

Mariglio v Berthel Fisher & Co. Fin. Servs., Inc.

2014 NY Slip Op 33796(U)

June 24, 2014

Supreme Court, Erie County

Docket Number: 2014-802966

Judge: Timothy J. Walker

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

FRANCES A. MARIGLIO,

Plaintiff,

v.

**COMMERCIAL DIVISION
DECISION AND ORDER**
Index No. 2014-802966

BERTHEL FISHER & COMPANY FINANCIAL
SERVICES, INC. and THOMAS J. BERTHEL,

Defendants.

BEFORE: HON. TIMOTHY J. WALKER, Presiding Justice

APPEARANCES: JOANNE A. SCHULTZ, ESQ.
Attorney for Plaintiff

JOHN J. FLAHERTY, ESQ.
Attorney for Plaintiff

BOND, SCHOENECK & KING, PLLC
Stephen A. Sharkey, Esq., Of Counsel
Attorneys for Defendants

ANTHONY, OSTLUND, BAER & LOUWAGIE, P.A.
Aaron R. Hartman, Esq.
Attorneys for Defendants

WALKER, J.

Plaintiff has moved, pursuant to CPLR §§3403(a)(4) and 3113(b), for a trial preference and for an order directing her expedited videotaped deposition. Defendants oppose the motion and have cross-moved, pursuant to CPLR §7503(a), to stay the action and compel arbitration.

Plaintiff is eighty seven (87) years old and a widow. Her husband died at the age of seventy four (74) in 1999. Plaintiff is in failing health, and she was recently diagnosed with lung

cancer by her pulmonologist, Dr. Mohammad Kahn. Dr. Kahn has recommended surgery, but Plaintiff cannot undergo surgery without the approval of her cardiologist, Dr. Sachin Wadhawan, because she suffers from atrial fibrillation.¹

Plaintiff's Complaint, dated March 19, 2014, alleges that following her husband's death in 1999, Plaintiff began investing with Michael Palazzo, a licensed financial advisor with an office located in Williamsville, New York. Mr. Palazzo also operated as a registered agent with Defendant, Berthel Fisher & Company Financial Services, Inc. ("Berthel Fisher"). Plaintiff contends that she has no understanding of financial markets or investing and that Mr. Palazzo took advantage of her and ultimately embezzled her life's savings, in an amount exceeding \$137,000. Mr. Palazzo committed suicide in May of 2013 and, prior to his suicide, Plaintiff had not filed an action or otherwise proceeded against him.

Plaintiff contends, *inter alia*, that Berthel Fisher failed to properly monitor Mr. Palazzo and oversee his accounts in compliance with standards established by the financial industry. Plaintiff's Complaint sets forth four (4) causes of action against the Defendants, grounded in breach of contract, fraud, negligence, and the New York General Business Law.

Plaintiff seeks a trial preference and an order directing that the parties proceed with her videotaped deposition immediately, in light of her age and failing health.

Defendants oppose Plaintiff's motion and have cross-moved to stay this action and compel arbitration. Defendants' position is based on the arbitration agreement contained in

¹While Plaintiff has not submitted an affidavit from Drs. Kahn or Wadhawan or any other treating physician, she has submitted copies of medical records that confirm that she has been diagnosed with lung cancer and atrial fibrillation. Defendants conceded Plaintiff's medical condition at oral argument.

Bethel Fisher's Customer Agreement. The Customer Agreement is referred to in Bethel Fisher's New Account Form, which Plaintiff and Mr. Palazzo signed on August 12, 2004. The New Account Form states in relevant part, as follows:

In consideration of your accepting one or more accounts, I hereby acknowledge that I have read, understood and agreed to the terms set forth in the Customer Agreement herein.

The Customer Agreement provides in relevant part, as follows:

Pre-Dispute Arbitration Agreement²

THIS ACCOUNT IS SUBJECT TO THE ARBITRATION RULES OF THE NEW YORK STOCK EXCHANGE, INC. OR NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. I AGREE THAT ALL CONTROVERSIES THAT MAY ARISE BETWEEN US, BFCFS, NFS³, AND THEIR AGENTS, EMPLOYEES, OFFICERS, DIRECTORS, AND AFFILIATED COMPANIES, CONCERNING ANY ORDER OR TRANSACTION, OR THE CONTINUATION, PERFORMANCE OR BREACH OF THIS OR ANY OTHER AGREEMENT BETWEEN US, WHETHER ENTERED INTO BEFORE, ON , OR AFTER THE DATE THIS ACCOUNT IS OPENED, SHALL BE DETERMINED BY ARBITRATION BEFORE A PANEL OF INDEPENDENT ARBITRATORS SET UP BY EITHER THE NEW YORK STOCK EXCHANGE, INC., OR NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS I MAY DESIGNATE.

