UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

TOM CUSOLITO,

PLAINTIFF,

v. CASE NO.: 0:17-cv-60963-WPD

CITIBANK, N.A. d/b/a
CITIGROUP, INC. A foreign corporation,

DEFENDANT.
_____//

ORDER GRANTING MOTION TO COMPEL ARBITRATION

THIS CAUSE is before the Court upon Defendant Citibank, N.A.'s Motion to Compel Arbitration [DE 11] ("Motion"). The Court has carefully considered the Motion, Plaintiff's Response [DE 15], Defendant's Reply [DE 19], and the record in this case, and is otherwise advised in the premises. For the reasons stated herein, the Court will grant the Motion to the extent that it seeks to compel Plaintiff to submit to arbitration.

I. BACKGROUND

On May 16, 2017, Plaintiff commenced this action against Defendant for violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et. seq.*, the Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. § 559.55, *et. seq.*, and the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et. seq.* [DE 1].

Plaintiff applied for a Home Depot credit card account, and as a result of that application, he obtained the credit card account issued by Defendant Citibank. Plaintiff used this account to make purchases at Home Depot, and he received monthly billing statements. The Citibank credit card agreement includes an arbitration agreement, and Defendant moved to enforce that agreement. Plaintiff argues that he never received the arbitration agreement.

When Plaintiff applied for and obtained the credit card, he signed the application using an electronic pin pad in which he agreed:

> By signing below, I certify that I have received, read, and agree to a written copy of the Credit Card Disclosures and Terms and Conditions OF OFFER. I also agree to be bound by the terms and conditions of the Citibank Card Agreement that will be provided to me if credit is granted. I also agree to pay all charges incurred under such terms. I certify that I am at least 18 years of age.

(Grayout Supp. Decl. at ¶ 5-11, Exs. 3-4) [DE 19-1]. The terms and conditions included the Card Agreement and Arbitration Agreement, which Plaintiff agreed to be bound by if his application was accepted. Plaintiff then assented to the terms of these agreements by using the credit card account to make purchases.

The Arbitration Agreement provides:

> All claims are subject to arbitration no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions or any other source of law. Claims made as counterclaims, cross-claims, third party claims, interpleaders or otherwise, and Claims made independently or with other claims.

(Grayot Decl.), Ex. 1, p. 6 attached as "Exhibit A") [DE 11-1]. The contracts specify that South Dakota law will govern, and that the agreement is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et. seq. Id.* at p. 7.

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA") places arbitration agreements on equal footing with all other contracts and reflects a "liberal federal policy favoring arbitration." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (internal quotations & citations omitted). Section 2 of the FAA provides that written arbitration agreements in 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. "Consistent with the FAA's text, courts must rigorously enforce arbitration agreements according to their terms." *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1329–30 (11th Cir. 2014) (internal quotations & citations omitted). Section 4 of the FAA allows "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to request the court to order arbitration "in the manner provided for in such agreement." 9 U.S.C. § 4. Section 3 mandates that when a court concludes an issue is "referable to arbitration under an agreement in writing for such arbitration" the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3.

The determination of whether a dispute is arbitrable under the Federal Arbitration Act ("FAA") consists of two prongs: "(1) whether the parties agreed to arbitrate the dispute," and (2) "whether 'legal constraints external to the parties' agreement foreclosed arbitration.'" *Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir. 2004) (citation omitted). The second step concerns whether "Congress has clearly expressed an intention to preclude arbitration of [a] statutory claim." *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1273 (11th Cir. 2002). An arbitration agreement governed by the FAA, like the Arbitration Agreement here, is presumed to be valid and enforceable. *See Palidino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1057 (11th Cir. 1998) ("The FAA creates a presumption in favor of arbitrability"). Furthermore, the party resisting arbitration bears the burden of showing that the Arbitration Agreement is invalid or does not encompass the claims at issue. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

III. DISCUSSION

It is undisputed that defendant's Card Agreement contains an Arbitration Agreement. Plaintiff instead argues that he never received the Arbitration Agreement. Another Court faced with this same challenge, found this argument is a challenge to formation of the Card Agreement as a whole, not a challenge to the Arbitration Agreement. *See Carr v. Citibank*, N.A., No. 15-CV-6993 (SAS), 2015 WL 9598797, at *2 (S.D.N.Y. Dec. 23, 2015). The question of whether a valid arbitration provision exists is distinct from whether the parties entered into an agreement at all. *Id.* (citing Buckeye Check Cashing v. Cardegna, 546 U.S. 440, 444-46 (2006) ("[A]s a matter of substantive federal arbitration law ... unless [plaintiff's] challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.")). The *Carr* Court found Plaintiff's "argument as to whether she ever entered into the Card Agreement at all must be considered by an arbitrator, and not this Court." *Id.* The undersigned agrees with this analysis and finds it applicable to the instant matter.

Plaintiff's claims clearly fall within the scope of the Arbitration Agreement. Where, as here, the existence of an arbitration clause is not apparent from the Complaint, a defendant's motion to compel arbitration must be evaluated under the standard applicable to summary judgment. *See Magnolia Capital Advisors, Inc. v. Bear Stearns & Co.*,272 Fed.Appx. 782, 785–86 (11th Cir. 2008). "'The party opposing a motion to compel arbitration or stay litigation pending arbitration has the affirmative duty of coming forward by way of affidavit or allegation of fact to show cause why the court should not compel arbitration.'" *Cedeno v. Morgan Stanley Smith Barney, LLC*, 154 F. Supp.3d 1318, 1324 (S.D. Fla. 2016) (quoting *Sims v. Clarendon Nat'l Ins. Co.*, 336 F. Supp.2d 1311, 1314 (S.D. Fla. 2014)). Defendant has met its burden by providing declarations and exhibits, including an exemplar of the Card Agreement provided to

Plaintiff, the account statement proving Plaintiff's use of the card, and an exhibit demonstrating how the pin pad language appeared and required Plaintiff to click "Agree" and sign the application when Plaintiff applied for the credit card.

In opposition, Plaintiff simply alleges that he did not receive the Arbitration Agreement, but this is insufficient to meet his burden. A party opposing arbitration cannot place the existence of an arbitration agreement in issue by merely denying its existence. *See, e.g., Chastain v. Robinson- Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992) (explaining that a "party cannot place the making of an arbitration agreement in issue simply by opining that no agreement exists"); *Cedeno v. Morgan Stanley Smith Barney, LLC,* 154 F. Supp.3d 1318, 1324 (S.D. Fla. 2016) ("Plaintiff's argument that he did not receive the Agreement, on its own, is not relevant to this Court's consideration in determining whether the Agreement is enforceable under the FAA"). Plaintiff's argument that he never received the agreement is insufficient. It is undisputed that Plaintiff applied for the credit card, received the credit card, and used it to make purchases. If Plaintiff contends that he never assented to the terms of the Card Agreement and Arbitration Agreement, he can make those arguments in arbitration.

The FAA provides, in pertinent part, that a court compelling arbitration "s*hall* on application of one of the parties *stay* the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). Despite this statutory language, "[t]he weight of authority clearly supports *dismissal* of the case when *all* of the issues raised in the district court must be submitted to arbitration." *Caley v. Gulfstream Aerospace Corp.*, 333 F. Supp. 2d 1367, 1379 (N.D. Ga. 2004), *aff'd*, 428 F.3d 1359 (11th Cir. 2005) (quoting *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992)) (emphasis added). Ultimately, "district courts are vested with discretion to determine whether

stay or dismissal is appropriate." *Swartz v. Westminister Servs., Inc.*, No. 810-CV-1722-T-30AEP, 2010 WL 3522141, at *2 (M.D. Fla. Sept. 8, 2010).

Here, a stay is the appropriate action. If the arbitrator determines that the arbitration agreements are not enforceable, Plaintiff may return to this Court to continue litigating his claims. The Court will stay this action while the relevant parties submit to arbitration.

IV. CONCLUSION

In sum, Plaintiff has entered into an Arbitration Agreement that the Court must treat as valid and enforceable. The Defendant has properly sought to enforce those provisions. Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Compel Arbitration [DE 11] is **GRANTED** to the extent that Plaintiff is ordered to submit to arbitration with Defendant pursuant to the terms of their Arbitration Agreement.
2. The Clerk is directed to **ADMINISTRATIVELY CLOSE this case and DENY AS MOOT** any pending motions.
3. The parties shall file status reports as to the status of the arbitration on or before January 5, 2018 and every ninety (90) days thereafter.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of October, 2017.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies to:
All counsel of record