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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JAY BACON,

Plaintiff and Appellant,

v.

BMW OF NORTH AMERICA, LLC,

Defendant and Respondent.

H050174

(Santa Clara County

Super. Ct. No. 19CV350387)

Plaintiff Jay Bacon signed a contract with a dealership to purchase a BMW sedan. That contract included an arbitration provision that can be invoked by the purchaser, the dealership, or the dealership's assignee. The provision covers claims between the buyer and the dealership and also any claim between plaintiff and "any third parties if [buyer] assert[s] a Claim against such third parties in connection with a Claim [buyer] asserts[s] against" the dealership. Bacon sued the dealership and defendant BMW of North America, LLC (the manufacturer), alleging that the sedan was defective. The manufacturer successfully moved to compel arbitration, an arbitrator issued an award in the manufacturer's favor, and judgment was entered for the manufacturer. Bacon contends the trial court erred in compelling arbitration because the manufacturer was not a party to the sales contract, the manufacturer could not enforce the contract as a third

party beneficiary, and equitable estoppel does not apply. We agree with Bacon and will reverse the judgment.

I. BACKGROUND

According to the complaint Bacon filed against the dealership and the manufacturer, Bacon bought a BMW sedan in 2007 from a dealership in Mountain View. It is undisputed that the retail installment contract attached to the complaint accurately reflects the written contract for the sedan. The contract was between Bacon and the dealership. The contract defines references to “ ‘I’, ‘me’ and ‘my’ ” as referring to the buyer, and references to “ ‘you’ and ‘your’ ” as referring to the dealership or its assignee. Another term in the contract assigned the dealership’s interest in the contract to “BMW Bank of North America, a wholly owned subsidiary of BMW Financial Services NA, LLC.” The manufacturer is not a party to the contract.

The contract’s arbitration provision begins: “Either [dealer/assignee] or [buyer] may choose to have any dispute between us decided by arbitration and not in a court or by jury trial.” The arbitration provision defines a claim as “any claim, dispute or controversy, whether in contract, tort, statute or otherwise, whether preexisting, present or future, between me and you or your employees, officers, directors, affiliates, successors or assigns, or between me and any third parties if I assert a Claim against such third parties in connection with a Claim I assert against you, which arises out of or relates to my credit application, purchase or condition of this Vehicle, this Contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this Contract).” The next sentence provides: “Any Claim shall, at your or my election, be resolved by neutral, binding arbitration and not by a court action.”

The contract includes a paragraph about warranties: “I understand that you are not offering any express warranties unless you have given a warranty to me. If you extend, or the Vehicle’s manufacturer extends, a written warranty or service contract covering the Vehicle within 90 days from the date of this Contract, I get implied warranties of

merchantability and fitness for a particular purpose covering the Vehicle. If not, you specifically disclaim any implied warranties of merchantability and fitness for a particular purpose covering this Vehicle.”

Bacon signed a separate “Extended Vehicle Protection” contract directly with the manufacturer. That warranty contract has no arbitration clause.

Bacon alleged in the complaint that he experienced a sudden acceleration issue in 2018 while trying to park the sedan. Bacon took the sedan to the dealership, and the dealership ultimately concluded that the sedan was not defective based on a road test allegedly performed by the manufacturer.

The complaint alleged that the sedan “has had serious and dangerous defects” and “is currently in a defective state.” Among other causes of action, the complaint alleged breaches of implied and express warranties under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.); breach of written contracts; violations of the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.); intentional and negligent misrepresentation; and violations of the federal Magnuson-Moss Warranty Act.

The manufacturer moved to compel arbitration; the dealership did not.¹ The manufacturer filed a supporting declaration from a finance systems manager for BMW Financial Services NA, LLC, declaring that BMW Financial Services NA, LLC is a wholly owned subsidiary of the manufacturer.

The trial court granted the motion to compel arbitration, concluding that the manufacturer had “standing to compel arbitration as a third-party beneficiary of the Purchase Agreement as well as under the doctrine of equitable estoppel.” The trial court addressed and rejected Bacon’s allegations of fraud in the inducement, reasoning that these allegations related to his acceptance of the contract as a whole and not specifically

¹ The record on appeal does not indicate the status of Bacon’s action against the dealership.

the agreement to arbitrate. The court stayed proceedings and ordered the parties to arbitration. A stipulated judgment in the manufacturer's favor was entered in 2022 after an arbitrator decided all claims in the manufacturer's favor.

