U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 07-06514

ADVERSARY PROCEEDING NO: 08-80001

ORDER

The relief set forth on the following pages, for a total of 9 pages including this page, is hereby ORDERED.

FILED BY THE COURT
07/03/2008

US Bankruptcy Court Judge
District of South Carolina

Entered: 07/03/2008

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re: Bobby Joe Parker and Rebecca McAbee Parker, Debtors.	C/A No. 07-06514-HB Adv. Pro. No. 08-80001-HB Chapter 13
Bobby Joe Parker, Rebecca McAbee Parker, Plaintiffs, v. Green Tree Servicing LLC f/k/a United Companies Funding, Inc., Defendant.	**ORDER ON MOTION TO DISMISS AND COMPEL ARBITRATION**

This matter is before the Court on the Motion of Defendant Green Tree LLC to Dismiss and to Compel Arbitration, filed pursuant to Rules 12(b)(1), 12(b)(3) and 12(b)(6) of the Federal Rules of Civil Procedure[1] and §§ 3 and 4 of the Federal Arbitration Act (9 U.S.C. § 1 et seq.). Plaintiffs Bobby Joe Parker and Rebecca McAbee Parker allege six causes of action in their Complaint: negligent misrepresentation, fraud, conversion, violations of the South Carolina Consumer Protection Code (SCCPC), S.C. Code Ann. § 37-1-101 et seq., and Unfair Trade Practices Act (SCUTPA), S.C. Code Ann. § 39-5-10 et seq., and an allegation concerning the confirmation of their Chapter 13 plan. The Complaint also states that "this is an action for actual, statutory and punitive damages . . . pursuant to Section[s] 105, 362, 501, 502, 503 and 506 of the Bankruptcy Code, and to challenge the arrearage claim of [Green Tree] pursuant to

[1] Fed. R. Civ. P. 12(b) is applicable to this adversary proceeding pursuant to Fed. R. Bankr. P. 7012(b).

FRBP 7001(2).” Green Tree contends that this Court should dismiss any portion of the adversary proceeding which requests confirmation relief or other relief which may be obtained in the Chapter 13 case without need for a separate adversary. As to the remaining causes of action, Green Tree asks that the Court enforce an arbitration provision allegedly contained in a Retail Installment Sales Contract between the parties. A hearing on this motion was held, and both parties appeared along with their counsel. After considering the pleadings, legal memoranda, and arguments presented, the Court finds as follows:

BACKGROUND

The pleadings and documents before the Court indicate that Bobby J. Parker entered into a Retail Installment Sales Contract with Seller Cardinal Homes on October 22, 1997 for the purchase of a 1997 Silhouette Mobile Home. The Parkers, captioned as Plaintiffs above, live in this home. The Complaint alleges that the Parkers were debtors in a previous Chapter 13 case, Case No. 01-12653, and that they were successfully discharged on November 8, 2006. It alleges that this prior case included payment of arrearages on the note and security agreement now serviced by Green Tree and that shortly after their discharge, the Parkers received a billing statement indicating an additional arrearage of $5,431.02.

On July 27, 2007 Green Tree filed a Claim and Delivery action against the Parkers in the Court of Common Pleas for Cherokee County. On or about August 7, 2007, the Parkers filed an Answer and Counterclaims in the state court action. Their Complaint alleges that their current Chapter 13 case, Case No. 07-06514 filed on

November 27, 2007, was filed to avoid protracted litigation in that Claim and Delivery action.

In addition to their second bankruptcy case, the Parkers filed this adversary proceeding (Adv. Pro. No. 08-80001) on January 2, 2008 alleging their state law counterclaims as direct claims against Green Tree. The Complaint alleges that the matter asserted in the adversary is primarily a core proceeding. In response to the Complaint, Green Tree filed the present motion to dismiss and compel arbitration. The state court case was subsequently removed to this Court on February 25, 2008 as Adv. Pro. No. 08-80025 and was consolidated with the adversary initiated by the Parkers by Consent Order entered March 17, 2008.

In the current bankruptcy case the Parkers include Green Tree as a secured creditor and list the mobile home as an asset. Confirmation of the Parker's plan was pending at the time of the hearing.[2]

Green Tree filed a claim in the case for $64,374.45, which includes an arrearage amount. Green Tree has objected to confirmation of the plan because it does not propose payment of arrearages. At the hearing on this matter Green Tree offered to deem the account current, but the total amount due on the note is in controversy.

Green Tree seeks enforcement of an arbitration provision allegedly found in the 1997 purchase contract which states as follows:

> ARBITRATION. Except as explained below, you and we understand and agree that all disputes, claims or controversies from or relating to this Contract (whether under case law, statutory law, or any other laws including, but not limited to, all contract, tort and property disputes) shall be resolved by binding arbitration ("Arbitration"). This contract is made pursuant to a transaction in

[2] Since the hearing the parties have agreed that confirmation of the plan may go forward. The plan contains a reservation of rights regarding this matter that was not objectionable as follows: *"Green Tree: Paid Directly by Debtor outside Plan. Debtor and Creditor reserve all rights as to the amount of the claim (including prepetition and post petition amounts) pending the resolution of the related Adversary proceeding*."

> interstate commerce and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Arbitration shall be conducted by one arbitrator selected by us with your consent. You and we agree that the arbitrator shall have all powers provided by law, and this Contract. These powers shall include all legal and equitable remedies including, but not limited to, money damages, declaratory relief and injunctive relief. Judgment upon the arbitrator's decision may be entered in any court having jurisdiction. You and we agree and understand that you and we choose Arbitration instead of litigation to resolve disputes, except as explained below. You and we understand that you and we each have a right to litigate disputes in court, but that you and we each prefer to resolve disputes through Arbitration, except as explained below. YOU AND WE VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT YOU OR WE HAVE TO A JURY TRIAL EITHER IN ARBITRATION OR IN A COURT ACTION BY US. EXCEPTION TO ARBITRATION: Even though you and we agree to Arbitration, we still may use judicial (filing a lawsuit) or nonjudicial relief to enforce our security interest, or to otherwise collect the balance due on this Contract. We may begin a lawsuit to enforce our security interest, or to obtain a monetary judgment, without waiving your right or our right to compel Arbitration of any other dispute or remedy, including the filing of a counterclaim by you in a lawsuit brought by us. If a court decides the Federal Arbitration Act at 9 U.S.C. Section 1 does not apply to this Contract, then the South Carolina Arbitration Act will apply instead.

In addition to raising the bankruptcy issues, Plaintiff's Complaint seeks a judgment against Green Tree in favor of the Parkers on theories of negligent misrepresentation, fraud, conversion and violations of SCCPC and SCUTPA. It appears at this early stage of the case that most of the facts plead in support of and relating to these state law causes of action are identical to those to be examined by the Court to determine the amount of Green Tree's claim and how it will impact the Debtors' current bankruptcy case. Plaintiff's Complaint is therefore at least in part an action to interpret the scope of this Court's prior orders in Case No. 01-12653 and the relief granted therein, and to determine the impact of any such interpretation on the debt reorganization process in the current bankruptcy case.[3]

DISCUSSION AND CONCLUSIONS OF LAW

As this Court has recognized, "[t]he United States Supreme Court and the South Carolina Court of Appeals have held that the Federal Arbitration Act declares a liberal

[3] The undersigned judge served as a Chapter 13 trustee in Case No. 01-12653 from the time it was filed until her resignation on February 1, 2006. That case was completed by the replacement trustee, Gretchen Holland, who was appointed on the same date. Ms. Holland completed disbursement in the case and filed the Final Report, and was trustee at entry of the Debtors' discharge.

policy favoring arbitration." In re Dunes Hotel Assoc., 194 B.R. 967, 992 (Bankr. D.S.C. 1995) (citing Circle S. Enter., Inc. v. Stanley Smith & Sons, 288 S.C. 428, 430, 343 S.E.2d 45, 46 (S.C. Ct. App. 1986) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983))); Moore v. Green Tree Fin. Corp. (In re Moore), No. 97-80311, 1998 WL 2017186, at *3 (Bankr. D.S.C. Jan. 13, 1998).

The causes of action in this matter that are predicated on non-bankruptcy laws can be subject to arbitration. See Moore, 1998 WL 2017186, at *4 (claims under SCUTPA and SCCPC "do not arise exclusively from the Bankruptcy Code and are statutory causes of action that may stand on their own without the core bankruptcy cause of action. . . .") However, a bankruptcy court has discretion to decline to compel arbitration where "there is an inherent conflict between arbitration and the underlying purposes of the bankruptcy laws." Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co.), 403 F.3d 164, 169 (4th Cir. 2005).[4]

In White Mountain, the Fourth Circuit upheld the bankruptcy court's refusal to send to arbitration a claim concerning whether a former part-owner's advances to a

[4] In White Mountain the Fourth Circuit, like other circuits, utilized a test derived from the Supreme Court case of Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987), to determine whether to enforce an arbitration agreement in the bankruptcy setting. In McMahon, the Supreme Court held that "standing alone," the language of the FAA is mandatory and requires enforcement of agreements to arbitrate statutory claims. Id. at 226. However, "the Arbitration Act's mandate may be overridden by a contrary congressional command." Id. at 226-27. "If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,'. . . or from an inherent conflict between arbitration and the statute's underlying purposes." Id. at 227 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632-637 (1985), and Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985)). Courts have fashioned a three-part alternative test from this language of McMahon: does the particular statute at issue (here, the Bankruptcy Code; in McMahon, RICO and the Securities Exchange Act), either from its (1) text, (2) legislative history, or (3) because of inherent conflict between arbitration and the statute's underlying purposes, indicate a congressional intent to prohibit a waiver of the judicial forum through arbitration? Utilizing one of the alternatives under McMahon, the Fourth Circuit held that "this case may be decided under McMahon's third line of analysis – whether congressional intent is deducible 'from an inherent conflict between arbitration and the statute's underlying purposes.'" White Mountain, 403 F.3d at 169 (quoting McMahon, 482 U.S. at 227).

Chapter 11 debtor were loans or contributions to capital. The court agreed that arbitration of whether the advances represented debt or equity "would substantially interfere with [the debtor's] efforts to reorganize." Id. at 170. Resolution of the debt-equity issue was "critical" to the formulation of the debtor's plan of reorganization, and the court was in a position to resolve the issue on an expedited basis. Id. The court concluded that sending a core claim such as the one at issue to arbitration would conflict with the bankruptcy laws' goal to "'centralize all disputes concerning [a debtor's legal obligations] so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas.'" Id. (quoting In re Ionosphere Clubs, Inc., 922 F.2d 984, 989 (2nd Cir. 1990)). See also Matter of National Gypsum Co., 118 F.3d 1056, 1067 (5th Cir. 1997) (refusing to compel arbitration after finding that the action involved the bankruptcy court's ability to construe its own confirmation and discharge orders and was central to the debtor's confirmed reorganization plan); Startec Global Commc'n Corp. v. Videsh Sanchar Nigam Ltd. (In re Startec Global Commc'n Corp.), 300 B.R. 244, 255 (D. Md. 2003) (finding that the bankruptcy court was within its discretion to refuse to compel arbitration of claims, including a claim alleging violation of the court's own critical vendor order); Cavanaugh v. Conseco Fin. Serv. Corp. (In re Cavanaugh), 271 B.R. 414, 425 (Bankr. D. Mass. 2001) (Chapter 7 debtor's claims that its mortgage holder collected unapproved attorney's fees in violation of automatic stay not subject to arbitration); In re Blanchard Transp. Serv., Inc., No. 07-01830, 2008 WL 619379, at *2 (Bankr. E.D.N.C. Feb. 29, 2008) (declining to send to arbitration a contract dispute concerning amounts owed to the debtor under a trucking contract because the funds owed were integral to its reorganization plan); Aeronautical Solutions, LLC v. Commercial Debt Counseling Corp.

(In re Aeronautical Solutions, LLC), Adv. Pro. No. L-06-00261-8, slip op. at 4-5 (Bankr. E.D.N.C. June 8, 2007) (declining to send to arbitration two fraudulent conveyance claims where arbitration would be inconsistent with Chapter 11's goal of rehabilitation and centralization of disputes.)

The goal of Chapter 13 bankruptcy is to allow a debtor to propose a plan, approved by order of the court and facilitated by court procedures, for the reorganization of his or her finances. This adversary involves matters not only of reorganization and determination of claims and assets in the current bankruptcy case, but also of challenges to the scope, application and effectiveness of the fresh start afforded by the prior Chapter 13 debt reorganization process and facilitating bankruptcy court orders. Such a combination touches the core of the Bankruptcy Code's purpose and any decision thereon affects the integrity of the Chapter 13 process. A court handling bankruptcy matters should determine these issues that are at the heart of the Debtors' reorganization and that require the interpretation and enforcement of its prior orders. Therefore, the Court will decline to send this adversary to arbitration at this time.[5]

This Court is equipped to handle expeditiously the bankruptcy matters raised in this adversary proceeding that must be determined prior to or at the same time as the resolution of any of the state law issues. Should matters requiring the interpretation of the effect of the prior bankruptcy and this Court's prior orders facilitating the same cease at any time to be relevant to any of the remaining causes of action, the parties may ask the Court to revisit the issue of arbitration.

[5] Having filed a motion under Fed. R. Civ. P. 12(b) instead of a responsive pleading, Defendant has not answered the Complaint, and the factual record thus far consists primarily of stipulations and allegations.

Green Tree has also asked the Court to dismiss the portion of the Complaint relating to confirmation of the plan, as such matters can be dealt with in the Chapter 13 case without the necessity of pleading them in an adversary proceeding. However, dismissing that cause of action would not eliminate any controversy pending between the parties. Contested matters involving Green Tree's claim and thus its repayment through the plan are intricately entwined with the facts of the adversary proceeding, even if they had not been plead as causes of action. Dismissal of the confirmation cause of action from the adversary would serve no purpose, so the motion is denied.

The Parkers also raised vigorous defenses to enforcement of the arbitration provision related to the content of the contract and the fairness of its enforcement; however, the Court need not address those issues at this time given the decision set forth above.

IT IS SO ORDERED.