Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-444

NOVEMBER TERM, 2002

Phelps N. Swett, Jr., et al. v. Robert and Brenda Hudson, Alpha Omega Financial Services, Inc., H.D. Vest Advisory Services, Inc. and H.D. Vest Investment Securities	}	APPEALED FROM: Chittenden Superior Court DOCKET NO. S0363-02 CnC Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Defendants H.D. Vest Advisory Services, Inc. (VAS) and H.D. Vest Investment Securities, Inc. (VIS) appeal from a superior court judgment denying their motion to compel arbitration. They contend the court erroneously ruled that plaintiffs were not required to submit their claims to arbitration. We affirm.

The record evidence may be summarized as follows. Plaintiffs Phelps N. Swett, Jr. and Lydia B. Swett, an elderly married couple residing in Essex Junction, engaged defendant Alpha Omega Financial Services, operated by defendants Robert and Brenda Hudson, for financial and estate planning services. Alpha Omega is the registered representative of defendant VIS, a national brokerage and financial services firm based in Texas. VIS is part of a larger national company known as H.D. Vest, which is also the parent company of VAS, which provides financial advisory services.

The Swetts allege that Robert Hudson recommended they sell the securities managed by Alpha Omega " consisting of the Swett' s entire life savings " in order to purchase four $250,000 charitable gift annuities from Mid-America Foundation. The Swetts further allege that VIS advised Hudson not to purchase the annuities because of problems related to Mid-America, but that Hudson failed to inform the Swetts of this fact and VIS thereafter failed to monitor the Swetts' accounts. After the Swetts purchased the annuities, Mid-America ceased making payments, and the Swetts lost their entire $1 million investment. The Securities and Exchange Commission has filed an action against Mid-America, alleging that its founder defrauded dozens of investors, many of whom were elderly persons like the Swetts.

The Swetts and their children filed an amended complaint in superior court against the Hudsons, Alpha Omega, VIS, and VAS (collectively " Vest"), alleging negligence, breach of fiduciary duty, securities fraud, consumer fraud, and negligent and intentional misrepresentation. Vest moved to compel arbitration under a mandatory arbitration clause contained in each of the six customer agreements executed by the Swetts in opening their investment accounts with Alpha Omega. In support of the motion, Vest filed an affidavit by its general counsel with one or two pages from each of the customer agreements attached, showing the signatures of one or both of the Swetts preceded by a paragraph acknowledging that the agreement is governed by a pre-dispute mandatory arbitration clause contained elsewhere in the agreement, and further acknowledging receipt of the pre-dispute arbitration clause. The affidavit also contained a form copy of the pre-dispute arbitration clause, although not from any of the agreements signed by the Swetts.

The Swetts opposed the motion to compel, arguing that defendants had failed to establish an enforceable arbitration agreement for two reasons: First, they asserted that Vest' s failure to produce a complete copy of the customer

agreement containing the pre-dispute arbitration clause was fatal to the motion to compel. Second, they noted that the customer agreements were addressed solely " To My Broker/Dealer and National Financial Services LLC" (not a party to the complaint). Vest is not named in the agreements and is not a signatory. Accordingly, the Swetts asserted that they had not agreed to binding arbitration with Vest.

Following a hearing, the trial court issued a brief entry order, denying the motion to compel. The court essentially agreed with plaintiffs' arguments, ruling as follows:

> Defendant Vests (VAS & VIS) have not shown the existence of agreements to arbitrate. Only some portions of some contracts with mandatory arbitrations clauses have been shown. There are no agreements involving VAS. The ones presumably (or allegedly) between the Swetts (parents) and VIS have not been shown to contain a clear agreement between the Swetts and VIS to arbitrate as they actually name NFS. The Swetts did not agree to arbitrate with the Hudsons or Alpha Omega. The Court cannot conclude that there are any complete agreements to arbitrate between the Plaintiffs and any Defendants.

This appeal followed.

Although arbitration is generally favored, to grant a motion to compel arbitration the court must find at a minimum an agreement evincing a clear and unambiguous intent by the parties to arbitrate their disputes. See, e.g., Keymer v. Management Recruiters Int' l, Inc., 169 F.3d 501, 504 (8th Cir. 1999) (" pro-arbitration policy does not operate without regard to the intent of the contracting parties, for arbitration is a matter of consent, not of coercion"); In re ACG Cotton Marketing, L.L.C., 985 S.W.2d 632, 633 (Tex. App. 1999) (" although the [arbitration] agreement need not appear in any particular form, it must nevertheless be sufficient to clearly and unambiguously evince the intention of the parties to arbitrate their disputes"). Thus, we examine an arbitration agreement as any other contract to determine whether the parties agreed to submit their disputes to arbitration. Keymer, 169 F.3d at 504.

The trial court here was unable to find a clear and unequivocal intent to arbitrate from the customer agreements. The court noted, in particular, the absence of a complete customer agreement signed by the Swetts, or an express contractual statement that they were waiving their right to seek court remedies against Vest. We discern no basis to overturn the ruling. It may be, as defendants claim, that the reference to " broker/dealer" in the agreements technically applies to Vest, but " like the trial court " we are not persuaded that this generic reference was sufficient to put an ordinary person on notice of such a waiver. See Joder Building Corp. v. Lewis, 153 Vt. 115, 119 (1989) (unclear arbitration provision was insufficient to demonstrate that " laymen would derive this principle from the statements in the agreement"). Confronted with an agreement missing multiple pages, moreover, the court was entitled to withhold judgment that plaintiffs had clearly and unequivocally waived their opportunity to pursue a court remedy. The motion to compel arbitration was therefore properly denied.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice