Donnelly v Teachers Fed. Credit Union
2021 NY Slip Op 34327(U)
December 6, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 610111/20
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

ANNIE DONNELLY, on behalf of herself and all others similarly situated,

Plaintiff,

-against-

TEACHERS FEDERAL CREDIT UNION,

Defendant.

x

Index No. 610111/20

Motion Seq: 001 MD
Decision/Order

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause…………	5-13, 82
Answering Papers………………………….........	19-27, 78-80
Reply……………………………………..........	30-34
Briefs: Plaintiff's/Petitioner's…………………...	27, 77
Defendant's/Respondent's………………	6

The defendant, TFCU, seeks dismissal of the complaint and for this Court to compel the plaintiff to arbitrate their dispute. In the alternative, defendant requests that this matter be stayed pending arbitration. By Decision and Order dated April 22, 2021, this Court temporarily stayed any arbitration that may have been requested/scheduled/ commenced pending the holding of a framed issue hearing to determine the validity of the arbitration provision and whether the plaintiff opted out of arbitration.

At the time of the Court's Decision and Order, the hearing was necessitated because TFCU maintained that it sent the plaintiff the binding arbitration notice in a December 1, 2019 email, and that the plaintiff failed to opt out of the arbitration provision by the December 31, 2019 deadline. Plaintiff maintained that she did not receive the December 1, 2019 email, but that she received a January 1, 2020 email concerning the binding arbitration provision, and that she opted out through her counsel who was representing her in a federal proceeding/putative class action against TFCU related to non-sufficient funds fees charged. TFCU asserted that the January 1, 2020 email was identical to the December 1, 2019 email containing the same binding arbitration notice, and that it was sent as the result of a processing error; therefore, it did not extend the plaintiff's time to opt out.

Specifically as to receipt of the December 1, 2019 email, the Court noted in its April 22, 2021 Order that "plaintiff states that she 'searched my inbox and my spam folder and I cannot find any evidence that I received an email from TFCU on December 1, 2019 regarding TFCU's Arbitration Provision and class action waiver. I nevertheless acknowledge that it is possible that such an email was sent and inadvertently deleted from my inbox.'" The hearing was scheduled for June 21, 2020. Due to scheduling and other issues, the hearing was adjourned to Monday, July 12, 2020.

On Friday, July 9, 2020, at 2:39 p.m., the Court received an e-mail from plaintiff's counsel advising as follows: "As Plaintiff's Counsel, I write to immediately correct the record in light of some new information we received this morning. In the midst of preparing for Monday's hearing, Ms. Donnelly located the December 1, 2019 email, which the credit union argued it had sent to her purportedly informing her of the addition of the new arbitration provision. . . Plaintiff believes there are no longer any disputed factual issues necessary to address at a framed evidentiary hearing." Accordingly, the Court cancelled the framed issue hearing, and supplemental papers were accepted, including the December 1, 2019 email to which the plaintiff attests to receiving as set forth in her amended affidavit sworn to on September 29, 2021. Plaintiff avers, "[p]rior to the evidentiary hearing scheduled for June 1S, 2021, I searched my inbox with the assistance of my counsel and I located the December 1, 2019 email purporting to add an arbitration provision." Plaintiff also claims in her affidavit that the January 1, 2020 email afforded her additional time to opt out, and that she "believe[s] my attorneys timely opted me out of the arbitration clause by sending a letter to TFCU's Counsel in January 2020."

Both the December 1, 2019 and the January 1, 2020 email are submitted for the Court's review and consideration, and they are identical, including in relevant part, that which constitutes the notice of binding arbitration and sets forth the exact procedure for exercising the "opt-out" choice. The procedure reads as follows:

> YOU MAY CHOOSE TO REJECT THIS RESOLUTION OF DISPUTES BY ARBITRATION PROVISION BY SENDING US WRITTEN NOTICE AS DESCRIBED BELOW:
>
> Rejection of the Resolution of Disputes by Arbitration provision: 1. if you do not agree to be bound by this Resolution of Disputes by Arbitration provision, you must send us written notice that you reject the Resolution of Disputes by Arbitration provision within 30 days of account opening or within 30 days of receiving this notice, whichever is sooner, including the following information: a. Your written notice must include: your name, as listed on your account, your account number, and a statement that you reject the Resolution of Disputes by Arbitration provision, and; b. You must send your written notice to Us at the following address: Teachers Federal Credit Union P.O. Box 9005, Smithtown, NY 11787

We sent you this alert because our records indicate that you registered for this alert for the above account.

It is undisputed that plaintiff's counsel in the federal action sent a letter via e-mail to TFCU's counsel dated January 13, 2020 and referenced as "Arbitration Opt-Out." In response to the e-mail notification, TFCU's counsel removed plaintiff from TFCU's binding arbitration affirmative defense in the federal action, and plaintiff's counsel agreed not to oppose TFCU's motion for an extension of time to respond to plaintiff's discovery requests. As already noted by this Court in its prior April 22, 2021 Decision and Order, the federal action was voluntarily discontinued on June 4, 2020, and the plaintiff filed this action on August 5, 2020. The Court also noted that prior to commencing this action, and one day after discontinuance of the federal action, plaintiff received a refund from TFCU of all fees charged by the credit union, whether or not the fees had been improperly imposed. The claims in this action are essentially the same as the claims advanced in the discontinued federal action.

Based upon the foregoing sequence of events, it is established that the plaintiff received the binding arbitration notice on December 1, 2019, and that she did not opt out on or before December 31, 2019; however, at the time that TFCU sent the binding arbitration notice to plaintiff on December 1, 2019, and again on January 1, 2020, the federal action had been pending since October 1, 2019; therefore, implementation of an arbitration provision after the complaint had been filed would likely not have been permitted because it would have impaired the integrity of the federal litigation, and the direct communication by TFCU to plaintiff during the pendency of the federal action while all parties were represented by counsel could have been viewed as unfair, misleading and/or coercive. Whether these circumstances led counsel for TFCU to remove plaintiff from the binding arbitration defense in the federal action is not known with certainty, but based upon this Court's review of the cases cited by plaintiff in her supplemental brief, it appears that the decision to remove plaintiff from that defense conformed with existing caselaw on these issues (*see* ***Dasher v. RBC Bank (USA)***, 882 F3d 1017, 1024 [11th Cir 2018]; ***Russell v. Citigroup, Inc.***, 748 F3d 677, 680 [6th Cir 2014]; ***O'Conner v. Agilant Solutions, Inc.***, 444 FSupp3d 593 [SDNY 2020]; ***In re Currency Conversion Fee Antitrust Litig.***, 361 F Supp 2d 237, 252-54 [SDNY 2005]; ***Carnegie v. H & R Block***, 180 Misc2d 67 [Sup Ct NY County 1999]).

In its prior Order, this Court recognized, and continues to recognize that "[a]rbitration is favored in the State of New York as a means of resolving disputes, and courts interfere as little as possible with agreements to arbitrate" (***Matter of City of Newburgh v McGrane***, 82 AD3d 1225, 1226 [2d Dept 2011]; *citing* ***Smith Barney Shearson Inc. v Sacharow***, 91 NY2d 39 [1997]), and that on a motion to compel arbitration, the first step is to determine whether the parties agreed to arbitrate (***Dazco Heating and Air Conditioning Corp. v C.B.C. Industries, Inc.***, 225 AD2d 578 [2d Dept 1996]).

It is well settled that arbitration is, at its essence, a matter of contract that requires a meeting of the minds evidencing that the parties have agreed to submit to arbitration, and that a party cannot be compelled to submit to arbitration when he or she has not agreed to so submit. "This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration" (***AT&T Technologies v. Communications. Workers of America***, 475 U.S. 643, 648-649 [1986]). Furthermore, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator (***Id***. at 649).

While it is true that the action pending before this Court was not pending at the time that TFCU's notices of binding arbitration were sent to plaintiff, the Court cannot ignore the undisputed fact that the plaintiff, through her counsel in the federal action, made clear in January 2020 that she did not wish to arbitrate her claims. Accordingly, there is no meeting of the minds as to arbitration. The plaintiff has not agreed to submit to arbitration; therefore, the defendant's motion to dismiss this action on the basis that the plaintiff failed to opt out of the binding arbitration provision is denied.

Defendant's additional argument that the plaintiff failed to follow the opt-out procedure set forth in the notice is unavailing because plaintiff was represented by counsel in the federal action when defendant sent her the notices.[1] As noted, direct communication between plaintiff and the defendant during the course of the pending federal action is disfavored in the first instance, and so the only communication should have been through counsel, as was done in that matter. The Court also notes that counsel for TFCU did not reject the January 2020 opt-out letter sent by plaintiff's counsel in the federal action as being untimely (NYSCEF Doc. No. 25, Exhibit 5). Thus, the defendant's motion is denied on this basis as well.

The defendant's motion is denied in its entirety.

Pursuant to CPLR § 3211 (f), "[s]ervice of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order." Although this action is electronically filed on NYSCEF, plaintiff is directed to electronically file and serve the defendant with a copy of this Order with Notice of Entry thereof in order that the time for defendant to interpose an answer will begin to run.

The foregoing constitutes the Decision and Order of this Court.

Dated: December 6, 2021
Riverhead, NY

Carmen Victoria St. George

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]

[1] Counsel for the plaintiff and defendants in the federal court action are the same counsel representing the respective parties in this action.