

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

BERNARD J. GIANGIULIO, JR.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 02-3844
	:	
HD BROUS & CO., INC. and MICHAEL	:	
VIGILANTE,	:	
Defendants.	:	

ORDER

AND NOW, this day of October, 2002, upon consideration of the Motion to Dismiss and to Compel Arbitration filed by Defendants HD Brous & Co., Inc., and Michael Vigilante (“Defendants”), and the Response to Defendants’ Motion to Dismiss and to Compel Arbitration filed by Plaintiff Bernard J. Giangliulo, Jr. (“Plaintiff”), it is hereby ORDERED that the motion is GRANTED.

Plaintiff’s Complaint seeks money damages arising from the alleged mismanagement of an investment account that Plaintiff opened with Defendants. According to the pleadings, Plaintiff opened an investment account with Defendants and deposited approximately \$300,000.00 in this account on April 30, 1999. On July 19, 1999, the parties entered into a written agreement which contains an arbitration clause providing that all controversies arising between the parties would be determined by arbitration. Plaintiff initiated this action by filing a Complaint in federal court setting forth four causes of action: (1) violation of § 10B of the

Securities Exchange Act (“SEA”) and Rule 10B-5 of the Securities Exchange Commission (“SEC”); (2) breach of fiduciary duty; (3) negligent misrepresentation; and (4) conversion. In response to Plaintiff’s Complaint, Defendants have filed a Motion to Dismiss and to Compel Arbitration pursuant to 9 U.S.C. § 4 of the Federal Arbitration Act (“FAA”). In this motion, Defendants also request that this Court award Defendants attorney’s fees and costs.

The law in this area is well established:

The FAA establishes a strong federal policy in favor of compelling arbitration over litigation. The Act provides that if a party petitions to enforce an arbitration agreement, “[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”

Sandvik AB v. Advent Intern. Corp., 220 F.3d 99, 104 (3d Cir. 2000) (quoting 9 U.S.C. § 4); see also Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980). Thus, upon petition by a party seeking to enforce an arbitration agreement, the issue is whether there exists “an express, unequivocal agreement” to arbitrate. Sandvik, 220 F.3d at 104 (quoting Par-Knit Mills, 636 F.2d at 54). The court should grant the motion to compel arbitration if “there is no genuine issue of fact concerning the formation of the agreement.” Id. (quoting Par-Knit Mills, 636 F.2d at 54) (noting that the summary judgment standard is appropriately applied to resolution of this issue).

In his Response to Defendants’ Motion to Dismiss and to Compel Arbitration, Plaintiff argues that this Court should apply a legal presumption against the parties’ written agreement being valid and enforceable, and that this Court should place the burden upon Defendants to establish the fairness of the agreement. However, the standard cited by Plaintiff is applicable

under Pennsylvania law only where: (1) a plaintiff alleges fraud in the creation of a contract or the undertaking of a transaction; (2) there existed a fiduciary relationship between the parties to the contract or transaction; and (3) the defendant was in a position of dominance or influence over the plaintiff and secured some benefit as a result of the contract or transaction. See Matter of Estate of Evasew, 526 Pa. 98, 103, 584 A.2d 910, 912 (1990). Here, although there may have existed a fiduciary relationship when the parties entered into the written agreement containing the arbitration provision in question, Plaintiff does not dispute the formation or existence of either the entire agreement between the parties generally or the arbitration clause specifically. In fact, Plaintiff expressly relies upon the validity of the written agreement as the basis for various causes of action set forth in the Complaint.¹ Therefore, the legal presumption that Plaintiff seeks to have the Court apply here is inapplicable.

As noted above, Defendants also request that this Court award Defendants attorney's fees and costs. Defendants contend that Plaintiff's filing of this action in federal court, rather than pursuing arbitration as required by the agreement, was undertaken in bad faith. In support of this contention, Defendants point to the fact that Plaintiff attached only pages one through five of the agreement to his Complaint as an exhibit, and that Plaintiff failed to attach page seven of the agreement which contains the pre-dispute arbitration agreement in question. This Court does not find that Plaintiff filed this action in bad faith and, therefore, Defendants' request for attorney's fees and costs will be denied. See Gold v. Deutsche Aktiengesellschaft, 1998 WL 126058, at 3 (S.D.N.Y).

¹ For example, Plaintiff's claim pursuant to Section 10B of the SEA and Rule 10B-5 of the SEC relies upon the fact that the signed agreement indicated that Plaintiff's investment objective was "retirement" and that Plaintiff had a moderate tolerance for risk.

For the reasons stated herein, Defendants' Motion to Dismiss and to Compel Arbitration is hereby GRANTED. The Court ORDERS Plaintiff to submit his claims to arbitration in the manner provided for in the parties' written agreement. In addition, Defendants' request for attorney's fees and costs based on Plaintiff's alleged bad faith in filing this action is hereby DENIED.

BY THE COURT:

Legrome D. Davis