IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHERLYN ROACH,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	1:16-cv-04215-CC-RGV
	:	
ASBURY AUTOMOTIVE GROUP, INC.,	:	
	:	
	:	
Defendant.	:	

FINAL REPORT AND RECOMMENDATION

Defendant Asbury Automotive Group, Inc. ("Asbury Automotive"), has filed a motion to compel arbitration and for stay pending arbitration, [Doc. 8],[1] which plaintiff Cherlyn Roach ("Roach") opposes,[2] [Doc. 13]. For the reasons that follow,

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[1] The listed document and page numbers in citations to the record in this Report and Recommendation refer to the document and page numbers shown on the Adobe file reader linked to the Court's electronic filing database, CM/ECF.

[2] Defendants filed their motion to compel arbitration, [Doc. 8], on January 25, 2017, and Roach's response was therefore due to be filed by February 8, 2017, see L.R. 7.1B, NDGa. ("Any party opposing a motion shall serve the party's response, responsive memorandum, affidavits, and any other responsive material not later than fourteen [] days after service of the motion[.]"); see also Fed. R. Civ. P. 6(d) (excluding service by electronic means from the addition of three days to the period that would otherwise expire under Rule 6(a)). Roach, however, did not file her response until February 13, 2017, see [Doc. 13], and it is therefore untimely. Nevertheless, the Court will consider the arguments advanced in Roach's response in ruling on the pending motion to compel arbitration. See Loncke v. Bank of Am., CIVIL ACTION FILE NO. 1:14-cv-01771-MHC-AJB, 2015 WL 11251741, at *5 (N.D. Ga. Jan. 16, 2015), adopted by 2015 WL 11256662, at *1 (N.D. Ga. Feb. 17, 2015) (citations omitted) ("The Court has discretion to consider the merits of untimely responses.").

it is **RECOMMENDED** that Asbury Automotive's motion to compel arbitration and stay pending arbitration, [Doc. 8], be **GRANTED IN PART** and **DENIED IN PART**.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

According to the complaint, Roach financed a vehicle from Nalley Toyota Stonecrest, which is owned by Asbury Automotive, on August 14, 2016. [Doc. 1 at 2 ¶ 4]; see also [Doc. 8-2 (Eke Decl.) at 1 ¶ 2]. At the time of purchase, she signed a "Retail Installment Sale Contract–Simple Finance Charge (with Arbitration Provision)" and a "Vehicle Buyer's Order," in which she agreed that any dispute between her and Asbury Automotive would be resolved through binding arbitration. [Doc. 8-2 at 5-8, 10-11 (all caps omitted)]; see also [id. at 1-2 ¶¶ 3-5].[3] The Retail Installment Sale Contract provides, in relevant part:

> ARBITRATION PROVISION
>
> PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS
>
> 1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE

[3] The Court may "consider evidence outside of the pleadings for purposes of a motion to compel arbitration." Chambers v. Groome Transp. of Ala., 41 F. Supp. 3d 1327, 1334 (M.D. Ala. 2014); see also In re Checking Account Overdraft Litig., 754 F.3d 1290, 1294 (11th Cir. 2014) (describing the standard used to resolve motions to compel arbitration as "summary-judgment-like"). Accordingly, the Court will consider the declarations and exhibits submitted by the parties in ruling on the pending motion to compel arbitration. See Schriever v. Navient Sols., Inc., No. 2:14-cv-596-FtM-38CM, 2014 WL 7273915, at *2 (M.D. Fla. Dec. 19, 2014) (considering written arbitration agreement proffered by party seeking to compel arbitration).

