

RENDERED: SEPTEMBER 12, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-001207-MR

PAINTER FINANCIAL, LLC AND  
LLOYD PAINTER

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 12-CI-005774

ELIZABETH H. JOHNSON

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Lloyd Painter and Painter Financial, LLC appeal from an order of the Jefferson Circuit Court denying a motion to dismiss or compel arbitration. Appellants argue that they were entitled to enforce an arbitration agreement signed by Elizabeth Johnson. We reverse and remand in order for the trial court to make further findings of fact.

On October 31, 2012, Appellee filed a complaint against Appellants in which she alleged that Appellants mismanaged her investment funds from 2001 through 2011. Appellants are what is known as introducing brokers. These brokers give investment advice to their clients. The clients then give these brokers permission to make investments on his or her behalf. The introducing brokers do not make the stock purchases or trades on their own. Introducing brokers must contract with broker/dealers<sup>1</sup> to consummate the securities transactions which they recommend to their customers. Broker/dealers have access to the floors of the relevant securities exchanges and actually trade the securities as they receive purchase and sale orders from their customers. In this case, the broker/dealer was a corporation called Cambridge Investment Research, Inc. (Cambridge).<sup>2</sup>

On December 17, 2012, Appellants filed a motion to dismiss or compel arbitration. In 2002 and again in 2003, Appellee was required by Cambridge to execute a customer agreement. Both agreements contained an arbitration clause which stated that any controversies that may arise between Appellee and Cambridge would have to be resolved by arbitration. Even though these customer agreements, including the arbitration sections, did not mention Appellants, Appellants argued they were entitled to enforce the arbitration agreement because they were agents of Cambridge.

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<sup>1</sup> Another name for a broker/dealer is clearing broker.

<sup>2</sup> Mr. Painter is a registered representative of Cambridge. It is unclear from the record what this designation means or the responsibilities, if any, a registered representative has toward the broker/dealer.

A hearing was held on this issue. The trial court denied the motion to compel arbitration because Appellants did not benefit from the contract between Appellee and Cambridge. The court held Appellants were not third-party beneficiaries to the contract; therefore, they could not enforce the arbitration agreement. This appeal followed.

For the most part federal courts have rejected attempts by introducing brokers to invoke arbitration clauses in agreements between their customers and clearing brokers.

An introducing broker has been permitted to invoke the arbitration provision in a customer-clearing broker agreement only in two situations that rarely occur: when the introducing broker is the agent of the clearing broker or when the introducing broker is a third-party beneficiary to the agreement.

*Arrants v. Buck*, 130 F.3d 636, 640-641 (4<sup>th</sup> Cir. 1997)(citations omitted). In this case, the trial court only ruled on the third-party beneficiary issue even though Appellants' primary argument concerned agency.

A determination of whether or not Appellants are agents of Cambridge will require factual findings. It is not this Court's role to make findings of fact; that is the responsibility of the trial court. We therefore reverse and remand for further findings as to whether Appellants are agents of Cambridge, and if so, whether they can invoke the arbitration agreement.

ALL CONCUR.

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