

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

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|-------------------------|---|----------------|
| Richard Wheeler, Jr.,   | : |                |
| Plaintiff,              | : |                |
|                         | : |                |
| v.                      | : | CIVIL ACTION   |
|                         | : | NO. 98-CV-3200 |
| A & M Industrial Supply | : |                |
| Co., Inc., and Arnold   | : |                |
| Young, and David Young, | : |                |
| and Creative Design     | : |                |
| Technologies,           | : |                |
| Defendants.             | : |                |

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MEMORANDUM OF DECISION

McGlynn, J. \_\_\_\_\_, 1998

Before the court is a motion by Defendants A & M Industrial Supply Co., Inc. ("A & M"), Arnold Young, David Young and Creative Design Technologies ("Creative Design") to stay the proceedings pending arbitration, to transfer the action to the U.S. District Court for the District of New Jersey, or to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The motion to stay pending arbitration will be granted.

**I. FACTUAL BACKGROUND**

A & M employed the plaintiff, Richard Wheeler, Jr. ("Wheeler"), starting in June 1989. See Compl. ¶ 16. On January 28, 1992 Wheeler signed a Restrictive Covenant and Arbitration

Agreement ("Agreement"). See Defs.' Mot.<sup>1</sup> Ex. A. The Agreement provides that Wheeler and A & M agreed to arbitrate "any controversy, dispute, or difference arising out of or relative to [Wheeler's] employment with A & M, including statutory claims and anything relating to this Agreement or the breach thereof[.]" Defs.' Mot. Ex. A at 5. Excepted from the arbitration provision, however were breaches or threatened breaches of the restrictive covenants not to compete, not to interfere and not to disclose. See Defs.' Mot. Ex. A at 3-5. The Agreement also provides that the laws of the State of New Jersey will govern the agreement and that the courts of the State of New Jersey have jurisdiction "[w]here court action is warranted[.]" Defs.' Mot. Ex. A at 5. Wheeler alleges he worked for A & M in Pennsylvania. See Compl. ¶ 14. He stopped working for A & M on September 19, 1997. See Defs.' Mem.<sup>2</sup> at 2.

On May 22, 1998 this action was filed by Wheeler against A & M, Arnold Young, David Young and Creative Design in the Philadelphia County Court of Common Pleas and removed to this

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<sup>1</sup> Defendants' Motion to Stay Proceedings Pending Arbitration, to Transfer This Action to the District of New Jersey or, in the Alternative, to Dismiss Plaintiff's Claims Pursuant to Federal Rule of Civil Procedure 12(b)(6) will be referred to as "Defs.' Mot."

<sup>2</sup> Defendants' Memorandum in Support of Defendants' Motion to Stay Proceedings Pending Arbitration, to Transfer this Action to the District of New Jersey or, in the Alternative, to Dismiss Plaintiff's Claims Pursuant to Federal Rule of Civil Procedure 12(b)(6) will be referred to as "Defs.' Mem."

court by defendants on federal question grounds (preemption by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq.)

Arnold Young and David Young are officers of A & M. See Compl. ¶¶ 3, 4. The dispute arises from incidents that occurred before, during and after Wheeler's employment with A & M. Wheeler alleges that A & M, Arnold Young and David Young reneged on several promises and agreements made to induce Wheeler to work for A & M and made during Wheeler's employment. See Compl. ¶¶ 16-22. He also claims that during his employment they coerced him into purchasing stock. See Compl. ¶ 23. They allegedly promised to pay Wheeler \$1,000 if he were to lose money from his stock purchase. See Compl. ¶ 24. When he did lose money, however, they failed to pay. See Compl. ¶ 25. Wheeler alleges that A & M, Arnold Young, David Young and Creative Design coerced Wheeler into using Creative Design to obtain a contractor who later performed substandard work on Wheeler's house. See Compl. ¶¶ 27-31, 64, 69. Moreover, Wheeler claims they wrongfully altered the contractor's bill. See Compl. ¶ 78(c),(d).

Wheeler also claims that A & M, Arnold Young and David Young improperly retained Wheeler's personal belongings after Wheeler's employment. See Compl. ¶ 26. Finally, Wheeler alleges that A & M, Arnold Young and David Young made defamatory and slanderous statements about Wheeler. See Compl. ¶¶ 101-04.

The complaint contains seventeen counts.<sup>3</sup> Counts numbered one through seven generally refer to alleged breaches of promises and agreements made before and during employment. Counts numbered eight through seventeen generally refer to incidents surrounding Wheeler's hiring of a contractor to work on Wheeler's home. Count eighteen refers to statements made by A & M, Arnold Young and David Young about Wheeler after his employment.

A & M is a defendant in counts numbered one through seven, twelve, and eighteen. Arnold Young and David Young are defendants in all counts. Creative Design is a defendant in counts numbered eight through seventeen.

Following removal to this court Defendants moved the court to stay the proceedings pending arbitration, stay the proceedings and transfer it to the U.S. District Court for the District of New Jersey or, in the alternative, dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

## II. DISCUSSION

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<sup>3</sup> Wheeler labeled the counts negligent misrepresentation (Count I), punitive damages (Count II), civil conspiracy (Count III), indemnification (Count IV), breach of contract (Count V), unjust enrichment (Count VI), fraud and fraudulent misrepresentation (Count VII), fraud and fraudulent misrepresentation (Count VIII), negligent misrepresentation (Count IX), conversion (Count X), breach of contract and warranties (Count XI), unjust enrichment (Count XII), indemnification (Count XIII), civil conspiracy (Count XV), punitive damages (Count XVI), breach of contract and warranties (Count XVII) and libel and slander (Count XVIII). The complaint has no Count XIV.

Defendants rely on the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. enacted by Congress "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S.Ct. 1647, 1651, 114 L.Ed.2d 26 (1991). The FAA applies to arbitration agreements in employment contracts. See Great Western Mortg. Corp. v. Peacock, 110 F.3d 222, 226-27 (3d Cir. 1997), cert. denied, Peacock v. Great Western Mortg. Corp., \_\_\_ U.S. \_\_\_, 118 S.Ct. 299, 139 L.Ed.2d 230 (1997). Under the FAA, the court must be convinced that the parties agreed to arbitrate. See Great Western, 110 F.3d at 228; Paine Webber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990). A narrow inquiry is conducted to determine whether an agreement to arbitrate exists, and if so, whether the agreement is valid. See 9 U.S.C. § 2; Great Western, 110 F.3d at 228. After this inquiry, the court shall stay an action if an issue in the case refers to arbitration under the arbitration agreement. See 9 U.S.C. § 3; Paine Webber, 921 F.2d at 511. A strong presumption in favor of arbitration exists, and doubts "concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-42, 74 L.Ed.2d 765 (1983).

#### **A. The Agreement's Validity**

Wheeler does not contest the existence of the agreement or that it is a transaction involving interstate commerce. Wheeler argues that the Agreement is invalid. See Wheeler's Reply<sup>4</sup> at 2-5. Under section 2 of the FAA, state law governs issues of contract validity. See Doctor's Assocs., Inc. v. Cassaroto, 517 U.S. 681, 684, 116 S.Ct. 1652, 1655, 134 L.Ed.2d 902 (1996) (quoting Perry v. Thomas, 482 U.S. 483, 492, n.9, 107 S.Ct. 2520, 2526, n. 9, 96 L.Ed.2d 426 (1987)).

### **1. Applicable Law**

Here, the court initially must decide whether Pennsylvania or New Jersey law governs. In diversity cases, the court must apply the choice of law rules of the state in which the federal court sits to determine which state law to use. See Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). However, the basis for jurisdiction in this case is not diversity, but ERISA.

ERISA preempts all state laws insofar as they "relate to" ERISA plans. 29 U.S.C. § 1144(a). The sweep of ERISA's express preemption clause is expansive. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987). State statutory and common law causes of action relate to an ERISA plan if they have a connection with or reference to such a

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<sup>4</sup> Wheeler's Reply to Defendants' Motion to Compel Arbitration will be referred to as "Wheeler's Reply."

plan. Id. If the existence of an ERISA plan is a critical factor in establishing liability under the state law and the court's inquiry must be directed to the plan, the action relates to an ERISA plan and is preempted. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139-140, 111 S.Ct. 478, 482-83, 112 L.Ed.2d 474 (1990). State laws may "relate to" an ERISA plan even if they were not created to affect it, Pilot Life, 481 U.S. at 47-48, or the effect is merely indirect. Ingersoll-Rand Co., 498 U.S. at 138-39. Despite its broad scope ERISA does not preempt Pennsylvania's choice of law rules because they do not relate to ERISA plans. Therefore, the court will apply them to determine which law governs.

Defendants argue the Agreement has a choice of law clause which provides that New Jersey law applies to the Agreement. See Defs.' Letter Reply Br. at 3. When parties have a contractual choice of law provision, Pennsylvania courts generally comply with the parties' will and apply the law designated in the contract so long as the law chosen has a reasonable relationship to the parties or the transaction. See Kruzits v. Okuna Mach. Tool, Inc., 40 F.3d 52, 55 (3d Cir. 1994); see also Northwestern National Life Ins. Co. v. U.S. Healthcare, Inc., No.CIV.A.96-4659, 1998 WL 252353, at \*4 (E.D.Pa. May 11, 1998) (upholding the choice of law provision requiring the application of Georgia law because the subject of the agreement was the solicitation of

sales of products in Georgia); Lang Tendons, Inc. v. The Great S.W. Mktg. Co., No. CIV. A. 90-7847, 1994 WL 159014, at \*3 (E.D.Pa. Apr. 25, 1994) (refusing to uphold the choice of law provision requiring New York law because the contribution cause of action was never contemplated to be performed in New York); see generally Restatement 2d of Conflict of Laws § 187 for the relevant rule. If the parties or the transaction bear a reasonable relationship to New Jersey, the court will apply New Jersey law.

Here, A & M is a New Jersey corporation. See Compl. ¶ 2. Arnold Young and David Young are officers of A & M and reside in New Jersey. See Compl. ¶ 3, 4; Arnold Young Aff. ¶¶ 4-6. Creative Design has its principal place of business in New Jersey. See Compl. ¶ 9. Wheeler resides in New Jersey. See Compl. ¶ 1. The parties and the Agreement clearly bear a reasonable relationship to New Jersey. Therefore, New Jersey law governs the Agreement.

## **2. Wheeler's Invalidity Claims**

Wheeler argues the Agreement was fraudulently induced, is an adhesion contract and lacks mutuality because A & M did not tell him of the Agreement's lack of mutuality. See Wheeler's Reply at 2-5. The court in Kalman Floor Co., Inc. v. Muscarelle, Inc., 196 N.J. Super. 16, 481 A.2d 553, 555 (1984), aff'd 98 N.J. 266, 486 A.2d 334 (1985), determined that mutuality of remedy under an

arbitration clause is not required in New Jersey law. See Id. The court in Kalman Floor concluded no inherent unfairness exists in enforcing a contractual clause which gave one party the right to compel arbitration. Id. at 560.

Wheeler relies on the decision of the Eleventh Circuit Court of Appeals in Hull v. Norcom, Inc., 750 F.2d 1547 (11th Cir. 1985), to persuade the court that a lack of mutuality shows fraudulent inducement and an adhesion contract. See Wheeler's Reply at 2-5. The court in Hull determined that the arbitration clause in an employment contract was invalid because the mutual obligation to arbitrate required by New York law was abrogated. Hull, 750 F.2d at 1550-51.

The instant case is distinguishable. The arbitration agreement in Hull excepted from arbitration any breach of the terms and conditions of the agreement. Hull, 750 F.2d at 1550. Here, the Agreement only permits A & M to sue Wheeler in court for breaches or threatened breaches of three restrictive covenants. See Defs.' Mot. Ex. A at 3-5. All other disputes involving Wheeler's employment must be arbitrated. Moreover, New York law does not apply here.

Therefore, Wheeler's lack of mutuality defense is without merit. New Jersey law does not require mutuality of remedy under

an arbitration clause.<sup>5</sup> Consequently, the Agreement is valid.

