

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LARRY HAMILTON,)
Plaintiff,)
)
v.) Civil Action No. 89-0351
)
DEAN WITTER REYNOLDS, INC.,)
and BRUCE BICKAR,)
Defendants.)

MEMORANDUM AND ORDER

GARY L. LANCASTER,
United States Magistrate

Plaintiff Larry Hamilton brought this action against defendants Dean Witter Reynolds, Inc. and its agent, Bruce Bickar, alleging violations of section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b) and SEC Rule 10b-5 (manipulative or deceptive devices or contrivances); section 12(2) of the Exchange Act, *id.* § 771(2) (false and misleading statements); and violations of sections 401(a), (b), & (c) and 403 of the Pennsylvania Securities Act, 70 P.S. §§ 1-401 & 1-403 and 64 Pa. Code § 403.010(b), (d)(1) & (4). Before the court is defendants' Motion to Compel Arbitration. For the following reasons, the motion is granted.

I. **BACKGROUND**

During the fall of 1986, plaintiff sought investment advice from Dean Witter and its agent Bickar. Based on the advice he received, plaintiff established a margin account with Dean Witter through which he made a series of investments in a security known as Dean Witter U.S. Government Securities Trust, and additional investments in a security known as Dean Witter Government Securities Plus.

In January, 1987, Bickar told plaintiff that, in order to continue to make margin purchases, he would have to execute certain forms, specifically, a "Customer's Margin Agreement Amendment For Mutual Funds Shares" and a "Customer's Agreement." Plaintiff signed both on January 6, 1987. Subsequently, plaintiff made additional purchases in one or both of the above-mentioned securities for a total investment, in the aggregate, of \$535,000.00.

Ultimately, the investments went bad and plaintiff's losses were substantial. He now contends that his losses are directly attributable to defendants because Bickar: (1) gave him inaccurate investment information and advice; (2) misinformed him of the tax consequences of his investments; (3) misinformed him of the commissions and brokerage fees charged to his account; and (4) unreasonably delayed in carrying out plaintiff's order to sell certain

securities.

Defendants' Motion to Compel Arbitration is based on paragraph 16 of the Customer's Agreement, which provides as

follows:

16. Any controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, . . .

On March 16, 1989, Dean Witter, through its counsel, made a demand for arbitration upon plaintiff's counsel. Plaintiff has refused to submit any of his claims to arbitration, contending that Bickar misled him into signing the Customer Agreement in the mistaken belief that his signature was necessary to continue margin purchases and that he did not realize that by signing the agreement he was agreeing to arbitrate claims. In the alternative, plaintiff asserts that the agreement to arbitrate must be limited to purchases made after he signed the agreement. Finally, plaintiff argues that the provisions of the agreement are so grossly one-sided as to warrant a total failure of consideration.

II. DISCUSSION

A.

The Federal Arbitration Act of 1947 ("Act"), 9 U.S.C. §§ 1-14, establishes by statute a federal policy favoring arbitration as an alternative to litigation, Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Moses H. Cone

Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983); Wilko v. Swan, 346 U.S. 427, 431 (1953), and requires that the courts rigorously enforce arbitration agreements. Shearson/American Express, 482 U.S. 220; Metro Industrial Painting Corp. v. Terminal Construction Co., 287 F.2d 382, 385 (2d Cir. 1961). All doubts are to be resolved in favor of arbitration. Metro Industrial Painting Corp. v. Terminal Construction, 287 F.2d 382, 385 (2d Cir. 1961). The Act authorizes a federal court to issue an order compelling arbitration if there has been a "failure, neglect, or refusal" to comply with the arbitration agreement." Id. § 4.

Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that "would provide grounds 'for the revocation of any contract,'" Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985), the Act provides no basis for disfavoring agreements to arbitrate claims. Where, as here, a party disputes the application of an arbitration clause, it is the court's responsibility to determine whether the agreement to arbitrate applies to the pending dispute. International Union of Operating Engineers v. Flair Builders, Inc., 406 U.S. 487 (1972). In making that determination, the court's role is distinctly limited. The applicable standards

for this review has been succinctly set forth by the Court of Appeals for the Seventh Circuit in Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711 (7th Cir. 1967), where the court stated:

Under the Federal Arbitration Act, the courts have been assigned the limited role of "ascertaining whether the party seeking arbitration is making a claim which on its face is one governed by the agreement." International Telephone and Telegraph Corporation v. Professional, Technical & Salaried Div., etc., 286 F.2d 329, 330-331 (3d Cir. 1961). As Judge Frank put in Reconstruction Finance Corporation v. Harrisons & Crosfield, 204 F.2d 366, 368, 37 A.L.R.2d 1117 (2d Cir. 1953), cert. denied, 346 U.S. 854, 74 S.Ct. 69, 98 L.E. 368:

"the provisions of that [Federal Arbitration] Act---9 U.S.C. § 4---
* * * make it clear that a federal court, in a suit asking it to compel arbitration, should . . . deal with no issues except (1) the making of an agreement to arbitrate, and (2) the failure, neglect or refusal of the other party to perform that agreement."

The policy of the Federal Arbitration Act is to promote arbitration to accord with the intention of the parties and to ease court congestion. Robert Lawrence Company v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959), certiorari dismissed, 364 U.S. 801, 81 S.Ct. 27, 5 L.Ed.2d 37. Whenever possible, the courts will use the Federal Arbitration Act to enforce agreements to arbitrate. See Monte v. Southern Delaware County Authority, 321 F.2d 870, 874 (3d Cir. 1963).

Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d at 714.

Thus, resolution of plaintiff's duty to arbitrate

depends on a determination of whether the writing at issue was intended to create a legally binding agreement to arbitrate a dispute and, if so, whether this dispute is encompassed in the arbitration clause.

B.

It is fundamental that arbitration is a matter of contract between the parties. Par-Knit Mills v. Stockbridge Fabrics, 636 F.2d 51, 54 (3d Cir. 1980); United Steelworkers of America v. Crane Co., 456 F. Supp. 385 (W.D. Pa. 1978). Consequently, before a party to a lawsuit can be ordered to arbitrate, there must be an express, unequivocal agreement to do so.¹ Plaintiff does not dispute that he signed the Customer Agreement which contains the arbitration clause. Nor is this a case where plaintiff claims he was pressured to sign quickly or that he is a person with little education and reduced ability to read or understand the English language. Cf.: Newfield v. Shearson Lehman Bros., 699 F. Supp. 1124 (E.D. Pa. 1988) (for these reasons, court denied motion to compel arbitration pending trial to determine contract formation). Rather, he disputes the enforceability and scope of the

¹The Arbitration Act requires that an agreement to arbitrate be in writing if it is to be enforceable. 9 U.S.C. § 2.

agreement, especially its application to investments which occurred prior to the date he signed.

In support of his argument, plaintiff relies on Par-Knit Mills v. Stockbridge Fabrics, 636 F.2d 51. In Par-Knit Mills, two corporations engaged in a series of oral contracts for the sale and purchase of textile goods. Prior to delivery of each shipment of goods, the supplier would send a document bearing the term "contract" which confirmed the most recent verbal order. On the back appeared twenty-two paragraphs, one of which required the parties to submit all disputes to arbitration. The "contract" was signed by a production manager who asserted he signed it only to confirm the delivery date contained therein.

The district court stayed further proceedings pending completion of arbitration. In reversing that decision, the Court of Appeals for the Third Circuit concluded the facts alleged raised a sufficient question whether the writing evidenced a meeting of the corporate minds. That is, because the document was not signed by a corporate executive but by a lower level employee, there was sufficient doubt as to whether the parties intended contract formation. Recognizing that its decision ran contrary to general policy encouraging arbitration, the court reiterated that its decision was fact

specific and that, "A naked assertion, however, by a party to a contract that it did not intend to be bound by the terms thereof is insufficient to place in issue 'the making of the arbitration agreement'. . ." 636 F.2d at 55.

The facts in Par-Knit raised the basic question of whether the purchaser had agreed to the contract as written. Here, the facts are fundamentally different. Plaintiff, who acknowledges he signed the agreement, now attempts to escape its provisions by contending he did not intend to be bound thereby but rather was only concerned with being able to make more margin purchases. A review of the arbitration clause shows that the clause is free of any ambiguity, clear in its scope, and could have been readily comprehended by plaintiff had he read it. It is fundamental Pennsylvania contract law that where the language of a contract is clear and unambiguous, the court is required to give effect to its language. And in the absence of proof of fraud, "failure to read the contract is an unavailing excuse or defense and cannot justify an avoidance, modification or nullification of the contract or any provision thereof." Standard Venetian Blind Co. v. American Express Ins., 469 A.2d 563, 567 (Pa. 1983) (quoting Olson Estate, 447 Pa. 483, 488, 291 A.2d 95, 98 (Pa. 1972)). In light of these principles, this is clearly a

situation which shows the making of an agreement to arbitrate and plaintiff is bound by the agreement he signed. Any challenge to the agreement, such as fraud in the inducement, may be decided by the arbitrator. See generally Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395 (where parties admitted contract formation, issue whether contract should be voided due to fraud in the inducement was for the arbitrators); Malison v. Prudential-Bache Securities, Inc., 654 F. Supp. 101 (W.D. N.C. 1987) (claims of unconscionability, illegality and duress are subject to arbitration); Arent v. Shearson/American Express, Inc., 633 F. Supp. 770 (D. Mass. 1985) (plaintiff admitted signing customer agreement but argued it was unenforceable as a contract of adhesion; court held that was an issue for arbitration).

C.

The next step in our analysis, then, is whether this specific controversy is subsumed by the arbitration agreement. The scope of the arbitration clause, as it appears on the face of the contract, is a question of law for our independent determination. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 723 F.2d 155, 159 (1st Cir. 1983) aff'd in part,

rev'd in part, 473 U.S. 620 (1985); see also Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 491 (1972) (citing Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962) (once court determines that parties are subject to an agreement to arbitrate "any difference," then a claim of laches is an arbitrable question)). On its face, the arbitration clause is broad in sweep. It is settled that such expansive clauses may cover not only disputes arising during the life of the agreement, but also those which arise from its demise. See Waddell v. Shriber, 348 A.2d 96 (Pa. 1975). Further, contrary to plaintiff's argument, the terms of the agreement to arbitrate are not limited to activities undertaken in the account after January 6, 1987. See generally Prester v. Shearson Lehman Bros., Inc., [1986-87 Transfer Binder] Fed.Sec.L.Rep. (C.C.H.) ¶ 92, 884 (D. Mass. 1986) (agreement to arbitrate applied retroactively). Moreover, the Supreme Court has recently determined in an unequivocal fashion that the very type of claims raised by plaintiff are subject to the sweeping terms compelling arbitration as set forth here. Ofelia Rodriguez DeQuijas v. Shearson/American Express, Inc., 109 S.Ct. 1917 (1989). We conclude, therefore, that this specific controversy is subject to the arbitration clause.

Accordingly, defendants' motion to compel plaintiff to submit this dispute to arbitration is granted. Defendants' motion to dismiss is denied as the Arbitration Act specifically directs the court to stay proceedings pending arbitration. 9 U.S.C. § 3. Finally, defendants' motion for sanctions against plaintiff for failing to timely abide by the agreement to arbitrate is denied. An appropriate order follows.

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and BRUCE BICKAR,)
Defendants.)

ORDER

Upon consideration of defendants' Motion to Compel Arbitration and the supporting memorandum filed therewith, IT IS HEREBY ORDERED that the plaintiff submit all claims contained herein to arbitration. IT IS FURTHER ORDERED that all further proceedings in this court are stayed pending the outcome of arbitration. IT IS FURTHER ORDERED that defendant Dean Witter's request for costs and/or sanctions associated with this matter are denied.

United States Magistrate

Dated: July 19, 1989

cc: The Honorable Alan N. Bloch
United States District Judge

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