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 (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a 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. You may choose the American Arbitration Association . . . or any other organization to conduct the arbitration subject to our approval. You may get a copy of the rules of an arbitration organization by contacting the organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law and the applicable statute of limitations. The arbitration hearing shall be conducted in the federal district in which you reside unless the Seller-Creditor is a party to the claim or dispute, in which case the hearing will be held in the federal district where this contract was executed. We will pay your filing, administration, service

> or case management fee and your arbitrator or hearing fee all up to a maximum of $5000, unless the law or the rules of the chosen arbitration organization require us to pay more. The amount we pay may be reimbursed in whole or in part by decision of the arbitrator if the arbitrator finds that any of your claims [are] frivolous under applicable law. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Provision, than the provisions of this Arbitration Provision shall control. Any arbitration under this Arbitration Provision shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration. Any award by the arbitrator shall be in writing and will be final and binding on all parties subject to any limited right to appeal under the Federal Arbitration Act.
>
> You and we retain the right to seek remedies in small claims court for disputes or claims within that 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. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Provision shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Provision, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Provision shall be unenforceable.

[Id. at 8 (emphasis omitted)]. The contract also contains an Agreement to Arbitrate that provides: "By signing below, you agree that pursuant to the Arbitration Provision on the reverse side 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." [Id. at 5]. Roach signed below this section, [id.]; see also [id. at 2 ¶ 4], and she also signed below the provision stating that she was given a copy of the contract and was "free to take it and review," that she "ha[d] read both sides of this contract, including the arbitration provision on the reverse side," and that she "received a completely filled-in copy when [she] signed [the contract]," [id. at 6].[4]

On November 10, 2016, Roach filed the instant complaint, alleging that Asbury Automotive violated the Truth in Lending Act, 15 U.S.C. § 1601 et seq. ("TILA"), by not providing her a copy of the required disclosures. [Doc. 1]. On January 25, 2017, Asbury Automotive filed the pending motion to compel arbitration, in which it requests an order compelling arbitration and staying judicial proceedings pending arbitration, [Doc. 8], which Roach opposes, [Doc. 13]. The pending motion, having been fully briefed, is now ripe for ruling.

II. DISCUSSION

Asbury Automotive argues that Roach entered into a valid and binding agreement to arbitrate all disputes arising out of her purchase of a vehicle from

[4] The Vehicle Buyer's Order also contains a similar Arbitration Provision, see [Doc. 8-2 at 11], and Roach signed it, stating that she "ha[d] read each page of this Order and Agreement, including the arbitration provision on the reverse side, and agree[d] to its terms" and that she "ha[d] received a completely filled in copy of this Order and Agreement," [id. at 10]; see also [id. at 2 ¶ 5].

Asbury Automotive, including the TILA claim brought in this lawsuit, and that the Court should compel arbitration pursuant to this agreement. See [Docs. 8-1 & 14]. In response, Roach argues that there was not a valid agreement to arbitrate and that "whether an agreement to arbitrate [was] [] entered into is a question to be determined at trial," not a question for an arbitrator to decide. [Doc. 13 at 1 (citation omitted)]. To support her argument, Roach alleges that this "is a case of fraud in the factum" because she "gave [Asbury Automotive] documents which enabled her to drive the vehicle home" for a test drive, but Asbury Automotive "treated their agreement as a sale." [Id. at 2]. Roach further alleges that she "never did receive a copy of the contract," nor was she "given a chance to read it." [Doc. 13-1 (Roach Decl.) at 4 ¶ 25].

A. Legal Standard

There is a strong presumption in favor of arbitration under federal law and the Federal Arbitration Act ("FAA"), which provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The arbitration agreement in this case is governed by the FAA. See

Kong v. Allied Prof'l Ins. Co., 750 F.3d 1295, 1303 (11th Cir. 2014) (citing 9 U.S.C. §§ 1-2)) ("The FAA applies to all contracts involving interstate commerce."); Pitchford v. AmSouth Bank, 285 F. Supp. 2d 1286, 1290 (M.D. Ala. 2003) (citations omitted) (finding transaction involving commercial loan to plaintiff for purposes of financing the purchase of a vehicle was "within the scope of the [FAA]").

