IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

NO. 7:16-CV-355-FL

SHANE MATHIS, individually and on behalf of all others similarly situated, Plaintiff, v. LENDMARK FINANCIAL SERVICES, LLC, Defendant.	)	ORDER

This matter is before the court on defendant's motion wherein it seeks an order directing arbitration together with dismissal of this action. Should the court not be inclined to dismiss the action, defendant seeks a stay during pendency of arbitration. Should the court decline to refer the matter to arbitration and, instead, reach the merits of defendant's motion, defendant seeks dismissal based upon plaintiff's failure to state a claim. The issues raised are ripe for ruling. For reasons that follow, defendant's motion to compel arbitration is granted and the case is dismissed.

BACKGROUND

Plaintiff, a member of the United States Navy ("Navy"), initiated this action September 1, 2016, in the Superior Court of North Carolina, Onslow County, on behalf of himself and others similarly situated, seeking compensatory and punitive damages as well as ancillary relief arising from defendant's refusal to reduce interest rate on a consumer loan pursuant the Servicemembers Civil Relief Act ("Servicemembers Act"), 50 U.S.C. §§ 3901-4043. Defendant removed the action to this court on the basis of federal question jurisdiction pursuant to 28 U.S.C. § 1441(a). On

November 7, 2016, defendant filed the instant motion. In support thereof, among other things, defendant relies upon a note dated November 18, 2011, and the affidavit of Loretta Byrd ("Byrd"). In opposition, plaintiff relies upon his affidavit wherein he testifies as to circumstances under which he entered into the subject loan agreement.

STATEMENT OF FACTS

The facts viewed in the light most favorable to plaintiff may be summarized as follows. Defendant is engaged in the business of consumer lending and, in the course of its business, lends to military servicemembers. Plaintiff enlisted in the Navy September 15, 2012, and began active duty April 16, 2013.

On November 18, 2011, before joining the Navy, plaintiff entered into a note with Green Cap Financial, LLC ("Green Cap"), secured in part by a 2004 Jeep Liberty motor vehicle. Plaintiff borrowed $8,636.33 at an annual interest rate of 18.35 percent and made regular payments in accordance with the parties' agreed-upon payment schedule. The note was paid and satisfied in full May 30, 2015.

The following acknowledgment appears on the face of the note:

> I, [plaintiff], do hereby acknowledge receipt of a copy of this Promissory Note and Security Agreement. Further acknowledged is the receipt of the proceeds of the loan stated above. I further acknowledge that at the time I received a copy of this Promissory Note and Security Agreement, that such forms were complete and filled-in and that all blanks in such forms we [sic] filled in prior to my executing the same.

(DE 17-2 at 2). It is undisputed that plaintiff's witnessed signature under seal appears directly below the foregoing text. In the bottom right corner appears the mark, "Page 1 of 3[.]" Page three of the note bears the mark "Page 3 of 3" and contains an arbitration agreement. Repeated reference is made to form number "NC0001" on these two pages of the note. Page two, however, is omitted

from the record.

The arbitration agreement specifies that "[the parties] agree than any and all disputes, claims or controversies of any kind and nature between us arising out of or relating to the relationship between us will be resolved through mandatory, binding arbitration. . . . Both of us are waiving our rights to have disputes resolved in court by a judge or jury [except as otherwise provided in the agreement]." (DE 17-2 at 3).

Based upon her experience as assistant branch manager for Green Cap and, later, branch manager for defendant, Byrd testifies that Green Cap and defendant regularly used form NC0001 in the course of business.[1] In her capacity as assistant branch manager for Green Cap, Byrd witnessed plaintiff sign the note. She attests that the version of NC0001 that plaintiff signed was the only version in use at that time, all of which plaintiff does not dispute.

In or around July 2013, plaintiff wrote to Green Cap requesting that interest rate on his loan be reduced to six percent per annum pursuant to the Servicemembers Act. Green Cap denied the request on the ground that plaintiff was not deployed at the time of request. Following denial, defendant acquired Green Cap September 30, 2014, and succeeded to Green Cap's interest.

