NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5637-10T2

MICHAEL E. HIRSCH, ROBYN J. HIRSCH,
and HIRSCH, LLP,

Plaintiffs-Appellants,

v.

AMPER FINANCIAL SERVICES, LLC, and
EISNERAMPER, LLP (f/k/a AMPER,
POLITIZNER & MATTIA, LLP),

Defendants/Third-Party
Plaintiffs-Respondents,

v.

SECURITIES AMERICA, INC.,

Third-Party Defendant-
Respondent.

Argued March 5, 2012 - Decided April 23, 2012

Before Judges Parrillo and Hoffman.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-5732-10.

Joel N. Kreizman argued the cause for appellants (Scarinci Hollenbeck, attorneys; Mr. Kreizman, on the brief).

Denis C. Dice of the Pennsylvania bar, admitted pro hac vice, argued the cause for respondent Securities America, Inc.

(Marshall, Dennehey, Warner, Coleman & Goggin, attorneys; Joel Wertman, on the brief).

Stark & Stark, attorneys for respondents Amper Financial Services, LLC and EisnerAmper, LLP, join in the brief of respondent Securities America, Inc.

PER CURIAM

Plaintiffs, Michael and Robyn Hirsch, and Hirsch, LLP, appeal from a June 24, 2011 order granting a motion by third-party defendant Securities America, Inc. (SAI), to stay all proceedings in the Law Division and compel arbitration. The underlying dispute concerns plaintiffs' purchase of securities that defaulted. Plaintiffs' account agreements with their stockbroker, SAI, mandated arbitration of any disputes arising between the parties. No agreement between plaintiffs and defendants, Amper Financial Services, LLC (AFS) and EisnerAmper, LLP – plaintiffs' financial services firm and accounting firm, respectively – mandated arbitration. After filing a claim for arbitration against SAI, plaintiffs filed an action in the Law Division against defendants, and they, in turn, filed a third-party complaint against SAI, seeking contribution and indemnification. Upon receiving the third-party complaint, SAI filed the motion that resulted in the order under appeal.

On this appeal, we are asked to determine whether all of plaintiffs' claims arising out of this dispute should be decided in one arbitration proceeding, despite the absence of an arbitration provision between plaintiffs and defendants. For the reasons that follow, we resolve this question in the affirmative, and affirm.

I.

This dispute arose out of plaintiffs' purchase of securitized notes issued by Medical Capital Companies (Med Cap). In 2002, plaintiffs' accounting firm, Amper, Politziner & Mattia (now known as EisnerAmper, LLP), referred them to an investment advisor, Marc Scudillo, a broker and registered financial representative with AFS, a financial planning and wealth management firm. EisnerAmper and Scudillo each own a fifty-percent interest in AFS. Plaintiffs allege they purchased the notes on the recommendation of Scudillo. SAI served as the broker-dealer for each transaction.

In September 2010, EisnerAmper's website listed Scudillo as the managing partner of AFS. From 2001 to 2010, the records of the Financial Industry Regulatory Authority ("FINRA") listed Scudillo as a registered broker with SAI.

Plaintiffs signed two account applications with SAI. The first, dated July 13, 2004, was signed in the name of Hirsch, FLP, and the second, dated June 7, 2006, was signed in the names of both individual plaintiffs. Scudillo also signed each agreement as "registered representative" and "principal" for SAI. Each account application incorporated a three-page Customer Agreement. Paragraph 18 of this agreement, entitled "Pre-Arbitration Agreement," states in pertinent part:

> All parties to this agreement are giving up their right to sue each other in court, including the right to a trial by jury . . . .
>
> . . . .
>
> All controversies that may arise between us (including but not limited to, controversies concerning any account, order, or transaction, or the continuation, performance, interpretation, or breach of this or any other agreement between you and us, whether entered into or arising before, on, or after the date this account is opened) shall be determined by arbitration in accordance with the rules then prevailing of the New York Stock Exchange, Inc. or the NASD . . . .[1]

Plaintiffs do not dispute the enforceability of this clause as to their claims against SAI and Scudillo.

[1] FINRA is the successor to the National Association of Securities Dealers, Inc. (NASD). It was formed by a consolidation of the enforcement arm of the New York Stock Exchange, NYSE Regulation, Inc., and the NASD. The merger was approved by the United States Securities and Exchange Commission (SEC) on July 26, 2007. FINRA performs financial regulation of member brokerage firms and exchange markets and has regulatory oversight over all securities firms that do business with the public. It also provides arbitration services by contract for the New York Stock Exchange, and other exchanges.

From 2004 to 2008, plaintiffs purchased four securitized notes issued by Med Cap with the following values: $300,000 on July 13, 2004; $250,000 on April 10, 2006; $300,000 on July 11, 2007; and $250,000 on May 6, 2008.[2] For each purchase, the broker transaction record listed Scudillo as the representative and SAI as the broker-dealer.

Starting in October 2008, Med Cap defaulted on the notes. On July 16, 2009, the SEC filed an enforcement action alleging securities fraud against Med Cap in federal district court in California. On August 17, 2009, the court appointed a permanent receiver for Med Cap.

On September 22, 2010, plaintiffs filed a FINRA arbitration claim against SAI and Scudillo concerning the defaulted notes. On November 15, 2010, plaintiffs filed a complaint in the Law Division against EisnerAmper and AFS, alleging, in connection with the sale of the Med Cap notes, breach of fiduciary duties, violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-2 to -2.13, violations of the New Jersey Uniform Securities Law, N.J.S.A. 49:3-47 to -76, negligent misrepresentation, professional malpractice, breach of contract, and negligent

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[2] The two later-purchased notes represented roll-overs of the two earlier-purchased notes. The losses at issue, totaling $550,000, therefore result from the default of the two later-purchased notes.

supervision. The complaint did not name Scudillo or SAI as defendants.[3]

On January 19, 2011, defendants filed an answer and third-party complaint against SAI, seeking contribution and indemnification with respect to plaintiffs' claims. On May 10, 2011, SAI moved for an order compelling arbitration, staying the action pending arbitration, and consolidating the Law Division action with plaintiffs' pending arbitration proceeding. In support of its motion, SAI argued that the arbitration clause in its Customer Agreement should be broadly construed to include the entire controversy, including defendants' third-party claims against SAI, despite that no agreement to arbitrate existed between plaintiffs and defendants. SAI also contended that because Scudillo, who is a fifty-percent owner and managing officer of AFS, was a party to the Customer Agreement, and thus a party to the arbitration agreement, then principles of agency bind defendants to the agreement to arbitrate. SAI further

[3] On this point, the plaintiffs' complaint states:

> Plaintiffs are required to submit their claims against [Scudillo] and . . . [SAI] . . . to the [FINRA] arbitration process. Despite their affiliation with these . . . entities, [AFS] and [EisnerAmper] are not registered with FINRA and, as such, cannot be compelled to submit to the FINRA arbitration case that has already been filed at FINRA bearing Arbitration No. 10-03244.

argued that in light of the multifaceted relationship among AFS, EisnerAmper and Scudillo, the three entities should be treated as alter egos. Alternatively, SAI contended that equitable estoppel operates to subject the Law Division action to arbitration. AFS and EisnerAmper joined in SAI's motion.

Plaintiffs opposed the motion, arguing that because no agreement to arbitrate existed between plaintiffs and either defendant, the court could not order the parties to submit the Law Division action to arbitration. Although plaintiffs conceded that some factual overlap existed between the arbitration and Law Division proceedings, they nonetheless maintained that the two matters presented separate and distinct issues, requiring separate and distinct proceedings.

On June 24, 2011, following argument, the trial court granted SAI's motion to compel arbitration and stay the proceeding pending arbitration. In an oral decision, the court cited Alfano v. BDO Seidman, LLP, 393 N.J. Super. 560 (App. Div. 2007), and concluded that the facts in that case were directly apposite to those under consideration:

> The plaintiffs declined to name SAI to establish their claim. So, in doing this, I find that they are attempting to circumvent the policy favoring arbitration. So therefore, I find that the claims here are the same as in Alfano and they must be compelled to arbitration.

On appeal, plaintiffs make the following argument:

> NO CONTRACT EXISTS REQUIRING THE HIRSCH PLAINTIFFS TO ARBITRATE WITH THE AMPER ENTITIES[]; NOR DO ANY EXCEPTIONS TO THE CONTRACTUAL REQUIREMENT APPLY TO THIS MATTER.

II.

As an initial matter, we note that "orders compelling or denying arbitration are deemed final and appealable as of right as of the date entered." GMAC v. Pittella, 205 N.J. 572, 587 (2011). Our review of such an order is plenary. EPIX Holdings Corp. v. Marsh & McLennan Companies, Inc., 410 N.J. Super. 453, 472 (App. Div. 2009) (citing Harris v. Green Tree Fin. Corp., 183 F.3d 173, 176 (3d Cir. 1999)).

> Moreover, in determining the scope of an arbitration agreement, a court must "focus on the factual allegations in the complaint rather than the legal causes of [the] action asserted." Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987). If these factual allegations "'touch matters' covered by the parties' contract, then those claims must be arbitrated, whatever the legal labels attached to them." Ibid.
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> [EPIX Holdings, supra, 410 N.J. Super. at 472-73.]

The Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1 to 3, preempts state arbitration law for contracts involving interstate commerce. Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc., 240 N.J. Super. 370, 376 (App.

Div. 1990). "The federal cases . . . strongly hold that ambiguities in agreements are to be resolved in favor of arbitration." Ibid.

Even though plaintiff's claims fall under the FAA, the issues presented by this appeal are governed by state law. See Allied-Bruce Terminex Cos., Inc. v. Dobson, 513 U.S. 265, 281, 115 S. Ct. 834, 843, 130 L. Ed. 2d 753, 769 (1995); Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 147-48 (App. Div. 2008). The parties do not dispute that the sale of notes by Med Cap, which had offices in Anaheim, California, to plaintiffs, New Jersey residents, involved interstate commerce, and that the FAA applies.

New Jersey has a long-standing policy favoring arbitration as a speedy and efficient approach to dispute resolution. Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 131 (2001). The revised New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, codifies this policy favoring arbitration. Because of the favored status afforded to arbitration, “[a]n agreement to arbitrate should be read liberally in favor of arbitration." Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993). Therefore, "courts operate under a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." EPIX Holdings, supra, 410 N.J. Super. at 471 (quoting Caldwell v. KFC Corp., 958 F. Supp. 962, 973 (D.N.J. 1997) (internal quotations omitted)).

It is well settled that arbitration is a matter of contract. Alfano, supra, 393 N.J. Super. at 568 (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 472, 109 S. Ct. 1248, 1252, 103 L. Ed. 2d 488, 496 (1989)). As a general rule, therefore, only signatories to an arbitration agreement will be required to submit to arbitration. That rule is not inflexible, however, and is subject to traditional principles of contract and agency law. Ibid. (although a customer account agreement required arbitration only with an affiliate of defendant bank, an agency agreement between the bank and its affiliate warranted submitting the dispute to arbitration).

As noted by the United States Supreme Court, "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631, 129 S. Ct. 1896, 1902, 173 L. Ed. 2d 832, 840 (2009) (quoting 21 Williston on Contracts § 57:19 (4th ed. 2001)).

"New Jersey law recognizes non-signatory standing to compel arbitration based on the principle of equitable estoppel." EPIX Holdings, supra, 410 N.J. Super. at 463. Determining whether that doctrine applies is a fact specific inquiry, but generally requires "an analysis of the connection between the claim, the arbitration agreement and the parties." Ibid. (citing JLM Indus., Inc. v. Stolt-Nielsen, S.A., 387 F.3d 163, 177-78 (2d Cir. 2004), rev'd, 130 S. Ct. 1758 (2010)).

