

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JASON LLOYD, an individual,)
on behalf of himself and all)
others similarly situated,)
)
Plaintiff,)
)
v.) Civil Action No. 00-109-SLR
)
MBNA AMERICA BANK, N.A., and)
JOHN DOES 1 through 100,)
inclusive,)
)
Defendants.)

John S. Spadaro, Esquire and Jonathan L. Parshall, Esquire of
Murphy, Spadaro & Landon, Wilmington, Delaware. Counsel for
plaintiff. Of Counsel: Brian R. Strange, Esquire and Gretchen
Carpenter, Esquire of Strange & Hoey, Los Angeles, California.

Kathleen M. Jennings, Esquire of Oberly & Jennings, P.A.,
Wilmington, Delaware. Counsel for defendants. Of Counsel:
Richard C. Pepperman, Esquire, Sharon L. Nelles, Esquire and
Elizabeth P. Martin, Esquire of Sullivan & Cromwell, New York,
New York.

MEMORANDUM OPINION

Dated: February 22, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Jason Lloyd filed this action on behalf of himself and a putative class of MBNA cardholders on February 22, 2000 against defendants MBNA America Bank ("MBNA") and its unidentified officers. Plaintiff alleges violation of the Truth in Lending Act, 15 U.S.C. § 1601, et seq., consumer fraud and breach of contract, arising out of defendants' processing of credit card payments. (D.I. 1) Defendants filed a motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1), or in the alternative, to stay the action in favor of mandatory arbitration pursuant to Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3. (D.I. 6) For the reasons that follow, the court shall dismiss plaintiff's complaint for lack of jurisdiction.

II. BACKGROUND

Plaintiff is a resident of the State of California and a holder of a credit card issued by MBNA. (D.I. 1) Plaintiff contends that on at least one occasion, MBNA failed to credit his account on the day that his payment was received. Plaintiff alleges that MBNA created a "specified cut-off time" for account payments, and when his payment arrived after this time, MBNA improperly credited his payment on the next business day. This resulted in excess finance charges that deprived plaintiff of the "expected benefits of [his] contract." (Id.)

Plaintiff's credit card account with MBNA is governed by a Credit Card Agreement (the "Agreement"), which contains an "Amendments Clause" that provides:

We may amend this Agreement by complying with the applicable notification requirements of federal law and the laws of the State of Delaware. If an amendment gives you the opportunity to reject the change, and if you reject the change in the manner provided in such amendment, we may terminate your right to receive credit and may ask you to return all credit devices as a condition of your rejection. The amended Agreement (including any higher rate or other higher charges or fees) will apply to the entire unpaid balance, including the balance existing before the amendment became effective. We may replace your credit card with another card at any time.

(D.I. 8, Ex. A)

In December 1999, MBNA mailed to plaintiff and other existing cardholders a notice that as of February 1, 2000, MBNA was amending the Agreement to add an "Arbitration Section" that provides for a mandatory arbitration in the event of a dispute:

As provided in your Credit Card Agreement and under Delaware law, we are amending the Credit Card Agreement to include an Arbitration Section. Please read it carefully because it will affect your right to go to court, including any right you may have to have a jury trial. Instead, you (and we) will have to arbitrate claims. You may choose not to be subject to this Arbitration Section by following the instructions at the end of this notice. This Arbitration Section will become effective on February 1, 2000.

(D.I. 8, Ex. B)

The Arbitration Section provides, in pertinent part:

Any claim or dispute ("Claim") by either you or us against the other, or against the employees, agents or assigns of the other, arising from or relating in any way to this Agreement or any prior Agreement or your

account (whether under a statute, contract, tort, or otherwise and whether for money damages, penalties or declaratory or equitable relief), including Claims regarding the applicability of this Arbitration Section or the validity of the entire Agreement or any prior Agreement, shall be resolved by binding arbitration.

The arbitration shall be conducted by the National Arbitration Forum ("NAF"), under the Code of Procedure in effect at the time the Claim is filed. . . . If the NAF is unable or unwilling to act as arbitrator, we may substitute another nationally recognized, independent arbitration organization that uses a similar code of procedure. At your written request, we will advance any arbitration filing fee, administrative and hearing fees which you are required to pay to pursue a Claim in arbitration. The arbitrator will decide who will be ultimately responsible for paying those fees. In no event will you be required to reimburse us for any arbitration filing, administrative or hearing fees in an amount greater than what your court costs would have been if the Claim had been resolved in a state court with jurisdiction. Any arbitration hearing at which you appear will take place within the federal judicial district that includes your billing address at the time the Claim is filed. . . .

