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

MARY MONTGOMERY, Plaintiff, v. DECISION ONE FINANCIAL NETWORK INC., et al., Defendants.	: : : : : : : : :	CIVIL ACTION No. 04-4551

MEMORANDUM AND ORDER

J. M. KELLY, J. **MARCH 1, 2005**

Presently before the Court is Defendant Decision One Mortgage Company LLC's ("Defendant") Motion to Dismiss in favor of Arbitration ("Motion"), Plaintiff Mary Montgomery's ("Plaintiff") Response, and Defendant's Reply thereto. Defendant's Motion moves this Court to dismiss Plaintiff's Complaint and to compel Plaintiff to comply with the claims resolution provisions contained in the parties' Arbitration Agreement (the "Arbitration Agreement"). Plaintiff argues that the Arbitration Agreement is unconscionable and, therefore, unenforceable under the Federal Arbitration Act and Pennsylvania law. Defendant counters that there is no relevant Pennsylvania authority on this issue, and that the Arbitration Agreement is enforceable pursuant to case law of the United States Court of Appeals for the Third Circuit. For the following reasons, Defendant's Motion to dismiss this action and compel arbitration is **GRANTED**.

I. BACKGROUND

Plaintiff Mary Montgomery is a consumer and homeowner in Philadelphia County. In or around September 2000, Plaintiff and Defendant Decision One Mortgage Company LLC executed a note and mortgage on Plaintiff's residence in favor of Defendant. At this time, the parties also signed the Arbitration Agreement requiring any disputes concerning the credit transaction between those two parties to be resolved through arbitration.

In May 2002, foreclosure was initiated against Plaintiff in the Court of Common Pleas of Philadelphia County. Dissatisfied with the terms of the loan and Defendant's alleged actions with regard to the loan, Plaintiff filed her Complaint in this matter on September 27, 2004. Thereafter, on November 18, 2004, Defendant filed its Motion seeking dismissal of Plaintiff's Complaint in favor of arbitration pursuant to the Arbitration Agreement and the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-16.

II. STANDARD OF REVIEW

The appropriate standard of review for a motion to stay proceedings in favor of arbitration pursuant to 9 U.S.C. § 3 is Federal Rule of Civil Procedure 56(c)'s summary judgment standard. Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 n.9 (3d Cir. 1980). Pursuant to Federal Rule of

Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

When a court decides that as a matter of law an issue exposed to the litigation is referable to arbitration pursuant to an arbitration agreement, section 3 of the FAA instructs the court to stay the entire action. See 9 U.S.C. § 3. If, however, all claims are subject to arbitration, then a court may dismiss the action instead of staying it. Seus v. John Nuveen Co., Inc., 146 F.3d 175, 179 (3d Cir. 1998) (stating that an action may be dismissed where all the claims are arbitrable). At that time, a court may also compel arbitration in accordance with the terms of the parties' agreement. See 9 U.S.C. § 4.

III. DISCUSSION

In the instant matter before the Court, the parties concede that there are no genuine issues of material fact and that, if enforceable, the Arbitration Agreement covers all Plaintiff's claims. Accordingly, this action may be dismissed should the Court determine that the Arbitration Agreement is enforceable. See Seus, 146 F.3d at 179.

Plaintiff contends that the FAA allows this Court to find the Arbitration Agreement unenforceable because the terms of the agreement are unconscionable pursuant to Pennsylvania case law. In support of this contention, section 2 of the FAA provides, in pertinent part:

> A written provision in . . . 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, . . . 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 (emphasis added). Under the FAA, Plaintiff may invoke the contract defense of unconscionability to revoke the Arbitration Agreement if its terms are unconscionable. See Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening § 2").

In support of her unconscionability argument, Plaintiff explains that the Arbitration Agreement's claims resolution provisions reserve access to the courts for Defendant while excluding Plaintiff from such a remedy. According to Plaintiff, Lytle v. Citifinancial Servs., Inc., 810 A.2d 643 (Pa. Super. 2002) dictates that these terms are presumptively unconscionable.

In Lytle the Pennsylvania Superior Court held that the lender who reserves access to the courts for itself to the

exclusion of the consumer "creates a presumption of unconscionability." Lytle, 810 A.2d at 665. The Superior Court went on to hold that in the absence of compelling business reasons for reserved access to the courts such an arbitration provision is unconscionable and unenforceable. Id. Plaintiff contends that Lytle "leaves no question" that under Pennsylvania law the Arbitration Agreement at issue is unconscionable and unenforceable. (Pl.'s Resp. at 8.)

