STATE OF NORTH CAROLINA

COUNTY OF YADKIN

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS-355

TRIAD GROUP, INC., OCEAN TRAIL CONVALESCENT CENTER, INC., LOUISBURG NURSING CENTER, INC., ROXBORO NURSING CENTER, INC., YADKIN NURSING CARE CENTER, INC., NOLAN G. BROWN, and SUE J. BROWN,

Plaintiffs,

v.

WACHOVIA BANK, N.A., f/k/a First Union National Bank,

Defendant.

ORDER ON MOTION TO STAY CASE AND COMPEL ARBITRATION

This matter is before the Court on the Motion to Stay Case and Compel Arbitration filed by Wachovia Bank, N.A. ("Wachovia" or "Defendant"). Having fully considered the submissions by counsel, the Court will GRANT the Motion.

The Court has considered Plaintiffs' arguments regarding the legal fees and expenses they incurred defending the motions to dismiss. Although the Court is always concerned about the ever-increasing costs of litigation, the fact that one party may file a motion to dismiss prior to invoking an existing arbitration clause is in and of itself insufficient to warrant denial of enforcement of an otherwise valid arbitration agreement. It would be bad public policy to discourage parties from filing early motions to test the legal sufficiency of claims. *Cf. Sweater Bee by Banff, Ltd. v. Manhattan Indus., Inc.*, 754 F.2d 457, 465 (2d Cir. 1985) ("Moreover, it is possible that by eliminating some of the claims as a matter of law the role of the arbitrator might be made more simple, because the arbitrator would then be able to concentrate or focus solely on claims that have facial merit.").

Courts may take timing and previous expense into consideration when determining enforceability. *See Culberson v. REO Properties Corp.*, 194 N.C. App. 793, 798, 670 S.E.2d 316, 320 (2009). However, this is not a case where so much time and expense have passed that the arbitration clause should not be enforced. Furthermore, Plaintiffs could have avoided their expenses though an earlier request for arbitration. *See id.* at 799, 670 S.E.2d at 320.

With respect to Plaintiffs' argument that Defendant will get "a second bite at the apple," the Court has reviewed its April 12, 2010 Order and finds the relevant passage to be as follows:

> Plaintiffs have alleged facts sufficient for the remainder of their claims to go forward. In addition, the Court recognizes that certain obligations may be subject to equitable principles of general application. Section 3(a)(v) of the ISDA Master Agreement provides:
>
> > Each party represents to the other party that . . . [i]ts obligations under this Agreement and any Credit Support Document to which it is a party constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms . . . *subject, as to enforceability, to equitable principles of general application* (regardless of whether enforcement is sought in a proceeding in equity or at law).
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> (Def.'s Mem. Supp. Mot. Dismiss, Ex. D (emphasis added).) The Court need not address the question of whether Plaintiffs are entitled to some form of equitable relief at this time. The Court simply holds that equitable relief *may* be available.

The question of whether equitable relief is actually available has not been decided and may be decided in the first instance by the arbitration panel.

The Court also has considered Plaintiffs' arguments that enforcement of the arbitration clause would be unconscionable and finds that enforcement of the provision in the context of this case is not unconscionable.

Therefore, based on the foregoing, the Court hereby ORDERS the following:

1. Wachovia's Motion to Stay Case and Compel Arbitration is granted.
2. Plaintiffs shall arbitrate their disputes with Wachovia pursuant to Paragraph 9.18(a) of the Letter of Credit and Reimbursement Agreement and the equivalent provisions in the First and Second Amendments.
3. This matter is stayed pending completion of the arbitration.

This 20th day of July, 2010.

/s/ Ben F. Tennille
The Honorable Ben F. Tennille
Chief Special Superior Court Judge
for Complex Business Cases