# STATE OF MICHIGAN

# COURT OF APPEALS

---

| | |
|---|---|
| CITY OF DETROIT POLICE AND FIRE RETIREMENT SYSTEM,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>May 11, 2010 |
| v | No. 289185<br>Wayne Circuit Court |
| GSC CDO FUND, LTD., GSC PARTNERS CDO FUND, LTD., GSC CDO FUND II, LTD., GSC PARTNERS CDO FUND II, LTD., GSC PARTNERS CDO INVESTORS II, L.P., GSC PARTNERS CDO GP, L.P., GSC PARTNERS CDO GP II, L.P., GSCP (NJ), L.P., GSC CDO, L.L.C., CDO GP, L.L.C., GSC CDO II, L.L.C., GSC PARTNERS CDO FUND II CORPORATION, CITIGROUP GLOBAL MARKETS, INC., f/k/a SALOMON SMITH BARNEY, INC., f/k/a SMITH BARNEY SHEARSON, INC., MORGAN STANLEY DEAN WITTER, INC., GLENN P. MURRAY, and JOHN A. GIAMPETRONI,<br><br>Defendants-Appellees. | LC No. 08-108699-NZ |

---

Before: CAVANAGH, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting summary disposition in favor of all defendants on the ground that plaintiff's claims were subject to arbitration. We affirm.

This action arises from plaintiff's investment in collateralized debt obligation funds. In 1995, plaintiff entered into a consulting agreement with Smith Barney Shearson, Inc. ("Smith Barney"), the predecessor of defendant Citigroup Global Markets, Inc. Plaintiff alleges that it relied on Smith Barney to provide investment advice and act as an investment fiduciary and that, in approximately 2000, Smith Barney, through its employees Glenn Murray and John Giampetroni, recommended that plaintiff make a sizeable investment in certain collateralized debt obligation funds managed by the GSC defendants (collectively referred to as the GSC Partners).[1] Plaintiff further alleges that Murray and Giampetroni later joined defendant Morgan Stanley Dean Witter, Inc. ("Morgan Stanley"), and urged it to invest in a second fund established by the GSC Partners, which allegedly involved the same type of investment model as the first fund, thereby inducing plaintiff to invest substantial additional monies in that fund as well. According to plaintiff, Murray and Giampetroni failed to disclose that GSC Partners collectively operated as a private equity arm of Smith Barney, and falsely represented that the GSC investments were a high-yield, low-risk investment strategy.

Plaintiff's complaint included claims for fraud, silent fraud, and innocent misrepresentation against all defendants (count I), violation of MCL 451.810 of the Michigan Uniform Securities Act, MCL 451.501 *et seq*,[2] by all defendants based on untrue statements of material fact and failure to disclose material facts in connection with the sale of securities (count II), breach of fiduciary duty against defendants Smith Barney, Murray, and Giampetroni (count III), and breach of the written consulting agreement by defendants Smith Barney, Murray, and Giampetroni (count IV).

Relying on an arbitration provision in the consulting agreement, all defendants moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff was required to submit its claims to binding arbitration. The trial court agreed and granted defendants' motions.

Plaintiff now argues that the trial court erred in finding that its claims were within the scope of the arbitration agreement, and also erred in finding that nonparties to the arbitration agreement were entitled to compel arbitration of its claims.

We review a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although the trial court did not specify under which subrule it granted summary disposition, it is apparent that the motions were granted under MCR 2.116(C)(7), the primary ground on which all defendants relied. Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred because of an agreement to arbitrate. The following principles apply to a motion under MCR 2.116(C)(7):

> A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits,

---

[1] Plaintiff's complaint refers to the various GSC defendants collectively as "GSC Partners." Because the individual identities of the GSC defendants are not material for purposes of this appeal, we shall likewise refer to the various GSC defendants collectively as "GSC Partners."

[2] Michigan Uniform Securities Act, MCL 451.501 *et seq*, was repealed effective October 1, 2009. MCL 451.2702. However, pursuant to MCL 451.2703(1), "[t]he predecessor act exclusively governs all actions, prosecutions, or proceedings that are pending or may be maintained or instituted on the basis of facts and circumstances occurring before the effective date of this act . . . ."

> depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v Mercy Hosps & Health Servs of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).]

The existence and enforceability of an arbitration agreement is a question of law that we review de novo. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003).

In *Amtower v William C Roney & Co* (*On Remand*), 232 Mich App 226, 234; 590 NW2d 580 (1998), this Court explained:

> "'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he had not agreed so to submit.'" *AT & T Technologies, Inc v Communications Workers of America*, 475 US 643, 648; 106 S Ct 1415; 89 L Ed 2d 648 (1986) (citations omitted). Thus, "the basic objective in this area is . . . to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms,' and according to the intentions of the parties." *First Options of Chicago, Inc v Kaplan*, 514 US 938, 947; 115 S Ct 1920; 131 L Ed 2d 985 (1995) (citations omitted).

