IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1483

Summary Calendar

TOMMY ABBOTT,

Plaintiff-Appellant,

versus

SHEARSON LEHMAN HUTTON, INC.
and JOHN KARRAS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(4:88-CV-856-K)

(February 22, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

I.

Tommy Abbott, Allen Wu, Mike Millet, and Francis Tsui complained that John Karras had embezzled their investment funds to pay his gambling debts while he was employed at Shearson Lehman Hutton, Inc. After the investors filed suit against Shearson and Karras, the district court stayed the case against Shearson and

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

compelled arbitration under the Federal Arbitration Act, 9 U.S.C. § 1, et seq. The court also stayed the case against Karras pending resolution of his bankruptcy proceedings. After an evidentiary hearing, the arbitrators found that all claims against Shearson should be dismissed, but made no finding in regard to the claims against Karras. The district court confirmed the award and dismissed Shearson as a defendant. Abbott obtained a default judgment against Karras. Abbott appealed. We affirm.

II.

Tsui, Millet, and Wu did not file timely notices of appeal under Federal Rules of Appellate Procedure 3 and 4. Such notices are "mandatory and jurisdictional." United States v. Robinson, 361 U.S. 220, 224 (1960); RTC v. Northpark Joint Venture, 958 F.2d 1313 (5th Cir. 1992), cert. denied, 113 S.Ct. 963 (1993). We do not have jurisdiction to hear any claims by Tsui, Millet, and Wu, and we dismiss any such claims.

III.

Abbott argues that the trial court erred in compelling arbitration, an argument we review mindful of the requirement that any doubts should be resolved in favor of arbitration. See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 103 S.Ct. 927, 941 (1983). He contends that the arbitration provision in the Shearson client agreement does not apply to claims of "fraud, misrepresentation, conversion and theft of funds to pay off gambling debts." The arbitration provision, however, applies to any controversy relating to accounts or transactions with Shearson

or its employees. Given presumption of arbitrability, we find that the court properly interpreted the agreement as requiring arbitration of the dispute. See Mar-Len of Louisiana, Inc. v. Parsons-Gilbane, 773 F.2d 633, 635 (5th Cir. 1985).

In a related argument, Abbott asserts that Shearson waived its right to arbitrate because "Peter Cohen, Chairman of the Board of [Shearson] refused to give any relief to Dr. Abbott when he requested it." No law requires a brokerage firm to reimburse a disgruntled customer on demand; no legal nexus exists between a client's request for relief, a firm's response to the request, and the arbitrability of the dispute. Shearson did not waive any right to arbitrate by waiting to see what claims Abbott would pursue at trial or in arbitration.

Abbott claims that Shearson surreptitiously altered its arbitration contract to gain tactical advantage in the case. As evidence of this alleged tampering, Abbott points to the fact that the date "6/28/87" appears on Shearson's copy of the arbitration agreement though it does not appear on his copy. This discrepancy does not constitute proof of tampering and does not affect the validity of the agreement. As well, Abbott failed to raise this argument below, and we consider him to have waived it.

IV.

The congressional preference for arbitration colors our review of the process afforded to Abbott in the arbitration proceedings. We defer to the arbitrators' resolution of a dispute whenever possible. Anderson/Smith Operating Co. v. Tennessee Gas Pipeline

Co., 918 F.2d 1215, 1218 (5th Cir. 1990), cert. denied, 111 S.Ct. 2799 (1991). This inclination prompts us to find no reversible infirmities in the arbitration proceedings. The district court did not abuse its discretion in upholding the arbitration award and dismissing the claims.

Abbott objects that the arbitrators had no legal training, that he could not participate in the selection of the arbitration panel members, and that a panel member had prior ties to Shearson that prejudiced the proceedings. Abbott, however, failed to make these objections below and overlooks the fact that his counsel participated in the selection of panel members. Abbott also failed to introduce evidence of prejudicial predispositions. We consider his arguments on this front to have been waived or to be meritless.

V.

The district court rejected Abbott's contentions that Shearson had stonewalled in discovery and had refused to produce important documents. It rejected this argument because he had refused to identify specific records. We also find this omission to be fatal. On appeal, Abbott mentions a "signature card" and generally alludes to other unidentified documents. This belated proffer does not erase the fact that Shearson produced pertinent records. As well, the arbitration panel found that a number of the document requests made by Abbott had no bearing on the case. We find no error in this determination.

For the first time on appeal, Abbott argues that the arbitrators refused to adjourn the proceedings until Shearson

produced the desired records. Again, it appears that Abbott did not take adequate steps to preserve his argument. No evidence exists that he requested an adjournment of the hearing. We consider the argument about adjournment to have been waived.

VI.

Abbott contends that the arbitration panel failed to subpoena Karras to the detriment of his claims. Under New York Stock Exchange Arbitration Rule 619(f), both arbitrators and counsel of record have subpoena power. The unwillingness or inability of Abbott's counsel to issue the subpoena does not mean that either Shearson's counsel or the arbitrators committed error by not doing so. At any rate, Karras' absence from the hearings could not have prejudiced Abbott because Abbott obtained a default judgment against him. We consider these arguments to have been waived or to be meritless.

VII.

Abbott argues that the arbitrators considered summary judgment evidence without him having notice of it. To the contrary, the arbitration panel did not consider a motion to dismiss until after it held a hearing. Given the unrefuted taint of in pari delicto, estoppel and unclean hands on Abbott's case, the panel properly granted the motion to dismiss. Abbott now attempts to make an "insider information" claim, but he had the opportunity to convince the arbitration panel of this argument and failed to do so. Abbott also failed to raise this argument in the district court. We consider it to have been waived.

VIII.

Abbott charges that he was prejudiced by the arbitration panel's decision to permit James Brucki, an expert witness, to testify. Contrary to Abbott's assertions, Brucki was identified as an expert witness in a letter to Abbott's counsel. In addition, no evidence exists that Abbott's case was prejudiced by Brucki's testimony. The arbitration panel had discretion to admit the testimony, and Abbott had an opportunity to test any weaknesses in it at the hearing. We find no error.

IX.

In breezy fashion, Abbott complains of the inherent unfairness of the arbitration hearing and numerous prejudicial and partial rulings of the arbitrators. Abbott failed to identify exactly which rulings he contests or why he was prejudiced. In the absence of more specific allegations, we find that Abbott has either waived the point or failed to establish adequate grounds for reversal.

X.

We recognize that although Abbott received a default judgment against Karras, this fact does not mean that Shearson is liable to Abbott for the allegations made in his complaint. Dundee Cement Co. v. Howard Pipe & Concrete Prod., Inc., 722 F.2d 1319, 1324 (7th Cir. 1983).

AFFIRMED.