IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

TERRY YORTY, Plaintiff	**CASE NO. 15CV001865**
	JUDGE VINCENT A. CULOTTA
vs.	**JUDGMENT ENTRY**
DELRAY CAPITAL, LLC, et al., Defendants	

This matter comes before the Court for consideration of the Defendant National Credit Adjusters' Motion to Stay Proceedings and Compel Arbitration, Named Plaintiff's Memorandum in Opposition to Defendant's Motion to Stay and Compel Arbitration, and the Reply Brief in Support of Defendant National Credit Adjusters' Motion to Stay Proceedings and Compel Arbitration.

STATEMENT OF THE CASE

Terry Yorty, Individually and on Behalf of a Class of Individuals, initiated this action against Delray Capital, LLC, Cooper Financial, LLC, Delaware Solutions, LLC, Mark Gray, Kelly Brace, National Credit Adjusters and John Does I-X alleging violation of the Fair Debt Collection Practices Act, 15 U.S.C. §1692. Plaintiff alleges that Defendants are involved in an ongoing scheme whereby they extort the payment of money from consumers who have allegedly failed to repay payday loans. Specifically, Plaintiff asserts that he obtained a payday loan from Ace Cash Express on or about January, 2014, and failed to repay it. Plaintiff alleges that Ace Cash Express charged off the debt and sold it to Defendant Delray Capital, LLC. Plaintiff alleges that Delray Capital, LLC placed the debt for collections with Delaware Solutions, LLC.

Plaintiff contends that on or about August, 2015, Defendants' employee or agent placed a call to Plaintiff's cell phone and left a message that he is a "processing server" for the Crawford County District Court with authority to come to Plaintiff's home/workplace to "sign a summons" for a court appearance next week. Plaintiff was advised to call a number to avoid "further legal action." Plaintiff alleges that he called the number and the call was answered by an employee or

agent who identified himself as "Tom Wilson" and answered the phone "law offices." Plaintiff alleges that "Mr. Wilson" told him his case was "going over to the courts so they can serve you." Plaintiff further alleges that he placed a second call to get more information about the debt and spoke to someone who told him the debt was being "sent out." Plaintiff indicates that he asked to speak with a supervisor and he was transferred to someone who identified himself as "Tom Wells, Director for Delaware Solutions." Plaintiff indicates that Mr. Wells denied that Delaware Solutions was a debt collector and made other representations about service on the summons. Plaintiff alleges that the representations were part of a standard script used to extort money.

Plaintiff further alleges that similar false accusations have been made against individuals in the purported class. Plaintiff contends that Defendants' behavior amounts to unlawful harassment of consumers and false representation. Plaintiff alleges that Defendants did not contact him in writing within the time-period prescribed in 15 U.S.C. §1692(g) and did not inform Plaintiff or class members that they have the right to request validation of the debt. Plaintiff alleges that Defendants' conduct amounts to various violations of the Fair Debt Collection Practices Act. Plaintiff further makes class action allegations and indicates that he is seeking statutory damages as well as attorney fees and the costs of this action.

At this time, Defendant National Credit Adjusters is seeking an Order staying this case and compelling the matter to arbitration before the American Arbitration Association.

DEFENDANT NATIONAL CREDIT ADJUSTERS' MOTION TO STAY AND COMPEL ARBITRATION

Defendant contends that an Order staying the case and compelling it to arbitration is warranted because Plaintiff's claims come squarely within a broad Arbitration Agreement signed by Plaintiff. Specifically, Defendant contends that the Arbitration Agreement provides that any dispute will be resolved by binding arbitration. Defendant notes that the Arbitration Agreement contained a provision by which Plaintiff could reject it by sending his name, address, telephone number, and other information to Defendant's counsel within thirty days of execution of the Agreement. Defendant maintains that inasmuch as Plaintiff did not formally reject the Arbitration Agreement as provided by the Agreement, it is binding on him now.

