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TRACEY M. PEREZ, individually and on behalf of those similarly situated, Plaintiff, vs. LEONARD AUTOMOTIVE ENTERPRISES, INC. d/b/a TOYOTA OF HACKENSACK, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-5882-16 CIVIL ACTION OPINION

Argued: **December 2, 2016**
Decided: **December 8, 2016**

Honorable Robert C. Wilson, J.S.C.

Yasmin T. Gonzalez, Esq., appearing for the Plaintiff, Tracey M. Perez, (from the law offices of Ballon Stoll Bader & Nadler, P.C.).

Patrick D. Messmer, Esq., appearing for the Defendant, Leonard Automotive Enterprises, Inc. d/b/a Toyota of Hackensack, (from the law offices of Maraziti Falcon, LLP).

FACTUAL BACKGROUND

In early December 2015, Perez purchased a vehicle with a LoJack Stolen Vehicle System from Toyota. As part of the purchase, Perez signed a Retail Installment Sales Contract (hereinafter "Sales Contract"). The Sales Contract contains an arbitration agreement that provides for disputes between the parties to be resolved via neutral binding arbitration and not by court action. The "Agreement to Arbitrate" paragraph appears on the first page of the Sales Contract and provides:

> **Agreement to Arbitrate:** By signing below, you agree that pursuant to Arbitration Provision on page 5 of this contract, you or we may elect to resolve any dispute by neutral, binding arbitration and not by court action. See the Arbitration Provision for additional information concerning the agreement to arbitrate.

Certification of Tracey M. Perez (the "Perez Cert."), at Exhibit A, page 1.

The Arbitration Provision, as stated in the "Agreement to Arbitrate" appears on page five of the Sales Contract and provides:

ARBITRATION PROVISION
PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS

1. **EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.**
2. **IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE, AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.**
3. **DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.**

> 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 … shall, at your or our election, be resolved by neutral, binding arbitration and not by court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Provision shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action…
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> You and we retain the right to seek remedies in small claims court for disputes or claims within the court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies, such as repossession, or by filing an action to recover the vehicle, to recover a deficiency balance, or for individual injunctive relief….

Certification of Patrick D. Messmer, Esq. ("Messmer Cert."), Exhibit A, page 5.

On or about February 26, 2016, the vehicle was stolen from the Newport Mall, and was later discovered inoperable and totaled after being involved in a fire. Perez filed her Complaint

on or about August 9, 2016, alleging several infractions by Toyota, including that Toyota failed to install and activate the LoJack purchased by Perez. Perez further alleges that Toyota violated the Retail Installment Sales Act and the Truth in Consumer Contract, Warranty and Notice Act ("TCCWNA"). Toyota filed this Motion to Dismiss Perez's Complaint with Prejudice on or about October 21, 2016 seeking to enforce the binding arbitration agreement in the Sales Contract. Perez filed opposition to the Motion on or about November 23, 2016, contending that the binding arbitration agreement is not valid.

MOTION TO DISMISS STANDARD

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1513 (2016) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However,

"a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

RULE OF LAW AND DECISION

1. A Valid and Binding Arbitration Agreement Exists Between Perez and Toyota.

"Arbitration provisions are commonplace in consumer contracts." Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 435 (2014). Such provisions must clearly state their purpose, and be "sufficiently clear to a reasonable consumer." Id. at 436. However, "[n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights." Id. at 444. With that in mind, "the affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism of resolving disputes." Id. at 440. (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 92 (2002)).

In Atalese, the Court was appropriately concerned that some arbitration provisions may not reference the fact that arbitration is a substitute for the right to maintain an action in a court of law. Atalese, 219 N.J. at 442. The Court noted that no particular form of words is necessary to accomplish a clear and unambiguous waiver of rights, but that they will "pass muster when phrased in plain language that is understandable to the reasonable consumer." Id. at 444. The Court approvingly cited the provision upheld in Griffin v. Burlington Volkswagon, Inc., 441 N.J. Super. 515 (App. Div. 2010) as an example of such plain language, which stated that:

> [b]y agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes.

Id. at 445 (quoting Griffin, 411 N.J. Super. at 518).

While not identical, the language contained in the Arbitration Provision at issue conveys the same message to the consumer; all claims, including statutory claims, are subject to arbitration,

which is different from court action. The provision not enforced in Atalese was found on page nine of a twenty-three-page document and did not contain language that statutory rights could also be arbitrated. Atalese, 219 N.J. at 446. Neither of these defects exist in the Arbitration Provision and the "Agreement to Arbitrate" in the Sales Contract. For example, immediately above the signature block on the first page of the Sales Contract is a boxed paragraph which states:

> **Agreement to Arbitrate:** By signing below, you agree that, pursuant to the Arbitration Provision on page 5 of this contract, you or we may elect to resolve any dispute by neutral, binding arbitration and not by a court action. See the Arbitration Provision for additional information concerning the agreement to arbitrate.
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> See Messmer Cert. at Exhibit A, page 1.

The Arbitration Provision is located on page five of the five-page Sales Contract. It is also the only provision on page five. It would be impossible to miss given the instructions in the "Agreement to Arbitrate" box on page one.

The Arbitration Agreement very clearly states "**EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL**." See Messmer Cert. at Exhibit A, page 5. It expressly notes that statutory claims are among those subject to arbitration under the agreement. Id. In fact, the Arbitration Provision includes a large warning in bold, capital letters:

> **ARBITRATION PROVISION**
> **PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS**
>
> Id.

This Arbitration Provision has been vetted by the American Arbitration Association ("AAA"), which maintains a Consumer [Arbitration] Clause Registry. See Messmer Cert. at Exhibit B. According to the website, the AAA only registers consumer clauses after review and a finding that the clause "substantially and materially complies with the due process standards of the

Consumer Due Process Protocol." Id. The Arbitration Provision at issue is nearly identical to the one already vetted and registered by Toyota Motor Credit Corporation. See Messmer Cert. at Exhibit C.

The "Agreement to Arbitrate" and Arbitration Provision are unambiguous. It is not buried within an obscure document, but clearly and conspicuously set off from the rest of the Sales Contract on its own page with specific directions right above the signature block on page one indicating that the consumer should read the full provision carefully. The Arbitration Provision is also bracketed by obvious bolded-capital letter warnings to review carefully. Unlike the provision in Atalese, which did not inform the consumer in plain language that would be clear and understandable that she is waiving statutory rights, Atalese, 219 N.J. at 446, the Arbitration Provision explains how "any claim or dispute, whether in contract, tort, **STATUTE** or otherwise" may be resolved by arbitration at the election of either Perez or Toyota. See Messmer Cert. Exhibit A, page 5 (emphasis added). This provision states in a clear and understandable way that all claims arising in contract, tort, statute or otherwise may be arbitrated should either party to the Sales Contract elect to do so.

Here, Toyota elected to submit this dispute to arbitration, while Perez brought this court action. Because the language of the Arbitration Provision is in "plain language that would be clear and understandable to the average consumer", it is a valid arbitration agreement between Perez and Toyota. Atalese, 219 N.J. at 446. Perez cannot bring this action when Toyota elected to submit this dispute to arbitration.

For the foregoing reasons, Toyota's Motion to Dismiss Perez's Complaint with Prejudice and to Compel Arbitration is **GRANTED**.

It is so ordered.