

NO. A09-2216

State of Minnesota
In Court of Appeals

TRANSAMERICA FINANCIAL ADVISORS, INC.,
 a Delaware corporation,

Appellant,

vs.

CRYSTAL D. KILCHER, DANIEL J. KILCHER,
 ANTHONY C. MUELLENBERG AND
 TROY D. MUELLENBERG,

Respondents.

REPLY BRIEF OF APPELLANT

James R. Crassweller (#19690)
 Jason E. Engkjer (#318814)
 KALINA, WILLS, GISVOLD
 & CLARK PLLP
 6160 Summit Drive, Suite 560
 Minneapolis, MN 55430
 Tel: (763) 259-3428
 Fax: (763) 503-7070

Bradford D. Kaufman
 Joseph C. Coates, III
 GREENBERG TRAUERIG, P.A.
 777 South Flagler Drive
 Suite 300 East
 West Palm Beach, FL 33401
 Tel: (561) 650-7900
 Fax: (561) 655-6222

Attorneys for Appellant

Kyle E. Hart (#159025)
 Gordon P. Heinson (#0164264)
 FABYANSKE, WESTRA, HART
 & THOMSON, P.A.
 800 LaSalle Avenue, Suite 1900
 Minneapolis, MN 55402
 Tel: (612) 359-7600
 Fax: (612) 359-7602

Attorneys for Respondents

Daniel D. Hill (#226506)
 HILL LAW OFFICE, LTD.
 7373 Kirkwood Court, Suite 305
 Maple Grove, MN 55369

David A. Baugh, Esq.
 BAUGH DALTON CARLSON & RYAN
 55 West Monroe Street, Suite 600
 Chicago, IL 60603

Attorneys for Defendant Helen A. Dale

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ARGUMENT

I. RESPONDENTS' STATEMENT OF THE CASE AND STATEMENT OF THE FACTS CONTAIN IMPROPER AND INACCURATE ARGUMENTS.

Nothing in Respondents' Brief changes the inescapable conclusion that Respondents must arbitrate their claims involving securities transactions with Transamerica Financial Advisors, Inc. ("TFA") in FINRA arbitration. Respondents' Brief improperly raises merit-based arguments, misstates the record on appeal, and asks the Court to ignore the plain language of the arbitration provision at issue and controlling law.

The narrow issue on appeal is whether the trial court erred in denying TFA's motion to stay and compel arbitration. There was no dispute below that TFA and Respondents had agreed to arbitrate under FINRA arbitration rules. Therefore, the only issue is the interpretation of FINRA Code of Arbitration Procedure Rule 12206 and whether it allows Respondents to avoid arbitration with TFA.

Despite this limited issue, Respondents devote much of their brief arguing their view of the underlying claims against TFA and Helen Dale. TFA strongly disagrees with Respondents' contentions regarding the purported merits of their claims. Further, significant parts of Respondents' description of the underlying arbitration and court proceedings are simply incorrect and should not be considered. TFA addresses these points below.

A. TFA Has Consistently Sought to Arbitrate the Claims Involving Securities Transactions.

Respondents contend that TFA and Helen Dale (who is not a party to this appeal and was represented by separate counsel throughout) have “dragged” this case on for over two years raising “obstruction after obstruction,” “delaying any resolution and refusing to comply with any discovery in any forum (including arbitration).” Respondents’ Brief at 2. These statements are unsupported by the record and wrong.

First, the facts as demonstrated in TFA’s Brief are that in every proceeding, in both the arbitration and the Hennepin County court action, TFA has consistently maintained that the claims involving securities transactions are subject to arbitration and that TFA stood ready to arbitrate those claims. AA-173 (Coates Aff. ¶ 7, Comp. Ex. D., n.1); AA-17-24; Trans. at 12-13, 46-47. The claims involving insurance transactions are not subject to arbitration pursuant to FINRA rules and, more importantly, do not involve TFA. TFA has not delayed or obstructed any proceeding. Instead, Respondents are the parties that chose to dismiss the underlying FINRA action and commence the Hennepin County court action. There is no reason why Respondents could not pursue their claims arising from securities transactions against TFA before the FINRA arbitrators. Had Respondents done so, the arbitration would have been completed a long time ago.

Respondents still claim that TFA and Dale had been “insisting on litigating in court.” Resp. Br. At 6. As to TFA, this statement is incorrect and not supported

by anything in the record. The undisputed record below conclusively establishes that TFA never objected to or disputed arbitrator jurisdiction over their claims involving securities transactions. TFA executed a Uniform Submission Agreement expressly agreeing to arbitrate pursuant to the FINRA rules. AA-91 (Coates Aff. at Exhibit B). TFA answered Respondents' claims substantively in the arbitration regarding the securities transactions. AA-99-171. TFA expressly stated to the arbitrators that it "has not objected to the arbitrators' jurisdiction over the claims involving securities transactions, such as mutual funds." AA-173 (Coates Aff. at ¶ 7, Comp. Ex. D, n. 1). Any contrary implication or suggestion regarding TFA's commitment to arbitrate Respondents' claims arising from securities transactions lacks any record support whatsoever.¹

Second, Respondents' assertions that Helen Dale and TFA have refused to comply with any discovery is incorrect and irrelevant to the issue on appeal. TFA produced documents in the underlying FINRA arbitration and the Hennepin County court action prior to its dismissal on October 16, 2009. Dale produced thousands of documents, and Respondents subjected her to a deposition prior to the October 16, 2009 dismissal. Regardless, Respondents' discovery arguments are irrelevant to the narrow issue on appeal before this Court. Minn. R. App. P.

