

IN THE CIRCUIT COURT OF OUACHITA COUNTY, ARKANSAS
CIVIL DIVISION
SIXTH DIVISION

KELVIN WHITE, CYNTHIA WIMBERLY
and NEHEMIA BAILEY

PLAINTIFFS

VS.

NO. CV-2007-123-6

ADVANCE AMERICA SERVICING OF
ARKANSAS, INC., d/b/a ADVANCE
AMERICA CASH ADVANCE; ADVANCE
AMERICA CASH ADVANCE CENTERS
OF ARKANSAS, INC.; and ADVANCE
AMERICA, CASH ADVANCE CENTERS,
INC.

DEFENDANTS

ORDER

ON the 16th day of October, 2007, the captioned cause was before the Court on the motion of Defendants to dismiss, or alternatively to stay judicial proceedings and to compel arbitration, and the motion of Plaintiffs for partial summary judgment; and from the pleadings, exhibits, argument of counsel and its review the Court finds as follows:

1. The Plaintiffs in this action executed separate contracts with Advance America Servicing of Arkansas, Inc., d/b/a Advance America Cash Advance, hereinafter "Defendants", related to what is known as payday loans. Pursuant to the terms of the contracts, Plaintiffs were obligated to pay back the principal of the loan together with a fee or interest within a short period of time. Plaintiffs allege in their complaint that the interest charged by Defendants exceeds the limits established by the Constitution of

Arkansas and certain statutes. As a result of this alleged usury by Defendants, Plaintiffs seek certain relief in this Court.

2. Defendants moved to dismiss the complaint, alleging that the contract requires the parties to submit all disputes related to the contracts to arbitration and that, as a result, this Court does not have jurisdiction over the case.

3. The second page of the contract contains a waiver of jury trial and arbitration provision which states that any dispute shall be resolved by binding arbitration. It also states that this provision will be governed by the Federal Arbitration Act. The provision applies equally to both sides.

4. However, in the first page, the contract, drafted by the Defendants, reserves to the Defendants the right to all civil remedies. No such reservation of rights is made to the Plaintiffs. This unequal treatment of the parties causes the arbitration provision to suffer a lack of mutuality, an essential element for the validity of this provision. Accordingly, the arbitration provision is unenforceable.

5. The fact that the reservation of rights is in a separate provision of the contract from the arbitration provision is of no significance. The purpose of the contract is a very narrow one — the making of loans by Defendants and their repayment with interest by Plaintiffs. Both the civil remedies reserved to Defendants and the disputes to be resolved in arbitration relate to the same

subject and that is remedies for lack of performance or the resolution of disputes. To make a distinction because of the format of the writing and the placement of these related provisions within the contract is to put form over substance.

5. This decision is limited to the dispute resolution provisions only and therefore is governed by Arkansas law. The validity of the contract as a whole is not addressed by this decision and therefore the Federal Arbitration Act is not controlling. Consequently, this Court, and not an arbitrator, makes the decision on the threshold issue of jurisdiction. The motion of Defendants to dismiss or to stay judicial proceedings or to compel arbitration is denied.

6. The Court recognizes that this order is subject to interim appeal for *de novo* review and that Defendants have not answered the complaint. Therefore, the motion of Plaintiffs for partial summary judgment on the constitutionality of statutes related to this controversy will be held in abeyance.

7. Defendants shall have until Friday, January 18, 2008, to answer the complaint.

IT IS SO ORDERED this 17th day of December, 2007.


DAVID F. GUTHRIE
CIRCUIT JUDGE