II. DISCUSSION

A. *Arbitration Agreement Interpretation*

The Federal Arbitration Act (9 U.S.C. § 1 et seq.) governs the contract at issue here. The federal legislation's "policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.'" (*Morgan v. Sundance, Inc.* (2022) 596 U.S. 411, ___ [142 S.Ct. 1708, 1713].) We apply California contract law to interpret the arbitration provision. (*Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324, 1332, review granted July 19, 2023, S279969 (*Ford*).) Where, as here, the trial court did not resolve any factual issues, we exercise our independent judgment to interpret the arbitration provision. (*Id.* at p. 1331.)

B. *The Manufacturer is Not a Third Party Beneficiary*

It is undisputed that the manufacturer is not a party to the contract containing the arbitration provision at issue here. "The United States Supreme Court has held that a litigant who is not a party to an arbitration agreement may invoke arbitration under the [Federal Arbitration Act] if the relevant state contract law allows the litigant to enforce the agreement." (*Kramer v. Toyota Motor Corp.* (9th Cir. 2013) 705 F.3d 1122, 1128.) A nonparty can enforce a contract as a third party beneficiary if it can demonstrate that: (1) "the third party would in fact benefit from the contract," (2) "a motivating purpose of the contracting parties was to provide a benefit to the third party," and (3) permitting the third party to enforce the contract "is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 830 (*Goonewardene*).)

1. *No Benefit to the Manufacturer*

The Ninth Circuit recently applied the *Goonewardene* test to a purchase agreement for a BMW vehicle in *Ngo v. BMW of North America, LLC* (9th Cir. 2022) 23 F.4th 942 (*Ngo*). The arbitration provision in *Ngo* between the dealership and purchaser applied to any “claim or dispute, whether in contract, tort, statute, or otherwise (including the interpretation and scope of this Arbitration Provision, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors, or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract).” (*Id.* at p. 945.) The agreement further provided that such a claim “shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.” (*Ibid.*) The contract defined “ ‘you’ as Ngo and ‘we’ as the dealership and its assignee.” (*Id.* at p. 946.) The *Ngo* court observed that the arbitration provision was “pellucid that only three parties may compel arbitration, none of which is BMW.” (*Id.* at p. 947.) That language limiting the “right to compel arbitration to a specific buyer and a specific dealership (and its assignees) means that extraneous third parties may not compel arbitration.” (*Ibid.*) The *Ngo* court concluded the manufacturer did not benefit from the contract because any “benefit that [manufacturer] BMW might receive from the clause is peripheral and indirect because it is predicated on the decisions of others to arbitrate.” (*Ibid.*; accord *Ford, supra*, 89 Cal.App.5th at pp. 1336–1339 [manufacturer not a third party beneficiary of sales contract between purchaser and dealership].)

We find the *Ngo* and *Ford* analyses persuasive. As in those cases, the arbitration provision here limits the parties who may compel arbitration to Bacon, the dealership, and the dealership’s assignee. The contract defines references to “ ‘I’, ‘me’ and ‘my’ ” as referring to the purchaser, and references to “ ‘you’ and ‘your’ ” as referring to the dealership or its assignee. The agreement provides, “Either you or I may choose to have

any dispute between us decided by arbitration and not in a court or by jury trial.” It later provides, “Any Claim shall, at your or my election, be resolved by neutral, binding arbitration and not by a court action.” Because the manufacturer cannot directly compel arbitration, it does not benefit from the contract.

We acknowledge that the arbitration provision’s broad description of the subject matter of arbitrable claims includes claims that could involve the manufacturer. The provision defines a claim as including “any claim . . . between me and you or your . . . affiliates, . . . or between me and any third parties if I assert a Claim against such third parties in connection with a Claim I assert against you.” In this case, the manufacturer is a third party sued in connection with a claim Bacon asserted against the dealership. The manufacturer is also an affiliate of assignee “BMW Bank of North America, a wholly owned subsidiary of BMW Financial Services NA, LLC.” (An uncontested declaration filed by the manufacturer indicates that BMW Financial Services NA, LLC is a wholly owned subsidiary of the manufacturer.) But “[w]ho may enforce an arbitration agreement is a separate matter from the types of disputes the agreement covers.” (See *Ford, supra*, 89 Cal.App.5th at p. 1339, review granted, italics omitted.) We agree with the *Ford* court that the “parties’ choice of the *subject* of the disputes they agree to arbitrate does not evince an intention to benefit nonparties so as to affect *who* is entitled to compel arbitration.” (*Ibid.*)

