UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

IN RE:	)	
	)	Case No.: 12-05563-8-RDD
OTERIA Q. MOSES,	)	
	)	
Debtor.	)	Chapter 13
_____	)	
	)	
OTERIA Q. MOSES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CASHCALL, INC.,	)	Adv. Pro.: 12-00174-8-RDD
	)	
Defendant.	)	
_____	)	

MEMORANDUM OPPOSING DEFENDANT'S MOTION TO DISMISS OR TO STAY AND COMPEL ARBITRATION

NOW COMES plaintiff, Oteria Q. Moses, by and through counsel, and respectfully submits this memorandum in opposition to defendant's Motion to Dismiss or to Stay and Compel Arbitration.

PRELIMINARY STATEMENT

Ms. Oteria Q. Moses first objects to Cashcall, Inc.'s proof of claim filed in her underlying bankruptcy case and she seeks a determination that the purported loan agreement with Western Sky Finance, LLC and subsequently assigned to defendant Cashcall, Inc. is void because it was made in violation of the North Carolina Consumer Finance Act (NCCFA). If the loan transaction was made in violation of the NCCFA, it is not legally enforceable against Ms. Moses and Cashcall's proof of claim should be disallowed under 11 U.S.C. § 502(b)(1).

The allowance or disallowance of claims is a core proceeding under 28 U.S.C. § 157(b)(2)(B) and may be determined by the bankruptcy courts even if an arbitration clause is at issue. If the contract is determined to be legally unenforceable, then any pre-petition collection attempts would necessarily have been in violation of the North Carolina debt collection statute as set forth under Chapter 75, Article Two.

Ms. Moses then seeks a determination that, because the purported loan agreement with Western Sky, LLC and subsequently assigned to Cashcall, Inc. is illegal, she may bring her claims for violation of the North Carolina debt collection statute[1] as a non-core proceeding to recover for damages stemming from the violations of the Chapter 75, Article Two of the North Carolina General Statutes.

FACTUAL BACKGROUND

As set forth in the Factual Allegations of plaintiff's complaint, Ms. Moses was experiencing financial difficulties prior to her bankruptcy filing on August 1, 2012. During that time, she turned to Western Sky Financial, LLC which advertises heavily on television. Western Sky states on television advertising and in its website promotions that money can be deposited in an applicant's account overnight. In desperation, Ms. Moses completed an on-line application which included listing her place of residence, that is, North Carolina. *Plaintiff's Complaint; Factual Allegations* ¶¶ *1-3.*

Western Sky, LLC is a limited liability company organized and existing under the laws of the State of South Dakota. *See Exhibit A.* Additionally, Western Sky, LLC states on its website that is "owned wholly by an individual Tribal Member" and that Western Sky Financial, LLC is "*not* owned or operated by the Cheyenne River Sioux Tribe or any of its political subdivisions."

[1] The federal Fair Debt Collections Practices Act most likely would not apply to Cashcall, Inc. as it is alleged to be an assignee of a debt that was not in default at the time of assignment. 15 U.S.C. § 1692a(6)(F)(iii)(2012).

See Website accessed August 13, 2012; December 4, 2012 (emphasis added). Western Sky further states that it is "a Native American-owned business operating within the *exterior* boundaries of the Cheyenne River Sioux Reservation." *See Website accessed August 13, 2012; December 4, 2012 (emphasis added).* The website further states that it will not accept loan applications from residents in California, Colorado, Maryland, South Dakota, and West Virginia (Colorado was added to the website after the filing of plaintiff's complaint). *See Exhibit B.* It is undisputed that Western Sky Finance, LLC is not a licensee by the North Carolina Commissioner of Banks as required under the North Carolina Consumer Finance Act.[2] *See Exhibit C.*

Ms. Moses then proceeded with the transaction and a certain sum was electronically deposited in Ms. Moses' bank account. It is alleged on information and belief that, immediately after the loan transaction was consummated, the loan account was assigned to Cashcall, Inc., defendant herein.

After the loan transaction was assigned to Cashcall, Inc. and after any alleged payments were due, Ms. Moses started receiving numerous phone calls and other duns demanding payment on this loan. As alleged in her complaint, Ms. Moses then sought bankruptcy protection by filing her case in this court. *Plaintiff's Complaint, Factual Allegations ¶ 8.*

On August 8, 2012, Cashcall, Inc. filed a proof of claim in Ms. Moses' bankruptcy case. *See Claim #3. Exhibit D.* In response to the proof of claim, Ms. Moses filed the instant adversary proceeding objecting to the proof of claim filed by Cashcall as it is unenforceable against the debtor under 11 U.S.C. § 502. On November 13, 2012, Cashcall filed a Motion to Withdraw Proof of Claim #3. *See DE #23 of underlying bankruptcy case.* As shown by the records of this Court as maintained by PACER and the Administrative Office of the Courts, since

[2] Nor is Cashcall, Inc. licensed as a North Carolina Consumer Finance Act lender. *See attachments.*

September 24, 2008, Cashcall has filed 118 proofs of claim in the Eastern District of North Carolina alone. *Exhibit E.* Ms. Moses has objected to the withdrawal of Cashcall's proof of claim.

On November 13, 2012, defendant Cashcall, Inc. filed the present Motion to Dismiss or to Stay and Compel Arbitration. Plaintiff timely filed her response thereto as allowed under L.R. 7007(b) and L.R. 5005-4(9)(d).

ARGUMENT

I. WHERE PLAINTIFF OBJECTED TO DEFENDANT'S PROOF OF CLAIM AS UNENFORCEABLE AGAINST THE DEBTOR UNDER APPLICABLE LAW, THE BANKRUPTCY COURT MAY DECIDE THE "CORE PROCEEDING" NOTWITHSTANDING ANY ALLEGED ARBITRATION PROVISIONS.

In the present case, Ms. Moses has objected to Cashcall's proof of claim filed in this matter. An objection to a proof of claim may be joined with any other demand for relief in an adversary proceeding. Fed. R. Bankr. P. Rule 3006(b)(2012). Ms. Moses objects to and seeks a declaration from this Court that the alleged loan transaction that she entered into with Western Sky Finance as Cashcall's predecessor-in-interest is void and unenforceable against the debtor or bankruptcy estate because it was made in violation of the North Carolina Consumer Finance Act as set forth under Article 15 of Chapter 53 of the North Carolina General Statutes. *See Plaintiff's Complaint, First Claim for Relief.* A proceeding to determine the "allowance or disallowance of claims" is a core proceeding under 28 U.S.C. § 157(b)(2012); *Phillips v. Congleton, (In re: White Mtn. Mining Co., LLC), 403 F.3d 164, 169 (4th Cir. 2005).*

The Fourth Circuit has noted that it can be argued that, in the bankruptcy context, "the statutory text of giving the bankruptcy courts core issue jurisdiction reveals a congressional intent to choose [bankruptcy courts] in exclusive preference to all other adjudicative bodies, including boards of arbitration, to decide core claims." *Phillips v. Congleton*, at 169. Though

the *Congleton* court did not reach the conclusion that the Bankruptcy Code supplants the Federal Arbitration Act in all core issues, the Fourth Circuit stated that "the very purpose of bankruptcy is to modify the rights of debtors and creditors and Congress intended to centralize disputes about a debtor's assets and legal obligations in the bankruptcy courts." *Phillips* at 169 (internal citations omitted). Further, "[a]rbitration is inconsistent with centralized decisionmaking because permitting an arbitrator to decide a core issue would make debtor-creditor rights 'contingent upon an arbitrator's ruling' rather than the ruling of a bankruptcy judge assigned to hear the debtor's case." *Phillips,* at 169-70 *citing* Note, *Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act,* 117 Harv. L. Rev. 2296 (2307 (2004). In affirming the bankruptcy court's decision to deny arbitration, the Court of Appeals affirmed the lower court's findings that arbitration would hamper the debtor's ability to reorganize by, among other things, reducing the creditor confidence in the debtor's ability to reorganize and impose additional costs on the bankruptcy estate. *See also, French v. Liebman (In re: French),* 440 F.3d 145, 154 (4th Cir. 2006)(denying arbitration of core proceeding—arbitration would result in depletion of estate assets).

Similarly, as acknowledged by defendant, "whether a proceeding is a 'core proceeding' generally determines whether an arbitration clause can be enforced." *TP, Inc. v. Bank of America, N.A.*, 479 B.R. 373, 382 (Bankr. E.D.N.C. 2012); *D&B Swine Farms, Inc. v. Murphy-Brown, LLC*, No. 09-02813-8-JRL, 2011 Bankr. LEXIS 4684 (E.D.N.C. 2011); *In re: Blanchard Transportation Services, Inc.*, 07-01830-8-JRL, 2008 Bankr. LEXIS 664 (E.D.N.C. 2008)(arbitration denied of core proceeding); Alan N. Resnick, *the Enforceability of Arbitration Clauses in Bankruptcy,* 15 Am. Bankr. Inst. L. Rev. 183 (Spring, 2007). Thus, if a core proceeding is at issue, the policy in favor of centralized determination in the bankruptcy court

generally prevails. *TP, Inc., supra,* at 382. *See also Ford Motor Credit, LLC v. Roberson*, 2010 Dist. LEXIS 115795 (D.Md. 2010)(arbitration denied of core proceeding). Furthermore, defendant has not cited one case in which arbitration was allowed to proceed with regards to a "core" issue.

Additional considerations also support Ms. Moses' contention that arbitration should be denied. Should this matter be referred to arbitration, estate assets could be further depleted as a result of any claim made for arbitration fees, attorney's fees or other fees that the arbitrator may award. Such additional claims against Ms. Moses' bankruptcy estate could hamper her ability to reorganize under her chapter 13 plan and would potentially deplete estate assets. *See* 11 U.S.C. § 1306(a)(2)(post-petition earnings of debtor constitute estate assets). The *Phillips* court considered preservation of estate assets as a factor to be considered in denying arbitration in a bankruptcy case. *Phillips v. Congleton (In re: White Mtn. Mining Co. LLC)*, 403 F.3d 164, 170 (4th Cir. 2005).

Finally, as set forth at Exhibit E, Cashcall has filed approximately 118 proofs of claim in bankruptcy cases filed in the Eastern District of North Carolina. While it cannot be determined whether all of these proofs of claims stem from Western Sky transactions, this Court has a further interest in ensuring that only valid claims are asserted against not only Ms. Moses' bankruptcy estate but in any other bankruptcy case filed in this district. Generally, arbitration proceedings are confidential. *See* Laurie Kratky Dore, *Public Courts Versus Private Justice: It's Time To Let Some Sun Shine In On Alternative Dispute Resolution*, 81 Chi-Kent L. Rev. 463, 482-83 (2006); *see also* JAMS Rule 26 attached as Exhibit F. In light of the number of claims filed in the Eastern District of North Carolina alone, this court has an obligation to determine whether the claims are properly enforceable against the debtor and the debtor's estate. By

determining whether Cashcall's claim is not enforceable against the debtor, the district as a whole will now know that the claims are invalid and should be disallowed. This benefits not only the court system in that potential unlawful claims may not be asserted against other debtors, but also benefits other creditors whose *pro rata* portion of a debtor's limited resources may be diminished through payment of invalid claims. As set forth above, because the initial determination of whether Cashcall's claim is enforceable against the debtor is a core proceeding, the policy in favor of centralized determination in the bankruptcy court generally prevails. *TP, Inc., supra,* at 382.

In the present case, resolution of Ms. Moses' core claim against Cashcall should proceed in the bankruptcy court. As stated above, the claims allowance or disallowance process is a core proceeding. 28 U.S.C. § 157(b)(2)(B)(2012); Collier on Bankruptcy ¶ 3.02[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). If a claim is unenforceable against the debtor and property of the debtor, then such claim can be disallowed under 11 U.S.C. § 502(b)(1)(2012); Collier on Bankruptcy ¶ 502.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Ms. Moses contends that, because the loan transaction with Western Sky Finance was made in violation of the North Carolina Consumer Finance, Act, the loan transaction is void and unenforceable against the debtor. N.C. Gen. Stat. § 53-166(d)(2012)(any contract of loan [. . .]" made in or collected in violation of this Article [. . .] is void.") This is the very definition of a core proceeding and arbitration should be denied.

II. IF THIS COURT DETERMINES THAT THE LOAN TRANSACTION IS VOID AND UNENFORCEABLE AGAINST THE DEBTOR UNDER NORTH CAROLINA LAW, THEN PLAINTIFF'S NON-CORE CLAIMS MAY PROCEED IN BANKRUPTCY COURT.

As set forth above, the legality of the loan agreement under North Carolina law and therefore whether it is enforceable against the debtor is a "core" proceeding and not subject to

arbitration. Plaintiff acknowledges that her state debt collection claims are "non-core" proceedings under 28 U.S.C. § 157(b)(2012). The entire premise of Ms. Moses' debt collection claims is that any attempt to collect on an illegal contract is done in violation of the North Carolina debt collection statute.

While much case law exists that if a contract contains an arbitration provision and the entire contract is alleged to be illegal, the decision should be made by the arbitrator, none of those cases arise in the context of a core proceeding in bankruptcy. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2005); *Nitro-Lift Technologies, LLC v. Lee*, 568 U.S. ___ (2012). *In re: TP, Inc.* 479 B.R. 373 (Bankr. E.D.N.C. 2012) is somewhat instructive as in that case, the court denied referring the core proceedings into arbitration while it did refer the non-core proceedings into arbitration. However, the current case is different in that Ms. Moses' non-core claims depend exclusively on the determination of whether the underlying contract is legal in the first instance. Therefore, this court should, consistent with Fourth Circuit precedent, deny defendant's Motion to Compel Arbitration and determine that the claim asserted against Ms. Moses by Cashcall is void *ab initio* and unenforceable against the debtor.

CONCLUSION

For the foregoing reasons, plaintiff respectfully prays that this Court deny defendant's Motion to Compel Arbitration.

This the 5th day of December, 2012.

ADRIAN M. LAPAS, P.A.

By: *s/ Adrian M. Lapas*

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify, under penalty of perjury, that I am, at all times relevant herein, am more than eighteen (18) years of age; and that on this day, I served the attached MEMORANDUM OF LAW OPPOSING DEFENDANT'S MOTION TO DISMISS OR STAY AND COMPEL ARBITRATION on all the parties to this cause by, unless an alternative method is specified below, depositing a copy hereof, postage prepaid, in the United States mail, addressed to the attorney for each said party as follows:

Mr. Hayden J. Silver, III
Mr. Raymond M. Bennett
Womble Carlyle Sandridge & Rice
150 Fayetteville Street, Ste. 2100
Raleigh, NC 27601
(Via ECF and e-mail)

This the 5th day of December, 2012.

ADRIAN M. LAPAS, P.A.

By: *s/ Adrian M. Lapas*

Adrian M. Lapas
Attorney for Plaintiff