STATE OF MICHIGAN

COURT OF APPEALS

MARJORIE R. BROWN,

Plaintiff-Appellant,

v

MORGAN STANLEY SMITH BARNEY, RICHARD C. RESS, and CITIGROUP GLOBAL MARKETS, INC.,

Defendants-Appellees.

UNPUBLISHED
February 19, 2013

No. 307849
Oakland Circuit Court
LC No. 2011-120248-CZ

Before: CAVANAGH, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion to set aside a default entered against Richard C. Ress, and an order granting defendants' motion for summary disposition premised on the ground that an arbitration agreement existed between the parties. We reverse and remand for proceedings consistent with this opinion.

According to plaintiff's complaint, she opened an investment account with Smith Barney Shearson in 1982 and then changed her individual account to a trust account in 1997. In 2004, defendant Richard C. Ress (Ress) became her investment advisor. In 2007, Ress advised plaintiff to transfer almost all of the trust assets into a particular investment and plaintiff agreed to do so based on the information Ress provided. Eventually, the trust incurred substantial economic losses and this lawsuit was filed. In Count I, plaintiff alleged that Ress committed fraud and made material misrepresentations regarding the particular investment. Count II was a breach of contract claim premised on the allegation that defendants failed to provide competent professional services. In Count III, plaintiff alleged that defendants breached their fiduciary duties. Counts IV and V asserted violations of the anti-fraud provisions of the federal Securities and Exchange Act and the Michigan Uniform Securities Act. Count VI alleged that defendants Morgan Stanley Smith Barney LLC (Morgan Stanley) and Citigroup Global Markets Inc. (Global Markets) failed to reasonably supervise Ress in violation of the respondeat superior doctrine.

After Ress failed to respond to plaintiff's complaint, a default was entered. Subsequently, plaintiff moved for entry of a default judgment. Defendants opposed the motion and moved to set aside the default entered against Ress. Defendants argued that plaintiff

executed arbitration agreements and was required to arbitrate her claims. Defendants asserted that their counsel advised plaintiff's counsel that arbitration agreements existed and that they would not file their motion to compel arbitration or other response to plaintiff's complaint while plaintiff's counsel reviewed the arbitration agreements. Defendants argued that, although plaintiff's counsel "agreed with this approach," he filed a default against Ress, who had a meritorious defense. Accordingly, defendants argued that the default should be set aside because good cause was shown and Ress had a meritorious defense.

Plaintiff responded to defendants' motion to set aside the default entered against Ress, arguing that she was not required to arbitrate her claims because neither Morgan Stanley nor Global Markets were signatories to the arbitration agreements. The arbitration agreements were with Smith Barney Inc. and Smith Barney Shearson Inc. Further, Ress "was not nor has he ever been an employee of Smith Barney Inc." and he did not establish a meritorious defense to plaintiff's claims. Plaintiff's counsel admitted that he had discussions with defendants' counsel, but asserted that they only involved defendants' claim that plaintiff was required to arbitrate this matter. Plaintiff's counsel denied that there was an oral agreement between himself and defendants' counsel regarding the filing of a response to plaintiff's complaint.

Defendants also filed a motion for summary disposition pursuant to MCR 2.116(C)(7) premised on the ground that this dispute must be arbitrated. Defendants argued that plaintiff had established accounts with their predecessors, Smith Barney Inc. and Smith Barney Shearson Inc. The client agreements that plaintiff executed contained arbitration agreements requiring that all claims and controversies arising between the parties, including successors, be arbitrated. Accordingly, defendants argued, plaintiff's complaint should be dismissed in favor of arbitration.