The parties' agreement generally determines the scope of arbitration. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007).

> "'To ascertain the arbitrability of an issue, [a] court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract.' *Huntington Woods* [*v Ajax Paving Industries, Inc* (*After Remand*), 196 Mich App 71, 74-75; 492 NW2d 463 (1992)]. The court should resolve all conflicts in favor of arbitration. *Id*. at 75. However, a court should not interpret a contract's language beyond determining whether arbitration applies and should not allow the parties to divide their disputes between the court and an arbitrator. *Brucker v McKinlay Transport, Inc*, 454 Mich 8, 15, 17-18; 557 NW2d 536 (1997). Dispute bifurcation defeats the efficiency of arbitration and considerably undermines its value as an acceptable alternative to litigation." [*Id.*, quoting *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004).]

Where the language of an arbitration clause is clear and unambiguous, the intent of the parties will be determined according to the plain meaning of the language. *Amtower*, 232 Mich App at 234. As explained in *Amtower*,

> [C]onsistent with the strong federal policy promoting arbitration, any ambiguity concerning whether a specific issue falls within the scope of arbitration, such as whether a claim is timely, must be resolved in favor of submitting the question to the arbitrator for resolution. See *AT & T Technologies*, [475 US at] 650. In other

> words, there is a presumption of arbitrability "'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *Id*., quoting *United Steelworkers of America v Warrior & Gulf Navigation Co,* 363 US 574, 582-583; 80 S Ct 1347; 4 L Ed 2d 1409 (1960). In *First Options* [514 US at 945], the Court explained that when the parties have a contract that provides for arbitration of some issues, "the parties likely gave at least some thought to the scope of arbitration." Therefore, the law "insist[s] upon clarity before concluding that the parties did not want to arbitrate a related matter." *Id.* [*Id.* at 234-235.]

In this case, the consulting agreement between plaintiff and Smith Barney contains the following arbitration provision:

> Any controversy: (1) arising out of or relating to any of Client's accounts maintained individually or jointly with any other party, in any capacity, with Smith Barney Shearson; or (2) relating to Client's transactions or accounts with any of Smith Barney Shearson's predecessor firms by merger, acquisition or other business combination from the inception of such accounts; or (3) with respect to transactions of any kind executed by, through or with Smith Barney Shearson, Smith Barney Shearson's officers, directors, agents and/or employees; or (4) with respect to this Agreement or any other agreements entered into with Smith Barney Shearson relating to Client's accounts, or the breach thereof, shall be resolved by arbitration conducted only at the New York Stock Exchange, Inc., National Association of Securities Dealers, Inc. ("NASD"), or the American Stock Exchange, Inc. or any self-regulatory organization ("SRO") subject to the jurisdiction of the Securities and Exchange Commission and pursuant to the arbitration procedures then in effect at the NASD, any such exchange or SRO as Client may elect. If Client does not make such election by registered mail addressed to Smith Barney Shearson at Smith Barney Shearson's main office within 5 days after demand by Smith Barney Shearson that Client make such election, then Smith Barney Shearson will have the right to elect the arbitration tribunal of Smith Barney Shearson's choice. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

We believe that plaintiff's claims against Citigroup (the successor to Smith Barney), Murray, and Giampetroni are clearly within the scope of subparagraph (3). That subparagraph broadly encompasses "*any controversy* . . . with respect to transactions *of any kind* executed *by, through or with* Smith Barney" or its "agents and/or employees." Plaintiff's claims against Citigroup, Murray, and Giampetroni Based are based on its relationship with Smith Barney and the investment advice provided by Murray and Giampetroni as agents or employees of Smith Barney.

We reject plaintiff's argument that subparagraph (3) does not apply to its GSC investments because those investments were made directly with GSC Partners and thus do not directly involve plaintiff's trade account with Smith Barney. Again, subparagraph (3) encompasses "any controversy" involving a transaction of "any kind," executed "by, through or with Smith Barney . . . [or its] agents and/or employees." The basis for plaintiff's complaint is that Smith Barney, through its employees Murray and Giampetroni, wrongly induced it to invest in GSC Partners. Because plaintiff's complaint alleges that the GSC investments were made "through" Smith Barney employees, there is no merit to plaintiff's argument.

Although plaintiff complains that the trial court failed to specify the particular subparagraph of the arbitration clause that it believed compelled arbitration, this deficiency does not require reversal. Because our review is de novo, we can decide that matter despite the trial court's failure to do so.

