IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HOPE GAMBLE, Plaintiff, v. NEW ENGLAND AUTO FINANCE, INC., Defendant.	:	CIVIL ACTION NO. 1:17-CV-2979-LMM

ORDER

This matter comes before the Court on a Motion to Compel Arbitration and Stay Action [8] by Defendant New England Auto Finance, Inc. ("New England Auto"). After due consideration, the Court enters the following Order.

I. BACKGROUND[1]

In November 2014, Plaintiff entered into a loan agreement (the "Loan Agreement") with Defendant. The Loan Agreement includes a provision requiring arbitration (the "Arbitration Provision") of "any claim, dispute, or controversy" between the parties, "whether preexisting, present, or future, that in any way arises from or relates to this Agreement." Dkt. No. [8-2] ¶ 12(d). "Claim" has the "broadest possible meaning" and includes federal claims. Id.

[1] All facts are taken from Plaintiff's Complaint, Dkt. No. [1], unless stated otherwise.

The Loan Agreement also includes a provision (the "Text Consent Provision") allowing Plaintiff to consent to receive cellular text messages from Defendant. Id. at 8. Plaintiff did not sign the Text Consent Provision. Id.

Around August 2015, Plaintiff paid off the loan, ending the parties' obligations to one another under the Loan Agreement. Afterwards, Defendant sent Plaintiff multiple cellular text messages advertising new loans without her consent. Although Plaintiff informed Defendant in November 2016 that she did not wish to receive the text messages, Defendant continued sending them. Based on the frequency and nature of the text messages, Plaintiff alleges that Defendant used an automatic dialing system to send them.

On August 8, 2017, Plaintiff filed a class action against Defendant under the Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227. Plaintiff alleges that Defendant violated the TCPA by using an automatic telephone dialing system to send non-emergency text messages to cell phone numbers without prior express consent. According to Plaintiff, Defendant's text messages caused her to suffer an invasion of her privacy and a private nuisance.

Plaintiff brings her action under Federal Rule of Civil Procedure 23(a) and (b) on behalf of herself and two classes of similarly situated individuals. The "Provision Class" includes persons who received text messages from Defendant after entering into a loan agreement with Defendant where they did not sign the Text Consent Provision. The "Revocation Class" includes persons who received text messages from Defendant after directing Defendant to cease sending text

messages. The Revocation Subclass includes persons who belong to both the Provision Class and the Revocation Class.

On October 2, 2017, Defendant filed a Motion to Compel Arbitration and Stay Action pursuant to the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1 *et seq.*, arguing that Plaintiff's claims are governed by an agreement to arbitrate disputes. Dkt. No. [8].

II. LEGAL STANDARD

The principal purpose of the FAA is "to ensure judicial enforcement of privately made agreements to arbitrate." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985). Therefore, "[t]he FAA embodies a liberal federal policy favoring arbitration agreements." Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1367 (11th Cir. 2005) (citation and quotation marks omitted). Generally, "[t]he role of the courts is to 'rigorously enforce agreements to arbitrate.'" Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs., 553 F.3d 1351, 1366 (11th Cir. 2008) (quoting Dean Witter Reynolds, 470 U.S. at 221).

When a district court rules on a motion to compel arbitration under the FAA, it must engage in a two-step inquiry. First, the court must determine whether the parties agreed to arbitrate the dispute in question. Klay v. All Defendants, 389 F.3d 1191, 1200 (11th Cir. 2004). Second, if the dispute is subject to an arbitration agreement, the court must determine whether "legal constraints external to the parties' agreement foreclosed arbitration." Id. (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

Regarding the first step, "it 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). Courts then measure the language of the arbitration provision against "the factual allegations in the complaint match[ed] up with the causes of action asserted." Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1220 n.13 (11th Cir. 2011). In making this determination, "a court is not to rule on the potential merits of the underlying claims." AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986).

The inquiry as to whether parties have agreed to arbitrate a dispute "must be undertaken against the background of a 'liberal federal policy favoring arbitration agreements.'" Klay, 389 F.3d at 1200 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). Thus, "questions of arbitrability, when in doubt, should be resolved in favor of arbitration." Emp'rs Ins. of Wausau v. Bright Metal Specialties, Inc., 251 F.3d 1316, 1322 (11th Cir. 2001).

However, "[b]ecause the FAA is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements,'" a district court faced with a motion to compel arbitration must "look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement." Waffle House, 534 U.S. at 294 (quoting Mitsubishi Motors, 473 U.S. at 625). Courts will not "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring

arbitration is implicated." Id. Thus, the presumption of arbitrability applies "only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 301 (2010). "Absent some ambiguity in the agreement, however, it is the language of the contract that defines the scope of disputes subject to arbitration." Waffle House, 534 U.S. at 289.

III. DISCUSSION

Plaintiff argues that Defendant's Motion should be denied because Plaintiff's claim falls outside the Arbitration Provision's scope. Dkt. No. [10] at 6. However, Defendant argues that Plaintiff's claim arises from the Loan Agreement, implicating the Arbitration Provision. Dkt. No. [8-1] at 11–17. The Court will address Defendant's arguments below.

a. The Text Consent Provision

Defendant argues that Plaintiff's claim arises from the Loan Agreement because Plaintiff's claim and class definitions are based on loan applicants' refusal to sign the Text Consent Provision. Id. at 12, 14–15. However, the Text Consent Provision, when unsigned, does not create any rights or obligations; no agreement on this basis occurred. See Dkt. No. [8-2] at 8. By pleading that she did not sign the Text Consent Provision, Plaintiff was merely pleading that she did not provide consent because her consent to the messages would defeat her claim. See 47 U.S.C. § 227(b)(1)(A) (barring claims for calls made with the "prior express consent" of the contacted party). Similarly, Plaintiff's class and subclass

definitions merely seek to exclude persons who would be ineligible for relief under the TCPA due to their prior consent to receive text messages. See Dkt. No. [1] ¶ 40. Therefore, because a failure to sign does not "arise from" the Loan Agreement, the Text Consent Provision cannot provide a basis for Plaintiff's claim. See Waffle House, 534 U.S. at 289 ("Absent some ambiguity in the agreement . . . it is the language of the contract that defines the scope of disputes subject to arbitration.").

b. Loan Agreement as Essential Element of Claim

Defendant argues that Plaintiff's claim arises from the Loan Agreement because Defendant sent the text messages based on Plaintiff's status as a former customer. Dkt. No. [8-1] at 13. However, "a dispute does not 'arise out of . . .' a contract just because the dispute would not have arisen if the contract 'had never existed.'" Int'l Underwriters AG v. Triple I: Int'l Invs., Inc., 533 F.3d 1342, 1347 (11th Cir. 2008) (quoting Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1350–51 (11th Cir. 1982)). Defendant did not exercise or violate any right or obligation created by the Loan Agreement when sending the text messages. See Dkt. No. [8-2]. Further, Plaintiff bases her claim on rights created under the TCPA, not the Loan Agreement. See Dkt. No. [1] ¶ 4; Hersman, Inc. v. Fleming Cos., Inc., 19 F. Supp. 2d 1282, 1286 (M.D. Ala. 1998), aff'd sub nom. Hersman, Inc. v. Fleming Cos., 180 F.3d 271 (11th Cir. 1999) ("The key element in determining whether tort claims are subject to an arbitration provision is the relationship between the claims asserted and the underlying contractual

obligations."). Defendant's text messages would harm Plaintiff regardless of whether Plaintiff had entered the Loan Agreement. See Dkt. No. [1] ¶ 4. Therefore, Plaintiff's claim does not arise from the Loan Agreement. See Hersman, Inc., 19 F. Supp. 2d at 1286–87 (denying motion to compel arbitration where claims did not implicate performance of duties under the contract).

Defendant also argues that the FAA requires arbitration because Plaintiff's claims "touch" the Loan Agreement. Dkt. No. [8-1] at 16. However, the cases Defendant cites do not support Defendant's argument. In Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), claims touched a contract because the claims arose from statutory rights implicated by the contract. See id. at 628; see also Gregory v. Electro-Mechanical Corporation, 83 F.3d 382, 384 (11th Cir. 2013) (holding that tort claims touched contractual matters because the claims arose from breach of the contract). However, here, Plaintiff's claim does not arise from any right implicated by the Loan Agreement, as discussed above. In Olsher Metals Corporation v. Olsher, No. 03-12184, 2004 WL 5394012 (11th Cir. Jan. 26, 2004), an arbitration provision applied because claims arose from the termination of agency relationships established by the contract. Id. at *3. However, Plaintiff's claim does not arise from the parties' contractual relationship, but from Defendant's violation of the TCPA following the contract's completion. See Dkt. No. [1] ¶ 4. Further, here, the parties have not yet submitted to arbitration. See AT&T Mobility LLC v. Crestpoint Solutions, Inc., (holding that an arbitration-related settlement dispute touched matters covered

by the arbitration clause). Therefore, Defendant's argument that the Arbitration Provision controls Plaintiff's claim because her claim touches the Loan Agreement fails.

Defendant also argues that the Loan Agreement expressly provides that the Arbitration Provision shall survive the repayment of the loan. Dkt. No. [8-1] at 17. However, the Arbitration Provision does not govern all claims between Defendant and a former customer, but only those that "arise[] from or relate[] to" the Loan Agreement. Dkt. No. [8-2] at 6. Because Plaintiff's claim does not arise from the Loan Agreement, the survival of the Arbitration Provision is irrelevant. See Princess Cruise Lines, Ltd., 657 F.3d at 1220 n.13 ("In analyzing the scope of an arbitration clause, we consider how the factual allegations in the complaint match up with the causes of action asserted and measure that against the language of the arbitration clause.").

Therefore, because Plaintiff's claim does not fall within the scope of the Loan Agreement, the Arbitration Provision does not apply.

c. Class Action Waiver

Defendant finally argues that Plaintiff is required to pursue arbitration on an individual, non-class basis because the Arbitration Provision contains a class action waiver. Dkt. No. [8-1] at 18. However, because the Arbitration Provision does not apply to Plaintiff's claim, the Court need not address whether the Arbitration Provision is enforceable on an individual basis.

IV. CONCLUSION

For the reasons discussed above, Defendant's Motion to Compel Arbitration and Stay Action [8] is **DENIED**.

IT IS SO ORDERED this 20th day of November, 2017.

Leigh Martin May
United States District Judge