It is well settled that New York has a "long and strong public policy" preferring arbitration as an alternative to litigation (*Smith Barney Shearson Inc. v. Sacharow*, 91 NY2d 39, 49 [1997]).

²In the Customer Agreement, the font of the heading "Pre-Dispute Arbitration Agreement," is larger than the font used for this section's text.

³The Customer Agreement defines "BFCFS" as the Defendant, Bethel Fisher & Company Financial Services, Inc. and "NFS" as National Financial Services, LLC.

It is equally well settled that on a motion to compel arbitration, the court's role is limited to determining whether the parties have agreed to arbitrate and whether their dispute comes under the scope of the arbitration agreement (*Sisters of St. John the Baptist v. Geraghty Constructor, Inc.*, 67 NY2d 997 [1986]). "Judicial interference is forbidden with respect to disputes that are 'logically connected' with an arbitration agreement" (*Orleans Community Health v. Germain*, 107 AD3d 1435, 1436 [4th Dept 2013] [internal citations omitted]).

In the instant matter, Plaintiff agreed to arbitrate the disputes alleged against Defendants in her Complaint. While Plaintiff contends that she has no recollection of signing the Customer Agreement or New Account Form, she admits that these documents bear her signature. Plaintiff contends that the arbitration agreement should be set aside, because she did not understand it due to her age and high school education. However, the Court is not aware of any case law (nor has Plaintiff cited to any) setting aside an arbitration agreement based on a signatory's advanced age. Plaintiff signed the Customer Agreement and New Account Form approximately ten (10) years ago. There is no evidence in the record that she suffered from failing health at that time. Rather, the medical records she submitted in opposition to Defendants' cross-motion reflect that her health began to fail this year. The medical records are dated January 27, 2014 (regarding the diagnosis of atrial fibrillation) and June 3, 2014 (regarding the diagnosis of lung cancer).

Plaintiff also contends that the arbitration agreement constitutes an adhesion contract and that it is otherwise unconscionable. It is neither. Rather, it is a standard arbitration agreement, and its terms are clear and unequivocal. In addition, the heading, "Pre-Dispute Arbitration Agreement," is typed in large font and the arbitration agreement is distinguished from the remainder of the Customer Agreement by being typed in capital letters. The arbitration

agreement, including the manner in which it is presented in the Customer Agreement, is capable of being understood by a person with a high school education.

Moreover, the Customer Agreement applies to both Berthel Fisher and to its "EMPLOYEES, OFFICERS, [AND] DIRECTORS," which includes Defendant, Thomas Berthel.

Notwithstanding New York's "long and strong public policy" preferring arbitration as an alternative to litigation (*Sacharow*, 91 NY2d at 49), it is also well settled that an arbitration agreement must be set aside where one of the parties to it demonstrates that "the equal sharing of arbitration fees and costs precluded [her] from pursuing her statutory rights in the arbitral forum" (*Brady v. Williams Capital Group, LP*, 14 NY3d 459, 462 [2010]).

Plaintiff contends that she is financially unable to bear the costs of arbitration. In making its determination, the Court

should at minimum consider the following questions: (1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum Although a full hearing is not required in all situations, there should be a written record of the findings pertaining to a litigant's financial ability (*Id.*, at 467)-(internal citations omitted).

