UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROBERT A. BURNS

Plaintiff,

v.

RICHARD HAMILTON, and GREG ZIMMERMAN, Individually and as agents, servants, and employees of CALVARY FINANCIAL CORP., INC., and NATIONAL COMMODITIES CORP.; and WACHOVIA BANK (as successors in interest for FIRST UNION NATIONAL BANK)

Defendants.

Case No. 1:02-cv-1388-SEB

ENTRY ON MOTION TO COMPEL ARBITRATION AND TO STAY PROCEEDINGS OR, IN THE ALTERNATIVE, TO TRANSFER VENUE AND DISMISS

This matter is before the Court on the Defendant's Motion to Compel Arbitration and to Stay Proceedings or, in the Alternative, to Transfer Venue and Dismiss. For the reasons set forth below, this court grants the Defendant's motion. This matter should be arbitrated pursuant to the provisions set forth in the Arbitration Agreement executed by the Plaintiff and this proceeding should be stayed until the parties have completed arbitration.

BACKGROUND

Plaintiff, Robert Burns ("Burns"), is an attorney who succumbed to the alleged hard sell telephone tactics of defendants, Calvary Financial Corp., Inc. ("Calvary") an "introducing broker", National Commodities Corp. Inc. ("NCCI") a "clearing broker" and their agents, and opened a discretionary account with NCCI in the amount of $10,000. The account was opened

on October 27, 2000, for the purpose of investing in stocks, commodities and futures. In connection with opening the account, Burns voluntarily signed a standard form Customer Agreement as well as a written Arbitration Agreement.

Evidently, Calvary's agents, defendants Richard Hamilton ("Hamilton") and Greg Zimmerman ("Zimmerman"), were initially quite adept at convincing Burns that they were successfully turning his investment into a personal profit center. Through a telephone conversation Hamilton convinced Burns that they could do even more for him if he would agree to a scheme by which they would immediately advance money to his account so as to take advantage of a position they adopted for him and others earlier that morning that had already appreciated by 20%. Of course, Burns would need to forward another $20,000 to cover the advance. As Burns readily admits in his brief and affidavit, greed got the better of him and he acceded to the proposal. However, the honeymoon for this financial marriage was short lived.

Burns maintains that the $20,000 he sent in response to the urging from Hamilton, never appeared on his statements. He claims he then had multiple telephone conversations with Hamilton or Zimmerman, wherein Burns would complain about not having verification of the receipt of his funds and Hamilton or Zimmerman would either assure him that nothing was wrong or turn the conversation toward how much money Burns was making and how much more he could make if he would increase his account holdings.

Finally, only five weeks after opening the account, Burns alleges he told Hamilton to close out the account. Several subsequent phone conversations occurred between the parties, wherein they discussed the account status and Burns' direction to close it out. One of those calls occurred a week after Burns claims to have given the first direction to close the account, and

during this call Burns claims Zimmerman stated that the account had been wiped out by a fall in the market and Burns was now in a deficit position. Burns communicated his surprise at hearing the account was wiped out in light of his direction to close it out the week before. He eventually also communicated a complaint to the FTC and SEC.

Despite a few more pressure filled telephone calls, which Burns says were aimed at getting him to withdraw the complaints or allowing NCCI to credit his account and pursue further positions without commission until he was made whole, Burns claims to have offered to arbitrate the matter in a phone conversation in late January of 2001. He also claims that he later sent two letters to NCCI demanding return of his investments and offering to arbitrate the dispute. He claims those offers were turned down by Zimmerman.[1]

Burns filed suit against NCCI, Calvary, Hamilton, Zimmerman and Wachovia Bank[2] in the Marion County Superior Court in Indianapolis. The complaint alleges: (1) violations of state and federal Racketeer Influenced and Corrupt Organizations Acts; (2) criminal mischief; (3) breach of fiduciary duty; and (4) fraud. The matter was removed to this Court pursuant to 28 U.S.C. § 1331. NCCI has since filed a motion seeking to compel arbitration pursuant to the agreement signed by Burns when he opened the account.

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[1]Burns submitted a supplement to his initial response to the Motion Compel Arbitration, wherein he provides eight pieces of correspondence. Apparently, these are communications referred to in his affidavit, though there are no references (other than dates on the documents submitted) which would tie any particular correspondence to any particular paragraph of the affidavit. In short, the Court is required to guess which of the submitted documents Burns is referring to in any given portion of his affidavit.

[2]Wachovia is the bank where Burns' account funds were kept in a segregated account.

ANALYSIS

The Motion to Compel Arbitration is straight forward and supported by NCCI's brief, the Customer Agreement and the Arbitration Agreement. In response Burns submits his own affidavit along with a brief outlining his arguments against compelling arbitration. Though passionate in his presentation, the arguments raised in the brief by Burns are confusing at times and not made in an organized fashion. It is clear that Burns takes issue with NCCI's Motion to Compel and, as best we can tell, does so on the following grounds. First, he argues that all of his claims should be heard in one location at the same time instead of being "piece-mealed." Second, Burns contends that both the Customer Agreement and the Arbitration Agreement were fraudulently induced. Third, he contends that the Arbitration Agreement is not broad enough to cover all of his claims. And, finally, Burns contends that NCCI waived its right to require that the dispute be arbitrated.

Burns' contention that his claims should not be heard in more than one venue misses the point. NCCI has moved to compel arbitration on the entirety of Burns' complaint. If the Court grants the motion, it will stay the entirety of this action until the arbitration is complete and any award is ripe for entry as a judgment. Consequently, Burns will have the single venue he requests, regardless of the outcome of this particular motion.

Next, we deal with Burns' argument that his allegations of fraudulent inducement require the Court to hear this matter rather than compelling arbitration. In his brief, he quotes from 9 U.S.C. § 4 with regard to the Court being required to satisfy itself that the making of the arbitration agreement not be at issue before ordering the dispute to arbitration. However, it is important to note that Burns has not offered any evidence of or alleged any fraud in connection

with his execution of the Arbitration Agreement. His claim of fraud in the making relates to the conduct of the defendants which he claims induced him to enter into the Customer Agreement.

The Supreme Court has interpreted the Federal Arbitration Act, including the section quoted from by Burns, as requiring a district court to satisfy itself that the making of the agreement to arbitrate is not at issue as opposed to the overall contract between the parties. *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-405 (1967). As the 7th Circuit has since opined:

> An arbitration clause will often be "severable" from the contract in which it is embedded, in the sense that it may be valid even if the rest of the contract is invalid. If the agreement of one party to arbitrate disputes is fully supported by the other party's agreement to do likewise, there is no need to look elsewhere in the contract for consideration for the agreement to arbitrate; so objections to other parts of the contract, based on fraud or unconscionability or mistake or whatever, need not spill over to the arbitration clause.

Matterhorn, Inc. v. NCR Corporation, 763 F.2d 866, 868-869 (7th Cir. 1985). Here, the Arbitration Agreement was separate from, but referred to, the Customer Agreement. There is no dispute that Burns entered into the Arbitration Agreement freely and without fraud in its inducement. In fact, the Arbitration Agreement specifically states that it need not be executed in order to open a customer account with NCCI.

Burns next contends that the Arbitration Agreement in this matter is not broad enough to cover all of the claims he raises against the defendants in this litigation. Burns provides little explanation and no case law to support this broad contention. At best, he claims that he is alleging fraud, deceit and other conduct tantamount to criminal conduct, which was never contemplated by the parties as being arbitrable. Burns signed an Arbitration Agreement which provides for arbitration of "any controversy arising out of or relating to my account". No matter

how you clothe the allegations of his complaint, they amount to a dispute arising out of or related to his account.

Finally, we must examine Burns' contention that NCCI waived its right to arbitration. He maintains that his affidavit and supporting documentation support a conclusion that he attempted to engage in an arbitration of his claims with defendants, but that this attempt was ignored. Burns argues that the defendants should not be allowed to pursue arbitration now, after he was rebuffed and forced to file his civil action.

Federal policy favors the enforcement of private arbitration agreements. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-226 (1987). However, this policy is not absolute, and a number of grounds exist for courts to refuse to enforce an arbitration agreement. One of those grounds is waiver of the right to arbitrate. *St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Company, Inc.*, 969 F.2d 585 (7th Cir. 1992). Whether or not a party has waived its right to arbitrate depends on the individual circumstances of the case and whether or not that party acted inconsistently with its right to arbitrate. *Id.* at 588. The party asserting waiver has a heavy burden, in light of the policy favoring arbitration, and courts are not to infer waiver without a firm basis to do so. *Id.* at 590.

Many waiver cases involve an element of delay with regard to the arbitration request following institution of litigation. *See e.g., Id.* at 587. Others include instances where the plaintiff in litigation changes its mind and seeks arbitration after initially filing litigation. *See e.g., Grumhaus v. Comerica Securities, Inc.*, 223 F. 3d 648, 650 (7th Cir. 2000). In this matter, NCCI acted promptly to request arbitration subsequent to the filing and removal of Burn's complaint. The actions taken or not taken which Burns insists are inconsistent with the pursuit of

arbitration, occurred prior to the filing of the litigation by Burns.

Burns states in his affidavit and brief that he verbally requested arbitration and wrote two letters to that effect as well. He then supplemented his response by submitting documents he said were inadvertently omitted from his earlier submission. Though he refers to letters he wrote requesting arbitration, none are included with his submission. The only mention of arbitration in any of the correspondence submitted is a statement in his letter of September 12, 2001 to the Chief Operations Officer of NCCI. In that letter he writes, "I informed Mr. Zimmerman that I desired "ARBITRATION" and he just laughed at me and told me to "go to hell." The letter is consistent with Burn's affidavit testimony that he had verbally requested arbitration. However, as pointed out in the letter Burns received later from Zimmerman, who had been forwarded a copy of the letter to the COO for NCCI, neither he nor Hamilton were employees of NCCI - rather, they were employees of Calvary. In addition, Zimmerman's response denied the bulk of allegations made by Burns in his earlier letter.

The Arbitration Agreement does not require any particular method of notification of intent to arbitrate. In addition, it is understandable that Burns would be unclear as to whether Zimmerman and Hamilton worked for Calvary or NCCI. Regardless, the Court needs more assurance that trumping the federal policy favoring enforcement of arbitration agreements would be appropriate here.

No one has appeared for any defendant in this litigation other than for NCCI. The removal documents suggest that service may never have been made on Hamilton or Wachovia and it is posited by Burns that Calvary is now defunct. In short, there is simply no evidence of record that the defendant seeking to invoke the Arbitration Agreement, NCCI, was ever directly

informed of Burns earlier request for arbitration. Hence, it can not be said that Burns has carried his burden of establishing that NCCI has acted inconsistently with its right to have the dispute resolved through arbitration. Accordingly, the dispute should be arbitrated.

CONCLUSION

For the foregoing reasons, NCCI's Motion to Compel Arbitration and to Stay Proceedings or, in the Alternative, to Transfer Venue and Dismiss is GRANTED. NCCI is given ten days from the entry of this order to provide the Plaintiff with the list of "qualified forums" referred to in the Arbitration Agreement. The parties are ordered to arbitration pursuant to the terms of the Arbitration Agreement and this matter is stayed pending the outcome of that arbitration.

IT IS SO ORDERED this 7th day of November, 2003.

Sarah Evans Barker

SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

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