALABRESE, JR., P.J., DISSENTS
WITH SEPARATE OPINION

MARY JANE BOYLE, J., CONCURRING IN JUDGMENT ONLY:

{¶ 4} I agree with the majority that this case must be reversed and remanded for further proceedings, but for a different reason.

{¶ 5} When the trial court compelled arbitration, it did so without the entire arbitration provision. The record reveals that the trial court only had the front page of the motor vehicle purchase contract before it when it compelled arbitration.

{¶ 6} Having the same record as the trial court, this court also does not have the entire arbitration provision on appeal. At oral argument, appellant informed the court that while this matter involves an arbitration provision in a new car sales contract and its enforceability, the entire provision is not in the court's record.

{¶ 7} Even though the front page of the contract provides for arbitration, this provision specifically references, "See back of this contract for additional terms."

{¶ 8} But no back page exists. Thus, the entire arbitration clause is missing from the contract. As such, I would hold that the trial court erred when it compelled arbitration since by not having the entire arbitration provision, it could not determine if procedural and substantive unconscionability existed. See *Olah v. Ganley Chevrolet*, 8th Dist. No. 86132, 2006-Ohio-694, at _14 (“Unconscionability is an equitable doctrine that allows a party to avoid an arbitration clause if a “quantum of both prongs” is established.”).

{¶ 9} Accordingly, I would remand this matter and instruct the trial court to hold the required oral hearing to determine if the arbitration provision is unconscionable, both procedurally and substantively. This court has repeatedly held that an oral hearing is necessary if the validity of the arbitration provision is in dispute. *Olah* at _30. If the trial court determines that is not unconscionable, then the trial court may compel arbitration.

{¶ 10} This court, in a recent decision, *James F. Post, et al. v. Procare Automotive Serv. Solutions*, 8th Dist. No. 87646, 2007-Ohio-2106, points out that currently pending before the Ohio Supreme Court is the issue of whether an appellate court should apply a de novo or abuse of discretion standard of review when reviewing a trial court’s decision granting or denying a motion to compel arbitration, where it is alleged that the arbitration clause is unconscionable. See *Taylor Bldg. Corp. of Am. v. Benfield*, 112 Ohio St.3d 1417, 2006-Ohio-6712. In

Post, this court extensively reviewed unconscionability and what is necessary for an arbitration provision to be enforceable and this writer need not repeat it again here.

ANTHONY O. CALABRESE, JR., P.J., DISSENTING:

{¶ 11} I respectfully dissent from the majority's opinion, and would find instead that the circumstances of the sale are sufficiently developed in the record to ascertain that the instant case is distinguishable from *Olah*, and that no evidentiary hearing is required. Accordingly, I would affirm the court's granting Ganley's motion to stay proceedings pending arbitration.