STATE OF MICHIGAN

COURT OF APPEALS

JONATHAN D. AHLBRAND, CRAIG A. JANUTOL, and EAST WEST CAPITAL CORPORATION,

Plaintiffs-Appellants,

v

KENNETH A. KEELEY, Trustee of the KENNETH A. KEELEY TRUST,

Defendant-Appellee.

UNPUBLISHED
January 9, 1998

No. 197775
Bay Circuit Court
LC No. 96-003628

Before: Gage, P.J., and Murphy and Reilly, JJ.

MEMORANDUM.

This is a declaratory judgment action in which the trial court was asked to determine whether defendant is precluded from arbitrating his dispute with plaintiffs, arising from the purchase of $1,000,000 in notes from the now bankrupt Towers Financial Corporation, by §12(d)(2) of the Uniform Code of Arbitration of the National Association of Securities Dealers [NASD] where defendant is a member of a putative class action, but has filed a "Declaration of Non-Participation in the Putative Class" with the NASD and the federal district court in which the putative class action is awaiting a decision on certification pursuant to Fed R Civ P 23. The trial court determined that defendant was not precluded from pursuing arbitration. We agree. This case is being decided without oral argument pursuant to MCR 7.214(E).

Section 12(d) of the Uniform Code of Arbitration provides:

> (1) A claim submitted as a class action shall not be eligible for arbitration under this Code at the Association.
>
> (2) Any claim filed by a member or members of a putative or certified class action is also ineligible for arbitration at the Association if the claim is encompassed by a putative or certified class action filed in federal or state court, or is ordered by a court to an arbitral forum not sponsored by a self-regulatory organization for class wide arbitration.

> However, such claims shall be eligible for arbitration in accordance with Section 12(a) or pursuant to the parties' contractual agreement, if any, if a claimant demonstrates that it has elected not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.

At issue is the meaning and application of the phrase "if a claimant demonstrates that it has elected not to participate in the putative . . . class action . . . ." Section 12(d) is silent with regard to how investor-customers are to demonstrate that they have elected not to participate in the putative class action suit. Plaintiffs argue that this precondition to arbitration can only be satisfied upon proof of affirmative judicial action taken to exclude the investor-customer from the putative class or to allow the investor-customer to withdraw from putative class.

We reject plaintiffs' argument in light of *In re Piper Funds, Inc*, 71 F3d 298 (CA 8, 1995). *In re Piper Funds* stands for the proposition that formal court action releasing a party from its membership as a class plaintiff is not required before that party may pursue arbitration under §12(d)(2) and the FAA. *Id*., 302-304.

In the instant case, defendant submitted to the NASD and the federal district court a sworn Declaration of Non-Participation in Putative Class in which defendant indicated his intent to opt out of the class action and to secure judicial action removing it from the putative class once the court of jurisdiction established the conditions for opting out of the putative class. Although not as definitely worded as the declaration in *In re Piper Funds*, the declaration filed by defendant demonstrates a clear intent to choose arbitration over participation in the class action. In light of *In re Piper Funds*, defendant's Declaration of Non-Participation in Putative Class was sufficient to trigger defendant's contractual right to immediate submission of his claims to arbitration under §12(d)(2). Defendant was not required to wait until the court with jurisdiction over the putative class action established procedures to opt out or took affirmative action to remove defendant from the putative class.

Affirmed.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Maureen Pulte Reilly