

THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL BROOM, KEVIN BROOM and ANDREA BROOM,

Respondents,

v.

MORGAN STANLEY DW INC., and KIMBERLY ANN BLINDHEIM,

Petitioners.

NO. 82311-1

PETITIONERS' STATEMENT OF ADDITIONAL AUTHORITIES

C/A NO. 60115-6-I

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COME NOW the Petitioners Morgan Stanley DW Inc. and Kimberly Anne Blindheim and submit the following additional authorities to the Court pursuant to RAP 10.8:

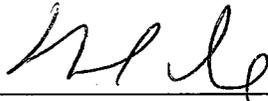
- 1. In Knight v. Merrill Lynch, Pierce, Fenner & Smith, 2009 U.S. App. LEXIS 23091, * 4, 2009 WL 3368439, *1 (9th Cir. Oct. 21, 2009)1, the Ninth Circuit Court of Appeals held that the arbitration panel did not manifestly disregard federal or state law when it applied state statutes of limitations to plaintiff's claims in arbitration because "Section 10304(c) of the NASD Code of Arbitration specifically contemplates the application of state and

1 Unpublished decisions of the Ninth Circuit issued after January 1, 2007 may be cited to that court. Ninth Circuit Rule 32-4. Such decisions may therefore be cited to this Court. GR 14.1(b).

federal statutes of limitations * * *.” The *Knight* case relates to the issue of whether the arbitration panel in this case committed legal error on the face of the award when it similarly applied state statutes of limitations to Respondents’ claims in the arbitration proceeding. A copy of this decision is attached.

RESPECTFULLY SUBMITTED this 23rd day of December, 2009

SCHWABE, WILLIAMSON & WYATT, P.C.

By: 
Michael T. Garone, WSBA #30113
mgarone@schwabe.com
Facsimile: 503-796-2900
Attorney for Petitioners

2009 U.S. App. LEXIS 23091, *

ROBERT J. KNIGHT, Plaintiff - Appellant, v. MERRILL LYNCH, PIERCE, FENNER & SMITH, Defendant - Appellee.

No. 08-16024

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2009 U.S. App. LEXIS 23091

October 8, 2009, Argued and Submitted, San Francisco, California

October 21, 2009, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from the United States District Court Northern District of California. D.C. No. 07-02753-SC. Samuel Conti, Judge, Presiding.

DISPOSITION: AFFIRMED.

CORE TERMS: arbitration panel, statutes of limitations, arbitration, telephonic, exceeded, arbitration agreement, implied contract, disregarded, manifestly, correctly

COUNSEL: For ROBERT J. KNIGHT, Plaintiff - Appellant: Timothy A. Canning ▼, Attorney, Law Offices of Timothy A. Canning, Arcata, CA.

For MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., Defendant - Appellee:

Michael J. Fortunato, Esquire ▼, RUBIN FORTUNATO & HARBISON PC, Paoli, PA;

Kenneth C. Mennemeier, Jr. ▼, Attorney, MENNEMEIER, GLASSMAN & STROUD LLP, Sacramento, CA.

JUDGES: Before: GOODWIN ▼ and PAEZ ▼, Circuit Judges, and CARNEY ▼, ** District Judge.

** The Honorable Cormac J. Carney ▼, United States District Court for the Central District of California, sitting by designation.

OPINION

MEMORANDUM *

FOOTNOTES

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Robert J. Knight appeals the district court's order denying his motion to vacate an arbitration decision issued by a panel appointed by the National Association of Securities Dealers ("NASD"). The panel dismissed Knight's claims for breach of an implied contract and other causes of action arising from the termination of his employment with Merrill Lynch, Pierce, Fenner & Smith Incorporated

[*2] ("Merrill Lynch"). We must determine whether the arbitration panel exceeded its authority or manifestly disregarded the law when it issued its decision in favor of Merrill Lynch. See 9 U.S.C. § 10(a); Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 997-98 (9th Cir. 2003) (en banc). We see no such error and, accordingly, we affirm.

Knight contends that the arbitration panel exceeded its authority by not holding an adequate hearing on his claims pursuant to the NASD Code of Arbitration Procedure and the parties' arbitration agreement. After Merrill Lynch moved to dismiss Knight's claims as untimely under the applicable statutes of limitations under California law, the panel held two telephonic conferences. Knight points to the fact that the two hearings held by the arbitration panel were telephonic, no witnesses were sworn, no witnesses were cross-examined, no documents were formally received into evidence, and only counsel for the parties, but not the parties themselves, attended. We do not agree with Knight that the arbitration panel exceeded its authority when it conducted the hearings in this manner. Neither the NASD Code of Arbitration nor the parties' arbitration **[*3]** agreement defines the requirements of a hearing, and the arbitration panel reasonably decided to conduct the hearings telephonically without live witness testimony and cross-examination. There were no material factual issues in dispute between the parties. The disputed, material legal issues--the applicability of California's statutes of limitations in arbitration and the proper limitations periods--could be fairly resolved without live witness testimony. Although Knight did not participate in the telephonic hearings, he was not precluded from doing so. Importantly, he was represented by counsel at both hearings. The arbitration panel did not exceed its authority in determining the manner in which it conducted the hearings on Knight's claims. ¹ See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002).

FOOTNOTES

¹ Mr. Knight also criticizes the arbitration panel for not following an advisory script during the hearings, not maintaining transcripts of the hearings, and not requiring a mutual exchange of witness and exhibit lists before the hearings. Mr. Knight never raised these criticisms with the arbitration panel, and he has not shown that he has suffered any prejudice by the panel's decision **[*4]** not to conduct the hearings in such a manner.

Knight also contends that the arbitration panel manifestly disregarded state and federal law by applying California statutes of limitations to his claims. We disagree. Section 10304(c) of the NASD Code of Arbitration specifically contemplates the application of state and federal statutes of limitations, and the arbitration panel correctly applied the California statutes of limitations to all of Knight's claims. The panel also correctly concluded that Knight's claim for breach of an implied contract was barred by California's two-year statute of limitations applicable to claims not founded upon an instrument in writing. The arbitration panel properly rejected Knight's argument that his implied contract claim was based on a written contract because Knight failed to identify any document that supported his claims. The two documents that Knight provided--his written employment agreement and employment manual--both explicitly provided that Knight's employment was at-will.

AFFIRMED.



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DECLARATION OF SERVICE

I, Michael T. Garone, hereby certify that I mailed a copy of the foregoing PETITIONERS' STATEMENT OF ADDITIONAL AUTHORITIES to Michael T. Schein and Kevin P. Sullivan, attorneys for Respondents, at Sullivan & Thoreson, 701 Fifth Avenue, Suite 4600, Seattle, WA 98104, via United States first-class mail with postage prepaid on the 23rd day of December, 2009.

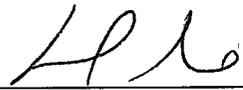
SCHWABE, WILLIAMSON & WYATT;
P.C.

By: 
Michael T. Garone, WSBA #30113
mgarone@schwabe.com
Facsimile: 503-796-2900
Attorney for Petitioners

CERTIFICATE OF FILING

I, Michael T. Garone, hereby certify that I filed the original and one copy of the foregoing PETITIONERS' STATEMENT OF ADDITIONAL AUTHORITIES on the Clerk of the Washington Supreme Court, 415 12th Ave SW, P.O. Box 40929, Olympia, WA 98504-0929, via Federal Express on the 23rd day of December, 2009, with postage prepaid.

SCHWABE, WILLIAMSON & WYATT,
P.C.

By: 
Michael T. Garone, WSBA #30113
mgarone@schwabe.com
Facsimile: 503-796-2900
Attorneys for Petitioners