The FAA evinces "a strong federal policy in favor of arbitration." Picard v. Credit Sols., Inc., 564 F.3d 1249, 1253 (11th Cir. 2009) (per curiam) (citation omitted). "Accordingly, courts 'rigorously enforce' arbitration agreements," id. (citations omitted), and "'[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,'" Chambers, 41 F. Supp. 3d at 1334 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)). "Federal statutory claims are as a rule arbitrable, and claims under TILA . . . are no exception." Anders v. Hometown Mortg. Servs., Inc., 346 F.3d 1024, 1030 (11th Cir. 2003) (citation omitted) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991); Bowen v. First Family Fin. Servs., Inc., 233 F.3d 1331, 1338 (11th Cir. 2000)).

In resolving a motion to compel arbitration, the Court must determine whether: "(1) there is a valid written agreement to arbitrate; (2) the issue [sought to be arbitrated] is arbitrable under the agreement; and (3) the party asserting the

claims has failed or refused to arbitrate the claims."[5] Wallace v. Rick Case Auto, Inc., 979 F. Supp. 2d 1343, 1347 (N.D. Ga. 2013), adopted at 1345 (alteration in original) (internal marks omitted) (citing Lomax v. Woodmen of the World Life Ins. Soc'y, 228 F. Supp. 2d 1360, 1362 (N.D. Ga. 2002)). "When determining whether the parties agreed to arbitrate their dispute, a court applies state law governing the formation of contracts, giving due regard to the federal policy favoring arbitration." Jordan v. Comcast Cable Commc'ns Mgmt., LLC, 1:14-cv-3622-WSD, 2016 WL 452145, at *4 (N.D. Ga Feb. 4, 2016) (citing Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1368 (11th Cir. 2005)). The law of Georgia applies here. "In Georgia, '[t]o constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate.'" Bazemore v. Jefferson Capital Sys., LLC, 827 F.3d 1325, 1330 (11th Cir. 2016) (alteration in original) (quoting O.C.G.A. § 13-3-1); see also Nat'l Fire Ins. Co. of Hartfod v. Thrasher Contracting, LLC, 142 F. Supp. 3d 1309, 1313 (N.D. Ga. 2015) (citations omitted).

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[5] Roach has not contested that her claim would be covered by the Arbitration Provision, see [Doc. 13], and, it is clear that she has refused to arbitrate her claim by filing this action, see FR 8 Singapore Pte. Ltd. v. Albacore Mar. Inc., 754 F. Supp. 2d 628, 632 (S.D.N.Y. 2010) (first alteration in original) (quoting LAIF X SPRL v. Axtel, S.A. de C.V., 390 F.3d 194, 198 (2d Cir. 2004)) ("In a paradigmatic case, '[a] party has refused to arbitrate if it commences litigation[.]'"). Thus, the sole issue is whether the parties entered into a valid agreement to arbitrate Roach's claim.

B. Merits of Asbury Automotive's Motion, [Doc. 8]

The only issue to be addressed is whether the parties entered into a valid agreement to arbitrate. Asbury Automotive has presented evidence establishing that Roach purchased a vehicle in August 2016, at which time she agreed to resolve any dispute relating to the purchase of her vehicle by neutral, binding arbitration and not by court action. [Doc. 8-2 at 1-2 ¶¶ 3-5, 5-11].[6]

Roach opposes the motion to compel, arguing that this "is a case of fraud in the factum." [Doc. 13 at 2]. In particular, Roach asserts that she signed the documents at issue to "enable[] her to drive the vehicle home" for a test drive, but that Asbury Automotive "treated their agreement as a sale, when that was not what the parties agreed," and that she therefore did not assent to the contract terms. [Id.]. Asbury Automotive responds that Roach has failed to present any evidence to suggest that anyone prevented her from reviewing the documents at issue that she signed and that the documents clearly indicated that she was agreeing to purchase a vehicle and to arbitrate any disputes relating to her purchase. [Doc. 14 at 2-5].

