

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

SIGNATOR INVESTORS, INC. : CIVIL ACTION
 :
 v. :
 :
 THOMAS W. OLICK, pro se : NO. 96-4460

MEMORANDUM

The factual and procedural history of this matter is well known to the parties and was described in detail by the court of appeals in John Hancock Mutual Life Insurance Co. v. Olick, 151 F.3d 132, 134 (3d Cir. 1998), and by this court in the order dated January 5, 2000, granting the preliminary injunction that barred defendant from pursuing arbitration. This matter is before the court on remand from the court of appeals, to determine whether defendant is enjoined from pursuing his malicious prosecution claim in NASD arbitration against plaintiff. Now before the court is Signator Investors, Inc. (formerly John Hancock Distributors, Inc.) (“Signator”)’s Motion for a Permanent Injunction, seeking to enjoin Olick from proceeding with the NASD arbitration, and Thomas W. Olick (“Olick”)’s pro se Motion for Summary Judgment. For the reasons that follow, Signator’s motion is granted, and Olick’s motion is denied.

I. BACKGROUND

On May 17, 2000, this court entered an order enforcing the final judgment in this case to bar the NASD Arbitration initiated by Olick against Signator in April 2000. That judgment had determined that res judicata barred claims Olick had raised against Signator in a 1996 NASD Arbitration, based on the finding that Olick was raising claims that he had asserted in the 1996 arbitration. The court of appeals has now vacated that order and remanded to this court for

further proceedings. The court of appeals determined that because Olick alleged that his malicious prosecution claim accrued in September 1995, it could not have been res judicata barred by the earlier judgment rendered in Carroll v. Hancock, 92-cv-5907 (E.D. Pa. 1995).

In this action, Olick raises against Signator a single claim for malicious prosecution, based on Signator's assertion of a counterclaim against Olick in a 1992 NASD arbitration he had initiated against Signator¹ in the midst of the Carroll litigation. Olick had filed that arbitration proceeding in his capacity as a customer of Signator because he had sold himself and family members certain Signator products. In the 1992 arbitration, Olick sought to have those transactions reversed, based on allegations that Signator had made misrepresentations about the products. Signator brought a counterclaim for indemnification, asserting that any wrongdoing relating to the sales of these products was attributable to Olick rather than Signator so that Olick was liable to indemnify Signator for any losses he caused.

On September 28, 1995, the NASD entered its award in the 1992 arbitration, reversing the sales Olick made to himself and his relatives and denying Signator's counterclaim, all without explanation. The arbitrator denied Olick's request for exemplary and punitive damages against Signator.

Now, Olick seeks to prosecute another NASD arbitration based on allegations that Signator's assertion of a counterclaim against him in the 1992 arbitration constituted malicious prosecution.

¹At the time of the 1992 arbitration, Signator was still known as Hancock, but for purposes of consistency the court refers to defendant as Signator throughout this memorandum.

II. DISCUSSION

In order to obtain a permanent injunction, the moving party must show: (1) irreparable injury in absence of relief; (2) absence of possibility of harm to a nonmoving party if leave were granted; (3) actual success on the merits; and (4) public interest in granting relief. Alessi v. Pennsylvania Dept. of Pub. Welfare, 893 F.2d 1333, 1337 (3d Cir. 1990); S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 374 (3d Cir. 1992); Public Interest Research Group v. Star Enterprise, 771 F. Supp. 655, 659 (D.N.J. 1991).

A. Irreparable Injury

In order to demonstrate irreparable injury, the movant “must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The . . . injunction must be the *only* way of protecting the plaintiff from harm.” Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989) (applying same standard to preliminary injunction and citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982); Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 356, 356 n.9 (3d Cir. 1980)); Gruntal & Co., Inc. v. Steinberg, 854 F. Supp. 324, 341 (D.N.J. 1994). The third circuit has held that irreparable injury is established when an unwilling party is required to arbitrate when not required by law to do so.

[W]e think it obvious that the harm to a party would be *per se* irreparable if a court were to abdicate its responsibility to determine the scope of an arbitrator’s jurisdiction and, instead, were to compel the party, who has not agreed to do so, to submit to an arbitrator’s own determination of his authority.

PaineWebber Inc. v. Hartmann, 921 F.2d 507, 515 (3d Cir. 1990) (quoted in Gruntal, 854 F.

Supp. at 341-42). Thus, if the court finds that the instant dispute does not fall within the scope of

the NASD arbitration agreement, then compelling Signator to arbitrate would constitute *per se* irreparable harm for the purposes of the injunction analysis. See Hartmann, 21 F.2d at 515; Gruntal, 854 F. Supp. at 342.

B. Balance of Hardships

In deciding whether injunctive relief is appropriate, this court must balance the hardships to the respective parties. Opticians Ass'n of America v. Independent Opticians of America, 920 F.2d 187, 197 (3d Cir. 1990); Frank's GMC Truck Center, Inc. v. General Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988); Gruntal, 854 F. Supp. at 342. The purpose of this is to ensure that issuing an injunction would not harm the defendant more than a denial would harm the plaintiff. Opticians Ass'n, 920 F.2d at 197; Gruntal, 854 F. Supp. at 342.

Neither Olick nor Signator has put forth any argument regarding the balance of hardships. The court finds that if Olick does not have a legal right to compel arbitration, the balance of equities tips in favor of granting permanent injunctive relief. If, however, Signator were compelled to arbitrate, the balance would tip in Olick's favor of denying the permanent injunction. In other words, the answer to this question turns on the determination of whether Olick has a legal right to compel arbitration.

C. Success on the Merits

“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” PaineWebber Inc. v. Hofmann, 984 F.2d 1372, 1376-77 (3d Cir. 1993) (quoting A.T.&T. Technologies, Inc. v. Communications

Workers of America, 475 U.S. 643, 648 (1986) (additional citations omitted)).

Under NASD Rule 10101,² the following disputes are eligible for submission to NASD arbitration.

10101. Matters Eligible for Submission

This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(iv) of the By-Laws of the Association for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company:

- (a) between or among members;
- (b) between or among members and associated persons;
- (c) between or among members or associated persons and public customers, or others; and
- (d) between or among members, registered clearing agencies with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures, and participants, pledgees, or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency.

Courts have interpreted Rule 10101 such that, in order to compel an unwilling party to arbitrate, a court must determine whether (1) there is a valid agreement to arbitrate, and (2) the specific dispute falls within the substantive scope of that agreement. Gruntal & Co., Inc. v. Steinberg, 854 F. Supp. at 339 (quoting Wheat, First Securities, Inc. v. Green, 993 F.2d 814, 820 (11th Cir. 1993)).

Olick argues that Signator is required to arbitrate this dispute because he is an associated person under 10101(b). He contends that the underlying dispute relates to Olick's sales of

²Olick relied on an earlier version of this rule which was replaced by Rule 10101 in November 1998.

Signator's limited partnerships while he was an employee, Signator's "reversal" payments to Olick's clients, and Signator's various attempts to collect indemnity from Olick.

While this is a correct statement of Olick's relationship with Signator, this does not suffice under the submission rule to require Signator to arbitrate the malicious prosecution claim. At the time that Olick's alleged malicious prosecution claim arose in 1995, he had not been employed by a Signator agency, or anywhere else in the industry, since 1991.

The malicious prosecution claim that Olick asserts in his 2000 arbitration is not eligible for submission under Rule 10101 because it is not an employment dispute, nor does it arise in connection with Signator's "business." It arises out of the filing of a counterclaim in an arbitration proceeding commenced in 1992 and concluded in 1995.

Because Olick is not seeking to arbitrate this claim as an investor or as an employee but rather as an allegedly wronged litigant, it is not in the scope of matters eligible for submission to arbitration under Rule 10101.

III. CONCLUSION

For the foregoing reasons, Signator's Motion for a Permanent Injunction is granted, and Olick's pro se Motion for Summary judgment is denied.

An appropriate order follows.

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ORDER

AND NOW, this ___ day of August 2002, upon consideration of the Motion of Signator Investors, Inc. (formerly John Hancock Distributors, Inc.) for a Permanent Injunction, and the arguments of the parties, for the reasons detailed in the above memorandum, it is hereby ORDERED that the Motion is GRANTED.

It is FURTHER ORDERED that Thomas W. Olick is PERMANENTLY ENJOINED from prosecuting NASD Arbitration Number 00-01386.

It is FURTHER ORDERED that Thomas W. Olick's Pro Se Motion for Summary Judgment is DENIED.

BY THE COURT:

JAMES T. GILES C.J.

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