Plaintiff also argues that because it never entered into an arbitration agreement with defendants Murray or Giampetroni personally, or with defendant Morgan Stanley or the GSC Partners, it is not required to arbitrate its claims against these defendants. We disagree.

As discussed previously, the arbitration agreement extends to both Murray and Giampetroni as employees or agents of Smith Barney. Furthermore, to the extent that plaintiff attempts to hold Murray and Giampetroni liable for conduct after they left Smith Barney and joined Morgan Stanley, for the reasons further explained below, the trial court did not err in finding that they were entitled to compel arbitration of those claims.

Initially, the language of the arbitration clause is broad enough to cover claims against those defendants who were not parties to the arbitration agreement. In *Rooyakker*, 276 Mich App at 163, this Court considered an arbitration clause that provided for arbitration of "any dispute or controversy arising out of or relating to" the underlying agreement. Based on that language, this Court held that an arbitrator could hear the plaintiffs' tortious interference and defamation claims, even though they involved nonparties to the agreement. *Id*. Relying on *Detroit Auto Inter-Ins Exch v Reck*, 90 Mich App 286, 289; 282 NW2d 292 (1979), the *Rooyakker* Court observed that this state has a strong public policy that favors arbitration "as a single, expeditious means of resolving disputes," and that this policy would be thwarted if all disputed issues in a case had to be segregated into arbitrable and nonarbitrable categories. *Rooyakker*, 276 Mich App at 163-164. As in *Rooyakker*, the language of the arbitration clause in this case is broad enough to encompass all plaintiff's claims, even those against nonparties to the arbitration agreement, because the claims all stem from plaintiff's relationship with Smith Barney.

Relying on *Javitch v First Union Securities, Inc*, 315 F3d 619 (CA 6, 2003), plaintiff argues that this case does not involve any of the circumstances for binding nonsignatories to an arbitration agreement. In *Javitch*, the court stated:

> Defendants continue to argue with one voice that the receiver should be bound to arbitrate all claims against all defendants under the theory of equitable estoppel because all of the claims arise out of the broker-customer relationship that would not exist "but for" the customer agreements containing the arbitration clauses. As the district court correctly stated, nonsignatories may be bound to an arbitration agreement under ordinary contract and agency principles. *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir.1990). Five theories for binding nonsignatories to arbitration agreements have been recognized: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (5)

> estoppel. *Thomson-CSF v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir.1995).
>
> The court in *Thomson* held that a nonsignatory may be bound to an arbitration agreement under an estoppel theory when the nonsignatory seeks a *direct* benefit from the contract while disavowing the arbitration provision. *Id.* at 778-79. When only an indirect benefit is sought, however, it is only a signatory that may be estopped from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the underlying contract. *Id.* at 779. See *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 418 (4th Cir.2000) (nonsignatory asserting breach of contract and breach of contract claims under the contract could not avoid the arbitration agreement in the contract).
>
> The district court rejected the estoppel argument, stating that defendants' reasoning was "circular and without merit." It is not clear from the discussion of *Thomson*, however, whether the court found that [plaintiff], in asserting claims on behalf of [two companies], sought to benefit either directly or indirectly from the customer agreements that contained the arbitration clauses. Since this determination would be central to the question of whether to apply estoppel to bind [plaintiff], a nonsignatory, to the arbitration agreements, we vacate and remand for further consideration of this issue. [*Javitch*, 315 F3d at 628-629.]

Unlike *Javitch*, this case does not involve a situation where a party to an arbitration agreement is attempting to compel arbitration against a nonparty. Rather, the nonsignatories are attempting to enforce the arbitration provision against plaintiff, a party to the arbitration agreement. In *Brown v Pacific Life Ins Co*, 462 F3d 384, 389-390 (CA 5, 2006), the plaintiffs entered into an arbitration agreement with Smith Barney. Nonparties to the agreement, defendants G.E. Life & Annuity Insurance Company and Pacific Life Insurance Company, moved to compel arbitration of the claims against them based on the agreement between plaintiffs and Smith Barney. *Id.* The court stated:

> Provided the agreements are valid, the Browns do not dispute the arbitrability of their claims against Smith Barney. They argue, however, that the district court erred by estopping the Browns from asserting that the lack of a written arbitration agreement precluded arbitration of their claims against GE and Pacific. We review for abuse of discretion the district court's use of equitable estoppel. *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 528 (5th Cir.2000).
>
> Although arbitration is a matter of contract that generally binds only signatories, a party to an arbitration agreement may be equitably estopped from litigating its claims against non-parties in court and may be ordered to arbitration. *Id.* at 526 (citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir.1999)). In *Grigson*, we held that a non-signatory to an arbitration agreement can compel arbitration: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against a non-signatory; or (2) when the signatory raises allegations of

> substantially interdependent and concerted misconduct by both the non-signatory and one or more signatories to the contract. *Id.* at 527. We reasoned that equity does not allow a party to "seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory." *Id.* at 528; *see Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 263 (5th Cir.2004) (stating that a plaintiff should not be able to claim the benefit of a contract and simultaneously avoid its burdens). "[T]he result in *Grigson* and similar cases makes sense because the parties resisting arbitration had expressly agreed to arbitrate claims of the very type that they asserted against the nonsignatory." *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.3d 347, 361 (5th Cir.2003).
>
> Although close, we conclude that the district court did not abuse its discretion in determining that the Browns were estopped under *Grigson*'s second prong from asserting that a lack of a written arbitration agreement precluded arbitration. The district court's finding that there was no way to bring actions against GE and Pacific without considering the actions of Smith Barney and Patrick Holt, is not patently incorrect. Whether and how GE and Pacific defrauded or breached duties owed to the Browns depends, in some part, upon the nature of tortious acts allegedly committed by Holt and Smith Barney—acts that would be covered by the arbitration agreement—as well as any tortious acts by GE and Pacific. *See Hill v. GE Power Sys., Inc.*, 282 F.3d 343, 349 (5th Cir.2002) (finding no abuse of discretion where a plaintiff alleges "interdependent and concerted misconduct," while denying that its claims are intertwined with an agreement containing an arbitration clause). As the Browns fail to allege tortious acts by GE and Pacific that are separate and apart from Holt's, we can only conclude that the complaint asserts concerted misconduct by all parties. "To constitute an abuse of discretion, the district court's decision must be either premised on an erroneous application of the law, or on an assessment of the evidence that is clearly erroneous." *Grigson*, 210 F.3d at 528. "By this measure the district court did not abuse its discretion." *Hill,* 282 F.3d at 349. [*Brown,* 462 F3d at 398-399.]

The facts of this case, like in *Brown*, support the conclusion that plaintiff should be estopped from arguing that its claims against any nonsignatories to the arbitration agreement are not subject to arbitration. The allegations in plaintiff's complaint involve "substantially interdependent and concerted misconduct by both the non-signator[ies] and one or more signatories to the contract." Murray and Giampetroni were both employed by Smith Barney (a signatory to the agreement) when plaintiff alleges that they breached their fiduciary duties by failing to fully disclose material information and by misrepresenting the risks associated with the GSC investments. Morgan Stanley's role in this case relates to Murray and Giampetroni's alleged similar misrepresentations after they joined Morgan Stanley. The GSC Partners' roles in this case also relate back to the misconduct alleged against Smith Barney. Plaintiff alleges that Smith Barney operated GSC Partners as part of a private equity arm without disclosing that relationship. Furthermore, plaintiff alleges that Smith Barney is liable for misrepresenting the risks associated with investing in GSC Partners. Indeed, all claims in plaintiff's complaint against nonsignatories were also brought against Smith Barney, a party to the arbitration agreement, thereby further indicating that all claims against nonsignatories are based on "substantially interdependent and concerted misconduct" by both a nonsignatory and signatory to the agreement.

In sum, plaintiff's claims against all defendants are intertwined because they are all based on allegations of faulty investment advice in a risky venture and the failure to disclose the true nature of the relationships between those acting as plaintiff's advisors and the GSC Partners. The underlying basis of all plaintiff's claims emanates from and goes back to its relationship with Smith Barney, a party to the consulting agreement that contains the arbitration agreement. Thus, plaintiff's allegations are "intimately founded in and intertwined with the obligations imposed by the [agreement containing the arbitration clause]." *MS Dealer Serv Corp v Franklin*, 177 F3d 942, 948 (CA 11, 1999) (quotation omitted). Plaintiff essentially seeks to base its claims on its consulting agreement with Smith Barney, but to avoid enforcement of the arbitration portion of that agreement against most parties to this litigation. On these facts, it is equitable to require plaintiff to arbitrate all its claims.

Plaintiff again complains that the trial court failed to properly analyze or explain why nonsignatories to the agreement containing the arbitration clause could compel arbitration. As explained above, however, on de novo review, we conclude that the trial court properly reached the correct result, even if its analysis was incomplete.

Based on the foregoing, we affirm the trial court's decision to compel plaintiff to arbitrate all its claims in this case, even those against defendants who were not parties to the arbitration agreement, because (1) the arbitration agreement is broad enough to encompass all plaintiff's claims and, for policy reasons, it is expeditious to resolve all disputes in a single proceeding, and (2) plaintiff, a party to the arbitration agreement, is estopped from avoiding arbitration of its claims against those defendants who did not sign the agreement where the claims are based on "substantially interdependent and concerted misconduct" by all defendants.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder