UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MARK DONALDSON,

Plaintiff,

v. Case No: 2:18-cv-530-FtM-99CM

ENHANCED RECOVERY COMPANY, LLC, HOVG, LLC, THE CBE GROUP, INC., SOUTHWEST CREDIT SYSTEMS, L.P. and AT&T MOBILITY, LLC.,

Defendants.

REPORT AND RECOMMENDATION[1]

This matter comes before the Court upon review of Defendant AT&T Mobility LLC's ("AT&T") Motion to Compel Arbitration and Dismiss or Stay, Plaintiff's response in opposition and AT&T's reply. Docs. 38, 43, 52.[2] For the reasons stated

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[1] A party has fourteen days from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1.

[2] Disclaimer: Documents filed in CM/ECF may contain hyperlinks to other documents or websites. These hyperlinks are provided only for users' convenience. Users are cautioned that hyperlinked documents in CM/ECF are subject to PACER fees. By allowing hyperlinks to other websites, this Court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their websites. Likewise, the Court has no agreements with any of these third parties or their websites. The Court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the Court.

herein, the Court recommends the motion be granted and the entire case be stayed pending completion of arbitration.

I. Background

This case was removed from the Twentieth Judicial Circuit Court in and for Lee County, Florida on August 1, 2018. Doc. 1. On September 6, 2018, Plaintiff filed an Amended Complaint against Defendants AT&T, HOVG, LLC d/b/a Bay Area Credit Service LLC ("BACS"), the CBE Group, Inc. ("CBE"), Southwest Credit Systems, LP ("SCS"), Diversified Consultants, Inc. ("DCI") and Enhanced Recovery Company, LLC ("ERC") alleging one count of violations of the Fair Debt Collection Practices Act, one count of violations of the Florida Consumer Collection Practices Act and one count of violations of Florida's Deceptive and Unfair Trade Practices Act. See Doc. 36.

Plaintiff alleges that on or about September 17, 2014, he opened a prepaid account with no commitment to AT&T. *Id.* ¶ 14. Plaintiff asserts that after cancelling his account during numerous phone calls, he continued to receive monthly statements until AT&T credited the account during the October 21, 2016 billing cycle. *Id.* ¶¶ 15-16. Between December 29, 2014 and October 19, 2016, BACS, CBE, SCS, DCI[3] and ERC sent debt collection letters to Plaintiff to collect a debt he allegedly, but did not actually, owe to AT&T. *Id.* ¶¶ 17-24. Plaintiff claims these actions violated the FDCPA, 15 U.S.C. §§ 1692e(2)(a) and 1692e(10), the Florida Consumer

[3] On October 2, 2018, Plaintiff and DCI filed a Joint Stipulation for Final Order of Dismissal with Prejudice, and the Court dismissed the claims against DCI on October 3, 2018. Docs. 48, 49, 50.

Collection Practices Act, Fla. Stat. § 559.72(9), and the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201. *Id.* ¶¶ 27-47. Thus, Plaintiff seeks actual or statutory damages, attorneys' fees and costs and injunctive relief preventing Defendants from trying to collect the alleged debt not owed. *Id.* at 5-7.

On September 14, 2018, AT&T filed the present Motion to Compel Arbitration and Dismiss or Stay, arguing that as a customer of AT&T, Plaintiff agreed to participate in a Wireless Customer Agreement that contains an arbitration provision. *See* Doc. 38. Plaintiff responded in opposition on September 25, 2018, challenging the constitutionality of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, arguing there was no agreement to arbitrate and claiming duress is a defense to enforcement of an arbitration agreement. *See* Doc. 43. On October 4, 2018, the Court directed AT&T to reply to Plaintiff's opposition, which it did on October 9, 2018. Docs. 51, 52. The matter is now ripe for review.

II. Analysis

Under the FAA, 9 U.S.C. § 1 *et seq.*, arbitration agreements are "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. The FAA "places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (internal citations omitted). As provided by the FAA, any party aggrieved by the failure or refusal of another to arbitrate under a written agreement may petition the court to compel arbitration. 9 U.S.C. § 4. The Supreme Court's precedent

establishes a "healthy regard for the federal policy favoring arbitration," resolving any doubts as to the scope of arbitrable issues in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983). In ruling on a motion to compel arbitration, courts consider three factors: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitrate was waived." *Fla. Farm Bureau Ins. Cos. v. Pulte Home Corp.*, No. 8:04-cv-2357-T-EAJ, 2005 WL 1345779, at *3 (M.D. Fla. June 6, 2005). The Court will address each of the three factors in turn.

a. Whether a valid arbitration agreement exists

"A court cannot compel parties to arbitrate their dispute in the absence of clear agreement to do so." *Larsen v. Citibank FSB*, 871 F.3d 1295, 1302 (11th Cir. 2017). Whether an agreement to arbitrate exists is a question of state contract law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1329-30 (11th Cir. 2016). "[W]hile doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made." *Bazemore*, 827 F.3d at 1329 (quoting *Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1115-16 (11th Cir. 2014)).

Here, the parties appear to agree that Florida law applies. *See* Doc. 38 at 6; *cf.* Doc. 43 at 3-4. Under Florida law, a contract is enforceable if there was an "offer, acceptance, consideration and sufficient specification of essential terms." *Jones v. Sallie Mae, Inc.*, No. 3:13-cv-837-J-99MMH-MCR, 2013 WL 6283483, at *4 (M.D. Fla.

Dec. 4, 2013) (internal citations and quotations omitted). The enforceability of an arbitration agreement does not depend on a signature; "[i]n the absence of a signature, the courts look to a party's words and conduct to determine whether the party assented to the agreement." *Global Metal Trading Co., Inc. v. Planet Metals, LLC*, No. 8:13-cv-1767-T-23EAJ, 2013 WL 6283711, at *3 (M.D. Fla. Dec. 4, 2013) (alteration in original) (citing and quoting *Fi-Evergreen Woods, LLC v. Robinson*, 135 So. 3d 331, 336-37 (Fla. 5th DCA 2013)).

Plaintiff states he preserves his "statutory right to a jury trial" on whether "(1) a contract to arbitrate exists; [and] (2) whether duress exists as a defense to any such contract." Doc. 43 at 3. Plaintiff cites the FAA and case law to say there must be an arbitration agreement in writing, but notably, Plaintiff does not actually deny that a written agreement to arbitrate exists. *See generally* Doc. 43. Instead, Plaintiff's affidavit states he "never *signed* a written Arbitration Agreement," and he "did not accept any terms and conditions through an Interactive Voice Response (IVR)." Doc. 47 at 1-2 (emphasis added).

As AT&T points out, however, Plaintiff's invoice from Cellular World—a two-page document that Plaintiff attached to his Amended Complaint—conspicuously states:

> Your agreement(s) with AT&T for the above Wireless Numbers consists of:
>
> 1. The Wireless Customer Agreement #FMSTCT06144448E ***and its arbitration clause***, and
> 2. The rates and other details about the rate plan in the Customer Service Summary or at att.com/wireless[.]

Doc. 36-1 at 2 (emphasis added). It also states in bold lettering:

> **I have reviewed and agree to the rates, terms, and conditions for the wireless products and services described in the Wireless Customer Agreement (*including limitation of liability and arbitration provisions*) and the Customer Service Summary.**

Id. (italic emphasis added). The Wireless Customer Agreement ("WCA") contains the following references to arbitration:

> 2.1 Dispute Resolution by Binding Arbitration
> **PLEASE READ THIS CAREFULLY. IT AFFECTS YOUR RIGHTS.**
> . . . **In the unlikely event that AT&T's customer service department is unable to resolve a complaint you may have to your satisfaction . . . we each agree to resolve those disputes through binding arbitration or small claims court instead of in courts of general jurisdiction.**
> . . .
> 2.2 Arbitration Agreement
> (1) AT&T and you agree to arbitration **all disputes and claims** between us. This agreement to arbitrate is intended to be broadly interpreted. . . . **You agree that, by entering into this Agreement, you and AT&T are each waiving the right to a trial by jury or to participate in a class action**. This agreement evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision. This arbitration provision shall survive termination of this Agreement.

Doc. 38 at 24-25 (emphasis in original).

Although Plaintiff did not sign the invoice or the WCA, he used AT&T's cellular service after receipt of the invoice without objection to the WCA or its arbitration provision.[4] Therefore, the Court recommends that Plaintiff's conduct demonstrates he assented to being bound by the WCA and its arbitration provision.[5] *See Global*

[4] The Cellular World invoice is dated September 17, 2014. Doc. 36-1 at 1. One of the wireless statements Plaintiff provided indicates he used his wireless number between September 17, 2018 and September 20, 2018. As best the Court can tell, Plaintiff alleges he cancelled his account sometime between September 30, 2018 and October 20, 2018. *See* Doc. 36 ¶¶ 14-16; Doc. 36-1 at 1; Doc. 36-2 at 1; Doc. 36-3 at 1.

[5] The parties dispute whether Plaintiff verbally assented to the terms of the WCA

Metal Trading Co., Inc., 2013 WL 6283711, at *3 (finding plaintiff's conduct demonstrated assent to arbitration agreement because plaintiff received ten invoices for ten product orders, each of which "contained an arbitration agreement conspicuously placed within the four-page document," and did not object); *see also Dye v. Tamko Build. Prds., Inc.*, —F.3d—, No. 17-14052, 2018 WL 5729085, at *3-4 (11th Cir. Nov. 2, 2018) (finding homeowners assented to arbitration clause through conduct of opening and retaining roofing product when its packaging contained an "IMPORTANT" message to "READ CAREFULLY BEFORE OPENING [THE PRODUCT]," which included an arbitration clause).

Additionally, "[t]he party seeking to avoid arbitration bears the burden of proving a contractual defense to enforcement of the arbitration agreement." *AMS Staff Leasing, Inc. v. Taylor*, 158 So.3d 682, 687 (Fla. 4th DCA 2015). While Plaintiff argues that duress is "a complete defense to enforcement of the agreement to arbitrate," Plaintiff never actually alleges—let alone proves—that he was subject to any duress when purchasing the cellular phone plan and assenting to the WCA. *See generally* Doc. 43. Therefore, the Court recommends a valid agreement to arbitrate was formed between Plaintiff and AT&T.

b. Whether an arbitrable issue exists

"[T]he FAA creates a presumption of arbitrability such that any doubts concerning the scope or arbitrable issues should be resolved in favor of arbitration."

through IVR. *See* Doc. 38 at 3-4; Doc. 43 at 5; Doc. 47 at 2. The Court need not resolve this issue for the purposes of this Report and Recommendation because the Court recommends Plaintiff assented to the terms of the WCA through his conduct.

Bazemore, 827 F.3d at 1329 (internal quotation marks omitted) (quoting *Dasher*, 745 F.3d at 1115-16). Here, AT&T argues Plaintiff's claims "fall squarely within the arbitration agreement." Doc. 38 at 7. Plaintiff does not contest that the claims raised fall within the scope of the arbitration clause. The WCA expressly states: "AT&T and you agree to arbitrate **all disputes and claims** between us. This agreement to arbitrate is intended to be broadly interpreted." *Id.* at 24 (emphasis in original). The WCA also indicates the arbitration clause extends to claims that arise after termination of the agreement. *Id.* at 24-25. This case concerns a billing dispute between Plaintiff and AT&T arising from Plaintiff's purchase and use of AT&T cell phone services, and as discussed, Plaintiff's use of AT&T's cell phone services demonstrated his assent to the WCA. *See generally* Doc. 36. Therefore, the Court recommends arbitrable issues—namely, the claims in Plaintiff's lawsuit—exist between the parties.

