Soloway v Morgan Stanley Smith Barney LLC
2012 NY Slip Op 30154(U)
January 17, 2012
Sup Ct, NY County
Docket Number: 108392/2011
Judge: Peter H. Moulton
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SCANNED ON 1/24/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 108392/2011
SOLOWAY, EDITH G.
vs
MORGAN STANLEY SMITH BARNEY
Sequence Number : 001
COMPEL OR STAY ARBITRATION

PART _____

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ Defendant's motion to compel arbitration is decided per attached

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JAN 24 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. PETER H. MOULTON
SUPREME COURT JUSTICE

Dated: 1/17/12

_____, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 40 B

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EDITH G. SOLOWAY

Plaintiff,

-against-

MORGAN STANLEY SMITH BARNEY LLC.

Defendant.

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FILED

JAN 24 2012

NEW YORK
COUNTY CLERK'S OFFICE

Index No. 108392/2011

PETER H. MOULTON, J.:

Defendant moves, pursuant to CPLR 7503, for an order compelling plaintiff to arbitrate her claims before the Financial Industry Regulatory Authority, and staying this tort and breach of contract action, pending completion of arbitration. Defendant also seeks sanctions. Plaintiff opposes the motion on the basis that defendant (i) has failed to satisfy its prima facie burden to produce copies of the two brokerage account agreements at issue, in legible form, (ii) has failed to demonstrate that the purported arbitration clauses in those agreements encompass the causes of action asserted here, and (iii) has waived the right to arbitrate by acting inconsistently with respect to plaintiff's instructions regarding liquidation of the accounts, and, by commencing an interpleader action in Supreme Court, New York County.[1]

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[1]The court has considered the following submissions: (i) notice of motion to compel arbitration, dated September 14, 2011 and annexed Smitham affirmation, dated September 14, 2011, with exhibits (including Davidson affidavit, sworn to September 13, 2011), (ii) memorandum of law, dated September 14, 2011, (iii) Goldberg affirmation, dated October 3, 2011, with exhibits, (iv) Soloway affidavit, sworn to October 4, 2011, (v) memorandum of law in opposition, dated October 5, 2011, (vi) reply, dated October 25, 2011, and (vii) letters dated October 25, 2011, October 26, 2011 and October 28, 2011.

Background

Plaintiff describes her causes of action, in relevant part, as follows:

> "1. This is action to recover monies for the defendant's illegal conversion of plaintiff's property and damages to plaintiff as a direct result. For a period of some three to four months, defendant refused to follow plaintiff's express instructions as to plaintiff's funds held in two brokerage accounts."

(Verified Interpleader Complaint ¶ 1).

Between February 2011 and May 12, 2011 (when plaintiff received the proceeds in her two brokerage accounts, totaling $139,322.50), defendant refused to turn over those proceeds to plaintiff, because her son, who had a 2008 power of attorney, claimed that she was incompetent (Verified Interpleader Complaint ¶¶ 5, 10, 12, 15 and 21; Goldberg Affirm ¶14). Because plaintiff's son wanted the proceeds to remain in the account, plaintiff revoked the 2008 power of attorney on April 28, 2011, and demanded payment. Unclear what to do, defendant commenced an interpleader action in Supreme Court, New York County (the "interpleader action"), seeking instruction from the court as to whether the monies should be released to plaintiff, in light of the allegations of plaintiff's incompetency and her son's contrary instructions (Verified Interpleader Complaint ¶¶ 10, 16, 22-25). Justice Rakower issued a decision, dated May 12, 2011 which provided "TRO DENIED" and disposed of the action for administrative purposes, by checking the box "FINAL DISPOSITION" (see Supreme Court Records On-Line Library, Index Number 105562/2011, available at http://10.132.37.7:8080/iscroll). On May 23, 2011, defendant filed a stipulation of voluntary discontinuance.

Arguments

Defendant submits the affidavit of Dwayne Davidson, a paralegal for defendant[2] (Ex 3, Smitham Affirm). He states that the business records of defendant indicate that plaintiff "executed two agreements, which contain arbitration provisions" (id. ¶ 3). Although Mr. Davson does not specifically describe these agreements, he states that he sent a fax and an email to plaintiff's attorney, which included a copy of a TRAK Investment Advisory Agreement, signed by plaintiff on November 6, 1995 (the "TRAK Agreement") and, an Account Application and Client Agreement, signed by plaintiff on May 23, 1997 (the "Application") (id. ¶¶ 4, 6). He further states that the arbitration clause is located on page 2 at Section 10 in the TRAK Agreement, and on page 3 at Section 6 in the Application, and, he attaches the facsimile and email (id. ¶¶ 4, 6, 9, 10). As noted by plaintiff, the first page of the TRAK Agreement is almost entirely blurred and unreadable (but a few words in the arbitration clause on the second page are legible). The arbitration clause in the Application is legible.

Defendant asserts that the TRAK Agreement provides for arbitration of:

> "all claims or controversies . . . concerning or arising from (i) any account maintained by Client with SB[3] individually or jointly with others in any capacity, (ii) any transactions involving SB or any predecessor firms by merger, acquisition or other business combination and Client, whether or not such transactions occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between Client and SB, or of any duty arising from the business of SB or otherwise"

(Smitham Affirm ¶ 6).

Defendant asserts that the Application provides for arbitration of:

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[2]The signature line indicates that the paralegal's name is Dwayne Davson.

[3]On June 1, 2009, a joint venture was formed between Smith Barney (SB) and Morgan Stanley, creating the defendant entity.

> "all claims or controversies . . . concerning or arising from (i) any account maintained by me with SB individually or jointly with others in any capacity; (ii) any transaction involving SB or any predecessor firms by merger, acquisition or other business combination and me, whether or not such transactions occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, any duty arising from the business of SB or otherwise"

(id. ¶ 8).

Whether under CPLR 7503 or the Federal Arbitration Act,[4] defendant maintains that plaintiff's causes of action are encompassed by these broad arbitration clauses. Plaintiff agreed to arbitrate all claims "concerning or arising" from the two brokerage accounts, and the alleged wrongdoing concerns, or arises from, the handling of those accounts.

Although plaintiff does not deny executing the TRAK Agreement or the Application, she maintains that defendant has not met its burden of proof to produce the relevant language of the arbitration clauses because the TRAK Agreement is unreadable. She also maintains that because she terminated the brokerage relationship by letter, dated May 2, 2011 (Ex C, Goldberg Affirm), the

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[4]The Federal Arbitration Act applies to all contracts evidencing a transaction involving commerce (see 9 USC § 2). Defendant cites numerous cases holding that agreements relating to brokerage accounts are transactions involving commerce (see e.g, Robinson v Bache & Co., 227 F Supp 456 [SD NY 1964]); Kribs v Bache, Halsey, Stuart, Sheilds, Inc., 1982 US Dist LEXIS 16564 [SD NY 1982]). Plaintiff argues that the agreements do not encompass this litigation under federal law, for the same reasons that plaintiff asserts that they do not encompass this action under state law. However, neither side briefed the issue of whether state or federal law governs (see Singer v Jefferies & Co., 78 NY2d 76 [1991] [a threshold question is whether federal or state law applies]). In fact, defendant included a section only at the end of its brief, entitled "Federal Law Also Requires that Plaintiff Submit her Claims to Arbitration" (Mem of Law at 9). Whether state or federal law governs can be relevant to the determination at issue. For example, if the Federal Arbitration Act applies here, the issue of waiver must be decided by the arbitrator, a point overlooked by both sides (see Howsam v Dean Witter Reynolds, Inc., 537 US 79 [2002] [unless the parties clearly indicate otherwise, the issue of arbitrability is for the court to decide; the issue of waiver is for the arbitrator to decide]). Although it appears that the Federal Arbitration Act governs, that issue will not be decided because it was not briefed and because, under both state and federal law, the action must be stayed and arbitration must be compelled.

