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IN THE
COURT OF APPEALS OF INDIANA

Financial Center First Credit Union,

Appellant-Plaintiff/ Counterclaim Defendant,

v.

Miguel Rivera,

Appellee-Defendant/ Counterclaim Plaintiff.

November 9, 2021

Court of Appeals Case No. 21A-CC-845

Appeal from the Marion Superior Court

The Honorable Christopher B. Haile, Magistrate

Trial Court Cause No. 49D06-1912-CC-52347

Tavitas, Judge.

Case Summary

[1] Miguel Rivera entered into a retail installment contract and security agreement with Financial Center First Credit Union ("Financial Center"), in order to purchase a used 2011 Mercedes-Benz. Rivera defaulted on the payments, and Financial Center repossessed and then sold the car. A deficiency balance remained, and Financial Center filed an action seeking to recover that balance.

Rivera answered and filed a counterclaim alleging that Financial Center committed violations of the Uniform Commercial Code ("UCC"). Financial Center filed a motion for summary judgment as to all claims.

[2] While the summary judgment motion was pending, Rivera filed a motion for leave to amend his answer and sought to alter his counterclaim by: (1) specifying the alleged violations of the UCC; and (2) converting the claim into a class action. The trial court denied the motion for summary judgment and, on the same day, granted the motion for leave to file an amended complaint. Financial Center moved to compel arbitration of the amended counterclaim and to stay the other components of the action in the meantime. The trial court denied the motion to compel arbitration. Financial Center appeals the denial of the motion to compel arbitration. We conclude that the trial court's denial of the motion was proper, and we affirm.

Issue

[3] We address a single issue: whether the trial court erred in denying Financial Center's motion to compel arbitration of Rivera's amended counterclaim.[1]

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[1] Financial Center raises a second issue: whether the trial court erred by not submitting the question of arbitrability, itself, to an arbitrator. The trial court, however, was not faced with that question. As we will detail *infra*, Financial Center framed the issues below differently from how it frames them on appeal. Below, Financial Center expressly sought to have the class allegations dismissed. It did not seek to have those allegations established as arbitrable. Financial Center, by attempting to separate the class action allegations, *only* sought to have Rivera's individual underlying claim compelled to arbitration. The trial court, however, was not faced with determining the *arbitrability* of the individual underlying claim. All parties agree that the individual underlying claim *was* arbitrable, at least prior to Financial Center's election to answer and seek

Facts

[4] On December 15, 2016, Rivera signed a retail installment contract and security agreement for the purchase of a used 2011 Mercedes-Benz. The contract was assigned to Financial Center, and Rivera defaulted on the payments. The agreement contained the following pertinent provisions:

> PLEASE READ CAREFULLY! By agreeing to this Arbitration Provision you are giving up your right to go to court for claims and disputes arising from this Contract:
>
> • 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.

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summary judgment as to said claim. The trial court was not tasked with evaluating the scope or enforceability of the arbitration provision, or with interpreting that provision. Rather, the trial court determined whether Financial Center's litigation conduct was inconsistent with an intent to elect arbitration, and, therefore, whether its right to compel arbitration, expressly set forth in the contract, was waived. *See, e.g.*, *Capitol Constr. Servs., Inc. v. Farah, LLC*, 946 N.E.2d 624, 628 (Ind. Ct. App. 2011). Financial Center appears to recognize that the question before the trial court was one of waiver, not of contract construction. *See* Appellant's App. Vol. II p. 102.

On appeal Financial Center artfully reframes the issue as whether the trial court should have "allowed an arbitrator to determine whether Appellee's *counterclaim* is within the scope of the Arbitration Agreement." Appellant's Br. p. 18 (emphasis added). Aside from the fact that Financial Center explicitly did not seek to compel arbitration of the counterclaim *as a whole* below, its argument on this issue is contained in a single paragraph regarding a non-binding case from the Missouri Court of Appeals in Financial Center's "Reply in Support of Cross-Defendant's *Motion to Dismiss* Cross-Plaintiff's Class Action Allegations and Motion to Stay Litigation to Compel Arbitration." Appellant's App. Vol. II pp. 100-01 (emphasis added). Generally, issues not considered by the trial court are not properly before us on review. *See, e.g.*, *Washington v. State*, 808 N.E.2d 617, 625 (Ind. 2004) ("More importantly, a trial court cannot be found to have erred as to an issue or argument that it never had an opportunity to consider."); *see also Harlow v. Parkevich*, 868 N.E.2d 822, 827-28 (Ind. Ct. App. 2007) (finding that the necessary submission of any and all issues, including arbitrability, to an arbitrator would be an absurd result).

