

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DIANE O. DABNEY :
Plaintiff, :
 :
v. : CIVIL ACTION No. 00-5831
 :
OPTION ONE MORTGAGE CORP. AND :
JOHN DOE "A" MORTGAGE BROKER, :
Defendants, :

MEMORANDUM

Padova, J.

April , 2001

Plaintiff Diane O. Dabney ("Dabney") brings this action against Defendants, Option One Mortgage Corporation ("Option One") and John Doe "A" Mortgage Broker in connection with a loan agreement. Before the Court is Defendant Option One's Motion to Dismiss Plaintiffs' Complaint and Compel Arbitration. For the reasons that follow, the Court will grant in part and deny in part Defendant's Motion. The Court concludes that an enforceable agreement to arbitrate has been made, stays this action and refers the matter to arbitration.

I. BACKGROUND

The Complaint alleges the following facts. Dabney entered into a loan agreement with Option One on March 13, 2000, for the amount of \$28,000. The loan was to be for repairs to Dabney's home. Dabney alleges that Defendants actively solicited her for the loan and then directed her to use a specific contractor who received virtually all of the loan proceeds and failed to do any work. Dabney has filed this action under the Truth in Lending Act, 15 U.S.C. § 1601 et seq., the Home Ownership and Equity Protection Act of 1994, 15 U.S.C. § 1639(a) and the Real Estate Settlement

Procedures Act, 12 U.S.C. § 2601 et seq. Dabney also made a claim for fraud and other violations under Pennsylvania law.

II. DISCUSSION

In the loan transaction, Plaintiff and Defendant executed an Agreement for the Arbitration of Disputes (“Arbitration Agreement”). (See Def. Ex. A.) Defendant argues that the Arbitration Agreement is governed by the Federal Arbitration Act (“FAA”), the subject matter of the action is within the scope of the Arbitration Agreement and, therefore, the Plaintiff’s claims must be arbitrated.

The Arbitration Agreement states that it is governed by the FAA. (Def. Ex. A.) The FAA provides:

[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . 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 (1994). Under the FAA, federal courts must compel arbitration if a party to an arbitration agreement institutes an action that involves an arbitrable issue and one party to the agreement has failed to enter arbitration. 9 U.S.C. §§ 3, 4 (1994); see Southland Corp. v. Keating, 465 U.S. 1, 11-12 (1984). On a motion to compel arbitration, the court must determine (1) whether the parties entered into a valid arbitration agreement, and (2) whether the specific dispute falls within the scope of that agreement. John Hancock Mutual Life Ins. Co. v. Olick, 151 F.3d 132, 137 (3d Cir. 1998). If the court answers these two questions in the affirmative, the court must either stay or dismiss the proceeding in favor of arbitration. Id.; Seus v. John Nuveen Co., Inc., 146 F.3d 175, 179

(3rd Cir.), cert. denied, 525 U.S. 1139 (1999).

It is undisputed that Plaintiff's claims fall within the Arbitration Agreement's scope. The Arbitration Agreement states that "you and we agree that any dispute ... shall be settled ... by arbitration in accordance with this agreement." (Def. Ex. A.) Further, a dispute is defined as

any claim or controversy of any nature whatsoever arising out of or in any way related to the Loan; the arranging of the Loan; any application, inquiry or attempt to obtain the loan; any Loan documents; the servicing of the Loan; or any other aspect of the Loan transaction. It includes, but is not limited to, federal or state contract, tort, statutory, regulatory, common law and equitable claims.

Id.

The primary issue, therefore, is whether the Arbitration Agreement is enforceable. The FAA presumptively favors the enforcement of arbitration agreements by making such agreements enforceable to the same extent as other contracts. Harris v. Green Tree Fin. Corp., 183 F.3d 173, 178 (3d Cir. 1999). State law applies to issues concerning the validity, revocability and enforceability of contracts. Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 684 (1996); Northwestern Nat'l Life Ins. Co. v. U.S. Healthcare, Inc., No. Civ.A.96-4659, 1998 WL 252353, at *4 (E.D. Pa. May 11, 1998).

Plaintiff presents several arguments contesting the enforceability of the Arbitration Agreement under Pennsylvania law. Plaintiff first argues that Defendant failed to prove that she effectively waived her constitutional right to a judicial forum. She also maintains that she will be precluded from vindicating her federal statutory rights in the arbitral forum due to the existence of large arbitration costs. Finally, Plaintiff argues that the Arbitration Agreement is an adhesion contract whose essential terms are unconscionable thereby rendering it unenforceable. The Court will address each argument in turn.

