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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

WARREN ELLIOTT, et al., Plaintiffs and Respondents, v. FILIPPINI FINANCIAL GROUP, INC., et al., Defendants and Appellants.	2d Civil No. B232601 (Super. Ct. No. 1370088) (Santa Barbara County)

Filippini Financial Group, Alfred Filippini, Deborah Filippini, and Ian Filippini appeal from the order denying their motion to compel arbitration of respondents' claims against them. The court denied the motion pursuant to Code of Civil Procedure section 1281.2, subdivision (c),[1] because of the possibility that arbitration could create rulings that would conflict with rulings in pending litigation involving third parties. Appellants contend that the Federal Arbitration Act (FAA) (9 U.S.C.A. § 1 et seq.) preempts section 1281.2, subdivision (c). They further contend that the court failed to exercise its discretion under section 1281.2 because its order did not reflect its consideration of alternative dispositions. We affirm.

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

BACKGROUND

Complaint

On June 14, 2010, Warren Elliott, individually and as trustee of the Warren Elliott Trust (Elliott) and his wife, Mary Griscom, individually and as trustee of the Mary Griscom Trust (Griscom) filed an action against Filippini Financial Group, Inc. (FFG), Alfred Filippini, Ian Filippini, ePlanning Securities Inc. (ePlanning), and Lawyers Mortgage and Investment Corporation (Lawyers Mortgage). Alfred Filippini died in 2009. In 2011, Elliott and Griscom filed a first amended complaint which also named Deborah Filippini as a defendant. Their complaint alleges causes of action for negligence, material misrepresentations in securities transactions, financial elder abuse and breach of fiduciary duty.[2]

Respondents lived in Elliott's Santa Barbara residence, and both were elderly. (Elliott was born in 1927; Griscom was born in 1935.) From 2002 through 2009, respondents relied upon appellants, "particularly Alfred Filippini and Ian Filippini" for financial advice.

In December 2006 or January 2007, Alfred Filippini "advised and persuaded . . . Elliott . . . to increase the mortgage on his residence by . . . $450,000 to enable [him] to invest [the proceeds] in what [appellants] described as a safe investment which would pay nearly 10 percent income, per annum." Elliott increased his home mortgage by $600,000 "to fund [that] investment and to pay some outstanding obligations." Lawyers Mortgage completed a financial application on Elliott's behalf. That application "substantially exaggerated [his] net income" and stated he had been employed as an investor for 30 years. Alfred Filippini told Elliott that the application was properly completed and instructed him to sign it. Lawyers Mortgage intentionally prepared and processed respondents' loan application knowing it was false, and received a fee in excess of $12,000 from the lender (SBMC Mortgage Company). Respondents paid FFG a fee of

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[2] Respondents dismissed their action against ePlanning Securities, Inc. after it filed a Chapter 11 Bankruptcy petition.

approximately $8,000, in connection with that loan. Appellants Filippini worked with Lawyers Mortgage employees on a regular basis in exaggerating borrowers' income to originate mortgage loans.

In January 2007, appellants persuaded Elliott to use funds from the new mortgage "to purchase a Note from Medical Provider Financial Corporation IV, [MPFC] which Note would pay a minimum of the 9.75 [percent] interest or in excess of $43,000 per year." In March 2007, appellants persuaded Griscom "to purchase an additional $150,000 note from MPFC." Appellants advised respondents that the MPFC notes were risk-free investments.

Appellants failed to adequately investigate the MPFC, whose officers "included persons with questionable credentials and a history of suspicious financial misdealings" who "operated a pyramid or Ponzi scheme." Respondents lost more than $600,000 as a result of their investment in the MPFC notes.

Motion to Compel Arbitration

On October 7, 2010, appellants filed their motion to compel arbitration and stay proceedings. Four exhibits to their motion are documents that contain arbitration provisions. Two documents are entitled "Annuity Contract Delivery Receipt" (receipt). Each receipt relates to an annuity that Alfred and Ian Filippini sold to Elliott and Griscom, respectively, in 2005 and 2007. The receipts each contain a provision called "Agreement for Mandatory Binding Arbitration" that states the following: "If a disagreement, or any cause of action of any kind or type, arises between any of the parties to this agreement[,] the parties hereto agree to be bound to binding arbitration as their sole remedy. Any dispute between the parties hereto and any dispute or claim arising in connection with the interpretation or enforcement of the provisions of this Agreement, or the application or validity thereof and any controversy or claim arising out of, or relating to, this Agreement, or the making, performance, or interpretation thereof and any fee dispute or other dispute that arises under this Agreement, or in connection with services rendered hereunder, or any other matter, including any claims against Agents, Alfred L.

Filippini, Ph.D., Ian L. Filippini, RFC, . . . Filippini Financial Group, or any of their affiliates, staff or associates[,] based upon alleged malpractice or upon any other claim, including tort claims, shall be submitted to binding arbitration in the county of Ventura. [¶] . . . [¶] Any award rendered in any such arbitration proceeding shall be final and binding on each of the parties hereto." In addition to signing the receipt, each respondent initialed the arbitration clause. The language of the arbitration clause differs only in that Elliott's receipt designates the County of Ventura as the arbitration site while Griscom's designates the County of Santa Barbara.

Appellants also submitted two documents called "New Account Application" in support of the motion to compel. Elliott and Griscom each signed an application to invest in an MPFC note. Each application is a 2-sided form, with its title (New Account Application) and the logo "ePlanning" displayed at the top of the front side. On the reverse side of the application, there is a heading that reads, "Client Agreement," that is followed by 14 paragraphs in fine print. Paragraph 10, which is below the mid-point of the page, and reads as follows: "ARBITRATION. YOU AGREE THAT ANY AND ALL CONTROVERSIES ARISING BETWEEN YOU AND ePLANNING (including ePLANNING Advisors, Inc., ePLANNING Inc., and/or any of their control persons, parents, employees, agents, representatives, predecessors, subsidiaries, affiliates, successors and assigns), WHETHER ARISING BEFORE OR AFTER EXECUTION OF THIS AGREEMENT, SHALL BE DETERMINED BY ARBITRATION." The arbitration provision contains additional language specifying the terms of the arbitration.[3] Elliott and Griscom each initialed the arbitration provision of their respective application.

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[3] The additional language reads, "You further acknowledge and agree that: [¶] 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. [¶] Pre-arbitration discovery is generally more limited than and different from court proceedings. [¶]

Respondents submitted a declaration in opposing the motion to compel which states that Ian Filippini "did not discuss the subject of arbitration or of a 'client Agreement' with ePlanning Securities" with them and they did not believe they were provided with any copy of the application. It states further that nobody advised them that the application was a "contract, much less that the back of it contained arbitration language."

Paragraph 14 of the "client agreement" side of the application has a bold-faced "Applicable Law" heading and states: "This Agreement is made in the State of California and shall be construed and enforced in all respects in accordance [with] the laws of the State of California, without giving effect to any conflicts of law provisions thereof. Anything herein to the contrary notwithstanding, any dispute involving an account that is carried by Bear Stearns . . . or to which Bear Stearns may be a party shall be governed by the laws of the State of New York . . . ."

Appellants' motion to compel arbitration states that "California law applies to both Agreements" and that both agreements should be enforced under sections 1281 and 1281.2. The trial court relied on subdivision (c) of section

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The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited. [¶] The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry. [¶] No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein. [¶] Any arbitration under this agreement shall be held at the facilities and before an arbitration panel appointed and acting under the Arbitration Rules of the National Association of Securities Dealers, Inc., or such other arbitration forum as may be required under the Bear Stearns Customer Agreement, if applicable."

1281.2 in denying the motion. It found, "A party to the arbitration agreement [was] also a party to a pending court action with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact" "on core issues." The court noted that an "arbitrator could find that [appellants] breached a duty to [respondents] and thereby rule in favor of [respondents]," while "[i]n litigation, the same breach of duty would be at issue for liability based on aiding and abetting . . . , yet the trier of fact could find that [appellants] did not breach a duty to [respondents] and . . . rul[e] in favor of Lawyers Mortgage for aiding and abetting the conduct. In such case, [respondents] would have a judgment against the principal actors [appellants] but not against the aider and abettor." The court reasoned that such a "substantial duplication in the conduct of both an arbitration and litigation [was not] in the interest of judicial economy or the parties" and denied the motion to compel arbitration.

DISCUSSION

Preemption Claim

Appellants contend that the FAA preempts section 1281.2. Although appellants did not raise this argument below, we address it here, and conclude that the FAA does not preempt section 1281.2 under the circumstances of this case. Preemption is a question of law subject to our de novo review. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1212.)

In making their preemption claim, appellants rely in large part upon section 2 of the FAA and *AT&T Mobility LLC v. Concepcion* (2011) ___U.S. ___ [131 S.Ct. 1740] (*AT&T Mobility*). Section 2 of the FAA provides as follows: "A written provision in any . . . transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." "In *AT&T Mobility*, the court held that the FAA preempted a California rule providing that class-action waivers in commercial adhesion contracts were unconscionable, because the rule interfered with the purposes of the FAA and was not just a principle of unconscionability applicable to contracts generally." (*Ajamian v. CantorCO2e, L.P.* (2012) 203Cal.App.4th 771, 804, fn. 18.) (The preempted rule arose from the opinion in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.)

Citing *AT&T Mobility*, appellants argue that the FAA preempts section 1281.2, subdivision (c) because it applies only to arbitration contracts, and not to all contracts. We disagree.

Section 1281.2, subdivision (c) provides as follows in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] . . . [¶] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact."

Appellants misplace their reliance upon *AT&T Mobility* in arguing that the FAA preempts section 1281.2, subdivision (c). *AT&T Mobility* invalidated the judicially imposed procedure that prohibited "outright the arbitration of a particular type of claim." (*AT&T Mobility, supra,* ___U.S. ___ [131 S.Ct. at p. 1747].) Rather than prohibiting the arbitration of a type of claim, section 1281.2 allows trial courts to deny a motion to compel arbitration where "[a] party to the arbitration agreement is also a party to a pending court action . . . with a third party . . . and there is a possibility of conflicting rulings." That procedure furthers

the interest of judicial economy and facilitates the consistent resolution of "common issues of fact and law." (*Mount Diablo Medical Center v. Health Net of California, Inc*. (2002) 101 Cal.App.4th 711, 727 (*Mount Diablo*).)

In *Mount Diablo*, the trial court found that arbitration would increase a risk of rulings that conflict with rulings in pending litigation involving third parties, and relied upon section 1281.2, subdivision (c) in denying the defense motion to compel arbitration. The parties' agreement contained a generic choice of law provision that required the application of California law. The reviewing court rejected the defense claim that the FAA preempted section 1281.2, subdivision (c) because the choice of law provision "was sufficient to avoid the FAA's procedural provisions even though the parties' contract involved interstate commerce. [Citation.]" (*Valencia v. Smyth* (2010) 185 Cal.App.4th 153,167.) The court further stated that the parties' '"explicit reference to enforcement reasonably includes such matters as whether proceedings to enforce the agreement shall occur in court or before an arbitrator. Chapter 2 (in which § 1281.2 appears) of title 9 of part III of the California Code of Civil Procedure is captioned "Enforcement of Arbitration Agreements." An interpretation of the choice-of-law provision to exclude reference to this chapter would be strained at best.' [Citation]." (*Id*. at p. 168.)

The *Mount Diablo* court further observed that "[s]ection 1281.2 (c) is not a provision designed to limit the rights of parties who choose to arbitrate or otherwise to discourage the use of arbitration. Rather, it is part of California's statutory scheme designed to enforce the parties' arbitration agreements, as the FAA requires. Section 1281.2(c) addresses the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement. The California provision giving the court discretion not to enforce the arbitration agreement under such circumstances—in order to avoid potential inconsistency in outcome as well as duplication of effort—does not contravene the letter or the spirit of the FAA. . . . Thus, there is no reason why the

broad language of the choice-of-law clause in this case, calling for the enforcement of the agreement under California law, should not be read to invoke the provisions of section 1281.2 [subdivision] (c)." (*Mount Diablo, supra*, 101 Cal.App.4th at p. 726; accord, *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393.)

In making their preemption argument, appellants claim that the *Mount Diablo* decision misapplied *Volt Info. Sciences v. Stanford Univ.* (1989) 489 U.S. 468. In *Volt*, the high court concluded that the FAA did not prevent application of section 1281.2, subdivision (c) "to stay arbitration where, as [there], the parties have agreed to arbitrate in accordance with California law." (*Volt*, at p. 477; *Mount Diablo*, at pp. 719-721.) Appellants argue that the *Mount Diablo* court misapplied *Volt*, because unlike *Volt*, which concerned an order to *stay* arbitration, *Mount Diablo* applied section 1281.2, subdivision (c) to refuse to enforce an agreement to arbitrate, in denying their motion. Their argument is not persuasive.

Abuse of Discretion Claim

Appellants claim that the trial court erred in denying their motion to compel arbitration because it "did not exercise its discretion in deciding among the options provided by section 1281.2, subdivision (c)." They assert that nothing in its order "indicates that the court considered any of the section 1281.2, [subdivision] (c) alternative dispositions in ruling except whether to enforce the arbitration agreement." We disagree.

The trial court's consideration of its multiple disposition options is reflected on its written order denying the motion to compel arbitration, and the reporter's transcript. In citing section 1281.2, subdivision (c), the court listed four disposition options: refusing to enforce the arbitration agreement; ordering intervention or joiner; ordering arbitration among the parties who have agreed to arbitration and staying the pending court action pending the outcome of the arbitration; or staying arbitration pending the outcome of the court action. The order also stated that the court "consider[ed] the positions of the parties." Those

positions included the multiple disposition options described in appellants' pleadings. The reporter's transcript of the February 7, 2011, hearing on the motion to compel also indicates that court considered multiple options before ruling.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Colleen K. Sterne, Judge

Superior Court County of Santa Barbara

Amyx Merrill, and Monty H. Amyx for Plaintiffs and Respondents.

Reicker, Pfau, Pyle & McRoy, Timothy J. Trager; Will Tomlinson for Defendants and Appellants.