No Claim submitted to arbitration is heard by a jury and no Claim may be brought as a class action or as a private attorney general. You will not have the right to act as a class representative or participate as a member of a class of claimants with respect to any Claim. This Arbitration Section does not apply to Claims between you and us previously asserted in any lawsuits filed before the date this Arbitration Section becomes effective. However, this Arbitration Section applies to all Claims now in existence or that may arise in the future.

. . . .

THE RESULT OF THIS ARBITRATION SECTION IS THAT, EXCEPT AS PROVIDED ABOVE, CLAIMS CANNOT BE LITIGATED IN COURT, INCLUDING SOME CLAIMS THAT COULD HAVE BEEN TRIED BEFORE A JURY, AS CLASS ACTIONS OR AS PRIVATE ATTORNEY GENERAL ACTIONS.

(Id.) (emphasis in original)

The notice of amendment also offers an opt-out provision by which cardholders may reject the Arbitration Section. If a cardholder did not want his account to be subject to the Arbitration Section, he was required to notify MBNA in writing by January 25, 2000. MBNA never received such notification from plaintiff, consequently, the Arbitration Section became effective in plaintiff's Agreement on February 1, 2000. (D.I. 8) Plaintiff filed this action on February 22, 2000. (D.I. 1)

III. DISCUSSION

If an arbitration clause is valid and enforceable, a court does not have jurisdiction over the underlying dispute and must refer the case to an arbitrator. See Harris v. Green Tree Financial Corp., 183 F.3d 173, 179-80 (3d Cir. 1999) ("If . . . a court deems a controverted arbitration clause a valid and enforceable agreement, it must refer questions regarding the enforceability of the terms of the underlying contract to an arbitrator, pursuant to section four of the FAA."); Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 228 (3d Cir. 1997) ("In conducting this inquiry the district court decides only whether there was an agreement to arbitrate, and if so, whether the agreement is valid."). The FAA requires the court to look to the principles of contract law to determine if arbitration clauses are valid and enforceable. See 9 U.S.C. § 2. In the case at bar, plaintiff raises several arguments why the Arbitration

Section of the Agreement is unenforceable, none of which has merit. The court shall address each argument seriatim.

A. Arbitration Conflicts with the Truth in Lending Act

The Truth in Lending Act ("TILA") provides for civil liability for lenders who fail to give the disclosures required by the statute, and specifically contemplates class actions as a method of suit. See 15 U.S.C. § 1640. Plaintiff argues that the Arbitration Section is unenforceable because it conflicts with TILA by discouraging class actions. This argument fails in light of the Third Circuit's recent decision in Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), cert. denied, 69 U.S.L.W. 3383 (U.S. Feb. 20, 2001) (No. 00-846), in which the court concluded that there was no congressional intent to preclude the enforcement of arbitration clauses under TILA. The court held that claims under TILA can be arbitrated when a plaintiff seeks to bring a claim on behalf of multiple claimants, even though such arbitration may render class actions to pursue TILA claims unavailable. See id. at 378. Thus, plaintiff's TILA claim in this case is arbitrable.

B. The Arbitration Section Does Not Ensure Vindication of Plaintiff's Rights Under TILA

Plaintiff contends that the cost allocation provision and the choice of forum provision in the Arbitration Section render it unenforceable. Plaintiff bears the burden of proving that the TILA claim is unsuitable for arbitration. See Green Tree

Financial Corp.-Alabama v. Randolph, 121 S. Ct. 513, 522 (2000)

("We believe that where . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."). In this case, the Arbitration Section provides that the arbitrator will decide which party will be ultimately responsible for paying the fees, which will be no higher than the costs that would be incurred in a state court with jurisdiction. Also, MBNA has agreed to advance the arbitration costs upon request of a cardholder. Plaintiff has failed to show that the cost allocation is prohibitive in any way. See, e.g., Green Tree, 121 S.Ct. at 523 (holding that arbitration agreement that does not mention arbitration costs and fees is not per se unenforceable because it fails to affirmatively protect party from potentially steep arbitration costs).

Similarly, plaintiff fails to prove that the choice of forum clause in the Arbitration Section renders it unenforceable. The Arbitration Section requires the arbitration to be conducted by the National Arbitration Forum, or another "nationally recognized, independent arbitration organization that uses a similar code of procedure." The hearing is to take place within the federal judicial district that includes plaintiff's billing

address at the time the claim was filed.¹ Plaintiff offers no persuasive evidence that the National Arbitration Forum is anything but neutral and efficient. See, e.g., Sagal v. First USA Bank, N.A., 69 F. Supp.2d 627 (D. Del. 1999), aff'd, No. 99-5873 (3d Cir. Jan. 18, 2001) (upholding clause that requires arbitration by National Arbitration Forum). Therefore, plaintiff has failed to show that the choice of forum clause renders the Arbitration Section unenforceable.

C. Arbitration Section Does Not Apply to Claims That Arose Prior to February 1, 2000

Plaintiff contends that claims that arose prior to February 1, 2000 are not subject to the arbitration clause, and therefore, his claim is not subject to binding arbitration. In construing the scope of an arbitration clause, courts generally operate under a pronounced "presumption of arbitrability." Battaglia v. McKendry, 233 F.3d 720, 725 (3d Cir. 2000) (quoting AT & T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 650 (1986)). In this case, by not exercising his right to opt-out, plaintiff agreed to arbitrate "all claims now in existence or that may arise in the future." Plaintiff's claim was "in existence" when the Arbitration Section became effective, and plaintiff has presented no persuasive evidence to overcome the presumption that his claim is subject to arbitration.

¹Plaintiff's billing address is American Canyon, California, which is located in the Northern District of California.

D. Plaintiff Did Not Knowingly and Intentionally Waive Right to Jury Trial

Plaintiff argues that he did not knowingly and intentionally waive his right to a jury trial because notification of the Arbitration Section was buried among other "junk mail" documents. However, the inconspicuousness of an arbitration clause does not provide a basis to invalidate an agreement to arbitrate. See Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687-88 (1996) (holding that FAA preempted state statute requiring that arbitration clause be printed on first page in capital letters); Harris, 183 F.3d at 182-83 (holding that neither arbitration clause in fine print on back of standard contracts nor inequality in bargaining power rendered clause unenforceable). Thus, plaintiff's argument is without merit.²

E. Arbitration Section is an Unconscionable Adhesion Contract

Finally, plaintiff's argument that the Arbitration Section is an unconscionable adhesion contract also fails as a matter of law. More than a disparity in bargaining power is needed to show that an arbitration agreement is unconscionable or unenforceable. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power, however, is not a

²Plaintiff's argument that MBNA waived its right to arbitrate because an MBNA officer was quoted in the Wilmington News Journal as saying that MBNA believes that plaintiff's lawsuit has no merit and "looks forward to seeing him in court" is also not persuasive.

sufficient reason to hold that arbitration agreements are never enforceable in the employment context."); Harris, 183 F.3d at 182-83.

F. State Law Claims

Defendants request that the court dismiss plaintiff's suit under Fed. R. Civ. P. 12(b)(1), or in the alternative, order a stay in favor of mandatory arbitration. The FAA provides that courts shall enter a stay pending arbitration when issues brought before the courts are subject to arbitration clauses. 9 U.S.C. § 3. Courts have interpreted the provision, however, to permit dismissal if all issues raised in an action are arbitrable and must be submitted to arbitration. See Pelegrin v. United States Filter, 1998 WL 175880, at *4 (D. Del. Mar. 31, 1998); Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992); Sparling v. Hoffman Construction Co., Inc., 864 F.2d 635, 638 (9th Cir. 1988); Hoffman v. Fidelity and Deposit Co., 734 F. Supp. 192, 195 (D.N.J. 1990). Since plaintiff's consumer fraud and breach of contract claims are also covered by the Arbitration Section, the court will not retain jurisdiction pending the completion of arbitration.

IV. CONCLUSION

For the reasons stated, defendants' motion to dismiss in favor of binding arbitration is granted. The court will not

retain jurisdiction pending the completion of arbitration. An appropriate order shall issue.

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JASON LLOYD, an individual,)
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MBNA AMERICA BANK, N.A., and)
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inclusive,)
)
Defendants.)

O R D E R

At Wilmington, this 22nd day of February, 2001, consistent with the memorandum opinion issued this same day,

IT IS ORDERED that defendants' motion to dismiss in favor of binding arbitration (D.I. 6) is granted. The court will not retain jurisdiction pending the completion of arbitration.

United States District Judge