UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Brendan Gilmore v. Shearson/American Express Inc. and Stuart Travis

668 F. Supp. 314 (S.D.N.Y. 1987) · No. 84 CIV. 9011 (PKL) · Decided September 4, 1987

SUMMARY

The court considered whether claims arising from alleged securities-account churning, including claims under § 10(b), RICO, and state law, were subject to arbitration. In light of the Supreme Court's intervening decision in Shearson/American Express, Inc. v. McMahon, the court held that the federal securities and RICO claims were arbitrable and that Shearson could revive its motion to compel arbitration as to the § 10(b) claims, but not the state-law claims. The court compelled arbitration of the federal claims and stayed the remaining litigation.

CASE DETAILS

COURT	United States District Court for the Southern District of New York
WRITING FOR THE COURT	Leisure, District Judge
JURISDICTION	New York
DECIDED	September 4, 1987
DOCKET	84 CIV. 9011 (PKL)
DISPOSITION	other
PROCEDURAL POSTURE	Defendants moved to compel arbitration of all claims in the amended complaint and alternatively moved for summary judgment. The district court reconsidered its earlier arbitration rulings in light of the Supreme Court's intervening decision in Shearson/American Express, Inc. v. McMahon, granted arbitration of the RICO and Exchange Act claims, denied arbitration of the state-law claims under the Second Circuit's prior ruling, and stayed the remaining litigation.
STANDARD OF REVIEW	The court applied the law-of-the-case doctrine and its exceptions for intervening changes in controlling law, new evidence, clear error, or manifest injustice; it also applied the federal policy favoring arbitration and the contractual scope of the arbitration agreement.
PRECEDENTIAL VALUE	Published federal district court opinion; persuasive authority within the Second Circuit and elsewhere, subject to subsequent appellate and

	Supreme Court precedent.
PARTIES	Shearson/American Express Inc., Stuart Travis v. Brendan Gilmore

TOPICS

arbitration · civil procedure · contracts · commercial litigation · motions to dismiss

PRACTICE AREAS

arbitration · civil procedure · contracts · commercial litigation · securities litigation

QUESTIONS PRESENTED

1. Whether an intervening Supreme Court decision holding Exchange Act and RICO claims arbitrable permitted the district court to reconsider its prior contrary ruling under the law-of-the-case doctrine.
2. Whether Shearson's prior withdrawal of its arbitration motion waived its right to compel arbitration of the RICO and section 10(b) claims.
3. Whether the arbitration agreement covered all transactions in Gilmore's account or only the option transactions associated with the Client Option Agreement.
4. Whether the nonarbitrable state-law claims and claims involving a non-signatory defendant should be stayed pending arbitration of the arbitrable claims.

HOLDINGS

1. An intervening Supreme Court decision establishing that Exchange Act and RICO claims are arbitrable justified reconsideration of the district court's prior ruling under the law-of-the-case doctrine.
2. The plaintiff's RICO and section 10(b) claims were subject to arbitration.
3. Shearson was permitted to revive its right to compel arbitration of the section 10(b) claims.
4. The arbitration clause applied to all transactions in the plaintiff's account, not merely the two option transactions.
5. The motion to compel arbitration of the common-law state claims was denied because the Second Circuit had already held that Shearson failed to establish a basis to revive its right to arbitrate those claims.
6. The balance of the litigation, including the claims against Travis, was stayed pending arbitration because the arbitrable claims predominated and rested on the same underlying facts as the nonarbitrable claims.

KEY QUOTATIONS

> *"Accordingly, the Court now holds that plaintiff's RICO and § 10(b) claims are subject to arbitration."* (at 317)

> *"Accordingly, the RICO and § 10(b) claims must be submitted to arbitration."* (at 320)

> *“Accordingly, Shearson's motion to compel arbitration of the RICO and § 10(b) claims is hereby granted and the balance of the litigation, including the action against defendant Travis, is hereby stayed pending the arbitration.”* (at 321)

FACTUAL BACKGROUND

Gilmore maintained a margin account with Shearson and alleged that Shearson and his broker, Stuart Travis, churned the account between January 1976 and April 1980, causing substantial losses. He asserted claims under section 10(b) of the Securities Exchange Act, Rules 10b-3 and 10b-5, RICO, breach of fiduciary duty, breach of contract, and common-law fraud. Gilmore signed a Client Option Agreement containing a broad arbitration clause covering controversies arising out of or relating to his account, transactions, or the agreement.

PROCEDURAL HISTORY

Gilmore filed suit in December 1984 alleging churning and asserting Exchange Act, fiduciary-duty, contract, and fraud claims. Shearson initially moved to compel arbitration but withdrew the motion; after Gilmore amended to add a RICO claim, Shearson renewed its arbitration demand. The district court initially declined to compel arbitration of the federal claims, and the Second Circuit affirmed the denial of arbitration for the state-law claims. After the Supreme Court held in McMahon that Exchange Act and RICO claims were arbitrable, the district court granted renewed arbitration of those claims, denied arbitration of the state-law claims, and stayed the balance of the case.

DISPOSITION

other

CASES CITED

- McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir. 1986)
- Gilmore v. Shearson/American Express Inc., 811 F.2d 108, 109, 112-14 (2d Cir. 1987)
- Rush v. Oppenheimer & Co., 779 F.2d 885, 887-89 (2d Cir. 1985)
- Arizona v. California, 460 U.S. 605, 618 (1983)
- United States v. Birney, 686 F.2d 102, 107 (2d Cir. 1982)
- United States v. Melendez-Carrion, 820 F.2d 56, 60 n.1 (2d Cir. 1987)
- Zdanok v. Glidden Co., 327 F.2d 944, 951 (2d Cir.), cert. denied, 377 U.S. 934 (1964)
- Fogel v. Chestnutt, 668 F.2d 100, 109 (2d Cir. 1981), cert. denied, 459 U.S. 828 (1982)
- Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 844, 846-47, 856 (2d Cir. 1987)
- Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505, 1512 (S.D.N.Y. 1985)
- Avila Group, Inc. v. Norman J. of California, 426 F. Supp. 537, 540 (S.D.N.Y. 1977)
- Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 20, 24-25 (1983)
- Leone v. Advest, Inc., 624 F. Supp. 297, 303 (S.D.N.Y. 1985)
- NPS Communications, Inc. v. Continental Group, Inc., 760 F.2d 463, 465 (2d Cir. 1985)

- Seguros Banvenez, S.A. v. S/S Oliver Drescher, 761 F.2d 855, 862 (2d Cir. 1985)
- Chang v. Lin, 824 F.2d 219, 221-23 (2d Cir. 1987)
- Wilko v. Swan, 346 U.S. 427 (1953)
- Allegaert v. Perot, 548 F.2d 432, 437-38 (2d Cir.), cert. denied, 432 U.S. 910 (1977)
- Greater Continental Corp. v. Schechter, 422 F.2d 1100, 1103 (2d Cir. 1970)
- Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218, 221 (1985)
- Doe v. New York City Department of Social Services, 709 F.2d 782, 788 (2d Cir.), cert. denied, 464 U.S. 864 (1983)
- Fine v. Bellefonte Underwriters Insurance Co., 758 F.2d 50, 52 (2d Cir.), cert. denied, 474 U.S. 826 (1985)
- Crane Co. v. American Standard, Inc., 603 F.2d 244, 248 n.8 (2d Cir. 1979)
- Lloyd v. Industrial Bio-Test Laboratories, Inc., 454 F. Supp. 807, 811 (S.D.N.Y. 1978)

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