UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

JIMMY SUNG, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

– against –

SACOR FINANCIAL, INC.,

Defendant.

MEMORANDUM & ORDER

16-CV-1317 (ERK) (VMS)

Korman, *J.*:

In May 2005, MBNA America Bank sold, transferred, and assigned to Columbia Credit Services, Inc. all rights in Jimmy Sung's overdue credit card account. *See* Def's. Mot. for Summ. J., Rule 56.1 Stmt. ¶ 3, Dkt. No. 19-1. Sung's agreement with MBNA included a mandatory arbitration provision. In July 2005, Columbia prevailed in the arbitration proceeding it had commenced to collect Sung's debt, and was awarded $13,330.07. *Id.* at ¶ 6. In 2007, Columbia obtained a default judgment in state court in the amount of $16,092.37—the award plus interest and fees. Stewart Decl., Ex. F., Dkt. No. 19-9.

In November 2010, Defendant Sacor Financial, Inc. acquired Sung's debt from Columbia, and attempted to collect it in the spring of 2012, sending two notices to Sung, one of which expressly informed him that Sacor had been assigned the judgment. Def's. R. 56.1 Stmt. ¶ 8, 10; Stewart Decl., Ex. I. Approximately one year later, on March 26, 2013, an assignment of judgment to Sacor from Columbia was filed in New York State Supreme Court, Richmond County. Notice of Removal, Ex. C, Dkt. No. 1-3, at 23. A copy of the assignment was served on Sung. *Id*. A levy was then served on Sung's bank account. *Id.* at ¶ 2. Through his counsel, Sung

arranged to pay $474.57, which equaled ten percent of the funds restrained in the account, in partial satisfaction of the judgment in July of 2014. *Id.* at ¶ 13.

In September 2014, Sacor obtained an income execution to garnish Sung's wages. *Id.* at ¶ 14. In response, Sung moved to have the default judgment vacated. *Id.* at ¶ 15. The motion was denied in November 2015. *Id.* at ¶ 16. The denial was affirmed on appeal, on the grounds, *inter alia*, that Sung had failed to establish a meritorious defense to the action because he did not dispute that the balance he owed was correct. *Columbia Credit Servs., Inc. v. Sung*, 2017 WL 4448163, at *2, (2d Dep't, Sept. 29, 2017).

While his unsuccessful effort to avoid the effect of the default judgment proceeded, Sung commenced a separate action against Sacor in New York State Supreme Court, Richmond County, in January 2016. Def's. R. 56.1 Stmt. ¶ 20. Even though Sung had been advised in writing that Sacor was the current judgment creditor, the complaint alleged that the income execution violated the Fair Debt Collection Practices Act (FDCPA), because the income execution "did not set forth in any manner that Sacor was the current judgment creditor; and therefore Sacor attempted to collect a debt and/or enforce a judgment in a name other than the true name of the owner of the debt and/or judgment creditor in violation of 15 USC 1692e (14) [sic]." Compl. ¶ 19. Sacor timely removed. Def's. R. 56 Stmt. ¶ 21.

After minimal discovery, Sacor moved for summary judgment and to compel arbitration on January 12, 2017. Sung cross-moved for summary judgment, arguing Sacor waived its right to arbitrate, and denying that Sung had ever entered into any binding agreement to arbitrate in the first place. Pl. Opp. & Cross-Mot. for Summ. J. at 7, Dkt. No. 20-2.

I ordered Sacor to explain why it did not invoke its right to arbitrate until filing its summary judgment motion. Dkt. Order, June 23, 2017. Sacor's counsel explained that his firm

did not receive the original MBNA agreement containing the arbitration clause when it took over for Sacor's prior counsel, Lacy Katzen LLP, in July 2014. Ltr. at 1, Dkt. No. 24. Sacor's counsel became aware of the provision on November 8, 2016, and, three days later, informed Sung's counsel of Sacor's intent to rely on it. *Id.*; Stewart Supp. Decl. ¶ 5, Dkt. No. 28. Because a briefing schedule had already been set, Sacor moved to compel arbitration in its summary judgment motion. Ltr. at 2. Sacor again alleged, as it had in its motion papers, that Sung had suffered no prejudice due to this 10-month inadvertent delay. *Id.*; *see also* Stewart Supp. Decl. ¶ 2, Dkt. No. 28.

DISCUSSION

Sung argues he is not bound by the arbitration clause of the credit card agreement, and also argues that Sacor waived its right to rely on the clause due to its delay in moving to compel arbitration. Both claims are without merit.

I. Sung Is Collaterally Estopped From Claiming He Is Not Bound by the Arbitration Clause.

Sung's argument that he is not bound by the arbitration clause fails. He argues, principally—without disputing receipt—that the declaration of Sacor's litigation specialist did not establish that MBNA had ever mailed the agreement, and therefore, Sacor has failed to prove a binding agreement existed. Pl's. Opp. 11. Sung further claims that the declaration fails to establish that the declarant ever worked for MBNA at all, and his assertions are therefore "insufficient to prove the actions taken by MBNA." *Id.* Finally, Sung claims that Sacor has failed to show that "the alleged agreement actually was applicable to Plaintiff's alleged account," because it "does not contain an account number or any other information identifying it as an agreement applicable to Plaintiff's alleged account." *Id.* at 12.

These arguments are frivolous; nevertheless, I decline to further address them because Sung is collaterally estopped from challenging the validity and enforceability of the arbitration clause. Sung arbitrated the validity of his debt, and a default judgment was obtained confirming the arbitration award against him. Because the judgment confirming the award, as well as the underlying cause of action, were both predicated on the existence of the arbitration clause, Sung is collaterally estopped from challenging its existence or enforceability here. *Allen v. McCurry*, 449 U.S.90, 96 (1980) (" . . . Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so."); *see also Reich v. Cochran*, 151 N.Y.2d 122 (1896); And this is true even though the judgment was entered on default. *Id.*; *see also Henry Modell & Co. v. Minister, Elders & Deacons of Ref. Prot. Dutch Church of City of N.Y.*, 68 N.Y.2d 456, 461 (1986).

Sung has no answer to this argument, which Sacor raised in opposing Sung's Cross-Motion. Def's. Opp. 9–10. Instead, he argues—correctly—that he is not collaterally estopped from bringing the post-judgment FDCPA allegations with regard to the income execution. This is, of course, an entirely separate argument that does not address Sacor's motion to compel arbitration of the FDCPA claims.

II. Sacor Did Not Waive Its Right to Arbitration.

Sung contends that any right to arbitration was waived because Sacor engaged in "protracted litigation" prior to moving to compel. Pl's. Opp. 1. Because "federal policy . . . strongly favors arbitration," *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 45 (2d Cir. 1993), "waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated." *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985) (finding no waiver despite eight

months of "extensive discovery"). Proving waiver is a "heavy burden." *Sweater Bee by Banff, Ltd. v. Manhattan Indus, Inc.*, 754 F.2d 457, 466 (2d Cir. 1985). "The waiver determination necessarily depends upon the facts of the particular case and is not susceptible to bright line rules." *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993).

Sung attempts to frame the timeline of these proceedings to support his allegation that Sacor "intentionally abandoned" any right to compel arbitration. Pl's. Opp. 5. Sung's FDCPA complaint was removed in March 2016. He claims Sacor answered the complaint "almost 3 months after being served," details the subsequent conferences with Magistrate Judge Scanlon and discovery schedule throughout the summer of 2016, refers to outstanding discovery demands which were answered three months after being served, and notes that throughout discovery, Sacor neither referenced nor produced the MBNA agreement. *Id.* at 2–3.

Sung provides neither a fair nor complete description of these events. Sung commenced the instant litigation in 2016, nearly a decade after the default judgment was entered against him. Though he claims that Sacor answered the complaint "almost 3 months after being served with the action," *id*. at 2, he omits the fact that Sacor served a demand for the complaint on Sung after several weeks elapsed following the notice of summons. Def's. Mot. for Summ. J. 4. After the removal of the complaint in March, one status conference was rescheduled due to the court's own conflict. *See* Re-Scheduling Order, June 10, 2016. Sung then filed two joint motions: one to extend time to complete discovery, and a second to adjourn the rescheduled status conference. Dkt. Nos. 11–12. In the first joint motion, Sung's counsel cited his own busy schedule as one of the reasons for seeking additional time. Joint Mot. for Ext. of Time, Dkt. No. 11.

Magistrate Judge Scanlon granted both joint motions, adjourning the status conference to November 1, 2016, which is when she certified that discovery had been completed and set a

briefing schedule. *See* Order Granting Mot. for Ext. of Time, Sept. 20, 2016. Sacor's counsel became aware of the MBNA agreement seven days later, and, three days after that, informed Sung's counsel of Sacor's intent to compel arbitration as part of the summary judgment briefing. Def. Letter 1, Dkt. No. 24.

Sung never objected to this schedule of events as it unfolded, and has neither uncovered nor alleged any prejudice resulting from it. He cannot now accuse Sacor of attempting to engage in the sort of "protracted litigation" that supports a rare finding of waiver. Nor has he claimed, after very limited document discovery, Pl. Opp. and Cross-Mot., Ex. O, that he has suffered any prejudice due to Sacor's inadvertent delay in attempting to enforce the arbitration clause.

In any event, mere delay—without prejudice—is insufficient to establish waiver. *See Rush*, 779 F.2d at 887. Sung's reliance on *Com-Tech Assoc. v. Computer Assoc. Intern., Inc.*, 753 F. Supp. 1078 (E.D.N.Y. 1990), is misplaced. In holding that defendants had waived their right to arbitrate, Judge Spatt found that the facts before him constituted "one of those rare cases in which the defendants' conduct resulted in prejudice to the plaintiffs supporting the doctrine of waiver of the right to compel arbitration." *Id.* at 1086. That conduct included "extensive pre-trial discovery for nearly two years before the issue of arbitration was finally raised in this motion . . . at least ten depositions, including seven of the plaintiffs . . . several sets of lengthy interrogatories . . . [v]oluminous discovery motions" and "extensive proposed pretrial orders." *Id.* Sung has not alleged anything similar to such a "rare case." Indeed, he has not alleged any prejudice at all. Because prejudice is "determinative of waiver," Sacor has not waived its right to arbitrate. *Rush*, 779 F.2d at 888.

CONCLUSION

Sacor's motion to compel arbitration is granted, and the case is stayed pending arbitration. Under these circumstances, it would be inappropriate for me to pass on the merits underlying the FDCPA claim in Sung's complaint. *See AT&T Technologies, Inc. v. Communcation Workers of America*, 475 U.S. 643, 649 (1986).

SO ORDERED.

Brooklyn, New York
May ___2__, 2018

Edward R. Korman
Edward R. Korman
United States District Judge