IN THE CIRCUIT COURT FOR THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 10-049061 CACE (19)
JUDGE: JOHN J. MURPHY, III

DANIEL S. NEWMAN, as RECEIVER for FOUNDING PARTNERS STABLE VALUE FUND, LP: FOUNDING PARTNERS STABLE VALUE FUND II, LP; FOUNDING PARTNERS GLOBAL FUND, LTD.; and FOUNDING PARTNERS HYBRID-VALUE FUND, L.P.,
Plaintiff,

vs.

ERNST & YOUNG LLP, a Delaware limited liability partnership; and MAYER BROWN LLP, an Illinois limited liability partnership,
Defendants.
_____/

ORDER ON DEFENDANT ERNST & YOUNG LLP'S REVISED MOTION TO COMPEL ARBITRATION AND STAY OR ABATE THE CLAIMS AGAINST IT

THIS CAUSE came before the court on Defendant Ernst & Young, LLP's Revised Motion to Compel Arbitration and Stay or Abate the Claims Against It. The court, having considered the motion and responses, having heard argument of counsel, and being otherwise duly advised in the premises, finds and decides as follows:

On August 3, 2015, plaintiff, Daniel S. Newman ("Plaintiff"), as Receiver for Founding Partners Stable Value Fund ("Stable-Value"), Founding Partners Stable-Value Fund II, LP ("Stable-Value II"), Founding Partners Global Fund, Ltd. ("Global Fund"), and Founding Partners Hybrid-Value Fund, LP ("Hybrid-Value Fund")[1], filed a twelve (12) count third amended complaint against defendants, Ernst & Young, LLP ("E&Y") and Mayer Brown, LLP ("Mayer

[1] Stable-Value, Stable-Value II, Global Fund, and Hybrid-Value Fund will be collectively referred to as "Founding Partners."

Brown").[2] With regard to E&Y, Plaintiff alleges causes of action for: (1) professional malpractice (count I); (2) negligent misrepresentation (count II); (3) fraud (count III); (4) breach of fiduciary duty (count IV); (5) aiding and abetting fraud (count V); (6) aiding and abetting breach of fiduciary duty (count VI); and (7) aiding and abetting breaches of statutory duties (count X). Plaintiff also asserts that he is the assignee of claims that were assigned by thirty-eight (38) different entities and individuals ("Assignors").[3]

According to the third amended complaint, Founding Partners Capital Management Co. ("FPCM"), which was operated by its chief executive officer, William L. Gunlicks ("Gunlicks"), was the general partner for Stable-Value, Stable-Value II, and Hybrid-Value Fund, and the investment manager for Global Fund. (Third Am. Compl. ¶¶ 10, 61-62). Through Stable-Value and Stable-Value II, Founding Partners "loaned hundreds of millions of dollars to two factoring companies who, according to Stable-Value's E&Y audited-financial statements, used the loan proceeds to purchase short-term (120 day), high quality (primarily healthcare) receivables payable by the government or by insurance companies." (Id. ¶ 2). Plaintiff alleges that "[t]hose receivables would then purportedly serve as collateral fully securing the Founding Partners' loans, and provide a stable, reliable source of income from which the factoring companies could make scheduled interest payments to Founding Partners." (Id.). Plaintiff alleges that the factoring companies used

[2] For purposes of this Order, the claims against Mayer Brown are not relevant.

[3] Those entities and individuals are: (1) Harrison Family Investments, LP; (2) Clanton Harrison IRA; (3) Leslie T. Merrick Investment Trust; (4) Chris Dance; (5) Kenny Allan Troutt Descendants Trust; (6) Double S Partners; (7) John Miller; (8) Vassar Point, LLC; (9) Telesis IIR, L.P.; (10) Glen Gibson; (11) Ron Mann, IRA; (12) Walter E. Johnson; (13) TJNJH Investment Partnership; (14) Kathleen A. Olberts Living Trust; (15) Annandale Partners, LP; (16) Annandale Partners II, LP; (17) J. Christopher Dance IRA; (18) R. Michael Bales; (19) Clear Fir Partners, LP; (20) John E. Cunningham IV; (21) Carolyn A. Cunningham; (22) Sayden Ranch, LP; (23) Cunningham Children's Trust; (24) Gary Sledge; (25) Stiles A. Kellett, Jr.; (26) Kellett Family Partners, LP; (27) Chariot Stable Asset Fund, LP; (28) MJA Innovative Income Fund, LP; (29) Maxwell Halstead Partners, LLC; (30) Haines All Seasons Select Fund, LLC; (31) Haines All Seasons Select Fund II, LLC; (32) Dakota Partners, LLP; (33) PP Partnership LP; (34) Rodger Sanders; (35) Stuart Frankenthal; (36) J. Mark Lozier Revocable Trust; (37) Four J. Partnership LP; and (38) Paul Loeb.

the loan proceeds to purchase receivables that were much riskier and for longer terms than those disclosed in financial statements and offering materials, rendering the factoring companies incapable of repaying the loans, which resulted in substantial losses to Founding Partners.

