UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

AUDREY P. JORDAN, Plaintiff, -vs- INTEGRITY FIRST FINANCIAL GROUP, INC., Defendants.	Civil Action No.: 4:17-cv-2994-RBH-TER **REPORT AND RECOMMENDATION**

I. INTRODUCTION

Plaintiff brings this action pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq. and the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). Presently before the court are Defendant's Motion to Dismiss (ECF No. 6) and Motion to Compel Arbitration (ECF No. 7). Plaintiff did not file a Response to the Motion to Compel Arbitration but did file a Response (ECF No. 10) in opposition to Defendant's Motion to Dismiss and indicated therein that she consented to arbitration. All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(g), DSC. This Report and Recommendation is entered for review by the district judge.

II. FACTUAL ALLEGATIONS

Plaintiff alleges that she worked eight months for Defendant as a mortgage loan originator before having to leave work due to a serious medical condition. Compl. ¶ 8(A). Plaintiff disclosed to Defendant that she required surgery and would need six weeks of recovery time. Compl. ¶ 8(B). However, she had complications from surgery and missed more work than planned. Compl. ¶ 8(B).

Plaintiff worked from home and informed Defendant of doctor's visits and her return to work options. Compl. ¶ 8(C). Defendant discharged Plaintiff from employment without warning or any disciplinary history on June 10, 2016, citing a lack of production. Compl. ¶ 8(D). Defendant also refused to compensate Plaintiff fully with her last paycheck. Compl. ¶ 8(F).

III. ARBITRATION AGREEMENT

On October 7, 2015, Plaintiff signed an Employment Agreement to begin working for Integrity First as a Loan Officer. Employment Agreement (Ex. B to Def. Motion to Compel). Paragraph VII of the Employment Agreement, entitled Arbitration/Governing Law, states in relevant part, "This Agreement is made and entered into in the State of California and governed by the law of the State of California. In the event of any dispute between the parties concerning or arising out of their employment relationship, it shall be resolved through binding arbitration in accordance with the rules of [Judicial and Arbitration Mediation Services] JAMS Arbitration . . . . ."

The Employment Agreement states, "Employee may opt out of this provision of the Agreement, thus relieving both parties of the obligations of this provision, simply by (1) sending a notarized letter to the attention of Employee's immediate supervisor copied to the Company's Human Resources department, both sent via Certified Mail within 30 days of the execution of this Agreement expressly opting out of this provision; or (2) striking the entirety of this paragraph and initialing here as follows." Plaintiff wrote her initials and Nationwide Mortgage Licensing System identification number at the bottom of the page and signed the Agreement without utilizing either of the opt-out methods available to her. See Ex. B at pp. 7, 8; Criswell Decl. at ¶¶ 4, 6 (Ex. C to Def. Motion to Compel). Paragraph XI(D) of the Agreement further states, "The Parties agree that this Agreement shall be severable, meaning that if any provision is held to be unenforceable, it shall not affect the validity or enforceability of the remainder of the terms and provisions of this Agreement."

IV. DISCUSSION

As set forth above, Plaintiff consents to arbitration of her claims pursuant to the Employment Agreement. In the Motion to Compel, Defendant asks that the court compel Plaintiff to arbitrate her claims in accordance with the arbitration agreement and dismiss this action. While Plaintiff filed a response in opposition to Defendant's Motion to Dismiss, her opposition appears to be based only on dismissal of this action on the merits and not to complete arbitration. She asserts "the Motion to Dismiss is moot as Plaintiff consents to Arbitration, and this case would no longer be before the court." Pl. Resp. p. 5 (emphasis added). The Fourth Circuit in Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F. 3d 707, 709-10 (4th Cir. 2001) provided that dismissal is proper where all of the parties' claims are covered by the arbitration agreement.[1] There appears to be no dispute that dismissal for that reason is appropriate.

[1]In Aggarao v. MOL Ship Management Company, Ltd., 675 F.3d 355, 376, n.18 (4th Cir. 2012), the Fourth Circuit acknowledged that there may be some tension between its decision in Hooters, indicating that "the FAA commands the federal courts to stay any ongoing judicial proceedings" when an arbitration agreement "covers the matters in dispute," 173 F.3d at 937, and Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F. 3d 707, 709-10 (4th Cir. 2001), which provides that dismissal is proper where all of the parties' claims are covered by the arbitration agreement. Aggarao, 675 F.3d at 376, n.18. The Aggarao court further noted a split among circuit courts as to "whether a district court has discretion to dismiss rather than stay an action subject to arbitration. Id. (comparing Cont'l Cas. Co. v. Am. Nat'l Ins. Co., 417 F.3d 727, 732 n. 7 (7th Cir.2005) ("[T]he proper course of action when a party seeks to invoke an arbitration clause is to stay the proceedings pending arbitration rather than to dismiss outright."), with Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir.1992) ("The weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration.")). The court declined to resolve the disagreement, however, because not all of the claims raised in that case were arbitrable, placing the case outside the framework for dismissal as set forth in Choice Hotels. Id. In it's most recent case mentioning Choice Hotels, the Fourth Circuit did not address the "tension" identified in Aggarao but affirmed the district court's order enforcing the arbitration agreement at issue and dismissing the action. See Galloway v. Santander Consumer USA, Inc., 819 F.3d 79, 90 (4th Cir. 2016).

V. CONCLUSION

For the reasons discussed above, it is recommended that Defendant's Motion to Compel Arbitration (ECF No. 7) be granted, this case be dismissed to pursue arbitration[2] and Defendant's Motion to Dismiss (ECF No. 6) on the merits be deemed moot.

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

March 14, 2018
Florence, South Carolina

[2]Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. § 1, et seq., set forth the exclusive grounds for review of an arbitration award. Hall Street Associates, LLC v. Mattel, Inc., 552 U.S. 576, 584, 128 S.Ct. 1396, 1403 (2008).