PLAINTIFF'S OPPOSITION TO MOTION TO STAY AND COMPEL ARBITRATION

Plaintiff Terry Yorty opposes Defendant National Credit Adjusters' motion. Plaintiff indicates that although NCA seeks to compel arbitration pursuant to an Arbitration Agreement purportedly signed by Plaintiff as part of a Credit Services Agreement, the Agreement was between Plaintiff and FSH Credit Services, LLC. Plaintiff contends that inasmuch as Defendant NCA was not a party to the Credit Services Agreement, it does not have the right to arbitration. Plaintiff notes that Defendant NCA relies upon a provision in the Credit Services Agreement which provides that the Arbitration Agreement is binding on:

> any person that has or acquires financial interest or rights under the Credit Services Agreement * * * any person that has or acquires financial interest or rights under any loan agreement or promissory note you execute in connection with the Credit Services Agreement and * * * with respect to any of the foregoing, any affiliated persons or companies, or any of their heirs, assigns, personal representatives, officers, directors, owners, shareholders, principals, agents attorneys, lenders, sureties or insures.

However, Plaintiff maintains that Defendant's motion to stay and compel arbitration should be denied because Defendant failed to comply with this Court's Orders regarding discovery. Plaintiff notes that the Defendant agreed at the time of the Case Management Conference to provide a copy of the agreement through which it acquired rights to collect on Plaintiff's alleged debt to Plaintiff and to also allow a company representative to be deposed. Defendant then disavowed any agreement which necessitated a telephone conference with the Court. Thereafter, the Court issued an Order requiring Defendant to produce the aforementioned agreement and a representative for a telephone deposition within ten days of the filing of a Stipulated Protective Order. Plaintiff indicates that although the Stipulated Protective Order was filed on October 3, 2016, Defendant did not produce the agreement until October 26, 2016. Plaintiff further indicates that a deposition of Mr. Moore, company representative, has not occurred. Therefore, Plaintiff asks that the Court strike the Motion to Stay and Compel Arbitration as a sanction for failure to comply with the Court's Order.

Alternatively, Plaintiff argues that Defendant has failed to satisfy its burden to prove that it has a right to enforce the Arbitration Agreement. Plaintiff notes that pursuant to *EMCC Invest. Ventures v. Rowe*, 11th Dist. Case No. 2011-005320, 12-Ohio-4462, the Eleventh District Court of Appeals held that a party who was not a party to the agreement to arbitrate bears the additional burden of proving the "chain of title"—the existence of an assignment that gives it the right to enforce the arbitration. Plaintiff maintains that the two pieces of evidence provided by

Defendant to support its motion do not show chain of title. First, Plaintiff argues that the Credit Services Agreement between FSH Credit Services and Plaintiff does not make it clear that FSH Credit Services is not offering a loan to Plaintiff. Rather, FSH Credit Services acts as a broker by finding a lender willing to offer a loan to Plaintiff and no one other than FSH Credit Services and Plaintiff are parties to the agreement. Second, Plaintiff argues that the affidavit of Nicholas Moore incorrectly claims that the subject Credit Services Agreement and accompanying arbitration agreement is between Plaintiff and Ace Cash Express. Plaintiff asserts that Mr. Moore does not explain how NCA obtained rights under the CSA, nor does he describe the nature of the rights acquired. Plaintiff maintains that the evidence is insufficient to demonstrate chain of title. Plaintiff further asserts that the document provided to Plaintiff by Defendant on September 26, 2016,[1] is a contract between NCA and Cash Express, Inc. Plaintiff notes that NCA offers no explanation as to how an assignment to it from ACE Cash Express, Inc. is relevant to the instant action. Thus, Plaintiff maintains that the Motion to Stay and Compel Arbitration should be denied.

Plaintiff also argues that Defendant waived any right it may have to enforce the Arbitration Agreement by filing a Motion to Dismiss. Plaintiff notes that Defendant sought dismissal of the action on the merits prior to filing any motion to enforce an Arbitration Agreement. Plaintiff again relies upon *EMCC Invest. Ventures, Id.* wherein the Court held that "[t]o prove waiver the opposing party merely needs to show: (1) that the party waiving the right knew of the existing right to arbitration and (2) that party acted inconsistently with that right."

Plaintiff maintains that Defendant NCA was aware of the Credit Services Agreement and its accompanying arbitration provision. Plaintiff notes that in his affidavit, Mr. Moore incorporates by reference a letter dated February 10, 2016, and addressed to Plaintiff's counsel from Defendant's counsel. Therein, Defendant's counsel states: "This letter shall serve as written notice of NCA's intention to initiate or require arbitration in the event that it is not dismissed from the Litigation voluntarily within 10 days of today's date, or by way of the Court's ruling on a Motion to Dismiss."

Plaintiff further asserts that actively participating in litigation prior to moving for arbitration is considered to be inconsistent with the right to arbitration. Plaintiff notes that in *EMCC Invest. Ventures, Id.*, the Court noted:

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[1] The Court believes this date should be October 26, 2016.

> 'Filing a motion for summary judgment is inconsistent with the right to arbitrate because it places the dispute squarely before the court for resolution on the merits and demonstrates an election to proceed with litigation as opposed to arbitration. As a result, many courts hold that filing a motion for summary judgment constitutes waiver of the right to arbitrate.' *Griffith v. Linton*, 130 Ohio App.3d 746, 753.

Plaintiff further maintains that a Civ.R. 12(B)(6) dismissal for failure to state a claim is also a judgment on the merits. Plaintiff contends that NCA plainly stated its intention to take advantage of the judicial system by seeking a determination on the merits before requesting arbitration and has therefore waived its right to seek arbitration.

DEFENDANT'S REPLY TO THE OPPOSITION TO MOTION TO STAY AND COMPEL ARBITRATION

Defendant National Credit Adjusters, Inc. has filed a reply to Plaintiff's opposition arguing that it did not fail to comply with any Order regarding discovery and there are no grounds under Civ.R. 37 to strike Defendant's motion.

Defendant further contends that Plaintiff's claims are subject to arbitration and the provision applies to both Plaintiff and NCA as provided for in the contract. Defendant notes that Plaintiff alleged in his own Complaint that he obtained a payday loan from Ace Cash Express, but now alters his position in an attempt to avoid arbitration. Defendant contends that Ace Cash Express charged off the account and then Plaintiff bought it from Ace Cash Express. Defendant notes that the assignment by which NCA was assigned the contract has been filed under seal.

Defendant contends that *EMCC Invest. Ventures v. Rowe*, 2012-Ohio-4462 is distinguishable because in that case, the Plaintiff relied upon a single statement in an affidavit whereas in this case the actual assignment has been produced as evidence of the right to arbitrate. Defendant notes that the terms of the Arbitration Agreement provide:

> **Coverage and Definitions**: This Arbitration Agreement is (sic) benefits and is binding upon you and us, Including: (1) ACE; (2) any company that owns or controls ACE (a "Parent Company"); (3) any company that is controlled by a Parent Company and/or ACE; (4) any person or company that has or acquires a financial interest or rights under this Credit Services Agreement; (5) any person or company that has or acquires a financial interest under any loan agreement and/or promissory note that you execute in connection with the Credit Services Agreement. . .

Defendant contends that under the terms set forth above, the Arbitration Agreement is binding on Ace Cash Express, Inc. as a parent company of FSH Credit Services, LLC. Ace Cash Express, Inc. was therefore fully within its rights to assign its rights under the Agreement to NCA. Defendant notes that the very premise of Plaintiff's claim is that NCA has a right or interest in collecting the debt of Plaintiff and is alone enough to trigger the benefits of the arbitration provision.

Defendant further contends that there has been no waiver of arbitration. Defendant notes that a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. See *State ex. rel. Hanson v. Guernsey Cty. Bd. Commsrs.* (1992), 65 Ohio St.3d 545 and *Fletcher v. Univ. Hosp. of Cleveland* (2008), 120 Ohio St.3d 167. Defendant contends that its motion to dismiss was not active participation in the litigation in order to constitute waiver.

Defendant notes that at every step of the way, it has repeatedly reserved and asserted the right to arbitrate. Defendant points to its pre-filing letter to Plaintiff's counsel, the motion to dismiss itself, and the affirmative defense of arbitration in its answer. Defendant relies upon *Alkenrack v. Green Tree Servicing, LLC* 2009-Ohio-6512, wherein the Eleventh District Court of Appeals recognized:

> A defendant who files an answer in a lawsuit may still move for a stay pending arbitration provided: (1) he affirmatively pled the application of the arbitration clause in the answer and (2) he did not conduct himself in a manner demonstrating waiver.

Defendant contends that it has not conducted itself in a manner demonstrating waiver and further notes that Plaintiff has not propounded any written discovery and neither has Defendant.

