[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15343
Non-Argument Calendar

D.C. Docket No. 1:17-cv-02979-LMM

HOPE GAMBLE,
on behalf of herself and others similarly situated,

Plaintiff - Appellee,

versus

NEW ENGLAND AUTO FINANCE, INC.,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(May 31, 2018)

Before MARTIN, JORDAN, and JILL PRYOR, Circuit Judges.

PER CURIAM:

Several months after paying off her auto loan with New England Auto Finance, Inc., Hope Gamble began to receive text messages from NEAF seeking new business from her. Although Ms. Gamble informed NEAF that she did not want to receive these text messages, NEAF continued to send them. As a result, on August 8, 2017, Ms. Gamble filed a class action lawsuit in federal district court against NEAF under the Telephone Consumer Protection Act, 47 U.S.C. § 227. In response, NEAF filed a motion to compel arbitration, arguing that the auto loan agreement between it and Ms. Gamble contained an arbitration provision that governed Ms. Gamble's TCPA claim. The district court denied NEAF's motion on the grounds that Ms. Gamble's TCPA claim fell outside the scope of the loan agreement. NEAF appeals that dismissal. We affirm.

I

On October 9, 2014, Ms. Gamble entered into an auto loan agreement (the "Loan Agreement") with NEAF. The Loan Agreement contained a clause (the "Arbitration Provision") requiring arbitration of any "claim, dispute or controversy . . . whether preexisting, present or future, that in any way arises from or relates to this Agreement or the Motor Vehicle securing this Agreement." The Loan Agreement document also contained a provision (the "Text Consent Provision") granting NEAF the right to send its customers "e-mails, text messages and other electronic communications." However, the Loan Agreement and the Text Consent

Provision required separate signatures, and the Text Consent Provision followed *after* the signature line for the Loan Agreement, which itself appeared at the end of all the loan agreement provisions. Ms. Gamble signed the Loan Agreement, but did not sign the Text Consent Provision.

Shortly after Ms. Gamble paid off her loan in August or September of 2015, she began receiving text messages from NEAF offering her a new loan. Ms. Gamble eventually called NEAF in November of 2016 and requested that NEAF stop sending her texts, but she received approximately 9 additional text messages through January of 2017. Ms. Gamble then filed this class action suit against NEAF alleging that it used an automatic telephone dialing system to send her, and others similarly situated, non-emergency text messages without their prior express consent, in violation of § 227(b)(1)(A)(iii) of the TCPA. NEAF filed a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*., arguing that Ms. Gamble's TCPA claim is governed by the Arbitration Provision contained within the Loan Agreement. The district court denied the motion.

II

We review *de novo* a district court's denial of a motion to compel arbitration. *See Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 873 (11th Cir. 2005). Whether a party has agreed to arbitrate an issue is a matter of contract law and interpretation. *See Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d

1204, 1208 (11th Cir. 2011). "[I]t is the language of the contract that defines the scope of disputes subject to arbitration." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). "[N]othing in the [Federal Arbitration Act] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement." *Id*.

III

NEAF argues that Ms. Gamble's TCPA claim is subject to arbitration because her complaint "touches matters" within the Loan Agreement containing the Arbitration Provision. According to NEAF, Ms. Gamble's complaint asserts that it lacked her express prior consent to send text messages to her cellular telephone number, and that it is the Text Consent Provision which governs this lack of consent (and thus NEAF's alleged TCPA violations). NEAF contends, therefore, that the complaint inextricably ties a *prima facie* element of the TCPA claim—lack of consent—to the Loan Agreement, and thus her claim is arbitrable.

We disagree. NEAF fundamentally misunderstands this important factor. Contrary to what NEAF asserts in its briefs, it is not the unsigned Text Consent Provision which gives Ms. Gamble the right not to receive unconsented-to text messages from NEAF. Congress provided Ms. Gamble that right through the TCPA, and she had that right (and could assert it through litigation against NEAF, for example) well before she signed the Loan Agreement and refused to sign the

Text Consent Provision with NEAF. *See generally* 47 U.S.C. § 227. The fact that NEAF requested, but was refused, Ms. Gamble's consent to receive text messages does not somehow transform the Text Consent Provision into the source of Ms. Gamble's rights regarding those text messages.

Likewise, NEAF is incorrect in arguing that the complaint alleges rights and obligations created by the Loan Agreement even though it references the Text Consent Provision. The district court correctly observed that the Text Consent Provision, when unsigned, does not create any rights or obligations between the parties, and that Ms. Gamble based her claim on rights created under the TCPA, not the Loan Agreement. The allegation in the complaint that the Text Consent Provision governs Ms. Gamble's right not to receive unconsented-to text messages changes nothing. Her TCPA claim "does not arise from any right implicated by the Loan Agreement" nor from "the parties' contractual relationship." D.E. 18 at 7.

NEAF also argues that the Arbitration Provision is broad enough to pull Ms. Gamble's TCPA claims into its orbit. NEAF points to specific language in the Arbitration Provision defining ''claim" as "any claim, dispute or controversy . . . whether preexisting, present or future, that in any way arises from or relates to this Agreement," while encompassing "disputes based upon contract, tort, consumer rights . . . [and] statute." But this argument lacks force.

The plain language of the Arbitration Provision requires that the dispute "arise[] from or relate[] to this Agreement or the Motor Vehicle securing this Agreement." Although this language makes the arbitration provision broad, it does not make it limitless. *See Princess Cruise Lines*, 657 F.3d at 1218 (stating "the term 'arising out of' is broad, but not all encompassing" while recognizing that the dispute in question must be "an immediate, foreseeable result of the performance of contractual duties"). Here, Ms. Gamble signed an agreement whereby NEAF promised to provide her with the necessary funds to purchase an automobile on a particular date, in exchange for her promise to pay NEAF back—with interest—by a later date. The Arbitration Provision only applies to disputes arising out of, or related to, this agreement.

Ms. Gamble's TCPA claim, on the other hand, arises not from the Loan Agreement or any breach of it, but from post-agreement conduct that allegedly violates a separate, distinct federal law. And NEAF's sending of the text messages do not relate to or arise from its lending money to Ms. Gamble, Ms. Gamble's repayment of that loan, or the vehicle which secured the loan. Further, the Text Consent Provision is a separate stand-alone provision which Ms. Gamble never signed, and thus no agreement regarding text messages exists between the parties. *See Telecom Italia, SpA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir. 2001) ("Disputes that are not related—with at least some directness—to

performance of duties specified by the contract do not count as disputes 'arising out of' the contract, and are not covered by the standard arbitration clause."). NEAF's argument that the Arbitration Provision is broad enough to encompass Ms. Gamble's TCPA claim thus fails.

Put differently, NEAF could have violated the TCPA, and Ms. Gamble could have brought a lawsuit against NEAF for those violations, without there ever having been a contract (in this case the Loan Agreement) between the two parties. In terms of TCPA claims, the existence of a contract is unnecessary and irrelevant, unless the specific contract contemplates future TCPA claims. But this Loan Agreement does no such thing. NEAF would have us believe that this Loan Agreement, which would otherwise be irrelevant to Ms. Gamble's TCPA claims, suddenly becomes applicable solely because NEAF requested from Ms. Gamble the ability to send her text messages, even though Ms. Gamble declined that request and did not provide her consent to those text messages. That is not so.

Had there been no Loan Agreement between NEAF and Ms. Gamble, NEAF would not argue that Ms. Gamble must submit her TCPA claim to arbitration. Had NEAF requested Ms. Gamble's consent to receive text messages at a separate time and in a manner apart from the Loan Agreement, but been refused, NEAF would not argue that Ms. Gamble must submit her TCPA claim to arbitration. The only difference here is that NEAF included its request for consent in the same physical

document as the contractual agreement. But that does not magically make Ms. Gamble's TCPA claim subject to the Arbitration Provision in the Loan Agreement. Ms. Gamble signed the Loan Agreement. She refused to sign the Text Consent Provision. And NEAF did not violate the Loan Agreement.

NEAF cannot force Ms. Gamble to arbitrate her TCPA claim just because the contract she entered into with NEAF, a contract that had nothing to do with the TCPA or with text messages, contained a separate provision, with a separate signature line, requesting Ms. Gamble's consent. NEAF cannot avoid the strictures of the TCPA, and force arbitration of its alleged TCPA violations, by placing the request for consent to receive text messages in the same document as, but after and apart from, a separate and independent contract, and then, after it failed to get the individual's consent, claim that the consent request was actually part of that contract. We will not accept NEAF's invitation to bootstring independent TCPA claims to a completely distinct contract.

The bottom line is that Ms. Gamble's TCPA claims did not "in any way arise[] from or relate[] to" the Loan Agreement, and the parties did not agree to arbitrate those TCPA claims.

IV

Because Ms. Gamble's TCPA claims are independent of the Loan Agreement with NEAF, and because the Arbitration Provision covered only those

disputes arising from or related to the Loan Agreement or the motor vehicle securing that agreement, the district court properly denied NEAF's motion to compel arbitration.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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May 31, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-15343-HH
Case Style: Hope Gamble v. New England Auto Finance, Inc.
District Court Docket No: 1:17-cv-02979-LMM

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against appellant.

The Bill of Costs form is available on the internet at www.ca11.uscourts.gov

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Christopher Bergquist, HH at 404-335-6169.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6161

OPIN-1A Issuance of Opinion With Costs