2018 IL App (3d) 180041-U

Order filed November 28, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

SIDNEY CARRERA and CAROLANN CARRERA, Plaintiffs-Appellants, v. MORGAN STANLEY SMITH BARNEY LLC, DAVID ALEXANDER HOHMANN, and TRENT ALAN AHLERS, Defendants-Appellees.	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, Appeal No. 3-18-0041 Circuit No. 17-L-212 Honorable Michael P. McCuskey, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendants' motion to compel arbitration, staying plaintiffs' cause of action.

¶ 2 Plaintiffs, Sidney and Carolann Carrera, brought suit against defendants, Morgan Stanley Smith Barney LLC (Morgan Stanley), David A. Hohmann, and Trent A. Ahlers, alleging violations of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1, *et seq*. (West 2016)), common law fraud, and the intentional infliction of emotional distress. Following

motions to compel arbitration by defendants, the trial court, pursuant to the parties' contracts, stayed plaintiffs' action and ordered arbitration. Plaintiffs appeal.

¶ 3 I. BACKGROUND

¶ 4 On November 19, 2014, defendants Hohmann and Ahlers, employees of Morgan Stanley, met with plaintiffs about investment opportunities. The parties allegedly agreed on a "conservative, no-risk" plan. Plaintiffs signed a Single Advisory Contract (the SAC) and tendered a check in the amount of $250,000 for future investment services from Morgan Stanley.

¶ 5 Section 1 of the SAC provides, in part:

> "Please note that the execution of this agreement permits [Morgan Stanley] to open an investment advisory account on your behalf at a future date based on your instruction (oral or written) to us to do so. The execution of this agreement alone does not open an investment advisory account. Unless or until you give [Morgan Stanley] an instruction to open an investment advisory account on your behalf, and you receive written confirmation from us that such an investment advisory account has been opened, your assets will be held in a non-discretionary brokerage account (and you will be responsible for making all security selections). (Emphasis omitted.)

Section 8 of the document reads as follows:

> "This Agreement contains a predispute arbitration clause. By signing an arbitration agreement the parties agree as follows:
>
> - All parties to this Agreement are giving up the right to sue each other in court, including the right to a trial by jury ***.
>
> * * *

> You agree that all claims or controversies *** between you and [Morgan Stanley] and/or any of its present or former *** employees concerning or arising from (i) any account maintained by you with [Morgan Stanley] individually or jointly with others in any capacity; (ii) any transaction involving [Morgan Stanley] or any predecessor or successor firms by merger, acquisition or other business combination and you, 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 you and us, any duty arising from the business of [Morgan Stanley] or otherwise, shall be determined by arbitration before, and only before, any self-regulatory organization or exchange of which [Morgan Stanley] is a member." (Emphasis omitted.)

¶ 6 The twelfth page of the SAC, immediately preceding plaintiffs' signatures, stated: "[t]his Agreement contains a predispute arbitration clause (in Section 8 on page 9) under which you agree to arbitrate any disputes with us, and your election on the delivery of trade confirmations set out above. By signing below, you acknowledge receiving a copy of this Agreement."

¶ 7 Plaintiffs received investment documents, including, but not limited to, a client agreement with attached signature pages in late November 2014. Section 15 of the client agreement was identical to section 8 of the SAC. The signature pages stated, in bold lettering:

> "By signing below I acknowledge that I have received and agree to be bound by the terms of:
>
> - The attached Client Agreement, which includes a predispute arbitration clause in Section 15, beginning on page 9." (Emphasis omitted.)

¶ 8 Additionally, plaintiffs received a fiduciary certification and trust account agreement, which stated "[y]ou acknowledge that you have read, received, understand and agree to the terms of the Client Agreement, and you further agree that the Trust Account is subject to the terms of the Client Agreement." Shortly after receipt, plaintiff signed the investment documents on November 26 and 28, 2014.

¶ 9 On December 2, 2014, in accordance with the SAC and pursuant to plaintiffs' instructions, Morgan Stanley sent plaintiffs advisory program confirmations and agreements. Plaintiffs' programs included three separate agreements, namely, "Consulting Group Advisor," "Select UMA, Non-Discretionary," and "Fiduciary Services." Each agreement indicated James J. Tracy approved and accepted the terms, including an arbitration clause, in his capacity as the managing director of Morgan Stanley. The SAC itself also notified plaintiffs that the program agreements would be governed by arbitration clauses.

¶ 10 The SAC, section 2, stated the following, in part, in bold and uppercase type:

> "By signing this agreement, you agree to all of the terms and conditions of this agreement. You also agree that all of the terms and provisions of the program agreements that you receive are incorporated by reference into this agreement as though they were fully set forth herein when you signed this agreement." (Emphasis omitted.)

Section 2 went on to explicitly state "[a]ll the terms of this [SAC] Agreement, any specific Program Agreement ***, and any Client Agreement (including the arbitration provisions contained therein and set forth in Section 8 below) will detail our mutual obligations regarding the Advisory Programs for Accounts that you open with [Morgan Stanley]."

¶ 11 On January 29, 2015, plaintiffs changed from the "Consulting Group Advisor" program to a "Portfolio Management" program. Morgan Stanley again sent plaintiffs a confirmation and agreement for the "Portfolio Management" program. The signed agreement included an arbitration clause and acknowledgment similar to that contained in the SAC.

¶ 12 Eventually, plaintiffs discovered their assets were being invested in a way that they believed was more aggressive than a "conservative, no-risk" plan. Plaintiffs notified defendant Ahlers to suspend the aggressive investments.

¶ 13 In July of 2016, plaintiffs sought legal counsel and reclaimed their assets from Morgan Stanley. On August 8, 2017, plaintiffs filed a three-count complaint against defendants, seeking investment losses for violations of the Consumer Fraud and Deceptive Business Practices Act, common law fraud, and the intentional infliction of emotional distress. On September 14, 2017, defendants, per their agreements with plaintiffs, filed motions to compel arbitration.

¶ 14 Following a hearing, on December 13, 2017, the trial court found as follows:

> "But I do believe we all agree that the law has changed over the years, *** in effect saying that arbitration provisions are fine.
>
> [Plaintiffs are] not saying they're not fine. [Plaintiffs are] just saying *** [they don't] believe they're appropriate based on our standard offer[,] acceptance[,] consideration[,] and whether we have the right documents signed in the right places.
>
> * * *
>
> I believe the defendants have set forth the appropriate law and that the documents presented provide the appropriate consideration, the appropriate

contract, and the appropriate route towards compelling arbitration[,] so the defendant[s'] motions to compel arbitration are granted."

On December 14, 2017, the trial court entered its order, staying plaintiffs' action and compelling the parties to arbitrate. Plaintiffs timely filed notice of appeal of that order on January 12, 2018.

¶ 15 II. ANALYSIS

¶ 16 On appeal, plaintiffs raise three issues with the trial court's grant of defendants' motions to compel arbitration. Namely, plaintiffs argue (1) the arbitration clause contained in the SAC is unenforceable; (2) the additional documents do not create a valid contract; and, (3) the arbitration clause at issue is contrary to public policy.

¶ 17 Generally, orders granting a motion to compel arbitration are reviewed for an abuse of discretion. *Watkins v. Mellen*, 2016 IL App (3d) 140570, ¶ 12. However, absent findings of fact from an evidentiary hearing, the standard for a pure question of law is *de novo*. *Id.*; *Vassilkovska v. Woodfield Nissan, Inc.*, 358 Ill. App. 3d 20, 24 (2005). We conclude that the trial court did not make factual findings. Therefore, a *de novo* standard of review applies.[1]

¶ 18 Turning to the first issue on appeal, plaintiffs challenge the enforceability of the SAC, including the arbitration clause, because defendants did not sign the SAC, and defendant's purported acceptance by performance could not cure this omission. Further, plaintiffs maintain consideration for the SAC is illusory because FINRA requires arbitration if there is a written contract or customer request.

¶ 19 Defendants respond by stating that the Illinois Uniform Arbitration Act (the IUAA), 710 ILCS 5/1, 2 (West 2016), and the Federal Arbitration Act (the FAA), 9 U.S.C. § 1, 2 (West

[1]The enforceability of a contract under considerations of public policy is reviewed *de novo*. *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 54 (2011).

2016), required enforcement of the written agreements.[2] [3] [4] Likewise, defendants argue because the SAC as a whole is being challenged, rather than the arbitration clause alone, the SAC's validity, as a dispute between the parties, should be left for the arbitrator.

¶ 20 Additionally, defendants assert that the program agreements, signed by Morgan Stanley, were incorporated into the SAC by reference. Thus, according to defendants, the incorporation of the program agreements by reference resulted in one contract, with the mutual promises to arbitrate and opening and maintaining of accounts each independently sufficing as consideration.

¶ 21 Alternatively, if this court concludes the incorporation of the program agreements by reference did not create one valid contractual agreement, defendants argue the SAC, signed by plaintiffs, was accepted by defendants' performance of services. Specifically, defendants maintain, pursuant to the SAC's obligations, Morgan Stanley opened investment accounts and sent program confirmations and agreements to plaintiffs.

¶ 22 We first address the enforceability of the SAC, which was not signed by defendants. In order for the SAC to be enforceable, it must have been derived from the basic contract requirements of offer, acceptance, and consideration. *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d. 135, 151 (2006). Acceptance of and consideration for the SAC are disputed by the parties.

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[2]The IUAA, section 1, reads as follows: "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract ***." 710 ILCS 5/1 (West 2016).

[3]The IUAA, section 2(a), reads as follows: "On application of a party showing an agreement described in Section 1, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied." 710 ILCS 5/2(a) (West 2016).

[4]The FAA, section 2, reads as follows: "A written provision in any *** contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (West 2016).

¶ 23 Acceptance generally requires an objective manifestation, as to demonstrate a meeting of the minds. *Trapani Construction Co., Inc. v. Elliot Group, Inc.*, 2016 IL App (1st) 143734, ¶ 43. However, the signature of the party to be charged renders the other party's signature unnecessary as long as the document is delivered with an indication of acceptance by performance. *Meyer v. Marilyn Miglin, Inc.*, 273 Ill. App. 3d 882, 891 (1995) (citing *St. Francis Medical Center v. Vernon*, 217 Ill. App. 3d 287, 289-90 (1991)).

¶ 24 At issue in *Meyer* was an order for the purchase of the right to use a photograph. *Id*. at 884-85. The defendant, as here, argued that the purchase order was invalid because it was not signed by the parties. *Id*. at 891. Our appellate court held this argument was meritless, as the defendant initialed the order and plaintiff indicated acceptance by performance after invoicing the defendant and delivering the photograph. *Id*. Likewise, in *Vernon*, the fact that the contract at issue was only signed by the defendant was not fatal. *Vernon*, 217 Ill. App. 3d at 289. The defendant in that case signed the contract, promising payment for services and goods, and plaintiff accepted by providing the services and goods referenced in the contract. *Id.* at 290.

¶ 25 Here, as in *Meyer* and *Vernon*, defendants validly accepted the SAC, indicating a meeting of the minds. Initially, we note signatures by defendants were unnecessary for the SAC because plaintiffs, who were the ones to be charged, signed that document. Further, the SAC was delivered to plaintiffs with an indication that defendants were going to accept by performance.

¶ 26 In particular, by signing the SAC, plaintiffs indicated their assent to its terms, including section 1, that, in part, pertains to defendants' acceptance by performance. When instructed by plaintiffs, defendants acted by performing services, consistent with the SAC, by sending confirmations and opening advisory accounts. The SAC outlines the parties' relationships and obligations, general information for each advisory program, and method for dispute resolution at

a time when the parties are in the advisory, selection, and opening of accounts phases of the relationship.

¶ 27 It is inconsequential that the SAC does not reference any specific investment selections by plaintiffs. At the time plaintiffs signed the SAC, the decision to open investment advisory accounts had not yet been finalized and conveyed to defendants. Put differently, the process had not yet advanced from the advisory phase to the selection and opening of accounts phases. Therefore, it was impossible to include specific investment information. However, we conclude that the SAC, section 1, explicitly stated the circumstances under which defendants would, and in fact did, perform under and accept the entirety of that agreement.

¶ 28 Next, consideration is the "bargained-for exchange of promises or performances ***." *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶ 23. [Citation omitted.] It is sufficient for any act or promise to serve as a benefit to one party or disadvantage to the other. *Id*. Further, the adequacy of consideration is rarely scrutinized when the parties contract freely and without fraud. *Id.* at ¶ 24.