2. No Motivating Purpose to Benefit the Manufacturer

The second factor asks whether a motivating purpose of the contracting parties was to benefit the manufacturer. (*Goonewardene, supra*, 6 Cal.5th at p. 830.) The Supreme Court explained this factor “clarif[ies] that the contracting parties must have a motivating purpose to benefit the third party, and not simply knowledge that a benefit to the third party may follow from the contract.” (*Ibid.*)

Here, the motivating purpose of the arbitration provision was to empower the purchaser, the dealership, and the dealership’s assignee to compel arbitration. The

arbitration provision did not similarly empower the manufacturer. To be sure, the manufacturer may indirectly benefit from the contract if the dealership or the dealership's assignee compel arbitration of a claim that also includes the manufacturer. But such incidental benefit does not support a finding of motivating purpose. (Accord *Ngo*, *supra*, 23 F.4th at pp. 947–948; *Ford*, *supra*, 89 Cal.App.5th at p. 1339, review granted.)

3. Objectives of the Contract and Reasonable Expectations of the Contracting Parties

The third factor asks whether permitting the manufacturer to enforce the contract is consistent with the objectives of the contract and the reasonable expectations of the contracting parties. (*Goonewardene*, *supra*, 6 Cal.5th at p. 830.) We again agree with the *Ford* court, which observed that allowing the manufacturer to “to enforce the arbitration provision as a third party beneficiary would be inconsistent with the ‘reasonable expectations of the contracting parties’ [citation] where they twice specifically vested the right of enforcement in the purchaser and the dealer only.” (*Ford*, *supra*, 89 Cal.App.5th at p. 1340, review granted; accord *Ngo*, *supra*, 23 F.4th at p. 948.)

In sum, the contract supplies the manufacturer no legal entitlement to arbitration as a third party beneficiary.

C. Equitable Estoppel

There is a split of authority about whether equitable estoppel allows a car manufacturer to compel arbitration based on a sales contract between a dealership and a car buyer. (Compare *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486, 495 (*Felisilda*) [compelling arbitration] with *Ford*, *supra*, 89 Cal.App.5th at p. 1332, review granted [denying arbitration].) The Supreme Court has granted review of *Ford* to decide whether “manufacturers’ express or implied warranties that accompany a vehicle at the time of sale constitute obligations arising from the sale contract, permitting manufacturers to enforce an arbitration agreement in the contract pursuant to equitable

estoppel.” (*Ford Motor Warranty Cases* (S279969, July 19, 2023) [order granting review].)

The Felisildas bought a minivan from a dealership, and later sued the dealership and manufacturer alleging a violation of the Song-Beverly Consumer Warranty Act. (*Felisilda, supra*, 53 Cal.App.5th at p. 489.) The dealership successfully moved to compel arbitration of the Felisildas’ claims against both the dealership and the manufacturer. The Felisildas then dismissed the dealership from the action, and the matter proceeded to arbitration between the manufacturer and the Felisildas. (*Id.* at pp. 491–492.) On appeal from a judgment confirming an arbitrator’s decision in favor of the manufacturer, the Felisildas argued that equitable estoppel did not apply. (*Id.* at pp. 495–496.)

The *Felisilda* court observed that a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the plaintiff’s causes of action are intimately founded in and intertwined with the underlying contract obligations. (*Felisilda, supra*, 53 Cal.App.5th at p. 495.) The *Felisilda* court noted that the sales contract at issue referred to any claim “ ‘which arises out of or relates to . . . [the] condition of this vehicle,’ ” and reasoned that the Felisildas’ claim related to the condition of the car they purchased. (*Id.* at p. 496, italics omitted.) The court also reasoned that the “sales contract was the source of the warranties at the heart” of the Felisildas’ action. (*Ibid.*) And the court reasoned that the “arbitration provision in this case provides for arbitration of disputes that include third parties so long as the dispute pertains to the condition of the vehicle.” (*Id.* at p. 497.) The court concluded equitable estoppel precluded the Felisildas from preventing the manufacturer from compelling arbitration.

Multiple appellate decisions have declined to follow *Felisilda*. (*Ford, supra*, 89 Cal.App.5th at p. 1333, review granted; *Ngo, supra*, 23 F.4th at p. 950; *Kielar v. Superior Court* (2023) 94 Cal.App.5th 614, 617.) In *Ford*, the manufacturer argued it was entitled

to compel arbitration based on sales contracts between the plaintiffs and dealerships under the doctrine of equitable estoppel. (*Ford, supra*, at p. 1332.) The *Ford* court disagreed with the three bases for *Felisilda*'s conclusion that equitable estoppel applied. First, the *Ford* court observed that the language defining the subject matter of arbitrable claims did not equitably estop the plaintiffs from asserting that a third party had no right to compel arbitration. (*Ford, supra*, at p. 1334 [“That the *Felisilda* plaintiffs and the *dealer* agreed in their sale contract to arbitrate disputes between them about the condition of the vehicle does not equitably estop the plaintiffs from asserting [the manufacturer] has no right to demand arbitration.”].) Second, the *Ford* court found that the sales contract was not the source of the warranties that formed the basis of the plaintiffs' warranty claims because “manufacturer vehicle warranties that accompany the sale of motor vehicles without regard to the terms of the sale contract between the purchaser and the dealer are independent of the sale contract.” (*Ford, supra*, at p. 1334; see also *id.* at p. 1335 [noting that “California law does not treat manufacturer warranties imposed outside the four corners of a retail sale contract as part of the sale contract”].) Third, the *Ford* court found that a reference to third parties in the arbitration clause did not act as consent by the purchaser to arbitrate claims with third party nonsignatories because the language delineated the “*subject matter* of claims the purchasers and dealers agreed to arbitrate,” not the parties who could *compel* arbitration. (*Id.* at p. 1335.) The *Ford* court concluded that because no plaintiff alleged manufacturer violations of the sales contracts' express terms and their allegations about warranties were independent from the sales contracts, equitable estoppel did not apply. (*Id.* at p. 1336.)

We find *Ford* persuasive. As in *Ford*, Bacon by his lawsuit does not attempt to enforce the sales contract's substantive terms against the manufacturer. He alleges violations of consumer protection statutes and violations of warranties that exist independent of the sales contract. The sales contract made clear that any written warranty was separate from the sales contract and that the dealership was “not offering

any express warranties unless you have given a warranty to me.” Equitable estoppel does not apply.

The manufacturer’s arguments to the contrary have been considered and rejected by *Ford* and other decisions. The manufacturer cites the California Commercial Code and argues that Bacon’s “claims for breach of the express and implied warranties are intimately founded in and intertwined with the Agreement.” We agree with *Ford* that the warranty claims are not intertwined with the sales contract because “manufacturer vehicle warranties that accompany the sale of motor vehicles without regard to the terms of the sale contract between the purchaser and the dealer are independent of the sale contract.” (*Ford, supra*, 89 Cal.App.5th at p. 1334, review granted.) The manufacturer argues the arbitration provision at issue here supports equitable estoppel because it “expressly envisions arbitration of claims involving the assignees and affiliates of both the [dealership] and [dealership’s] assignees.” But the language the manufacturer cites pertains to the subject matter of arbitrable claims, not the parties who may *compel* arbitration. (See *Ford*, at p. 1335.) The manufacturer argues Bacon’s “claims directly derive from, and depend upon, the Agreement containing the arbitration provision to which Bacon agreed.” The Ninth Circuit rejected a similar argument in *Ngo*, where the court observed it is the retail sale, “not the purchase agreement, that gives a plaintiff standing to bring claims under the Song-Beverly Act.” (*Ngo, supra*, 23 F.4th at p. 950.) We agree with that analysis.

III. DISPOSITION

The judgment is reversed and the matter remanded with instructions to enter a new order denying defendant BMW of North America, LLC’s motion to compel arbitration. Bacon is awarded his costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

LIE, J.

WE CONCUR:

BAMATTRE-MANOUKIAN, ACTING P.J.

WILSON, J.

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