* * * * *

You or we (including any assignee) may elect to resolve any Claim by neutral, binding arbitration and not by a court action.

* * * * *

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. Instead, the Claim will be arbitrated on an individual basis and not on a class or representative basis.

* * * * *

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.

* * * * *

"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 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.

Appellant's App. Vol. II p. 85.

[5] On September 16, 2019, Financial Center repossessed the vehicle and informed Rivera of its intent to sell the vehicle "in a commercially acceptable manner." *Id*. at 47. The vehicle's sale, however, resulted in a deficiency in the amount of $6,123.32.

[6] On December 17, 2019, Financial Center filed a one-count complaint in the Marion Superior Court seeking to recover the deficiency amount, interest, and attorney's fees. On May 13, 2020, Rivera filed his answer and counterclaim. In the counterclaim, Rivera alleged that Financial Center failed to sell the vehicle in a commercially viable manner pursuant to the Uniform Commercial Code ("UCC") and that: "Plaintiff failed to comply with Ind. Code. § 26-1-9.1-601 through § 26-1-9.1-628, which entitles Defendant to damages under § 26-1-9.1-625." *Id.* at 27. On May 19, 2020, Financial Center filed an answer to the counterclaim. On June 18, 2020, Financial Center filed a motion for summary judgment on both the complaint and Rivera's counterclaim.

[7] On September 15, 2020, while Financial Center's motion for summary judgment remained pending, Rivera filed a motion for leave to file an amended answer and counterclaim. The original counterclaim was approximately half a

page in length. The proposed amended counterclaim was approximately ten-and-a-half pages in length. The amended counterclaim included the following allegations:

> 72. Plaintiff violated the UCC by failing to sell Rivera's vehicle in a commercially reasonable manner.
>
> 73. Plaintiff violated the UCC by failing to provide the notices required under the UCC prior to disposing of collateral secured by loans entered by, assigned to, or owned by Plaintiff.
>
> 74. Plaintiff did not use the form of notification provided in § 26-1-9.1-614(3) of the UCC when mailing presale notices to Plaintiffs and the Class.
>
> 75. Plaintiffs [sic] presale notices to Rivera and the Class included incorrect information language not allowed by law or the consumer credit contracts, rendering the presale notices misleading or unreasonable in violation of §§ 26-1-9.1-611 and 26-1-9.1-614 of the UCC.
>
> 76. As required under § 26-1-9.1-611, Plaintiff failed to provide "reasonable authenticated notice of disposition" to Rivera and the Class.
>
> 77. Plaintiff did not apply sale proceeds to Rivera and the class members' accounts as required by § 26-1-9.1-615 and overstated the class members' unpaid loan balances.

Id. at 43-44.

[8] The alleged counterclaim sought to establish a class action suit against Financial Center and included the specifics of the UCC violations alluded to in the original counterclaim. On October 1, 2020, Rivera filed an amended motion for leave to amend his counterclaim.

[9] On October 19, 2020, the trial court entered two orders. First, it denied Financial Center's motion for summary judgment with respect to its claim and Rivera's original counterclaim. Second, the trial court granted Rivera's amended motion for leave to file an amended counterclaim.

[10] On December 8, 2020, Financial Center filed: (1) an answer to Rivera's amended counterclaim; and (2) a motion to dismiss Rivera's class allegations and to compel arbitration of Rivera's individual counterclaim.[2] Specifically, Financial Center sought:

> 2. An Order compelling arbitration *of Defendant's individual counterclaim* pursuant to 9 U.S.C. §4;
>
> 3. An Order dismissing Defendant Rivera's class action allegations pursuant to the class action waiver signed by

[2] Below, Financial Center purported to compel arbitration of Rivera's *individual* counterclaim and sought dismissal outright of the class action "allegations." Appellant's App. Vol. II p. 80 (". . . Plaintiff requests the class action allegations in Defendant's Answer and Counterclaim be dismissed and Defendant be compelled to arbitrate his Claim on an individual basis."). It appears to us, however, that Rivera's counterclaim was pleaded as a single class action count. It is not clear upon which basis Financial Center believed that allegations contained within that count could be extracted, severed, and resolved differently than other aspects of the count. Now, on appeal, Financial Center no longer appears to draw that distinction, merely asserting that the trial court erred in denying Financial Center's motion to compel arbitration of the "amended counterclaim." Appellant's Br. p. 5.

> Defendant Rivera that was held to be enforceable by the U.S. Supreme Court.

Id. at 69 (emphasis added). After a hearing on April 1, 2021, the trial court denied Financial Center's motion to compel arbitration and to dismiss Rivera's class action allegations. This appeal ensued.

Analysis

[11] Financial Center contends that the trial court erroneously denied its motion to compel arbitration of the amended counterclaim. "A trial court's decision on a motion to compel arbitration is reviewed de novo." *Doe v. Carmel Operator, LLC*, 160 N.E.3d 518, 521 (Ind. 2021) (citing *Med. Realty Assocs., LLC v. D.A. Dodd, Inc.*, 928 N.E.2d 871, 874 (Ind. Ct. App. 2010)). "[W]hen two parties enter into a contract that includes an arbitration clause, courts will presume the parties made the agreement willingly." *Id*. at 522 (citing *MPACT Constr. Grp., LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 906 (Ind. 2004)). "And, unless something in the arbitration clause is illegal or contravenes public policy, a court will enforce it so long as the dispute is covered within the broader contract." *Id*. (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46, 126 S. Ct. 1204 (2006); *Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d 770, 777 (Ind. Ct. App. 2011)).

[12] Indeed, "[o]nce satisfied that the parties contracted to submit their disputes to arbitration, the court is required by statute to compel arbitration." *Est. of King by Briggs v. Aperion Care*, 155 N.E.3d 1193, 1194 (Ind. Ct. App. 2020) (citing *PSI*

Energy, Inc. v. AMAX, Inc., 644 N.E.2d 96, 99 (Ind. 1994)), *reh'g denied, trans. denied*; *see also* Ind. Code § 34-57-2-3(a) ("If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue raised without further pleading and *shall* order arbitration if found for the moving party[.]") (emphasis added). Finally, we note that "when construing arbitration agreements, 'every doubt is to be resolved in favor of arbitration.'" *Id*. (quoting *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 416-17 (Ind. Ct. App. 2004), *trans. dismissed*).

[13] The parties do not dispute that the arbitration agreement is a legal, enforceable contract. Rather, they differ as to whether Financial Center has waived its right to compel arbitration of the counterclaim. Financial Center contends that the amended counterclaim "include[d] several new individual Claims along with a novel class action Claim."[3] Appellant's Br. p. 8. Thus, Financial Center argues, the amended counterclaim is a new claim, and one that has not yet been litigated.

[14] Rivera disagrees and contends that "[Financial Center's] deficiency claim and [Rivera's] UCC counterclaim constitute one 'claim' because they are

[3] We read Rivera's counterclaim as presenting a single claim, differing from his first counterclaim only inasmuch as it is more specific and seeks to certify a class of individuals that have suffered the same or similar injuries to the one alleged by Rivera. The fact that Rivera asserts new and alternative requests for relief, which Financial Center appears to take issue within its appellate brief at page 17, is of no moment. This is a practice expressly permitted under Indiana Trial Rule 8(A)(2). Moreover, detailing the types of harm that Rivera alleges is not the same as asserting new theories of liability. All of Rivera's allegations rest of a single theory of liability—that Financial Center violated the UCC.

interdependent and inextricably intertwined." Appellee's Br. p. 14 (cleaned up). Thus, Rivera contends, Financial Center has waived its right to compel arbitration of the counterclaim, having elected to file its deficiency claim in the trial court or, in the alternative, having litigated Rivera's counterclaim. Essentially, Rivera's primary argument is that, by electing to initially file in the trial court, Financial Center has opted not to arbitrate any claims arising as part of the lawsuit. In the alternative, Rivera argues that Financial Center has waived the right to compel arbitration for Rivera's underlying individual counterclaim, because Financial Center has already partially litigated said counterclaim.

