/s/ Micheal M. Cochrane
Circuit Court Judge
Ref. Code: 21WXREU6X

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CC-55-2020-C-75
Wyoming County Circuit Clerk
Michael Stover

In the Circuit Court of Wyoming County, West Virginia

FORD MOTOR CREDIT COMPANY, LLC, Plaintiff,	)	
vs.)	)	Case No. CC-55-2020-C-75
RONALD R MILLER, Defendant	)	

Order Denying Ford Motor Credit Company, LLC's Motion to Compel Arbitration and Stay this Proceeding

On September 21, 2021, came the parties, by counsel, for Plaintiff Ford Motor Credit Company, LLC's Motion to Compel Arbitration and Stay this Action. Based upon a review of the Motions, briefing of the parties, oral argument of the parties, relevant case law, and applicable statutory authority, this Court hereby denies Ford Motor Credit Company, LLC's Motion. The Court finds and concludes as follows:

FINDINGS OF FACT

1. On October 19, 2020, Ford Motor Credit Company, LLC (hereafter "Ford Bank") filed the instant lawsuit against Ronald R. Miller in Wyoming County Circuit Court. *See* "Lawsuit."

2. On March 19, 2021, Mr. Miller filed an Answer along with Counterclaims alleging violations of common law and this State's Consumer Credit and Protection Act (hereafter "WVCCPA"). *See* Answer and Counterclaim.

3. It is undisputed that Ford Bank is the party that selected Wyoming County Circuit Court to sue Mr. Miller for the instant dispute.

4. Discovery was issued to Ford Bank on March 25, 2021.

5. On April 9, 2021, after filing its lawsuit in Wyoming County Circuit Court,

Ford Bank filed a Motion to Compel Arbitration and to Stay this Action.

6. Ford Bank asserts that it possesses an enforceable arbitration agreement with Mr. Miller prohibiting further litigation of the lawsuit it initiated in Wyoming County Circuit Court.

7. Ford Bank noticed the hearing on its motion to compel arbitration for September 21, 2021.

8. For at least five (5) months, Ford Bank had the opportunity the provide evidence to this Court that it possessed an enforceable arbitration agreement.

9. Ford Bank failed to meet its burden, and the record is clear, that Ford Bank submitted no evidence prior to the hearing or during the hearing on September 21, 2021.

10. In fact, during the proceeding on September 21, 2021, no West Virginia Rule of Evidence was ever spoken, and no request to move for the admission or consideration of a single piece of evidence was made by the movant.

11. The documents discussed by Ford Bank had not been authenticated and no affidavit or witness regarding the alleged arbitration agreement was provided to the Court.

12. The Court stated at the end of the hearing it would rule on Ford Bank's motion.

13. In addition to failing to provide evidence, Ford Bank refused to participate in any discovery, jurisdictional or otherwise, in regard to its motion for arbitration. *See* Ford Bank's Motion for Protective Order filed on May 11, 2021 and Certificate of Service for Mr. Miller's First Set of Discovery to Ford Bank filed on March 25, 2021.

14. Then on September 24, 2021, three (3) days after the hearing on Ford Bank's motion to compel arbitration, Ford Bank, contrary to the Court's ruling, filed

supplemental briefing in which it attempted to introduce new cases and, finally, some evidence of an arbitration agreement including the affidavit of Miguel Brookes, the alleged Director of Business Center Operations at Ford Bank.

15. Miguel Brookes did not participate in the September 21, 2021 hearing, did not provide any evidence prior to that proceeding that Mr. Miller could have addressed, he has not been deposed in this matter, and the affidavit of Miguel Brookes was provided only after the Court specifically instructed that it would rule on the record with no further filings.

16. On September 30, 2021, Mr. Miller filed a motion to strike the untimely filing of Ford Bank on the grounds that providing evidence after the fact is further proof Ford Bank had no evidence to prove any arbitration rights and also that Ford Bank utilized unfair surprise after the proceeding had taken place. Mr. Miller also argued that the filing of the self-serving affidavit occurred against this Court's clear instruction.

17. Ford Bank's new filings relied primarily on *State ex rel. Troy Group, Inc. v. Sims*, 244 W. Va. 203, 852 S.E.2d 270, 279 (2020).

18. In *Sims*, the movant for arbitration actually proved it possessed arbitration rights and even submitted to a Rule 30(b)(7) corporate deposition to authenticate and prove its documents.

19. Conversely, in the instant matter, Ford Bank refused to participate in any discovery, including any depositions of corporate representatives or document authentication as was completed in *Sims* prior to the ruling on arbitration.

20. It is undisputed that Ford Bank initiated the instant lawsuit, has refused to participate in any discovery in this case, and provided no evidence before or during the hearing upon its motion to compel arbitration.

STANDARD OF REVIEW

1. When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement. *See* Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc., v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010).

2. Courts use state law principles to evaluate the issues of whether an arbitration agreement was validly formed and whether the claims asserted fall within the scope of the arbitration agreement. *See, e.g., State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 228 W. Va. 125 (2011).

3. There is no presumption that an arbitration agreement was formed, and there is no policy in favor of enforcing arbitration until and unless a court finds that there is an agreement to arbitrate. *See Granite Rock v. International Broth. Of Teamsters*, 561 U.S. 287, 302 (2010) (explaining that the "presumption in favor of arbitration" only applies after "a judicial conclusion that arbitration of a particular dispute is what the parties intended"); *BCS Ins. Co. v. Wellmark, Inc.*, 410 F.3d 349, 352 (7th Cir. 2005)(explaining federal policy favoring arbitration only relevant if parties agreed to arbitrate).

4. Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate. *State ex rel. U-Haul Co. of W. Virginia v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586, 593 (2013).

5. "Under the Federal Arbitration Act, 9 U.S.C. § 2, parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to

arbitrate. An agreement to arbitrate will not be extended by construction or implication." Syl. pt. 10, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011) ("*Brown I*"), overruled on other grounds by *Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012) (per curiam).

6. Importantly, "[n]othing in the Federal Arbitration Act ... overrides normal rules of contract interpretation." Syl. pt. 9, in part, *Brown I*, 228 W.Va. 646, 724 S.E.2d 250. Rather, the purpose of the Act "is for courts to treat arbitration agreements like any other contract. The Act does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms." Syl. pt. 7, in part, *id*, Syl. Pt. 3, *State ex rel AMFM, LLC v. King*, 230 W.Va. 471 (W.Va. 2013).

7. The West Virginia Supreme Court of Appeals has emphasized:

> Thus, to be valid, an arbitration agreement must conform to the rules governing contracts, generally. We long have held that " '[t]he fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement.' Syllabus Point 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926)." Syl. pt. 3, *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012). Accordingly, to be valid, the subject Arbitration Agreement must have (1) competent parties; (2) legal subject matter; (3) valuable consideration; and (4) mutual assent. *Id.* Absent anyone of these elements, the Arbitration Agreement is invalid. Syl. Pt. 4, *State ex rel AMFM, LLC v. King*, 230 W.Va. 471 (W.Va. 2013).

8. In West Virginia, parties to contracts can waive certain contractual provisions. Utah Code Ann. § 78B-11-107(I) (Arbitration contract is revocable "upon ground that exists at law or in equity..."; *see also* Syl. pt. 7, *Schumacher Homes of Circleville, Inc. v. Spencer,* 774 S.E.2d 1 (W. Va. 2015)("'[n]othing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides the 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.'")(quoting Syl. pt. 9, *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011), reversed on other grounds by *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 182 L.Ed.2d 42 (2012); *Ara v. Erie Ins. Co.*, 387 S.E.2d 320, 323 (W. Va. 1989)("an insurance company may waive a contractual policy provision").

CONCLUSIONS OF LAW

Ford Bank failed to prove the existence of a valid arbitration agreement

1. It is well-settled that when reviewing a motion to compel arbitration a court must first consider the validity of the agreement and whether the claims asserted are covered by the arbitration agreement. *See Golden Eagle Resources, II v. Willow Run Energy*, 836 S.E.2d 23 (W. Va. 2019).

2. The Court is required to make the following determinations on the issue of arbitration: (1) The existence of a valid, enforceable agreement to arbitrate between the parties; and (2) That the parties' controversy falls within the substantive scope of that agreement to arbitrate. *See* Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 298 (2010). *See also, Frontline Asset Strategies, LLC v. Rutledge*, 2021 WL 1972277 (2021).

3. A brief review of the procedural history of this case is helpful. The case was filed on October 19, 2020. Mr. Miller filed his Answer and Counterclaim on March 19, 2021. Discovery was filed on March 25, 2021. Ford Bank then proceeded to file its motion to compel arbitration on April 9, 2021. Argument on Ford Bank's motion for arbitration was heard on September 21, 2021. No evidence of an arbitration agreement was produced. [1]

4. Ford Bank asserts that it was assigned the lending agreement and it contains an arbitration agreement that is triggered at the request of either the borrower

or the lender. Ford Bank further asserts that the alleged arbitration agreement includes the right to assign the option to arbitrate to assignees of the original lender. Ford Bank did not move for the admission of any evidence, provide any witness testimony, or provide an affidavit prior to or during its hearing to compel arbitration. The assertions of Ford Bank, that it was assigned a lending agreement, were reliant upon argument of counsel for Ford Bank, and it is well settled that attorney argument is not evidence.

5. West Virginia Rules of Evidence prohibit testimony by witnesses who lack personal knowledge of the matter. An attorney is not a witness with personal knowledge of the matter.

6. Rule 602 of the West Virginia Rules of Evidence provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." W. Va. R. Evid. 602.

7. Ford Bank failed to provide evidence that an arbitration agreement exists or was transferred with the right to collect the original debt. Without actual proof or evidence provided to the Court, Ford Bank cannot proceed to arbitrate claims that it initiated.

8. The WVSCA recently addressed this very scenario in the case of *Frontline Asset Strategies, LLC v. Rutledge*, 2021 WL 1972277 (2021). In that case, Frontline Assets Strategies appealed an order from Raleigh County Circuit Court denying their motion to compel arbitration. The respondents alleged that Frontline failed to prove any assignment of the debt and its right to compel arbitration and the WVSCA ruled that "[a] party, such as Frontline, cannot enforce the original creditor's right to compel arbitration without proving assignment of that right." *Id.* (emphasis added).

9. In *Frontline*, the WVSCA further held that "Frontline has not established that the arbitration rights of the original creditors were effectively assigned to

it...Frontline has failed to show that a valid arbitration agreement exists between it and Respondents." *Id.*

10. Thus, the law is clear that "[t]o compel arbitration, [a movant] must prove the assignment of that particular right from the original creditor to its current client or to itself. [The movant] carries the burden to prove the assignment of the right to arbitrate." *See Frontline Asset Strategies, LLC v. Rutledge*, 2021 WL 1972277 (2021).

11. In *Pearson v. United Debt Holdings, LLC*, 123 F. Supp. 3d 1070, Defendant, United Debt Holdings (UDH) moved to compel arbitration just as RHC has here, and the Court reasoned as:

> The Court is without sufficient evidence to find that there exists an agreement to arbitrate... the record is devoid of evidence supporting the conclusion that the document attached to UDH's motion [to arbitrate] is the agreement into which Pearson entered and reference in the Complaint. The document is not physically signed. No witness affirms that the documents were found in Plain Green of UDH's business records, that they were presented to Pearson when he took out his loan, or that the document actually bears Pearson's electronic signature. UDH does not argue that the agreement constitutes any type of evidence that is self-authenticating under Rule 902 of the Federal Rules of evidence.

Id. at 1073-1074. In *Pearson*, UDH failed to provide an affidavit. Here, the affidavit does not prove arbitration or any actual evidence of assignment.

12. In *Bazemore v. Jefferson Capital Systems, LLC*, 827 F.3d 1325, (11th Cir. 2016), the debt buyer attempted to establish the terms of the contract between the consumer and the original creditor with an affidavit of someone who allegedly had access to the records of the original creditor. In that case, arbitration was denied on the fact that the affidavit was "woefully inadequate."

13. *Buford v. Palisades Collection, L.L.C.*, 552 F. Supp. 2d 800, 809 (N.D. Ill. 2008), was a Fair Debt Collection Practices Act case in which the debt collector did not provide the court with specific assignment or purchase contract language between the

debt collector and creditor, the debt collector had not shown that it acquired all the rights under the agreement, including the right to arbitrate or the right to enforce a bar on class actions allegedly originally agreed to by the consumer with the original creditor.

14. In *Starr v. Hameroff Law Firm, Prof'l Corp.*, 2007 WL 3231988 (D. Ariz. Oct. 31, 2007)(mag.), the debt buyer failed to establish with admissible evidence that it purchased the right to enforce arbitration against the consumer plaintiff and arbitration was denied.

15. In *Matute v. Main St. Acquisition Corp.*, 2012 WL 4513420 (S.D. Fla. Oct. 2, 2012), the movant's failure to present admissible evidence to prove that it was an assignee of debtor's account and that it obtained the right to enforce arbitration prevented it from enforcing the arbitration clause, which is essentially the scenario before this Court.

16. Providing admissible evidence in support of its motion to compel arbitration was not done by Ford Bank either before or during its hearing upon the motion to compel arbitration. Ford Bank had more than eleven (11) months to provide this information, and instead refused to participate in discovery.

17. As a matter of evidence, Ford Bank asserts that an affidavit attached to a supplemental filing **after** the hearing on the motion to compel arbitration was held and **after** this Court instructed that its ruling was forthcoming. Permitting a party to present evidence that a nonmovant has no chance to rebut, after a Court instructs that a ruling is forthcoming, would be inherently unfair.

18. Furthermore, Ford Bank's reliance upon *Sims*, in its late filing, is fatally flawed. In *Sims*, the movant for arbitration actually proved it possessed arbitration rights and even submitted to a Rule 30(b)(7) corporate deposition to authenticate and prove its documents. The WVSCA noted such efforts and reasoned as follows in *Sims*:

> TROY's Rule 30(b)(7) representative, Ms. Orum provided the following compelling information **during her deposition in the underlying litigation which supports the authenticity of the document and the signature.** Ms. Orum **testified** that in producing Ms. Willis' arbitration agreement, she retrieved it from the human resources server ("the server") in Ms. Willis' electronic personnel file. Only the director of IT and Ms. Orum have access to the server. Ms. Orum testified that her assistant has viewing access to certain folders and files within the server, but does not have any edit access. Ms. Orum stated that she does have edit access; however, she was not specific as to what exactly she could edit...When asked about what metadata exists regarding Ms. Willis' arbitration agreement, Ms. Orum **testified** that the only metadata that could be produced with regard to this specific arbitration agreement because it was a PDF document was the date the document was scanned into the server and who scanned it. Ms. Willis' arbitration agreement was scanned into the server on December 21, 2016.

State ex rel. Troy Group, Inc. v. Sims, 244 W. Va. 203, 852 S.E.2d 270, 279 (2020).

19. In the instant case, Ford Bank refused to participate in discovery, no depositions have been taken, and Ford Bank failed to ever present evidence of its arbitration rights.

20. As discussed *infra*, the movant has the burden to prove it possesses arbitration rights. The Court cannot find that Mr. Miller agreed to arbitration with Ford Bank with the lack of evidence presented and in consideration of the litigation activity of Ford Bank. *See Frontline Asset Strategies, LLC v. Rutledge*, 2021 WL 1972277 (2021).

WHEREFORE, the Court **ORDERS** that Plaintiff Ford Bank's Motion to Compel Arbitration is **DENIED** due to Ford Bank's failure to prove the existence of a valid arbitration agreement. Accordingly, this Court ORDERS, ADJUDGES, and DECREES that Ford Bank's Motion to Compel Arbitration and to Stay this Action is hereby **DENIED**.

The parties are to begin discovery immediately in this matter.

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

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

Prepared by:

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/s/ Micheal M. Cochrane
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27th Judicial Circuit

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