Plaintiff alleges that "E&Y was engaged to serve as outside auditor [for] Founding Partners, and audited Founding Partners' financial statements for at least the fiscal years 2000 through 2007."[4] The claims asserted against Defendant E&Y arise from E&Y's auditing services. Specifically, the gravamen of Plaintiff's claims against E&Y is that

> E&Y knew about the factoring companies' undisclosed and improper uses of Stable-Value loan proceeds, but did not require any disclosure of these facts in either Stable-Value's or any of the other Founding Partners funds' financial statements. E&Y instead issued unqualified or "clean" audit opinions on those financial statements.

(Id. ¶ 5).

On September 8, 2016, Defendant E&Y filed the instant motion seeking to compel arbitration of all the claims Plaintiff asserts against E&Y in the third amended complaint. Specifically, Defendant E&Y argues that it performed auditing services from 2000-2007 for Stable-Value, Stable-Value II, and Hybrid-Value Fund pursuant to engagement agreements ("Engagement Agreements"), which require any and all disputes arising from such auditing services to be submitted to binding arbitration. On October 13, 2015, Plaintiff filed a response. Thereafter, on November 23, 2015, Defendant E&Y filed a reply. A hearing was held before the court on April 27, 2016.

Initially, the court determines that the instant dispute is controlled by the Federal Arbitration Act ("FAA"). The Engagement Agreements expressly specify that the FAA applies. Further, the instant action implicates interstate commerce. *See Buckeye Check Cashing, Inc. v.*

[4] E&Y did not complete its audit of Founding Partners for the fiscal year 2007. (Third Am. Compl. ¶ 46).

Cardegna, 824 So. 2d 228, 230 (Fla. 4th DCA 2002) ("Appellant correctly argues that federal law controls because the arbitration agreement expressly provides that "this arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act...." (citation omitted)). When determining whether to compel arbitration under the FAA, the trial court considers three factors: "(1) whether a valid written agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitrate was waived." *Mercury Telco Group, Inc. v. Empresa De Telecommunicaciones De Bogota S.A. E.S.P.*, 670 F. Supp. 2d 1350, 1354 (S.D. Fla. 2009). After a careful review, the court determines that arbitration of the instant dispute is appropriate.

First, the court determines that a valid written agreement to arbitrate exists. To the extent Plaintiff argues that he and the Assignors did not sign the Engagement Agreements, and therefore cannot be bound by thereto, such argument lacks merit. Plaintiff, as the Receiver of Founding Partners, is bound by the Engagement Agreements. *See Javitch v. First Union Securities, Inc.*, 315 F. 3d 619, 627 (6th Cir. 2003) (finding that a receiver "is bound to . . . arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver" (footnote omitted)). Moreover, the court determines that to the extent Plaintiff has brought the instant action as the assignee of the Assignors, such claims are derivate of those of Founding Partners, and subject to the arbitration provisions of the Engagement Agreements. *See KPMG LLP v. Cocchi*, 88 So. 3d 327, 331 (Fla. 4th DCA 2012).

Second, whether an arbitrable issue exists is a determination that, pursuant to the Engagement Agreements, was delegated to the arbitrator. Such delegation provisions are enforceable under both the FAA and Florida's Arbitration Code. *See Rent-A-Center, W., Inc. v.*

Jackson, 561 U.S. 63 (2010); *see also, Morton v. Polivchak*, 931 So. 2d 935, 938 (Fla. 2d DCA 2006)).

Third, the court determines that Defendants have not waived its right to arbitration. A party waives its right to arbitration by "actually participating in a lawsuit or taking action inconsistent with that right." *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005). The record in the instant action reveals that Defendant E&Y has not actively participated in the instant action or otherwise acted inconsistent with its right to arbitration.

Accordingly, it is hereby:

ORDERED that Defendant Ernst & Young LLP's Revised Motion to Compel Arbitration and Stay or Abate the Claims Against It is GRANTED and all claims against Ernst & Young LLP are STAYED pending the completion of arbitration.

IT IS FURTHER ORDERED that this Order **does not** stay Plaintiff's claims against Defendant Mayer Brown, LLP.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 20 day of May, 2016.

JOHN J. MURPHY, III
CIRCUIT COURT JUDGE

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