IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

WEST GEORGIA WIRELESS, LLC d/b/a WEST GEORGIA WIRELESS, Plaintiff, v. SOUTHWESTCO WIRELESS, LP d/b/a VERIZON f/k/a VERIZON WIRELESS, Defendant.	CIVIL ACTION FILE NUMBER 3:16-cv-196-TCB

O R D E R

This case comes before the Court on Defendant Southwestco Wireless Inc.'s[1] motion to compel arbitration [12]. Also pending before the Court is Southwestco's motion to stay discovery pending ruling on the motion to compel arbitration [15].

[1] Southwestco Wireless Inc. is the successor in interest to the named Defendant Southwestco Wireless, LP, which was legally dissolved on September 30, 2016.

I. Background

Plaintiff Regal Marketing, Inc. d/b/a WG Wireless ("WGW")[2] sold Verizon Wireless telephone services and equipment pursuant to a series of agency agreements with Southwestco. The most recent of those contracts was entered into in February 2013.

Southwestco drafted the contracts, using a standard form contract that it typically used with stores that sold Verizon products. For WGW to become an authorized agent of Southwestco, it had to accept the terms of the contract as offered.

The 2013 contract contained an arbitration provision that provided, in pertinent part:

> Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope of applicability of this agreement to arbitrate, not resolved by mediation . . . shall be determined by arbitration in (or as near as possible to) the city of the principal office of the VZW region in which the

[2] The named Plaintiff—West Georgia Wireless, LLC—was a party to the 2008 contract with Southwestco. However, Plaintiff's counsel asserts that Regal Marketing, Inc is the true name of the party to the 2013 contract at issue in this case, and that an amended pleading will be forthcoming to reflect this fact. To avoid a semantic battle, the Court will refer to Plaintiff as WGW, the acronym chosen in Plaintiff's filings. *See* [17] at 1.

> controversy or claim arose, before one arbitrator. The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. The parties will share equally in arbitration costs charged by JAMS. Each party will bear all fees, costs and expenses of its own attorneys, experts and witnesses in the arbitration.

[12-2] at 20. The provision also specified that "[t]he parties will share equally in the arbitration costs charged by JAMS," and that "[e]ach party will bear all fees, costs and expenses of its own attorneys, experts and witnesses in the arbitration." *Id.*

On December 13, 2016, WGW filed this action alleging breach of contract and fraud. The complaint also sought declaratory relief that the arbitration provision is unenforceable.[3]

II. Arbitrability

Southwestco questions the Court's authority to rule on the arbitration provision by pointing to the contract language that "determination of the scope of applicability of this agreement to arbitrate . . . shall be determined by arbitration." [12-2] at 20. The question of which body—the arbitrators or the Court—should decide

[3] The complaint also seeks relief from a release agreement that the parties entered into in 2016. *See* [1] at ¶¶157–62.

whether WGW is bound to arbitrate is not a simple one. The issue of "arbitrability"—the term used by courts in referring to the threshold issue of who has the primary power to determine whether the parties agreed to arbitrate the merits of a dispute—is a complicated subject, inspiring a plethora of law review articles and court opinions.

The Supreme Court has explained that generally the question of arbitrability is a matter for the courts to decide. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). However, the Court has also made clear that arbitration is a matter of contract law. *First Options v. Kaplan*, 514 U.S. 938, 943 (1995). And as such, parties may contract around the general rule and agree to submit questions of arbitrability to the arbitrator in the first instance. *Id.*; *see also Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1333 (11th Cir. 2005). However, regardless of whether the parties have delegated arbitrability to the arbitrators, before a court can compel a party to arbitration, it must be satisfied that the party actually agreed to arbitrate. *Terminix*, 432 F.3d at 1333. Therefore, the Court will

determine this preliminary question of the arbitration provision's validity.

III. Legal Standard

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, establishes a "federal policy favoring arbitration" and requires that courts "rigorously enforce agreements to arbitrate." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Consequently, arbitration provisions are to be generously construed in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Notwithstanding the strong federal policy favoring arbitration, no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate. *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1214 (11th Cir. 2011); *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1290 (11th Cir. 2002).

In order to determine whether arbitration should be compelled, the Court ordinarily determines (1) the existence of a written agreement to arbitrate; (2) that the issues sought to be arbitrated are arbitrable under the agreement; and (3) that the party asserting the

claims has failed or refused to arbitrate the claims. *Caley v. Gulfstream Aerospace Corp.*, 333 F. Supp. 2d 1367, 1373 (N.D. Ga. 2004); *Lomax v. World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1362 (N.D. Ga. 2002). However, the parties may narrow the Court's inquiry if they clearly and unmistakably agree to arbitrate the very issue of arbitrability. *Martinez v. Carnival Corp.*, 744 F.3d 1240, 1246 (11th Cir. 2014).

IV. Analysis

WGW does not dispute the existence of the contract, or that the arbitration provision would cover the claims asserted in this action. Instead, WGW asserts that the arbitration provision is unenforceable for two primary reasons: 1) arbitration would be financially prohibitive; and 2) the arbitration provision is unconscionable.

A. Costliness of Arbitration

WGW argues that the costs of arbitration are prohibitive, meaning the arbitration provision would prevent WGW from litigating its claims. In support, WGW cites to *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000), which recognized that excessive arbitration costs could render an arbitration provision unenforceable.

As a preliminary matter, *Green Tree* and its progeny are not binding precedent on this issue. Those cases dealt with individual plaintiffs making claims under Title VII, and the courts in those cases were concerned with whether arbitration provisions "undermine[ ] the policies that support Title VII." *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259–60 (11th Cir. 2003) (quoting *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998)). WGW has not cited to—and the Court is unaware of—any cases in this circuit applying *Green Tree* considerations outside of the Title VII or employment context, much less to a corporate plaintiff. WGW's common-law contract claims in this case are not the sort of "statutory right" that these cases have sought to protect. *See Musnick*, 325 F.3d at 1258 ("The party seeking to avoid arbitration under such an agreement has the burden of establishing that enforcement of the agreement would 'preclude' him from 'effectively vindicating [his] *federal statutory right* in the arbitral forum.') (emphasis added) (quoting *Green Tree*, 531 U.S. at 90).

Even if the Court could entertain a cost-based objection to the arbitration provision in this case, WGW has not made the requisite showing of financial prohibition. Plaintiffs have an "obligation to offer evidence of the amount of fees [they] are likely to incur, as well as of [their] inability to pay those fees." *Musnick*, 325 F.3d at 1260. "The mere existence of a cost-splitting clause in an arbitration agreement" does not satisfy this burden. *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1291 (11th Cir. 2015).

Two recent Eleventh Circuit decisions are illustrative of the high burdens plaintiffs face to make this showing. First, in *Escobar*, the court considered an arbitration provision that required defendant to pay the initial fee for arbitration, but noted that plaintiff "ultimately will be responsible for his one-half share" of the costs. *Id.* at 1292. Plaintiff estimated that his total costs would be $20,000. *Id.* at 1283. Despite testimony that the plaintiff "was unemployed, had $0 in his bank account, and did not have any money to pay for arbitration," *id.*, the Eleventh Circuit held that he had "wholly failed to establish that he would be denied access to the forum." *Id.* at 1292.

Next, in *Suazo v. NCL (Bahamas) LTD.*, 822 F.3d 543, 554–55 (11th Cir. 2016), the Eleventh Circuit considered evidence that the plaintiff would have to pay "up to $2,000 to initiate arbitration and $1,750 as a final arbitration fee," plus potentially other costs. Despite the facts that the plaintiff was "from a poor rural community in Nicaragua" and that he "[did] not have the means to pay for thousands of dollars to an arbitrator," the Court held that his objections were conclusory and insufficient. *Id* at 555–56.

Here, WGW asserts that JAMS charges a $1,200 filing fee and a twelve-percent case-management fee. Based on an average hourly rate for JAMS arbitrators, WGW estimates that "[a]rbitration would cost WGW more than $30,000." [17] at 5. Moreover, based on affidavit testimony, WGW asserts that it is "in debt in an amount exceeding $1,600,000" and that it has "no assets from which to pay" the arbitration costs. [17] at 5; *see also* [17-2] at ¶¶6–12.

While the arbitration provision in this case may shift slightly more burden to WGW than the similar provision in *Suazo*, WGW is no more destitute than the plaintiffs in *Suazo* or *Escobar*, and the overall

burden faced is indistinguishable from *Escobar*. Mindful of both of these precedents, and of the general maxim that arbitration provisions are to be generously construed in favor of arbitration, *Moses*, 460 U.S. at 24, the Court finds that WGW has not carried the heavy burden of demonstrating that the cost of arbitration would deny it access to the forum.

Further, allowing discovery of Southwestco—as WGW requests—would not allow WGW to alleviate this burden. Additional discovery would not help WGW establish its own financial shortcomings, nor would discovery into Southwestco's motivation for preferring arbitration provisions be relevant. *See* [17] at 24 ("WGW respectfully submits that discovery . . . would establish that Defendant improperly uses the Arbitration Provision in its form contract as a showstopper."). WGW has already provided relevant information about JAMS arbitrations, and this factual record simply does not compel the Court to disregard an otherwise valid arbitration agreement.

B. Unconscionability

"Generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). To invalidate a contract, Georgia law[4] requires a showing of both procedural unconscionability, which "addresses the process of making the contract," and substantive unconscionability, which "looks to the contractual terms themselves." *NEC Techs., Inc. v. Nelson*, 478 S.E.2d 769, 771–73 & n.6 (Ga. 1999). Factors relevant to procedural unconscionability include "the age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice." *Id.* at 771–72. For substantive unconscionability, "courts have focused on matters such as the

[4] The contract contains a choice of law provision in favor of New York law. [12-2] at 16. However, both parties briefed this issue using Georgia law, and Defendant asserts that "the tests for procedural and substantive unconscionability do not differ significantly under Georgia and New York law." [12-1] at 14 n.5. Given the consensus of the parties, the Court will apply Georgia law to this issue.

commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of risks between the parties, and similar public policy concerns." *Id.* at 772. Unconscionable agreements must "shock the conscious," *Mitchell v. Ford Motor Credit Co.*, 68 F. Supp. 2d 1315, 1319 (N.D. Ga. 1998), and be "such an agreement as no sane mane not acting under a delusion would make, and that no honest man would take advantage of." *R.L. Kimsey Cotton Co. v. Ferguson*, 214 S.E.2d 360, 363 (Ga. 1975).

WGW argues repeatedly that "it had no meaningful choice" in the contract terms. *See* [17] at 20. But even assuming this assertion is true, it is not enough to demonstrate procedural unconscionability. *See Hopkins v. World Acceptance Corp.*, 798 F. Supp. 2d 1339, 1346 (N.D. Ga. 2011) ([A] contract of adhesion is not necessarily unconscionable [even] when one party is economically disadvantaged or lacks sophistication."). WGW does not dispute that it was a sophisticated business entity that could analyze for itself whether it was worthwhile to sell Verizon products on behalf of Southwestco. Thus, even assuming that Southwestco had an advantage in bargaining power—an assertion

that WGW does not explain—there are insufficient allegations of procedural unconscionability.

Similarly, the terms of the contract are not so substantively unconscionable that they "shock the conscious." *Mitchell*, 68 F. Supp. 2d at 1319. The only allegations of substantive unconscionability concern the fairness of the arbitration provision, which the Court has already determined is not financially prohibitive. Accordingly, WGW has not made a showing of unconscionability that would defeat an otherwise valid arbitration agreement.

V. Conclusion

Southwestco's motion to compel arbitration [12] is GRANTED. The motion for a stay of discovery [15] is denied as moot. This action will be stayed pending arbitration, and the Clerk is directed to administratively close the case. Either party may, by motion, reopen the case once arbitration is complete.

IT IS SO ORDERED this 13th day of March, 2017.

Timothy C. Batten, Sr.
United States District Judge