UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SCOTT BORECKI,

Plaintiff,

-against-

RAYMOURS FURNITURE CO., INC. d/b/a RAYMOUR & FLANIGAN,

Defendant.

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17-CV-01188 (LAK)(SN)

REPORT AND RECOMMENDATION

SARAH NETBURN, United States Magistrate Judge.

TO THE HONORABLE LEWIS A. KAPLAN:

In 2014, Plaintiff Scott Borecki ("Borecki") purchased a bedroom set from defendant Raymour Furniture Co., Inc., d/b/a Raymour & Flanigan ("Raymour"). During that transaction, Borecki provided Raymour with his cell phone number so that he could be reached when the furniture was ready to be claimed. Nearly three years later, Raymour allegedly sent to Borecki's cell phone spam texts of advertising and promotional materials without his consent. The question before the Court is whether the arbitration agreement entered into by the parties at the time of the 2014 sale governs Borecki's claim, styled as a putative class action, that Raymour violated the Telephone Consumer Protection Act ("TCPA"), 42 U.S.C. § 227. I find that the arbitration agreement between the parties to be narrow and recommend that the Court deny Raymour's motion to compel arbitration.

BACKGROUND

On January 25, 2014, Borecki visited a Raymour store and purchased a bedroom set. As part of that transaction, he executed and agreed to a Sales Ticket, which contained an arbitration

provision. See Sales Ticket, attached as Exhibit A to the Declaration of Neil A. Rube ("Rube Decl.") (ECF No. 12). Borecki signed the Sales Ticket under the section stating, "I HEREBY ACKNOWLEDGE AND AGREE TO THE ARBITRATION AGREEMENT CONTAINED HEREIN . . . ." In addition, Borecki provided his cell phone number to Raymour so that it could notify him when the furniture he purchased would be ready for pick up.

Attached to the Sales Ticket was an arbitration agreement (the "Arbitration Agreement" or "Agreement"), which allowed either party to elect to arbitrate any "Claim." Arbitration Agreement ¶ (a), Ex. B to Rube Decl. "Claim" is defined by the Agreement to include:

> [A]ny claim, dispute, or controversy between you and us that in any way arises from or relates to the goods and/or services you have purchased or are purchasing from us (the "Purchases"), now or in the past, including . . . any information we seek from you . . . . "Claim" has the broadest reasonable meaning, and includes . . . consumer rights . . . statute, regulation, ordinance, common law and equity . . . .

See id. ¶ (b)(iii). The Agreement contained a procedure for a customer to reject arbitration by requiring that a written notice be sent to Raymour within 60 days after the date of purchase. See id. ¶ (l). There is no evidence in the record that Borecki submitted a timely written notice to Raymour rejecting arbitration.

The Agreement also included a waiver against class action:

> Notwithstanding any language herein to the contrary, if you or we elect to arbitrate a Claim, neither you nor we will have the right to: (i) participate in a class action in court or in arbitration, either as a class representative, class member or class opponent; (ii) act as a private attorney general in court or in arbitration; or (iii) join or consolidate your Claims with claims of any other person, and the arbitrator shall have no authority to conduct any such class, private attorney general or multiple-party proceeding.

See id. ¶ (d).

The complaint alleges that, nearly three years after the bedroom set sale, Raymour sent Borecki four unauthorized texts that promote products for future purchases:

- On November 25, 2016, Borecki received a text that read: "Friday Doorbusters at Raymour & Flanigan – FREE TV or tablet w/ select mattress sets + save up to $700 on furniture – 8am-9pm in stores. Text STOP to cancel." Compl. ¶ 39 (ECF No. 1).

- He received another text on November 28, 2016 that read: "Raymour & Flanigan Cyber Monday: Save 30% or more on select items + Free TV w/ select mattresses. In store til 9 pm or online til midnight. Text STOP to cancel." Id. ¶ 44.

- On January 27, 2017, Borecki received two texts from Raymour. One stated: "Please join us for a VIP event at Raymour & Flanigan in Fairfield on Sat, 1/28 for a FREE gift & special offer!" Id. ¶ 49. The second read: "For info call the store at 973-227-2868 or get directions http://bit.ly/FAIRNJ You are subscribed to Raymour & Flanigan Alerts. Reply STOP to cancel." Id. ¶ 50.

On February 16, 2017, Borecki filed a complaint alleging that Raymour violated the TCPA by sending the four spam text messages to the number he provided in January 2014 without obtaining "prior express written consent." See Compl. ¶ 32, 38–47, 53 (ECF No. 1). Borecki asserted TCPA violations on behalf of himself and a nationwide class of customers who received text messages on their cell phones by Raymour. Raymour moved to compel arbitration on March 22, 2017, asserting that Borecki's TCPA claim was subject to mandatory arbitration pursuant to the Sales Ticket.

DISCUSSION

I. Legal Standard

The Federal Arbitration Act ("FAA") governs "any arbitration agreement within the coverage of the Act." Moses H. Cone Mem'l Hosp. v. Mercury Corp., 460 U.S. 1, 24 (1983). Pursuant to the FAA, an arbitration provision in a contract involving a commercial transaction is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; see also In re Am. Exp. Fin. Advisors Sec. Litig., 672 F.3d 113, 127 (2d Cir. 2011). A district court has "no discretion regarding the arbitrability of a

dispute when the parties have agreed in writing to arbitration." Leadertex, Inc. v. Morganton Dyeing & Finishing Grp., 67 F.3d 20, 25 (2d Cir. 1995) (internal citations omitted).

The FAA embodies an "emphatic federal policy in favor of arbitral dispute resolution." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985). Indeed, the Court of Appeals has stated that "it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we 'have often and emphatically applied.'" Arciniaga v. Gen. Motors Corp., 460 F.3d 231, 234 (2d Cir. 2006) (quoting Leadertex, 67 F.3d at 25). Accordingly, "where . . . the existence of an arbitration agreement is undisputed, doubts as to whether a claim falls within the scope of that agreement should be resolved in favor of arbitrability." ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co., 307 F.3d 24, 29 (2d Cir. 2002); see also Collins v. Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 19 (2d Cir. 2005) ("[F]ederal policy requires us to construe arbitration clauses as broadly as possible." (internal citation and quotation marks omitted)). If an issue is "referable to arbitration," proceedings before the district court must be stayed until "such arbitration has been held in accordance with the terms of the agreement." 9 U.S.C. § 3.

The Court of Appeals has established a four-prong test to determine whether an action should be sent to arbitration: (1) the court must determine whether the parties agreed to arbitrate; (2) if so, the court must determine the scope of that arbitration agreement (that is, whether the instant dispute falls within that scope); (3) if the plaintiff asserts federal statutory claims, the court must determine whether Congress intended those claims to be nonarbitrable; and (4) if only some, but not all, of the plaintiff's claims are arbitrable, the court must decide whether to stay the balance of the proceedings pending arbitration. See JLM Indus. v. Stolt-Nielsen SA, 387 F.3d 163, 169 (2d Cir. 2004) (citing Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 75–76 (2d Cir.

1998)); Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 844 (2d Cir. 1987). Because Borecki asserts a single TCPA claim, the Court analyzes only the first three prongs.

Under the FAA, state law generally governs issues of contract interpretation. See Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 46 (2d Cir. 1993). Raymour is a New York corporation with its principal place of business in New York. Borecki, however, resides in New Jersey, purchased the furniture in New Jersey, and the furniture that is the subject matter of the contract is in New Jersey. Because "the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile of the contracting parties" point to New Jersey, New Jersey law should govern. Bank of New York v. Yugoimport, 745 F.3d 599, 609 (2d Cir. 2014) (internal quotation marks omitted).

New Jersey courts consider the plain and ordinary meaning of the contract and the parties' intent within the four corners of the written instrument. See State Troopers Fraternal Ass'n v. New Jersey, 149 N.J. 38, 47 (1997); Leodori v. Cigna Corp., 175 N.J. 293, 302 (2003). "A basic principle of contract interpretation is to read the document as a whole in a fair and common sense manner." Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009).

II. Whether This Dispute is Subject to Arbitration

A. Agreement to Arbitrate

Borecki signed the Sales Ticket expressly acknowledging the Ticket's attached Arbitration Agreement. Although the Agreement provided a 60-day window to reject arbitration, Borecki did not submit any subsequent notice rejecting arbitration or otherwise challenging the Agreement's validity. See Rube Decl. ¶ 10 (ECF No. 12). Accordingly, the Court finds that the parties agreed to arbitration.

B. Scope of Arbitration Agreement

1. Arbitration Agreement is Narrow

In order to determine whether Borecki's claim falls within the scope of the Agreement, the Court must first "classify the [Agreement] as either broad or narrow." Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001). A broad agreement triggers "a presumption of arbitrability"—"arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it." Id. (internal quotations omitted). Narrow clauses, on the other hand, limit arbitration to specific types or areas of disputes. See McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co., 858 F.2d 825, 832 (2d Cir. 1988).

The Court reads the Agreement attached to the Sales Ticket to be narrow. The universe of potentially arbitrable disputes ("any claim, dispute or controversy") is expressly limited to those claims that arise from or are related to "the goods and/or services you have purchased or are purchasing from us (the 'Purchases'), now or in the past." Arbitration Agreement ¶ (b)(iii). The categories of disputes following the definition of "Claim" likewise refer specifically to the goods or services purchased (for example, "any advertising, promotion or statement made *concerning the Purchases*"; "the construction or quality *of the Purchases*"; "our written or verbal descriptions *of the goods and/or services purchased*"). Id. The Agreement also contains an explicit temporal restriction—the dispute must involve purchases made "now or in the past." Id.

This qualifier restricting arbitrable claims to those regarding the goods or services purchased places the Agreement on different footing than the arbitration clauses cited by Raymour. Those clauses broadly allowed for arbitration of "any controversy, claim or dispute between the Parties arising out of or relating in any way to this Agreement," Paramedics

Electormedicina Comercial, Ltda v. GE Med. Sys. Info. Tech., Inc., 369 F.3d 645, 649 (2d Cir. 2004), or of "[a]ny dispute, controversy or claim arising under or in connection with [the agreement]." Oldroyd, 134 F.3d at 76; Collins, 58 F.3d at 20. The language of this Agreement is much more limited in comparison and is similar to arbitration clauses that other courts read to be narrow. See, e.g., McDonnell Douglas Fin. Corp., 858 F.2d at 832 (arbitration clause limited to providing for appointment of independent tax counsel and "the circumstances that might surround the utility's decision to seek redemption" pursuant to the provision); N.H. Ins. Co. v. Canali Reins. Co., Ltd., No. 03 Civ. 8889 (LTS)(DCF), 2004 WL 769775, at *2 (S.D.N.Y. Apr. 12, 2004) (arbitration clause limited to specific categories of "disputes or differences arising out of the interpretation of the Agreement"); Fabry's S.R.L. v. IFT Internat'l Inc., No. 02 Civ. 9855 (SAS), 2003 WL 21203405, at *5 (S.D.N.Y. May 21, 2003) (arbitration clause limited to "any dispute arising from the interpretation of this agreement"); ACE Ltd. v. CIGNA Corp. and CIGNA Holdings, Inc., 2001 WL 767015, at *3 (S.D.N.Y. July 6, 2001) (arbitration clause referring to "points of disagreement concerning Tax matters").

Accordingly, read as a whole and in accordance with its plain and ordinary meaning, the Arbitration Agreement is limited to those specific disputes arising out of or relating to "the goods and/or services you have purchased or are purchasing" from Raymour, and should therefore be construed as narrow.

2. Borecki's Claim is Not Within Scope of Arbitration Agreement

When reviewing a narrow arbitration clause, the next question for a court to decide is whether the dispute "is over an issue that is on its face within the purview of the [arbitration] clause, or over some collateral issue that is somehow connected to the main agreement that contains the arbitration clause." Louis Dreyfus Negoce S.A., 252 F.3d at 224. When an

arbitration provision is determined to be narrow, a collateral dispute is beyond the purview of the arbitration clause. See id. at 224–25 ("When parties use expansive language in drafting an arbitration clause, presumably they intend all issues that 'touch matters' within the main agreement to be arbitrated . . . while the intended scope of a narrow arbitration clause is obviously more limited."); see also N.H. Ins. Co., 2004 WL 769775, at *2 ("Narrow arbitration clauses such as the one upon which the Petition relies cannot authorize compulsion of the arbitration disputes beyond their scope.").

The Agreement provides for two ways in which a claim falls within the purview of arbitration: disputes "aris[ing] from" or disputes "relat[ing] to" the goods or services purchased. To "arise" from means "to originate from" a specific source and indicates a "causal connection," while to "relate to" is "defined more broadly and is not necessarily tied to the concept of a causal connection." Coregis Ins. Co. v. Am. Health Found., 241 F.3d 123, 128 (2d Cir. 2001) (citing Webster's Dictionary and Black's Law Dictionary).

Raymour first argues that Borecki's TCPA claim arises from or relates to the goods purchased because Raymour obtained Borecki's phone number during the transaction for the bedroom set in order to facilitate his physical retrieval of the furniture.[1] Thus, in Raymour's view, the TCPA claim is related to the good purchased because Raymour was able to carry out its allegedly unlawful advertising campaign only after it obtained Borecki's phone number during the sale transaction. This is the wrong way to think of the question presented. The question is not how Raymour obtained Borecki's cell phone number but whether the *TCPA claim* he now asserts relates to or originates from the goods he purchased. This claim has nothing to do with the bedroom furniture set he purchased; it is not a claim for falsely advertising the quality of

[1] There is no allegation or argument that Borecki purchased any "services," which the Court assumes to include furniture delivery or assembly, or financing services.

the bedroom set, defective products, or even repeated, unwarranted texts messages from Raymour asking Borecki to rate favorably the bedroom set he purchased. The 2014 sales transaction merely provided Raymour with the means to carry out its advertising campaign three years later. But it cannot be said that the TCPA claim originates or "flows" from the transaction.

Second, in its reply brief, Raymour presses a new argument that the TCPA claim relates to "information we may seek from you," that is, the cell phone number Raymour obtained in order to notify Borecki when his furniture was ready for pick-up. The Arbitration Agreement defines "Claim" to mean any claim "that in any way arises from or relates to the goods . . . you have purchased . . . including . . . information we seek from you. . . ." Agreement ¶ (b)(iii), Ex. B to Rube Decl. This fresh argument seems compelling at first blush: Raymour "sought" Borecki's information—his cell phone number—and, having obtained it during the 2014 sales transaction, has allegedly used it in violation of the TCPA. But the Arbitration Agreement merely identifies "information we seek from you" as one of the basis for a Claim that would be subject to arbitration *if* it arises from or relates to the goods purchased. As addressed above, Borecki's TCPA claim is not in any way connected to "the goods" that Borecki bought. Therefore, this claim, even as it involves "information" Raymour sought and obtained, should not be subject to the Arbitration Agreement.

Finally, Borecki's TCPA claim is distinguishable from other TCPA claims in this Circuit, in which the claim related more directly to the scope of the respective arbitration clause. For example, the arbitration provision in Lozada v. Progressive Leasing applied to disputes that "arise[] from or relate[] in any way to this Lease or the Property." No. 15 Civ. 2812 (KAM)(JO), 2016 WL 3620756, at *3 (E.D.N.Y. June 28, 2016). Progressive Leasing's automated phone calls were made with regards to the plaintiff's "account" or lease with the defendant. Id. The

phone calls therefore "relate[d] to" the lease and were within the scope of the arbitration provision. Id. In Velez v. Credit One Bank, the TCPA claim was based on Credit One making repeated phone calls for the purpose of attempting to collect on the plaintiff's delinquent credit account. See No. 15 Civ. 4752 (PKC), 2016 WL 324963, at *6 (E.D.N.Y. Jan. 25, 2016). The court granted Credit One's motion to compel arbitration on the ground that plaintiff's claim was covered by a clause mandating arbitration of all disputes implicating the parties' rights and obligations under the agreement. Id. See also Boule v. Credit One Bank, No. 15 Civ. 8562 (RJS), 2016 WL 3015251, at *4 (S.D.N.Y. May 11, 2016) (Credit One's repeated phone calls regarding plaintiff's account was within the purview of a provision directing "any controversy or dispute between [Plaintiff] and [Defendant]" to be arbitrated); Carr v. Citibank, N.A., No. 15 Civ. 6993 (SAS), 2015 WL 9598787, at *3 (S.D.N.Y. Dec. 23, 2015) (defendant's unauthorized auto-dialing regarding plaintiff's credit card was within the purview of a provision requiring arbitration of all claims "relating to [plaintiff's] account, a prior related account, or [the parties'] relationship").

Thus, the Court should conclude that Borecki's TCPA claim is not subject to the Arbitration Agreement.

III. Class Action Waiver is Not Enforceable.

Because the Agreement's class action waiver is applicable only to arbitrable claims, and because I recommend finding that the Arbitration Agreement does not require Borecki to arbitrate his TCPA claim, Borecki's TCPA claim may be asserted as a class action.

CONCLUSION

I recommend that Raymour's motion to compel arbitration and stay this action be DENIED and that the parties continue litigating this putative class action in this Court.

SARAH NETBURN
United States Magistrate Judge

DATED: June 21, 2017
New York, New York

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NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen days from the service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. See also Fed. R. Civ. P. 6(a), (d) (adding three additional days when service is made under Fed. R. Civ. P. 5(b)(2)(C), (D), or (F)). A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Lewis A. Kaplan at the Daniel P. Moynihan U.S. Courthouse, 500 Pearl Street, New York, New York 10007, and to any opposing parties. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Kaplan. The failure to file these timely objections will result in a waiver of those objections for purposes of appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); Thomas v. Arn, 474 U.S. 140 (1985).