Plaintiff has submitted a detailed analysis of her monthly income and expenses, which reflects a monthly surplus of \$1,025.00, as follows:

Monthly Income:	\$3,909.00
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- Monthly Expenses: \$1,515.00⁴
- Additional Monthly Expenses: \$1,369.00 (rounded)
\$1,025.00 (Monthly Surplus)

Plaintiff's "Additional Monthly Expenses" consist of two components, including \$727.00 for, *inter alia*, real property taxes, homeowner's insurance, automobile insurance, automobile road service, and long term health insurance, and \$642.00 for home maintenance expenses incurred in 2013 for the purchase of a new furnace and roof repairs. Defendants object to that portion of "Additional Monthly Expenses" in the amount of \$642.00 per month attributed to home maintenance because they were made and paid for in 2013. Plaintiff has failed to sufficiently demonstrate that similar expenses will be expended in 2014 and going forward on a regular basis. Plaintiff has not identified any home maintenance expenses incurred this year, or any that are planned to be incurred thereafter. Accordingly, the Court has not considered Plaintiff's "Additional Monthly Expenses" pertaining to home maintenance expenses incurred last year, which increases her monthly surplus to \$1,667.00 ($\$3,909.00 - \$1,515 - \$727 = \$1,667$) and amounts to a yearly surplus of \$20,004.00.

In seeking to reduce Plaintiff's financial burden in proceeding with arbitration, Defendants have stipulated to the following⁵:

- The case filing fee is \$1,425.00, and shall be borne by the applicant, which would

⁴ While the Court has not included the individual items that make up the monthly income and expenses in this Decision and Order, the Court finds that they are reasonable and not exaggerated or otherwise unreliable.

⁵ Defendants' stipulation is detailed in their attorney's (Aaron R. Hartman, Esq.) letter to the Court, dated June 23, 2014.

be Plaintiff (Financial Industry Regulatory Authority ["FINRA"], Rule 12900[a][1]). In the event FINRA does not agree to waive the filing fee, Defendants agree to bear half of it (\$712.50).

• Three (3) arbitrators shall hear the dispute in this matter, because it exceeds \$100,000.00 (FINRA, Rule 12902[a]). FINRA charges \$1,125.00 per hearing session for hearings involving three (3) arbitrators in disputes ranging from \$100,000.01 to \$500,000.00 (*Id.*). A full day of arbitration hearings is two hearing sessions. FINRA also charges \$1,125.00 for an initial pre-hearing conference session with three (3) arbitrators. Based upon these figures, Plaintiff reasonably estimates that the dispute will cost her \$10,125.00 in hearing session fees before three (3) arbitrators, inclusive of the pre-hearing conference.⁶ However, FINRA charges \$450.00 per hearing session and for the initial pre-hearing conference for hearings heard by a single arbitrator. Defendants have agreed to arbitrate the dispute before a single arbitrator, thus potentially reducing the session hearing fees to \$4,050.00 (9 sessions @ \$450 per session, inclusive of the pre-hearing conference).

In addition to these financial considerations, Defendants have also stipulated to expedite the arbitration proceeding and to proceed with Plaintiff's video deposition without requiring Plaintiff to make such a request to the arbitrator.

In light of these stipulations and Plaintiff's financial information, Plaintiff has failed to

⁶Plaintiff estimates nine (9) hearing sessions, inclusive of the pre-hearing conference, @ \$1,125.00 per session.

satisfy her burden that she is financially unable to bear the costs of arbitration.

In light of the foregoing, it is hereby

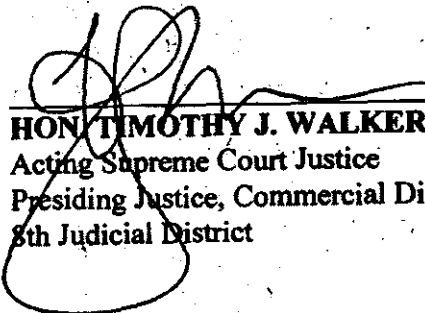
ORDERED, that Plaintiff's motion is denied; and it is further

ORDERED, that Defendants' cross-motion is granted, consistent with the stipulations identified above; and it is further

ORDERED, that a copy of the transcript of oral argument on the motion and cross-motion shall be annexed hereto and incorporated herein.

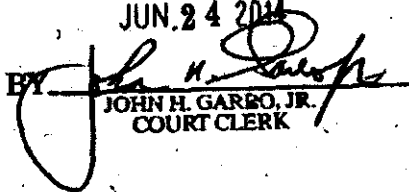
This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: June 24, 2014
Buffalo, New York



HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District

GRANTED

JUN 24 2014
BY 
JOHN H. GARBO, JR.
COURT CLERK