COURT'S ANALYSIS AND CONCLUSION

R.C. §2711.01(A) governs the validity of arbitration provisions in contracts and provides, in relevant part:

> A provision in any written contract * * * to settle by arbitration a controversy that subsequently arises out of the contract * * * shall be valid, irrevocable and enforceable, except on grounds that exists at law or equity for the revocation of any contract.

As a matter of policy, the law favors and encourages arbitration. *Taylor Bldg. Corp. of Am. v. Benfield* (2008), 117 Ohio St.3d 352. Further, in general, public policy in Ohio encourages the resolution of disputes through arbitration and any uncertainty regarding the

applicability of an arbitration clause should be resolved in favor of coverage. *Owens Flooring Co. v. Hummel Construction Co.* (2001) 140 Ohio App.3d 825. See also *Ignazio v. Clear Channel Broadcasting, Inc.* (2007), 113 Ohio St.3d 276.

In this case, Defendant National Credit Adjusters has provided evidence that the parties entered into an Arbitration Agreement whereby legal disputes are to be resolved via arbitration. The Agreement provided for a mechanism by which the Arbitration Agreement could be rejected by Plaintiff. Defendant indicates that Plaintiff did not formally reject the Arbitration Agreement. There is no evidence before this Court that the Arbitration Agreement is procedurally and/or substantively unconscionable or that any grounds exist under which the Arbitration Agreement would be unenforceable.

Turning now to the issue of waiver, circumstances which may be considered by the court as pertinent to the issue of waiver are: (1) any delay in the requesting party's demand to arbitrate via a motion to stay judicial proceedings and an order compelling arbitration; (2) the extent of the requesting party's participation in the litigation prior to its filing a motion to stay the judicial proceeding, including a determination of the status of discovery, dispositive motions, and the trial date; (3) whether the requesting party invoked the jurisdiction of the court by filing a counterclaim or third-party complaint without asking for a stay of the proceedings; and (4) whether the non-requesting party has been prejudiced by the requesting party's inconsistent acts. See *Harsco Corp. v. Crane Carrier Co.*, 122 Ohio App. 3d 406, 414–15, 701 N.E.2d 1040, 1046 (1997)

The filing of a motion to dismiss alone does not operate as a waiver of a party's right to arbitrate. See *Bayer v. Mapes*, 8th Dist. No. 66541, 1994 Ohio App. LEXIS 5156, 1994 WL 652850 (Nov. 17, 1994). Indeed, a motion for a stay pending arbitration does not raise any of the defenses specifically enumerated in Civ.R. 12(B)(1) to (7), and such motion therefore need not be filed prior to filing a motion to dismiss. *Id.* See also *Skerlec v. Ganley Chevrolet, Inc.*, 2012-Ohio-5748, ¶ 25

In this case, the Court finds that Defendant National Credit Adjusters has not waived its right to seek arbitration inasmuch as it pled arbitration as an affirmative defense in its Answer. Further, the Court finds that the Motion to Dismiss in this case was not an adjudication on the merits. Defendant participated in this case only to the extent ordered by this Court and provided documentation pursuant to an Order of this Court so that Plaintiff could have information

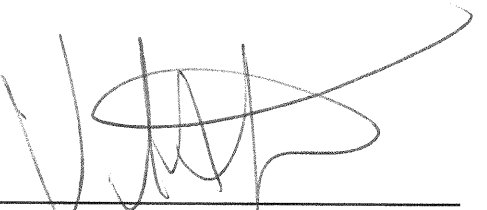
necessary to oppose the Motion to Stay and Compel Arbitration. Considering the totality of the circumstances, Defendant has not acted inconsistent with the right to arbitrate.

The Court further declines to strike the Defendant's motion and/or deny it as a sanction pursuant to Civ.R. 37.

Therefore, the Court finds Defendant National Credit Adjusters' Motion to Stay Proceedings and Compel Arbitration well taken and hereby granted.

ACCORDINGLY, this matter is hereby stayed pending arbitration between Plaintiff and Defendant National Credit Adjusters before the American Arbitration Association in accordance with said parties' written Arbitration Agreement.

IT IS SO ORDERED.



VINCENT A. CULOTTA, JUDGE

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