UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

LISA DRAYTON, individually
and on behalf of all others
similarly situated,

Plaintiff,

v. CASE NO. 3:16-cv-46-J-39JBT

TOYOTA MOTOR CREDIT
CORPORATION, etc.,

Defendant.
_____/

**REPORT AND RECOMMENDATION**[1]

**THIS CAUSE** is before the Court on Defendant, Toyota Motor Credit Corporation, D/B/A Lexus Financial Service's, Motion to Compel Arbitration and for Dismissal (Doc. 13) ("Motion"), Plaintiff's Response in Opposition to Motion to Compel Arbitration and for Dismissal (Doc. 15) ("Response"), Defendant's Reply to Plaintiff's Response in Opposition to Motion to Compel Arbitration and for Dismissal (Doc. 24) ("Reply"), and Plaintiff's Sur-Reply in Opposition to Motion to

[1] "Within 14 days after being served with a copy of [this Report and Recommendation], a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). "A party may respond to another party's objections within 14 days after being served with a copy." *Id.* A party's failure to serve and file specific objections to the proposed findings and recommendations alters the scope of review by the District Judge and the United States Court of Appeals for the Eleventh Circuit, including waiver of the right to challenge anything to which no specific objection was made. *See* Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(B); 11th Cir. R. 3-1; Local Rule 6.02.

Compel Arbitration (Doc. 27) ("Sur-Reply"). For the reasons set forth herein, the undersigned respectfully **RECOMMENDS** that the Motion be **DENIED**, that the stay previously ordered (Doc. 23) be **LIFTED**, and that the parties be directed to conduct another case management meeting, if necessary, and file their case management report.[2]

## I. Summary of Recommendation

There are two contracts at issue in the Motion. One contains an arbitration provision; the other does not. Defendant was assigned the contract not containing the arbitration provision, i.e., the Retail Installment Sale Contract (Doc. 14-2) ("RISC"). Defendant was not assigned the contract containing the arbitration provision, i.e., the Retail Buyer's Order (Doc. 14-1) ("RBO"). For this simple reason, the undersigned recommends that Defendant cannot compel arbitration.

The question of whether Defendant can compel arbitration as a non-party to the agreement is controlled by Florida law. The general rule in Florida is that a non-party to an arbitration agreement cannot compel arbitration. Although Defendant argues that arbitration should be compelled under several Florida law exceptions to the general rule, including equitable estoppel and the scope of the arbitration provision, the undersigned recommends that those arguments be rejected. This case does not present circumstances in which an exception should

[2] Although the parties previously conducted a case management meeting, they did not file a case management report in light of the filing of the instant Motion. (Doc. 16 at 1.)

be applied. Moreover, the cases relied on by Defendant are distinguishable on multiple grounds. Therefore, the undersigned recommends that the Motion be denied.[3]

## II. Background

Plaintiff's Complaint, a proposed class action, is brought pursuant to the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.*, and the Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. § 559.55 *et seq*. (Doc. 1.) In general, the Complaint alleges that Defendant violated these Acts by seeking to collect a consumer debt using an automatic telephone dialing system or an artificial or pre-recorded voice to call Plaintiff's cell phone, even though it did not have consent to do so. (*Id.*) In addition, Defendant allegedly continued to contact Plaintiff directly even after Defendant was informed that Plaintiff was represented by an attorney. (*Id.* at 6.) The Complaint does not disclose the exact nature of the consumer debt or how the debt arose. Thus, the Complaint contains no reference to the RBO, or even the RISC.

The Motion states that on January 9, 2013, Plaintiff and her husband, Daniel Drayton, executed the RBO and the RISC as part of the purchase of a 2009 Lexus automobile from Lexus of Orange Park. (Doc. 13 at 2.) Although the Motion seeks

[3] An additional potential ground for denying the Motion is that the RISC superseded the RBO. *See HHH Motors, LLP v. Holt*, 152 So. 3d 745 (Fla. Dist. Ct. App. 2014); *Duval Motors Co. v. Rogers*, 73 So. 3d 261 (Fla. Dist. Ct. App. 2011). However, the Court need not address this issue if this Report and Recommendation is adopted. If needed, a report and recommendation on this issue will be provided.

to bundle these two contracts together, only the RISC, not the RBO, was assigned to Defendant. (*See* Doc. 14-2 at 3; Doc. 13 at 2–3.)[4] The arbitration provision in the RBO provides in part:

> ARBITRATION: Dealer and Customer agree that any controversy, claim, suit, demand, counterclaim, cross claim, or third party complaint, arising out of, or relating to this Order or the parties' relationship (whether statutory or otherwise and irrespective of whether the Financing Approvals were obtained), including, but not limited to any matter that may have induced the Customer to enter into a relationship with Dealer (collectively referred to as "Claim["]), as well as the validity of this provision, shall be submitted to final and binding arbitration in the county and state where Dealer is situated.

(Doc. 14-1 at 4.) The arbitration provision also contains a clause in bold letters stating that "if a dispute is arbitrated, customer will give up the right to participate as a class representative or class member in any class claim against dealer . . . ." (*Id*.)

## III. Analysis

Defendant concedes that it is not a party to the RBO. (Doc. 13 at 5.) However, it argues that it can enforce the arbitration agreement based on equitable estoppel and/or the scope of the arbitration provision, coupled with the relatedness of the RBO and the RISC.

In *Lawson v. Life of the South Insurance Company*, the Eleventh Circuit

[4] Defendant cites only the RISC in support of its argument that it is an assignee, and there is no indication that the RBO was ever assigned. (Doc. 13 at 2–3.)

made clear that "the applicable state law provides the rule of decision" for "the question of whether a non-party can enforce an arbitration clause against a party." 648 F.3d 1166, 1170–71 (11th Cir. 2011) (relying on *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009)). Thus, the issue in the case at bar is controlled by Florida law. The Eleventh Circuit has set forth the following standard in interpreting Florida law:

> Where the highest court—in this case, the Florida Supreme Court—has spoken on the topic, we follow its rule. Where that court has not spoken, however, we must predict how the highest court would decide this case. Decisions of the intermediate appellate courts—here, the Florida District Courts of Appeal—provide data for this prediction. As a general matter, we must follow the decisions of these intermediate courts. But we may disregard these decisions if persuasive evidence demonstrates that the highest court would conclude otherwise.

*Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1348 (11th Cir. 2011) (citations omitted).

The Florida Supreme Court does not appear to have decided a case in which a non-signatory to an arbitration agreement was attempting to compel a signatory to arbitrate. However, that court recognizes the following basic rule: "The intent of the parties to the contract should govern the construction of a contract." *See Am. Home Assurance Co. v. Larkin Gen. Hosp., Ltd.*, 593 So. 2d 195, 197 (Fla. 1992).

Florida's District Courts of Appeal ("DCAs") recognize the general rule that "a non-signatory to a contract containing an arbitration agreement ordinarily cannot compel a signatory to submit to arbitration." *See Marcus v. Fla. Bagels, LLC*, 112

So. 3d 631, 633 (Fla. Dist. Ct. App. 2013). However, there are exceptions to this rule. In *Marcus*, the Fourth DCA summarized the exception of equitable estoppel:

> [C]ourts have been willing to estop a *signatory* from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.
>
> We have written that the equitable estoppel exception to the general rule is warranted when the signatory to the contract containing the arbitration clause raises allegations of concerted conduct by both the non-signatory and one or more of the signatories to the contract. In such circumstances, . . . equitable estoppel will apply since there exists a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement.
>
> The doctrine of equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity. The rationale behind allowing a non-party to an arbitration agreement to use equitable estoppel to compel a party to arbitrate is that otherwise the arbitration proceedings [between the two signatories] would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted. Consequently, in applying this doctrine, courts have also focused upon the "fairness" of the party's conduct. *See Hill v. GE Power Sys., Inc.*, 282 F.3d 343, 349 (5th Cir. 2002) ("'[T]he lynchpin for equitable estoppel is equity' and the point of applying it to compel arbitration is to prevent a situation that 'would fly in the face of fairness.'").
>
> Applying these principles, the equitable estoppel doctrine has been found to apply when one party attempts to hold [another party] to the terms of [an] agreement while simultaneously trying to avoid the agreement's arbitration

> clause.

*Id.* at 633–34 (some citations and quotations omitted).

The undersigned recommends that the circumstances in this case do not fall within any of the circumstances recognized in Florida for applying the doctrine of equitable estoppel. Further, recognizing that the linchpin for the application of equitable estoppel is to prevent unfairness, there is no reason to invoke the doctrine in this case. Plaintiff is not alleging that Defendant engaged in concerted conduct with Lexus of Orange Park or anyone else. (Doc. 1.) There is nothing about Plaintiff's conduct that makes it unfair for her to assert her rights in court against a nonparty to the arbitration agreement. Plaintiff is not seeking to hold Defendant to the terms of either the RBO or even the RISC. In short, there appears to be no adequate reason to invoke the doctrine of equitable estoppel in this case.

A related theory for allowing a non-signatory to bind a signatory to an arbitration clause (which is sometimes also labeled as equitable estoppel) was recognized in *Betancourt v. Green Tree Servicing, LLC:* "Florida courts broadly construe arbitration provisions containing the language, 'arising out of or relating to,' such that the clause may include non-signatories, in certain situations." *Betancourt*, Case No. 8:13-cv-2759-T-30AEP, 2013 WL 6644560, at *2 (M.D. Fla. Dec. 17, 2013). However, *Betancourt* also recognized that under Florida law:

> [I]n order for the dispute to be characterized as arising out of or related to the subject matter of the contract . . . it must, at the very least, raise some issue the resolution of which requires a reference to or construction of some portion of the contract itself.

*Id*. (quotations omitted). *See also Armas v. Prudential Sec., Inc.*, 842 So. 2d 210, 212 (Fla. Dist. Ct. App. 2003) ("Equitable estoppel is also warranted when each of the signatory's claims against a non-signatory make reference to or presume the existence of a written agreement.").

In this case, Plaintiff raises no issue regarding construction of the RBO. Plaintiff does not even "make reference to or presume the existence of [the RBO.]" *Id.* For identification of the consumer debt at issue, Plaintiff can rely solely on the RISC. Thus, the undersigned recommends that this argument be rejected as well.

Moreover, the undersigned recommends that compelling arbitration in this case would not accord with the parties' intent. There is a contract between the parties that does not contain an arbitration provision, i.e., the RISC. There is no contract between the parties that does contain one. The RISC could have contained such a provision, or the RBO could have been assigned, but that did not happen.[5] Thus, it would not accord with the parties' intent to read an arbitration provision into a contract, i.e., the RISC, in which none exists.[6]

This case is distinguishable from the cases cited by Defendant in which a non-signatory was allowed to compel arbitration against a signatory. None of

[5] The RBO provides: "Dealer's obligations and rights hereunder may be assigned as this Order shall inure to the benefit of Dealer, its successors and/or assigns." (Doc. 14-1 at 5.)

[6] Although Defendant now seeks to take advantage of an arbitration provision in the RBO, there is no indication that it wanted such a provision in the RISC. Without one, it can sue Plaintiff on the RISC for non-payment in court and get a judgment without having to go through arbitration.

those cases involved the existence of a separate contract between the non-signatory and the signatory that did not contain an arbitration provision. In all of those cases, there was no contract at all between the non-signatory and the signatory. *See MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999); *Blinco v. Green Tree Serv. LLC*, 400 F.3d 1308 (11th Cir. 2005); *Betancourt*, 2013 WL 6644560, at *1–5; *Cunningham Hamilton Quiter, P.A. v. B.L. of Miami, Inc.*, 776 So. 2d 940 (Fla. Dist. Ct. App. 2000); *Armas*, 842 So. 2d at 210–12.

Moreover, several of the cases cited by Defendant are distinguishable because they did not apply Florida law. *See MS Dealer Serv. Corp.*, 177 F.3d at 947; *Blinco*, 400 F.3d at 1312.[7] In addition, none is factually similar to this case. *Cf*. *MS Dealer Serv. Corp.*, 177 F.3d at 942–48 (plaintiff alleging concerted action between signatory and non-signatory, and claim dependent on service contract incorporated into contract with arbitration clause); *Blinco*, 400 F.3d at 1308–12 (claim against servicer of promissory note with arbitration clause); *Betancourt*, 2013 WL 6644560, at *1–5 (same); *Cunningham Hamilton Quiter, P.A.*, 776 So. 2d at 940–43 (owner suing architect); *Armas*, 842 So. 2d at 210–12 (concerted conduct between signatory and non-signatory). In short, the undersigned recommends that the Florida case law does not support compelling arbitration in this case.

[7] These cases were decided prior to *Lawson* and *Carlisle*.

## IV. Conclusion

Defendant is not a party to the contract containing the arbitration provision, but is a party to the contract not containing such a provision. For that reason, and because no Florida law doctrine would allow Defendant to enforce the arbitration provision in the circumstances of this case, the undersigned recommends that the Motion be denied.

Accordingly, it is respectfully **RECOMMENDED** that:

1. The Motion (**Doc. 13**) be **DENIED**.

2. The stay previously ordered (**Doc. 23**) be **LIFTED**.

3. The parties be directed to conduct another case management meeting, if necessary, and file their case management report.

**DONE AND ENTERED** at Jacksonville, Florida, on July 11, 2016.

Joel B. Toomey

JOEL B. TOOMEY
United States Magistrate Judge

Copies to:

The Honorable Brian J. Davis
United States District Judge

Counsel of Record