UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LINDA LAUDANO,
Plaintiff,

v.

CREDIT ONE BANK
Defendant.

CIVIL NO. 15-7668(NLH/KMW)

OPINION

Appearances:

AMY LYNN BENNECOFF GINSBURG
KIMMEL AND SILVERMAN P.C.
EXECUTIVE QUARTERS
1930 E. MARLTON PIKE,
SUITE Q 29
CHERRY HILL, NJ 08003
On behalf of Plaintiff Linda Laudano

ROSS STEVEN ENDERS
SESSIONS FISHMAN NATHAN & ISRAEL LLC
2302 OXFORDSHIRE ROAD
FURLONG, PA 18925
On behalf of Defendant Credit One Bank

HILLMAN, District Judge

In this matter, Plaintiff Linda Laudano filed a complaint alleging that Credit One Bank, N.A. ("Credit One") violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, using an automatic telephone dialing system and automatic or pre-recorded messages without her consent. Defendant Credit One filed a motion to compel arbitration and to dismiss Laudano's complaint, pending arbitration of her claims against Credit One.

For the reasons set forth below, this Court will deny Credit One's motion to dismiss without prejudice and direct the parties to conduct discovery, limited in scope as to whether the parties have entered into a valid agreement to arbitrate.

I. JURISDICTION

District courts have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States. 28 U.S.C. § 1331. In this action, our jurisdiction is founded upon the TCPA, 47 U.S.C. § 227.

II. BACKGROUND

Credit One filed a motion for an order to dismiss the complaint without prejudice and to compel arbitration pursuant to Federal Rules of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted) and the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. ("FAA"). In the alternative, if the Court determines "arbitrability is not apparent of the face of the complaint, or if plaintiff responds to the motion with additional facts sufficient to place the agreement to arbitrate in issue . . . Credit One requests the Court stay resolution of its Motion to allow limited discovery relating to arbitrability." (Docket 5-1 at 9 n.1.) Laudano opposes Defendant's motion.

According to Laudano's complaint,[1] Credit One Bank called her cellular telephone from September 2015 through October 2015 using an automatic telephone dialing system and pre-recorded messages. On September 30, 2015, Laudano revoked any consent previously given to Defendant to call her cell phone and demanded the calls stop. A collector told her that a note regarding her request to cease the calls would be put into her file. Laudano contends Credit One continued to telephone her for several weeks. Laudano alleges that Credit One's actions violated the TCPA and she demands damages, injunctive relief, other relief and demands a jury trial.

Although it appears from Defendant's submissions that Laudano's commercial relationship with the Defendant revolves around a credit card, the complaint is notably silent as to those underlying facts. In her complaint, Laudano neither admits nor denies receiving a solicitation from Credit One to open a credit card account, opening a Credit One account, receiving a Credit One credit card, making charges on a Credit One card, having an agreement with Credit One, or having an arbitration agreement with Credit One.

[1] As set forth below, this case presents the issue of what legal standard applies to Defendant's motion. For present purposes, we will accept all facts as alleged by Plaintiff in the complaint as true as if we were deciding the motion pursuant to Fed. R. Civ. P. 12.

In support of its motion, Credit One argues that Laudano is bound by an agreement to arbitrate. Credit One references two discrete documents with arbitration agreement language. The first is an arbitration provision that it contends was on the back of the credit card solicitation sent to Laudano, a "sample copy" (Docket 5-1 at 2.) attached as Exhibit A-1. ("Solicitation Agreement," Exhibit A-1, Docket 5-3.) Second, is the full arbitration agreement that it states it sent to her with the credit card. ("Disclosure Statement and Arbitration Agreement," hereinafter "Arbitration Agreement," Ex. A-2, Docket 5-4.)

Credit One submits with its motion an affidavit of the Vice President of Portfolio Services, Gary Harwood. (Harwood Aff., Ex. A, Docket 5-2.) Harwood oversees accounts in collections. He said he has access to records maintained in the course of "regularly conducted activity of Credit One" and is "fully familiar with the manner in which they are created and maintained." (Docket 5-2 at 2.) He asserts that Credit One mailed "Plaintiff a written solicitation for a pre-approved credit card" bearing a unique reservation number on or about November 13, 2012. (Id.)

He further avers: "In response to Plaintiff's application, Credit One issued a credit card to Plaintiff and mailed Plaintiff the card, along with a copy of the [Arbitration Agreement], which governs the account and relationship between

Plaintiff and Credit One." (Id. at 2.) He further contends that: "A true and correct copy of the [Arbitration Agreement] is attached hereto as Exhibit A-2." (Id.)

In short, Credit One contends that the agreement to arbitrate is found in the terms of the Solicitation Agreement and Arbitration Agreement which it supplied to Plaintiff when she was first solicited and later approved for a credit card. More specifically, it notes that the back pages of the Solicitation Agreement include terms and conditions that apply to the "credit card offer and application and require arbitration of claims between the parties." (Docket 5-1 at 2.) Credit One adds that the Solicitation Agreement provides in part, "If this application is accepted and one or more credit cards are issued . . . I understand that once my credit card Account is opened, it will be subject to the terms and conditions of the [Arbitration Agreement] sent with my card[.]" (Docket 5-1 at 2.) Credit One says Laudano responded to the solicitation by completing a credit card application online on Credit One's website. (Docket 5-1 at 2.)

As for the Arbitration Agreement, Credit One contends it issued and mailed Laudano a VISA card which "Per Credit One's policy and ordinary business practice, [] included a copy of the [Arbitration Agreement] . . . in the same envelope as the credit card." (Docket 5-1 at 3.) According to Credit One, the

Arbitration Agreement says in part: "PLEASE READ THIS PROVISION OF YOUR CARD AGREEMENT CAREFULLY. IT PROVIDES THAT EITHER YOU OR WE CAN REQUIRE THAT ANY CONTROVERSY OR DISPUTE BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY . . . ." (Docket 5-1 at 3.) Credit One says Plaintiff activated the credit card by telephone via its Interactive Voice Response system and used it for years before she stopped making payments. (Docket 5-1 at 5.)

Harwood's statement that Laudano received a copy of the Arbitration Agreement appears to be based on the assumption that Credit One followed its standard practice. (Id.) His title, description of duties, and other information in the Affidavit could be construed as an indication that he lacks personal information related to the solicitation and opening of accounts. He says, for example, "It is Credit One's policy to include a copy of the [Arbitration Agreement] when mailing the customer her credit card." (Id.)

Importantly, Credit One admits that: "While Credit One does not retain actual copies of the solicitation it sends potential customers, a sample copy of the solicitation [including a sample confirmation and approval number] is attached hereto as Exhibit A-1." (Docket 5-1 at 2.)

III. STANDARD OF REVIEW

The Third Circuit concluded, "It is well established that the Federal Arbitration Act (FAA), reflects a strong federal policy in favor of the resolution of disputes through arbitration. But this presumption in favor of arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." Kirleis v. Dickie, McCamey & Chilcote, 560 F.3d 156, 160 (3d Cir. 2009) (internal quotations and citations omitted). The court more recently held, "When the very existence of . . . an [arbitration] agreement is disputed, a district court is correct to refuse to compel arbitration until it resolves the threshold question of whether the arbitration agreement exists." Guidotti v. Legal Helpers Debt Resolution, L.L.C., 716 F.3d 764, 775 n.5 (3d Cir. 2013). The Third Circuit rule is clear: "Before a party can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect." Par-Knit Mills v. Stockbridge Fabrics, 636 F.2d 51, 54 (3d Cir. 1980).

