

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

CHILDREN’S SERVICES, INC.,	:	JULY TERM, 2001
Plaintiff,	:	
v.	:	No. 1627
	:	
RAYMOND FULLMAN	:	Commerce Program
and SALOMON SMITH BARNEY, INC.,	:	
Defendants.	:	Control No. 082220

ORDER

AND NOW, this 24th day of October, 2001, upon the consideration of the Petition to Compel Arbitration of Defendants Raymond Fullman and Salomon Smith Barney (“Defendants”) and the response of Plaintiff Children Services, Inc., (“CSI”) thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Petition to Compel Arbitration is GRANTED;
2. The Plaintiff is hereby COMPELLED to submit all claims pending in this action to arbitration, pursuant to the terms of the Account Application and Client Agreement between the parties;
3. All proceedings in this Court against Defendants are hereby STAYED, pending the resolution of Plaintiff’s claim in such arbitration.

BY THE COURT:

JOHN W. HERRON, J.

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Defendants.	:	Control No. 082220

MEMORANDUM OPINION

Presently before this court is the Petition to Compel Arbitration of Defendants Raymond Fullman and Salomon Smith Barney (“Defendants”) and the response of Plaintiff Children Services, Inc., (“CSI”) thereto. For the reasons set forth below, the Petition to Compel Arbitration is granted, CSI is hereby compelled to submit all of its claims to arbitration, and all proceedings in this court against Defendants are hereby stayed, pending the resolution of such arbitration.

BACKGROUND

This dispute arises from financial services provided to CSI by Defendants. In its complaint filed on July 13, 2001, CSI alleges, *inter alia*, that Defendants negligently liquidated its brokerage account causing CSI damages. On August 31, 2001, Defendants filed this Petition to Compel Arbitration pursuant to the arbitration clause contained within the Client Agreement to which CSI was a signatory.

DISCUSSION

The standard of review for a petition to compel arbitration is well established. When there is a dispute as to whether arbitration should be compelled “judicial inquiry is limited to determining (1) whether a valid agreement to arbitrate exists between the parties and, if so, (2) whether the dispute involved is within the scope of the arbitration agreement.” Midomo Company, Inc. v. Presbyterian Housing Development Co., 739 A.2d 180, 186 (Pa. Super. 1999). See also Santiago v. State Farm Insurance Co., 453 Pa. Super. 343, 683 A.2d 1216, 1217-18 (1996). Thus, when considering a petition to compel arbitration, a court may not consider the merits of the dispute. Mesa v. State Farm Insurance Co., 433 Pa. Super. 594, 641 A.2d 1167, 1168 (1994).

As the Pennsylvania Supreme Court observed, agreements to settle disputes by arbitration are not only valid but favored by state statute. Borough of Ambridge Water Authority v. Columbia, 458 Pa. 546, 328 A.2d 498, 500 (1974). Interpretation of an arbitration provision is controlled by rules of contractual construction. The primary object is to discern the intent of the parties as set forth in the language of the contract. In so doing, a court should consider “the four corners of the contract and its express language.” Hazleton Area School District v. Bosak, 671 A.2d 277, 281 (Pa. Cmwlth. 1996).

In its petition, Defendants allege that a valid arbitration agreement exists and that the current controversy is within the scope of the agreement. When CSI opened its brokerage account with Solomon Smith Barney, Defendants allege that CSI entered into an agreement which specifically required the arbitration of all controversies arising under the agreement. Def’s Mem of Law at 1. This Client Agreement, signed by CSI’s President, states in pertinent part:

I agree that all claims or controversies, whether such claims controversies arose prior, on or subsequent to the date hereof, between me and SB and/or any of its present or former officers, directors, or employees concerning or arising from (i) any account maintained by me with SB individually or jointly with others in any capacity; (ii) any transaction involving SB or any predecessor firms by merger, acquisition, or other

business combination and me, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, any duty arising from the business of SB or otherwise, shall be determined by arbitration before, and only before any self-regulatory organization or exchange of which SB is a member.

See Def's Petition to Comp. Arb. Exh. A. Further, the Defendants allege that all of CSI's claims arise out of account transactions pursuant to the Client Agreement. Therefore, "this subject matter squarely fits within the scope of the arbitration agreement to which plaintiff agreed." Def's Mem of Law at 5. CSI however, disagrees.

CSI contends that the arbitration clause is unenforceable as there was no mutual assent to the terms of the Client Agreement. Not only, is it alleged, did CSI never sign the Client Agreement, but that the agreement entered into between Smith Barney and CSI was an oral agreement. Pl's Reply Mem. of Law at 3. Further, CSI alleges that the arbitration clause is unenforceable because Mr. John Griswold, CSI's President, "has no recollection whatsoever of signing such an agreement." Id (citing to Affidavit of John Griswold). Given this lack of recollection, and that Mr. Griswold's mother's maiden name is incorrectly identified in the agreement, CSI alleges that a question of fact is raised as to whether CSI even entered into this agreement. Id at 4. Therefore, having never agreed to an arbitration provision, CSI argues it should not be compelled to go to arbitration. Id. This court disagrees.

To begin with, this court finds that CSI is bound to the terms of the Client Agreement.¹ Pa.R.C.P. 206.7 (c) states that if "an answer is filed raising disputed issues of material fact" further discovery may be granted. Here, however, this court finds no disputed issues of material fact and shall therefore "decide the petition on the petition and answer." Pa.R.C.P. 206.7 (b). To begin with, the

¹ In its answer, CSI also alleges that even if Mr. Griswold signed the Client Agreement, he did not have the corporate authority to do so. Since this court finds, for the reasons mentioned above, that CSI is bound to the arbitration provision in the Client Agreement, it is unnecessary to address this issue.

notion that Mr. Griswold “does not recall” signing the agreement is irrelevant and of no legal consequence. The Pennsylvania Superior Court found a similar argument unpersuasive in Dollar Bank, FSB v. Northwood Cheese Co, 431 Pa. Super. 541, 637 A.2d 309 (1994). There, the Superior Court agreed with the trial court’s inability to find a meritorious defense to a petition to open and/or strike a confessed judgement. There the appellants argued that the confessed judgement was improper because there was evidence that the party did not sign the agreement. However, where the party testified that “she did *not recall* signing the... document” but yet she “does *not deny* her signing... the document,” the court held that this mere lack of recollection was not a meritorious defense to strike a confessed judgment. Dollar Bank, 431 Pa. Super 541, 550, 637 A.2d 309, 313 (emphasis added). Alternatively, where an “appellant testified that she did not sign [an]... agreement; that it was not her signature on the document; that she did not authorize anyone to sign for her; and that she did not appear before any notary,” the Pennsylvania Supreme Court has held that this *was* sufficient evidence to open a confessed judgement. Reliance Insurance Company v. Liberati, 489 Pa. 591, 414 A.2d 1049 (1980).²

Although this case is not a petition to open judgment by confession, this court finds the principals and reasoning espoused in Dollar Bank and Liberati to be analogous to the present case.

² This court also finds persuasive the series of cases cited by Defendants generally upholding arbitration of claims despite arguments of not being able to recall signing the arbitration agreements. See generally Gilmore v. Shearson/American Express, Inc., 668 F.Supp. 314 (S.D.N.Y. 1987); McEntee v. Ormes Capital Markets, Inc., 1995 WL 716734 (S.D.N.Y. 1995); Paul Revere Variable Annuity Ins. Co. v. Zang, 248 F.3d 1, 8-9 (1st Circ. 2001). Although decisions of federal courts are not binding, Pennsylvania state courts have found them to have persuasive authority. Hutchinson v. Luddy, 763 A.2d 826, 837 n.8 (Pa.Super.Ct. 2000); In re Insurance Stacking Litig., 754 A.2d 702, 705 (Pa.Super.Ct. 2000). See also Moore v. Sims, 442 U.S. 415, 429 (1979) (stating that “[s]tate courts are the principal expositors of state law”).

Unlike in Liberati, here CSI merely alleges that Mr. Griswold does not recall signing the Client Agreement. No where in CSI's answer does Mr. Griswold state that he did not sign the document, deny that it is his signature, or even suggest whose signature it could possibly be on the Client Agreement. In fact, Mr. Griswold's affidavit reiterates the fact that he merely has "no recollection of signing this document." Affidavit of John Griswold at 1. As in Dollar Bank, where the court did not find a meritorious defense in a party's inability to recall signing a document, similarly, this court finds that the fact that Mr. Griswold "does not recall" signing the Client Agreement does not rise to the requisite level of materiality in Pa.R.C.P. 206.7 (c). Therefore, applying the standard of review to this petition, this court compels CSI to submit all its claims to arbitration. Here, it already has been resolved that the Client Agreement contains a valid arbitration clause between the parties. Further, the dispute involved is clearly within the scope of the arbitration agreement. CSI's claims, namely negligence and breach of fiduciary duty, arise directly from the alleged liquidated brokerage account CSI maintained with Solomon Smith Barney. Thus, pursuant to the Client Agreement, CSI must submit all such claims to arbitration. Moreover, in considering the "four corners" of this Client Agreement and applying all the rules of contractual construction, this court sees no reason why CSI should not be bound by the Client Agreement.³

³CSI also alleges that the Client Agreement is "rife with fraud" since Mr. Griswold's mother's maiden name in the space provided for in the agreement is incorrect. Pl.'s Resp. to Def's Reply at 2, 3. CSI alleges that this error alone raises "a question as to the genuineness of the signature and the Client Agreement." Id at 2. Although CSI alleges that this is "an important fact," this court finds this particular fact irrelevant as to whether CSI should be compelled to honor its obligations pursuant to the Client Agreement and arbitrate its claims. This fact does not rise to the level of materiality identified in Pa.R.C.P. 206.7 (c) since such "bald unsupported assertions of conclusory accusations cannot create genuine issues of material fact." Nationwide Mt. Ins. Co. v. Lehman, 743 A.2d 933, 937 (Pa. Super 1999).

CONCLUSION

For the reasons set forth above, the Defendant's Petition to Compel Arbitration is granted, CSI is hereby compelled to submit all of its claims to arbitration, and all proceedings in this court against Defendants are hereby stayed, pending the resolution of such arbitration.

BY THE COURT:

JOHN W. HERRON, J.

Date: October 24, 2001