### **B. The Agreement's Scope**

To stay the action, the court must determine whether an issue in the case refers to arbitration under the agreement. See 9 U.S.C. § 3. If the court decides that the dispute falls within the scope of the arbitration agreement, it may not consider the merits, but must refer the matter to arbitration. Paine Webber, 921 F.2d at 511.

The dispute involves incidents surrounding Wheeler's employment with A & M. The Agreement provides that "any controversy, dispute, or difference arising out of or relative to [Wheeler's] employment, including statutory claims" is arbitrable. Defs.' Mot. Ex. A at 5. Issues regarding the three restrictive covenants are the only exceptions. See Defs.' Mot. Ex. A at 5. Moreover, statutory ERISA claims clearly are arbitrable. See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (3d Cir. 1993). Therefore, the

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<sup>5</sup> Wheeler submits two untimely pleadings in which he contends the Agreement lacks consideration and is unconscionable. See Wheeler's Supplemental Mem. Opposing Mot. Compel Arbitration at unnumbered page 1; Wheeler's Reply Letter Submission Defs.' at unnumbered page 1. Wheeler also requests discovery and an evidentiary hearing on the issue of unconscionability. See Wheeler's Reply Letter Submission Defs.' at unnumbered page 1. The basis for Wheeler's lack of consideration and unconscionability claims apparently is Defendants' failure to tell him of the Agreement's lack of mutuality. The Court does not address these claims because they should be submitted to arbitration. See Part B.

dispute falls within the agreement's scope.

### C. The Parties to the Agreement

Defendants argue that Wheeler's claims against Arnold Young, David Young and Creative Design are arbitrable under the Agreement between Wheeler and A & M. See Defs.' Mem. at 7-9. Nonsignatories of arbitration agreements may be bound by such agreements under ordinary common law contract and agency principles. In re Prudential Ins. Co. of Am. Sales Practice Lit. All Agent Action, 133 F.3d 225, 229 (3d Cir. 1998), cert. denied, Weaver v. Prudential Ins. Co. of America, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, 1998 WL 289267 (U.S. Oct. 5, 1998). Agency principles require claims against officers of one of the contracting parties who were not signatories to the arbitration agreement be submitted to arbitration. See Pritzker, 7 F.3d at 1121-22. Arnold Young and David Young are officers of A & M. See Arnold Young Aff. ¶¶ 1, 6. Therefore, Wheeler's claims against Arnold Young and David Young are arbitrable.

No agency relationship between A & M and Creative Design apparently exists. Without this relationship, Wheeler's claims against Creative Design are not arbitrable. However, courts grant stays although both arbitrable and non-arbitrable claims exist in the same action. See Barrowclough v. Kidder, Peabody & Co., Inc., 752 F.2d 923, 938 (3d Cir. 1985), overruled on other grounds by Pritzker v. Merrill Lynch, Pierce, Fenner & Smith,

Inc., 7 F.3d 1110 (3d Cir. 1993). The court may stay an action involving arbitrable and non-arbitrable claims so long as there is a significant overlap between the parties and issues. See Davies v. Ecogen, Inc., No. CIV. A. 98-288, 1998 WL 229780 at \*1 (E.D. Pa. April 16, 1998).

Besides being officers of A & M, Arnold Young and David Young are officers of Creative Design. See Arnold Young Aff. ¶¶ 1, 6. Like Arnold Young and David Young, Creative Design is a defendant in counts seven through seventeen of the complaint. Therefore, significant overlap between parties and issues exists.

### **III. CONCLUSION**

For the above stated reasons, Defendants' motion to stay the proceedings pending arbitration will be granted.

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

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Richard Wheeler, Jr.,  
Plaintiff,  
  
v.  
  
A & M Industrial Supply  
Co., Inc., and Arnold  
Young, and David Young,  
and Creative Design,  
Defendants.

CIVIL ACTION  
NO. 98-CV-3200

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ORDER

AND NOW, this \_\_\_\_ day of October, 1998, for the reasons set forth the accompanying memorandum, it is ORDERED

1. This action is STAYED pending arbitration.
2. Failure of the Plaintiff to submit the matter to

arbitration within 30 days of the date of this order will result in sanctions which may include dismissal of this action with prejudice.

BY THE COURT

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JOSEPH L. MCGLYNN, JR. J.