SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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RONALD CURTIS, individually and as trustee of the STUART CURTIS FAMILY TRUST,

Plaintiffs,

-against-

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendants.

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DECISION AND ORDER
Index No.: 655921/2016

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

In this motion sequence 001, defendant moves to compel arbitration and stay this action under 9 U.S.C. §§ 3 and 4. For the following reasons, the motion shall be granted.

I. BACKGROUND

A. *Allegations of the Complaint*

Plaintiff Ronald Curtis ("Curtis") maintained an account at defendant's predecessor in interest, Banc of America Investment Services, Inc. ("BAI"), with Michael Stern ("Stern") serving as financial advisor (complaint ¶ 39). In October 2009, Bryce S. Wilinski ("Wilinski") informed Curtis that he would be servicing the account due to Stern's departure to work with Wells Fargo (*id.* ¶¶ 41, 45). After Curtis informed Wilinski that he intended to close the account and transfer his assets to a new account at Well Fargo, Wilinski represented that, if Curtis refrained from moving his account, Wilinski should be able to extend Curtis a better offer once the anticipated merger between BAI and defendant was completed (*id.* ¶¶ 47-49). After the merger was completed, Wilinski offered that if plaintiffs opened new accounts with Wilinski named as the financial advisor, plaintiffs would never be charged any undisclosed fees, and the only fees plaintiffs would be charged would be a $5 processing fee for any bond transaction, a $5 processing fee plus a disclosed maximum .2% commission on any equity transaction (the "ML Offer") (*id.* ¶¶

51-55). After Stern at Wells Fargo failed to match the ML Offer, Curtis accepted the ML Offer and subsequently opened accounts on behalf of himself (the "Curtis Account") and on behalf of the Stuart Curtis Family Trust (respectively, the "Trust" and the "Trust Account") (*id.* ¶¶ 62-67). In discovery during a FINRA Arbitration over certain unauthorized trades, plaintiffs discovered that defendant had charged them previously undisclosed fees in contravention with the ML Offer (*id.* ¶¶ 10-12). Plaintiffs now assert nine causes of action arising out of the undisclosed fees defendant purportedly charged.

B. *Provisions Relevant to the Motion*

Curtis executed a Brokerage Account Application in connection with the Trust Account on December 4, 2009 (NYSCEF Doc. No. 10 ["Brokerage Account Application"]). In relevant portion, that application states that Curtis "acknowledge[s] that [he] ha[s] received, read, understands and agree[s] to ... the terms set forth in the separate Customer Agreement, and agree[s] to be bound by such terms and conditions as are currently in effect and may be amended from time to time with or without prior notice," (*id.* at 4). The application also stated that Curtis understood that "the Customer Agreement contains a pre-dispute arbitration clause requiring all disputes under [the Customer Agreement] to be settled by binding arbitration" and that Curtis had "received, read, understands and agree[s] to such arbitration provisions and ... [that he has] receive[d] a copy of the agreement" (*id.*).

The Customer Agreement, in turn, provides that:

> "[a]ll controversies that may arise between me, MLPF&S and NFS concerning any subject matter, issue or circumstance whatsoever (including, but not limited to controversies concerning any account, order or transaction, or the continuation, performance or breach of this or any other agreement between me, MLPF&S and NFS whether entered into or arising before, on or after the date this account is opened) shall be determined by arbitration in accordance with the rules then prevailing of the Financial Industry Regulatory Authority (FINRA) or any United States securities self-regulatory organization or United States

> securities exchange of which the person, entity or entities against whom the claim is made is a member, as I may designate"

(NYSCEF Doc. No. 11 ["Customer Agreement"] § 16 at 3).

Curtis also executed Standard Option Agreements in connection with both the Trust Account and the Individual Account which, in relevant portion, provided that Curtis:

> "agree[d] that all controversies that may arise between us shall be determined by arbitration. Such controversies include, but are not limited to, those involving any transaction in any of my accounts with MLPF&S, or the construction, performance or breach of any agreement between us, whether entered into or occurring prior, on or subsequent to the date hereof. Any arbitration pursuant to this provision shall be conducted only before the Financial Industry Regulatory Authority, Inc. (FINRA) or an arbitration facility provided by any other exchange of which MLPF&S is a member, and in accordance with its arbitration rules then in effect at FINRA or any such other exchange..."

(NYSCEF Doc. Nos. 12, 13 at 3).

Curtis claims that during the process of opening the Trust Account, Wilinski represented that the Brokerage Account Appliction was meant merely to gather "biographical information" needed to open the Trust Account. Curtis also states that the Trust never received a copy of the Customer Agreement. (NYSCEF Doc. No. 20 ["Curtis aff"] ¶ 28.)

II. ARGUMENTS

Defendant notes the broad scope of the operative arbitration clauses and argues that plaintiffs' claims fall squarely within their ambit (NYSCEF Doc. No. 14 at 7-9). Defendant also notes that, if the arbitration provisions apply, under 9 USC § 3, this action must be stayed while the claims are resolved in arbitration (*id.* at 9-10).

In opposition, plaintiffs first contend that the Option Agreements are not bonding since the ML Offer was represented as having the only governing terms, and didn't have an agreement to arbitrate. Since defendant purportedly stated that only the terms of the ML Offer would bind, the Option Agreement does not control (NYSCEF Doc. No. 29 ["pls' mem"] at 6-9). Plaintiffs also

note that the Option Agreement makes no reference to any other types of transaction subject to the Curtis Account, other than options, and add that those agreements do not apply because plaintiffs have not asserted any claims concerning the Option Agreement (*id.* at 9). Plaintiffs also argue that the parties never exchanged consideration, nor performed under the agreement, and that because there is another agreement that is the subject of plaintiffs' claims, the Option Agreements' arbitration clauses are unenforceable (*id.* citing *TMP Worldwide Inc. v Franzino*, 269 AD2d 332, 332 [1st Dept 2000] [finding arbitration provision in stock option agreements was not enforceable against party that had never exercised the subject stock options and thus was "not bound by the terms of the agreement pursuant to which the options were offered"]).

With respect to the Brokerage Account Application, plaintiffs argue that, based on Wilinski's representations, the terms of the ML Offer should govern instead. Plaintiffs also contend that the Trust never consented to the arbitration provision contained in the Customer Agreement since Wilinski indicated that the forms were only to be used to gather biographical information. Moreover, the Trust never received the Customer Agreement, (*id.* at 9-11). Plaintiffs also argue that the Brokerage Account Application does not concern Curtis in his individual capacity and thus cannot bind him as such (*id.* at 6-7).

Plaintiffs assert that, while fraud in the inducement is typically arbitrable, there are two means by which fraud can defeat an arbitration clause: (1) where the fraud in the inducement goes to the arbitration clause itself, and (2) where fraud permeates the entire agreement (*id.* at 12-13, citing, *e.g.*, *Housekeeper v Lourie*, 39 AD2d 280, 283 [1st Dept 1972]). Plaintiffs argue the arbitration provision in the Brokerage Account Application falls under the first category since Wilinski misrepresented the purpose of the document (*id.* at 13-14). With respect to all arbitration provisions, plaintiffs argue that fraud permeates all agreements involved and that the arbitration

clauses were inserted to help "keep [defendant's] actions in the dark and encourage [defendant] to perpetrate its schemes on other unknowing victims" (*id.* at 17, 14-18).

Plaintiffs argue further that, at minimum, this court should hold an evidentiary hearing (*id.* at 18, citing *e.g. Burbank Broadcasting Co. v Roslin Radio Sales, Inc.*, 99 AD2d 976, 977 [1st Dept 1984] [noting that "[i]t is well settled that on an application to stay arbitration, a trial or evidentiary hearing is required if there is any disputed issue of fact"]).

Finally, plaintiffs contend that their claims are not arbitrable under FINRA Rule 12206 (a) of the Code of Arbitration Procedure, which provides that "[n]o claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim." More than six years have elapsed since the alleged fraud occurred (*id.* at 18-19).

In reply, defendant argues that plaintiffs' reliance on the purported ML Offer is defeated by the terms of the arbitration agreements (NYSCEF Doc. No. 31 ["def's reply"] at 6, citing *Bank Julius Baer & Co., Ltd. v Waxfield Ltd.*, 424 F3d 278, 284 [2d Cir 2005] [rejecting argument that forum selection clause constituted a waiver of agreement to arbitrate on basis that "we cannot nullify an arbitration clause unless the forum selection clause specifically precludes arbitration" and the forum selection clause "[n]either specifically precludes arbitration [n]or contains a positive assurance that this dispute is not governed by the Arbitration Agreement"] [internal quotation marks and citation omitted] [abrogated on other grounds by *Goldman, Sachs & Co. v Golden Empire Schools Fin. Auth.*, 764 F3d 210, 215 n 3 [2d Cir 2014]]).

Regarding the Brokerage Account Application, defendant contends the arbitration provision contained therein is broad enough to cover claims arising out of both the Trust Account and the Curtis Account (*id.* at 6-7). Defendant additionally argues that the parties did in fact

perform and exchange consideration under the Standard Option Agreements since plaintiff obtained the right to trade options and even engaged in options transactions in the Individual Account (*id.* at 7-8; Curtis aff, exhibit 5).

Regarding plaintiffs' claims that they were fraudulently induced to enter into the arbitration provision, defendant contends that the allegations of fraud in the complaint relate, not to an inducement to enter into the arbitration provision, but rather to inducement of the contract generally. As such, defendant contends these claims are for the arbitrator to decide, not this court (*id.* at 8-9, citing *Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 US 395, 403–404 [1967] [noting that "if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it" but that "the federal court [may not] consider claims of fraud in the inducement of the contract generally"]).

Finally, with respect to plaintiffs' argument that their claims are not eligible for arbitration under FINRA Rule 12206 (a), defendant notes that this rule also provides that the "panel will resolve any questions regarding the eligibility of a claim under this rule" (*id.* at 9).

III. DISCUSSION

As a preliminary matter, plaintiffs' arguments that this court should not compel arbitration because (a) plaintiffs have not asserted any claims relating to those agreements, (b) the forms were used only to gather biographical information, and (c) the Trust never received the Customer Agreement, are belied by the text of the agreements. Additionally, as defendant notes, plaintiffs' attempt to rely on the terms of the purported ML Offer fails in that plaintiffs allege only that the ML Offer did not itself contain an arbitration clause, and not that the terms of the ML Offer

specifically precluded arbitration (*see Bank Julius Baer & Co*,424 F3d at 284; *see also Goldman, Sachs & Co. v Golden Empire Schools Fin. Auth.*, 764 F3d 210, 215 [2d Cir 2014]).

Plaintiffs claim that there has been no consideration or performance sufficient to make the Option Agreements binding. However, this argument confuses the parties' agreements to allow plaintiffs the right to trade opinions transactions with defendant (e.g. put / call options), with an "option contract," or "is an agreement to hold an offer open [which] confers upon the optionee, for consideration paid, the right to purchase at a later date" (*Kaplan v Lippman*, 75 NY2d 320, 324–25 [1990]). While in the case of an option contract, "the optionee is not bound until the option is actually exercised" (*id.*) plaintiffs have cited to no authority which states that their contracts with defendant, labeled "Option Agreements," were not binding until plaintiffs executed a trade under those agreements. Additionally, as defendant notes, the ability to engage in options transactions with defendant provides sufficient consideration (*see Apfel v Prudential-Bache Sec. Inc.*, 81 NY2d 470, 476 [1993] ["Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny . . . . It is enough that something of real value in the eye of the law was exchanged"] [internal quotation marks and citation omitted]). Additionally, under FINRA Rule 12206 (a), plaintiffs' argument that these claims are not arbitrable under that same rule is left for the arbitrator to decide.

Turning to plaintiffs' fraud-based arguments, all parties acknowledge that, under the doctrine of "separability," plaintiffs' allegations of fraud will not defeat the arbitration provisions in question unless the alleged fraud either goes "to the arbitration provision itself," or "was part of a grand scheme that permeated the entire contract, including the arbitration provision," (*Weinrott v Carp*, 32 NY2d 190, 197 [1973]). With respect to the latter, "it must be established that the agreement was not the result of an arm's length negotiation, or the arbitration clause was inserted

into the contract to accomplish a fraudulent scheme" (*Ferrarella v Godt*, 131 AD3d 563, 566–67 [2d Dept 2015], *lv to appeal denied*, 26 NY3d 913 [2015]). Plaintiffs do not dispute that the agreements were a result of an arm's length negotiation, thus their argument that fraud permeated the entire agreements reduces to an argument that the arbitration clauses were inserted into the agreements to accomplish the purported fraudulent scheme.

Plaintiffs' argument that the fraud went to the arbitration provision itself contravenes the allegations of the complaint, which relate to inducement to contract generally (*see e.g.* complaint ¶¶ 121-130). Additionally, although plaintiffs argue the arbitration clauses will help defendant conceal its fraudulent scheme from the eyes of the public, and thus aid defendant in repeating this scheme, plaintiffs have made no allegations that the arbitration clauses were inserted in the contract to help accomplish the fraudulent scheme alleged in the complaint – that is, the fraudulent scheme perpetrated against them. Plaintiffs have cited no case in which a court found that the potential use of an arbitration clause in the *ex post* cover-up of a fraudulent scheme is sufficient to find that the arbitration clause was "inserted into the contract to accomplish a fraudulent scheme." Indeed, if such an argument were sufficient, it would be difficult to imagine a scenario in which an allegation of fraud did not render an arbitration clause unenforceable.[1]

Plaintiffs' argument that, at minimum, this court should hold an evidentiary hearing fails as well. Although "[i]t is well settled that on an application to stay arbitration, a trial or evidentiary hearing is required if there is any disputed issue of fact," (*Burbank Broadcasting Co. v Roslin Radio Sales, Inc.*, 99 AD2d 976, 977 [1st Dept 1984]), as discussed above, even accepting

[1] To the extent that plaintiffs rely on *Loop Prod. v Capital Connections LLC* (797 F Supp 2d 338, 347–348 [SD NY 2011]) for the proposition that an "intentional scam" in and of itself is sufficient to constitute a "grand scheme that permeate[s] the entire contract," that statement of law does not comport with the doctrine of separability, as discussed above. It seems that in arriving at this statement of law, the court relied on *Bongo-Astier v Carefree Lifestyles, Inc.* (27 Misc 3d 1211(A) [Civ Ct 2010]), which discussed the enforceability of forum selection clauses, not arbitration clauses. The doctrine of separability applies specifically to arbitration clauses (*see Weinrott*, 32 NY2d at 197).

plaintiffs' allegations as true, plaintiffs have alleged no facts that would invalidate the arbitration provisions in question.

Accordingly, it is hereby

ORDERED that defendants motion to compel arbitration and to stay this action is granted; and it is further

ORDERD that plaintiffs Ronald Curtis and the Stuart Curtis Family Trust shall arbitrate their claims against defendant Merrill Lynch, Pierce, Fenner & Smith, Inc., in accordance with FINRA agreements; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

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

This constitutes the decision and order of the court.

DATED: May 25, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.