

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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CLERK OF COURT

IN RE:

Randi Ingram Moore,

Debtor.

Randi Ingram Moore,

Plaintiff,

v.

Green Tree Financial Corporation and Green
Tree Financial Servicing Corporation,

Defendant.

C/A No. 97-04050-W

Adv. Pro. No. 97-80311-W

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Defendants' Motion to Stay Pending Litigation and Compel Arbitration as to the Second, Third and Fourth causes of action is granted. The Fifth and Sixth causes of action have been voluntarily dismissed without prejudice and the First cause of action will proceed in this Court pursuant to the current scheduling order.

Columbia, South Carolina,

January 13, 1998.

John E. White
UNITED STATES BANKRUPTCY JUDGE

ENTERED

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J.G.S.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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IN RE:

Randi Ingram Moore,

Debtor.

Randi Ingram Moore,

Plaintiff,

v.

Green Tree Financial Corporation and Green
Tree Financial Servicing Corporation,

Defendant.

C/A No. 97-04050-W

Adv. Pro. No. 97-80311-W

ORDER

Chapter 7

THIS MATTER comes before the Court upon the Motion to Stay Pending Litigation and Compel Arbitration ("Motion") filed by Defendants Green Tree Financial Corporation ("Green Tree Financial") and Green Tree Financial Servicing Corporation ("Green Tree Servicing") (jointly "Green Tree") on November 18, 1997. In the Motion, Green Tree contends that this Court should refuse to entertain this adversary proceeding and enforce an arbitration provision found in pre-petition contracts between the Plaintiff/Debtor, Randi Ingram Moore ("Ms. Moore" or "Debtor") and Green Tree. After considering the pleadings, legal memoranda, and arguments presented, the Court makes the following Findings of Fact and Conclusions of Law.

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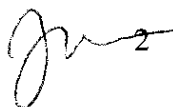
FINDINGS OF FACT

On December 30, 1994, Ms. Moore executed and delivered to Green Tree Financial a Real Estate Note ("Note"); Manufactured Home Promissory Note, Security Agreement and Disclosure Statement ("Agreement"); and Open-End Mortgage wherein Green Tree Financial obtained a security interest in a 1995 Horton manufactured home and a mortgage on certain real property. Ms. Moore is a resident of the State of South Carolina, and while both Defendants do business within the State of South Carolina, they were incorporated in the State of Delaware and maintain their principal places of business in St. Paul, Minnesota. The 1995 Horton manufactured home was manufactured in Eatonton, Georgia. Green Tree Financial purchased this Agreement from Anderson Housing Center, and in so doing, remitted payment to the dealer by check drawn on a banking institution located in Minnesota. Green Tree Financial subsequently assigned Ms. Moore's loan to Green Tree Servicing, and payments were made by Ms. Moore through a payment processing company in Atlanta, Georgia.

On May 12, 1997, Ms. Moore filed a voluntary Chapter 7 petition. Green Tree was listed as a creditor with a secured claim in the approximate amount of \$39,000 and an unsecured claim in the approximate amount of \$4,600. At the conclusion of the 11 U.S.C. § 341¹ first meeting of creditors, the Chapter 7 Trustee declared the case to be a "no asset" case and on June 10, 1997 filed his "Trustee's Report of No Distribution".

On October 14, 1997 Ms. Moore filed the within adversary proceeding alleging six (6) causes of action arising from Green Tree's alleged post-petition violation of the automatic stay

¹ Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, shall be by section number only.

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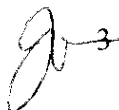
provisions of § 362. According to Ms. Moore's Complaint against Green Tree Financial and Green Tree Servicing, Green Tree Servicing mailed three letters to Ms. Moore demanding payment post petition. In further violation of the stay, Ms. Moore alleges that either Green Tree Financial or Green Tree Servicing contacted her by telephone and, despite Ms. Moore's *informing Green Tree of her attorney's name and telephone number, Green Tree demanded* payment and threatened to repossess her home. Also, Ms. Moore alleges that Green Tree contacted her mother in order to collect payment, although it was fully aware of the existence of the bankruptcy case.

Based upon this alleged conduct, Ms. Moore asserted the six (6) causes of action against Green Tree including (1) violation of the automatic stay imposed by § 362; (2) violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692; (3) violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 to -560; (4) violation of the South Carolina Consumer Protection Code, S.C. Code Ann. § 37-1-101 et. seq. (1989 & Supp. 1996); (5) Intentional Infliction of Emotional Distress; and (6) Negligence.²

In response, Green Tree filed the within Motion requesting that the Court allow the matter to be determined through arbitration in accordance with the arbitration provision found in the Mobile Home Promissory Note, Security Agreement and Disclosure Statement ("Agreement").³ The arbitration provision provides as follows:

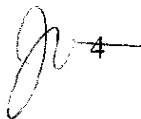
² Moore's Fifth and Sixth causes of action, Intentional Infliction of Emotional Distress and Negligence, respectively, have been voluntarily dismissed without prejudice with the consent of Green Tree.

³ The arbitration provision found in the Real Estate Note is essentially the same.

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ARBITRATION - All disputes, claims or controversies arising from or relating to this Agreement or the relationships which result from this Agreement or the validity of this arbitration clause or the entire Agreement shall be resolved by binding arbitration by one arbitrator selected by the Creditor with consent of the Maker(s). This Arbitration Agreement is made pursuant to a transaction in interstate commerce and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. . . . The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY THE CREDITOR(AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law and all other laws including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this Agreement. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Agreement of the parties. These powers shall include all legal and equitable remedies including, but not limited to, money damages, declaratory relief and injunctive relief. Notwithstanding anything hereunto the contrary, the Creditor retains an option to use judicial or non-judicial relief to enforce a security agreement relating to the Manufactured Home secured in a transaction underlying this Arbitration Agreement to enforce the monetary obligation secured by the Manufactured Home or to foreclose on the Manufactured Home. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to repossess any security or collateral, to obtain a monetary judgment or enforce the security agreement shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Agreement, including the filing of a counterclaim in a suit brought by the Creditor pursuant to this provision.

The provision is labeled as paragraph 21 of the Agreement and requires arbitration in all litigation initiated by the borrower but retains the ability by Green Tree to seek judicial relief, should it desire to do so. Ms. Moore filed an objection to the relief requested by Green Tree; however, at no time during the hearings or in the pleadings has Ms. Moore taken the position that

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the arbitration provision is unenforceable.⁴

CONCLUSIONS OF LAW

As the Court ruled at the hearing, Ms. Moore's allegation that Green Tree violated the automatic stay imposed by the Bankruptcy Code is a core proceeding and a cause of action exclusively related to a bankruptcy statute and central to the integrity of the bankruptcy court's orders. For these reasons, it will remain before this Court. See e.g., Johnston Envtl. Corp. V. Knight, 991 F.2d 613 (9th Cir. 1993); In re University Medical Center, 973 F.2d 1065 (3d Cir. 1992); In re Emergency Beacon Corp., 52 B.R. 979 (Bkrcty. S.D.N.Y. 1989); East Bay Realty Corp. v. Ashmore Woods, 94-70187 (Bkrcty. D.S.C. 6/6/94)(Unpubl.)(refusing to enforce arbitration provision when the causes of action were core proceedings); Norton Bankruptcy Law and Practice 2d § 147:2 ("In proceedings where the dispute is considered 'core,' referral to arbitration is generally prohibited.") and In re Dunes Hotel Associates, 194 B.R. 967 (Bkrcty. D.S.C. 1995)(finding core proceeding and causes of action that solely exist due to the provisions of the Bankruptcy Code are not subject to arbitration).

Additionally, with the consent of Green Tree, Ms. Moore has agreed to dismiss the Fifth and Sixth causes of action without prejudice. Therefore, the sole remaining issue is whether the

⁴ During the hearing on the Motion, the Court asked counsel for Ms. Moore if she was contesting the enforceability of the arbitration provisions. The response was that she was not because there were other grounds present to deny the motion. However, at the conclusion of the hearing on the Motion, the Court took the matter under advisement and asked the parties to submit proposed orders and in Ms. Moore's proposed order, she took the position that the enforceability of the arbitration provision was questionable because it might contain language which might not be clear. As this argument was raised for the first time in a proposed order following the close of the evidence and arguments and because it was stated at the hearing that this was not an issue, the Court will not address this argument at this time.



arbitration provisions of the Agreement should be enforced as to the Second cause of action for violation of the Fair Debt Collection Practices Act codified at 15 U.S.C. §§ 1692, the Third cause of action for violation of the South Carolina Unfair Trade Practices Act codified at S.C. Code Ann. § 39-5-10 to -560 and the Fourth cause of action for violation of the South Carolina Consumer Protection Code codified at S.C. Code Ann. § 37-1-101 et. seq. (1989 & Supp. 1996).

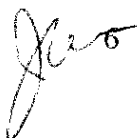
As this Court has previously stated, courts have followed a liberal policy in favor of arbitration.

The United States Supreme Court and the South Carolina Court of Appeals have held that the Federal Arbitration Act declares a liberal policy favoring arbitration. Circle S. Enterprises, Inc. v. Stanley Smith & Sons, 288 S.C. 428, 430, 343 S.E.2d 45, 46 (Ct.App.1986) citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp. 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). For purposes of applying the Federal Arbitration Act, interstate commerce must be broadly construed to promote arbitration. Godwin v. Stanley Smith & Sons, 300 S.C. 90, 386 S.E.2d 464, 465-66 (Ct.App.1989). A transaction may be found to involve interstate commerce, even where such a connection was not anticipated, based on, inter alia, the multi-state nature of the parties. Allied-Bruce Terminix Cos. v. Dobson, --- U.S. ----, ----, 115 S.Ct. 834, 843, 130 L.Ed.2d 753 (1995).

In re Dunes Hotel Associates, 194 B.R. 967, 992 (Bkrcty. D.S.C. 1995).

In a similar case from the Bankruptcy Court for the Southern District of Georgia also involving Green Tree but which involved a pre-petition Truth in Lending Act cause of action, the Court held that the Federal Arbitration Act did not conflict with the policies and goals of the Bankruptcy Code and enforced a similar arbitration provision.

Although the rationale of Zimmerman [Zimmerman v. Continental Airlines, Inc., 712 F.2d 55, 58 (3d Cir.1983)] was repudiated in Hays [Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149 (3d Cir.1989)], Hays dealt with a non-core

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proceeding and recognized that the court "must carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause and that ... such a clause [must be enforced] unless that effect would seriously jeopardize the objectives of the [Bankruptcy] Code." Id. at 1161. However, general assertions that the Bankruptcy Code was "designed to consolidate jurisdiction over property of the debtor and reflects a policy favoring a unified and consistent exercise of jurisdiction and supervision over the debtor and the debtor's estate," or that allowing arbitration would affect the overall administration of the estate by causing inefficient delay, duplicative proceedings, or the collateral effect of such arbitration on estate administration are insufficient to override the general federal policy favoring arbitration. Id. at 1157-1158.

In re Pate, 198 B.R. 841 (Bkrtcy. S.D. Ga. 1996). The Third Circuit's Hays decision cited in Pate was also discussed in a recent Fifth Circuit opinion.

Rather, as did the Third Circuit in Hays, we believe that *nonenforcement* of an otherwise applicable arbitration provision turns on the underlying nature of the proceeding, *i.e.*, whether the proceeding derives exclusively from the provisions of the Bankruptcy Code and, if so, whether arbitration of the proceeding would conflict with the purposes of the Code.

Matter of National Gypsum Co., 118 F.3d 1056 (5th Cir. 1997).

In the within adversary proceeding, the allegations in the Second, Third and Fourth causes of action 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 which is the violation of the automatic stay.

It also appears clear that this transaction involves interstate commerce. The parties to the transaction are citizens of different states, the subject matter of the transaction was manufactured outside of the State of South Carolina, and payments were made pursuant to the Note and Agreement to a state other than South Carolina.

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All of these reasons justify a finding that the arbitration clause should be effective.

However, in the Dunes Hotel Associates opinion, this Court in following the District Court of South Carolina also looked to several factors to consider in making a determination not to enforce an otherwise valid and binding arbitration agreement.

In the case of In re Lawrence W. Thompson, slip op. No. 89-2767-18 (D.S.C. 2/28/91) (Norton J.), the District Court recognized that a bankruptcy court may have the discretion to refuse to compel arbitration even if an arbitration clause may be technically enforceable. The Court recited the following factors to consider in determining whether otherwise enforceable arbitration should be compelled in a bankruptcy proceeding:

- A. Whether the issue can be resolved more expeditiously by the bankruptcy judge as opposed to through the arbitration process;
- B. Whether or not special expertise is necessary in deciding the issue;
- C. The impact on creditors of the debtor who were never parties to the agreement containing the arbitration clause; and
- D. Whether arbitration threatens the assets of the estate.

Thompson, slip op. at *2 (citing In re Chas. P. Young Co., 111 B.R. 410, 417 (Bkrtcy. S.D.N.Y.1990)).

In re Dunes Hotel Associates, 194 B.R. 967, 993 (Bkrtcy. D.S.C. 1995).

As the Second, Third and Fourth causes of action involve state law and federal non-bankruptcy law, the only one of these four factors which arguably weighs in favor of this Court retaining jurisdiction over the claims is the issue of judicial economy.⁵ However, because of the overwhelming congressional and judicial support for arbitration along with the fact that these

⁵ This Court is mindful that the cause of action regarding violation of the stay involves the same post-petition factual occurrences as the other causes of action and that this Court is likely to determine that action prior to the conclusion of any arbitration or state court action.



claims do not arise under title 11 of the United States Code and because the Chapter 7 Trustee declared this case to be a "no asset" case and therefore the administration of the case will not be affected, the Court believes that arbitration is what the parties bargained for⁶ and that the arbitration clause should be enforced. For all of these reasons, it is therefore,

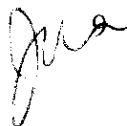
ORDERED, that the Defendants' Motion to Stay Pending Litigation and Compel Arbitration as to the Second, Third and Fourth causes of action is granted. The Fifth and Sixth causes of action have been voluntarily dismissed without prejudice and the First cause of action will proceed in this Court pursuant to the current scheduling order.

AND IT IS SO ORDERED.

Columbia, South Carolina,
January 13, 1998.


UNITED STATES BANKRUPTCY JUDGE

⁶ As stated in a previous footnote, there was no evidence presented on the enforceability of the arbitration provisions and therefore this Court will not consider the issue.



CERTIFICATE OF MAILING

The undersigned clerk (or deputy clerk) of the United States Bankruptcy Court for this district hereby certifies that a copy of the document on which this stamp appears was mailed on 1/14/98, to: w/ judgment

Snyder

Barlow

Index #98-13

J. Smith
Deputy Clerk