In Bruno v. Mark MaGrann Assocs., Inc., 388 N.J. Super. 539, 543 (App. Div. 2006), the plaintiffs, purchasers of allegedly defective heating units in their homes, brought a class action suit against a developer, but that suit was dismissed pursuant to an arbitration agreement between the homebuyers and the developer. 388 N.J. Super. at 543. The plaintiffs then filed suit against certain subcontractors, with whom there was no agreement to arbitrate. We held that despite the lack of an express arbitration agreement between the plaintiffs and the subcontractor, their claims arose out of the same facts as their claims against the developer, and therefore should be submitted to arbitration pursuant to the agreement between plaintiffs and the developer to arbitrate. Id. at 548.

In so holding, we cited with approval JLM Industries, in which the Second Circuit Court of Appeals held that a "non-signatory to [an] arbitration agreement may compel [a] signatory to arbitrate when [the] issues to be litigated are intertwined with [the] agreement containing [the] arbitration clause." Ibid.

III.

Applying the foregoing principles, we find the trial court correctly determined that the Law Division action should be stayed and referred to arbitration, albeit for somewhat different reasons than those expressed by the trial court. See El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 169 (App. Div. 2005) (noting "that a correct result, even if predicated on an erroneous basis in fact or in law, will not be overturned on appeal"). Were AFS the only named defendant, we would agree with the trial court's determination that the holding in Alfano is controlling because Scudillo, a signatory to the arbitration agreement, acted as the agent for AFS in completing the note purchases. By itself, Alfano does not, however, provide a basis for requiring plaintiffs to submit their claims against their accountant, EisnerAmper, to arbitration. Further analysis is therefore required.

As we noted in EPIX Holdings:

> As a matter of both federal and state law, the principle of equitable estoppel has been invoked, under appropriate circumstances, to force an objecting signatory to arbitrate the same claims against a non-signatory as alleged against the other party to the contract. But even where the inextricable connectivity was not considered itself dispositive of the issue, the combination of the requisite nexus of the claim to the contract together with the integral relationship between the non-signatory and the other contracting party was recognized as a sufficient basis to invoke estoppel.
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> [410 N.J. Super. at 465-66 (emphasis added) (citing Angrisani, supra, 402 N.J. Super. at 154; E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 202 (3d Cir. 2001)).]

Here, while no contractual provision between plaintiffs and defendants mandated arbitration, plaintiffs and SAI did agree to arbitrate all controversies that may arise between them "concerning any account, order, or transaction." Notably, plaintiffs' claims against defendants arise directly from these same accounts and transactions. Scudillo, who is an employee of defendant AFS, acting in his capacity as investment advisor, recommended the purchase of the Med Cap notes, and then completed the transaction in his capacity as broker for SAI. Scudillo also signed the Customer Agreement mandating arbitration, and plaintiffs included their claims against him in the arbitration proceeding filed prior to their Law Division action. Clearly, the legal and factual issues concerning plaintiffs’ transactions are intertwined and should be resolved in one proceeding. The purchase of Med Cap notes forms the basis for both the Law Division action and the arbitration claim filed before FINRA.

The relationship between the non-signatory defendants and Scudillo, a contracting party, also militates in favor of estoppel. At times, Scudillo acted on behalf of SAI and at other times as plaintiffs' investment advisor on behalf of AFS. Plaintiffs' complaint goes to great lengths to link defendants and Scudillo together. In the complaint's factual allegations, plaintiffs reference Scudillo twenty-eight times and AFS twenty-four times. The complaint also alleges that "[b]oth [EisnerAmper] and [AFS] were, according to their literature and representations, part of a 'team' to advise clients, including [plaintiffs], on a host of financial matters, including their investments. Both [EisnerAmper] and [AFS] were fiduciaries to [plaintiffs]." The complex and intertwined relationship between and among plaintiffs, Scudillo, EisnerAmper and AFS is an "integral" one which provides "sufficient basis to invoke estoppel." <u>EPIX Holdings</u>, <u>supra</u>, 410 <u>N.J. Super.</u> at 466.