¹ As noted in TFA's Brief, TFA did not agree to arbitrate insurance claims, and the FINRA Code of Arbitration excludes such claims from arbitrator jurisdiction. Appellant's Brief at 2. TFA did not sell the insurance products at issue, and these products had nothing to do with TFA. App. Brf. at 16, n.11.

110.01; In re Conservatorship of Foster, 535 N.W.2d 677, 684 (Minn. Ct. App.1995) (“Only matters before the trial court may be considered by the reviewing court”).

Finally, and as alluded to above, any purported delay in this matter has been caused by Respondents themselves. They have now filed their claims in three fora: FINRA arbitration; the Fourth Judicial District, Hennepin County; and now after Judge Blaeser dismissed their Hennepin County action, they re-filed their claims in Scott County. Respondents’ Brief at 10. Respondents chose to “drag” this matter through three different forums, while TFA has remained willing and able to arbitrate Respondents’ securities claims in FINRA arbitration. Respondents could have pursued their securities claims against TFA in FINRA arbitration without delay, but chose not to do so.

B. The Mischaracterized Order of the Arbitrators.

Throughout their Brief, Respondents suggest that the FINRA arbitrators entered a separate order that allowed Respondents to withdraw their claims from arbitration and re-file them in court. No such order exists, and this phantom order is nowhere in the record below. The only order entered by the FINRA arbitrators and in the record is the July 23, 2008 order (the “Arbitration Order”) which granted dismissal of the insurance claims; granted Helen Dale’s motion to dismiss under the six-year eligibility rule (FINRA Rule 12206); and dismissed certain federal or state securities law claims under the applicable statutes of repose. AA-26 (Crassweller Aff at ¶ 10). Nothing in the Arbitration Order states that

Respondents were permitted to re-file their dismissed claims in any court. In fact, the Arbitration Order dismissed only a portion of the Respondents' claims, leaving the remainder of the case to proceed in arbitration. Indeed, the Arbitration Order noted that the dismissal of certain claims "is not a ruling on the admissibility of any evidence concerning these securities or to events before that date." AA-30.

The actual record establishes that after the Arbitration Order, Respondents voluntarily dismissed their FINRA claims and commenced the Hennepin County action. AA-26 (Crassweller Aff. a5 ¶ 11). Respondents never moved the arbitration panel seeking permission to dismiss the arbitration. There is no subsequent arbitrator order, as Respondents imply, purporting to rule on Respondents' request for dismissal or that authorizes them to re-file their claims in court. The "order" suggested by Respondents' Brief is a mischaracterization of the record that does not exist, and their arguments based on this non-existent order is without factual basis.

II. RESPONDENTS RELY ON THE WRONG LEGAL STANDARD.

In addition to mischaracterizations of the record, Respondents base their arguments on the wrong legal standard. Respondents argue that in cases of equitable estoppel, the standard of review is abuse of discretion. Resp Brf. at 10-11. Equitable estoppel, however, has nothing to do with this appeal. Equitable estoppel in the arbitration context involves the issue of whether a non-party to a contract can invoke an arbitration provision to compel arbitration. See, e.g., Ev3 Inc. v. Collins, No. A08-1120, 2009 WL 2432348, *1 (Minn. Ct. App. April 21,

2009) (quoting Onvoy, Inc. v. SHAL, LLC, 669 N.W.2d 344, 356 (Minn. 2003) (“Federal cases have set out at least three principles on which a nonsignatory to a contract can compel arbitration: equitable estoppel, agency, and third-party beneficiary. Equitable estoppel prevents a signatory from relying on the underlying contract to make his or her claim against the nonsignatory.”). Indeed, the other cases cited by Respondents involve the same issue of whether a signatory to an arbitration provision was equitably estopped from denying it was bound by an arbitration clause in a dispute with a non-party. See Resp. Brf. at 11. The application of equitable estoppel is not at issue and should not serve as the basis for the proper standard of review for this appeal.

Here, there is no dispute that the parties -- TFA and Respondents -- signed an arbitration agreement. TFA did not invoke equitable estoppel below as a basis to compel arbitration. The only issue before the Court is the scope or the interpretation of that arbitration agreement between TFA and Respondents (i.e., the FINRA Code of Arbitration). Consequently, the correct legal standard, as TFA pointed out in its brief, is *de novo*. All doubts or ambiguities concerning the interpretation of the FINRA Code of Arbitration section at issue are to be resolved in favor of arbitration, “whether the problem is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability.” Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790, 795 (Minn. 1995) (quoting Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)). This standard of review is dispositive of this appeal.

