

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION**

IN RE:)	
)	
OTERIA Q. MOSES,)	Case No.: 12-05563-8-RDD
)	
Debtor,)	Chapter 13
)	
)	
OTERIA Q. MOSES,)	
)	
Plaintiff,)	
)	
v.)	
)	Adv. Pro.: 12-000174-8-RDD
CASHCALL, INC.,)	
)	
Defendant.)	
)	

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR TO STAY AND
COMPEL ARBITRATION**

Defendant CashCall, Inc. (“CashCall”), submits the following Memorandum of Law in support of its Motion to Dismiss the Complaint filed by Debtor/Plaintiff Oteria Q. Moses (“Moses” or “Debtor”), or, in the alternative, to Stay and Compel Arbitration pursuant to 9 U.S.C. § 3 and Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012.

INTRODUCTION

Defendant CashCall merely seeks to hold the Debtor to her agreement that she will arbitrate her non-core debt collection claim against CashCall. Defendant CashCall filed a Proof of Claim in the bankruptcy proceeding for the unpaid balance of loan to the Debtor. In response,

the Debtor objected to the Proof of Claim, and filed an adversary proceeding seeking damages under North Carolina's Prohibited Acts by Debt Collectors Act, *see* N.C. Gen. Stat. § 75-50 *et seq.* (the "Fair Debt Claim").

The Debtor concedes that the Fair Debt Claim is a non-core proceeding. (Compl. ¶ 3.) The law is well-established that non-core proceedings are subject to arbitration, even in bankruptcy. Therefore, there can be no dispute that the Fair Debt Claim must either be dismissed or stayed so that the parties can arbitrate the Debtor's claim.

FACTUAL BACKGROUND

Oteria Q. Moses (the "Debtor") entered into a Consumer Loan Agreement (the "Note" or "Loan Agreement") with Western Sky Financial, LLC ("Western Sky") in May 2012, in which she promised to pay the holder of the Note \$1500 plus interest. (Compl. ¶¶ 1–4.) A copy of the Loan Agreement is attached to the Declaration of Raymond M. Bennett ("Bennett Decl.") as Exhibit A.¹ Moses agreed that she was executing the Agreement as if she were "physically present within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation," and that the Loan Agreement is "fully performed within the exterior boundaries" of the Reservation. (Bennett Decl., Ex. A at 1, 4.) Although the Debtor seeks to challenge the Loan Agreement under North Carolina law, the Loan Agreement states clearly that it is (1) subject solely to the exclusive laws of the Cheyenne River Sioux Tribe, (2) the debtor consents to the exclusive jurisdiction of the Cheyenne River Sioux Tribal Court, (3) the agreement is governed by the Indian Commerce Clause of the U.S. Constitution and Cheyenne River Sioux Tribal laws, and (4) the company is subject to the laws of no state. *See id.*

¹ "Whether the parties have agreed to arbitrate their disputes is a jurisdictional question. . . . Thus, the Court may consider materials outside the pleadings, including the [loan agreement] at issue in this case, to determine whether a valid arbitration agreement exists." *Wake County Bd. of Educ. v. Dow Roofing Sys., LLC*, 792 F. Supp. 2d 897, 900 (E.D.N.C. 2011).

The Loan Agreement contains an arbitration clause, entitled “WAIVER OF JURY TRIAL AND ARBITRATION,” whereby the parties agreed to resolve *any disputes* in binding arbitration. The provision provides:

Agreement to Arbitrate. You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.

(Bennett Decl., Ex. A at 5.) The Loan Agreement defines a “Dispute” in the broadest possible terms:

A “Dispute” is *any controversy or claim between you and Western Sky or the holder or servicer of the Note*. The term Dispute is to be given its broadest possible meaning and includes, without limitation, all claims or demands (whether past, present, or future, including events that occurred prior to the opening of this Account), based on any legal or equitable theory (tort, contract or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief). A Dispute includes, by way of example and without limitation, any claim based upon marketing or solicitations to obtain the loan and the *handling or servicing of my account* whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law, and *including any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement*.

Id. (emphases added).

The arbitration provision expressly provides that it will survive “the bankruptcy of any party” and any transfer or assignment of the Note, and that it continues in “full force and effect” even if Debtor’s “obligations have been paid or discharged through bankruptcy.” *Id.*

The Arbitration Clause is not unfavorable to the Debtor. First, CashCall must “pay the filing fee and any costs or fees charged by the arbitrator regardless of which party initiates the Arbitration.” *Id.* Second, the Debtor has the right to select AAA, JAMS, or an arbitration organization agreeable to all parties to administer the arbitration. *Id.* Third, the Debtor can elect to conduct the arbitration “within thirty miles of [her] residence.” *Id.*

If the Debtor did not want her account to be subject to the arbitration provision, she had the right to “opt out” of the provision by providing written notice (by letter or e-mail) within sixty days of the funding of the loan that she rejected the provision. *Id.* at 6. The Debtor did not elect to opt out of the arbitration provision.

After the Debtor entered into the Loan Agreement, Western Sky assigned all of its rights under the Agreement to CashCall. (Compl. ¶ 5.) The Debtor defaulted on her obligations under the Loan Agreement, and CashCall communicated with the Debtor on several occasions in an attempt to collect the debt. (Compl. ¶¶ 6–7.) In August 2012, the Debtor filed a petition for bankruptcy. (Compl. ¶ 4.) In the bankruptcy proceeding, CashCall filed a Proof of Claim with this Court for the unpaid balance of the loan in accordance with 11 U.S.C. § 501(a) (2012).² (Compl. ¶ 1.)

On August 23, 2012, the Debtor filed an adversary proceeding objecting to the Proof of Claim and seeking damages under North Carolina’s Prohibited Acts by Debt Collectors Act (the “Fair Debt Claim”). (Compl. ¶¶ 25–36.) The Fair Debt Claim seeks up to \$4,000.00 for every debt collection communication initiated by CashCall before the filing of the petition in this bankruptcy, plus attorney’s fees. (Compl. ¶¶ 25–36.) The Debtor admits that the Fair Debt Claim is a non-core proceeding. (Compl. ¶ 3.)

ANALYSIS

“Whether the parties have agreed to arbitrate their disputes is a jurisdictional question” to be resolved under Rule 12(b)(1) of the Rules of Civil Procedure. *Wake County Bd. of Educ. v. Dow Roofing Sys.*, 792 F. Supp. 2d 897, 900 (E.D.N.C. 2011). “Because of the strong federal policy favoring arbitration, the burden lies with the party opposing arbitration to demonstrate

² On November 13, 2012, CashCall filed a Motion to Withdraw its Proof of Claim with prejudice as it has decided to waive the debt.

why arbitration should not be ordered.” *Id.* (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987)).

A. *The Fair Debt Claim is a Non-Core Proceeding, and Therefore, Subject to Arbitration in Bankruptcy*

Bankruptcy courts, like other federal courts, “view a motion to compel arbitration in light of the strong federal and state policy favoring arbitration” and resolve “any doubts concerning the scope of arbitrable issues” in favor of arbitration. *TP, Inc. v. Bank of Am., N.A.*, No. 10-01594-8-SWH, 2012 Bankr. LEXIS 4467, at *5 (E.D.N.C. Sept. 26, 2012). In bankruptcy proceedings, “whether a proceeding is a ‘core proceeding’ generally determines whether an arbitration clause can be enforced.” *D&B Swine Farms, Inc. v. Murphy-Brown, LLC*, No. 09-02813-8-JRL, 2011 Bankr. LEXIS 4684 (E.D.N.C. Dec. 2, 2011). Arbitration of a non-core proceeding is strongly favored: “if the matter is non-core, it is generally referred to arbitration consistent with the policy in favor of arbitration; however, if a core proceeding is at issue, the policy in favor of centralized determination in the bankruptcy court generally prevails.” *TP, Inc.* 2012 Bankr. 4467, at *18-19.

In this case, the Debtor concedes that her Fair Debt Claim, which is at the heart of her adversary proceeding, is non-core. (Compl. ¶ 3.) Therefore, the Debtor’s Fair Debt Claim must be sent to arbitration if it is within the scope of the arbitration agreement. *See TP, Inc.*, 2012 Bankr. LEXIS 4467, at * 23-33 (pre-petition claims for damages grounded in state law that will merely augment value of the estate, rather than reduce value of proof of claim, are non-core and must be referred to arbitration).

B. *The Arbitration Agreement Applies to the Fair Debt Claim*

There can be no dispute that the arbitration agreement extends to the Debtor’s Fair Debt Claim, which arises from CashCall’s attempt to enforce the Loan Agreement and challenges the

validity of the loan. As set forth above, the arbitration clause in the Loan Agreement applies to “*any disputes*” between the parties, regardless of the theory or relief sought. (Bennett Decl., Ex. A at 5.) A “Dispute” is to be given “the broadest possible meaning” and includes without limitation “all claims or demands” including, without limitation, any claim based upon “the handling or servicing of [the] account” based upon state law and “any issue concerning the validity, enforceability, or scope of [the] loan or the Arbitration agreement.” *Id.*

This Court has held that such a “broad and all encompassing” arbitration provision that purports to cover “any dispute” between the parties, including those unrelated to the loan relationship, extends to a broad range of tort, contract, and statutory disputes between a debtor and creditor and is not limited to interpretation of the contract itself. *See TP, Inc.*, 2012 Bankr. LEXIS 4467, at *6-7 (interpreting similarly broad arbitration provision); *see also Cara’s Notions v. Hallmark Cards, Inc.*, 140 F.3d 566, 569 (4th Cir. 1998) (an “extremely broad arbitration clause,” which called for arbitration of “[a]ny controversy or claim arising out of or relating to . . . any aspects of the relationship,” covered all conflicts between the parties); *Levin v. Alms and Assocs., Inc.*, 634 F.3d 260, 267 (4th Cir. 2011) (in light of the presumption in favor of arbitrability, that broad language referring to “[a]ny dispute” encompassed any disputes between the parties, past or present”).

C. *The Arbitration Clause is Enforceable Even if the Agreement is Invalid under North Carolina Law*

The Debtor’s claim that the Loan Agreement is invalid under North Carolina law does not invalidate or avoid the arbitration clause. The law is well-settled that an agreement to arbitrate is severable from the rest of the contract and, therefore, enforceable even if one party contends the contract is invalid. A “party’s challenge to . . . the contract as a whole does not prevent a court from enforcing a specific agreement to arbitrate.” *Rent-A-Center, W., Inc. v*

Jackson, 130 S. Ct. 2772 (2010). In fact, the U.S. Supreme Court first established this rule of law in a context very similar to this one. *See also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-45 (2006) (rejecting party's claim that contract as a whole, including arbitration provision, was rendered invalid by a usurious finance charge; arbitration provision was enforceable apart from remainder of the contract).

Accordingly, the Debtor's Fair Debt Claim is subject to arbitration pursuant to the parties' agreement. The Court has the authority to dismiss the claim or to stay the matter and compel arbitration. *See* 9 U.S.C. § 1-4 (FAA grants courts authority to stay or dismiss claims that are subject to valid arbitration agreements); *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 395 (4th Cir. 2005) (where parties are compelled to arbitrate, court has authority to stay lawsuit pending issuance of award or to dismiss without prejudice to parties' right to file separate action to confirm/vacate award); *Quest Motor Racing, Inc. v. Paramount Hosp. Mgmt., LLC*, 2007 U.S. Dist. LEXIS 19838, at *2-3 (W.D.N.C. Mar. 19, 2007) (same); *TP, Inc.*, 2012 Bankr. LEXIS 4467, at *34 (staying bankruptcy proceedings and referring claims to arbitration).³

CONCLUSION

CashCall's Motion to Dismiss or to Stay and Compel Arbitration should be granted because the Fair Debt Claim is a non-core proceeding, which is subject to arbitration pursuant to the parties' broad agreement to arbitrate all disputes between them and under the rule in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-45 (2006) that an arbitration provision is enforceable even where one of the parties challenges the validity of the contract as a whole.

³ The Complaint also includes a declaratory judgment action objecting to CashCall's Proof of Claim. (Compl. ¶¶11-24.) As CashCall has moved to dismiss its Proof of Claim with prejudice, the declaratory judgment claim should be dismissed as moot.

Respectfully submitted, this the 13th day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR TO STAY AND COMPEL ARBITRATION** with the Clerk of Court using the CM/ECF which will send notification of such filing to the following:

Mr. Adrian M. Lapas
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This the 13th day of November, 2012.

/s/ Hayden J. Silver III

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