

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - February 28, 2011

JOSEPH COVELLO, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
SANDRA L. SGROI, JJ.

2010-09064

DECISION & ORDER

Patricia Whitelock, appellant, v Morgan Stanley Smith
Barney, LLC, et al., respondents.

(Index No. 32302/09)

Mahler & Harris, P.C., Kew Gardens, N.Y. (Stephen R. Mahler of counsel), for
appellant.

Lubiner & Schmidt, LLC, New York, N.Y. (John E. Jenkins of counsel), for
respondents.

In an action, inter alia, to recover damages for breach of contract and breach of
fiduciary duty, the plaintiff appeals from an order of the Supreme Court, Queens County (Brathwaite-
Nelson, J.), entered August 12, 2010, which granted the defendants' motion to stay the action and
compel arbitration.

ORDERED that the order is affirmed, with costs.

“[I]n the commercial context generally, the rule is clear that unless the agreement to
arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute, a party
cannot be compelled to forego the right to seek judicial relief and instead submit to arbitration”
(*Bowmer v Bowmer*, 50 NY2d 288, 293-294; *see Sammarco v Pepsi-Cola Bottling Co. of N.Y.*, 1
AD3d 341, 342; *Computer Assoc. Intl. v Com-Tech Assoc.*, 239 AD2d 379, 380-381). The burden
of proof is on the party seeking arbitration (*see Matter of Allstate Ins. Co. v Roseboro*, 247 AD2d
379, 380; *Matter of American Centennial Ins. Co. v Williams*, 233 AD2d 320). Here, the defendants
satisfied their burden of establishing the existence of a valid agreement to arbitrate which expressly

March 29, 2011

Page 1.

WHITELOCK v MORGAN STANLEY SMITH BARNEY, LLC

and unequivocally encompassed the subject matter of the plaintiff's claims (*see Bowmer v Bowmer*, 50 NY2d at 293-294; *Matter of Allstate Ins. Co. v Roseboro*, 247 AD2d at 380). Accordingly, the Supreme Court properly granted the defendants' motion to stay the action and compel arbitration.

COVELLO, J.P., DICKERSON, ENG and SGROI, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court