In Kirleis, the court said, "To determine whether the parties agreed to arbitrate, we turn to ordinary state-law principles that govern the formation of contracts." 560 F.3d at 160 (internal quotation and citation omitted). The court held, "Because arbitration is a matter of contract, before compelling arbitration pursuant to the Federal Arbitration Act, a court

must determine that (1) a valid agreement to arbitrate exists, and (2) the particular dispute falls within the scope of that agreement." Kirleis, 560 F.3d at 160 (internal citation omitted).

A. Choice of Law

Laudano contends and Credit One appears to concede by silence that New Jersey law applies to this issue. In determining whether a valid agreement to arbitrate exists in this matter, we apply New Jersey law including its choice of law rules.[2] New Jersey's choice of law rules is a two-step analysis: "First, we must determine whether there is an actual conflict. If there is not an actual conflict, the inquiry is over[.]" Lebegern v. Forman, 471 F.3d 424, 428 (3d Cir. 2006) (internal citations and quotations omitted). If there is an

[2] Credit One's affirmative defense of arbitrability derives from the FAA. According to the Third Circuit, "notwithstanding the supremacy of federal law, courts repeatedly have held that in interpreting [arbitration] agreements, federal courts may apply state law, pursuant to section two of the FAA." Gay v. Creditinform, 511 F.3d 369, at 388 (3d Cir. 2007) (quotations and citation omitted). To determine whether Laudano and Credit One agreed to arbitrate, this Court looks to state law for the law of contract formation. See Kirleis v. Dickie, McCamey & Chilcote, 560 F.3d 156, 160 (3d Cir. 2009). Moreover, we apply the law including the conflicts rules of the forum state even though the jurisdiction is premised on federal law. Gay, 511 F.3d at 389 (if District Court jurisdiction in federal question case had been based on diversity court would apply Pennsylvania's choice-of-law principles as the court was in the Eastern District of Pennsylvania) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S 487 (1941)).

actual conflict between the two states' laws, the Court determines which jurisdiction has "the most significant relationship to the parties and the event." Id.

Under New Jersey law, consumers can choose to pursue arbitration and waive their right to sue in court, but should know that they are making that choice. Atalese v. U.S. Legal Serv. Group, L.P., 99 A.3d 306, 309 (N.J. 2014).[3] Under Nevada law, arbitration is favored by public policy because it avoids the higher costs and waiting time of litigation. D.R. Horton, Inc. v. Green, 96 P.3d 1159, 1162 (Nev. 2004). However, arbitration provisions that are inconspicuous, one sided and

[3] In 2014, the Supreme Court of New Jersey said:

> Because arbitration involves a waiver of the right to pursue a case in a judicial forum, courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent. The requirement that a contractual provision be sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right is not specific to arbitration provisions. Rather, under New Jersey law, any contractual waiver-of-rights provision must reflect that the party has agreed clearly and unambiguously to its terms.

Atalese, 99 A.3d 306, 313 (N.J. 2014) (internal quotations and citations omitted); Morgan v. Sanford Brown Inst., -- A.3d --, 2016 WL 3248016 (N.J. June 14, 2016). In Atalese, the court found the arbitration agreement was unenforceable because the language of the agreement "did not clearly and unambiguously" inform plaintiff that she was waiving her right to pursue claims in court. 99 A.3d at 315, 316.

fail to advise one side that they are agreeing to waive significant rights under Nevada law, might be procedurally and substantively unconscionable, and might be invalidated under Nevada law. Id. As both states appear to apply similar principles in determining whether an agreement to arbitrate in a consumer context has been reached, no conflict exists and we will apply New Jersey law.

