

STATE OF MICHIGAN
COURT OF APPEALS

ADDIE PATZKE DUKE and WILBUR
DAVIDSON, Trustees of the Estate of WALTER H.
WYETH,

UNPUBLISHED
March 20, 1998

Plaintiffs-Appellees,

v

No. 199970
St. Clair Circuit Court
LC No. 94-002868-NZ

PRUDENTIAL-BACHE SECURITIES and DAVID
R. HESTER,

Defendants-Appellants.

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

This arbitration case is before us on remand from the Supreme Court for consideration as on leave granted of defendants' argument that the circuit court erred by refusing to grant summary disposition in their favor on the ground that plaintiffs' action was barred by an arbitration panel's denial of relief. We affirm.

This controversy arose from a decision by plaintiffs, as trustees of the estate of Walter Wyeth, to open a brokerage account with defendant David Hester, a stockbroker at Thompson McKinnon, which was later acquired by defendant Prudential-Bache Securities. Plaintiffs contend that they opened the account with the understanding that it would be placed under the control of an independent financial advisor and that the investments would be conservative in nature. Plaintiffs claim that defendant Hester defrauded them and breached his fiduciary duty by failing to follow their agreement when he invested their account and that defendant Prudential-Bache failed to supervise him. Plaintiffs allegedly suffered "substantial losses" from defendants' investments. The parties agreed in their "Uniform Submission Agreement" to submit this controversy to arbitration before the National Association of Securities Dealers (NASD) and that any judgment rendered by the arbitration panel may be entered by "any court of competent jurisdiction." One of the arguments raised by defendant at the arbitration hearing was that plaintiffs' Healthvest claim was not eligible for arbitration under NASD arbitration rule 12(d)(2)¹ because plaintiff had participated as a plaintiff in a class action lawsuit against Healthvest.

The arbitration panel dismissed plaintiffs' action in its entirety without explaining the basis of its decision. Believing that the arbitration panel had dismissed their Healthvest claims without reaching the merits of the claims, plaintiffs filed an action against defendants in circuit court on the Healthvest investments, alleging fraud, breach of fiduciary duty, and failure to supervise. Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that the action was barred by res judicata because of the NASD arbitration panel's decision. At the hearing on this motion, the trial court instructed plaintiffs to obtain clarification from the arbitration panel of the basis for its ruling. In a letter addressed to plaintiffs' counsel, Edward Anderson of the NASD indicated that the arbitrators had dismissed all of plaintiffs' claims on the merits except for the Healthvest claims, which had been dismissed under Rule 12(d)(2) because plaintiffs had participated in a class action lawsuit regarding that investment.

At the hearing on defendants' amended motion for summary disposition, defendants argued that although the Healthvest claim had been dismissed by the arbitrators under Rule 12(d)(2), that dismissal amounted to a substantive determination and barred any further claim regarding the Healthvest investment. The trial court held that, because the Healthvest claim was not eligible for arbitration due to a procedural bar, plaintiffs were entitled to pursue relief in circuit court regarding defendants handling of the Healthvest investment.

On appeal, defendants do not claim that the Healthvest claim was arbitrable. Indeed, defendants argued before the arbitrators that the claim was not arbitrable pursuant to Rule 12(d)(2), and the arbitrators agreed.² Because there appears to be no dispute that the Healthvest claim was ineligible for arbitration, the arbitration agreement would not prevent the circuit court action from proceeding.³ Cf. *DAIIE v Sanford*, 141 Mich App 820; 369 NW2d 239 (1985) (once a claim is *resolved* by arbitration, no party to the arbitration proceedings may proceed judicially with a complaint that would relitigate the same issues decided by the arbitrable process).

Defendants also argue that they were entitled to summary disposition because the arbitration panel's decision that plaintiffs' Healthvest claim was ineligible for arbitration was a substantive decision that barred the state court action as a matter of res judicata. This argument misapprehends the nature of res judicata principles. The arbitration panel refused to hear the Healthvest claim because the claim was ineligible for arbitration; hence, the action alleging fraud and breach of fiduciary duty on the Healthvest investment was not reviewed on its merits. Whether the arbitration panel's decision is characterized as substantive or procedural, res judicata would not bar the litigation of this issue for the first time where there has been no decision on the merits of the issue. See *Andrews v Donnelly (After Remand)*, 220 Mich App 206, 209; 559 NW2d 68 (1996).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer

¹ NASD rule 12(d)(2) provides that any claim filed by a member of a putative or certified class action is “ineligible for arbitration . . . if the claim is encompassed by a putative or certified class action.”

² Defendant does not dispute the arbitration panel’s decision. Therefore, for purposes of our analysis, we need not determine the validity of the arbitrator’s holding that Rule 12(d)(2) prohibited arbitration of the Healthvest claim.

³ Contrary to defendants’ suggestion, plaintiffs are not seeking to review, vacate, or confirm the arbitration award and, therefore, the time limitations contained in MCR 3.602(J)(2) are inapplicable.