

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

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| DAVID E. STERN, | : JANUARY TERM, 2002 |
| | : |
| Plaintiff, | : No. 0571 |
| | : |
| v. | : Commerce Program |
| | : |
| PRUDENTIAL FINANCIAL, INC. d/b/a | : |
| PRUDENTIAL SECURITIES, INC., et al., | : |
| | : SUPERIOR COURT DOCKET |
| Defendants. | : NO. 6 EDA 2003 |

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OPINION

Albert W. Sheppard, Jr., J. February 4, 2003

This Opinion is respectfully submitted in support of this court’s Order, dated November 21, 2002, which sustained the preliminary objections of defendant Prudential Securities, Inc.¹ (“Prudential”), dismissing the Complaint and ordering that the action proceed to arbitration.

For the reasons set forth, this court respectfully requests that its Order be affirmed.

FACTS

The operative facts may be briefly summarized. On January 11, 1993, plaintiff David E. Stern, Esquire (“Stern”) and Prudential entered into a contract called the Command Client Agreement, under which Stern opened an account with Prudential and Prudential provided brokerage services to Stern. Preliminary Objections, ¶ 6 and Ex. D. Defendant Kenneth Cohen (“Cohen”) was a licensed securities

¹ Defendant Prudential Securities states that it was erroneously identified in the Complaint as Prudential Financial, Inc. See Preliminary Objections, p.1, n.1.

broker who worked for Prudential. Complaint, ¶ 4. Cohen advised Stern regarding his account at Prudential and investment in certain securities. Complaint, ¶¶ 6-11, 13, 16.

On May 1, 2002, Stern² filed a complaint against Prudential and Cohen, asserting the following causes of action: Unsuitability of Recommended Investments (Count I); Breach of Fiduciary Duty (Count II); Fraud, Conversion and Negligence (Count III); Breach of Contract (Count IV); Violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (Count V); Failure to Supervise Cohen (Count VI); Breach of Contract as to Prudential Only (Count VII).

Prudential filed preliminary objections to the Complaint. Prudential asserted that the Complaint should be dismissed because the dispute should be arbitrated in accordance with the arbitration provision contained in the parties' Command Client Agreement.³ Stern, in response, maintained that the arbitration provision was invalid and unenforceable, and that the dispute did not fall within the scope of the arbitration provision.

By Order dated November 21, 2002, this court sustained Prudential's preliminary objections, dismissed the Complaint, and ordered that the case proceed to arbitration.

² Robert Stern and Marcy Greenstein were named plaintiffs when this action was commenced by writ of summons, but they withdrew prior to the filing of the complaint and advised Prudential that they intended to pursue their claims in arbitration. Preliminary Objections, ¶ 4; Plaintiff's Response to Preliminary Objections, ¶ 4.

³ Prudential states that other than the Command Client Agreement, Stern entered into two other written agreements in which he agreed to arbitrate all disputes arising from the breach of those agreements and from transactions between the parties. Prudential's Memorandum of Law In Support of Preliminary Objections, Exs. 1 and 2.

This court did not consider those agreements, however, because they pre-date the Command Client Agreement.

DISCUSSION

The issue presented is whether the arbitration clause embodied in the Command Client Agreement should be enforced. It is established law that when the dispute is 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 provision.” Midomo Co., Inc. v. Presbyterian Housing Development Co., 739 A.2d 180, 186 (Pa. Super. 1999) (citation omitted). See also Santiago v. State Farm Ins. Co., 453 Pa. Super. 343, 346, 683 A.2d 1216, 1217 (1996) (citation omitted). Our Commonwealth Court has counselled:

Arbitration is a matter of contract and, as such, in construing the language of an arbitration provision, courts must resort to the rules of contractual construction. The language of a contract should be construed with the intent of the parties as the paramount consideration. In order to determine the intent of parties to a contract, a court should look to the four corners of the document and its express language.

Hazleton Area School District v. Bosak, 671 A.2d 277, 281-82 (Pa. Commw. 1996) (citations omitted).

Pennsylvania courts favor the settlement of disputes by arbitration. Goral v. Fox Ridge, Inc., 453 Pa. Super. 316, 321, 683 A.2d 931, 933 (1996). However, a party may waive the right to enforce an arbitration provision. Id. (citation omitted). Our Superior Court has stated with regard to waiver:

A waiver of the right to proceed to arbitration may be expressly stated, or it may be inferred from “a party’s undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary.” Samuel J. Marranca General Contracting Co., Inc. v. Amerimar Cherry Hill Associates Limited Partnership, 416 Pa. Super. 45, 49, 610 A.2d 499, 501 (1992). Waiver “should not be lightly inferred[,] and unless one’s conduct has gained him an undue advantage or resulted in prejudice to another he should not be held to have relinquished the right.” Kwalick v. Bosacco, 329 Pa. Super. 235, 238, 478 A.2d 50, 52 (1984).