B. Rule 12(b)(1) Standard

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges the existence of a federal court's subject matter jurisdiction. In this Circuit, courts generally, but not uniformly, [4] have accepted and embraced Rule 12(b)(1) as a proper vehicle for deciding whether to dismiss a suit by

[4] In Holdbrook, this Court noted courts have been inconsistent in entertaining the use of Rule 12(b)(1) to move to compel arbitration. Holdbrook Pediatric Dental, LLC v. Pro Computer Service, LLC, 2015 WL 4476017 at *2 (D.N.J. July 21, 2015). We quoted Masoner which stated "Rule 12(b)(1) . . . is not the correct rule of law under which to assert a contract-based defense requiring arbitration." See Masoner v. Educ. Mgmt. Corp., 18 F. Supp. 3d 652, 656 (W.D. Pa. 2014). Although our Court of Appeals has suggested in an unpublished decision that Rule 12(b)(1) is not the proper vehicle because a motion to compel arbitration raises a defense to the merits and not jurisdiction, see Liberty Mut. Fire Ins. Co. v. Yoder, 112 F. App'x 826, 828 (3d. Cir. 2004) (unpublished), absent clear and binding precedent from our Circuit we have, and will allow such motion, especially in those cases, as here, where it is coupled with a motion under Rule 12(b)(6). Cf., Thompson v. Nienaber, 239 F. Supp. 2d 478 (D.N.J. 2002) (noting district courts should be flexible in applying procedural rules to motions to compel arbitration).

virtue of an arbitration agreement between the parties. See, e.g., Wells v. Merit Life Ins. Co., 671 F. Supp. 2d 570, 573 (D. Del. 2009) (stating that "[a] motion to dismiss on the basis that the dispute must be arbitrated is a factual challenge" to a court's subject matter jurisdiction); Thompson v. Nienaber, 239 F. Supp. 2d 478, 483 (D.N.J. 2002) (approving Rule 12(b)(1) motion to join issue of arbitrability).

"When considering a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the court must accept as true all material allegations of the complaint and construe that complaint in favor of the non-moving party." Nienaber, 239 F. Supp. 2d at 481. The court should focus upon the issue of whether it has jurisdiction to bar the claim and grant relief. Id.

C. Rule 12(b)(6) Standard

To survive dismissal for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation and quotation omitted). The court must accept all well-pleaded allegations in the claim as true and view them in the light most favorable to the claimant.

Evancho v. Fisher, 423 F.3d 347, 350 (3d Cir. 2005). A complaint must have "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings give defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 149-50 n.3 (1984) (quotation and citation omitted). A district court, in weighing a motion to dismiss, asks "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Bell Atlantic v. Twombly, 550 U.S. 544, 563 n.8 (2007).

IV. ANALYSIS

Although styled as a Rule 12(b)(6) motion, we are unable, in the circumstances of the case, to dismiss on that basis.[5] We turn for guidance to the Third Circuit's decision in Guidotti:

[5] As we have noted, there is a strong federal policy in favor of using arbitration to resolve disputes as set forth in the FAA. Kirleis, 560 F.3d at 160. This does not mean, as Defendant suggests, that this Court presently lacks subject matter jurisdiction. The Court retains jurisdiction to determine the threshold question of whether there is a valid arbitration agreement between the parties. The FAA provides, "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration."

> [A] Rule 12(b)(6) standard is inappropriate when either the motion to compel arbitration does not have as its predicate a complaint with the requisite clarity to establish on its face that the parties agreed to arbitrate, or the opposing party has come forth with reliable evidence that is more than a naked assertion . . . that it did not intend to be bound by the arbitration agreement, even though on the face of the pleadings it appears that it did. Under the first scenario, arbitrability not being apparent on the face of the complaint, the motion to compel arbitration must be denied pending further development of the actual record. The second scenario will come into play when the complaint and incorporated documents facially establish arbitrability but the non-movant has come forward with enough evidence in response to the motion to compel arbitration to place the question in issue. At that point, the Rule 12(b)(6) standard is no longer appropriate, and the issue should be judged under the Rule 56 standard.

