[Cite as *May v. Wachovia Secs., L.L.C.*, 2009-Ohio-4339.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

JOSEPH MAY	C.A. No. 24635
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
WACHOVIA SECURITIES LLC	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CV-2008-09-6703

DECISION AND JOURNAL ENTRY

Dated: August 26, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Wachovia Securities, LLC ("Wachovia"), appeals from the order of the Summit County Court of Common Pleas, denying its motion to stay the proceedings pending arbitration. This Court reverses.

I

{¶2} In December 1998, Joseph May entered into an Account Application and Client Agreement ("Account Application") with EVEREN Securities, Inc. ("EVEREN"). The Account Application governed May's investments and provided for standing instructions on his investment profile. After May entered into the Account Application, EVEREN, and later Wachovia as EVEREN's successor, began advising May in his investment decisions. In August 2000, May entered into two separate "Application[s] for Proposed Insured" with Western Reserve Life Assurance Co. of Ohio ("Western Reserve Applications"). The Western Reserve Applications sought to create two insurance policies for May's grandchildren, each in the amount

of $250,000. The policies were signed by May and Edward Pero, a Wachovia representative who apparently advised May regarding the policies and recommended them as an authorized agent of their issuing company.

{¶3} On September 24, 2008, May filed suit against Wachovia as "the successor of First Union Corporation, with which [he] attempted to negotiate a contract for the benefit of [his grandchildren]." May alleged that Wachovia's agent, Edward Pero, made misrepresentations upon which May relied when he entered into the Western Reserve Applications and that he incurred damages as a result. On October 31, 2008, Wachovia filed a motion to stay the proceedings pending arbitration. Wachovia argued that the Account Application that May had signed in 1998 contained an arbitration provision, which required May to arbitrate his claim. May objected to Wachovia's motion on November 14, 2008. On February 10, 2009, the trial court denied Wachovia's motion to stay. Wachovia now appeals from the trial court's denial of its motion to stay and raises one assignment of error for our review.

II

Assignment of Error

> "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW WHEN IT DENIED WACHOVIA SECURITIES, LLC'S MOTION TO STAY PROCEEDINGS PENDING ARBITRATION, WHERE THE PARTIES ARE BOUND BY A VALID ARBITRATION AGREEMENT AND THERE IS A STRONG PUBLIC POLICY FAVORING ARBITRATION AS SET FORTH IN THE OHIO ARBITRATION ACT, THE FEDERAL ARBITRATION ACT, AND RELEVANT OHIO AND FEDERAL CASE LAW."

{¶4} In its sole assignment of error, Wachovia argues that the trial court erred by denying its motion to stay the proceedings for arbitration. Specifically, Wachovia argues that the Account Application that May signed, covering "any dispute" and "all claims and controversies," governs May's claim against it.

{¶5} Generally, this Court reviews a trial court's decision to deny a motion to stay proceedings for arbitration for an abuse of discretion. *Ault v. Parkview Homes*, Inc., 9th Dist. No. 24375, 2009-Ohio-586, at ¶7. Abuse of discretion connotes more than simply an error in judgment; the court must act in an unreasonable, arbitrary, or unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. If, however, the trial court's decision presents a question of law, this Court employs a de novo standard of review. *Ault* at ¶7. "The question of whether a controversy is arbitrable under *** [a] contract is a question [of law] for the Court to decide upon an examination of the contract." *Telstat, Inc. v. Knight*, 9th Dist. No. 23502, 2007-Ohio-2342, at ¶12, quoting *Gibbons-Grable Co. v. Gilbane Bldg. Co.* (1986), 34 Ohio App.3d 170, 172.

{¶6} R.C. 2711.02(B) provides, in relevant part, as follows:

> "If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement ***."

Accordingly, a court shall stay a matter for arbitration if: "(1) the action is brought upon any issue referable to arbitration under a written agreement for arbitration[;] and (2) the court is satisfied the issue is referable to arbitration under the written agreement." (Internal citations and emphasis omitted.) *Telstat* at ¶10, quoting *Medallion Northeast Ohio, Inc. v. SCO Medallion Healthy Homes, Ltd.*, 9th Dist. No. 23214, 2006-Ohio-6965, at ¶7. This Court recognizes that "Ohio public policy favors arbitration." *Tomovich v. USA Waterproofing & Foundation Servs., Inc.*, 9th Dist. No. 07CA009150, 2007-Ohio-6214, at ¶8. "[I]f a dispute even arguably falls within the arbitration provision, [a] trial court must stay the proceedings until arbitration has been completed." Id.

{¶7} Initially, we note that May did not file an appellate brief in this matter. Accordingly, "this Court may accept [Wachovia's] statement of the facts and issues as presented in [its] brief as correct and reverse the judgment of the trial court if [its] brief reasonably appears to sustain such action." *Polen Implement, Inc. v. Toth*, 9th Dist. No. 07CA009280, 2008-Ohio-3211, at ¶8; App.R. 18(C).

{¶8} Wachovia premised its motion to stay upon the Account Application that May signed with EVEREN in 1998. The Account Application provided, in part, that:

> "In consideration of EVEREN *** accepting an account for me[], I[] acknowledge that I have read, understood, and agree to the terms of sections 1 through 18 of the attached Client Agreement and the applicable portions of the Full Service Disclosure Document.
>
> "***
>
> "By signing below, I acknowledge that I have received and read the attached Client Agreement which contains a pre-dispute arbitration clause in section 10."

Section 10 of the Account Application provides, in part, as follows:

> "(a) I understand that I am consenting to arbitration of any disputes between you[1] and me ***[.]
>
> "(b) I agree that all claims and controversies, whether such claims or controversies arose prior to, on or subsequent to the date hereof, between me and EVEREN and/or any of its present or former officers, directors, or employees concerning or arising from (i) any account maintained by me with EVEREN individually or jointly with others in any capacity; (ii) any transaction involving EVEREN or any predecessor firms by merger, acquisition or other business combination and me, whether or not such transaction occurred in such account or accounts, or (iii) the construction, performance or breach of this or any other agreement between us or any duty arising from the business of EVEREN or otherwise, shall be submitted to arbitration ***[.]"

According to Wachovia, May's Account Application with EVEREN governs this dispute because Wachovia is the successor to EVEREN.

{¶9} In response to Wachovia's motion to stay, May filed an objection to which he attached the Western Reserve Applications that governed the insurance policies for his grandchildren. May argued that the Western Reserve Applications formed the basis for his suit against Wachovia and, unlike the Account Application, did not contain any arbitration provision. In explaining his claim, however, May specified that it revolved around alleged misrepresentations that Wachovia's agent made to him about the insurance polices and his reliance upon those statements. Accordingly, the true basis of May's suit is the allegedly faulty advice that he received from Wachovia and acted upon, not the insurance policies themselves. The Western Reserve Applications only reflect the outcome of Wachovia's advice. As such, the fact that they do not contain an arbitration provision is irrelevant. The only relevant issue is whether the arbitration provision in May's Account Application with Wachovia governs claims against Wachovia stemming from allegedly faulty investment advice.

{¶10} The trial court denied Wachovia's motion to stay without the benefit of a hearing, concluding that "there is absolutely no basis as presently set forth in the motion and responses thereto to justify any arbitration[.]" At the very least, the record in this matter does not support that conclusion. It is possible that May's suit falls within the scope of Wachovia's broad arbitration provision. See *Alexander v. Wells Fargo Financial Ohio 1, Inc.*, Slip Opinion No. 2009-Ohio-2962, at ¶13 ("[T]he phrase 'any claim or controversy arising out of the agreement' is the paradigm of a broad [arbitration] clause."). Yet, it is unclear from the limited information in the record whether the arbitration provision in the Account Application, in fact, governs this suit. The record only consists of May's brief complaint, Wachovia's motion to stay, May's objection

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[1] The Account Application defines the terms "you," "your," and "EVEREN" as "EVEREN Securities, Inc., its successor firms, direct or indirect subsidiaries, correspondents, affiliates or assigns."

to the same, and Wachovia's response. None of these items outline the exact nature of the misrepresentations May alleges or the scope of his relationship with Wachovia. The only conclusion that can be drawn from these items is that they do not support the trial court's statement that "there is absolutely no basis *** to justify any arbitration[.]"

{¶11} Although R.C. 2711.02 does not require a trial court to hold a hearing on a party's motion to stay proceedings pending arbitration, it is within the court's discretion to do so. *Ault* at ¶8. Under the circumstances in this case, the trial court should have held a hearing on Wachovia's motion. Id. at ¶13. Wachovia's motion to stay arguably points to evidence in support of arbitration, and May's objection, which only relies upon the Western Reserve Applications, does nothing to detract from this evidence. While we cannot agree with Wachovia's assertion that its evidence definitively supports the conclusion that arbitration is appropriate, we do conclude that the evidence necessitated a hearing. The trial court could only determine whether this dispute arguably falls within the scope of Wachovia's arbitration provision through a hearing. Id. at ¶10-13. See, also, *Tomovich* at ¶8. To the extent that the trial court erred by denying Wachovia's motion to stay, Wachovia's sole assignment of error is sustained. *Ault* at ¶13.

III

{¶12} Wachovia's sole assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

BETH WHITMORE
FOR THE COURT

BELFANCE, J.
CONCURS

DICKINSON, P. J.
CONCURS, SAYING:

{¶13} I concur in the majority's reversal and remand. I write separately to note my understanding that the only issue to be determined at the hearing before the trial court is whether Wachovia is a successor of EVEREN.

APPEARANCES:

JOSEPH S. SIMMS, Attorney at Law, for Appellant.

ROBERT MAHER, Attorney at Law, for Appellee.