¶ 29 Regarding promises to arbitrate, the consideration required depends upon whether an independent arbitration agreement or an arbitration clause within a broader contract is at issue. *Tortoriello v. Gerald Nissan of North Aurora, Inc.*, 379 Ill. App. 3d 214, 237-38 (2008). Arbitration clauses, unlike arbitration agreements, do not require mutual promises to arbitrate if the contract is otherwise supported by consideration. *Id*.; See also *Vassilkovska*, 358 Ill. App. 3d at 28 ("Mutuality of obligation [to arbitrate] is required only to the extent that both parties to an agreement are bound or neither is bound; that is, if the requirement of consideration has been met, mutuality of obligation is not essential.").

¶ 30 Here, a broader contract, the SAC, is at issue, rather than an independent arbitration agreement. Thus, even if FINRA rule 12200 could be read to require defendants to arbitrate, plaintiffs' concerns as to the mutuality of that obligation become irrelevant if the SAC as a whole was supported by consideration.[5] See *Tortoriello*, 379 Ill. App. 3d at 237-38.

¶ 31 We conclude the benefit received by plaintiffs upon tendering a particular amount in retirement assets and instructing defendants to open and manage specific investment programs, on their behalf, indicates a bargained-for exchange of promises and performances by the parties. See *Carter*, 2012 IL 113204 at ¶ 23. Thus, the validity of the acceptance and consideration requirements dictate the conclusion that the SAC is enforceable and compels both parties to engage in arbitration, where plaintiffs' broader claims of construction, breach, and performance will be addressed and resolved.

¶ 32 Next, we address plaintiffs challenge to other executed documents, namely the program agreements. Specifically, plaintiffs maintain the SAC was invalid and unenforceable. On this basis, plaintiffs contend that an invalid agreement could not incorporate the program agreements by reference.

¶ 33 Briefly, we note that it is unnecessary for purposes of this appeal to engage in an analysis regarding whether the program agreements were incorporated into the SAC by reference, or whether those agreements may stand independently from the SAC. Again, those questions, and all other questions of construction, breach, or performance, are outside the narrow focus of this

[5]FINRA rule 12200, titled "Arbitration Under an Arbitration Agreement or the Rules of FINRA," states: "Parties must arbitrate a dispute under the Code if: Arbitration under the Code is either: (1) Required by a written agreement, or (2) Requested by the customer; The dispute is between a customer and a member or associated person of a member; and The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company."

appeal. In conclusion, the SAC is an enforceable contract that compels arbitration as the negotiated forum for dispute resolution.

¶ 34 Finally, we consider whether arbitration clauses in cases such as this are contrary to public policy. Generally, public policy favors arbitration to resolve disputes. *Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 49-50 (2010) (citing 710 ILCS 5/2(a) (West 2006)). However, courts will declare contracts void if enforcement would be contrary to the State's constitution, statutes, judicial decisions, or manifestly injurious to the public welfare. *Fosler v. Midwest Care Center II, Inc.*, 398 Ill. App. 3d 563, 571 (2009). See also *Reed v. Farmers Insurance Group*, 188 Ill. 2d 168, 174-75 (1999).

¶ 35 In the statutory context, the General Assembly, which speaks by enacting laws, occupies a position superior to the courts in determining public policy. *Reed*, 188 Ill. 2d at 175. " 'When the legislature has declared, by law, the public policy of the State, the judicial department must remain silent ***.' " *Id.* (quoting *Collins v. Metropolitan Life Insurance Co.*, 232 Ill. 37, 44 (1907)). As noted in *Fosler*, the public policy generally favoring arbitration is codified in section 2 of the IUAA, with incongruities arising from issues not " 'concerning the validity, revocability, and enforceability of contracts generally.' " *Fosler*, 398 Ill. App. 3d at 575 (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n. 9 (1987)) (Emphasis omitted.); See also 735 ILCS 5/1, 2 (West 2016).

¶ 36 Here, the SAC is a contract containing an arbitration clause. Enforcement of that contract is consistent with, rather than contrary to, the Illinois General Assembly's expressed public policy. See 735 ILCS 5/1, 2 (West 2016).

¶ 37 Our holding is limited to the enforceability of the SAC for purposes of compelling arbitration for dispute resolution. We express no opinion as to any other claims of wrongdoing

by defendants. Those issues are to be resolved in the arbitration process, according to the parties' agreement.

¶ 38 III. CONCLUSION

¶ 39 The judgment of the circuit court of Peoria County is affirmed.

¶ 40 Affirmed.