Goral, 453 Pa. Super. at 321, 683 A.2d at 933.⁴

Here, it is undisputed that Stern and Prudential entered into the Command Client Agreement.

Preliminary Objections, ¶ 6; Plaintiff's Response to Preliminary Objections, ¶ 6. It is also undisputed that the Command Client Agreement contains an arbitration clause, which states:

16. ARBITRATION / GOVERNING LAW

- Arbitration is final and binding on the parties.
- The parties are waiving their rights to seek remedies in court, including the right to jury trial.
- Pre-arbitration discovery is generally more limited than and different from court proceedings.
- The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification 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.

Unless unenforceable under applicable law, any controversy arising out of or relating to Client's accounts, to transaction with PSI [Prudential Securities Incorporated] for Client, or to this Agreement or the breach thereof, and whether executed in or outside the United States, shall be settled by arbitration pursuant to the Federal Arbitration Act before either the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc. or any other self-regulatory organization of which PSI is a member, as Client may elect and under the then existing arbitration procedures of the forum Client has elected. If Client does not make the above election by registered mail addressed to PSI at its main office within five days after demand by PSI that Client make such election, then PSI may make such election. The foregoing shall apply to controversies with any of PSI's present or former employees or affiliates relating to Client's accounts and transactions with PSI. Notice preliminary to, in conjunction with, or incident to arbitration, may be sent to Client by mail, and personal service is hereby waived. Judgment upon any award rendered by the arbitrators may be entered in any court of competent jurisdiction. This Agreement shall be governed by the laws of the State of New York, and shall inure to the benefit of PSI's successors and assigns, and shall be binding on the undersigned, Client's representatives, attorneys in-fact, heirs, executors, administrators and assigns.

⁴ Typically, the issue of waiver of an arbitration provision arises within the context of a defendant's failure to raise it as a defense to an action. However, this court believes that the principles of waiver apply equally within the context of a defendant's alleged modification of the arbitration provision.

Preliminary Objections, Ex. D, ¶ 16. Prudential relies on this provision urging that Stern's claims must be arbitrated.

In response, Stern contends that Prudential waived the arbitration provision.⁵ Response to Preliminary Objections, ¶ 6(i). In support, Stern states:

Respondent and Cohen, the agent of Prudential, modified and negated the terms of the document as it pertained to any obligation to arbitrate whereby Respondent orally advised Cohen and his supervisor, Steven Moore, that he was not bound by the document. In the alternative, Cohen, while acting within the scope of his employment, waived compliance with the arbitration clause and Prudential is bound by his actions.

Response to Preliminary Objections, ¶ 6(i). Further, Stern submitted an affidavit attached to his memorandum of law in opposition to preliminary objections in which he stated:

On various occasions in 1999 and 2000, Plaintiff had oral communications with Kenneth Cohen and/or Steven Moore. It is believed that Mr. Moore was the manager of the Prudential Securities branch in Philadelphia, Pennsylvania. Mr. Moore was also believed to be Cohen's supervisor. In the context of said discussions with Cohen and/or Moore, Plaintiff became very agitated concerning certain letters mailed to Plaintiff by Prudential indicating that his purchase of certain securities was "unsolicited." The letters further demanded that Plaintiff sign documents acknowledging that his purchase of specified securities were "unsolicited." Plaintiff vehemently contested the statements set forth in the letters in that Cohen had solicited Plaintiff to purchase said securities. As such, Plaintiff refused to execute the non-solicitation letters.

In the course of said discussions with Cohen and/or Moore, Plaintiff threatened to "pull his account" from Prudential and to bring appropriate legal action to protect his interests. Plaintiff made it clear he would only agree to continue to retain the services of Prudential under circumstances whereby Plaintiff did not waive any right or remedy, including the right to commence court action against Prudential for its wrongful conduct. Prudential through Cohen and Moore, acquiesced to Plaintiff's position and as a consequence thereof, Plaintiff continued to maintain his account at Prudential thus deriving Prudential a substantial benefit relating to fee income generated from Plaintiff's account activity.

Prudential could have refused to accept the conditions imposed by Plaintiff pertaining to

⁵ Interestingly, Stern's Complaint fails to cite the Command Client Agreement, or include claims that an arbitration provision had been waived or modified.

the modification of the Client Command Agreement. In the alternative, Plaintiff believes that Prudential's failure to terminate the relationship constituted a modification of the Client Command Agreement and negated the enforceability of any arbitration clause.