"securities transaction ceased" (Mem of Law in Opp at 6-9; Goldberg Affirm ¶¶13, 19, 20). Thus, she argues, that the causes of action here, which stem from defendant's failure to follow her instructions, do not involve the issues typically arbitrated, such as issues of money management, investment advice, or disputes over commissions (Mem of Law in Opp at 6-9). Further, citing Matter of Grumman Aerospace Corp. (Lockheed Aircraft Corp.) (72 Misc 2d 680 [Sup Ct, New York County 1972]), plaintiff maintains that defendant waived its right to arbitrate as a result of its inconsistent conduct in first following plaintiff's instruction to liquidate her accounts, but then refusing to turn over the money to her (id. at 12-13). Moreover, she maintains that defendant waived arbitration by filing the interpleader action (id. at 13-15), citing Sherill v Grayco Builders, Inc. (64 NY2d 261, 274 [1985] ["The courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration"] [internal quotations and citation omitted]).

In reply, defendant points out that even if the TRAK Agreement is hard to read, the Application is entirely legible and it alone would require plaintiff to arbitrate this dispute (Reply Mem of Law at 3-4). Defendant also maintains that the arbitration clauses (which do not contain any language limiting them to issues of money management, investment advice, or disputes over commissions) encompass the claims in this action (id. at 4-5). Further, defendant maintains that it did not waive the right to arbitrate because the interpleader action did not "affirmatively" seek relief which was clearly inconsistent with arbitration and because it was litigation of a "defensive" nature, where defendant "took no position with respect to the dispute" (id. at 8-10). Moreover, defendant asserts that it cannot be deemed to have waived arbitration by commencing an interpleader action where it sought to preserve the status quo and was able to "obtain a faster resolution to the

conflicting claims of Plaintiff and her son" (id. at 11-12).

Discussion

Under New York law, a broad arbitration clause creates a presumption of arbitrability with respect to disputes related to the underlying contract (see Matter of Domansky v Little, 2 AD3d 132 [1st Dept 2003]). The court must "determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement" (Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor, 67 NY2d 997, 999 [1986]; see also, Liberty Mgt. & Constr, Ltd. v Fifth Ave. & Sixty-Sixth St. Corp., 208 AD2d 73, 76 [1st Dept 1995]). A "party will not be compelled to arbitrate . . . absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their dispute" (Harriman Group, Inc. v Napolitano, 213 AD2d 159, 163 [1st Dept 1995] [internal quotations and citation omitted]). Similarly under federal law, there is a liberal policy favoring arbitration, and the issue of arbitrability must be decided by the court (see Howsam v Dean Witter Reynolds, Inc., 537 US 79, supra).

Under New York law, it is the "affirmative use of the judicial process to prosecute claims also encompassed by the arbitration agreement that result in a waiver of the right to arbitration" (Tengtu Intl. Corp. v Pak Kwan Cheung, 24 AD3d 170, 172 [1st Dept 2005] [company waived the right to arbitrate by asserting claims in a federal action, which were not separate and distinct from the claims asserted in the arbitration]). "Where claims are entirely separate, though arising from a common agreement, no waiver of arbitration may be implied from the fact that resort has been made to the courts on other claims" (Sherrill, 64 NY2d at 273; see also Corcoran v Corcoran, 114 AD2d

881, 881 [2d Dept 1985]["A party may waive his right to arbitrate by utilizing the judicial system to attain the same relief or determination sought in arbitration"]). The right to arbitration is not waived by service of routine pleadings and minimal, defensive, litigation (see e.g., Matter of Haupt v. Rose, 265 NY 108 [1934] [entering into stipulation to extend time to answer, coupled with moving to dismiss the complaint or, alternatively, to compel plaintiff to separately state and number causes of action is insufficient to constitute a waiver]; Flynn v. Labor Ready, Inc., 6 AD3d 492 [2d Dept 2004] [making motions to dismiss complaint pursuant to CPLR 3211[a][7] and to deny class action certification is insufficient to constitute a waiver]; Two Central Tower Food, Inc. v. Pelligrino, 212 AD2d 441 [1st Dept 1995] [interposing answer that contains no affirmative defenses or counterclaims is insufficient to constitute a waiver]; Braun Equip. Co., v Meli Borelli Assoc., 220 AD2d 311 [1st Dept 1995] [service of routine pleadings, with no more detail than was minimally necessary, is insufficient to constitute a waiver]; compare Esquire Indust., Inc. v East Bay Textiles, Inc., 68 AD2d 845 [1st Dept 1979] [plaintiff waived arbitration by serving a summons; defendant waived arbitration by obtaining a judgment staying arbitration]). A crucial question is the degree of participation in the litigation (see Stark v Malod Spitz DeSantis & Stark, P.C., 9 NY3d 59 [2007]). As previously noted, and overlooked by the parties, under federal law, the issue of waiver is decided by the arbitrator (see Howsam v Dean Witter Reynolds, Inc., 537 US 79, supra).

Contrary to plaintiff's argument, defendant has met its burden to produce copies of the relevant agreements containing the arbitration clauses. Although it is difficult to read the arbitration clause in the TRAK Agreement, certain words regarding arbitration are discernable. In any event, the language in the arbitration clause in the Application is legible, and that agreement alone would require plaintiff to arbitrate this dispute. Plaintiff's attempt to circumvent the language of the broad

arbitration clause is misplaced, whether state or federal law applies. As defendant notes, plaintiff must arbitrate "all claims . . . concerning or arising from" the accounts. Although plaintiff's argument, that defendant's failure to follow its customer's instructions after it liquidated the accounts, is distinct from the typical money management or investment disputes which are arbitrated, the causes of action still concern, or arise from, the accounts. The cases cited by plaintiff do not dictate a contrary result as they involve narrowly drafted arbitration clauses or clauses containing language limiting the clauses' scope. Although defendant followed plaintiff's instruction to liquidate the accounts (despite contrary directions from her son) and then declined to turn over the proceeds to plaintiff, such conduct is not evidence of an intent to waive arbitration under state law, but is, rather, evidence of defendant's uncertainty as to how to respond to conflicting directions.

Whether plaintiff's commencement of the interpleader action resulted in a waiver of arbitration under state law is a more difficult issue.[5] The verified interpleader complaint in the Supreme Court New York County action referred to defendant as "a mere stakeholder requiring direction from the court" who was "ready and willing to deliver the assets to such persons as the Court shall direct" (see Verified Interpleader Complaint, Supreme Court Records On-Line Library, Index Number 105562/2011, supra). Although defendant attempted to use the judicial system to attain relief, that relief was almost entirely defensive in nature. Except for a one line request in the WHEREFORE clause, for a judgment "discharging it from liability to Defendants-Claimants (or any other party) with respect to the Accounts," the seven page complaint indicates that defendant took no position as to the underlying dispute between plaintiff and her son, requesting guidance as a defensive

[5]As previously noted, the issue of waiver is a matter for the arbitrator under federal law. Defendant appears to have brought this motion under state law, and the court need not decide whether state or federal law governs, because the result is the same.

measure. Thus, defendant's action in commencing the interpleader action is similar to the defensive actions of those defendants who merely answer a complaint, or move to dismiss the action (see e.g., Matter of Haupt, 265 NY 108, supra; Flynn, 6 AD3d 492, supra; Two Central Tower Food, Inc., 212 AD2d 441, supra; Braun Equip. Co., v Meli Borelli Assoc., 220 AD2d 311, supra). Although the one line request for a discharge in the interpleader action is arguably in the nature of an affirmative request for a finding that defendant committed no past wrongdoing, defendant discontinued the action approximately thirteen days after it was commenced, and prior to any substantive determination by the court. Once waived, the right to arbitrate cannot be regained (Tengtu Intl. Corp., 24 AD3d 170, supra). However, defendant cannot be deemed to have actively participated in the litigation, when it discontinued the interpleader action shortly after it was commenced, by routine pleadings, and after only one court appearance which resulted in no substantive determination.

It is hereby

ORDERED that defendant's motion is granted, except as to the request for sanctions, which is denied as unsupported; and it is further

ORDERED that plaintiff shall arbitrate her claims against defendant before the Financial Industry Regulatory Authority; and it is further

ORDERED that this action is stayed, pending the completion of arbitration; and it is further

ORDERED that either party may make an application to vacate or modify this stay upon the final determination of the arbitration.

This constitutes the Decision and Order of the Court.

Dated: January 17, 2012

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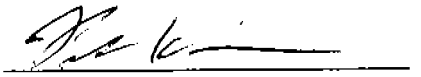

J.S.C

HON. [illegible] J.E. SLOUSTON
SUPREME COURT JUSTICE

FILED

JAN 24 2012

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