Plaintiff wrote to defendant February 19, 2015, again requesting an interest rate reduction pursuant to the Servicemembers Act. Defendant denied the request. Finally, on March 18, 2015,

[1] Byrd describes NC0001 as a double-sided document where the first two pages are printed upon reverse sides of a single sheet and stapled to a second sheet containing only page three. An example of the second page of NC0001 is attached to Byrd's affidavit as exhibit two. Byrd explains that, pursuant to defendant's regular business practice, the original copy of the agreement plaintiff signed was kept in defendant's possession in a fireproof storage cabinet until plaintiff requested it on or about March 25, 2016. Following plaintiff's request, defendant made a photocopy of the agreement for its file before sending the original copy to plaintiff. Pursuant to its usual practice, defendant did not photocopy the second page because, where the second page of NC0001 contains note terms, and where the loan had already been paid and satisfied in full by the time plaintiff requested the original copy, defendant had no reason to maintain a copy of the second page.

plaintiff's counsel sent a formal written demand for relief under the Servicemembers Act, which request defendant denied. This action followed.

DISCUSSION

A. Standard of Review

The standard of review for a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 2–4 ("FAA"), is akin to the standard of review of a motion for summary judgment. See Chorley Enters. v. Dickey's Barbecue Rests., Inc., 807 F.3d 553, 564 (4th Cir. 2015). Therefore, such motions should be granted where an examination of the pleadings, affidavits, and other discovery materials properly before the court demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Anderson Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986) (holding that a factual dispute is "material" only if it might affect the outcome of the suit and "genuine" only if there is sufficient evidence for a reasonable jury to find for the non-moving party). Where a genuine dispute as to one or more material facts exists, however, the FAA requires a jury trial. Chorley, 807 F.3d at 564.

The party seeking to compel arbitration "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party must then "set forth specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party.

Anderson, 477 U.S. at 250. In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the nonmoving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Nevertheless, "permissible inference must still be within the range of reasonable probability, . . . and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241 (4th Cir. 1982) (quotations omitted). Thus, judgment as a matter of law is warranted where "a reasonable jury could reach only one conclusion based on the evidence," or when "the verdict in favor of the non-moving party would necessarily be based on speculation and conjecture." Myrick v. Prime Ins. Syndicate, Inc., 395 F.3d 485, 489 (4th Cir. 2005). By contrast, when "the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created," and judgment as a matter of law must be denied. Id. at 489–90.

B. Analysis

Section 2 of the FAA provides, "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such 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. 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] petition any United States district court which, save for such agreement, would have jurisdiction . . . for an order [compelling arbitration as provided for in the agreement]." 9 U.S.C. § 4.

When faced with a motion to compel arbitration, the court analyzes only two gateway issues.

See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83–84 (2006). First, the court must determine whether "a valid agreement to arbitrate exists between the parties." Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999). This inquiry is not confined to defects in contract formation, but includes also "such grounds as exist at law or in equity for the revocation of any contract." Id. (quoting 9 U.S.C. § 2). Where the court concludes there is a contract, the court next asks whether "the specific dispute falls within the substantive scope of that agreement." Id.

An agreement to arbitrate any dispute "arising out of or related to" an underlying agreement constitutes a broad arbitration agreement to be given "expansive reach." American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996). Such language "does not limit arbitration to the literal interpretation or performance of the contract, but embraces every dispute between the parties having a significant relationship to the contract regardless of the label added to the dispute." Id. (quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988) (alterations omitted)).

In the instant matter, the existence of a contract is established by the presence of plaintiff's signature on page one of the note. See Davenport v. Travelers Indem. Co., 283 N.C. 234, 241 (1973) (written contracts enforceable); J.B. Colt Co. v. Turlington, 184 N.C. 137 (1922) ("Having signed the contract, [defendant] is presumed to have read it, and is bound by its terms."). By the terms of the agreement, arbitration is required with respect to "any and all disputes, claims, or controversies of any kind and nature between [the parties] arising out of or relating to the relationship between [the parties] . . ." (DE 17-2 ¶ 1). Accordingly, where plaintiff claims entitlement to adjustment of the interest rate applicable to the agreement, the instant dispute "arises out of" same agreement and is, therefore, subject to arbitration. See American Recovery, 96 F.3d at 93.

Plaintiff argues he is not bound to arbitrate on the ground that no arbitration agreement was connected to or otherwise part of the note terms. More specifically, plaintiff argues that because the note is a three page document, where defendant has failed to produce page two, and where agreement to arbitrate is contained on page three, which is not signed, defendant has not demonstrated that page three or the arbitration agreement contained therein is genuinely part of the agreement.

This argument fails because plaintiff acknowledges on page one of the agreement, which page plaintiff does not deny signing, "that at the time I received a copy of [the agreement,] such forms were complete and filled-in and that all blanks in such forms we [sic] filled in prior to my executing the same." (DE 17-2 at 2 (emphasis added)). Plaintiff thus acknowledged receipt of the complete document, whereupon the bottom right corner of page one of the note provides, "Page 1 of 3[,]" and where page three states, "Page 3 of 3." (Id. at 2-3).

In addition, both page one and page three indicate that each is part of a standard form titled "NC0001[,]" (id.), authentication of which document is forecast by affidavit of Byrd, see Fed. R. Evid. 901(b)(1) (permitting testimony of a witness with knowledge to demonstrate that a document is what it appears to be). Based upon her experience as assistant branch manager for Green Cap and, later, branch manager for defendant, as set forth earlier, Byrd's undisputed testimony is that Green Cap and defendant regularly used form NC0001 in the course of business. Byrd, a witness to plaintiff's signature, also testified that the version of NC0001 plaintiff signed was the only version in use at that time. Moreover, Byrd's testimony that page two of NC0001 was contained on the reverse of "Page 1 of 3" is consistent with the statement on page one to "see reverse." (DE 17-2 at 2; see DE 17-5 at ¶ 20).

Based upon the foregoing, defendant has made a prima facie showing that the proffered document bearing the mark "Page 3 of 3" is indeed the third page of the note. Therefore, the foregoing evidence satisfies defendant's initial burden to "identify[] those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323.

Plaintiff denies authenticity of page three, declaring, "I never signed an arbitration agreement with [Green Cap] or [defendant.]" (DE 27-1 ¶ 4). However, where "parol evidence is admissible [to prove the parties' intent and other extrinsic matters] only if the writing is found to contain an ambiguity[,]" Lattimore v. Fisher's Food Shoppe, Inc., 313 N.C. 467, 474 (1985), the court cannot consider plaintiff's parol evidence where it contradicts plaintiff's unambiguous acknowledgment that the agreement was complete when plaintiff signed it. Fed. R. Civ. P. 56(c)(4) (requiring that affidavits submitted in support of or in opposition to summary judgment relate admissible evidence). That is, where, within the four corners of the agreement, plaintiff unambiguously acknowledged receipt of "a copy of this Promissory Note and Security Agreement[,]" plainly a three-page document, extrinsic evidence in the form of plaintiff's affidavit may not be considered to establish that plaintiff did not agree to terms also memorialized on the third page. See Lattimore, 313 N.C. at 474. Therefore, where plaintiff has produced no admissible evidence as counterweight to defendant's evidence, see Fed. R. Civ. P. 56(e)(2) (permitting the court to consider a fact undisputed if a party fails to properly support the fact), plaintiff has not met his burden to "set forth specific facts showing that there is a genuine issue for trial." Matsushita, 475 U.S. at 586–87.

In sum, where the evidence of record demonstrates validity of an agreement to arbitrate incorporated into the note, order compelling arbitration is proper. See 9 U.S.C. § 4. Additionally,

where the parties have identified no dispute outside the scope of agreement to arbitrate, dismissal is proper as to all issues. Choice Hotels Int'l., Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709–10 (4th Cir. 2001) ("[D]ismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable."). Accordingly, the case is dismissed.

CONCLUSION

For the foregoing reasons, defendant's motion to compel arbitration (DE 16) is GRANTED, and this matter is DISMISSED. The clerk is DIRECTED to close this case.

SO ORDERED, this the 20th day of July, 2017.

LOUISE W. FLANAGAN
United States District Judge