IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

American General Finance,	)	Case No. 09-685562
	)	
Plaintiff	)	Judge Peter J. Corrigan
	)	
	)	
vs.	)	**OPINION AND ORDER**
	)	
Opal Griffin	)	
	)	
Defendant	)	

Peter J. Corrigan, J.:

Introduction

The issue before the Court for its consideration is the Amended Motion to Compel Arbitration, Stay Court Proceedings and Dismiss Class Claims. For the following reasons, the motion is denied.

Procedural History

On August 11, 2008, plaintiff American General Finance nka American General Finance Services ("AGFS") filed a collection action against defendant Opal Griffin in Bedford Municipal Court seeking $7,289.48 allegedly due AGFS on loans made to Griffin. On February 23, 2009, Griffin filed an Amended Answer with Counterclaims seeking damages in excess of $61,000.00. The case was then certified to Common Pleas Court as it exceeded the Municipal Court's jurisdictional limit.

On May 13, 2009, AGFS filed its reply to Griffin's counterclaims in its Amended Answer. The Amended Answer did not raise a demand for arbitration.

On October 16, 2009, Griffin filed a Third Amended Counterclaim and a Third-Party Complaint ("CC") against AGFS and newly added defendants American General Finance Corporation

("AGFC"), American General Finance, Inc. ("AGFI"), Yosemite Insurance Company ("Yosemite"), and Merit Life Insurance Company ("Merit Life") ["affiliated companies"].[1]

In her pleading, Griffin raised class action claims for usury, unconscionability, violation of the Truth in Lending Act, breach of contract, breach of fiduciary duty, and civil conspiracy claims against AFGS. (CC pgs.14-22) Griffin raised claims for violations of Ohio insurance law, civil conspiracy, and unjust enrichment against the affiliated companies and sought refunds of the excess premiums. However, Griffin and the class members assign any right to collect these premiums to AGFS. (CC pgs. 17, 19)

In response to Griffin's pleading, AGFS and the affiliated companies filed requests for an extension of time to respond and shortly thereafter, the affiliated companies removed the case to the federal district court claiming subject matter jurisdiction under the Class Action Fairness Act of 2005.

In the federal court case, on November 25, 2009, the affiliated companies filed answers to the Third Amended Counterclaim and Third-Party Complaint. For the first time, arbitration was raised as a defense required by the parties' contract in the affiliated companies' answer. AGFS replied to the Third Amended Counterclaim and Third-Party Complaint on December 23, 2009 and finally raised the arbitration defense. On that same date, AGFS and the affiliated companies filed a Motion to Compel Arbitration, Stay Court Proceedings and to Dismiss Class Actions, which the federal court did not consider because it first addressed Griffin's Motion to Remand.

On February 17, 2010, the federal court granted the Motion to Remand. AGFS and the affiliated companies moved to stay the remand pending an appeal to the Sixth Circuit Court of Appeals; however, the case was eventually remanded to this Court on May 5, 2010.

Once back in this Court, AGFS and the affiliated companies have been actively litigating the case, filing motions to stay the case pending a decision from the Sixth Circuit Court of Appeals,

[1] AGFI owns AGFC, AGFC owns Yosemite, Merit Life and AGFS.

opposing discovery requests, seeking protective orders, and filing this motion seeking arbitration, staying the proceedings and dismissing the class claims.

Factual Background

According to the pleadings, over the course of five years, AGFS made eight loans to Griffin, ranging in principal amount from $3000 to $7700. (CC pgs. 6-7) Each loan refinanced a balance due on a previous loan and often extended additional credit as well. (CC p. 6) With each loan, AGFS also sold Griffin multiple credit insurance policies, written by Yosemite and Merit Life. (CC p. 6) The up-front premiums (totaling an average of $950) were included in the initial principal amount for each loan. (CC pgs. 6-7) Griffin asserts that when she terminated each loan by refinancing it, AGFS and the affiliated companies failed to fully pay or credit to her the unearned premiums from the terminated policies (CC pgs.8-9). Griffin contends this failure caused the interest rates on the loans to exceed the statutory maximum, led to violations of the Truth in Lending Act, and breached her contract with AGFS. (CC pgs.14, 16-17, 19).

The loan contract at issue was signed on March 10, 2008. The amount financed in this loan was $6750.29 with a stated contract rate of 24.99% although AGFS calculated the APR as 28.30%. (Contract, p. 1) The entire principal amount was paid to AGFS and the affiliated companies. (Contract p.2) The amount of $5750.15 was used to pay off the balance from the previous loan and $1010.14 was paid to the affiliated companies for four different types of insurance policies issued by the companies. (Contract p.2) According to Griffin, although her monthly loan payments were reduced by $18.12, the term of the loan was extended by many months, the APR was increased, new up-front insurance costs were added and she was required to pay a new loan origination fee of $200.00 and credit investigation fee of $10.00, thus, her benefit was illusory.

Analysis

The first page of the parties' contract provides that the agreement is subject to the Federal Arbitration Act ("FAA"). The other pertinent parts of the contract, which discuss the arbitration agreement, provide on page 3:

> "ARBITRATION AGREEMENT AND WAIVER OF JURY TRIAL"
>
> "**DESCRIPTION OF ARBITRATION.** * * * TO THE FULLEST EXTENT PERMITTED BY LAW, BY SIGNING THIS AGREEMENT, BOTH LENDER AND I ARE VOLUNTARILY WAIVING ANY RIGHT TO A JURY TRIAL OR JUDGE TRIAL OF ALL CLAIMS AND DISPUTES COVERED BY THIS ARBITRATION AGREEMENT." (Emphasis sic.)
>
> "**CLAIMS AND DISPUTES COVERED.** Except for those claims mentioned below under the heading "MATTERS NOT COVERED BY ARBITRATION," Lender and I agree that either party may elect to resolve by BINDING ARBITRATION all claims and disputes between us. ("Covered Claims"). This includes, but is not limited to, all claims and disputes arising out of, in connection with, or relating to:
>
> "My loan from Lender today; any previous loan from Lender * * * any insurance product, * * *"
>
> * * * (Emphasis sic.)

Thus, according to these provisions of the contract, the general rule is that claims and disputes are to be decided by arbitration. Because Griffin principally alleges that defendants failed to properly refund premiums paid by borrowers for various credit insurance policies purchased with their loans, and that due to the purportedly inaccurate premium refunds, there were overcharges of interest on subsequently refinanced loans, the general rule of arbitration applies. However, the contract goes on to provide the exception to the rule:

> "**MATTERS NOT COVERED BY ARBITRATION.** I agree that Lender does not have to initiate arbitration before exercising lawful self-help remedies or judicial remedies of garnishment, repossession, replevin, or foreclosure, but instead may proceed in court for those judicial remedies (an 'Excluded Collateral Lawsuit'). I may assert in court any defenses I may have to Lender's claims in such a lawsuit, but any claim or counter claim for rescission or damages I may have arising out of, relating to, or in connection with Lender's exercise of those remedies must be arbitrated. **Instead of pursuing arbitration, either Lender or I also have the option to bring a lawsuit in court to seek to recover an amount which does not exceed the total sum of $5,000.00 (including costs and attorneys' fees), provided that no relief other than such recovery is**

> **requested in such lawsuit (an "Excluded Damages Lawsuit'). If an Excluded Damages Lawsuit is filed, the other party cannot require that the claims in that lawsuit be arbitrated**. An Excluded Damages Lawsuit can be brought to recover money for myself or Lender only, not for any class or group of persons having similar claims. If such an Excluded Damages Lawsuit is filed by me or Lender, and any party to that lawsuit files an amendment, counterclaim, cross-claim or third-party claim seeking to recover more than $5,000, then that claim, counterclaim, cross-claim, or third party claim must be arbitrated in accordance with the procedures set forth in this Arbitration Agreement. **Neither I nor Lender shall be deemed to have waived any arbitration rights** by the fact of having exercised any self-help or judicial remedies of garnishment, repossession, replevin, or foreclosure or **by having filed any claims in court seeking to recover a total sum of $5,000.00 or less."** (Emphasis added.)

Griffin argues the exception to the rule applies, and according to the emphasized language, that AGFS waived its right to demand arbitration by filing a lawsuit to collect $7289.48 and interest. According to the contract language cited above, Griffin argues that AGFS was allowed to file an Excluded Damages Lawsuit for $5000.00 or less and, if faced with a counterclaim in excess of $5000.00, AGFS could demand that the counterclaim be arbitrated. In that instance, AGFS would not have waived the right to seek arbitration. Instead, Griffin asserts that AGFS chose to sue her for an amount that exceeds the Excluded Damages Lawsuit threshold and therefore, AGFS cannot rely upon its very specific contract provision and the existence of that provision logically leads to the conclusion that AGFS waived its arbitration rights. AGFS concedes that waiver is a valid defense, however, argues that under controlling federal law that the filing of a complaint does not waive the right to arbitration absent a showing of actual prejudice.

In deciding this case, we are governed by several long-standing principles. First, while the interpretation of an arbitration agreement is generally a matter of state law, according to the agreement, the FAA applies as well and imposes certain rules of fundamental importance. *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.,* 130 S.Ct. 1758, 1773, 176 L.Ed.2d 605 (2010).

The FAA was enacted to overcome "the longstanding judicial hostility" toward arbitration. *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed. 2d 765 (1991). Accordingly, the United States Supreme Court has repeatedly confirmed that there is a "liberal federal policy favoring arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed. 2d 765 (1983).

Yet, the United States Supreme Court has emphasized the fundamental principle that arbitration is a matter of contract and that courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms. *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1745, 179 L.Ed.2d 742 (2011).

According to the FAA, an arbitration provision in a contract involving interstate commerce is "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 (emphasis added). Therefore, the express language of the FAA and case law makes clear that an arbitration provision may be found invalid, revocable or unenforceable upon such grounds that exist at law or in equity for the revocation of any contract.

Waiver is a ground that exists at law or in equity in both state and federal courts for the revocation of a contract. *Medical Imaging Network, Inc. v. Medical Resources,* 7th Dist. No. 04 MA 220, 2005-Ohio-2783, ¶20. Both sides agree that waiver is a valid defense. Yet, AGFS urges this Court to follow federal case law that requires a showing of actual prejudice in order to find it waived its right to arbitrate. In contrast, Griffin argues that Ohio's substantive law on waiver (which does not require actual prejudice) applies and requests that this Court follow state law.

AGFS principally relies on *Credit Acceptance Corp. v. Davisson,* 644 F.Supp.2d 948, 955 (N.D.Ohio 2009), a federal district court decision that stated that when an arbitration agreement specifically provides that the FAA applies, that statute and not the Ohio Arbitration Act governs. However, *Davisson* was a case brought in federal court.

In *Medical Imaging,* the Seventh District Court of Appeals citing *Perry v. Thomas,* 482 U.S. 483, 492-493, 107 S.Ct. 2520, 96 L.Ed. 2d 426 (1987), found that state law, whether legislative or judicial, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. "It is only where the state created a special rule for finding arbitration agreements invalid, revocable or unenforceable will federal law be applied on the issue. Id. at ¶21. Because AGFS is not arguing that Ohio has created a special rule for finding arbitration agreements invalid, revocable or unenforceable, Ohio law will be applied to this case that is brought in state court. This is not contrary to the FAA as there is no express language in the FAA that requires federal law to be applied to arbitration clause challenges brought in state court.

Ohio courts recognize that the conduct of a party that is inconsistent with an arbitration provision may act as a waiver of that contract provision. *Wishnosky v. Star-Lite Bldg. & Dev. Co.,* 8th Dist. No. 77245, 2000 Ohio App. Lexis 4081. In *Checksmart v. Morgan,* 8th Dist. No. 80856, 2003-Ohio-163, the Eighth District Court of Appeals found that Checksmart waived its right to arbitrate the dispute when it instituted its lawsuit against the defendant and acted inconsistently with its right to arbitrate.

The contract, however, provides language describing "Matters Not Covered by Arbitration," which illustrate conduct where AGFS could initiate self-help or a lawsuit without first requesting arbitration, i.e., garnishment, repossession, replevin, or foreclosure, and further specifies such conduct does not indicate waiver of the arbitration general rule. AGFS did not attempt to avail itself of said judicial remedies. Therefore, this language does not apply to the facts of this case.

Furthermore, this Court agrees with Griffin that when AGFS chose to file a complaint seeking more than $5000.00, thus taking the case out of its self-defined category of an "Excluded Damages Lawsuit," also set forth in "Matters Not Covered by Arbitration," AGFS waived its right to arbitration. AGFS's conduct in litigating this suit indicates a waiver of any right to seek arbitration. The very

specific language it used in the agreement shows that AGFS contemplated certain acts that would not constitute waiver. Therefore, AGFS cannot now claim where its conduct is inapposite of that specific language, that waiver would never apply. Here, AGFS expressly waived its right to arbitrate by filing suit on a claim excluded by its arbitration clause.

The Court also rejects AGFS's argument that two other trial courts have found these arbitration provisions to be enforceable, to wit: *Mortgage Lenders v. Doughty,* Cuyahoga C.P. No. CV-01-452336 (May 3, 2006) and *Coleman v. American General Financial Services, Inc.,* Cuyahoga C.P. No. CV-06-594166 (Dec. 21, 2009). First, the rulings of other trial courts, even from the same jurisdiction, are not *stare decisis* in this Court. Second, both cases involve litigation where AGFS did not initiate the lawsuit and thus are factually dissimilar.

Also, this Court rejects AGFS's argument that Griffin failed to address the affiliated companies' request for arbitration and therefore, Griffin's claims against them must be arbitrated. First, when AGFS filed suit in Bedford Heights it did not name its affiliated companies as parties entitled to relief. Second, as previously mentioned in footnote 1, AGFI owns AFGC and AGFC owns Yosemite, Merit Life and AGFS, therefore, all affiliated companies are owned and controlled by the same entity. Third, Griffin assigns any right to collect the insurance premiums to AGFS, thus, the arbitration clause applies to all of them and AGFS's waiver applies to all of them as well.

Finally, because this lawsuit does not fall within an "Excluded Damages Lawsuit" exception, the language pertaining to Griffin's inability to pursue class claims does not apply. The Court will not dismiss the class claims. However, the issue of whether Griffin may represent a class still remains to be decided. Parties may file supplemental briefs on this issue. AGFS's brief due on or before October 26, 2012. Griffin's brief due on or before November 26, 2012.

The Amended Motion to Compel Arbitration, Stay Court Proceedings and Dismiss Cross claims is denied.

IT IS SO ORDERED.

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PETER J. CORRIGAN, JUDGE

DATE: September _____, 2012

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