In arguing that the court erred in compelling arbitration of the Law Division action, plaintiffs principally rely upon our decision in Angrisani as establishing the general rule that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Angrisani, supra, 402 N.J. Super. at 148-49 (quoting AT&T Techs. v. Commc'ns Workers of Am., 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648, 655 (1986) (internal quotations omitted)). A careful examination of the facts in Angrisani leads us to conclude that it does not control our disposition of this appeal.

In Angrisani, the plaintiff entered into two contracts with two different entities on the same day. 402 N.J. Super. at 145. The first agreement, an employment contract between Angrisani and defendant Nexxar, contained an arbitration provision. The second agreement, a stock purchase agreement between the plaintiff and defendant FT Ventures, did not contain an arbitration provision. The two agreements also contained a different choice of law clause.

After these agreements were signed, Angrisani discovered evidence of illegal practices by FT Ventures, improprieties that preceded and affected its purchase of Nexxar stock. Id. at 145-46. Angrisani then brought an action against Nexxar for breach of the employment contract, and a separate action against FT

Ventures for breach of the stock purchase agreement and other claims. Ibid.

The trial court compelled arbitration of all claims, despite that no agreement to arbitrate existed between Angrisani and FT Ventures. The Appellate Division affirmed the decision as to Angrisani's claims against Nexxar, but reversed the decision as to those against FT Ventures. As Judge Skillman explained:

> The conclusion that plaintiff and FT Ventures, as parties to the stock purchase agreement, did not agree to subject any disputes arising thereunder to the arbitration provision of the employment agreement is supported by the different provisions of the two agreements regarding choice of law. The employment agreement states that it shall be "governed and construed" under New Jersey law, while the stock purchase agreement, which is the only agreement entered into by FT Ventures, states that it shall be "governed and construed" under Delaware law. Thus, even though there was a relationship between the employment and stock purchase agreements, the parties contemplated that each agreement would be construed and applied independently based on its own provisions and different laws.
>
> Our conclusion that plaintiff agreed to arbitrate solely employment-related disputes with Nexxar, and not the claims he asserts against FT Ventures, is reinforced by the fact that the arbitration provision in the employment agreement specifically states that arbitration thereunder shall be governed by "the AAA's rules for the Resolution of Employment Disputes." Those

> rules clearly would not be suitable for the resolution of plaintiff's commercial fraud and other tort and contract claims against FT Ventures.
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> [Id. at 152-153.]

Plaintiffs are unable to point to any facts or circumstances that would present comparable reasons for reversing the trial court's decision to compel arbitration as to plaintiffs' claims against defendants. Here, unlike in Angrisani, the parties have not pointed to any conflicting choice of law provisions in the Customer Agreement, executed by plaintiffs and SAI, on the one hand, and any agreement between plaintiffs and AFS or EisnerAmper on the other hand, to the extent one exists. Nor is there any conflict between the arbitration rules to be applied in the FINRA arbitration of plaintiffs' claims against SAI and those against AFS and EisnerAmper. Indeed, the parties have not submitted evidence of any agreement to provide services between plaintiffs and AFS or EisnerAmper. Angrisani is thus readily distinguishable on its facts.

Additionally, we note that our holding accords with the equitable underpinnings of the entire controversy doctrine. The doctrine, which "seeks to further the judicial goals of fairness and efficiency by requiring, whenever possible, 'that the adjudication of a legal controversy . . . occur in one litigation in only one court,'" Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280, 289 (1995) (internal quotations omitted), applies to arbitration proceedings as well as to state court litigation. Shoremount v. APS Corp., 368 N.J. Super. 252, 255 (App. Div. 2004) ("Nor is there any doubt that under the proper circumstances the entire controversy doctrine is correctly applied to arbitration proceedings."). Compelling arbitration of all of plaintiffs' claims in this case furthers the doctrine's goals of fairness and judicial efficiency.

Accordingly, we find no basis to disturb the trial judge's order staying the Law Division proceeding and compelling arbitration.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION