DOCKET NO. CV07 5002280-S	:	SUPERIOR COURT
PAUL B. TAYLOR, III	:	JUDICIAL DISTRICT OF NEW HAVEN
VS.	:	AT MERIDEN
CHASE MANHATTAN BANK	:	DECEMBER 11, 2008

MEMORANDUM OF DECISION
RE: MOTION TO DISMISS #128

The defendant/counter-plaintiff, Chase Manhattan Bank USA N.A., has filed a motion asking the court to dismiss the amended complaint of the plaintiff/counter-defendant, Paul B. Taylor, III, and to confirm an arbitration award entered against the defendant. Essentially it is a motion for summary judgment and this court will treat it as such. In response, the plaintiff has filed his own motion for summary judgment, asking the court to vacate the arbitration award entered against him.

The plaintiff's amended complaint contains one count, which attempts to assert a cause of action for breach of contract and appears to stem from the parties' actions pursuant to a consumer credit card agreement. The plaintiff contends this agreement was breached when the defendant filed a claim with the National Arbitration Forum for sums due and owing on the plaintiff's credit account, a claim which ultimately resulted in an award of $20,657.51 being entered against the plaintiff. He argues that nothing in the agreement permitted the defendant to resolve disputes by arbitration, and that by using arbitration as a means of conflict resolution the defendant breached their contract.

The defendant, on the other hand, contends that the original agreement did, in fact, contain a valid arbitration agreement, that arbitration with the National Arbitration Forum was a proper method for effectuating collection of the debt it claims was due, and that it therefore did not breach its contract with the plaintiff. Thus, the defendant claims it is entitled to judgment as a matter of law. To this end, the defendant earlier filed a counterclaim against the plaintiff alleging that the award granted by the National Arbitration Forum was proper, that the plaintiff has failed to pay any part of the award, and that it is entitled to a confirmation of this award. The defendant's motion currently before the court also seeks judgment in its favor on this counterclaim.

In support of its motion for summary judgment, the defendant has submitted several relevant items, including: (1) the affidavit of Joette G. Herrera, an audit manager for the defendant; (2) a copy of a "Cardmember Agreement"; (3) copies of the plaintiff's billing statements from July 2005 through August 2006; and (4) records of the arbitration proceedings. In response, the plaintiff has filed only his own affidavit stating that he received an original agreement in July of 2005 which allegedly did not contain an arbitration clause and that he never received any amendments designed to alter the original agreement to add one.

As an initial matter, the court notes that there is no dispute that an agreement existed between the parties, since, in his amended complaint, the plaintiff acknowledges that he and the defendant "entered into a consumer account agreement on and about July 03, 2005." The question raised then is which agreement controls this dispute. The defendant points to the Cardmember Agreement,

which, as established by Herrera's affidavit, was sent to all newly issued credit cards in 2005.[1] In relevant part, the Cardmember Agreement contains the following provisions:

> ARBITRATION AGREEMENT: Please read this agreement carefully. It provides that any dispute may be resolved by binding arbitration. Arbitration replaces the right to go to court. . . . This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by and be enforceable under the Federal Arbitration Act (the "FAA"), 9 U.S.C. §1-16 as it may be amended. . . . Either you or we may, without the other's consent, elect mandatory, binding arbitration of any claim, dispute or controversy . . . arising from or relating in any way to the Cardmember Agreement, any prior Cardmember Agreement, your credit card Account or the advertising, application or approval of your Account ("Claim"). . . . The party filing a Claim in arbitration must choose one of the following two arbitration administrators: American Arbitration Association; or National Arbitration Forum. . . . This agreement and your account will be governed by the law of the state of Delaware and, as applicable, federal law.

The plaintiff does not expressly contest the authenticity of the Cardmember Agreement; instead, he merely reiterates the allegations found in his amended complaint, arguing that the parties' original agreement did not contain arbitration language. It is accompanied by the plaintiff's own affidavit, which echoes these same vague, conclusory allegations. It is well established, however, that a party's conclusory statements, "in the affidavit and elsewhere . . . do not constitute evidence sufficient to establish the existence of disputed material facts." *Gupta* v. *New Britain General Hospital*, 239 Conn. 574, 583, 687 A.2d 111 (1996). Furthermore, absent additional evidence, the plaintiff's affidavit is simply a self-serving proclamation, and "[a]ffidavits containing self-serving

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[1] The contents of Herrera's affidavit are further discussed below. In the affidavit, Herrera acknowledges that credit cards issued in 2005 under the AARP name did not contain the pertinent arbitration language found in the Cardmember Agreement presented to the court, but also explains that the plaintiff's card was not issued under the AARP name.

and unsubstantiated allegations need not be viewed as persuasive by the court." (Internal quotation marks omitted.) *England* v. *Reliance Ins. Co.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV 02 0079606 (February 24, 2004, *Carroll, J.*) (36 Conn. L. Rptr. 581, 586 n.4).

Despite the plaintiff's claim that the original agreement between the parties did not contain arbitration provisions, he has not produced such an agreement—or any other independent evidence—for the court's review.

This court finds that the Cardmember Agreement provided by the defendant is the original, controlling agreement between the parties, and that the plaintiff received a copy of this agreement in 2005 along with his newly issued credit card. See *Reiss* v. *Chase Bank USA, N.A.*, Superior Court, judicial district of New Haven, Docket No. CV 08 4030653 (July 30, 2008, *Silbert, J.*) (46 Conn. L. Rptr. 29, 31) (finding agreement provided by non-movant/credit card company that contained arbitration clause governed where movant/consumer alleged original agreement contained no such language, but did not produce an alternative agreement).

The plaintiff also seems to argue that, to the extent that it demonstrates the plaintiff received a copy of the Cardmember Agreement, Herrera's affidavit should not be considered by this court because she did not have personal knowledge of the facts necessary to prove such an assertion.

This claim is without merit. It is clear from Herrera's affidavit that she is personally familiar with the records pertaining to the plaintiff.[2] See Practice Book § 17-46 ("Supporting and opposing

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[2] The affidavit states, inter alia, that she is an audit manger for the defendant, that she is "fully familiar with the facts and circumstances" stated in the remainder of her affidavit, that, prior to making her affidavit, she "reviewed and [became] familiar with the records of [the defendant] relating to [the] plaintiff's credit card account," and that she was familiar with the computer system used by the defendant to maintain credit card accounts, including the plaintiff's. Herrera goes on to

affidavits shall be made on personal knowledge . . . and shall show affirmatively that the affiant is competent to testify to the matters stated therein."); see also *Arrow Electronics, Inc.* v. *Federal Ins. Co.*, Superior Court, complex litigation docket at Waterbury, Docket No. X01 CV 00 0167080 (January 7, 2002, *Hodgson, J.*) (31 Conn. L. Rptr. 252, 260 n.7); 2A C.J.S., Affidavits §§ 45-49 (2003).

The court finds that the parties entered into a valid contract in July of 2005, and that the Cardmember Agreement, which included the "Arbitration Agreement" which established the following: the Federal Arbitration Act, 9 U.S.C. §§ 1-16, controlled their Arbitration Agreement; either party, with or without the other's consent, was permitted to use mandatory, binding arbitration to resolve disputes originating under the Cardmember Agreement or credit card account; and the National Arbitration Forum was a proper arbitration administrator. Accordingly it was proper for the defendant to resort to using an arbitrator from the National Arbitration Forum in order to get an award for monies it claimed were due and owed under the Cardmember Agreement. The defendant did not, therefore, breach the contract, and is entitled to judgment as a matter of law.

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state that, in 2005, it was the defendant's standard practice and procedure to include the Cardmember Agreement in the envelope in which it sent credit cards to new members, such as the plaintiff, and that the "[p]laintiff could not have received his credit card without also receiving the Cardmember Agreement."

Further, the plaintiff's filings with the court are replete with admissions that he in fact did receive an agreement in July of 2005. For instance, in his affidavit filed to support his memorandum of law in opposition, the plaintiff states "[t]hat in July 2005 I received an original agreement with terms and conditions related to [the] account . . . ." Thus, there is no question that the plaintiff received *some* agreement.

The defendant also requests summary judgment on its counterclaim, which seeks to confirm the arbitration award entered in its favor, a copy of which accompanies the defendant's motion. In response, the plaintiff has filed his own motion seeking to vacate this award, which is accompanied by a memorandum of law.

The plaintiff argues that the arbitrator did not have jurisdiction to issue an award against him. He contends that the Federal Arbitration Act, particularly § 4,[3] provides that whenever there is a question as to whether an arbitration agreement was validly made, a court must decide the issue, since an arbitrator's jurisdiction relies upon the power granted to him by the parties. See, e.g., *Reiss* v. *Chase Bank USA, N.A.*, supra, 46 Conn. L. Rptr. 31. The plaintiff provided the court with a copy of a Notice of Objection to Arbitration he filed with the arbitrator on November 28, 2006, in which he plainly asserted that "[t]here was never any arbitration agreement between [the] [p]laintiff and [the] [d]efendant . . . ." The plaintiff argues that because he disputed the existence of an arbitration

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[3] 9 U.S.C. § 4 provides in relevant part: "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default . . . the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may . . . demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

agreement, the arbitrator did not have jurisdiction to issue an award in the defendant's favor, and, therefore, this court should vacate the award.

"Challenges to the validity of arbitration agreements . . . can be divided into two types. One type challenges specifically the validity of the agreement to arbitrate. . . . The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid. . . . [A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. . . . [U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. . . . [T]his arbitration law applies in state as well as federal courts." (Citations omitted.) *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 444-46, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); see also *C.R. Klewin Northeast, LLC* v. *Bridgeport*, 282 Conn. 54, 70-75, 919 A.2d 1002 (2007).

In the present case, the plaintiff has contested the validity of the Cardmember Agreement as opposed to the arbitration clause itself. Under *Buckeye Check Cashing, Inc.*, the arbitrator was permitted to consider whether the parties entered into a contract that contained an agreement to arbitrate. See,*Millan* v. *Chase Bank USA, N.A.*, 533 F. Sup. 2d 1061, 1067 (C.D. Cal. 2008) (where consumer acknowledged credit card agreement existed but contended original agreement did not contain arbitration provision, consumer's challenge was to existence of contract itself and question was to be decided by arbitrator); *Carmack* v. *Chase Manhattan Bank (USA)*, 521 F. Sup. 2d 1017, 1025-26 (N.D. Cal. 2007) (same).

Here the arbitrator did consider this issue, as he concluded that "[o]n or before [November 7, 2006] the parties entered into a valid, written agreement to arbitrate their disputes." In sum, the arbitrator had jurisdiction to consider the dispute between the parties and issue an award in the defendant's favor.

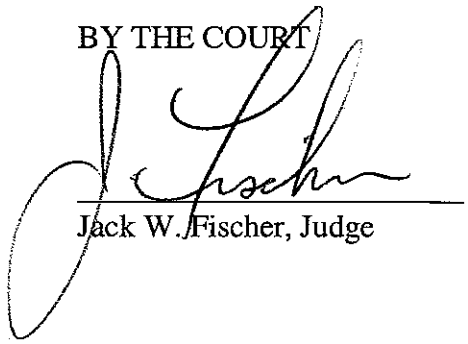
The plaintiff also briefly seems to argue that the award should be vacated because the arbitrator displayed evident partiality in favor of the defendant, and relies upon § 10 of the Federal Arbitration Act, which, in relevant part, states that an arbitration award may be vacated "where there was evident partiality or corruption in the [arbitrator] . . . ." There is no merit to this claim. The only evidence of this evident partiality offered by the plaintiff is his broad statement that "[t]his is a private forum of which [the defendant] is one of the [National Arbitration Forum's] largest customers," apparently suggesting the arbitrator was biased in favor of the defendant because it repeatedly uses the National Arbitration Forum's services.

"'[E]vident partiality' will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. To put it in the vernacular, 'evident partiality' exists where it reasonably looks as though a given arbitrator would tend to favor one of the parties." *Local 530, AFSCME, Council 15* v. *New Haven*, 9 Conn. App. 260, 274, 518 A.2d 941 (1986). Here, the plaintiff has provided no evidence whatsoever that would lead a reasonable person to conclude that the arbitrator demonstrated evident partiality in favor of the defendant.

In sum, the plaintiff has presented no evidence which would authorize the court to vacate the arbitration award. Therefore, as a matter of law, the defendant is entitled to judgment confirming the award.

The defendant's motions are granted and the plaintiff's motion is denied. Judgment will enter in favor of the defendant.

BY THE COURT



Jack W. Fischer, Judge