United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	11 C 6931	**DATE**	1/25/2012
CASE TITLE	Young Soon Kim and Il Joo Kim vs. TD Ameritrade		

DOCKET ENTRY TEXT

Defendant's motion to compel arbitration [8] is denied. Ruling on motion date of 2/2/12 at 10:00 a.m. is stricken. Briefing schedule on Defendant TD Ameritrade, Inc.'s Rule 12(b)(6) Motion to dismiss [11]: Responses due 2/15/12; Reply due 2/29/12; Target date for ruling by mail 3/28/12.

■[For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

Plaintiffs Young Soon Kim and Il Joo Kim (the "Kims") filed a lawsuit against defendant TD Ameritrade, Inc. ("TD Ameritrade") in the Circuit Court of Cook County, Illinois, alleging violations of two provisions of the Illinois Uniform Commercial Code ("Illinois UCC"). Defendants removed the action and are now seeking to compel arbitration. For the following reasons, the motion is denied.

I.

Underlying the Kims' claims against TD Ameritrade are the actions of Peter Cho, who allegedly defrauded the Kims out of more than $300,000. In their verified complaint, the Kims allege that Cho convinced them to invest in a real estate development that required a capital contribution of about $550,000. Cho instructed the Kims to liquidate assets and to take a mortgage on their home in order to come up with the capital contribution. The Kims liquidated a mutual fund account for $123,217 and gave the funds to Cho, thinking that they were making an advance on the down payment for the real estate investment. The Kims also issued three checks to Cho, leaving the payee line blank as instructed by Cho, for amounts totaling $187,035.86. Cho did not make a down payment on a real estate investment. Instead, Cho took the funds and opened a TD Ameritrade account in plaintiffs' names. The Kims claim that Cho never told them that he was opening the account.

Relevant to the claims raised against TD Ameritrade, the Kims allege that when Cho opened the account he used an address that was different from the Kims' address, forged the signatures on the application, and included other inconsistent identifying information. The Kims claim that the forged signatures did not resemble the signature on the check used to open the account and that the address on the application also did not match the address on the check used to open the account. Cho was successful in opening the account notwithstanding language on the application stating that federal law requires financial institutions to verify identifying information used to open a new account. TD Ameritrade issued checks and a debit card in plaintiffs' names to the address listed on the application. According to defendant, the online

STATEMENT

brokerage application allegedly executed by Cho also indicates that the relevant Client Agreement contains an arbitration clause.[1]

Between September 2008 and March 2009, Cho allegedly used the funds in the account and almost depleted it by writing checks to himself and through online stock trades. Throughout this period, the Kims reportedly received no statements from TD Ameritrade, but they eventually learned of the account from their own bank in April 2009. Plaintiffs contacted TD Ameritrade and requested statements. The Kims then reported the fraud to TD Ameritrade and demanded that TD Ameritrade return their money. TD Ameritrade opened a fraud investigation but refused to return the money to the Kims.

II.

The Supreme Court has recently reiterated that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, reflects "both a liberal federal policy favoring arbitration ... and the fundamental principle that arbitration is a matter of contract." *AT& T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745, 179 L.Ed.2d 742 (2011) (internal quotation marks and citations omitted). Accordingly, courts "must place arbitration agreements on an equal footing with other contracts." *Id.* (citation omitted). The FAA permits a court to declare that an arbitration agreement is unenforceable because of a "generally applicable contract defense[], such as fraud, duress, or unconscionability." *Id.* at 1746 (internal quotation marks and citation omitted). However, "there are five doctrines through which a non-signatory can be bound by arbitration agreements entered into by others: (1) assumption; (2) agency; (3) estoppel; (4) veil piercing; and (5) incorporation by reference." *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 687 (7th Cir. 2005) (citations omitted).

Defendant does not dispute plaintiffs' claim that they did not enter into the Client Agreement with TD Ameritrade. Still, defendant argues that the issue of whether the Kims signed the Client Agreement is "immaterial" because they have attempted to derive direct benefits under the agreement and are therefore estopped from objecting to the arbitration provision. Plaintiffs counter that they have merely referenced the Client Agreement in their complaint and do not seek any benefit under the contract.

Under *Zurich*, a "nonsignatory party is estopped from avoiding arbitration if it knowingly seeks the benefits of the contract containing the arbitration clause." 417 F.3d at 688 (citing *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 778 (2d Cir. 1995); *Indus. Elecs. Corp. of Wis. v. iPower Distribution Group*, 215 F.3d 677, 680 (7th Cir. 2000)). But the Seventh Circuit went on to elaborate, saying that the "caselaw consistently requires a *direct* benefit under *the contract containing an arbitration clause* before a reluctant party can be forced into arbitration." *Id.* (emphasis in original).

To support their position, defendant points to Count II of plaintiffs' verified complaint, which is brought under Illinois UCC Article 3, 810 ILCS 5/4-401. That provision governs when a bank may charge a customer's account, and the relevant portion of that provision assumes both a client-bank relationship and an agreement governing when an item is properly payable. *See* 810 ILCS 5/4-401(a). Yet defendants fail to articulate which provision of the Client Agreement, if any, would provide a direct benefit to plaintiffs should they succeed on their claims in Count II. The mere fact that the law refers to an agreement governing when an item is properly payable is "too attenuated and indirect to force arbitration under an estoppel theory." *Zurich* at 688.[2]

Defendant's reliance on *Gersten v. Intrinsic Technologies, LLP*, 442 F.Supp.2d 573 (N.D. Ill. 2006), is of no aid. In that case, the plaintiff's son worked for the defendant, owned an interest in the defendant's company, and was a party to an agreement that governed his ownership of the interest and that included an arbitration clause. *Id.* at 574. The plaintiff's son attempted to sell his interest in the company to the plaintiff and the plaintiff claimed that, pursuant to the agreement between his son and the defendant, the plaintiff had a right to purchase the interest. *Id.* at 575. The defendant sought to enforce the arbitration agreement and the court did so, finding that the plaintiff's claims were "all fundamentally rooted in and dependent on rights and conditions defined in the [agreement]." *Id.* at 578. Unlike the Kims, the plaintiff in *Gersten* "cite[d] to [the agreement] repeatedly" and relied on several specific provisions of the agreement. *Id.* at 580. Here, by

STATEMENT

contrast, plaintiffs primarily rely on the Illinois UCC Article 3 and refer to the Client Agreement to show that defendant did not follow its own policies and obligations. Plaintiffs do not assert any affirmative rights under the Client Agreement.

III.

For the foregoing reasons, defendant's motion to compel arbitration is denied.

1. For purposes of this motion, TD Ameritrade has not disputed that Cho executed the application without the Kims' knowledge or consent.

2. Defendant also argues that plaintiffs' references to the agreement in their verified complaint support TD Ameritrade's position. However, the Kims only reference the Client Agreement in their complaint to point to TD Ameritrade's recognition of its obligation under federal law to verify the information on applications for new accounts. To the extent that plaintiffs allege that the federal law establishes that defendant had a duty to verify the information on the application, it is a duty that is independent of the Client Agreement.