

CAUSE NO. 06-03-02273

MOMENTUM TRANSPORTATION SERVICES, L.L.C. D/B/A TURNKEY TRAILERS & REPAIR	§	IN THE DISTRICT COURT
	§	
	§	
VS.	§	MONTGOMERY COUNTY, TEXAS
	§	
GE COMMERCIAL DISTRIBUTION FINANCE CORPORATION and UNIVERSAL TRAILER CORPORATION D/B/A EXISS	§	221 ST JUDICIAL DISTRICT
	§	

PLAINTIFF'S FIRST AMENDED MOTION TO VACATE ARBITRATION AWARD

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, MOMENTUM TRANSPORTATION SERVICES, L.L.C. D/B/A TURN KEY TRAILERS & REPAIR (“Plaintiff” or “Momentum”), Plaintiff in the above styled and numbered cause and files this First Amended Motion to Vacate Arbitration Award and would respectfully show the Court the following:

SYNOPSIS OF MOTION

Pursuant to *Tex. Civ. Prac. & Rem. Code § 171.088*, Plaintiff files this Motion to Vacate Arbitration Award. This court had previously compelled arbitration of this matter based on motions from the Defendants. On April 7, 2008, the arbitrator, Daniel J. Goldberg made his award in the referenced matter. (A copy is attached as Exhibit “A”.) Plaintiff will demonstrate that the dispute between GE Commercial Distribution Finance Corporation (“GE”) and Momentum did not fall within the scope of the arbitration agreement. Rather, this dispute arose out of a contract between Momentum and Textron Financial which did not include an arbitration provision. Next, the arbitrator refused to hear evidence material to the contrary. Further, GE’s position with the American Arbitration Association establishes that the award was obtained by

corruption, fraud or other undue means. Finally, the arbitrator's award is arbitrary and capricious and should be vacated.

FACTUAL & PROCEDURAL BACKGROUND

A brief recasting of the factual and procedural background of this case will aid in putting the basis for this motion in context.¹

While now a manufacturer of conversion trucks used in the oil field service industry, Momentum had been in the retail trailer business serving as a dealer for several manufacturers. Momentum initially acquired its inventory under floor plan financing agreements with Deutch Commercial Finance ("DFS"), Bombardier and later Textron Financial ("Textron"). Momentum never signed a financing agreement with GE Commercial Distribution Finance Corporation ("GE"). As this Court may recall, this dispute arose out of a voluntary surrender by Momentum of its inventory to GE. Pursuant to an agreement proposed by GE and signed by Momentum and GE on September 13, 2004, Momentum returned its inventory to GE.

All of the manufacturers were contractually obligated to repurchase and agreed to repurchase inventory at 100 percent of the wholesale cost. UTC originally agreed but later refused even though it was contractually obligated to repurchase the inventory at 100 percent but evidentially, later agreed to purchase its inventory from GE at 85 percent of the wholesale cost.

GE then demanded that Momentum pay the 15 percent deficiency as well as accumulated interest GE claimed was owed on the UTC inventory/account. Because GE claimed Momentum was in default, it refused to provide Momentum with lien releases for certain inventory that Momentum had paid GE for in full and refused to file a termination statements pursuant to *Tex. Bus & Com. Code § 9.513 (c)*.

¹ The record from the American Arbitration Association has been filed with this court. It consists of four volumes which were sequentially numbered and bound in the order in which the documents were received. Citation to the record will be made by referring to the volume of the record and the page number of the volume, i.e. Vol. I, pp. 22-25.

On March 6, 2006, Momentum filed suit against GE, alleging among other things, breach of contract and failure to file termination statements. On April 17, 2006, GE answered and filed a Motion to Abate and Compel Arbitration based on an arbitration provision in the Wholesale Financing Agreement signed in January 2000.

GE then filed its demand for arbitration and Statement of Claim on May 22, 2006, in the American Arbitration Association (“AAA”). (Vol. IV, pp. 1317-1324). Over the succeeding five months, there were several motions filed by GE and responses by Momentum addressing the issue of arbitration. On November 2, 2006, this Court signed an order abating this case against GE and compelling arbitration. As a result, on November 16, 2006, Momentum filed a counter-claim against GE in the AAA tracking the claims alleged in the district court case. (Vol. IV, pp. 1180-1189).

