[Cite as *Marks v. Morgan Stanley Dean Witter Commercial Financial Serv., Inc.*, 2004-Ohio-6419.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84209

BRUCE W. MARKS	:	
	:	
Plaintiff-appellee	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
MORGAN STANLEY DEAN WITTER COMMERCIAL FINANCIAL SERVICES, INC., et al.	:	
	:	
Defendants-appellants	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION	:	DECEMBER 2, 2004
CHARACTER OF PROCEEDING	:	Civil appeal from Cuyahoga
	:	County Common Pleas Court
	:	Case Nos. CV-502459 & 507811
JUDGMENT	:	DISMISSED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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BRITT J. ROSSITER

ELIZABETH S. RUDNICK
Attorneys at Law
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Cleveland, Ohio 44114

KENNETH A. ROCCO, J.:

{¶ 1} Defendants-appellants, Morgan Stanley Dean Witter Commercial Financial Services, Inc., Dean Witter Reynolds, Inc., Linda Cain, Timothy Adkins, George Kohler and Cindy DeLeo, appeal from orders of the Cuyahoga County Common Pleas Court entered January 28 and 30, 2004. They claim these orders denied their motions to compel arbitration and to stay proceedings. However, we find that the common pleas court's orders only denied appellants' motions to stay discovery and set the motions to compel arbitration for hearing. The denial of appellant's motions to stay discovery was not a final appealable order. Therefore, we dismiss this appeal.

{¶ 2} The record reflects that plaintiff-appellee, Bruce W. Marks, was employed by Morgan Stanley Dean Witter Commercial Financial Services, Inc. ("Morgan Stanley") and its predecessor, Dean Witter Reynolds, Inc. ("Dean Witter") as an account executive from June 1999 until his termination in May 2002. In June 2003, Marks filed a 15-count complaint which asserted several employment-related claims against Morgan Stanley, Dean Witter and his supervisors. This complaint was amended twice, and included claims for discrimination, breach of contract, promissory estoppel, unjust enrichment, fraud, intentional infliction of emotional distress, conversion, invasion of privacy, interference with business relationships, violation of securities laws, defamation, declaratory judgment, a request for an accounting and the establishment of a constructive trust.

{¶ 3} In August 2003, Marks filed a separate complaint to enjoin arbitration of a claim for indemnification which Morgan Stanley had made against Marks in connection with a proceeding which a client had instituted against Morgan Stanley. Marks further sought a declaratory judgment regarding his right of access to the courts, and asked the court to disqualify Morgan Stanley's counsel. Marks' two cases were consolidated before the common pleas court.

{¶ 4} The defendants filed motions to compel arbitration and to stay discovery, basing their motions on arbitration clauses contained in two documents which Marks executed at the commencement of his employment. On January 30, 2004, the court issued orders ruling on these motions as follows:

{¶ 5} "Discovery as to all issues in both cases is to proceed.

{¶ 6} "The trial dated June 14, 2004 is stayed, which date shall be used for the hearing on the motion for arbitration and the motion to disqualify is to be 6-14-04 @ 1:30 p.m.

{¶ 7} "*** Motion #240800 Motion to Compel Arbitration and to Stay discovery is denied in part hearing set 6-14-04. Discovery to proceed. ***"

{¶ 8} Defendants-appellants appealed from these orders.

{¶ 9} Appellee moved this court to dismiss the appeal, arguing that the trial court's orders were not final and appealable because the court had not yet ruled on the motion to compel arbitration. Appellants contended that the orders were final and appealable because "they denied Appellants' Motion to Stay Proceedings and Motion to Compel Arbitration," likening the ruling to the grant or denial of a stay of proceedings to permit arbitration. This court denied the motion to dismiss, without opinion.

{¶ 10} Closer examination of the underlying motions and the common pleas court rulings reveals that the judgment entries from which appellants have appealed do not deny a motion to stay

proceedings pending arbitration as appellant argued. In each of their three motions to stay discovery, appellants expressly asked the court to stay discovery *pending a ruling on their motion to compel arbitration*. The denial of these motions did not expressly or impliedly rule on the motions to compel arbitration. Rather, the court set the motions to compel arbitration for hearing.[1] The court only refused to stay discovery during the pendency of the motions to compel arbitration. This order is not appealable pursuant to R.C. 2711.02(C).

{¶ 11} Nor is the order denying a stay appealable under any provision of R.C. 2505.02. "An order denying a stay clearly is not an order that determines the action, is made in a special proceeding (i.e., was unknown at common law), vacates or sets aside a judgment or grants a new trial, or determines class action status. Consequently, it is final and appealable only if it grants or denies a 'provisional remedy' and meets the further conditions of R.C. 2505.02(B)(4)(a) and (b)." *Cleveland v. Zakaib* (Oct. 12, 2000), Cuyahoga App. Nos. 76928, 76929, 76930.

{¶ 12} A "provisional remedy" is statutorily defined as a "proceeding ancillary to an action, including but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence." R.C. 2505.02(A)(3). An ancillary proceeding is one that is attendant upon or aids another proceeding, and is subordinate to it. *State v. Muncie*, 91 Ohio St.3d 440, 449, 2001-Ohio-93. In a sense, every ruling can be said to "aid" the proceedings. However, to think of provisional remedies in this way would allow the exception to swallow the rule that interlocutory orders generally are not appealable. The legislature's inclusion of specific examples of provisional remedies indicates that a more limited meaning was intended.

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[1]The nature of appellants' motion distinguishes this case from *Oncology Div. Of UIMA, Inc. V. Community Ins. Co.*, Hamilton App. No. C-020056, 2002-Ohio-4800, ¶7, in which the denial of a motion to stay proceedings pending arbitration was found to be final and appealable.

{¶ 13} A recurring theme in the statutory and dictionary definitions of the term "provisional remedy" "is that a provisional remedy protects one party against irreparable harm by another party during the pendency of the litigation." *Duryee v. Rogers* (Dec. 16, 1999), Cuyahoga App. No. 74963. We cannot characterize a request for a stay of discovery pending a ruling on a motion to compel arbitration as a means of preventing irreparable harm. The purpose – as stated by appellants in their motion to stay discovery – was to prevent duplicative discovery in the court proceedings and the anticipated arbitration proceedings. The potential for duplicative discovery is not an irreparable harm; it is at worst annoying and burdensome. Furthermore, nothing prevents the parties from avoiding duplication by using discovery obtained through court proceedings in any later arbitration proceedings. Therefore, we hold that a stay of discovery is not a "provisional remedy," the denial of which is subject to immediate appeal pursuant to R.C. 2505.02(B)(4).[2]

{¶ 14} Having determined that the court's orders are not final and appealable, we do not have jurisdiction to address any of appellants' arguments why appellee should be compelled to arbitrate his claims.

Appeal dismissed.

This cause is dismissed.

It is, therefore, considered that said appellee recover of said appellant its costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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[2]Appellants could still ask the court to narrow the scope of discovery, for example, by moving the court for a protective order to limit discovery to matters encompassed by their motion to compel arbitration.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JUDGE
KENNETH A. ROCCO

ANTHONY O. CALABRESE, JR., J. CONCURS

TIMOTHY E. McMONAGLE, P.J. DISSENTS
(SEE SEPARATE DISSENTING OPINION)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84209

BRUCE W. MARKS,	:	
	:	
Plaintiff-Appellee	:	
	:	
v.	:	
	:	D I S S E N T I N G
MORGAN STANLEY DEAN WITTER	:	
COMMERCIAL FINANCIAL	:	O P I N I O N
SERVICES, INC., ET AL.,	:	
	:	
Defendants-Appellants	:	

:
:

DATE: DECEMBER 2, 2004

TIMOTHY E. McMONAGLE, P.J., DISSENTING:

{¶ 15} I respectfully dissent.

{¶ 16} R.C. 2711.02(C) provides that an order granting or denying a "stay of a trial of any action pending arbitration" is a final order capable of immediate review. Despite the statute's use of the term *trial* when referencing a motion to stay, this court, as well as other courts, has equated an order emanating from a motion to stay *proceedings* with a motion to stay trial. See, e.g., *Thornton v. Haggins*, Cuyahoga App. No. 83055, 2003-Ohio-7078. The majority acknowledges as much when it references *Oncology Div. of UIMA v. Community Ins. Co.*, 1st Dist. No. C-020056, 2002-Ohio-4800, yet it finds the order that is the subject of this appeal to be non-final.

{¶ 17} A review of the record reveals that Morgan Stanley filed several motions to compel arbitration in the two cases before they were consolidated. The first motion was filed in Case No. CV-502459 on July 8, 2003 and was captioned as a motion to compel arbitration. Within the body of that motion was a request for an order "compelling arbitration and staying the instant proceedings ***." It is true that Morgan Stanley thereafter filed a motion to stay discovery in Case No. CV-502459 on July 17, 2003 and an alternative motion to "stay proceedings" in Case No. CV-507811 on October 27, 2003. After the two cases were consolidated, Morgan Stanley filed yet another motion, which was captioned as a motion to compel arbitration and stay discovery. Within the body of that motion, however, Morgan Stanley specifically incorporated all arguments contained in their motions filed July 8, 2003 and October 27, 2003, both which sought an order staying the "proceedings." It is well established that the substance of the motion, and not its caption, determines its operative effect.

See *Nethery v. State Farm Ins. Cos.* (2001), 146 Ohio App.3d 282, 283, citing *Morris v. Children's Hosp. Med. Ctr.* (1991), 73 Ohio App.3d 437, 440-441; see, also, *Lungard v. Bertram* (1949), 86 Ohio App. 392, 395. Because the court ordered discovery to continue and set the motion to compel for hearing, I find that it effectively denied Morgan Stanley's request to stay proceedings, making that order final and capable of immediate review under R.C. 2711.02(C).

{¶ 18} In that event, I would find the arbitration provision at issue unenforceable. Although arbitration agreements are generally favored in the law as a less costly and more efficient method of settling disputes, the presumption favoring arbitration arises only when the claim in dispute falls within the scope of the arbitration provision. See *Gerig v. Kahn*, 95 Ohio St.3d 478, 2002-Ohio-2581, at ¶20; *Kelm v. Kelm* (2001), 92 Ohio St.3d 223, 225. An arbitration agreement is generally viewed as an expression that the parties agree to arbitrate disagreements within the scope of the agreement, and, with limited exceptions, such an agreement is to be upheld just as any other contract. See *Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 668; see, also, *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 471.

{¶ 19} Under R.C. 2711.02, a trial court is required to stay proceedings instituted in its court when a party demonstrates that an agreement exists between the parties to submit the issue to arbitration. In order for an arbitration agreement to be enforceable, however, the agreement must apply to the disputed issue and the parties must have agreed to submit that particular issue or dispute to arbitration. *Harmon v. Philip Morris Inc.* (1997), 120 Ohio App.3d 187, 189; *Ervin v. American Funding Corp.* (1993), 89 Ohio App.3d 519; see, also, *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465, at ¶17; *ABM Farms v. Woods* (1998), 81 Ohio St.3d 498, 500.

{¶ 20} Here, Morgan Stanley argues that Marks agreed to arbitrate any claims against it under two separate documents: the Uniform Application for Securities Industry Registration or Transfer and the Account Executive Employment Agreement.

Uniform Application for Securities Industry Registration

{¶ 21} At the commencement of his employment with Morgan Stanley's predecessor, Dean Witter, Marks completed an application to be registered as a securities representative. The registration application, entitled "Uniform Application for Securities Industry Registration or Transfer" (hereafter referred to as "Securities Application") provided, among other things, that Marks "agreed to arbitrate any dispute, claim or controversy that may arise between [him] and [his] firm *** that is required to be arbitrated under the rules, constitutions or by-laws of the organizations indicated in Item 10 *** ." Item 10 of the Securities Application lists several organizations, including the National Association of Securities Dealers ("NASD"). The applicant checks the appropriate box of the organization from which he or she seeks registration. It is Morgan Stanley's position that Marks registered with NASD as part of the application process and is, therefore, bound by the arbitration provision set forth in the NASD Code of Arbitration Procedure, which provides:

{¶ 22} "This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(iv) of the By-Laws of the Association for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member ***."

{¶ 23} Marks, on the other hand, maintains that the NASD rules and regulations are inapplicable because Item 10 of Marks' Securities Application is blank, meaning that Marks' application cannot be construed to bind him to the arbitration provision set forth by NASD. Morgan

Stanley argues in opposition that being registered with this entity was a requirement of employment, one that Marks does not dispute.

{¶ 24} Contrary to Morgan Stanley's argument, I find no evidence in the record indicating that Marks was registered with NASD. The Securities Application is silent on this issue. Moreover, Marks' second amended complaint does not contain an assertion that Marks is registered with NASD. To be sure, the complaint sets forth that Marks is a "successful and coveted financial planner and advisor," that he used his "best efforts to discharge his duties to Dean Witter" and that he was coerced "to steer clients to invest funds." Without more, I cannot infer or assume by these averments that Marks was required to be a registered member of one of the organizations listed in Item 10 of the Securities Application. Although it may, in fact, be true that Marks could not discharge his duties as an account executive without such registration, there is no evidence in the record indicating that he was so registered and, therefore, bound by the arbitration agreement referenced in paragraph five on page four of the Securities Agreement.

{¶ 25} Consequently, I would find that Morgan Stanley is not entitled to a stay of proceedings on the basis of the arbitration agreement referenced in the Securities Application.

Account Executive Employment Agreement

{¶ 26} Marks executed an Account Executive Employment Agreement ("Employment Agreement") at the commencement of his employment with Morgan Stanley's predecessor, Dean Witter. The Employment Agreement contained 11 paragraphs and addressed several employment-related issues, including, among others, the treatment of confidential information, unfair competition, Dean Witter's right to injunctive relief and the termination of employment. The Employment Agreement also contained the following arbitration provision:

{¶ 27} "Any controversy or claim arising out of or relating to this Agreement, or its breach, will be settled by arbitration before either the National Association of Securities Dealers, Inc.[,] or the New York Stock Exchange, Inc., as Dean Witter may elect, in accordance with their respective rules, and judgment upon the award entered by the arbitrator(s) may be entered in any court having jurisdiction thereof. *** "

{¶ 28} Morgan Stanley, as the successor in interest to Dean Witter, argues that this provision within the Employment Agreement obligates Marks to submit his employment-related claims to arbitration. Marks, on the other hand, maintains that this provision is narrow in scope and relates only to the issues addressed in the Employment Agreement; namely, provisions for treatment of confidential information, unfair competition and injunctive relief. Because Marks' claims do not come within any of these provisions, Marks argues that he cannot be compelled to submit the claims raised in his complaint to arbitration. I would agree with Marks.

{¶ 29} Ordinarily, the existence of a contract containing a broad arbitration provision creates a presumption that the parties agreed to arbitrate all disputes unless expressly excluded or unless there exists evidence of a purpose to exclude the claim from arbitration. See *Crawford v. Ribbon Tech. Corp.* (2000), 138 Ohio App.3d 326, 333, citing *Internatl. Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 20 v. Toledo* (1988), 48 Ohio App.3d 11, 13; see, also, *Battle v. Bill Swad Chevrolet* (2000), 140 Ohio App.3d 185, 188. Here, the arbitration provision at issue is indeed broad, encompassing any claim or controversy arising out of or related to the Employment Agreement.

{¶ 30} Notwithstanding this broad language, however, the agreement to arbitrate is limited to controversies or claims arising out of or related to that *particular* agreement, which itself is limited to issues of unfair competition, the treatment of confidential information or Morgan Stanley's right

to injunctive relief. Marks raised no such claims and should not now be required to arbitrate claims he did not agree to arbitrate. As such, I would find that Morgan Stanley is also not entitled to a stay of proceedings on the basis of the arbitration provision contained in the Employment Agreement.

{¶ 31} I would affirm the judgment of the trial court.