c. Whether AT&T has waived the right to arbitration

"[A]ny party arguing waiver of arbitration bears a heavy burden of proof" and must establish: (1) "under the totality of the circumstances, the party [seeking arbitration] has acted inconsistently with the arbitration right," and (2) the conduct of the party seeking arbitration has somehow prejudiced the other party. *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018); *see also In re Checking Account Overdraft Litig.*, 754 F.3d 1290, 1294 (11th Cir. 2014). Moreover, "[p]rejudice exists when the party opposing arbitration undergoes the types of

litigation expenses that arbitration was designed to alleviate." *In re Checking Account Overdraft Litig.*, 754 F.3d at 1294 (internal quotation marks omitted).

Here, the case was removed on August 1, 2018 by Defendant ERC. Doc. 1. On August 10, 2018, AT&T filed a Motion to Compel Arbitration. Doc. 21. On September 6, 2018, Plaintiff filed an Amended Complaint, correcting AT&T's name on the caption. Doc. 36. On September 14, 2018, AT&T re-filed the Motion to Compel Arbitration, and on September 27, 2018 the Court denied as moot AT&T's first Motion to Compel Arbitration, given the Amended Complaint. Docs. 38, 44. AT&T filed a reply to Plaintiff's opposition to the present Motion to Compel after the Court directed it to do so. Docs. 51, 52. Under the totality of the circumstances, these actions are not inconsistent with AT&T's right to arbitrate. *See Gutierrez*, 889 F.3d at 1236-39. Further, Plaintiff does not argue that AT&T waived its right to arbitrate. Therefore, the Court recommends AT&T has not waived its right to arbitration.

d. Seventh Amendment

The Court notes that Plaintiff challenges the FAA on Seventh Amendment grounds in an apparently copied-and-pasted argument and requests the Court certify the issue for immediate appeal under 28 U.S.C. § 1292(b). *See* Doc. 43 at 1-3 (referencing the FMLA and back pay relief). As AT&T notes, however, the Eleventh Circuit has held: "where a party enters into a valid agreement to arbitrate, the party is not entitled to a jury trial or to a judicial forum for covered disputes." Doc. 52 at 2; *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1372 (11th Cir. 2005). As

discussed, the Court recommends a valid agreement to arbitrate exists between Plaintiff and AT&T. Therefore, the Court recommends Plaintiff's arguments about the Seventh Amendment are without merit, and the issue need not be certified for immediate appeal.

e. Stay pending arbitration

Under 9 U.S.C. § 3, a law suit brought in a United States court found to be referable to arbitration under an arbitration agreement shall be stayed pending completion of arbitration. Because the resolution of the arbitration may have a substantial impact on the other defendants and issues in this case, the Court recommends staying the entire case pending arbitration. *See Global Tel*Link Corp. v. Scott*, 652 F. Supp. 2d 1240, 1248 (M.D. Fla. 2009).

III. Conclusion

For the reasons stated herein, the Court recommends AT&T's Motion to Compel Arbitration be granted, and the entire case be stayed under 9 U.S.C. § 3 pending completion of arbitration.

ACCORDINGLY, it is respectfully

RECOMMENDED:

1. AT&T's Motion to Compel Arbitration and Dismiss or Stay and Incorporated Memorandum of Law (Doc. 38) be **GRANTED**;

2. The case be **STAYED** pending notification of the parties that they have completed the arbitration process and the stay is due to be lifted or the case is due to be dismissed;

3. The parties be ordered to file a joint status report with the Court every ninety (90) days, or as the Court so orders, until the matter is resolved.

DONE and **ENTERED** in Fort Myers, Florida on this 27th day of November, 2018.

CAROL MIRANDO
United States Magistrate Judge

Copies:
Counsel of record