III. RESPONDENTS SEEK TO REWRITE RULE 12206.

Respondents' argument opposing arbitration, in essence, ignores the plain language of FINRA Rule 12206. That Rule unambiguously states "the moving party agrees" that if the arbitrators dismiss some of the claims because of the six-year eligibility rule, the "non-moving party may" withdraw any remaining claims and go to court. That section of Rule 12206 states, in pertinent part:

***By filing a motion to dismiss a claim** under this rule, **the moving party agrees** that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.*

(Emphasis added).

This language is not complicated. It applies to "the moving party." It is undisputed that TFA was neither a "moving party" under Rule 12206, nor did it ever "agree" that Respondents could dismiss their claims and commence an action in court. Respondents conceded this point. Resp. Brf. at 15-16. That should be the end to this appeal. Instead, Respondents ask the Court to rewrite Rule 12206 and insert a brand new phrase to the end of the rule that would impose an obligation on a non-moving party to "object" or to "protest" the withdrawal of claims when a "moving party" moves to dismiss under Rule 12206. This clause is found nowhere in the arbitration language, and that fact standing alone should dispose of Respondents' arguments. Respondents' new clause not only violates basic contract construction, but it is directly contrary to the controlling legal standard which requires all doubts regarding the interpretation of Rule 12206 or

alleged waiver to be construed in favor of arbitration. Johnson, 530 N.W.2d at 795.

Not only is this “protest” clause not in Rule 12206, but Respondents provide no argument why such language should be added to Rule 12206. After all, TFA did not move to dismiss under Rule 12206 and, in fact, prior to the hearing on the motion to dismiss advised the arbitrators that it did not object to arbitrator jurisdiction over the securities claims. TFA’s position was clear. Moreover, even if TFA had “protested” Respondents’ voluntary dismissal, the end result would be the same -- the parties would be in court litigating over the arbitrability of the dispute.

Similarly, Respondents’ argument regarding the intention of Rule 12206 is nothing more than an attempt to argue that the language is ambiguous and should be construed in a way to make it easier for Respondents to pursue claims against two defendants in court. Respondents’ position is flawed for a variety of reasons.

First, nothing in Rule 12206 suggests that this is the proper interpretation. Another interpretation -- the one based on the clear language of Rule -- and the actual purpose of the Rule, is that the Rule permits all claims against one party (i.e., the party moving to dismiss) to be pursued in court.

Second, Respondents’ inconvenience arguments have been expressly rejected by the Supreme Court. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985) (“The Arbitration Act required district courts to compel arbitration of

pendant state claims, even when the result would be the possible inefficient maintenance of separate proceedings in different forums”).

Third, the controlling law holds that any ambiguity must be decided in favor of arbitration. See App. Brf. at 10-11. Even if the Court accepts the provision at issue is ambiguous, it must rule in favor of arbitration.

Finally, Respondents presented no law in support of their argument that the litigation strategy of one party (i.e., Helen Dale) could waive the arbitration rights of another party (i.e., TFA). TFA and Dale are separate parties with separate interests. The decisions of one party cannot and should not be imputed to another party.

IV. THE INSURANCE CLAIMS SHOULD BE STAYED.

Respondents have raised no new arguments regarding the stay of insurance claims that warrants a reply. Judge Blaeser correctly found that, as to TFA, the securities claims predominated and the insurance claims should be stayed. Order at 9-10.

CONCLUSION

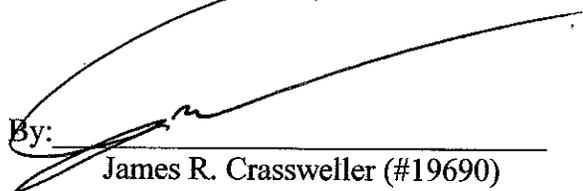
Respondents bear a very heavy burden in trying to prove that the arbitration provision at issue was not susceptible of an interpretation in favor of arbitration. They have not satisfied that burden. Instead, Respondents raise arguments based on phantom orders, and ask the Court to not only ignore the plain language of Rule 12206, but rewrite it to impose new obligations on parties not subject to the rule. Each of Respondents’ arguments is contrary to the controlling legal standard that

all doubts are to be resolved in favor of arbitration. The Court should reverse the trial court on this specific issue and order that the claims based on securities transactions against TFA be compelled to arbitration and any remaining insurance claims be stayed pending the outcome of arbitration.

RESPECTFULLY SUBMITTED,

Dated: April 5, 2010

**KALINA, WILLS,
GISVOLD & CLARK, PLLP**

By: 

James R. Crassweller (#19690)

Jason E. Engkjer (#318814)

6160 Summit Drive, Suite 560

Minneapolis, MN 55430

Telephone: (763) 259-3428

Facsimile: (763) 503-7070

IN ASSOCIATION WITH:

Joseph C. Coates, III, FBN 772860

Greenberg Traurig, PA

777 South Flagler Drive

Suite 300 East

West Palm Beach, FL 33401

Telephone: (561) 650-7900

Facsimile: (561) 655-6222

*Attorneys for Defendant, Transamerica
Financial Advisors, Inc.*