While Plaintiff urges this Court to follow Lytle, she admits that there is no Pennsylvania Supreme Court precedent for Lytle's holding that a unilateral reservation of access to the courts is presumptively unconscionable. (See Pl.'s Resp.) Absent a conflicting decision from the Pennsylvania Supreme Court, this Court is bound by the decisions of the United States Court of Appeals for the Third Circuit in determining issues of state law. See Stepanuk v. State Farm Mutual Auto. Ins. Co., No. 92-6095, 1995 U.S. Dist. LEXIS 13581, *6-7 (E.D. Pa. Sept. 18, 1995) (finding "[i]t is axiomatic that if another panel of the Court of Appeals for the Third Circuit is bound by a previous panel's construction of state law then district courts within the Third Circuit are also bound by that construction").[1] Therefore, our

[1] Moreover, for the reasons explained by the court in Choice v. Option One Mortgage Corp., No. 02-6626, 2003 U.S. Dist. LEXIS 9714 (E.D. Pa. May 13, 2003), we are not persuaded by Plaintiff's legal argument that Superior Court's holding in Lytle is indicative of Pennsylvania law. See Choice, 2003 U.S. Dist.

determination as to whether the terms of the Arbitration Agreement are unconscionable will be made pursuant to Third Circuit precedent.

The following two-part test is used to determine whether the terms of an arbitration agreement are unconscionable: (1) that there is no meaningful choice on the part of the other party regarding acceptance of the provisions, and (2) that the contractual terms are unreasonably favorable to the drafter. Worldwide Underwriters Ins. Co. v. Brady, 973 F.2d 192, 196 (3d Cir. 1992). Taking the evidence in the light most favorable to Plaintiff, we presume that Plaintiff lacked a "meaningful choice" when signing the Arbitration Agreement thereby fulfilling the first part of the test. The second part involves a decision as to whether the Arbitration Agreement unreasonably favors Defendant. This part requires us to review the terms of the Arbitration Agreement.

Plaintiff objects to the way Defendant drafted the Arbitration Agreement's exceptions to arbitration. The Arbitration Agreement excepts certain claims from the requirement of arbitration of all disputes, including "ancillary or preliminary remedies, judicial or otherwise, for the purpose of

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LEXIS 9714, *26-27 (Yohn, J.) (explaining that Lytle is not predictive of Pennsylvania law because the court in Lytle relied heavily on a $15,000 cut-off provision and cited unpersuasive authority from other jurisdictions that interpret state laws outside of Pennsylvania).

realizing upon, preserving, protecting or foreclosing upon any property involved in any Claim or subject to the loan documents." (Def.'s Mot. Ex. A; Pl.'s Resp. Ex. B.) Plaintiff argues that in practice these exceptions to arbitration unreasonably favor Defendant because they could only be available to Defendant. Plaintiff's argument rests on whether these unilateral exceptions fulfill the second part of the unconscionability test. We find that the second part of the test has not been met.

Plaintiff's argument against enforcement of the Arbitration Agreement is that it does not treat both parties equally because it reserves access to the courts for Defendant alone. The Third Circuit, however, has specifically held that a defendant's unilateral reservation of the right to litigate certain arbitrable claims does not unreasonably favor a defendant. See Harris v. Green Tree Fin. Corp., 183 F.3d 173, 180-83 (3d Cir. 1999); see also Choice, 2003 U.S. Dist. LEXIS 9714, at *20-28 (discussing Third Circuit precedent, which rejects unconscionability arguments that are based upon of lack of mutuality). Harris addressed a factually similar case and found that the parties to an arbitration agreement need not exchange reciprocal promises for the agreement to be enforceable. Harris, 183 F.3d at 180. The Harris court further stated, "[i]t is of no legal consequence" that an arbitration agreement's drafter unilaterally retained the right to litigate arbitrable issues in

court. Id. at 181. As we rely on Harris for our decision, Plaintiff has failed to meet the second requirement of the unconscionability test because she has not presented contractual terms that unreasonably favor Defendant. The Arbitration Agreement is, therefore, enforceable.

IV. CONCLUSION

Taking the evidence in the light most favorable to Plaintiff, the Arbitration Agreement is enforceable. The parties do not dispute that the Arbitration Agreement, if enforceable, covers all of Plaintiff's claims. As all Plaintiff's claims are subject to arbitration, retaining jurisdiction would serve no purpose. Therefore, the Court **GRANTS** Defendant's Motion to dismiss this action and compel arbitration. See Seus, 146 F.3d at 179.

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O R D E R

AND NOW, this **1st** day of March, 2005, after consideration of Defendant Decision One Mortgage Company LLC's ("Defendant") Motion to Dismiss in favor of Arbitration ("Motion") (Doc. No. 6), Plaintiff Mary Montgomery's Response (Doc. No. 10), and Defendant's Reply (Doc. No. 12) thereto, it is **ORDERED** that Defendant's Motion (Doc. No. 6) is **GRANTED** as follows:

1. Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 3-4, all claims are **DISMISSED WITHOUT PREJUDICE**; and

2. The parties **SHALL** arbitrate these claims pursuant to the terms of the their Arbitration Agreement.

BY THE COURT:

/s/ James McGirr Kelly, J.
JAMES McGIRR KELLY, J.