UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MICHAEL HAUSER,

Plaintiff,

vs. Case No. 3:18-cv-143-J-39JRK

WESTLAKE SERVICES, LLC.,

Defendant.
_____/

REPORT AND RECOMMENDATION[1]

This cause is before the Court on Defendant's Motion to Compel Arbitration and Stay Action (Doc. No. 24; "Motion"), filed July 27, 2018. Plaintiff responded in opposition to the Motion on July 30, 2018. See Plaintiff's Response in Opposition to Defendant's Motion to Compel Arbitration and Stay Action (Doc. No. 25; "Response"). With leave of Court, Defendant filed a Reply in Support of Westlake Services, LLC's Motion to Compel Arbitration and Stay Action (Doc. No. 28; "Reply") on August 6, 2018. See Order (Doc. No. 27), entered August 6, 2018. The Motion is now ripe for review.

I. Background

This matter involves a retail installment agreement contract ("RISC") entered into by Plaintiff in connection to his purchase of a vehicle. Motion at Ex. 1 (Doc. No. 24-1; "Ex. 1")

[1] "Within 14 days after being served with a copy of [a report and recommendation on a dispositive motion], a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). "A party may respond to another party's objections within 14 days after being served with a copy." Id. A party's failure to serve and file specific objections to the proposed findings and recommendations alters the scope of review by the District Judge and the United States Court of Appeals for the Eleventh Circuit, including waiver of the right to challenge anything to which no specific objection was made. See Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(B); 11th Cir. R. 3-1; Local Rule 6.02.

at 3 ¶¶ 4-5.[2] The RISC was assigned to Defendant. Ex. 1 at 3 ¶ 6. The RISC contains an Arbitration Provision that states, in relevant part:

> Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Provision, and the arbitrability of the claim or dispute), between [Plaintiff] and [the creditor] or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract, or any resulting transaction or relationship . . . shall, at [the creditor's] election, be resolved by neutral, binding arbitration and not by a court action.

Id. at 6.

Plaintiff commenced this case on January 22, 2018 by filing a Complaint (Doc. No. 1). Plaintiff alleges that Defendant violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, and the Florida Consumer Collection Practices Act, Fla. Stat. § 559.72 et seq., in its attempts to enforce the RISC. See generally Complaint; Motion at 6.

II. Parties' Positions

Defendant seeks an Order compelling arbitration and staying this case pursuant to the Arbitration Provision and the Federal Arbitration Act ("FAA"). Motion at 3-7; see 9 U.S.C. § 2. Defendant asserts that the Arbitration Provision is enforceable under the FAA and that it has not waived its right to compel arbitration because it has not substantially participated in litigation to a point that is inconsistent with its intent to arbitrate. Motion at 5-10.

Responding, Plaintiff argues Defendant has waived its right to demand arbitration. Response at 2-6. Plaintiff contends Defendant acted inconsistently with its arbitration right by waiting six months to file the Motion, engaging in "significant discovery," agreeing to a date and time for the deposition of its corporate representative, entering into a confidentiality

[2] Citations to Exhibit 1 of the Motion follow the pagination assigned by the Court's electronic filing system (CM/ECF).

agreement regarding discovery, conducting mediation, and filing a joint Case Management Report (Doc. No. 11) on April 5, 2018. Id. at 3-5. Plaintiff asserts that Defendant has prejudiced Plaintiff by acting inconsistently with its alleged right of arbitration. Id. at 5. Plaintiff argues he has "incurred the costs of subpoenaing his cellular telephone records, the costs of [Plaintiff's] travel to [Tampa for] mediation, the cost of mediation itself, and dozens of hours for his counsel to litigate this matter." Id. Plaintiff further contends that "Defendant has benefitted from the receipt of Plaintiff's cellular telephone records and the information gathered informally during mediation that it might not otherwise be entitled to." Id. at 4. Plaintiff does raise any challenges regarding whether the Arbitration Provision is enforceable or whether an arbitrable issue exists.

In its Reply, Defendant reiterates it has not waived its right to arbitration because it has not served any written discovery requests on Plaintiff, the parties have not engaged in any motion practice, and "the Case Management Report is a perfunctory ministerial function which allows the Court to manage the case." Reply at 3-4. Defendant argues that "the extent of Defendant's affirmative action in the discovery process has been limited to requesting copies of . . . Plaintiff's cellular phone records, which Plaintiff had already sought to subpoena on his own." Id. at 3. Defendant contends that Plaintiff has not shown he has been prejudiced because he would have needed his cellphone records to prove his case, and the expenses of mediation were not substantial. Id. at 5.

III. Legal Framework

When determining whether to compel arbitration, generally a court considers so-called "gateway" matters. Anders v. Hometown Mortg. Servs., Inc., 346 F.3d 1024, 1027 (11th Cir. 2003) (citing Green Tree Fin. Corp v. Bazzle, 539 U.S. 444, 452 (2003)). In other words, the

default rule is that a court should decide "'such issues as are essential to defining the nature of the forum in which a dispute will be decided.'" Musnick v. King Motor Co. of Ft. Lauderdale, 325 F.3d 1255, 1261 (11th Cir. 2003) (quoting Larry's United Super, Inc. v. Werries, 253 F.3d 1083, 1085 (8th Cir. 2001)). Specifically, the following factors should be considered: 1) whether a valid written agreement to arbitrate exists; 2) whether an arbitrable issue exists; and 3) whether the right to arbitrate has been waived. Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999) (naming factors); see Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1370-79 (11th Cir. 2005) (discussing validity of agreement and whether employment claims can be arbitrable); S&H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990) (discussing waiver of the right to arbitrate). There is a strong federal policy favoring arbitration; thus, the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]" Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

IV. Discussion

As Plaintiff does not raise any challenges regarding the first and second factors, the undersigned focuses the discussion on the third factor: whether the right to arbitrate has been waived.

To determine whether the right to arbitrate has been waived, courts apply a two part test: i) whether, "'under the totality of the circumstances,' the party 'has acted inconsistently with the arbitration right'"; and ii) "whether, by doing so, that party 'has in some way prejudiced the other party.'" Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1315-16 (11th Cir. 2002) (quoting S & H Contractors, Inc., 906 F.2d at 1514); see also Garcia v. Wachovia Corp., 699 F.3d 1273, 1277 (11th Cir. 2012) (quotations and citations omitted). Due to the

strong federal policy favoring arbitration, "any party arguing waiver of arbitration bears a heavy burden of proof." Stone v. E.F. Hutton & Co., Inc., 898 F.2d 1542, 1543 (11th Cir. 1990) (quotation and citation omitted).

A party that "'substantially invokes the litigation machinery prior to demanding arbitration'" may waive the right to arbitrate. Garcia, 699 F.3d at 1277 (quoting S & H Contractors, 906 F.2d at 1514). The key is whether there has been substantial participation in litigation "to a point inconsistent with an intent to arbitrate[.]" Morewitz v. W. of Eng. Ship Owners Mut. Prot. & Indem. Ass'n (Luxembourg), 62 F.3d 1356, 1366 (11th Cir. 1995). As examples, courts have held that long delays in seeking to compel arbitration and participation in discovery can amount to acting inconsistently with the right to arbitrate. See, e.g., Garcia, 699 F.3d at 1277 (party failed to move to compel arbitration twice even though the court invited it to do so, and party participated substantially in litigation by conducting discovery for more than one year); S & H Contractors, 906 F.2d at 1514 (holding a party acted inconsistently with the right to arbitrate when it waited eight months to move to compel arbitration, by which time the parties had litigated two motions and the moving party had taken five depositions); Int'l Hair & Beauty Sys., LLC v. Simply Organic Inc., No. 8:11-cv-1883-T-30AEP, 2012 WL 3670260, at *3 (M.D. Fla. Aug. 24, 2012) (unpublished) (finding waiver when a defendant "filed an answer and affirmative defenses, participated in hearings, submitted an affidavit in opposition to and testified against [the opposing party's] motion for a Temporary Restraining Order, objected to document requests, answered interrogatories, and had his deposition taken" before requesting to arbitrate eight months into the litigation).

"The failure to assert the right of arbitration alone," without a finding of substantial participation in litigation, "does not establish a waiver of the right of arbitration." Suntrust Bank

v. Gill, No. 8:10-CV-2619-T-17TBM, 2011 WL 2192825, at *2 (M.D. Fla. June 6, 2011) (unpublished). When a defendant merely appears in an action and files "some motions, without response and adjudication," it is not typically considered substantial participation in litigation. Id.

"Prejudice has been found in situations where the party seeking arbitration allows the opposing party to undergo the types of litigation expenses that arbitration was designed to alleviate." Morewitz, 62 F.3d at 1366 (citation omitted); Garcia, 699 F.3d at 1277 (quotation and citation omitted) (in determining whether prejudice has occurred, the court "may consider the length of delay in demanding arbitration and the expense incurred by that party from participating in the litigation process"). Additionally, "[t]he use of pre-trial discovery procedures by a party seeking arbitration may sufficiently prejudice the legal position of an opposing party so as to constitute a waiver of the party's right to arbitration." Stone v. E.F. Hutton & Co, 898 F.2d 1542, 1543 (11th Cir. 1990) (citation omitted).

Here, the undersigned finds that Defendant's conduct has not amounted to substantial participation in litigation. In the six months between the filing of the Complaint and the filing of the Motion, Defendant filed an Answer and Affirmative Defenses (Doc. No. 10), but the parties have not conducted much discovery. Defendant's participation in the discovery process has been limited to requesting Plaintiff's cellphone records, responding to Plaintiff's interrogatories, and producing less than 500 pages of documents. See Reply at 3. No depositions have been taken, and discovery has not closed. See Case Management and Scheduling Order (Doc. No. 13), entered April 6, 2018 (setting discovery deadline for May 6, 2019). Two motions for extension of time have been filed (Doc. Nos. 8, 18), but the parties have not engaged in any substantive motion practice.

The filing of the joint Case Management Report did not amount to substantial participation in litigation. See Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc., No. 6:14-cv-1551-Orl-40GJK, 2015 WL 6869734, at *3 (M.D. Fla. Nov. 9, 2015) (unpublished) (finding that the filing of a joint case management report did not amount to substantial participation in litigation even though the parties marked "no" to the question of whether the case should be submitted to arbitration, and the defendant filed a motion to dismiss), aff'd, 845 F.3d 1351 (11th Cir. 2017).

Lastly, Defendant's participation in mediation was not inconsistent with an intent to arbitrate. The mediation conference ended in an impasse on July 27, 2018, and the Motion was filed on the same day. See Final Mediation Report (Doc. No. 22), filed July 27, 2018; Manard v. Knology, Inc., No. 4:10-cv-15 (CDL), 2010 WL 2528320, at *4 (M.D. Ga. June 18, 2010) (unpublished) (finding that filing a motion to dismiss, negotiating a scheduling order, and participating in mediation were not inconsistent with defendant's right to arbitrate, and noting that "only when the meditation yielded unsuccessful results did [d]efendant file its motion to compel arbitration"). Although some courts have found waiver in cases where the parties engaged in mediation, those cases are not binding and are distinguishable. See Snelling & Snelling, Inc. v. Reynolds, 140 F. Supp. 2d 1314 (M.D. Fla. 2001) (finding waiver because party moved to compel arbitration after the close of discovery and after the party filed an answer, took depositions, requested discovery, engaged in court-ordered mediation, and participated in a case management conference); Mims v. Global Credit & Collection Corp., 803 F. Supp. 2d 1349 (S.D. Fla. 2011) (finding waiver because party moved to compel arbitration after attending hearings and mediation).

In light of the foregoing, the undersigned finds that Defendant's actions do not amount to substantial participation in litigation to a point inconsistent with an intent to arbitrate. See Palmer v. Navient Sols., LLC, No. 3:17-cv-657-J-39JBT, 2018 WL 1863829, at *2 (M.D. Fla. Jan. 31, 2018) (unpublished report and recommendation) (finding defendant did not waive its right to arbitration by filing two motions for extension of time, filing an answer and affirmative defenses, engaging in a case management conference, and responding to plaintiff's discovery requests because defendant "ha[d] not propounded any discovery of its own, and it [did] not appear that [d]efendant ha[d] taken any other substantive action in this case"), adopted, No. 3:17-cv-657-J-39JBT (unpublished order).

Even if Defendant has acted inconsistently with the right to arbitrate, Plaintiff's attempt to avoid arbitration is futile because he cannot show he has been prejudiced as a result. See Suntrust Bank, 2011 WL 2192825, at *2 (alternatively finding that even if there had been substantial participation in litigation, the opposing party had not been prejudiced, and the right to arbitration had not been waived). Any expenses incurred by Plaintiff as a result of producing his cellphone records do not prejudice him because he would have needed these records to support his claims. The expenses incurred as a result of mediation were not so substantial as to result in prejudice to Plaintiff. To the extent Plaintiff argues he incurred additional costs because he had to travel to Tampa, Plaintiff agreed to mediate in Tampa, and the costs incurred were not substantial.

V. Conclusion

For the foregoing reasons, it is **RECOMMENDED**:

1. That Defendant's Motion to Compel Arbitration and Stay Action (Doc. No. 24) be **GRANTED**.

2. That the parties be **DIRECTED** to submit Plaintiff's claims to arbitration in accordance with the Arbitration Provision.

3. That this case be **STAYED** pending the completion of the arbitration proceedings, and that the Clerk of Court be **DIRECTED** to terminate any pending motions and administratively close this file pending notification from the parties that the case is due to be reopened or dismissed.

4. That the parties be **DIRECTED** to file a joint status report upon the conclusion of the arbitration proceedings. That the parties be further **DIRECTED** that if the arbitration proceedings are not completed within 120 days of a final order being entered on the instant Motion, the parties shall file a joint status report at that time and every 120 days thereafter until the arbitration proceedings are completed.

RESPECTFULLY RECOMMENDED at Jacksonville, Florida on October 31, 2018.

James R. Klindt

JAMES R. KLINDT
United States Magistrate Judge

bhc
Copies to:

Honorable Brian J. Davis
United States District Judge

Counsel of record