"[F]raud in the factum occurs when a party procures a[nother] party's signature to an instrument without knowledge of its true nature or contents."

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[6] Roach argues that the "contractual documents are well nigh unreadable," [Doc. 13 at 1 n.1], but a review of the documents at issue submitted by Asbury Automotive reveals that the portions relevant to its motion to compel arbitration are legible, see [Doc. 8-2 at 5-11].

Solymar Invs., Ltd. v. Banco Santander S.A., 672 F.3d 981, 994 (11th Cir. 2012) (second alteration in original) (citations omitted); see also Bank of the Ozarks v. Khan, 903 F. Supp. 2d 1370, 1378 (N.D. Ga. 2012) (citation omitted). "[T]he test of the defense of fraud in the factum is that of excusable ignorance of the contents of the writing signed. The party must not only have been in ignorance, but must also have had no reasonable opportunity to obtain knowledge." Straus v. Renasant Bank, 756 S.E.2d 340, 344 (Ga. Ct. App. 2014) (footnote omitted) (citing Khan, 903 F. Supp. 2d at 1378). "[W]here the allegation is one of fraud in the factum, i.e., ineffective assent to the contract, the issue is not subject to resolution pursuant to an arbitration clause contained in the contract documents." Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998, 1000 (11th Cir. 1986) (per curiam) (footnote omitted).

To support her argument, Roach relies on Cancanon, [Doc. 13 at 2]; however, she has failed to present a viable claim of fraud in the factum. In Cancanon, "the plaintiffs, who could not speak English, alleged that the defendant falsely told them that the signed documents at issue, all of which were in English, merely opened money market accounts when, in fact, the documents opened accounts that were designed to allow the trading of securities," and the plaintiffs further asserted "'that they never intended to enter into a securities account agreement and were duped by'

one of the defendant's employees." Goulart v. Snap-On Tools Corp., No. CIV.A. 00-D-361-S, CIV.A. 00-D-521-S, 2000 WL 1863486, at *6 (M.D. Ala. Nov. 30, 2000) (citing Cancanon, 805 F.2d at 999-1001). "The Eleventh Circuit concluded that these allegations effectively alleged and substantiated a fraud in the factum claim," thus holding that "the district court, not the arbitrator, must decide after trial whether 'the plaintiffs gave effective assent to' the agreement at issue." Id. (citation omitted) (quoting Cancanon, 805 F.3d at 1001).

However, "[u]nlike the plaintiffs in *Cancanon*, [Roach] does not allege that [s]he did not understand the agreement or was unable to read it because [s]he, for example, does not speak English." Daley v. Carnival Corp., CASE NO.: 1-15-cv-21943, 2015 WL 12743772, at *3 (S.D. Fla. July 7, 2015); see also Sitarz v. Drexel Burnham Lambert Inc., No. 89 C 8795, 1991 WL 55508, at *2 (N.D. Ill. Apr. 9, 1991) (finding "case [was] distinguishable from *Cancanon*" because one of the plaintiffs "could read the agreements and discuss their terms with [defendant]"). And, although she claims that she "was never given a chance to read [the contract]," [Doc. 13-1 at 4 ¶ 25], as Asbury Automotive points out, [Doc. 14 at 3], "Georgia law is well settled that 'a party to a contract who can read must read, or show a legal excuse for not doing so, and that fraud which will relieve a party who can read must be such as prevents [her] from reading." C&C Family Trust 04/04/05 ex rel. Cox-Ott v.