Stern's Memorandum of Law In Opposition to Preliminary Objections, Ex. B, ¶ 5.

In reply, Prudential denied waiver of the arbitration provision and submitted the affidavit of Stephen M. Moore, currently the Regional Sales Manager and First Vice President of Prudential, and formerly the branch manager for Prudential's Philadelphia branch office. Prudential's Reply In Support of Preliminary Objections, Ex. A, ¶¶ 1-2. Moore stated that "contrary to the assertions set forth in paragraph 5 of Mr. Stern's affidavit, [Moore] never discussed with David Stern his alleged right to pursue legal action against [Prudential] in court," and that Moore had "not had any discussions with Mr. Stern regarding his obligation to arbitrate disputes with [Prudential]." *Id.* at ¶¶ 4-5. Furthermore, Moore stated that he "never agreed, on [Prudential's] behalf, to any modifications of Mr. Stern's contractual obligation to arbitrate disputes with [Prudential], nor would [he] have been authorized to do so." *Id.* at ¶ 6. Thus, Moore unequivocally denies any waiver of the arbitration provision.

In a sur-reply, Stern reasserted his argument that Prudential waived the arbitration provision. This time, Stern submitted the affidavit of Kenneth Cohen, a named defendant in this action who had previously worked for Prudential and whose employment was terminated. Stern's Supplemental Reply In Opposition to Preliminary Objections, Ex. A; Complaint, ¶ 55. Cohen's affidavit states:

I believe the statements set forth in Mr. Moore's affidavit are inaccurate in that I can confirm that I had conversations with David Stern concerning his receipt of "non-solicitation" notices.

I recollect at least one conference call with David Stern and Stephen Moore whereby Mr. Stern objected to the non-solicitation letters and threatened to bring legal action against Prudential. I further recollect that David Stern was going to terminate his relationship with Prudential Securities and bring legal action unless the non-solicitation letters ceased.

Stern's Supplemental Reply In Opposition to Preliminary Objections, Ex. A, ¶¶ 3-4. Therefore, Cohen confirms that there was at least one discussion regarding Stern's expressed intent to bring legal action unless Prudential stopped sending non-solicitation letters. But, Cohen never confirms that he, Moore, or anyone else at Prudential waived the arbitration provision, or otherwise modified the Command Client Agreement.

These affidavits by Stern, Moore and Cohen attest to clear and specific facts, but they do not evidence that Prudential waived the arbitration provision.⁶ A waiver of the right to arbitrate may be inferred from "a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary." Marranca, 416 Pa. Super. at 49, 610 A.2d at 501. The facts, as attested to in the three affidavits, do not reveal that Prudential acted to waive its arbitration provision, or even that one of its employees attempted to do so. Furthermore, Stern is not unduly prejudiced in that he has a forum for the resolution of his claims, and it is the forum that he agreed to in choosing to maintain an account at Prudential. This court heeds the Superior Court's admonition in Kwalick, 329 Pa. Super. at 238, 478 A.2d at 52, that waiver of an arbitration provision should not be lightly inferred. This court finds that the arbitration provision in the Command Client Agreement was not waived.

Aside from waiver, Stern argues that the arbitration provision is invalid for a host of additional reasons. First, Stern asserts that the arbitration provision violates the Plain Language Consumer Contract Act, 73 P.S. § 2210, *et seq.* Response to Preliminary Objections, ¶ 6(a). This Act states that it does not apply to contracts to buy securities or to documents used by financial institutions. 73 P.S. § 2204(4) and

⁶ Our Superior Court has held that a lower court may consider an affidavit for the determination of preliminary objections, other than a demurrer, where the facts attested to in the affidavit are clear and specific. Slota v. Moorings, Ltd., 343 Pa. Super. 96, 100, 494 A.2d 1, 3 (1985); See also Mellon Bank, N.A. v. Fabinyi, 437 Pa. Super. 559, 567, 650 A.2d 895, 899 (1994).

(5). Based on these two exceptions, the Act does not encompass the Command Client Agreement. Furthermore, even assuming it was appropriate to apply the Act to the arbitration provision, no violation would exist because the arbitration provision's terms are undeniably clear and understandable.⁷

Next, Stern argues that the Command Client Agreement violates the Pennsylvania Unfair Trade Practices and Consumer Protection Act, 73 P.S. § 201-1. Response to Preliminary Objections, ¶ 6(b). In fact, Count V of the Complaint asserts that Prudential has violated this Act. The merits of this claim, along with the other claims, should be resolved in arbitration. It would be inappropriate for this court to consider the merits of this claim at this stage because judicial inquiry is limited to determining whether a valid agreement to arbitrate exists between the parties and, if so, whether the dispute involved is within the scope of the arbitration provision. Midomo, 739 A.2d at 186. Moreover, Stern provides no support for the argument that a claim pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Act cannot be arbitrated.

Stern also argues that the arbitration provision is ambiguous. Response to Preliminary Objections, ¶ 6(c). Based on the language of the arbitration provision, this court disagrees. Stern argues that the Command Client Agreement is voidable, constitutes a contract of adhesion, and lacks consideration. Response to Preliminary Objections, ¶ 6(d), (e), (f). These arguments are dismissed, however, because Stern failed to assert any support for this list of reasons why the agreement which he signed is invalid.⁸

⁷ In addition, in response to Stern's focus on the legibility of the copy of the Command Client Agreement attached to preliminary objections, this court notes that it is able to read the arbitration provision in its entirety.

⁸ In Huegel v. Mifflin Construction Co., Inc., 796 A.2d 350, 357 (Pa. Super. 2002), our Superior Court analyzed the plaintiffs' argument that an arbitration provision was unconscionable because the contract constituted a contract of adhesion. The Court stated that to find a contractual provision unconscionable, the court "must determine both that the contractual terms are unreasonably

Stern next argues that Prudential Securities Incorporated was not a party to the agreement and that instead, he entered into an agreement with Prudential Bache Securities, Inc. Response to Preliminary Objections, ¶ 6(g). However, the Command Client Agreement refers to Prudential Securities Incorporated as being a party to the agreement. Preliminary Objections, Ex. D.⁹ Stern also asserts that enforcement of the agreement is barred by the statute of limitations. Response to Preliminary Objections, ¶ 6(h). This court disagrees. Stern has failed to set forth any support otherwise. Thus, despite these arguments, this court finds that the arbitration provision set forth in the Command Client Agreement is valid and enforceable.

The remaining question is whether Stern's causes of action fall within the scope of the arbitration provision. The provision states that "any controversy arising out of or relating to Client's accounts, to transaction with PSI [Prudential Securities Incorporated] for Client, or to this Agreement or the breach thereof, and whether executed in or outside the United States, shall be settled by arbitration." Preliminary Objections, Ex. D, ¶ 16.

The causes of action asserted by Stern pertain directly to the management, investment activity and supervision of his accounts at Prudential. Count I, Unsuitability of Recommended Investments, states that Prudential and Cohen recommended that Stern purchase securities without advising him of the risks involved. Complaint, ¶¶ 12-24. Count II, Breach of Fiduciary Duty, states that Prudential and Cohen breached their fiduciary duty to Stern by failing to inform Stern of the risks involved in buying certain

favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions." *Id.* (citation omitted). As in Huegel, Stern failed to explain how the arbitration provision is unreasonably favorable to Prudential.

⁹ Moreover, Prudential explains that Prudential Bache Securities, Inc. was the predecessor of Prudential Securities, Inc., and in 1991, when Stern originally dealt with Prudential, he dealt with Prudential Bache Securities, Inc. Prudential's Memorandum of Law In Support of Preliminary Objections, p. 2.

securities, omitting material information concerning the securities, along with other breaches. Complaint, ¶¶ 25-35. Count III, Fraud, Conversion and Negligence, states that Prudential and Cohen's actions constituted a conversion of Stern's property in his account and that their actions constituted reckless indifference or gross negligence. Complaint, ¶¶ 36-38. Count IV, Breach of Contract, states that Prudential and Cohen breached their implied obligation of good faith and fair dealing in handling Stern's account. Complaint, ¶¶ 39-40. Count V, Violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, states that Prudential and Cohen violated the Act when they bought and sold securities for him. Complaint, ¶¶ 41-44. Count VI, Failure to Supervise Cohen, states that Prudential breached its duty to Stern by failing to adequately supervise Cohen in permitting him to purchase unsuitable securities for Stern. Complaint, ¶¶ 45-53. Count VII, Breach of Contract as to Prudential Only, states that Prudential has breached its duty to Stern by failing to advise him about the investments in his accounts since the time that Cohen's employment at Prudential was terminated. Complaint, ¶¶ 54-65. This court submits that all of these claims fall within the scope of the arbitration provision.

Based on the existence of a valid agreement to arbitrate, and the fact that the claims involved fall within the scope of the arbitration provision, this case is properly arbitrable.

CONCLUSION

For these reasons, it is respectfully submitted that this court's Order dated November 21, 2002, should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.