[15] A contractual right to arbitration may be waived. *See Welty Bldg. Co. v. Indy Fedreau Co., LLC*, 985 N.E.2d 792, 798 (Ind. Ct. App. 2013) (citing *Capitol*, 946 N.E.2d at 628). "Waiver is a question of fact under the circumstances of each case." *Finlay Props., Inc. v. Hoosier Contracting, LLC*, 802 N.E.2d 453, 455 (Ind. Ct. App. 2003) (citing *Kilkenny v. Mitchell Hurst Jacobs & Dick*, 733 N.E.2d 984 (Ind. Ct. App. 2000), *trans. denied*).

> In determining if waiver has occurred, courts look at a variety of factors, including the timing of the arbitration request, if dispositive motions have been filed, and/or if a litigant is unfairly manipulating the judicial system by attempting to obtain a second bite at the apple due to an unfavorable ruling in another forum.

Id. at 455-56 (citing *JKL Components Corp. v. Insul-Reps, Inc.*, 596 N.E.2d 945 (Ind. Ct. App. 1992), *trans. denied*; *Aetna Cas. & Sur. Co. v. Dalson*, 421 N.E.2d

691 (Ind. Ct. App. 1981); *Shahan v. Brinegar*, 181 Ind. App. 39, 390 N.E.2d 1036 (1979); *St. Mary's Med. Ctr. v. Disco Aluminum Prods. Co.*, 969 F.2d 585 (7th Cir. 1992)). "[A]ccording to the United States Supreme Court, we must resolve any doubts here regarding waiver of the right to arbitration against finding such a waiver." *Welty Bldg. Co.*, 985 N.E.2d at 802-03 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983)).

[16] Class action lawsuits involve numerous requirements beyond Rivera's original individual counterclaim. In order for a class to be certified, for example, an applicant must demonstrate: (1) sufficient numerosity (that is, a sufficient number of plaintiffs); (2) commonality of injuries among those plaintiffs; (3) typicality of the claims of the representative plaintiffs (that is, are the claims of the named plaintiff typical of the claims of the other class members); and (4) that "[t]he representative parties will fairly and adequately protect the interests of the class." Ind. Trial Rule 23(A); *see also, e.g., LHO Indianapolis One Lessee, LLC v. Bowman*, 40 N.E.3d 1264, 1269-70 (Ind. Ct. App. 2015). Accordingly, the amended counterclaim—with its added class action allegations—was arguably a different claim from the individual counterclaim initially raised by Rivera.

[17] Nevertheless, Financial Center's motion sought to compel arbitration with respect to Rivera's underlying *individual* claim[4] after Financial Center had

[4] In its motion below, Financial Center sought to have the class action "allegations" dismissed, rather than sent to arbitration. Appellant's App. Vol. II pp. 71-72.

already answered the individual claim and then sought summary judgment. Thus, by acting in a manner inconsistent with an intent to arbitrate, Financial Center waived its contractual right to arbitration of the individual claim. *See, e.g., St. Mary's.*, 969 F.2d at 588 (court found waiver where party requesting arbitration waited ten months after commencement of lawsuit to request arbitration and did not request arbitration until after the party lost its joint motion to dismiss or for summary judgment).

[18] Now, on appeal, Financial Center attempts to restyle its motion below as one seeking to compel arbitration of "Appellee's Amended Counterclaim," thereby introducing an ambiguity as to whether it sought to compel arbitration of just Rivera's underlying individual claim or of the amended counterclaim as a whole, including the class action allegations. Appellant's Br. p. 5. When Financial Center filed its motion to compel arbitration, Financial Center invoked the following burden: "First, the party must demonstrate that there is an enforceable agreement to arbitrate the dispute. Second, the party must prove the disputed matter is the type of claim that the parties agreed to arbitrate." *Tender Loving Care Mgmt., Inc. v. Sherls*, 14 N.E.3d 67, 71-72 (Ind. Ct. App. 2014) (citing *Safety Nat. Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 1000 (Ind. Ct. App. 2005), *trans. denied*). As we have already noted, the first prong of the burden is not disputed. To the extent that Financial Center argues that it sought to compel arbitration of the class action allegations, as though they are somehow severable from the underlying injury upon which the claim is based, we conclude that Financial Center cannot meet its burden to "prove the

disputed matter is the type of claim that the parties agreed to arbitrate." *Id*. at 72.

[19] The plain language of the contract makes it unambiguously clear that *if* a claim is to be arbitrated *it cannot* be in the style of a class action. *See* Appellant's Br. p. 8. As the contract stated:

> 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. Instead, the Claim will be arbitrated on an individual basis and not on a class or representative basis.
>
> * * * * *
>
> 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**.

Appellant's App. Vol. II p. 85 (emphasis added). Reading these sections of the contract demonstrates that class action claims are not arbitrable under the contract. The contract, however, does not prohibit the filing of a class action suit in a court.

[20] We find Financial Center's conflicting arguments to the contrary unconvincing.[5] First, Financial Center has repeatedly argued that "Rivera is arguing that our $6,000 deficiency judgment has waived our right to compel arbitration of all future claims, including counterclaims, class action claims, etc." Tr. Vol. II p. 9. We agree that this is an untenable position of Rivera's. Claims and counterclaims do not suddenly become one claim simply because they relate to one another or have factual or legal disputes in common. Financial Center, however, ignores Rivera's alternative argument: Financial Center litigated Rivera's counterclaim when it was still individual in nature, did not prevail on its motion for summary judgment, and then sought to have that same claim sent to arbitration. This is not an argument about "**any** other future claim or cause of action that arises between the parties. . ." (emphasis in original), but about a single specific claim that Financial Center itself has sought to establish is separate from the later-added allegations. Appellant's Br. p. 15. In short, Financial Center does not articulate a response to the argument that it has already litigated the specific individual counterclaim.

[21] Second, Appellant places a great deal of emphasis upon the well-known public policy favoring arbitration and the honoring of contractually evinced intent of parties to arbitrate. We cannot, however, treat that policy preference as a magic

[5] We should also note that we do not agree with Rivera's argument that the counterclaim and Financial Center's original complaint are "inextricably intertwined" so as to constitute a single claim. Appellee's Br. p. 14. This is inaccurate both as a matter of contractual interpretation and as an understanding of the doctrine underpinning our trial rules generally.

wand. Just as a contract containing an arbitration provision establishes the circumstances in which parties to the contract agree to arbitrate, so too does it establish the circumstance in which the parties *do not* agree to arbitrate.

[22] And third, Financial Center argues that it has met the requirement to "prove that the disputed matter is the type of claim that the parties agreed to arbitrate." Appellant's Br. p. 13. The focus of our inquiry is whether the claim is the *type* of claim that the parties agreed to arbitrate and not, as Financial Center's argument suggests, whether it is a "claim" as contemplated by the contract. As we have explained, if Financial Center was seeking to compel arbitration of Rivera's individual claim, then it sought the impermissible second bite at the apple. If Financial Center sought to arbitrate Rivera's class action claim (to the extent, if any, that claim was separable from Rivera's individual claim, a suggestion about which we express skepticism) then that claim is expressly *not* of a type that the arbitration clause contemplates. The trial court, accordingly, properly denied the motion to compel arbitration of Rivera's counterclaim.

Conclusion

[23] The trial court did not err in denying Financial Center's motion to compel arbitration and to stay the proceedings. We affirm.

[24] Affirmed.

Mathias, J., and Weissmann, J., concur.