Once it discovered that the UTC inventory which was at the root of the dispute was not acquired under the GE financing agreement GE obtained from DFS and Bombardier, Momentum filed a Motion to Dismiss the arbitration with the American Arbitration Association (“AAA”). (Vol. II, pp. 626-647). The motion argued that the dispute between GE and Momentum could not fall within the scope of the arbitration agreement on which GE relied because the inventory involved was obtained under a financing agreement with Textron. (Vol. II, pp. 626). As alleged by GE in its initial complaint filed with the AAA, the essence of the dispute between GE and Momentum arose out of the surrender of Universal Trailer Corporation (“UTC”) inventory by Momentum to GE. (Vol. IV, pp. 1309-1323). According to GE’s statement in the AAA, Momentum acquired the UTC inventory under the Agreement for wholesale financing with Deutsche Financial Services Corporation (“DFS”) signed by Momentum on January 22, 2000.²

² DFS later underwent a name change to GE Commercial Distribution Finance Corporation (“GE”).

At the time, GE filed its Motion to Compel Arbitration on April 17, 2006, it represented that the UTC inventory and debt associated with it was acquired under the GE/Momentum Contract. Similarly, its Statement of Claim filed in the AAA, GE claimed an outstanding principal balance and accumulated and unpaid interest for the UTC inventory. However, this amount represents UTC inventory acquired by Momentum under its Textron financing agreement. As demonstrated in Momentum's Motion to Dismiss, the UTC inventory was acquired by Momentum under a floor plan financing agreement with another lender, Textron, which does not contain an arbitration provision. (Vol. II, pp. 631-634). GE's connection to the principal and accumulated interest arises from its acquisition of UTC dealer balances from Textron on or about August 1, 2005. (Vol. II, p. 647).

An unpacking of the relevant facts related to the acquisition and return of the UTC inventory by Momentum reveals that the substance of the claims between GE and Momentum evolved out of the Textron/Momentum agreement. On January 27, 2000, Momentum entered into an Agreement for Wholesale Financing with DFS. (Vol. II, pp. 627). This agreement contains the arbitration provision upon which GE relied to file its arbitration. In an effort to expand its inventory and product lines, Momentum sought out other sources for floor plan financing. (Vol. II, p. 632). To that end, Momentum sought and received approval for floor plan financing of inventory from Textron in June 2001. (Vol. II, p. 632). **Without question, Momentum acquired all of its UTC inventory which resulted in the principal and interest in question under the Textron Agreement.** (Vol. II, p. 632).

In May 2005, Momentum received a letter from Textron stating that UTC had terminated its inventory financing program with Textron. (Vol. II, p. 633 and p. 641). According to the letter, Momentum was allowed, if it chose, to continue to finance UTC products with Textron

through July 31, 2005. (Vol. II, p. 641). **Textron instructed Momentum to continue making interest payments to Textron for the UTC inventory “as normal until the account has been paid in full.”** (Vol. II, p. 641).

At the same time, on May 19, 2005, Momentum received a Marketing Memo from UTC which discussed UTC’s plans to convert all of its wholesale floor plan financing of UTC inventory to GE. (Vol. II, p. 633 and pps. 643-647). The Memo provided specific procedures for UTC dealers to follow, for among other things, (1) applying for financing of UTC inventory with GE, or (2) continuing a relationship with the dealer’s current lender (Textron) for UTC inventory. *Id.* Momentum chose the second option and maintained its relationship with Textron for financing of UTC inventory. (Vol. II, pp. 633-634). GE later sent an application to Momentum to apply for financing but Momentum made a business decision and elected to not sign it.

Consistent with that decision, Momentum continued to receive Inventory Billing Statements from Textron through the date of Momentum’s Voluntary Surrender of all inventory on September 14, 2005. (Vol. II, pp. 633-634 and p. 642). This Textron billing statement listed by VIN number all of the UTC inventory in the possession of Momentum at the time of the surrender on September 14, 2005. *Id.* The importance of this Billing Statement is that it (1) establishes that all of the inventory was financed under Momentum’s financing agreement with Textron and not GE and (2) the principal and interest owed on it was still Textron principal and interest. At some point after that, GE actually bought out all of the UTC dealer debt from Textron. (Vol. II, pp. 636-638).

ARGUMENT

A. The Substance of the Claims Involves Issues Related to the UTC Inventory and Falls Outside of the Arbitration Agreement.

The party seeking to compel arbitration must establish that (1) a valid arbitration agreement exists, and (2) the claims at issue fall within that agreement's scope. In re *Dillard Dep't Stores, Inc.*, 186 S.W. 3d 514, 515 (Tex. 2006). Whether a valid arbitration agreement exists is a legal question subject to de novo review. In re *D. Wilson Constr. Co.*, 196 S.W. 3d 774, 781 (Tex. 2006). Arbitrability turns on the substance of a claim. In re *Merrill Lynch Trust Co.*, 235 S.W. 3d 185, 190 (Tex. 2007).

In this case, the evidence establishes that the substance of the claims involving GE, Momentum and UTC arises out of Momentum's surrender of UTC inventory. The inventory was acquired by Momentum under a financing agreement with Textron which specified the terms and conditions under which Momentum agreed to obtain the UTC inventory. (Vol. II, pp. 636-638). The Textron/Momentum financing agreement did not include an arbitration provision. GE did not and can not produce any evidence that Momentum agreed to obtain the UTC inventory under the terms and conditions of the "GE/Momentum" agreement which in fact never existed. GE simply agreed to buy out the entire UTC dealer line at which time the Textron dealer accounts were assigned to GE. (Vol. II, p. 647: "August 1, 2005 – GE CDF will buy out from Textron any remaining dealer UTC balances, ...").

GE failed to present evidence that the UTC inventory and related debt issues fall within the scope of the DFS/Momentum agreement. Further, there is no evidence that Momentum agreed to arbitrate issues that developed in the framework of a financing agreement that lacked an arbitration provision. Reducing this argument to its essence, GE unilaterally acquired Momentum's account with Textron associated with the UTC inventory and made it subject to the

terms and conditions of the DFS/Momentum contract executed five years earlier. Despite that action, the substance of the claim remains the principal and debt Momentum incurred under its contract with Textron.

B. The Claims Involving the UTC Inventory Financed by Textron are Independent of the DFS/Momentum Arbitration Agreement and not Subject to Arbitration.

Texas law provides that independent claims are not arbitrable. So, even if there is an arbitration agreement between the parties (which does not exist between GE and Momentum as it relates to the UTC inventory), Texas case law clearly establishes that claims are not subject to arbitration if they (1) can stand alone, (2) are independent of the contract containing the arbitration provision, and (3) can be maintained without reference to the contract. *Loy v. Hunter*, 120 S.W. 3d 397 (Tex. App. - - Texarkana 2004, writ denied); *Jenkins v. Gilchrist & Riggs*, 87 S.W. 3d 198 (Tex. App. - - Dallas 2002, writ denied) and *Fridl v. Look*, 908 S.W. 2d 507 (Tex. App. - - El Paso 1995, writ dismissed).

This dispute occurs against the backdrop of GE's procurement of the UTC product line from Textron for wholesale financing in May 2005. Up until that time, Textron provided dealer financing for the purchase of UTC inventory. In May of 2005, UTC converted all of its dealer wholesale floor plan financing to GE. (Vol. II, pp. 643-646). Before the conversion, Momentum had obtained all of its UTC inventory with Textron financing. (Vol. II, pp. 632-633). As previously stated, GE simply bought the UTC dealer accounts from Textron and acquired whatever rights and obligations Textron had under its financing agreements with the dealers like Momentum.

From the outset of this dispute, GE has treated the Momentum UTC principal and interest as arising under the DFS/Momentum contract when the evidence established that it did not. It

was a Textron account that GE agreed to take over as part of its joint marketing program with UTC.

Clearly, the facts alleged in support of Momentum's claims, as well as GE's debt claims, stand alone, are completely independent of the DFS/Momentum contract and the claims can be maintained without reference to the DFS/Momentum contract. Therefore, the GE and Momentum claims are not subject to arbitration because the Textron/Momentum contract does not have an arbitration provision.

C. The Arbitrator Refused to Hear Evidence Material to the Controversy.

The Texas General Arbitration Act provides that the Court shall vacate the award if the arbitrator "refused to hear evidence material to the case." *Tex. Rev. Civ. Proc. & Rem. Code § 171.088(3)(c)*. The affidavit of Joe Napoleon is attached as Exhibit "B." It establishes that the arbitrator refused to hear evidence material to the case, specifically the testimony of Momentum's C.P.A., Gladys Pierson.