A. Waiver

Plaintiff argues that Defendant bears the burden of proving that she knowingly and voluntarily waived her rights to a judicial forum which it has failed to meet. The Court rejects Plaintiff's contention. An inquiry into whether a party entered an agreement knowingly and voluntarily is inconsistent with the FAA and federal law. Seus, 146 F.3d at 183-84; see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that a court can decline to enforce an arbitration contract if and only if the party resisting arbitration can point to a generally applicable principle of contract law under which the agreement could be revoked). Nothing short of a showing of fraud, duress, mistake or some other ground recognized by the law applicable to contracts generally excuses the court from enforcing an arbitration agreement. Seus, 146 F.3d at 184. Plaintiff's argument with respect to waiver does not establish any recognized legal ground for the revocation of contracts.

The cases Plaintiff cites in support of her argument are inapposite. See Fuentes v. Shevin, 407 U.S. 67 (1972); Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084 (3d Cir. 1988). Fuentes primarily involved a constitutional challenge to a state replevin statute. Fuentes, 407 U.S. at 69-70. In connection to a contractual provision permitting the seller of a good to repossess the item upon default, Fuentes only held that the contract provision at issue did not actually contain a waiver of any constitutional rights. Id. at 95-96. Erie involved a contract that provided for the complete waiver of constitutional rights, as opposed to merely providing for adjudication of those rights in a particular forum as is the case here. Erie, 853 F.2d at 1084.

B. Arbitration Fees

Plaintiff next argues that the Arbitration Agreement should be invalidated due to the

existence of prohibitively large arbitration costs. Courts have acknowledged that large arbitration costs could preclude a litigant from effectively vindicating federal statutory rights. Green Tree Financial Corp. Alabama v. Randolph, 121 S.Ct. 513, 522 (2000). The party seeking to avoid arbitration bears the burden of establishing that likelihood of incurring such prohibitive costs. Id. at 522. While an arbitration agreement's mere silence with respect to costs and fees is clearly insufficient to render it unenforceable, id. at 523, some courts have refused to enforce agreements that require aggrieved plaintiffs to pay all or part of the arbitrator's fees. See, e.g., Shankle v. B-G Maintenance Mgmt. of Colorado, Inc., 163 F.3d 1230, 1234 (10th Cir. 1999); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997). Other courts, however, have refused to adopt a per se rule rendering unenforceable provisions that require the parties to split or the loser TO pay the arbitrator's fees or prohibiting arbitration under conditions where the arbitrator may so require. See, e.g., Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752, 763-64 (5th Cir. 1999); McCaskill v. SCI Mgmt. Group, No. Civ.A.00-1543, 2000 WL 875396, at *3- *4 (N.D. Ill. June 22, 2000); Arakawa v. Japan Network Group, 56 F.Supp.2d 349, 354- 55 (S.D.N.Y. 1999); Palmer-Scopetta v. Metropolitan Life Ins. Co., 37 F.Supp.2d 1364, 1370 (S.D. Fla. 1999). The United States Court of Appeals for the Third Circuit has not decided this issue.

The Arbitration Agreement provides that the arbitration shall be administered by the American Arbitration Association ("AAA") pursuant to its commercial arbitration rules. (Def. Ex. A at 1.) Furthermore, the Agreement requires each party to "bear its own costs and expenses, including attorney's fees, that the party incurs with respect to the arbitration." (Id.) Although the Arbitration Agreement does not specifically mention arbitrator's fees, Defendant concedes that the arbitrator's compensation is included within the Agreement's 'costs and expenses' language.

Plaintiff submits evidence of the administrative fees and arbitrator's compensation billed under the AAA rules and argues that she has no savings or other means to pay such fees and costs. (See Pl. Ex. A.)

The Court concludes that the Arbitration Agreement is not unenforceable because any risk of Plaintiff bearing such costs is speculative.¹ The AAA rules submitted by Plaintiff and incorporated into the Arbitration Agreement contain safeguards protecting plaintiffs from inordinately high arbitration costs. (See Pl. Ex. A.) Specifically, the AAA rules provide that filing and administrative fees may be reduced in cases of extreme hardship and are subject to final apportionment by the arbitrator. (Pl. Ex. A R-51.) See also McCaskill, 2000 WL 875396, at *4. To the extent that the Arbitration Agreement requires Plaintiff to pay her own attorney's fees and litigation expenses, such burden is one borne by any litigant in federal court as well. Furthermore, the AAA rules permit the arbitrator to include payment of litigation expenses in an award. (Pl. Ex. A R-52.)

C. Unconscionability

Finally, Plaintiff argues that the Arbitration Agreement is an adhesion contract whose essential terms are unconscionable thereby rendering it unenforceable. Plaintiff contends that the terms of the Arbitration Agreement unreasonably favor Defendant and that because of the financial obligation she had entered into with the contractor, at the time of the signing of the Arbitration Agreement, Plaintiff had no meaningful choice regarding the acceptance of those terms.

An adhesion contract is a "standardized contract form offered to consumers of goods and

¹While the Arbitration Agreement provides that the party failing to enter arbitration following a proper demand to do so "shall bear all the costs and expenses including reasonable attorney's fees, incurred by the other party compelling arbitration," these costs, however, are similar to those that the Plaintiff faces in litigating in a judicial forum and are not sufficient to invalidate the Arbitration Agreement. (See Def. Ex. A.)

services on [an] essentially 'take it or leave it' basis without affording [the] consumer a realistic opportunity to bargain and under such conditions that [the] consumer cannot obtain [the] desired product or services except by acquiescing [to the] form contract." Denlinger, Inc. v. Dendler, 608 A.2d 1061, 1066 (Pa. Super. Ct. 1992). The fundamental nature of this type of contract is such that the consumer who is presented with it has no choice but to either accept the terms of the document as they are written or reject the transaction entirely. Leidy v. Deseret Enterprises Inc., 381 A.2d 164, 167 (Pa. Super. Ct. 1977). A contract of adhesion is invalid only where its terms unreasonably favor the other party. See Witmer v. Exxon Corp., 434 A.2d 1222, 1228 (Pa. 1981).

In evaluating claims of unconscionability, courts generally recognize two categories, procedural, or "unfair surprise," unconscionability and substantive unconscionability. Harris, 183 F.3d at 181 (citations omitted). Procedural unconscionability pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language, or terms that are not expected by the contracting party. Id.

Plaintiff's argument that the Arbitration Agreement failed to disclose that she was waiving constitutional rights or the costs of arbitration relates to the issue of procedural unconscionability. The Court disagrees that the Arbitration Agreement was procedurally unconscionable. Contrary to Plaintiff's characterization, the Arbitration Agreement does not provide for waiver of any rights or prevent the signer from raising violations of any rights in any forum, but rather requires vindication of such rights in an alternate forum. Although the Arbitration Agreement does not delineate the costs of arbitration, it states that "[e]ach arbitration...will be administered by the American Arbitration Association (the 'AAA')" and advises how to contact the AAA to get further information. (Def. Ex. A.) Plaintiff had sufficient information available to obtain the costs of arbitration if she so desired.

Substantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent. Harris, 181 F.3d at 181. To establish substantive unconscionability, the plaintiff must show that the contractual terms are unreasonably favorable to the drafter, and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions. Id.

Plaintiff argues that she had no meaningful choice in signing the Arbitration Agreement because she had already executed a contract with the repair contractor. The Court rejects this argument. The relevant inquiry with regard to the absence of meaningful choice is whether "the party signing the contract lacked a meaningful choice in accepting the challenged provision." Denlinger, Inc. v. Dendler, 608 A. 2d 1061, 1068 (Pa. Super. Ct. 1992). There is no evidence that Plaintiff attempted to negotiate over the challenged provision or that she did not have the opportunity to obtain other financing sources if the provision was unacceptable to her. See id. The mere existence of a debt is not sufficient to preclude meaningful choice with respect to acceptance of the Arbitration Agreement.

Even if Plaintiff could establish the lack of a meaningful choice, the Court further finds that the terms of the Arbitration Agreement do not unreasonably favor Defendant. The inequality of bargaining power by itself is not a valid basis upon which to invalidate an arbitration agreement. See Great Western Mortg. Corp. v. Peacock, 110 F.3d 222, 229 (3d Cir. 1997) (citing Gilmer, 500 U.S. at 33). It is also of no legal consequence that the Arbitration Agreement allowed the Defendant to retain rights to litigate while denying them to the Plaintiff. See Harris, 183 F.3d at 183.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration is granted in part and denied in part. The Court stays this action pending arbitration. An appropriate Order follows.

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ORDER

AND NOW, this day of April, 2001, upon consideration of Defendants' Motion to Dismiss and Compel Arbitration and Plaintiffs' opposition thereto, **IT IS HEREBY ORDERED** that Defendants' Motion is **GRANTED IN PART** and **DENIED IN PART**:

1. This action is **STAYED** pending arbitration of the claims raised in Plaintiff's complaint.
2. The Clerk of Court shall mark this action **CLOSED** for statistical purposes and place the matter in a Civil Suspense File. The Court shall retain jurisdiction and the case may be restored to the trial docket when the action is in a status so that it may proceed to final disposition. This Order shall not prejudice the rights of the parties to this litigation.
3. The preliminary pre-trial conference scheduled for April 25, 2001, is cancelled.

BY THE COURT:

John R. Padova, J.