IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

EDWARD H. ARNOLD, et al.,	:	DECEMBER TERM, 2010
Plaintiffs,	:	NO. 01099
v.	:	COMMERCE PROGRAM
CHENERY MANAGEMENT, INC., et al.	:	
Defendants.	:	

OPINION

Defendant Art Shaw appeals from this court's Order docketed on June 30, 2011, in which the court overruled Mr. Shaw's Preliminary Objections to the Amended Complaint. In his Rule 1925(b) Statement, Mr. Shaw raises two general categories of alleged error: 1) that the court found it has personal jurisdiction over Mr. Shaw;[1] and 2) that the court found there was no valid arbitration agreement executed by plaintiffs.

The arbitration issue was raised by several of Mr. Shaw's co-defendants by way of Motions to Compel Arbitration, which this court denied. Those co-defendants took appeals from the orders denying arbitration, and this court previously explained why it refused to compel plaintiffs to arbitrate their claims against defendants in an Appeal Opinion issued on October 11, 2011.[2] The court denied Mr. Shaw's demand for arbitration for the same reasons.

In addition to raising the arbitration issue, Mr. Shaw claimed in his Preliminary Objections that the court lacks personal jurisdiction over him because he is a California resident

[1] Upon Motion by Mr. Shaw, the court, by Order docketed on August 4, 2012, certified that Mr. Shaw's Preliminary Objections "present a substantial issue of jurisdiction within the meaning of Pennsylvania Rule of Appellate Procedure 311(b)(2)." Mr. Shaw filed an appeal from this Order as well.

[2] A copy of that Opinion is attached hereto as Exhibit A. The court apologizes for a slight error in that Opinion: this case was originally filed the United States Court for the Middle District of Pennsylvania, not the Eastern District.

who has conducted no activities in Pennsylvania.[3] Clearly, Mr. Shaw is not subject to general jurisdiction in this Commonwealth. The question is whether he may be subject to specific jurisdiction here based on his and the other defendants' activities giving rise to plaintiffs' claims in this action.

> A tribunal of this Commonwealth may exercise personal jurisdiction over a person . . . who acts directly or by an agent, as to a cause of action or other matter arising from such person:
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> * * *
>
> (4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.[4]

Plaintiffs allege that Mr. Shaw is liable for committing the torts of breach of fiduciary duty, negligence, negligent misrepresentation, fraud, and conspiracy to commit fraud against plaintiffs. Mr. Shaw was the President and Chief Executive Officer of defendant myCFO[5] and allegedly was actively involved in setting up and continuing myCFO's fraudulent tax scheme by which plaintiffs claim to have been harmed. His status as a corporate officer does not shield him from potential liability for tortious acts he committed in his corporate capacity, nor from this court's exercise of personal jurisdiction over him with respect to those acts.

> Pennsylvania law recognizes the participation theory as a basis of liability. [Under that theory] an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefor; but an officer of a corporation who takes no part in the commission of the tort committed by the corporation is not personally liable to third persons for such a tort, nor for the acts of other agents, officers or employees of the corporation in committing it, unless he specifically directed the particular act to be done or participated, or cooperated therein.[6]

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[3] *See* Preliminary Objections, ¶ 3.

[4] 42 Pa. C.S. § 5322.

[5] Mr. Shaw admits that he held this position at myCFO during the relevant time period. *See* Preliminary Objections, ¶ 6.

[6] Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 621-622, 470 A.2d 86, 90 (1983).

It appears that all the acts Mr. Shaw personally committed in furtherance of the fraudulent scheme occurred in California or otherwise outside of Pennsylvania. However, plaintiffs are residents of Pennsylvania, so they felt the economic harm caused by Mr. Shaw's alleged tortious acts in Pennsylvania. Furthermore, it is alleged that Mr. Shaw acted in concert with, and directed the activities of, several other defendants, including Chenery Management, Inc., Sidley Austin LLP, Grant Thorton LLP, and the Houlihan defendants, and of an employee of myCFO, Phil Groves, who actively promoted the fraudulent tax scheme to plaintiffs in Pennsylvania.[7] "When co-conspirators have sufficient contacts with the forum, so that due process would not be violated, it is imputed against the 'foreign' co-conspirators who allege that there [are] not sufficient contacts; co-conspirators are agents for each other."[8]

At this early stage in the proceedings, the court must accept the substantive allegations of the Amended Complaint as true; the court is not required to determine whether plaintiffs' claims of a conspiracy have merit before deciding whether jurisdiction may be exercised against a defendant.[9] Since plaintiffs have alleged that Mr. Shaw was actively involved in concerted tortious activity specifically aimed at residents of Pennsylvania who were damaged thereby, the Pennsylvania long-arm statute and constitutional due process are satisfied. Mr. Shaw is subject to specific jurisdiction in Pennsylvania with respect to the claims asserted against him in this action.

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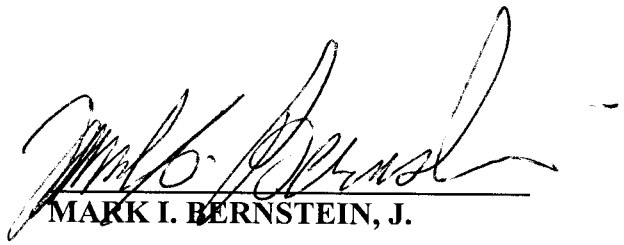
[7] *See* Amended Complaint, ¶¶ 33-38, 44, 50, 53, 55-56, 77. Mr. Shaw disclaims knowledge of the other defendants' wrongful acts, but as the President and CEO of myCFO he knew or should have known what his employees and agents were doing. *See* Shaw Affidavit attached to Preliminary Objections.

[8] Ethanol Partners Accredited v. Wiener, Zuckerbrot, Weiss & Brecher, 635 F. Supp. 15, 18 (E. D. Pa. 1985) (in a securities fraud case, the court found it had personal jurisdiction over a Missouri attorney based on the forum activities of his alleged co-conspirators).

[9] *See* Am. Bus. Fin. Servs. v. First Union Nat'l Bank, 2002 Phila. Ct. Com. Pl. LEXIS 93 (Phila. Co. 2002) (In finding personal jurisdiction over defendant based on an allegedly tortious email he sent, the court noted that "plaintiff will ultimately have to prove that its business relationships in Pennsylvania have in fact been harmed by [defendant's] conduct, but this determination is not presently before this court.")

For all the foregoing reasons, and for the reasons set forth in the attached Opinion regarding arbitration, the court respectfully requests that its Order of June 30, 2011, by affirmed on appeal.

Dated: June 29, 2012



MARK I. BERNSTEIN, J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

EDWARD H. ARNOLD, et al., Plaintiffs, v. CHENERY MANAGEMENT, INC., et al., Defendants.	December Term, 2010 No. 1099 1830 EDA 2011 1831 EDA 2011 1832 EDA 2011 1833 EDA 2011 1834 EDA 2011

OPINION

Defendant Harris myCFO, Inc.[1] appeals the order of this court dated June 15, 2011, denying its petition to compel plaintiffs Edward H. Arnold and Jeanne D. Arnold[2] to arbitrate their claims against the defendant and to stay proceedings in this suit pending that arbitration.

On July 14, 2010, plaintiffs filed this suit in the Federal District Court for the Eastern District of Pennsylvania, alleging Harris myCFO, Inc. and its codefendants defrauded plaintiffs by marketing an illegal tax shelter as a legitimate investment. The Eastern District Court dismissed plaintiffs' complaint for lack of diversity jurisdiction. Plaintiffs refiled their amended complaint in state court on December 13, 2010.

Plaintiffs' amended complaint alleged that defendant, Harris myCFO., Inc. in concert with codefendants, developed and marketed an investment vehicle based on buying distressed debt in South Korea. The amended complaint alleges that defendants claimed this would lead to substantial tax savings for plaintiffs. Plaintiffs claim that, on the contrary, as a result of their investment in this scheme they were the subject of an IRS audit which disallowed their claimed deductions and required plaintiffs to pay substantial penalties and back taxes.

[1] Defendant Harris myCFO, Inc. is the corporate successor to myCFO, Inc., the entity which originally contracted with Plaintiffs.
[2] Plaintiffs are husband and wife.

Plaintiffs contracted with defendant Harris myCFO, Inc. for "investment and estate planning services" by means of an Engagement Letter executed December 21, 2001.[3] The Engagement Letter engaged myCFO to provide consulting services concerning an investment in "distressed Asian securities."[4] Plaintiffs engaged defendant Chenery Associates to identify the specific securities and to structure the proposed investment.[5] The Engagement Letter identifies defendants Sidley, Austin, Brown & Wood and LeBouef, Lamb, Greene and MacRae, as law firms which would provide legal advice to Plaintiffs.[6] The Engagement Letter then outlines the structure of the investment and how specially created partnerships will trade the underlying debt.[7] The Engagement Letter contains extensive disclosures and disclaimers limiting the scope of defendant's advice and declaring plaintiffs' responsibility for all penalties.[8]

Plaintiffs and defendant 3Harris my CFO extensively negotiated several issues concerning the Engagement Letter prior to its execution.[9] Plaintiffs rejected Engagement Letter drafts which contained an arbitration provision.[10] Plaintiffs negotiated out of their agreement any arbitration provision.[11] The Engagement Letter drafted by defendant which was finally signed by plaintiffs was devoid of any arbitration provision.[12] However, the last paragraph of The Engagement Letter, entitled "Additional Provisions" reads:

> The terms and conditions set forth in the Professional Services Agreement governing tax planning/compliance, indemnity, liability limitations, arbitration and governing

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[3] Plaintiffs' Opposition to Defendant's Petition to Compel Arbitration, Exhibit 2 (Part 4).
[4] Id.
[5] Id.
[6] Id.
[7] Id.
[8] Id.
[9] Affidavit of Edward H. Arnold, ¶¶ 19-20, Plaintiff's Opposition to Defendant's Petition to Compel Arbitration, Exhibit 2 (Part 1).
[10] Id.
[11] Id. At ¶ 22
[12] Pls. Opposition to Defendant's Petition to Compel Arbitration, Exhibit 2 (Part 4).

> law shall be deemed incorporated herein in full and made a material part hereof.

Defendant claims that even though the Engagement Letter had no arbitration provision and despite the fact that this had been specifically negotiated out of the agreement, this provision incorporates a detailed arbitration provision in a separate Professional Services Agreement ("PSA") through the back door. In support of this claim, defendant offers a form PSA which does not contain plaintiffs' signatures. Presumably, the form supplied by defendant had been signed by someone else because there is a redaction on the signature line.[13] This form, which the Plaintiff had never seen before it was supplied to the Court, contains a four-paragraph section titled "Arbitration of Disputes." These paragraphs provide extensive scope, manner, conduct, finality and cost of arbitrating disputes.[14] These paragraphs further include a California choice of law provision.[15] The full text of the section reads:

> If you are, at any time, dissatisfied with any aspect of our engagement, this Agreement, or our Service, you should bring it to our attention immediately so that we can take steps to address your concerns promptly. In the unlikely event that we cannot resolve any such issues together, you and myCFO agree to submit and resolve by binding arbitration any claims or disputes between us and arising out of our agreement or services. Any such arbitration will be subject to the auspices of the American Arbitration Association and its commercial arbitration rules then in effect, and will be conducted by a neutral retired judge, practicing attorney, CPA or other professional of good standing with experience in the accounting, securities or financial services industries.
>
> The arbitrator shall have authority to award direct and compensatory damages only, and may not award punitive or exemplary damages unless (but only to the extent that) such damages are expressly required by law to be an available remedy for any of the specific claims

[13] Reply Brief in Support of Defendant Harris myCFO, Inc.'s Petition to Compel Arbitration, Exhibit B.
[14] Id.
[15] Id.

> asserted. Any such arbitration award shall be final, binding and non-appealable. Please understand that discovery, standards of evidence, procedural rules and rights of appeal differ in binding arbitration than in a civil trial or proceeding. Please also understand tha in agreeing to submit all claims or disputes to binding arbitration, you and myCFO are agreeing to waive and forego, to the fullest extent permitted by law, any right to a civil trial or adjudication of the claim or dispute, whether by a judge or a jury.
>
> California law will govern any claims or disputes between us, including any arbitration. We both also agree that that appropriate and exclusive jurisdiction and venue of any arbitration or proceeding between us to resolve any cause, claim or action arising from our engagement, this Agreement or our services, or our respective rights or obligations, shall be either (a) Santa Clara County, California or (b) the county and state in which is located the principal myCFO office providing the services which are the bases of cause, claim or actions. We shall share equally the fees and costs of the arbitrator.
>
> You should consider and weigh carefully the benefit to you of agreeing to this arbitration provision before signing this Services Agreement, and consult with your attorney if that would be helpful to you.

This form was never signed by plaintiffs, never agreed to by plaintiff, and never seen by plaintiffs before they learned that the investment vehicle did not provide any tax benefits.

Defendant presents affidavits from Harvey Armstrong, Managing Director of Harris myCFO, Inc., and Stephen M. Debenham, General Counsel of Harris myCFO, Inc.[16] These affidavits say nothing specific to plaintiff but attest only to company policy. These witnesses state that defendant's policy was to have new clients "execute" a standard engagement agreement which included an arbitration clause and they are not aware of any exceptions. However, this standard policy was not followed in this case. Defendant has not produced any

[16] Affidavits of Harvey Armstrong and Stephen M. Debenham, Reply Brief in Support of Defendant Harris myCFO, Inc.'s Petition to Compel Arbitration.

PSA signed by plaintiffs. An attorney for defendant, Hannah Blumenstiel, affirms that her law firm searched myCFO client files held by Sherwood Partners, LLC.[17] Ms. Blumenstiel found 275 PSA's signed by myCFO clients but failed to find any form signed by Plaintiffs.[18] Defendant does not claim that the PSA purportedly signed by plaintiffs was lost or destroyed. Plaintiffs never signed any arbitration agreement.

Plaintiffs present an affidavit by Edward H. Arnold.[19] Mr. Arnold states he never discussed any "Professional Services Agreement."[20] He says he did discuss arbitration of disputes and refused to sign until defendants agreed to eliminate any arbitration provision. Mr. Arnold further states that he did not sign, nor was he even shown, any arbitration agreement.[21] Mr. Arnold states that he had specifically rejected several drafts of the Engagement Letter which contained an arbitration requirement. He states he explicitly objected to the language requiring him to arbitrate disputes.[22] Mr. Arnold further says he would not have accepted any arbitration provision.[23]

Defendant offers only an unexecuted form contract, repudiated by plaintiffs, and affidavits that state that its policy is to get a signed agreement. The Court finds that after refusing any arbitration provision, Plaintiffs entered into an engagement agreement that did not require arbitration.

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[17] Affidavit of Hannah L. Blumenstiel ¶ 4, Reply Brief in Support of Defendant Harris myCFO, Inc.'s Petition to Compel Arbitration.
[18] Id.
[19] Affidavit of Edward H. Arnold, Plaintiffs' Opposition to Harris myCFO's Petition to Compel Arbitration, Exhibit 2 (Part 1).
[20] Id. at ¶¶ 23 and 26.
[21] Id. at ¶ 23.
[22] Id. at ¶ 20.
[23] Id. at ¶ 27.

The Federal Arbitration Act[24] establishes a strong federal policy in favor of arbitrating disputes.[25] That policy requires that state law treat arbitration agreements no differently from other contracts.[26] Nonetheless, agreements to arbitrate are governed by state contract law.[27] Pennsylvania contract law is in accord with Federal law and does not present any conflict. In fact, Pennsylvania law reflects the same policy of favoring arbitration as Federal law.[28]

In Highmark, Inc., v. Hospital Service Association of Northeastern Pennsylvania, the Pennsylvania Superior Court held that the focus of a court's inquiry in a contract dispute must be on enforcing the parties' intent as manifested by their agreement. The Superior Court stated:

> in determining whether parties have agreed to arbitrate, courts should apply the rules of contractual construction, adopting an interpretation that gives paramount importance to the intent of the parties and ascribes the most reasonable, probable, and natural conduct of the parties.[29]

Of course parties may incorporate arbitration provisions found in a separate document by reference.[30] However, where there has been no meeting of the minds, no arbitration agreement has been created.[31] To compel arbitration in this case, there must have been a contract that incorporated the PSA's arbitration provision into the engagement letter.[32] The evidence presented demonstrates there was never any agreement to arbitrate at all, certainly without question there could not possibly have been any agreement to the extent of detail contained in the exemplar form never signed by plaintiffs.

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[24] 9 U.S.C. § 1 *et seq.*
[25] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
[26] AT&T Mobility v. Conception, 131 S. Ct. 1740, 1747 (2011), Preston v. Ferrer, 552 U.S. 346, 353 (2008).
[27] 9 U.S.C. § 2. See also, Conception, 131 S. Ct. at 1746.
[28] See, 42 P.S. § 7303, Highmark, Inc. v. Hosp. Serv. Ass'n of Northeastern Pa., 785 A.2d 93, 98 (Pa. Super. 2001).
[29] 785 A.2d at 98.
[30] Incorporation by reference can be effective to bring referenced terms into the four corners of a written contract. However, for incorporation to accrue all incorporated terms must have a reasonably clear and ascertainable meaning.
[31] Waverton Transp. Leasing, Inc. v. Moran, 834 A.2d 1169, 1172 (Pa.Super. 2003).
[32] Worman v. FedEx Ground Package Sys., Inc., 76 Pa. D. & C.4th 292, 298 (Lehigh Ct. Com. Pl. 2005).

The claim that defendant had an unalterable policy requiring an arbitration agreement is contradicted by clear and specific factual evidence. In the face of factual, specific testimony that arbitration requirements were specifically negotiated out of any agreement, generalized incorporation policy is inadequate rebuttal. Defendant's policy is an internal expectation. This policy does not demonstrate any actual assent in the face of clear, unambiguous and detailed testimony to the contrary. Edward Arnold's affidavit contradicts that the parties acted in conformity with the policy as described in defendant's affidavits.[33] There was no agreement to arbitrate disputes.

Defendant's own affidavits belie its claim to have incorporated any arbitration requirement into the Engagement Letter. The affidavits of defendant's general counsel and managing director declare an unalterable policy that all new clients separately execute a PSA document.[34] The company did not rely on incorporation of an unsigned PSA.

Defendant presented no proof that plaintiff ever agreed to arbitrate in any form. Plaintiff offered a clear and direct repudiation of arbitration under oath. The court finds as fact that plaintiffs never agreed to arbitrate any dispute which might arise with the defendant.

Defendant's Petition to Compel Arbitration was properly denied and should be upheld on appeal.

Defendants who are non-parties to any agreements between plaintiffs and defendant Harris myCFO also claim their disputes should be referred to arbitration as third party beneficiaries. This court need not determine whether Pennsylvania law permits a "third party

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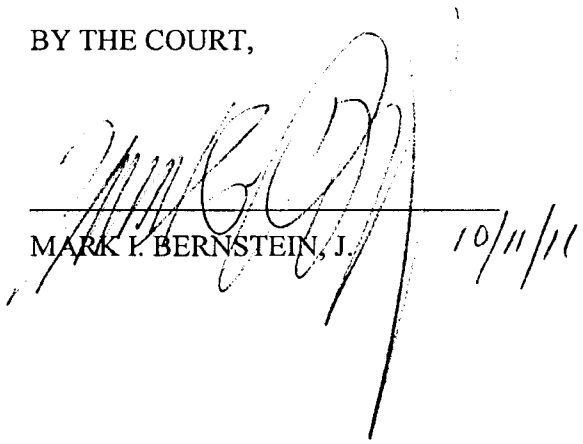
[33] Affidavit of Edward H. Arnold ¶¶ 20-27. Defendant asked the Court to infer that because defendant's policy was to have clients sign a similar PSA containing an arbitration agreement and its officers cannot recall any deviations from that policy, the arbitration provision that the defendant offers must be incorporated into the engagement agreement. The Court cannot draw any such inference when the record contains evidence of extensive negotiations concerning arbitration and a total and explicit rejection of any arbitration by the plaintiff.

[34] Affidavit of Harvey Armstrong ¶ 2 and Affidavit of Stephen Debenham ¶¶ 3-5.

beneficiary" to piggyback onto a different party's agreement because in this case there was no primary agreement to arbitrate. Therefore, all claims to compel arbitration have been properly denied.

BY THE COURT,



MARK I. BERNSTEIN, J. 10/11/11