

DOCKET NO.: HHD-CV21-6144098-S	:	SUPERIOR COURT
	:	
GRIST MILL PARTNERS, LLC	:	J.D. OF HARTFORD
	:	
v.	:	AT HARTFORD
	:	
CURALEAF, LLC	:	APRIL 8, 2022

MOTION TO STAY PENDING ARBITRATION

The Defendant, Curaleaf, LLC, respectfully moves to stay the instant case pending arbitration, all as more specifically set forth as follows.

FACTUAL BACKGROUND

Curaleaf, LLC is a Connecticut limited liability company formed in 2013, and is one of four (4) licensed marijuana growers in the State of Connecticut. On or about February 11, 2014, Grist Mill Partners, LLC, as Landlord and Curaleaf, LLC, as Tenant, executed a 5-year Lease Agreement (the “Lease”) for that certain real property located at 100 Grist Mill Road, Simsbury, Connecticut which Curaleaf used as a grow facility (the “Demised Premises”). Curaleaf, LLC was acquired by Palliatech, Inc. (now known as Curaleaf, Inc.), a Delaware corporation, in March 2017. Curaleaf operated its grow facility at the Demised Premises until it vacated in December of 2019.

Shortly after Curaleaf vacated the Demised Premises, Attorney Morris Borea, representing the Landlord, wrote to the Escrow Agent holding the Tenant’s Security Deposit on April 7, 2020, complaining about (1) mold accumulating in the property in the duration of the tenancy; (2) damage resulting in the removal of the HVAC; (3) damage to the walls, floors and exit doors; and (4) faulty lighting. These complaints differ substantially from the subsequent complaints in the

Landlord's December 19, 2018 letter (EXHIBIT G to the Complaint) and in the Landlord's June 25, 2021 Complaint.¹

The Plaintiff filed its Complaint dated June 25, 2021, alleging, *inter alia*, that Curaleaf violated various provisions of the Lease because it failed to restore the Demised Premises to Class A office space after vacating same.

However, Section 25.7 of the Lease expressly requires that in the event of a dispute between the parties thereto, the parties must attempt to resolve the dispute by negotiation, then the parties must proceed to AAA arbitration. Section 25.7 states, in pertinent part:

25.7. Dispute Resolution and Arbitration. In the event any dispute involving this Lease arises between the parties (excepting non-payment of rent), they shall negotiate a resolution of the dispute at a meeting of the principals called for that purpose. If the dispute cannot be resolved by negotiation, then the parties shall submit the matter to binding arbitration under the standard rules of the American Arbitration Association.

See Lease (attached to Plaintiff's Complaint as Exhibit E). Pursuant to the plain language of Section 25.7, the parties to this litigation have agreed to mediate this dispute, and to send the matter to arbitration if the mediation fails.

DISCUSSION

General Statutes § 52-409 states, in pertinent part: "If any action for legal or equitable relief or other proceeding is brought by any party to a written agreement to arbitrate, the court in which the action or proceeding is pending, upon being satisfied that any issue involved in the action or proceeding is referable to arbitration under the agreement, shall, on motion of any party

¹ The principal and chairman of Grist Mill Partners (the entity that owns 100 Grist Mill Road), which housed the Demised Premises, had been found guilty in 2008 of 19 counts of wire and mail fraud in Massachusetts, having been sentenced in February 2014 by U.S. District Court Judge George A. O'Toole to three (3) years in prison, and three (3) years of supervised release.

to the arbitration agreement, stay the action or proceeding until an arbitration has been had in compliance with the agreement, provided the person making application for the stay shall be ready and willing to proceed with the arbitration.”

To establish its right to a stay pursuant to General Statutes § 52-409, a moving party must establish the following facts: (1) that both it and the plaintiff in the action sought to be stayed are parties to a written arbitration agreement; (2) that at least one issue involved in the actions sought to be stayed is referable to arbitration under the agreement; and (3) that the movant is ready and willing to proceed with the arbitration. *Dime Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, X05CV094017091S, 2010 WL 628908, at *6 (Conn. Super. Jan. 14, 2010).

In evaluating the moving party’s motion for a stay, this Court should consider that “Connecticut law has long favored resolution of disputes by arbitration.” *Panamsat Corp. v. 20 Westport Holdings, LLC*, X08CV040199193, 2004 WL 944544, at *2 (Conn. Super. Apr. 12, 2004). To this end:

In cases where there are some doubts about whether an issue is arbitrable, those doubts should be resolved in favor of arbitration. Indeed, Connecticut courts have adopted the ‘positive assurance’ test, that is, unless a court can say with positive assurance that the arbitration provision is not susceptible to an interpretation that it covers a dispute, then the dispute should be submitted to arbitration.

See id. In fact, the Superior Courts have consistently granted motions to stay litigation pending arbitration where, as here, the actions sought to be stayed are referable to arbitration under the Agreement. *See Dime Bank*, 2010 WL 628908, at *9-10 (granting motion to stay litigation pending arbitration); *Panamsat Corp.*, 2004 WL 944544, at *3 (same); *Field v. AT&T Corp.*, CV030827266S, 2004 WL 615686, at *2 (Conn. Super. Mar. 12, 2004) (same); *Ostroske v. Lenkowski, Lonergan & Co.*, CV97137039, 1998 WL 61421, at *2 (Conn. Super. Feb. 4, 1998) (same).

In addition, “General Statutes § 52-409 requires the court to stay the action if ‘any’ issue is referable to arbitration under the written agreement. Therefore, the law requires a stay even if only part of the issues in the case are arbitrable.” *Panamsat Corp.*, 2004 WL 944544, at *2; *see Ostroske*, 1998 WL 61421, at *2 (Section 52-409 “requires a court to stay proceedings in any action brought by a party to an agreement to arbitrate if the court is satisfied that ‘any issue’ involved in the proceeding is referable to arbitration, and the party seeking the stay is ‘ready and willing’ to go to arbitration.”)

Here, this Court should stay this litigation pending arbitration because all parties to the litigation are parties to the Agreement, and at least one of the issues raised in the Complaint are referable to arbitration under Section 25.7 of the Lease. *See id.* Specifically, Count Four (breach of contract) and Count Five (declaratory judgment) of the Plaintiff’s Complaint are disputes arising out of the Lease. Thus, the law requires a stay even if this Court concludes that some of the issues raised in the Plaintiff’s Complaint are not arbitrable. *See id.*

In addition, the Defendants represent that they are ready and willing to commence arbitration. *See id.* Indeed, the parties to this litigation have already agreed to mediate this dispute, and they have further agreed that if the matter cannot be resolved by mediation, the case will be sent to arbitration. Under these circumstances, this Court must order a stay of this litigation pending arbitration pursuant to § 52-409. *See id.*

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Defendant respectfully moves that this motion to stay pending arbitration be granted.

**THE DEFENDANT -
CURALEAF, LLC**

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CERTIFICATION

I certify that a copy of the foregoing was or will immediately be mailed or delivered electronically or non-electronically on **April 8, 2022**, to all counsel and self-represented parties of record and that written consent for electronic delivery was received from all counsel and self-represented parties of record who were or will immediately be electronically served.

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2010 WL 628908

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.Superior Court of Connecticut,
Judicial District of Stamford-
Norwalk, Complex Litigation Docket.

DIME BANK et al.

v.

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

No. X05CV094017091S.

|

Jan. 14, 2010.

Attorneys and Law FirmsScott & Scott, LLP, Colchester, Guglielmo Joseph, New York,
NY, for Plaintiffs.Bingham McCutchen, LLP, Hartford, Hansen W. Steven,
Burke P. Timothy, Boston, MA, for Defendants.

BLAWIE, J.

Introduction

*1 This case involves allegations of fraud in the auction rate securities market and related causes of actions brought by a group of banks against a securities broker-dealer and several of its employees. All of the eleven plaintiffs are Connecticut-chartered banks that are FDIC-insured, and are banks which primarily do business within the state of Connecticut. The defendant, Merrill Lynch & Co., Inc., is a Delaware corporation. Its subsidiaries include the co-defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. (collectively, Merrill Lynch or the defendants). Among other businesses, Merrill Lynch acts as a broker-dealer for corporate and institutional clients in the purchase and sale of various securities. The remaining named co-defendants are individual Merrill Lynch bankers working out of offices in either Connecticut or New York.

The complaint sounds in six-counts as to all defendants: fraud, fraudulent inducement, a violation of General Statutes §§ 36b-4 and 36b-5 (the Connecticut Securities Law), negligent misrepresentation, fraudulent misrepresentation and rescission. The allegations center around the plaintiff banks' purchase of certain auction rate securities (ARS) marketed and sold to the plaintiffs by Merrill Lynch, and the inability of the plaintiffs to later sell or liquidate their positions in ARS when they attempted to do so, due to the failure of the auction market for such securities. Among other things, the complaint alleges that Merrill Lynch and its employees made untrue statements of material facts about the true liquidity of ARS, and failed to disclose to the plaintiffs that, "in the summer of 2007, the ARS market began a slow-motion implosion." (Complaint at ¶ 8.) This implosion allegedly culminated in an ARS market crash when Merrill Lynch and other broker-dealers stopped supporting the ARS auctions in early 2008, leaving the plaintiff banks collectively holding millions of dollars in illiquid assets. These assets are ARS that are alleged to have substantially depreciated in value. (Complaint at ¶¶ 8 and 9.)

While a total of eleven banks have joined this suit as plaintiffs, Merrill Lynch has filed this motion as to two of those plaintiff banks, Naugatuck Valley Savings & Loan (Naugatuck), and Putnam Savings Bank (Putnam).¹ Merrill Lynch contends that Naugatuck and Putnam are each obligated by separate written agreements to submit any disputes with Merrill Lynch, including the instant allegations, to industry arbitration. Because of these agreements, Merrill Lynch has now moved to dismiss the complaint against them brought in the name of Naugatuck and Putnam. Alternatively, Merrill Lynch has moved to stay the action as to both Naugatuck and Putnam, pending the arbitration of their respective claims, pursuant to the Federal Arbitration Act, § 2, 9 U.S.C. § 2, Connecticut General Statutes § 52-409,² and what Merrill Lynch asserts are contractual obligations to arbitrate. The plaintiffs contend that the arbitration agreements relied upon by Merrill Lynch are inapplicable and/or unenforceable. Because the defendants have moved for relief in the alternative, Part I of this decision addresses the defendant's motion to dismiss, and the requested stay is discussed in Part II.

*I.**The Motion to Dismiss*

*2 Merrill Lynch seeks dismissal of the Banks' claims against it on the grounds of subject matter jurisdiction. Merrill Lynch argues that the existence of the arbitration agreements as to each of the Banks deprives this court of subject matter jurisdiction. "Pursuant to the rules of practice, a motion to dismiss is the appropriate motion for raising a lack of subject matter jurisdiction." *St. George v. Gordon*, 264 Conn. 538, 545, 825 A.2d 90 (2003). "A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Gurliacci v. Mayer*, 218 Conn. 531, 544, 590 A.2d 914 (1991).

"Jurisdiction of the subject-matter is the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong ... A claim that [the] court lacks subject matter jurisdiction [may be raised] at any time ... Once the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented ... and the court must fully resolve it before proceeding further with the case ..." (Citations omitted; internal quotation marks omitted.) *Goldberg v. Goodwill Industries*, Superior Court, judicial district of Hartford, Docket No. CV 05 4009642 (January 3, 2006, Keller, J.).

"Standing ... implicates a court's subject matter jurisdiction, which may be raised at any point in judicial proceedings." *Stamford Hospital v. Vega*, 236 Conn. 646, 657, 674 A.2d 821 (1996). "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause." (Internal quotation marks omitted; citation omitted.) *Connecticut State Medical Society v. Oxford Health Plans, Inc.*, 272 Conn. 469, 475, 863 A.2d 645 (2005). "The plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." *Fink v. Golenbock*, 238 Conn. 183, 199 n. 13, 680 A.2d 1243 (1996). "The standard governing a trial court's review of a motion to dismiss is well established. In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Davis v. Environmental Commission*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 05 4007475 (January 26, 2007, Tobin, J.) [42 Conn. L. Rptr. 691].