AXA Equitable Life Ins. Co., 44 F. Supp. 3d 1247, 1260 (N.D. Ga. 2014), aff'd, 654 F. App'x 429 (11th Cir. 2016) (per curiam) (unpublished) (emphasis and citations omitted); see also Brewer v. Royal Ins. Co. of Am., 641 S.E.2d 291, 293 (Ga. Ct. App. 2007) (citations omitted). "This rule is based on the commonsense principle that one cannot claim to be defrauded about a matter equally open to the observation of all parties where no special relationship of trust or confidence exists." Gustafson v. Plyler, CIVIL ACTION FILE NO. 1:14-CV-1364-MHC, 2016 WL 3128514, at *5 (N.D. Ga. Mar. 14, 2016) (citation omitted).

Roach has presented "no evidence to show that [her] ignorance of the [] contents [of the documents at issue] should be excused," id., nor, as Asbury Automotive correctly contends, "has [she] presented [] evidence . . . that [it] took any action to prevent her from reviewing the documents before she signed them," [Doc. 14 at 5]; see generally [Docs. 13, 13-1, & 13-2]; see also Gustafson, 2016 WL 3128514, at *5; Oakwood Mobile Homes, Inc. v. Barger, 773 So. 2d 454, 461 (Ala. 2000) (finding plaintiff's claim of fraud in the factum without merit as he "did not state in his affidavit that he [could not] read or that [defendant] prevented him from reading the document[] he signed" and that plaintiff's reliance on the defendant's representation that it was for another purpose was also without merit as it was "apparent on the face of the document itself" that it was an arbitration agreement). Thus, because

Roach has not claimed that she could not read, that she had any excuse for not reading the documents at issue, or that Asbury Automotive prevented her from reading them, she has not presented a viable fraud in the factum challenge. Gustafson, 2016 WL 3128514, at *5.[7] Therefore, Roach's sole argument in opposition to the motion to compel is without merit, and Asbury Automotive's motion to compel arbitration is due to granted.

In its motion, Asbury Automotive also requests that "this Court enter an order . . . staying all proceedings in this case pending arbitration." [Doc. 8-1 at 1]. However, "[w]hen all claims in a given action must be submitted to arbitration, the [C]ourt may dismiss rather than simply stay the case." Jackson v. Cintas Corp., Civil Action No. 1:03-CV-3104-JOF, 2004 WL 5545444, at *10 (N.D. Ga. Sept. 29, 2004), aff'd, 425 F.3d 1313 (11th Cir. 2005) (per curiam) (citations omitted); see also Kozma v. Hunter Scott Fin., L.L.C., No. 09-80502-CIV, 2010 WL 724498, at *2 (S.D. Fla. Feb. 25, 2010) (collecting cases) (noting that the Eleventh Circuit has "frequently affirmed where the district court compelled arbitration and dismissed the underlying case"); Athon v. Direct Merchs. Bank, No. 5:06-CV-1 (CAR), 2007 WL 1100477, at *6 (M.D.

[7] Moreover, despite her argument that she thought she was merely test driving a vehicle, which she alleges in her response in opposition to Asbury Automotive's motion to compel arbitration, [Doc. 13 at 2], Roach alleged in her complaint that she actually "financed a vehicle from [Asbury Automotive]," and "entered into a consumer credit transaction," with Asbury Automotive, [Doc. 1 at 2 ¶¶ 4-5].

Ga. Apr. 11, 2007) (citation omitted) (citing Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992)) ("In cases such as the one at bar, where all of the plaintiff's claims are subject to arbitration, the Court may dismiss with prejudice, rather than stay, the action."). Because the only claim asserted in Roach's complaint is subject to arbitration, it is **RECOMMENDED** that this action be **DISMISSED** and that Asbury Automotive's request to stay this case pending arbitration be **DENIED**.

III. CONCLUSION

For the reasons stated, it is **RECOMMENDED** that Asbury Automotive's motion to compel arbitration and for stay pending arbitration, [Doc. 8], be **GRANTED IN PART** and **DENIED IN PART**, and that his action be **DISMISSED**.

The Clerk is **DIRECTED** to terminate this reference.

IT IS SO RECOMMENDED, this 14th day of April, 2017.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE