UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In Re:	)	
	)	
E-Z Serve Convenience Stores, Inc., et al.	)	Case No. 02-83138 - 11D
	)	(Jointly Administered)
Debtors.	)	
	)	
GE Capital Franchise Finance Corporation, a Delaware corporation; and Richard M. Hutson, II, Chapter 11 Trustee for E-Z Serve Convenience Stores, Inc.,	)	Adv. Proceeding No. 03-9013
Plaintiffs,	)	
v.	)	
William L. Camp,	)	
Defendant.	)	

ORDER DENYING MOTION BY DEFENDANT (1) TO STAY ADVERSARY PROCEEDING PENDING ARBITRATION, (2) TO COMPEL PLAINTIFFS TO COMPLY WITH THE ARBITRATION PROVISIONS, AND (3) FOR RELIEF FROM STAY TO THE EXTENT NECESSARY TO CONCLUDE ARBITRATION

This matter came on before this court to consider the Motion by the Defendant to stay this adversary proceeding pending the conclusion of arbitration, to compel the Plaintiffs to comply with arbitration provisions and for relief from stay to the extent necessary to complete arbitration. John A. Northen appeared on behalf of the Chapter 11 Trustee, Gene B. Tarr appeared on behalf of the Defendant, and John H. Bernstein appeared on behalf of GE Capital Franchise Finance Corporation. After receiving the exhibits and arguments of counsel, the Court makes the following findings of fact and conclusions of law:

FACTUAL BACKGROUND

E-Z Serve Convenience Stores, Inc. (the "Debtor") formerly operated a convenience store business through direct ownership, indirect ownership and the lease of stores located throughout the southeastern United States. Prior to bankruptcy filing, the Debtor owned approximately 197 store locations and leased approximately 454 other locations. A large number of the leased stores were leased by certain special purpose entities formed and wholly owned by the Debtor or by related special purpose entities and subsequently subleased to the Debtor.

The present action arises out of the Defendant's attempt, after the filing of the Debtor's voluntary petition in bankruptcy, to terminate certain leases of nonresidential real property, including Store No. 8790 and Store No. 8799, which were subleased to the Debtor. William L. Camp, the Defendant, is the record owner of these properties.

On December 1, 1996, the Defendant leased these properties to Camp Oil Company, pursuant to lease agreements with respect to each property (the "Leases"). Four years later, in the fall of 2000, the Leases were amended (the "Amendments"), in anticipation of the Debtor's purchase of the stock of Camp Oil Company, to include certain terms for the benefit of the Debtor's lender, GE Capital Franchise Finance Corporation ("GE Capital"). The Amendments included provisions allowing for the assignment of the Lease, and for a special purpose entity to encumber the Leasehold and grant certain rights in favor of GE Capital.

On November 17, 2000, the Debtor acquired the stock of Camp Oil Company, and the Leases and Amendments for each Property were assigned to a special purpose entity, Camp Leasing Ventures. Camp Leasing Ventures subsequently subleased the stores to Camp Oil

Company (now owned by the Debtor). The stock purchase was financed by GE Capital, which was secured by virtue of a lien on the leasehold interests held by Camp Leasing Ventures. Finally, on April 1, 2002, Camp Oil Company was merged into the Debtor, with the Debtor as the surviving entity and the sub-lessee of each property.

By the fall of 2002, the Debtor was losing money at an alarming rate. Camp Leasing Ventures failed to pay the Defendant the rent due October 1, 2002 for Store Numbers 8790 and 8799. On October 4, 2002, the Debtor filed its voluntary petition under Chapter 11 of the Bankruptcy Code. On October 7, 2002, the Defendant served notice of default on Camp Leasing Ventures and GE Capital. By letter dated October 29, 2002, the Defendant served on Camp Leasing Ventures and GE Capital another notice of default with respect to Store No. 8790, asserting that delinquent ad valorem property taxes in the amount of $6,131.40 had not been paid. On November 7, 2002, the Trustee filed a motion seeking to reject the subleases for Stores Numbers 8790 and 8799, which motion was granted by an order entered November 26, 2002. On November 19, 2002, the Defendant sent notice to Camp Leasing Ventures and GE Capital either purporting to terminate or terminating each of the Leases.

Finally, on January 17, 2003, GE Capital advised the Defendant that it disputed the contention that the Leases were terminated. The parties disagree as to the basis and timing of the tender and amount of payment required to cure the lease defaults. The Defendant has refused to execute new leases for Store Numbers 8790 or 8799.

This declaratory judgment proceeding was commenced on January 29, 2003 to determine (i) the extent of the Trustee's interest in and ability to transfer certain leases of nonresidential real property and (ii) whether the lessor under the leases, Defendant William L. Camp, violated the

automatic stay of 11 U.S.C. § 362 by attempting to terminate the leases post-petition. On February 7, 2003, the Defendant made demand for mediation and arbitration upon both GE Capital and the Trustee based upon arbitration provisions in the original Leases dated December 1, 1996 between the Defendant and Camp Oil Company. GE Capital refused such demand, leading to the filing of the present motion.

DISCUSSION

The Defendant moves to stay this adversary proceeding pending arbitration based upon arbitration provisions contained in the original Leases signed by the Defendant and Camp Oil Company in 1996. The Defendant contends that the arbitration provisions must be enforced under the Federal Arbitration Act (the "FAA"). Section 3 of the FAA states:

> If any suit or proceeding brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which each suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement; shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

9 U.S.C. § 3. The United States Supreme Court has stated that the FAA establishes a federal policy favoring arbitration and "on consideration of Congress' intent on passing the statute ... a court must compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219, 105 S.Ct. 1238, 1242 (1985); see also Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983).

Despite this policy, there are limitations on when a court must compel arbitration. First and foremost, as enunciated by the Fourth Circuit Court of Appeals in Hightower v. GMRI, Inc.,

272 F.3d 239 (4th Cir. 2001), in order to compel arbitration the court "must first find that an arbitration agreement exists between the parties." Id. at 242. The rule that a party being compelled to arbitrate must have consented to do so is well-established. See E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294, 122 S. Ct. 754, 764 (2002) ("Arbitration under the [FAA] is a matter of consent, not coercion.") (citation omitted); see also United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582, 80 S. Ct. 1347, 1353 (1960) ("Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); E.I. duPont de Nemours and Co. v. Rhodia Fiber and Resin Intermediates, S.A.S., 197 F.R.D. 112, 127 (D. Del. 2000) ("[I]f the parties have not agreed to arbitrate the courts have no authority to mandate that they do so."); Connecticut Union of Tel. Workers, Inc. v. Southern New England Tel. Co., 148 Conn. 192, 197, 169 A.2d 646, 649 (1961) ("No one is under a duty to submit any question to arbitration except to the extent that he has signified his willingness.") (citation omitted).

"To determine whether the parties agreed to arbitrate, courts apply state law principles governing contract formation." Hightower v. GMRI, Inc., 272 F.3d at 242 (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). Under North Carolina law, "where the language of a contract is plan and unambiguous, the construction of the agreement is a matter of law for the court." Rich, Rich & Nance v. Carolina Constr. Corp., 153 N.C. App. 149, 155, 570 S.E.2d 212, 216 (2002) (citations omitted). In this case, GE Capital was not a signatory to the original Leases. The arbitration provision in the original Leases between Defendant and Camp Oil Company is plain and unambiguous: the provision specifically concerns disputes "between Lessor and Lessee arising out of or relating to the lease" and makes

no reference to any other parties. Furthermore, the Amendments separately identify the "Lessor," the "Lessee," and the "Lender." Had the parties intended to include GE Capital as an additional party in its arbitration provisions, they could have done so in further amendments to the Leases. Therefore, there is no indication from the language contained in the Leases that GE Capital agreed to an arbitration provision, and as a result, it cannot be compelled to arbitrate.

The Defendant argues that while GE Capital was not a signatory to the original Leases, it should still be compelled to arbitrate under the doctrine of equitable estoppel as applied in International Paper Co. v. Schabededissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000). In International Paper, a purchaser of an industrial saw sought to sue the manufacturer of the product under the contract between the manufacturer and the distributor. The Fourth Circuit held that equitable estoppel bound the non-signatory purchaser to the arbitration clause contained in the same contract under which he brought suit, as the purchaser "cannot seek to enforce ... contractual rights and avoid the contract's requirement that "any dispute arising out of" the contract be arbitrated." Int'l Paper Co., 206 F.3d at 418.

The case at hand presents a very different situation from International Paper. There is no evidence in this case to show that GE Capital is deriving benefits from some provisions of the Leases so as to be equitably estopped from avoiding other burdensome provisions. Additionally, the arbitration provision in the contract in International Paper was a general clause said to apply to "[a]ny dispute arising out the Contract" and named no specific parties bound to such provision. Id. at 414. Equitable estoppel is not applicable if the party to be bound is a non-signatory and the provision is a specific, rather than a general, arbitration provision. See SouthTrust Bank v. Ford, 835 So.2d 990 (Ala. 2002); see also Monsanto Co. v. Benton Farm,

bound to arbitration to the Lessor and Lessee, and as such, equitable estoppel does not apply to bind GE Capital to arbitration of this adversary proceeding.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED that the Motion by Defendant (1) to stay adversary proceeding pending arbitration, (2) to compel Plaintiffs to comply with the arbitration provisions, and (3) for relief from stay to the extent necessary to conclude arbitration is hereby DENIED.

This the 1 day of ~~June~~ July 2003.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge