Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr. IAS PART 32
Justice

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JING XIE, Index No.: 717579/2018

Plaintiff,

- against - Motion Dated: May 30, 2019
Motion Seq. No. 1
Motion Cal. No. 50

CITIBANK, N.A., CITIMORTGAGE INC.,

Defendants.

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The following papers numbered E4 to E32 were read on this application by defendants for an order compelling the arbitration of plaintiff's claims pursuant to CPLR §7503(a), and staying and enjoining all proceedings in this litigation pending the resolution of the arbitration, or alternatively dismissing the Complaint.

	Papers Numbered
Order to Show Caus, Affirmation, Exhibits, Memo. of Law.....	E4-12
Affirmation in Opposition, Exhibits, Memo. of Law.....	E24-31
Reply Memorandum of Law.....	E32

Upon the foregoing papers, and a conference/oral argument at the call of the calendar, it is ordered that this application is determined as follows:

Plaintiff commenced this action alleging damages based on defendants' refusal to assign her Home Equity Line of Credit ("loan" or HELOC "), which she obtained from defendants in April 2008. Plaintiff allegedly received a commitment from a "crowd funding lender" offering more favorable terms than defendants. Her request of defendants to assign the loan to this lender was denied. By this action, plaintiff asks the court to adjudicate whether under the HELOC she has a right to compel defendants to effectuate the assignment.

Defendants argue that by virtue of the underlying loan agreement plaintiff agreed that any disputes arising out of it, or relating to it may be subject to arbitration. The arbitration provision is at paragraph 19 of the agreement. Defendants argue that the court should enforce this clause given arbitration's favored status and in accordance with CPLR §7503. Specifically, defendants highlight that plaintiff's dispute falls squarely within the arbitration provision and that she consented to same by signing the loan agreement. Plaintiff opposed the application arguing that the arbitration provision is unconscionable, both procedurally and substantively, and thus, unenforceable under section 2 of

the Federal Arbitration Act, also known as "the savings clause".

The HELOC agreement at issue is a form contract required to be signed by all customers wishing to obtain such loan. Again, the arbitration provision is at paragraph 19 thereof. The title and introductory paragraph appear in the same font type and size as the remainder of the agreement, save that it is in all capital letters. This introduction provides that "...either you or Citibank can require that any disputes be resolved by binding arbitration [and] [a]rbitration replaces the right to go to court... ." Also, that "[t]he decision of the arbitrator is final and binding." The provision contains subsections (a) through (j) that further outline the disputes covered, the procedures regarding the process and other substantive instructions relative thereto. Included within subsection (b) are the following broad proclamations: 1) "[d]isputes covered by arbitration include any claim relating to or arising out of your account and any services relating to that relationship"; 2) "[d]isputes include not only claims that relate directly to Citibank, but also its parent, affiliates, successors, assignees, employees and agents..."; and 3) [d]isputes include claims based on any theory of law, contract, statute, regulation, tort (including fraud or any intentional tort), or other legal or equitable ground...". Within other subsections there is a prohibition against joinder and class action suits, as well as carve outs for defendants as to certain remedies that are not shared by plaintiff. Finally, two arbitral bodies are designated for the purposes of dispute resolution, one of which faced prosecution for its bias towards corporate entities over consumers.

The court's disposition favoring arbitration as a method of dispute resolution is clearly found in case law, (*see Farrarella v Godt*, 131 AD3d 563, 565-66 [2nd Dept. 2015] *internal citations omitted*), and the mandatory language of CPLR §7503(a), which provides that the court *shall* direct the parties to arbitrate "[w]here there is no substantial question whether a valid agreement was made or complied with..." (*id*). This propensity should be exercised in the shadow of the Federal Arbitration Act; specifically section 2, "the savings clause." This clause likewise promotes the validity of arbitration agreements, but provides for annulment "upon such grounds as exist at law or in equity for the revocation of any contract" (*id*; *see also Doctor's Associates, Inc. v Cassaroto*, 517 US 68, 687 [1996], *Allied-Bruce Terminix Cos. v Dobson*, 513 US 265, 281 [1995]).

Effectively plaintiff here bears the more difficult burden. Or does she? Although enacted after plaintiff executed the HELOC at issue the Dodd-Frank Wall Street Reform and Consumer Protection Act determined that arbitration provisions such as the one at issue should be prohibited from use. Dodd-Frank also went so far as to bar mandatory arbitration provisions from mortgage and home equity loans. The provision at issue is not mandatory and Dodd-Frank was not implemented retroactively. Consequently, mandatory or not, this HELOC and specifically paragraph 19 are not bound by Dodd-Frank.

Nevertheless, this Court is cognizant of the impetus for Dodd-Frank's enactment and is informed thereby. If provisions such as the one at issue where reviewed and found so unfair as to suggest prohibition, then their favored status should be undermined, validity and invalidity should stand on equal footing and a request to compel should be more closely scruntized. Put another way, defendants' arguments that rely heavily on public policy are not, in and of themselves, sufficient.

Failing to acknowlegde this position or to be dismissive of Dodd-Frank simply because the HELOC here predates same deflats the very purpose of the Act.

With this in mind, the court opines that the subject arbitration provision is unconscionable. The doctrine of unconscionability, rooted in equity, its broad definitions and their implications, has been discussed at length, (*see generally Matter of Friedman*, 64 AD2d 70, 84-86 [2nd Dept. 1978]; *see also Matter of State of New York v Avco Fin. Serv. of N.Y.*, 50 NY2d 383, 389-90 [1980], *State v Wolowitz*, 96 AD2d 47, 67-68 [2nd Dept. 1983]), with certain overriding principles, such as its factually specific and flexible nature, (*see Matter of Friedman, supra* at 85), and the necessity to show elements of both substantive and procedural unconscionability that operate on a sliding scale, (*see Master Lease Corp. v Manhattan Limousine*, 177 AD2d 85, 88-89 [2nd Dept. 1992]). As to the latter, a showing of "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*see Matter of State of New York v Avco Fin. Serv. of N.Y.*, *supra* at 389 *quoting Williams v Walker-Thomas Furniture Co.*, 350 F2d 445 [DC Cir 1965]), is required. Further on the sliding scale, "the more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated and vice versa" (*Master Lease Corp. v Manhattan Limousine*, *supra* at 89 [*internal quotations omitted*]).

As to procedural unconscionability, here plaintiff had no say in the contract provisions. The HELOC agreement is a standard form contract whose terms are not subject to negotiation.[1] If plaintiff wanted to obtain an equity loan with defendants she was required to sign their agreement as is. Defendants' assertion that she did have a choice, a choice to obtain a loan through a different lender, is illusory and speculative. The court cannot know if at the time plaintiff obtained this loan, she had other options available with terms as presumably favorable as those of defendants. Thus, defendants' loan may have been her best option, and if so, it is highly unlikely that she would have declined same because of the contract terms, specifically the inclusion of the subject arbitration provision. Even more so, it is likely that all lenders used similar HELOC form agreements hence, and here we return to the importance of, the enactment of Dodd-Frank.

Defendants also cite to plaintiff's assistance of counsel in deciding to enter into the loan agreement to offset any disparity in bargaining power, or lack of experience and education on plaintiff's part, (factors determinative of procedural unconscionability, [*see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10-11 {1988}]). Again, such representation is of little consequence as the attorney would not have had any negotiating powers either. As to the attorney's ability to explain the implications of the provision, this arbitration clause is not mandatory. It provides that "you or Citibank **can** require that any disputes be resolved by binding arbitration" (*see above, emphasize added*), and "you or Citibank **may** elect...that any dispute...be resolved by binding arbitration" (*citing HELOC Agreement and Disclosure at p. 19[a]*). Accordingly, the attorney's explanation presumably would have been that arbitration is an elective not a requirement: an outcome clearly not the intended circumstance.

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[1]This Court limits its findings to the facts of this case and makes no opinions on other form contracts that are not generally subject to negotiation.

The cases cited by defendants are inapposite. The first, *Hayes v. Cnty. Bank* (26 AD3d 465 [2nd Dept. 2006]) predated the enactment of Dodd-Frank, and *Morris v. Snappy Car Rental, Inc.* (84 NY2d 21 [1994]) does not involve a HELOC.

The question of substantive unconscionability "entails an analysis of the substance of the [agreement] to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged" (*Gillman v Chase Manhattan Bank, supra* at 12), i.e. terms that are overly harsh or one-sided, (*see Matter of Frankel v Citicorp Ins. Servs., Inc.*, 80 AD3d 280, 290 [2nd Dept. 2010]). Here, the availability of alternate forums and remedies to defendant that are not also offered to plaintiff, the joinder and class action waivers, and the designation of two arbitral bodies, one of which faced consequences for its pro-company/anti-consumer slant signals a finding of substantive unconscionability. To address defendants' opposition is it not any one of these factors on their own that is dispositive, but rather their totality that leads to the court's conclusion. That defendants fall back on severability, consent to utilizing one arbitral body over the other and discuss post arbitration remedies under Article 75 of the CPLR lends support to plaintiff's position and thus, the court's finding. Lastly, the cases relied upon by defendants suffer the same inadequacy as those above mentioned.

In light of the above, this Court denies defendants' application to compel arbitration in its entirety and grants defendants additional time, as per CPLR, to file and serve their Answer. Plaintiff was given leave to file an Amended Complaint that evidences her intention to certify this matter as a class action.

Dated: June 6, 2019

Rudolph E. Greco, Jr.
J.S.C.

FILED
JUN 14 2019
COUNTY CLERK
QUEENS COUNTY

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