

Barrett v Grenda

2015 NY Slip Op 32792(U)

April 2, 2015

Supreme Court, Erie County

Docket Number: 800933-2014

Judge: Henry J. Nowak

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

ANNA BARRETT,

Plaintiff,

vs.

MEMORANDUM DECISION

INDEX NO. 800933-2014

WALTER GREENDA, TIMOTHY DEMBSKI,
RELIANCE FINANCIAL ADVISORS, LLC,
WALL STREET FINANCIAL GROUP, INC.,
TD AMERITRADE HOLDING CORPORATION,
TD AMERITRADE, INC.,
TD AMERITRADE INSTITUTIONAL and
TD AMERITRADE CLEARING, INC.

Defendants.

HON. HENRY NOWAK, J.S.C.
Justice Presiding

Defendants TD Ameritrade Holding Corporation, TD Ameritrade, Inc., TD Ameritrade Institutional, and TD Ameritrade Clearing, Inc. (collectively, "TD Ameritrade") move to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (1) (documentary evidence) and (7) (failure to state a cause of action), and to compel arbitration pursuant to CPLR 7503 (a). Plaintiff, Anna Barrett, opposes the motion asserting, *inter alia*, that TD Ameritrade's motion is without merit.

On a motion to dismiss, the court must "accept as true each and every allegation made by plaintiff" and limit "inquiries to the legal sufficiency of plaintiff's claim" (*Silsdorf v Levine*, 59 NY2d 8, 12 [1983]). The complaint in this action makes the following allegations.

Barrett is a 70 year-old woman who worked for 38 years as a teacher at St. Mary's School for the Deaf in Buffalo, New York. She lived a frugal life and retired in 2005. Her retirement funds were invested by defendants Walter Grenda, Timothy Dembski, and Reliance Financial Advisors, LLC. In 2011, a large portion of her portfolio, which was held by defendant Wall Street Financial Group, Inc., was liquidated and swept into TD Ameritrade retirement accounts. \$ 225,000.00 was invested into a hedge fund, and by early 2013, those funds had been depleted to approximately \$ 17,000.00.

The only contracts with TD Ameritrade that bear Barrett's signature are March 22, 2011 applications for an IRA and a Roth IRA. Each application is four pages. They authorize Reliance Financial Advisors, LLC to execute trades on her behalf and request monthly paper statements from TD Ameritrade.

They also refer to an unsigned "Client Agreement." The applications state that Barrett received and read the Client Agreement, but in the same sentence, the applications list a web site and 1-800 telephone number where it is available, which would presumably be unnecessary if Barrett actually received and read it. Nonetheless, the applications provide that Barrett agreed to be bound by the Client Agreement, "which may be amended from time to time and which are incorporated by this reference." Barrett claims that she was never given an opportunity to read the full text of the applications, much less the unattached Client Agreement.

In support of their motion, TD Ameritrade attached a ten page Client Agreement that they claim to have been applicable. It appears on its face to have been effective October 21, 2010 and prepared specifically by TD Ameritrade Institutional. It is unclear whether any amendments were made to this Client Agreement from the date it was effective to the date Barrett claims she

suffered damages, in early 2013. The Client Agreement proffered by TD Ameritrade includes a pre-dispute arbitration clause.

Barrett's claims against TD Ameritrade fall generally in two separate categories. First, she alleges that TD Ameritrade failed to evaluate and supervise co-defendants Walter Grenda and Timothy Dembski in the way they handled her funds. Second, she claims that TD Ameritrade failed to accurately report to her the value of her investments – specifically, that “TD Ameritrade continued to report a positive position investment of \$ 225,000.00 on Ms. Barrett's statements for many months despite the facet that the fund was almost exhausted” (Complaint, ¶ 73). Barrett's causes of action allege fraud, negligence, breach of contract, breach of fiduciary duty and violation of General Business Law § 349.

In the absence of discovery, the court finds TD Ameritrade's allegations to premature. No documentary evidence was submitted to reflect the nature of the relationship between TD Ameritrade and defendants Walter Grenda, Timothy Dembski, and Reliance Financial Advisors, LLC. Furthermore, TD Ameritrade has failed to submit documentary evidence to show that they properly reported the value of Barrett's investments.

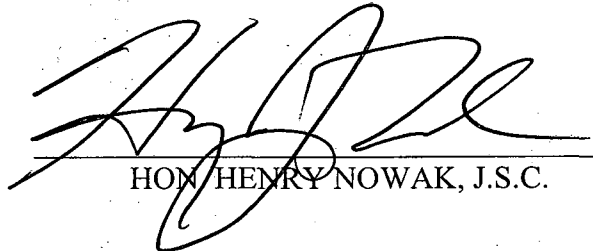
The only documentary evidence proffered were the applications for the IRA and Roth IRA (which are insufficient to defeat Barrett's claims), and the unsigned October 21, 2010 Client Agreement prepared specifically by TD Ameritrade Institutional. In regard to the Client Agreement, Barrett challenges its validity on several grounds – first, TD Ameritrade Institutional is not a legal entity, but merely a division of TD Ameritrade, Inc.; second, there is no evidence that it was provided to Barrett; and third, the Client Agreement would be an unconscionable contract of adhesion.

Therefore, this court orders that the parties engage in limited discovery on the issue of whether the proffered Client Agreement applies to the instant action. Specifically, Barrett may determine how the Client Agreement was prepared and why it bears the name of a non-legal entity, whether the Client Agreement was ever provided to her, and whether it was amended from the effective date of October 21, 2010 to the date she sustained the losses claimed. The parties also may endeavor to discover whether the facts and circumstances of this case would result in a finding that the Client Agreement is unconscionable (*see Matter of Friedman*, 64 AD2d 70, 84-85 [2d Dept 1978]).

If the Client Agreement is found to be valid and applicable to this action, this court also notes that Barrett claims that she should not be “forced to spend excessive amounts in forum fees to pursue this action” in arbitration (Affidavit of Anna Barrett, sworn to on June 17, 2014, ¶ 32). Accordingly, this court would conduct a hearing to determine Barrett’s financial inability to engage in arbitration, pursuant to *Matter of Brady v Williams Capital Group, L.P.*, 14 NY3d 359 (2010). In *Brady*, the court acknowledged both the strong state policy favoring arbitration agreements, as well as the “equally strong policy requiring the invalidation of such agreements when they contain terms that could preclude a litigant from vindicating his/her statutory rights in the arbitral forum” (*id.* at 467).

For these reasons, TD Ameritrade’s motion to dismiss or compel arbitration is denied without prejudice. Submit order.

Dated: April 2, 2015



HON HENRY NOWAK, J.S.C.