

15-1121

**BOONE COUNTY
CIRCUIT CLERK
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IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

**CITIBANK, N.A., SUCCESSOR, TO
CITIBANK (SOUTH DAKOTA), N.A.**

2015 OCT 15 P 3:52

Plaintiff,

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v.

**CIVIL ACTION NO.: 10-C-218
Judge William Thompson**

**ROBERT S. PERRY, individually and
on behalf of all others similarly situated,**

Defendant(s).

ORDER DENYING CITIBANK'S MOTION TO COMPEL ARBITRATION

On the 10th day of September, 2015, came Defendant/Counterclaim Plaintiff, Robert S. Perry, by counsel Troy N. Giatras and Matthew Stonestreet, and came Plaintiff/Counterclaim Defendant, Citibank, N.A. ("Citibank"), by counsel Jeffrey M. Wakefield and Bryan N. Price, for hearing on Citibank's Motion to Compel Arbitration and Stay Action. Following a full and complete review of the relevant evidence, an examination of the pleadings (including Citibank's motion, the responsive memorandum, and the reply), an inspection of relevant portions of the Court file, oral argument of counsel, and an analysis of the issues presented, the Court makes the following findings:

ARBITRATION

Arbitration is a form of alternative dispute resolution that offers, in many instances, a quicker, efficient, and less expensive alternative to court litigation. Parties to a contract often agree that in the event a dispute arises, they will settle the matter in arbitration rather than in court litigation. However, disagreement often arises regarding whether the case should be

litigated or arbitrated. The court can make arbitration clauses void in any contract with an illegal or unconscionable provision.

While arbitration closely parallels traditional court proceedings, one of the main advantages is the speedy process; arbitration allows the parties to bypass delays inherent in litigation and resolve the dispute rather quickly. Arbitration can also be cheaper than litigating in court and typically affords the parties a higher level of confidentiality than what is otherwise available in a court of public record. Arbitration should be quick, easy, and efficient.

Arbitration was originally used in the United States to keep corporations out of court while they quickly resolved their differences in a speedy and cost efficient manner. However, as a result of several United States Supreme Court decisions, arbitration is now being used in more and more consumer litigation matters, a shift that has not been received well by both current and former West Virginia Supreme Court Justices.

FINDINGS OF FACT

1. On September 20, 2010, Citibank filed this lawsuit against Robert Perry in Boone County Circuit. *See* "Citibank Boone County Circuit Court Complaint."
2. Citibank's lawsuit sought the collection of an alleged debt and also contained a demand for attorney's fees, which Citibank claimed it was owed under the terms of its agreement with Mr. Perry. *See* "Affidavit Demanding Attorney's Fees" (Stating that "pursuant to the terms and conditions of the Account, defendant agreed to pay reasonable attorneys' fees to Citibank...").

3. It is undisputed that Citibank selected Boone County Circuit Court to enforce its purported contract with Mr. Perry nearly five years ago in September of 2010. *Id.*

4. On October 1, 2010, the Defendant and his wife submitted a *pro se* letter to the Court in response to Citibank's Complaint. *See* "Robert and Valerie Perry Letter Answer."

5. Citibank then filed a motion and memorandum, on April 22, 2011, requesting judgment on the pleadings. *See* "Citibank Motion for Judgment on the Pleadings."

6. The record reveals that Citibank then allowed its lawsuit to languish until December of 2014, when Citibank hired new counsel, its second law firm on the case, and filed a notice of appearance. *See* "Notice of Appearance of Counsel."

7. On February 18, 2015, Citibank and Mr. Perry presented an agreed scheduling order to the Court with a trial date of November 17, 2015, and deadlines for discovery completion, expert witness disclosures, fact witness disclosures, dispositive motions, and mandatory mediation. *See* "Agreed Scheduling Order."

8. Importantly, the scheduling order agreed to by Citibank and counsel specifically permitted "third party complaints, counterclaims, joinders, and amended pleadings to be filed and served on or before May 1, 2015." *Id.*

9. The Court entered the parties' Agreed Scheduling Order on February 24, 2015. *See* "Entered Agreed Scheduling Order."

10. Citibank continued to litigate its dispute with Mr. Perry and filed discovery including interrogatories, requests for production of documents, and requests for admission

on March 13, 2015. *See* "Citibank's First Set of Discovery, Interrogatories, Requests for Production, and Requests for Admission."

11. Mr. Perry provided responses to Citibank's discovery requests and participated in the civil discovery process in Boone County Circuit Court.

12. On May 1, 2015, Mr. Perry, in accordance with the agreed scheduling order, filed a putative class counterclaim complaint alleging common law claims and violations of the West Virginia Consumer Credit Protection Act. *See* "Perry Counterclaim."

13. Citibank then hired new counsel, its third law firm on the case, and requested additional time to respond to the counterclaims. *See* "Notice of Appearance and Substitution of Counsel" and "Stipulation Enlarging time to Response to Counterclaim."

14. On June 23, 2015, Citibank filed its motion to compel arbitration and stay the proceedings. *See* "Motion to Compel Arbitration and to Stay Action."

15. Even after filing its motion to compel arbitration, Citibank filed fact witness disclosures in accordance with the agreed scheduling order on July 2, 2015. *See* "Citibank's Fact Witness Disclosures."

16. Citibank asserts that it has an enforceable and valid arbitration agreement that prohibits further litigation of this matter in Boone County Circuit Court. Citibank argues that the following 2006 provision¹ contains the most recent arbitration agreement between the parties:

ARBITRATION

¹ This Court finds that Citibank has filed twenty-seven (27) lawsuits in the Circuit Court of Boone County since 2006. All of these suits were consumer debt collection actions.

PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.

17. During the September 10, 2015 hearing, the enforceability of this arbitration clause along with the enforceability of the provided template agreement was disputed by Mr. Perry. It was also noted that the actual agreement between the parties had never been produced and that only a "Card Agreement Exemplar" had been provided to the Court. *See* "Walters Affidavit, ¶ 8."

18. Mr. Perry asserts that the enforceability of Citibank's purported arbitration agreement is a red herring because Citibank repeatedly waived any right it once held to arbitrate the disputes at issue in this litigation as a result of the following:

- a. Citibank chose Boone County Circuit Court to resolve its dispute with Mr. Perry;
- b. Citibank significantly advanced its lawsuit to the extent of requesting judgment on the pleadings;
- c. Citibank issued discovery and Mr. Perry provided responses;
- d. Citibank prejudiced Mr. Perry by refusing to participate in discovery but receiving meaningful responses from him, damaging his credit for five years as Citibank's lawsuit languished, exposing Mr. Perry to the expense of prolonged litigation, and, Mr. Perry argues the inherent unfairness in a party taking advantage of the litigation process and then shifting to the arbitration process for its own advantage;
- e. Citibank actively negotiated its debt claims for years;
- f. Citibank agreed to a scheduling order, which provided for a deadline to file any counterclaims;

- g. Citibank waited nearly five years to request transfer of this case to arbitration; and
- h. Citibank never provided the actual agreement it is attempting to enforce and has only provided a "Card Agreement Exemplar."

CONCLUSIONS OF LAW

1. According to the United States Supreme Court, "Congress' clear intent, in the [FAA], [was] to move the parties in an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Canst. Corp.*, 460 U.S. 1, 22 (1983).

2. The parties agree, and Citibank argued in its briefs to the Court, that the primary virtue of arbitration is efficiency in resolving disputes. *See Peoples Security Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989) (stating that "[t]his heavy presumption in favor of arbitrability is based on public policy consideration of the need for speedy and efficient decisions...")

3. The Court FINDS that Citibank's arguments regarding a quick and efficient resolution of disputes contradicts its nearly five year delay in invoking arbitration and is inconsistent with *Moses v. Mercury*, which calls for the parties to move as "quickly and easily as possible" out of court and into arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Canst. Corp.*, 460 U.S. 1, 22 (1983).

4. According to this State's high court, "[n]othing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses – such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be

applied to invalidate an arbitration agreement.” *Syllabus Point 9, Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011).²

5. The Court also notes that because the enforcement of an arbitration clause is purely a matter of contract, “[a]s with any contract right, an arbitration requirement may be waived through the conduct of the parties.” *See State ex rel. Barden & Robeson Corp. v. Hill*, 208 W.Va. 163, 168, 539 S.E.2d 106, 111 (2000) (citing *Earl T. Browder, Inc. v. Cnty. Court of Webster Cnty.*, 143 W.Va. 406, 412, 102 S.E.2d 425, 430 (1958) (Holding that defendant’s neglect or refusal to arbitrate dispute constituted waiver of right to require arbitration)).

6. Waiver that is inferred by the conduct of a party is known as “implied waiver.” *See Potesta v. U.S. Fidelity & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135, 142-43 (1998).

7. Furthermore, when a party repeatedly conducts itself inconsistent with a contractual right, the party relinquishes that right. *See Hoffman v. Wheeling Sav. & Loan Ass’n*, 133 W.Va. 694, 713 57 S.E.2d 725, 735 (1950) (Finding that a litigant’s conduct may “...amount to an intentional relinquishment of a known right.”).

8. The Court FINDS that Citibank effectively waived any purported arbitration rights it once held because Citibank, *inter alia*, voluntarily selected Boone County Circuit Court as its preferred forum, litigated its disputes with Mr. Perry in this Court, agreed to an amended scheduling order allowing for counterclaims, issued fact witness disclosures, requested judgment on the pleadings, and waited nearly five years to invoke its purported

² *Brown I* was overruled on other grounds. As stated in *Brown II*, *Syllabus Point 21 of Brown I* was overruled, but all other holdings were otherwise reaffirmed. *Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 396, 729 S.E.2d 217, 231 (2012).

contractual right to arbitrate. These repeated and voluntarily actions of Citibank constitute waiver because “[v]oluntary choice is of the very essence of waiver.” *See Hoffman*, 57S.E.2d at 735.

9. The Court FINDS that Mr. Perry’s Counterclaim Complaint complies with the scheduling order agreed to by Citibank as the entered Order specifically permitted “third party complaints, counterclaims, joinders, and amended pleadings to be filed and served on or before May 1, 2015.”

10. The Court further FINDS the specific request in this case of allowing a party to take advantage of the litigation process and then permitting that party to shift to the arbitration process for its own advantage is inherently unfair and disfavored. *See, MC Asset Recovery, LLC v. Castex Energy, Inc.*, 613 F.3d 584, 590 (5th Cir. 2010)(Noting that a Court should reject tardy motions to compel arbitration that reflect nothing more than a party’s shift to “the arbitration option as a backup plan.”)

11. Thus, the Court FINDS, after an examination of the totality of the circumstances and conducting a fact specific analysis, that Citibank waived any right it may have had to invoke arbitration; therefore, the Mr. Perry has won this wrestling match with the arbitration bear.

CONCLUSION

Accordingly, this Court **ORDERS** that Citibank’s Motion to Compel Arbitration and Stay the Action is hereby **DENIED**.

The objections and exceptions of any aggrieved party are noted and preserved.

The stay of discovery is lifted, the previous pre-trial date of November 9, 2015 shall be kept as a status hearing, and the parties are directed to contact the Court and enter a new scheduling order.

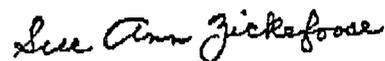
The Court directs the Clerk to provide certified copies of this Order to counsel of record.

All of which is hereby **ORDERED, ADJUDGED, and DECREED.**

ENTERED this 15th day of October, 2015.


JUDGE WILLIAM S. THOMPSON

A COPY ATTEST



CIRCUIT COURT