Plaintiff responded to defendants' motion for summary disposition in favor of arbitration, arguing that neither Morgan Stanley nor Global Markets were signatories to the arbitration agreements. The only signatories to plaintiff's client agreements were Smith Barney Inc. and Smith Barney Shearson Inc. Further Ress was employed by Global Markets from July 1993 to June 2009 and then by Morgan Stanley from June 2009 to the present time. Plaintiff's complaint related to investment activities that occurred in 2007 and 2009; in 2007, plaintiff's broker/dealer was Global Markets and, in 2009, her broker/dealer was Morgan Stanley, not a Smith Barney entity. Global Markets was formed in October 1998 and it was previously known as Solomon Smith Barney Inc. Morgan Stanley was formed in February 2009. Neither Morgan Stanley nor Global Markets are corporate successors of Smith Barney Inc. or Smith Barney Shearson Inc. Thus, plaintiff argued, her claims against these defendants were not subject to the arbitration agreements contained in the client agreements.

Defendants responded to plaintiff's brief opposing their motion for summary disposition, arguing that Morgan Stanley and Global Markets are the legal successors to Smith Barney Inc. and Smith Barney Shearson Inc., as evidenced by an attached one-page "official record" of the Financial Industry Regulatory Authority (FINRA) which governs the securities industry. Further, several courts have held that Global Markets is a successor to Smith Barney and have noted that Morgan Stanley entered into a joint venture with Smith Barney to form Morgan Stanley Smith Barney. Thus, defendants argued, plaintiff was required to arbitrate her claims. Plaintiff filed a supplemental brief, arguing that no court had ever held that Global Markets is the successor to Smith Barney Inc.; rather, Global Markets may be the successor to *Solomon* Smith

Barney Inc., not Smith Barney Inc. Further, citing *Brecher v Citigroup Global Markets, Inc*, 2011 WL 3475299 (SD Cal, 2011), plaintiff argued that Morgan Stanley did not enter into a joint venture with Smith Barney, it entered into a joint venture with Citigroup.

A hearing on the motions was conducted on November 16, 2011, at which time the trial court held that good cause existed to set aside the default entered against Ress "since defense counsel was in communication with plaintiff's counsel regarding arbitration and [ ] defendants present a meritorious defense through the Ress affidavit." Further, the court held, the plain language of the client agreements provided that plaintiff agreed to waive all claims in favor of settling any disputes through arbitration. After noting that the arbitration provisions inured to the benefit of successors, the trial court held that Morgan Stanley and Global Markets were the "legal successors" of Smith Barney Inc. and Smith Barney Shearson Inc. Accordingly, the trial court granted defendants' motion for summary disposition in favor of arbitration. An order consistent with the trial court's ruling was subsequently entered and this appeal followed.

Plaintiff argues that the trial court erroneously granted defendants' motion for summary disposition because defendants did not establish that they are successors to Smith Barney Inc. and Smith Barney Shearson Inc.; thus, plaintiff was not required by the client agreements to arbitrate her claims.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A claim that is barred because of an agreement to arbitrate is properly dismissed under MCR 2.116(C)(7). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), an appellate court accepts all the plaintiff's well-pleaded allegations as true, and construes them most favorably to the plaintiff, unless specifically contradicted by documentary evidence." *Xu v Gay*, 257 Mich App 263, 266; 668 NW2d 166 (2003). If documentary evidence is offered in support of a motion based on MCR 2.116(C)(7), it "shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). Such documentary evidence is considered to determine whether a genuine issue of material fact exists. See *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred is an issue of law for the court." *Id*.

We also review de novo as a question of law the existence and enforceability of an arbitration agreement. *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009); *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). "Arbitration is a matter of contract, and a party cannot be forced to submit to arbitration in the absence of an agreement to do so." *Ehresman v Bultynck & Co, PC*, 203 Mich App 350, 353-354; 511 NW2d 724 (1994).

In this case, plaintiff admits that she signed client agreements with Smith Barney Inc. and Smith Barney Shearson Inc. and that the client agreements contained arbitration provisions. The client agreement with Smith Barney Inc. provided, in relevant part:

> In consideration of your opening one or more accounts for me . . . and your agreeing to act as broker/dealer for me . . . it is agreed in respect to any and all

accounts, whether upon margin or otherwise, which I now have or may at any future time have with Smith Barney Inc. or its direct or indirect subsidiaries and affiliates or their successors or assigns (hereinafter referred to as "you" or "your" or "SB"), that:

* * *

6. Arbitration

- Arbitration is final and binding on the parties.
- The parties are waiving their right to seek remedies in court, including the right to jury trial.

* * *

I agree that all claims or controversies, whether such claims or controversies arose prior, on or subsequent to the date hereof, between me and SB and/or any of its present or former officers, directors, or employees concerning or arising from (i) any account maintained by me with SB individually or jointly with others in any capacity; (ii) any transaction involving SB or any predecessor firms by merger, acquisition or other business combination and me, whether or not such transaction occurred in such account or accounts . . . . .

* * *

7. The provisions of this Agreement shall be continuous, shall cover individually and collectively all accounts which I may open or reopen with SB, and shall inure to the benefit of SB's present organization, and any successor organization or assigns.

The client agreement with Smith Barney Shearson Inc. provided, in relevant part:

In consideration of your opening one or more accounts for me . . . and your agreeing to act as broker/dealer for me . . . it is agreed in respect to any and all accounts, whether upon margin or otherwise, which I now have or may at any future time have with Smith Barney Shearson Inc. or your successors (hereinafter referred to as "you" or "your" or "SBS"), that:

* * *

6. Arbitration

- Arbitration is final and binding on the parties.
- The parties are waiving their right to seek remedies in court, including the right to jury trial.

* * *

> I agree that all claims or controversies, whether such claims or controversies arose prior, on or subsequent to the date hereof, between me and SBS and/or any of its present or former officers, directors, or employees concerning or arising from (i) any account maintained by me with SBS individually or jointly with others in any capacity; (ii) any transaction involving SBS or any predecessor firms by merger, acquisition or other business combination and me, whether or not such transaction occurred in such account or accounts . . . . .
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> * * *
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> 7. The provisions of this Agreement shall be continuous, shall cover individually and collectively all accounts which I may open or reopen with SBS, and shall inure to the benefit of SBS's present organization, and any successor organization or assigns.

Plaintiff concedes on appeal that the arbitration agreements inured to the benefit of a successor corporation to either Smith Barney Inc. or Smith Barney Shearson Inc. However, plaintiff argues, neither Morgan Stanley nor Global Markets is a successor to Smith Barney Inc. or Smith Barney Shearson Inc.; thus, neither defendant is entitled to enforce the arbitration agreements.

In particular, plaintiff first argues that Smith Barney Inc. merged with Primerica in 1987 and, at that time, Primerica acquired all of Smith Barney Inc.'s stock; thus, it ceased to exist. See *Lama Holding Co v Smith Barney Inc*, 88 NY2d 413, 418; 668 NE2d 1370 (1996). Accordingly, neither defendant could be the successor to Smith Barney Inc. because neither defendant existed at the time of that merger when Smith Barney Inc. ceased to exist. Second, plaintiff argues, defendants provided no admissible evidence establishing that either defendant is a successor to Smith Barney Shearson Inc. For example, plaintiff argues, defendants have provided no evidence of a stock merger and no evidence of a cash transaction. In short, there is no evidence of any continuity between the corporations. However, plaintiff admits that Global Markets may be a successor to *Solomon* Smith Barney Inc., but plaintiff argues that *Solomon* Smith Barney Inc. was not Smith Barney *Shearson* Inc. And Morgan Stanley has provided no evidence of any relationship to Smith Barney Shearson Inc.

In support of their motion for summary dismissal and to compel arbitration, defendants attached the client agreements as exhibits. These exhibits do not bear on the issue whether defendants are successor corporations of either Smith Barney Inc. or Smith Barney Shearson Inc. In their reply brief filed in response to plaintiff's opposition brief, defendants only attached as an exhibit a one-page "search results" document purportedly retrieved from the FINRA website. However, defendants failed to set forth any argument as to the admissibility of this purported evidence. Documentary evidence offered in support of a motion based on MCR 2.116(C)(7) may be considered only to the extent that its contents or substance would be admissible as evidence to establish or deny the grounds stated in the motion. MCR 2.116(G)(6).

Further, we have reviewed the lower court record and could find no admissible evidence which definitively explains the relationship, if any, between defendants and either Smith Barney Inc. or Smith Barney Shearson Inc. The preamble in the Smith Barney Inc. client agreement relied upon by defendants provides that the agreement applies not only to Smith Barney Inc., but

any of their "direct or indirect subsidiaries and affiliates or their successors or assigns." The preamble in the Smith Barney Shearson Inc. client agreement relied upon by defendants provides that the agreement applies to successors. The trial court provided no analysis of this issue before concluding that defendants were the "legal successors" of these Smith Barney entities. Therefore, we reverse and remand for articulation of the reasons underlying the trial court's decision or, in the alternative, for development of the record regarding the issue whether a requisite relationship exists entitling defendants to enforce the arbitration agreements contained in the client agreements.

Next, plaintiff argues that the trial court erred in granting defendants' motion to set aside the default entered against Ress because a meritorious defense was not shown.

This Court reviews for an abuse of discretion a trial court's decision on a motion to set aside a default. *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 220-221; 760 NW2d 674 (2008).

Generally, a motion to set aside a default may only be granted if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1). In this case, plaintiff argues that Ress' affidavit failed to show a meritorious defense. To establish a meritorious defense, an affidavit of facts signed by an affiant with personal knowledge of the facts must be submitted. *Huntington Nat'l Bank*, 292 Mich App at 392. The affidavit must "state admissible facts with particularity, and show that the affiant can testify competently to the facts set forth in the affidavit." *Id*. Several factors are considered, where relevant, under a totality of the circumstances test in determining whether a meritorious defense has been shown. *Shawl*, 280 Mich App at 238-239. Although not an exhaustive list of factors, the court should consider, for example, whether the affidavit contains evidence that: (1) the plaintiff cannot prove, or the defendant can disprove, an element of the claim; (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7), or (8); or (3) the plaintiff's claim rests on inadmissible evidence. *Shawl*, 280 Mich App at 238.

The claims set forth in plaintiff's complaint included that (1) Ress committed fraud and made material misrepresentations regarding the disputed investment, (2) defendants breached their contract to provide competent professional services, (3) defendants breached their fiduciary duties, and (4) defendants violated anti-fraud provisions of the federal Securities and Exchange Act and the Michigan Uniform Securities Act. The affidavit of meritorious defense filed by Ress with regard to these claims included the following statement:

> The Complaint claims a loss to Plaintiff of $537,638 from a transaction that was alleged to be unsuitable and the result of Defendants' allegedly misrepresenting or omitting to state material facts. I have meritorious defenses to Plaintiff's claims. With respect to the transaction at issue, under the securities rules, I had a reasonable basis in light of plaintiff's financial situation, investment objectives and risk tolerance, to recommend the transaction. The terms of the transaction were fully disclosed to Plaintiff and she had the final yes or no on

executing the transaction. Defendants fulfilled any contract and other obligations to Plaintiff and the losses she complains of were not caused by Defendants.

We conclude that this affidavit of meritorious defense failed to "state admissible facts with particularity" and failed to contain any evidence of a meritorious defense, i.e., for example, that plaintiff could not prove her claim or that defendants could disprove her claim. See *Huntington Nat'l Bank*, 292 Mich App at 392. Because the trial court did not articulate its reasoning in support of its conclusion that a meritorious defense was established, we reverse and remand this matter for articulation of the reasons underlying the trial court's decision or, in the alternative, for development of the record regarding the issue.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Henry William Saad