Guidotti 716 F. 3d at 774 (internal quotations and citations omitted). In Guidotti, the non-movant came forward with enough evidence showing she had not intended to be bound by an arbitration agreement and therefore she fell within the second scenario. In this motion, Laudano's complaint is not only

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9 U.S.C. § 4. Thus, this Court retains jurisdiction until it decides the making of the agreement is not in issue. As the Third Circuit said, "This presumption in favor of arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." Kirleis, 560 F.3d at 160. Therefore, to the extent Defendant's motion pursuant to Fed. R. Civ. P. 12(b)(1) is premised on an argument this Court lacks jurisdiction to determine whether the parties entered into an agreement to arbitrate the motion will be denied. To the extent it merely provides an alternative basis to argue the matter should be dismissed because of such an agreement to arbitrate exists, the motion is denied as moot in light of our decision to allow limited discovery. Guidotti v. Legal Helpers Debt Resolution, L.L.C., 716 F.3d 764 (3d Cir. 2013).

silent as to an agreement to arbitrate, but also does not mention a credit card agreement at all. Arbitrability is not apparent on the face of the complaint. Her complaint falls within the first scenario. Pursuant to Guidotti, the parties must be given the opportunity to conduct discovery on the limited issue of the validity of the arbitration agreement.

In determining that Guidotti resolves the pending motion, we need not address Laudano's arguments challenging the Harwood affidavit such as her argument that Harwood lacks personal knowledge of the relevant facts, that the agreements are unsigned, that Defendant has only produced "samples" of the alleged agreements, and that Laudano never assented to such terms either by word or conduct.[6] The resolution of such matters will await limited discovery and a properly supported motion for summary judgment.

[6] Credit One relies upon Bibb which states, "It has long been recognized in New Jersey that in the context of traditional credit cards, the cardholder's decision to use the card provides the requisite assent to the terms of the offer extended by the card's issuance, such that a contract is formed." MBNA Am. Bank, N.A. v. Bibb, 2009 WL 1750220, at *3 (N.J. Super. Ct. App. Div. 2009) (citing Novack v. Cities Serv. Oil Co., 149 N.J. Super. 542, 548 (Law Div. 1977) and City Stores Co. v. Henderson, 156 S.E.2d 818, 823 (App. Ct. 1967)). We do not view Bibb as controlling on the record now before us as we construe Bibb as holding that use can constitute acceptance where the terms are conveyed and known, and therefore accepted, at the time of use. In any event, Defendant may reassert Bibb and any other relevant precedent in the context of any future motion of summary judgment.

For now, we simply apply the principle articulated in Guidotti that, "[t]he district court, when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise." Par-Knit Mills, 636 F.2d at 54. Therefore, we grant to Laudano, as the non-moving party, the benefit of all reasonable doubts and inferences. Credit One must show in a procedurally correct manner, after a limited discovery on the issue, that a valid agreement to arbitrate exists between the parties.[7]

V. CONCLUSION

For the reasons set forth above, Credit One's motion to dismiss the complaint and compel arbitration will be denied as well as its alternate motion to stay. The parties will be ordered to conduct discovery, limited in scope, on the issue of whether the parties have entered into a valid agreement to arbitrate. Following the discovery, this Court will consider

[7] We reject Credit One's argument, relying on Quilloin, 673 F.3d 221 (3d Cir. 2012), that where a valid delegation clause exists, questions of arbitrability must go to the arbitrator, not the court. In Quilloin, in contrast to this case, the non-movant admitted in a supplemental submission to signing a form acknowledging receipt of a brochure that described the arbitration agreement. Id. at 225. Thus, Quilloin did not deal with the threshold question here of whether the parties ever formed an agreement to arbitrate.

any procedurally appropriate motions consistent with Guidotti.[8]

An appropriate Order accompanies this Opinion.

Dated: June 22, 2016
At Camden, New Jersey

__s/ Noel L. Hillman_____
Noel L. Hillman, U.S.D.J.

[8] Laudano argues that any agreement to arbitrate is unconscionable and therefore unenforceable. As the issue of arbitrability has not been resolved, the Court need not consider that issue at this time.