As set forth in the affidavit, on January 17, 2008, Mr. Goldberg told the parties that he would hear evidence through the morning of January 18, 2008, but the rest of the witnesses were to be covered at a later date. At that time, it was clear that Momentum could not finish its case on January 18, 2008. At the same time, counsel for UTC and GE were complaining about their flight schedule which had them leaving Houston during the afternoon of January 18, 2008. Counsel for UTC and GE, however, also objected to having to return to Houston. Based on Mr. Goldberg's representation, two of Momentum's witnesses were told that they were not going to be called. They were Gladys Pierson, C.P.A. for Momentum and an expert witness, Barry Wilbratte, Ph.D. When the hearing resumed on January 18, 2008, Mr. Goldberg announced that he would not hear evidence after January 18, 2008, which prevented Momentum from calling a

material witness, Momentum's C.P.A., Gladys Pierson. This decision was contrary to his promise that Momentum would be allowed to present its entire case, which GE and UTC were allowed to do.

D. GE's Prominent Role in the Operation of the AAA Indicates that the Award was the Result of Fraud or Undue Means.

Momentum recently discovered GE's prominent role in the operation of the AAA. Brackett B. Denniston, III, who is Vice President, General Counsel of General Electric Company. (See Ex. "C," listing of Board of Directors for the AAA). A review of the document reveals that GE is one of the corporate interests represented on the AAA Board of Directors. The fact that, by all appearances, GE plays a major role in the operation of the AAA suggests that there are major conflict of interest concerns that have not been disclosed by GE or the AAA. Clearly, there is the appearance of impropriety and fraud. While Texas case law consistently holds that arbitration agreements should be given wide deference, the fact remains that when a party, like GE, plays a major role in controlling the operation of the forum, the integrity of the entire process, service to the public and the judicial system is severely compromised. Based on the foregoing, the award in question was obtained by fraudulent and/or undue means and should be vacated.

E. The Arbitrator Acted in an Arbitrary and Capricious Manner and thus Committed a Gross Mistake in his Award.

This case involved a mosaic of interwoven legal issues and facts. In its Fourth Amended Counter-Claim, Momentum alleged that GE committed negligent misrepresentation, fraud and intentional misrepresentation and breach of contract. (Vol. II, pp. 656-666). In response, GE asserted numerous defenses. (Vol. II, pp. 582-586). Prior to the hearing, Momentum provided the arbitrator with proposed Findings of Fact and Conclusions of Law. (Vol. II, pp. 349-363).

Following the five day hearing, the parties presented the arbitrator with over 100 pages of post-hearing briefs. Mr. Goldberg's reaction to the myriad of complex legal and factual issues presented was to present the parties an "award" that failed to address the legal theories presented at the hearing. On its face, the arbitrator's award demonstrates a failure to exercise honest judgment and as such constitutes a gross mistake.

Under the common law, an otherwise valid award may be held to be invalid if it is tainted with such gross mistake that would imply bad faith or the failure to exercise honest judgment. *House Grain Co. v. Obot*, 659 S.W. 2d 903, 906 (Tex. App. - - Corpus Christi 1983, writ ref'd). In this case, the arbitrator's primary conclusion was that "Momentum was not a third party beneficiary," which is a mystery. (Vol. I, p. 35) A review of Momentum's Proposed Findings of Fact and Conclusions of Law indicates that Momentum did not ask the arbitrator to find that it was a third-party beneficiary. Further, in its Post-Hearing Brief, Momentum did not argue that it was a 'third-party beneficiary.' It argued negligent misrepresentation, fraud and breach of contract. All of the issues and cause of action raised by Momentum were ignored by the arbitrator. The one issue that he addressed was one that Momentum did not ask for a ruling on. Accordingly, the arbitrator failed to exercise honest judgment and the arbitrary and capricious award should be vacated.

CONCLUSION

The record establishes that the substance of the claims between GE and Momentum rests in the framework of the Textron/Momentum Contract. As a result, GE has not and can not establish that the substance of the claims fall within the scope of the arbitration provision on which GE relied. For the same reasons, the claims are independent of the DFS/Momentum arbitration provision and not subject to arbitration. Further, the arbitrator refused to hear

material evidence and the award was obtained by undue means. Specifically, GE's prominent role in the operation of the AAA points to a conclusion that the award was the result of undue means or fraud and that the failure to disclose the relationship between GE, the AAA and its arbitrators impeded Momentum's right to a fair and impartial hearing. Finally, the arbitrator acted in an arbitrary and capricious manner and thus committed a gross mistake in his award. Based on the foregoing, Momentum requests that this Court vacate the arbitrator's award in total and place this case on the trial docket of this Court.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been served upon all known parties and/or counsel of record in compliance with the Texas Rules of Civil Procedure, on this the ___ day of _____, 2008.

LANCELOT OLINDE, JR.