In its memorandum of law in support of its motion to dismiss, Merrill Lynch acknowledges that a recent Appellate Court decision, *Catrini v. Erickson*, 113 Conn.App. 195, 967 A.2d 295 (2009), held that the existence of an arbitration agreement does not deprive the court of jurisdiction. (Defendants' Brief, p. 7 fn 6). This court appreciates the defendants' candor in admitting the existence of contrary authority. However, it is not persuaded by the defendants' efforts to distinguish that authority from the facts of this case. In *Catrini v. Erickson*, the plaintiff alleged that the defendants had made fraudulent representations to induce him to enter into a stock purchase agreement. The plaintiff further alleged that the defendants' actions violated the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. The defendants moved to dismiss the action on the ground that the court lacked subject matter jurisdiction, because the parties had signed a contract providing that they would submit any disputes arising from the agreement to final and binding arbitration.

*3 The trial court granted the motion to dismiss, and the Appellate Court reversed. In doing so, the *Catrini* court construed § 52-409, the statutory authority explicitly relied upon by the Merrill Lynch defendants in this case in support of their motion in the alternative to stay these proceedings. In reversing the trial court, the Appellate Court reasoned that, "[t]he fact that ... § 52-409 allows a court to enter a stay in a matter involving an arbitration agreement belies the defendants' claim, and the trial court's implicit ruling, that an agreement to arbitrate ousts the court of its subject matter jurisdiction. If the existence of an arbitration agreement in a contract implicated the court's jurisdiction to hear an action, then a court would, accordingly, not have jurisdiction to stay such a matter because, in the absence of jurisdiction, the court may only dismiss a matter. In short, because the power to order a stay implies that the court has jurisdiction over a matter, the legislature could not have empowered the court to enter a stay in such a matter unless the court has jurisdiction over it." *Catrini v. Erickson*, *supra*, 113 Conn.App. at 197, 966 A.2d 275.

Accordingly, because the existence of any arbitration agreements between Merrill Lynch and the Banks do not serve to divest this court of jurisdiction, the defendants' motion to dismiss the Banks' claims for lack of subject matter jurisdiction is hereby denied.

II.

The Motion to Stay

Turning now to the alternative relief sought by the defendants, Merrill Lynch has moved to stay these proceedings as to both Naugatuck and Putnam, due to the existence of prior written agreements to arbitrate between each of these Banks and Merrill Lynch. A discussion of some additional facts and circumstances is necessary for an analysis of this claim. In connection with the hearing held on the defendant's motion, the court received certain affidavits from corporate officers of Putnam, Naugatuck and Merrill Lynch, as well as attachments containing portions or complete copies of the agreements at issue. That each of the Banks engaged in securities transactions with Merrill Lynch is clear. That these agreements proffered were signed by both the Banks and Merrill Lynch there is also no serious dispute. What is in dispute between the parties is the scope of those agreements, more specifically the reach and applicability of the arbitration provisions in these agreements to the allegations in the complaint, namely, the purchase and sale of ARS. Among other arguments, the Banks contend these agreements were terminated prior to their purchase of ARS, and are unrelated to the allegations in the complaint.

Just as judicial review of an arbitrator's award is delineated by the scope of the parties' agreement; *State v. Connecticut State Employees Assn., SEIU Local 2001*, 117 Conn.App. 54, 978 A.2d 131 (2009); so too is judicial review of the arbitrability of a claim itself on a motion to stay also delineated by the scope of the parties' agreement. Therefore, the court will first turn to the relevant language of the agreements themselves. Each of the two Plaintiff Bank's particular agreements with Merrill Lynch must be considered separately for purposes of granting or denying Merrill Lynch's motion to stay their respective claims. The court will start with the earlier of the two contracts, namely, the 1987 agreement between Putnam and Merrill Lynch, followed by the 2002 agreement between Naugatuck and Merrill Lynch.

1. The Putnam Agreement with Merrill Lynch

*4 In February 1987, Putnam's predecessor, Putnam Savings Bank, entered into a Working Capital Management Account Agreement (P-WCMA Agreement) with Merrill Lynch. One of the components of the P-WCMA Agreement was a securities account in which Putnam could purchase, sell or hold securities. Paragraph 8 of the P-WCMA Agreement

is entitled, "Arbitration of controversies with MLPF & S [Merrill Lynch]." It reads in part as follows:

It is understood that the following agreement to arbitrate does not constitute a waiver by [Putnam] of the right to seek a judicial forum where such a waiver would be void under the federal securities law.³

[Putnam] agrees, and by carrying an account for [Putnam] [Merrill Lynch] agrees, that except as inconsistent with the foregoing sentence, all controversies which may arise in connection with the WCMA Program, including but not limited to any transaction or the construction, performance or breach of this or any other agreement between [Putnam and Merrill Lynch], whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration, and shall be governed by the laws of the State of New York.

Putnam argues that the above arbitration clause in Putnam's agreement with Merrill Lynch is limited to claims against Merrill Lynch arising from Putnam's WCMA Account.

2. The Naugatuck Agreement with Merrill Lynch

In September 2002, Naugatuck entered into an agreement with Merrill Lynch entitled "Working Capital Management Account Agreement." (N-WCMA Agreement). The terms of the N-WCMA Agreement are part of a 24-page "Agreement and Program Description Booklet" containing a cover sheet and table of contents, copyrighted in 2001 by Merrill Lynch. The N-WCMA Agreement itself constitutes the first 9 pages of the booklet. On the first page of the N-WCMA Agreement, the following language is found: "THE CUSTOMER [NAUGATUCK] HEREBY ACKNOWLEDGES THAT THE WCMA SERVICE WILL OPERATE SUBSTANTIALLY AS FOLLOWS, AND CONSENTS AND AGREES TO THE FOLLOWING TERMS AND CONDITIONS." (Emphasis in original.) After this language, the N-WCMA Agreement describes the WCMA service provided by Merrill Lynch as "an integrated financial service linking three components: (1) Securities Account; (2) a choice of several Money Accounts and; (3) a WCMA Check/Card Account."

The table of contents for the N-WCMA Agreement includes 17 separate headings for various terms and conditions, the last heading in the table of contents being a reference on page

9 to “Arbitration of Controversies with MLPF & S [Merrill Lynch].” Under that same arbitration caption on page 9, the N-WCMA Agreement contains the following language in part (bulleted points are in the original):

- Arbitration is final and binding on the parties.
- The parties are waiving their right to seek remedies in court, including the right to jury trial.
- Pre-arbitration discovery is generally more limited than and different from court proceedings.
- *5 • The arbitrators' award is not required to include factual findings or legal reasoning, and any party's right to appeal or to seek modifications of rulings by the arbitrators is strictly limited.
- The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

[Naugatuck] agrees that all controversies that may arise between [Naugatuck] and [Merrill Lynch], including but not limited to, those involving any transaction or the construction, performance or breach of this or any other agreement between [Naugatuck] and [Merrill Lynch], whether entered into prior to, on or subsequent to the date hereof, shall be determined by arbitration.” (Emphasis added.)

In addition to the N-WCMA Agreement, the court also received a copy of a separate “Certification of Authority and Execution of WCMA Agreement for Corporations” (the Authorization). The Authorization was signed in September 2002 by the senior management of Naugatuck, including its president and CEO, an executive vice president, a vice president, and the corporate secretary. The first paragraph represents that Naugatuck is duly authorized to open both a “WCMA Check/Card Account” and a “Cash Securities Account” with Merrill Lynch, the latter being “for the purchase and sale ... of stocks, bonds, options and/or other securities.” It also provides that “[t]he Securities Account and the WCMA Check/Card Account shall be governed by the terms and conditions as represented by pages 1 through 9 of the WCMA Agreement/Program Description Booklet.” Further on in the Authorization, Naugatuck “[does] hereby agree to the terms of the WCMA Agreement as represented by pages 1 through 9 provided to me by my financial advisor and acknowledge:

(1) That [Merrill Lynch] shall be entitled to fully rely upon the above certifications, representations and warranties ...

(2) That in accordance with Paragraph 16 on Page 9 of the WCMA Agreement, [Naugatuck] is agreeing in advance to arbitrate any controversies which may arise with [Merrill Lynch] ...

(4) Receipt of a copy of the WCMA Agreement consisting of 16 numbered paragraphs as of this date.

Naugatuck argues that paragraph 16, the arbitration clause in its agreement with Merrill Lynch cited above, and which is also specifically referenced in the Authorization signed by Naugatuck's senior management, is limited to the WCMA account, and is so all-encompassing and violative of public policy as to be unenforceable.

Naugatuck also argues that because it has no record of having received the arbitration agreement, and Merrill Lynch cannot prove they provided it, that Naugatuck cannot be compelled to arbitrate. The court is not persuaded. Even if Naugatuck cannot currently locate a copy of the N-WCMA agreement in their files, the absence of evidence from the parties on this score is not evidence of the absence of such terms. To the contrary, the Authorization signed by senior management in 2002 both clearly references the arbitration provision with Merrill Lynch, and explicitly acknowledges that Naugatuck received a copy of the N-WCMA Agreement, which spelled out its details.

Discussion

*6 “To establish its right to a stay pursuant to General Statutes § 52-409, [Merrill Lynch as the movant] must establish the following facts: (1) that both it and the plaintiff in the action sought to be stayed are parties to a written arbitration agreement; (2) that at least one issue involved in the actions sought to be stayed is referable to arbitration under the agreement; and (3) that the movant is ready and willing to proceed with the arbitration.” *American Materials Corp. v. Eagle Crusher, Co., Inc.*, Superior Court, judicial district of Hartford, Docket No. CV 03 0827738 (December 16, 2003, Sheldon, J.). It is the second prong of this three-part test, namely, whether or not the purchase and sale of ARS is referable to arbitration under the agreements which is at issue in this case.

Determining what promises exist requires reading the contracts and their identifying conditions. The first issue presented is whether, by contract language, the Banks manifested an intent to submit the instant disputes to arbitration. The first place to look to find the parties' intent is the language of the contracts, and words in a contract are to be given their ordinary meaning. As fact finder for purposes of this motion to stay, the court is tasked with fixing the terms and scope of the undertakings between the plaintiffs and defendants, and thereafter applying the law to those findings of fact. Ultimately, however, the court recognizes that "where there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." *Stevenson Lumber Co.-Suffield, Inc. v. Chase Associates, Inc.*, 284 Conn. 205, 218, 932 A.2d 401 (2007).

In this process, the court is first and foremost mindful of the principle of law that arbitration is a favored means of settling private disputes. *State v. Connecticut State Employees Assn., SEIU Local 2001*, *supra*, 117 Conn.App. at 54, 978 A.2d 131. This is neither a novel nor controversial principle. It is reiterated again and again in case law at both the state and federal level. "In Connecticut, arbitration is the favored means of settling differences ... It is designed to avoid litigation and secure prompt settlement of disputes and favored by the law ... [A] person can be compelled to arbitrate a dispute only if, to the extent that and in the manner in which, he has agreed so to do ... [A]rbitration and its scope remain dependent on the contract. The courts are empowered to direct compliance with the provisions of arbitration agreements, but no one may be compelled to arbitrate a dispute outside the scope of the agreement ..." (Citations omitted; internal quotation marks omitted.) *Goldberg v. Goodwill Industries*, *supra*, Superior Court, Docket No. CV 05 4009642. The question before this court on the motion to stay is whether the disputed allegations in the Banks' complaint are outside the scope of their respective agreements to arbitrate with Merrill Lynch. However, in light of case law and public policy, as is more fully discussed, *infra*, in order to sustain the plaintiffs' objection to the motion to stay, the answer to that question must be framed not merely as a balancing of interests, or as a "yes," but as a "positive assurance" admitting of no contrary conclusion. Any doubts must be resolved in favor of arbitration.

*7 "Judicial construction of an arbitration agreement, however, is not guided solely by the principles of relevant state contract law. The arbitration act; 9 U.S.C. §§ 1 through

16; governs written arbitration agreements that pertain to contracts involving interstate commerce. 9 U.S.C. §§ 1 and 2. The arbitration act creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the act ... As federal substantive law ... the arbitration act is to be applied by state courts as well as by federal courts ... [S]ee *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, [489 U.S. 468, 476 (1989)] (arbitration act requires state court, in applying general state law principles of contract interpretation, to give due regard to federal policy favoring arbitration)." *Levine v. Advest, Inc.*, 244 Conn. 732, 747, 714 A.2d 649 (1998).

"A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction ... [T]he intent of the parties [to a contract] is to be ascertained by a fair and reasonable construction of the written words and ... the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract ... Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity ... [C]ourts do not unmake bargains unwisely made. Absent other infirmities, bargains moved on calculated considerations, and whether provident or improvident, are entitled nevertheless to sanctions of the law ... Although parties might prefer to have the court decide the plain effect of their contract contrary to the agreement, it is not within its power to make a new and different agreement ... As stated by our Supreme Court, a presumption that the language used is definitive arises when ... the contract at issue is between sophisticated parties and is commercial in nature." (Citations omitted; emphasis added; internal quotations omitted.) *William Raveis Real Estate, Inc. v. Newtown Group Properties, LP*, 95 Conn.App. 772, 776-77, 898 A.2d 265 (2006). As to this last point in the case cited above, the court notes that *all* of the corporate entities, both plaintiffs and defendants, that are involved in this commercial litigation and which were signatories to the disputed agreements, are sophisticated parties.

The Banks further urge this court to void any arbitration clause in any agreements executed with Merrill Lynch on public policy grounds. "The question of public policy is ultimately one for resolution by the courts." *W.R. Grace &*

Co. v. Rubber Workers, 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983). It is based on a “general doctrine rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.” *Id.* “That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public’s interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.” (Internal quotation marks omitted.) *Ankerman v. Mancuso*, 79 Conn.App. 480, 830 A.2d 388 (2003), *aff’d*, 271 Conn. 772, 860 A.2d 244 (2004). In the common law of contracts, this doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements. However, it is not normally the court’s function to remake a contract, or to change the terms of a contract.

*8 This last point was made somewhat differently in a case involving the question of when a federal court may refuse to enforce an arbitration award rendered under a collective-bargaining agreement. The U.S. Supreme Court has cautioned that it is to be “limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.” (Internal quotation marks omitted.) *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

The problem with the Banks’ public policy argument is, as this court previously stated, and as the Connecticut Supreme Court recognized in *Levine v. Advest, Inc.*, *supra*, 244 Conn. at 732, 714 A.2d 649, that there exists a public policy favoring arbitration at both the state and federal level. The language of these agreements cited earlier is plain. As to both Putnam and Naugatuck, the Banks *by their agreement* chose not to restrict the scope of the type of controversies that may arise with Merrill Lynch that are required to be submitted to arbitration. There is no question that the arbitration language at issue in both instances is very broadly worded, particularly as to Naugatuck, and has, if you will, a “long tail.” However, it is what these sophisticated corporate parties agreed to at the time. In the absence of fraud in the making of a contract, or a showing of bad faith in obtaining the assent of a party to its terms, the courts, as noted earlier, cannot unmake bargains

that in hindsight turn out to be unwisely made from the perspective of one of the sophisticated parties to that bargain.

As the U.S. Supreme Court has stated, in determining the arbitrability of claims, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). In this area, the Connecticut Supreme Court, in a series of opinions, has adopted the “positive assurance” test which was articulated in an earlier U.S. Supreme Court case, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). The “positive assurance” test starts out with an acknowledged deference to arbitration, and is particularly helpful when faced with contractual provisions (like in this case) that fall within what the Supreme Court calls the “grey area of arbitrability.” Grey areas of arbitrability can arise from the imprecise wording or drafting of a contract itself, or from the reach and applicability of otherwise clear contract language to a set of circumstances. This case is most definitely an example of the latter.

*9 As to Putnam, the court rejects Putnam’s argument that the P-WCMA Agreement on its face requires arbitration of controversies *only* in connection with the WCMA program, as it also specifies that arbitration applies perforce to “breach of this *or any other agreement* between [Putnam] and [Merrill Lynch], whether entered into prior, on or *subsequent to the date hereof*.” (Emphasis added.) Naugatuck’s agreement, N-WCMA, is even more broadly worded. Besides articulating in bullet point form some of the differences between arbitration and civil litigation, it states: “[Naugatuck] agrees that *all controversies* that may arise between [Naugatuck] and [Merrill Lynch], including, but not limited to, those involving any transaction or the construction, performance or breach of this *or any other agreement* between [Naugatuck] and [Merrill Lynch], whether entered into prior to, on or *subsequent to the date hereof*, shall be determined by arbitration.” (Emphasis added.)

As previously noted, the WCMA accounts also covered the purchase and sale of securities through Merrill Lynch. Does this contract language cited apply if the Banks’ grievance, i.e., their purchase of ARS from Merrill Lynch, did *not* arise out of either Banks’ WCMA agreement with Merrill Lynch? A grey area indeed, but one in which the positive assurance test holds

the answer. “Under this test, judicial inquiry must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance. An order to arbitrate the particular grievance should not be denied 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.” (Emphasis in original.) *White v. Kampner*, 229 Conn. 465, 473, 641 A.2d 1381 (1994).

Unfortunately for the Banks, this “positive assurance” test is an insurmountable hurdle. While an argument can be certainly made, and the plaintiff Banks press it as adroitly as possible, that the language cited in the agreements should not extend to the ARS dispute, that the extinction of the WCMA accounts extinguished the arbitration clauses, it is also true that this unambiguous contractual language of “any other agreement” with Merrill Lynch reached after the date of the WCMA agreements is *readily* susceptible of an interpretation that would cover arbitration of the ARS dispute. Thus, this court cannot make the requisite finding with *positive assurance* in order for the Banks to prevail in their opposition to arbitration.

In addition, the court rejects the notion advanced by the plaintiffs that because this agreement language “could be construed so broadly as to have an ‘ad infinitum’ arbitration reach to all disputes;” (e.g., Plaintiffs’ Sur-reply, p. 8.); between the parties, “in perpetuity, forever;” (Plaintiffs’ Opp., p. 7); or even “fifty years from now;” (Plaintiffs’ Opp.’ p. 10); that it should be void as against public policy. While such words arguably could have such meaning in theory, the court is not acting “theoretically,” nor is it deciding whether or not

at some point (and not fifty years hence), under a different set of facts, the disputed arbitration language would cease to be applicable. The court’s decision should not be read as a blanket endorsement of the validity of such language in all circumstances. It is deciding the specific issue before it in light of the facts and circumstances of this case, that is, the actual business dealings between these sophisticated parties, and the legal framework (both substantive and procedural) it must apply in granting or denying the motion to stay, including a consideration of the Banks’ objections. In light of the “positive assurance” test, and the public policy favoring arbitration, including the resolution of doubts in its favor, the motion to stay as to both Banks must be granted.

Conclusion

*10 The evidence supports the conclusion as a matter of law that both Putnam and Naugatuck must arbitrate their claims as to the Merrill Lynch defendants.⁴ The motion to stay as to those two plaintiffs only (Naugatuck and Putnam) is hereby granted. The court denies the defendants’ request to stay this action in its entirety, limiting its order to the arbitrable claims of Putnam and Naugatuck. Accordingly, the complaint on behalf of the nine remaining bank Plaintiffs may proceed in Superior Court.

SO ORDERED.

All Citations

Not Reported in A.2d, 2010 WL 628908

Footnotes

- 1 Collectively, Naugatuck and Putnam may also be referred to herein as “the Banks.” The claims of the remaining nine plaintiff banks are *not* implicated by any prior arbitration agreements with Merrill Lynch, and due to the nature of the motion at issue, those other bank plaintiffs are not further discussed, *infra*.
- 2 General Statutes § 52-409 provides: “If any action for legal or equitable relief or other proceeding is brought by any party to a written agreement to arbitrate, the court in which the action or proceeding is pending, upon being satisfied that any issue involved in the action or proceeding is referable to arbitration under the agreement, shall, on motion of any party to the arbitration agreement, stay the action or proceeding until an arbitration has been had in compliance with the agreement, provided the person making the application for the stay shall be ready and willing to proceed with the arbitration.”
- 3 Putnam has not provided any authority for the proposition that this contractual arbitration provision is void under the federal securities laws.
- 4 This order granting the motion to stay also applies to the Banks’ claims against the individual Merrill Lynch defendants, as any claims against these agents or employees are also properly referable to arbitration under the principal’s agreement. See *Sordoni Skanska Construction Co., Inc. v. Charles Beckman Swanson Architects*, Superior Court, complex litigation docket at Waterbury, Docket No. CV X00 0161286 (May 11, 2001, Sheldon, J.) (30 Conn. L. Rptr. 189).

2004 WL 944544

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford-Norwalk.

PANAMSAT CORPORATION

v.

20 WESTPORT HOLDINGS, LLC et al.

No. Xo8CVo40199193.

|
April 12, 2004.

Attorneys and Law Firms

Ivey Barnum & O'Mara, Greenwich, for Panamsat Corp.

Zeldes Needle & Cooper, Bridgeport and Dechert Price &
Rhoads, Hartford, for Twenty Westport Holdings LLC.

Cummings & Lockwood, Stamford, for Advance Magazine
Publishers Inc.

Opinion

TAGGART D. ADAMS, Superior Court Judge.

***1** PanAmSat Corporation is a tenant in a commercial office building located at 20 Westport Roads in Wilton, Connecticut. PanAmSat and the defendant 20 Westport Holdings, LLC (Westport I) entered into a lease agreement in September 2000 whereby PanAmSat would lease a portion of the 20 Westport Road building from Westport I, the owner of the building.

At the time the original lease was signed, the building had not been fully constructed. The lease was amended three times and PanAmSat began paying rent for part of the leased space in July 2001 and for all of the leased space in October 2001. The building was sold, and the PanAmSat lease assigned to the new owner defendant Twenty Westport LLC (Westport II) in December 2001.

The gist of the PanAmSat complaint is that the defendants Westport I and Westport II, as landlords, have miscalculated, and hence overcharged PanAmSat for, certain expenses which are purportedly payable by PanAmSat over and above the

base rent. In Article 3 of the lease certain taxes and expenses are defined, and PanAmSat agreed to pay a share of these in proportion to the amount of space it was leasing in the building. These expenses and taxes are to be itemized and billed by the landlord in what the lease describes as an Additional Rent Statement.

In Paragraph 19 of the first count of its complaint, PanAmSat details the errors and miscalculations of the defendants. These include failure to provide timely, or any, information supporting the claimed additional expenses, failure to reimburse PanAmSat for incorrect charges and PanAmSat's audit costs to ferret out the errors, overstatement of expenses, overstatement of PanAmSat's proportionate allocation and general 'stonewalling' in dealing with PanAmSat's complaints.

PanAmsat's complaint has seven counts. The first count is for breach of contract. The second count is for breach of an implied covenant of good faith and fair dealing. The third, fourth and fifth counts allege fraud, negligent misrepresentation, and innocent misrepresentation respectively. The last two counts allege a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 41-110a et seq. (CUTPA) and breach of fiduciary duty. All counts incorporate the allegations of Paragraph 19 of the first count which are the factual allegations of wrongdoing underlying each count.

Westport I and Westport II have moved to stay this action pursuant to General Statutes § 52-409, pending the completion of arbitration. They contend that the dispute with PanAmSat involves additional rent payments under Article 3 of the lease and that Article 3.12 provides that:

[a]ny dispute relating to any Additional Rent Statement that is not resolved within 90 days after the rendering of such Additional Rent Statement may be submitted to arbitration pursuant to Article 37 ...

Article 37 calls for arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association. Both Westport I and Westport II state in their motions that they are ready and able to commence arbitration proceedings.

***2** PamAmSat opposes the motion to stay, contending among other things, that Article 3.12 is too narrow a provision to encompass this dispute and that the provision does not mandate arbitration.

Connecticut law has long favored resolution of disputes by arbitration. See e.g. *Metropolitan District Commission v. AFSCME, Council 4, Local 184*, 237 Conn. 114, 118 (1996). In cases where there are some doubts about whether an issue is arbitrable, those doubts should be resolved in favor of arbitration. *Fink v. Goldenbock*, 238 Conn. 183, 195 (1996). Indeed, Connecticut courts have adopted the ‘positive assurance’ test, that is, unless a court can say with positive assurance that the arbitration provision is not susceptible to an interpretation that it covers a dispute, then the dispute should be submitted to arbitration. *John A. Errichetti Associates v. Boutin*, 183 Conn. 481, 488-89 (1981). However, as the subject arbitration agreement is a matter of contract, no one and no entity can be forced to arbitrate a dispute if such is found to be outside the scope of what was agreed to in the arbitration agreement. *Fink v. Goldenbock*, *supra* 238 Conn. at 195; see also *White v. Kampner*, 229 Conn. 465 (1994).

PanAmSat contends that the arbitration provision in Article 3.12 only deals with Additional Rent Statements, and therefore, it has not contracted to arbitrate the issues in its complaint which contains tort, contract and statutory claims. There are two answers to this argument. First, a close reading of the complaint shows quite clearly that the actions of the defendants which give rise to all of PanAmSat's claims are the alleged imposition of unwarranted expense charges. These charges are contained in the Additional Rent Statements. Article 3.12 calls for arbitration of “any” unresolved dispute “relating to any Additional Rent Statement.” In the court's view the provision is broad enough to cover most, if not all, of PanAmSat's claim.

Second, PanAmSat appears not to contest that some of the claims are related to the Additional Rent Statements. General Statutes § 52-409 requires the court to stay the action if “any”

issue is referable to arbitration under the written agreement. Therefore, the law requires a stay even if only part of the issues in the case are arbitrable.

PanAmSat also argues that Article 37 of the lease only deals with disputes that are “required” to be arbitrated under the lease and arbitration of Article 3.12 disputes is not required since it says the disputes “may be submitted to arbitration.” PanAmSat points to other arbitration provisions in the lease (specifically Articles 23.2 and 2.7) which state that disputes “shall” be submitted to arbitration. The court concludes that there is not much distinction between “may” and “shall” in this case. With respect to Article 3.12, the dispute about what is the correct amount of Additional Rent might, in some cases, involve such a small amount that neither party wishes to contest it further and, if so, the amount on the Additional Rent Statement shall be paid. Therefore, the parties are not forced to arbitrate. However, once a party elects to arbitrate, as has been done here, the arbitration is required.

*3 Finally, PanAmSat has contended that since they allege they were fraudulently induced to enter the lease, they are not bound by the lease's arbitration provision. However, the complaint does not allege that Article 3.12 was fraudulently bargained for. Therefore, the arbitration provision is binding. *Two Sisters, Inc. v. Gosch & Co.*, 171 Conn. 493 (1976).

The motions to stay this action pending arbitration are granted.

So Ordered.

All Citations

Not Reported in A.2d, 2004 WL 944544

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2004 WL 615686

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

Stella M. FIELD et al.
v.
AT & T CORPORATION.

No. CV030827266S.

|
March 12, 2004.

Attorneys and Law Firms

Stella M. Field, Hartford, pro se.

Gregory M. Field, Hartford, pro se.

Day Berry & Howard, Hartford, for AT & T Corporation.

Opinion

WAGNER, JTR.

*1 The plaintiffs, Stella and Gregory Field, bring this two-count complaint against defendant AT & T, alleging breach of contract, fraud and negligence arising out of alleged failure to remedy a problem and to deliver a gift certificate, as well as negligence in terminating the plaintiff's phone service.

AT & T brings this motion to compel arbitration and dismiss or stay proceedings based on alleged contractual relationship between the parties under its Customer Service Agreement (CSA) distributed to all customers. AT & T argues that pursuant to the Telecommunications Act of 1996, which amended the Federal Communications Act of 1934, it was required to establish contractual relationships with its clients instead of filing tariffs with the FCC. To do this AT & T issued notices to all of its current clients of the changes and sent out "take it or leave it" contracts.¹ It is established in the record that AT & T did send Stella Field one of these notices and that the postal service did not report the notice to have been returned or forwarded.

AT & T argues that based on both Section 3 of the Federal Arbitration Act (FAA) and Connecticut General Statutes

§ 52-409, there is a "strong preference for arbitration" in Connecticut and that courts "routinely enforce arbitration agreements between individuals and corporations, such as banks, credit card issuers, brokerage houses, insurance companies, and computer manufacturers." Plaintiff claims that in the absence of a written contract, under Connecticut law, AT & T cannot compel arbitration.

No Connecticut case law has been drawn to our attention on the question of the enforceability of provisions set forth in public utility company announcements to consumers, with language to the effect that if the provisions are found objectionable, the consumer may reject the service. A recent law review article discussing "the proliferation of pre-dispute arbitration clauses in consumer contracts" which have been offered on "a take it or leave it" basis, indicates that courts either deny their validity because they are viewed as "unconscionable" or validate them under federal statutes or regulations. See e.g. "Arbitration Ethics-Is California the Future?" Jay Folberg, 18 Ohio St. J. Disp. Resol. 343 (2002-2003).

Three federal cases dealing with the issue in this have been cited by the parties:

In *Boomer v. AT & T Corp.*, 309 F.3d 404 (7th Cir.2002), the Seventh Circuit Court of Appeals held that AT & T's CSA (which is the same contract at issue in the present case) was a valid contract that could not be challenged by state laws because the federal government had preempted the telecommunications field through the Federal Communications Act of 1934, and the Telecommunications Act of 1996. Frank Boomer brought a class action suit against AT & T claiming that under Illinois law the arbitration clause in the CSA was unconscionable. The Court determined that the CSA was a valid contract with a proper offer, acceptance and consideration; that the notice letter contained clear language of an offer and that the plaintiffs' continuing service with AT & T amounted to an acceptance of the terms since AT & T was under no obligation to continue to provide the service.

*2 With respect to federal preemption, the court decided that the United States Congress did not intend to give up preemption when it enacted the Telecommunications Act of 1996, reasoning that the intent behind the 1934 act was to establish uniform terms and conditions of services across the country, and that if state law could be used to challenge the

arbitration clauses it would result in different service terms based on locality.

The U.S. District Court of Massachusetts followed the *Boomer* decision recently when confronted with the same arbitration clause of AT & T's CSA in *Kisala v. AT & T Corp.*, No. 02 CV 10752 MEL, Memorandum and Order dated Jan. 15, 2003 (D.Mass. Jan. 15, 2003), relying heavily on *Boomer*. AT & T's motion to compel arbitration was granted based on the finding that the plaintiffs had received the AT & T notice, that the notice constituted a proper contract, and that state law did not apply because the issue was preempted.

However, in *Ting v. AT & T Corp.*, 319 F.3d 1126 (9th Cir.2003), cert. denied, 124 S.Ct. 53, also involving AT & T's CSA, the Ninth Circuit reached the opposite conclusion. In *Ting*, the court criticized the *Boomer* decision and concluded that there is no federal preemption under the 1996 Act, and that state challenges to the CSA could be asserted. The court held that when the FCC deregulated telecommunication industry in 1996 the effect was to create a system that was more like a free market system that contemplates state law protections under state contract and consumer protection laws. The court went on to hold that under California's contract and consumer protection laws, the CSA was "unconscionable," on the fact that California's law defines unconscionable contracts as those which require a consumer either to agree to changes or to face cancellation of service.

Footnotes

- 1 The notice read in part: "IT IS IMPORTANT THAT YOU READ THIS ENTIRE SECTION CAREFULLY. THIS SECTION PROVIDES FOR RESOLUTION OF DISPUTES THROUGH FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY OR THROUGH CLASS ACTION. YOU CONTINUE TO HAVE CERTAIN RIGHTS TO OBTAIN RELIEF FROM A FEDERAL OR STATE REGULATORY AGENCY."

Following this language was a paragraph going into further detail:

All other disputes arising out of or related to this Agreement (whether based in contract, tort, statute, fraud, misrepresentation or any other legal or equitable theory) must be resolved by final and binding arbitration. This includes any dispute based on any product, service, or advertising having a connection with this Agreement and any dispute not finally resolved by a small claims court.

The *Boomer* and *Kisala* cases seem to be more persuasive concerning the federal preemption arguments, and these cases may reflect a trend for other federal circuits but both decisions rely heavily on the public policy favoring arbitration in cases of this kind. Connecticut also has a strong public policy favoring arbitration. *Salomon, Smith Barney, Inc. v. Cotrone*, 81 Conn.App. 904 (2004), and cases cited.

In granting this motion to compel arbitration, which is a fair, flexible and time-saving process for resolving the dispute in this case, we note that the "contract" relied on by AT & T is barely sufficient to justify this result even with the arbitration clause so prominently highlighted in the notice. Therefore, this decision cannot be relied on to justify the contractual acceptance of other conditions set forth by AT & T in its announcements, such as interest, late charges, etc, the resolution of which is governed by long established state requirements, without having the benefit of the favorable public policy in favor of arbitration.

Motion to Compel Arbitration and stay proceedings granted.

All Citations

Not Reported in A.2d, 2004 WL 615686, 36 Conn. L. Rptr. 674

1998 WL 61421

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut.

Kenneth L. OSTROSKE, et al.

v.

LENKOWSKI, LONERGAN
& CO., LLP, et al.

No. CV 97137039.

|
Feb. 4, 1998.

MEMORANDUM OF DECISION

SHORTALL, J.

*1 The plaintiffs in this action are partners in the defendant accounting partnership, along with the individual defendants. They have filed a seven-count complaint, alleging breach of fiduciary duty, fraud, tortious interference, unfair trade practices and civil conspiracy on the part of the individual defendants and seeking a judicial dissolution of the partnership, appointment of a receiver, an accounting, repayments by the defendants of alleged improper compensation and other payments from partnership assets and damages. The defendants have moved to compel arbitration and to stay proceedings pending arbitration.

Article IX of the partnership agreement contains the following language: "Any controversy between or among the Partners or any claim of any one or more of them ..., arising out of or relating to this contract ... shall be subject to arbitration." It is difficult to imagine a broader statement of the partners' agreement to submit disputes to arbitration, and, stripped to its essentials, the plaintiffs' complaint describes a series of disputes between them and their partners about such issues as management control, access to partnership books and records, improper uses of partnership assets and improper payments to other partners.

Nevertheless, the plaintiffs oppose the defendants' motion on several grounds. They claim that the defendants have waived their right to submit the disputes to arbitration because they did not file their motion to compel until six months after

the action was filed. If the disputes are arbitrable, however, the action should never have been brought, and I do not see how the relatively short delay in raising the issue should foreclose the defendants from having a determination of the basic question of arbitrability *vel non*. Cf. *A. Sangivanni & Sons v. F.M. Floryan & Co.*, 158 Conn. 467, 474-76, 262 A.2d 159 (1969).

The plaintiffs also claim that the allegations made in their complaint are beyond the scope of the arbitration clause in the partnership agreement. As indicated above, comparing the very broad language of the agreement with the *factual allegations* of the complaint, as opposed to its legal labels and conclusions, this does not seem to me to be the case. And, "the 'positive assurance' test of arbitrability ... is the law in this state ... Under the positive assurance test 'an order to arbitrate the particular [dispute] should not be denied 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.' " *Welch Group, Inc. v. Creative Drywall, Inc.*, 215 Conn. 464, 467, 576 A.2d 153 (1990), quoting *Board of Education v. Frey*, 174 Conn. 578, 582, 392 A.2d 466 (1978) (emphasis in original). The facts that the defendants have instituted separate collection actions against clients or former clients of the accounting firm and that one of the named defendants is now retired from the firm have no bearing at all on the arbitrability of the issues raised by the plaintiffs' complaint. See *A. Sangivanni & Sons v. F.M. Floryan & Co., Inc.*, *supra* at 474.

*2 Finally, the plaintiffs claim that they were fraudulently induced to enter into the partnership agreement; therefore, they should not be bound to the arbitration clause. The law is clear, however, that it is only if the inclusion of the arbitration clause, itself, was induced by fraud that a party to an agreement can avoid its application, and then only if that party is seeking to void the entire agreement as opposed to affirming it and suing for damages. See *A. Sangivanni & Sons v. F.M. Floryan & Co., Inc.*, *supra* at 471-73; *Fidelity & Deposit Co. of Maryland v. Hewitt*, Superior Court, Judicial District of Hartford/New Britain, Docket No. 93-523652 (June 29, 1995).

Section 52-409 of the General Statute *requires* a court to stay proceedings in any action brought by a party to an agreement to arbitrate if the court is satisfied that "any issue" involved in the proceeding is referable to arbitration and that the party seeking the stay is "ready and willing" to go to

arbitration. Since I am satisfied on both counts, I must and do stay all proceedings in this action, including all discovery proceedings. Pursuant to Section 52-410, C.G.S., I order the parties to proceed with the arbitration in compliance with their agreement.

The defendants' motion (# 107) is granted.

All Citations

Not Reported in A.2d, 1998 WL 61421, 21 Conn. L. Rptr. 339

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