IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 13-12665-FF

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff-Appellant,

v.

MORGAN STANLEY SMITH BARNEY, ET AL.,

Defendants-Appellees,

On Appeal from the United States District Court
for the Southern District of Florida
Case No. 12-cv-22439-MGC

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA'S REPLY BRIEF

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I. THE PRINCIPLES OF AGENCY LAW DO NOT BIND THE MICCOSUKEE TRIBE TO AN ARBITRATION AGREEMENT WITH MORGAN STANLEY

The Miccosukee Tribe disputes the validity and enforceability of the arbitration agreement contained within Morgan Stanley's client agreement. While the FAA strongly favors the enforceability of arbitration agreements, "arbitration is a matter or consent, not coercion." *See World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc.*, 517 F. 3d 1240, 1244 (11th Cir. 2008). Therefore, if there is any reason grounded in law or equity, an arbitration agreement may be revoked. *See* 9 U.S.C. § 2.

Under New York law, an "agent cannot properly possess any individual interests or represent interests adverse to those of his principal in transactions which involve the subject matter of the agency." *Otsego Aviation Serv. v. Glens Falls Ins. Co.*, 102 N.Y.S. 2d 344, 349 (N.Y.A.D. 1951). Defendant Cypress was engaged in a scheme to defraud the Miccosukee Tribe, improperly diverting millions of dollars in tribal funds for his personal use. Morgan Stanley's participation in this fraudulent scheme was instrumental toward the perpetuation of the conspiracy. Morgan Stanley, as a financial institution, has the means to detect suspicious financial transactions. For example, Defendant Cypress's several daily withdrawals of less than $10,000 should have been sufficient cause for Morgan

Stanley to alert the Miccosukee Tribe of the irregular transactions. *See U.S. v. Puche,* 350 F. 3d 1137, 1151 (11th Cir. 2003)(Defendants structured deposits in amounts less than $10,000 in order to evade currency transaction reporting.).

The Miccosukee Tribe cannot and should not be bound by an arbitration agreement which was entered into by two co-conspirators to the detriment of the Miccosukee Tribe. While it is true that in some instances, the agent's knowledge is imputed to the principal and that effectively serves as a waiver of a defense to the principal, the same rule does not apply where there is a "fraud and an acquiescence in the fraud by the agent." *See Otsego Aviation,* 102 N.Y.S. 2d at 348. In the present case, Morgan Stanley and Defendant Cypress were engaged in an active conspiracy against the Miccosukee Tribe and the arbitration agreement provided a layer of protection to Morgan Stanley as an incentive to continue participating in the fraud. Therefore, since the Miccosukee Tribe did not have actual knowledge of the arbitration clause in the Morgan Stanley client agreement, then the arbitration agreement may not be enforced against the Miccosukee Tribe. The Miccosukee Tribe did not waive its due process rights to a jury trial and Defendant Cypress's knowledge of the arbitration agreement may not be properly imputed to the Miccosukee Tribe.

"[T]he mere execution of a document ... does not negate a factual assertion that such signature was not intended to represent a contractual undertaking."

Cancanon v. Smith Barney, Harris, Upham & Co., 805 F. 2d 998, 1000 (11th Cir, 1986)(quoting *Lummus Co. v. Commonwealth Oil Refining Co.*, 280 F.2d 915, 923 n. 8 (1st Cir.1960)). As Morgan Stanley quoted, "the determination whether a signatory… had the authority to bind a non-signatory… to arbitrate turns on the specific facts of each case." *Bd. Of Trustees of City of Delray Beach Police & Fire Ret. Sys.*, 622 F. 3d 1335, 1342 (11th Cir. 2010). In this case, the District Court had to consider the special status of an Indian Tribe, the role of the Chairman and the general way in which the Miccosukee Tribe specifically handled their business and finances. The District Court did not consider the specific facts of this case, rather, it accepted all the facts Morgan Stanley alleged as true and dismissed the case.

The facts which Morgan Stanley allege to support the proposition that Defendant Cypress had the apparent authority to bind the Miccosukee Tribe to the arbitration agreement are not conclusive. While the Miccosukee Tribe's allegations in the Second Amended Complaint do state that Cypress "oversaw, controlled supervised and had unrestricted access and control over financial funds and records of the Miccosukee Tribe," the allegations do not also state that Defendant Cypress had unlimited authority to bind the Miccosukee Tribe to any contractual obligation. The authority of Defendant Cypress did not extend to enable him to waive the Miccosukee Tribe's right to access the federal court. Therefore, the fact that Defendant Cypress signed the client agreement containing the arbitration clause

allegedly on behalf of the Miccosukee Tribe, does not foreclose the fact that the Miccosukee Tribe did not consent to Defendant Cypress binding the Miccosukee Tribe to arbitration. Therefore, the district court committed reversible clear error when it found that the actions of former chairman Cypress bound the Miccosukee Tribe to the arbitration agreement.

II. THE DISTRICT COURT IMPROPERLY GRANTED MORGAN STANLEY'S MOTION TO COMPEL ARBITRATION

The District Court's Order focuses on Defendant Cypress's apparent authority to bind the Miccosukee Tribe to the arbitration agreement without considering the valid defenses presented by the Miccosukee Tribe. Morgan Stanley argues that because there is a federal policy supporting arbitral dispute resolution, that the Miccosukee Tribe is bound by the arbitration agreement signed by Defendant Cypress. However, arbitration agreements may be deemed unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." *AT&T Mobility L.L.C. v. Concepcion,*131 S.Ct. 1740, 1746 (2011). Agreements to arbitrate may be invalidated by general contract principles including fraud, duress and/or unconscionability. *Id*. The Miccosukee Tribe never assented to the arbitration agreement with Morgan Stanley and Defendant Cypress overstepped the bounds of his authority by signing the agreement.

Defendant Cypress, as Chairman of the Miccosukee Tribe at that time, had the duty to act in the best interest of the Tribe. When Defendant Cypress engaged

in acts that were directly adverse and harmful to the best interest of the Miccosukee Tribe and its people, repeatedly stealing and embezzling money from the Miccosukee Tribe and its people, he was acting beyond the scope of his authority. Defendant Cypress overstepped the bounds of his authority and without the consent of the Miccosukee Tribe signed the arbitration agreement. The arbitration agreement was mutually beneficial to Defendant Cypress and Respondent Morgan Stanley and the Miccosukee Tribe should not be bound by the arbitration agreement to arbitrate through their fraud. The arbitration agreement was signed by Defendant Cypress during the course of the scheme to defraud the Miccosukee Tribe, and was an act in furtherance of the conspiracy. Therefore, there was ineffective assent to the arbitration agreement by the Miccosukee Tribe.

The allegation of ineffective assent to the arbitration agreement by the Miccosukee Tribe is not subject to resolution through the arbitration process. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967). Whether Defendant Cypress was acting within his authority to bind the Miccosukee Tribe when he signed the arbitration agreement is also not subject to resolution by arbitration, but must be determined by this Court. *Cancanon,* 805 F. 2d at 1000. The arbitration agreement was the result of a fraud and is invalid, defeating the purported arbitration agreement. Subjecting the Miccosukee Tribe to arbitration under these circumstances would be oppressive and highly disfavored.

The District Court and Morgan Stanley misconstrue the Miccosukee Tribe's argument regarding fraud. The Miccosukee Tribe has claimed not only that their accounts were handled fraudulently, but also that the arbitration agreement was procured fraudulently. Because fraud was involved in procuring the arbitration agreement, then the validity of the arbitration agreement is for the district court to consider in depth.

Additionally, the District Court should have stayed the case rather than dismissed pending arbitration. Morgan Stanley was not the only Defendant in the case below. Morgan Stanley was part of a RICO enterprise comprised of several other Defendants who schemed against the Miccosukee Tribe. Therefore, it was improper for the District Court to wholly dismiss the claims against Morgan Stanley. Even if the District Court believed the arbitration agreement was valid, the Court should have stayed pending arbitration. At the conclusion of the arbitration, depending on the outcome, Morgan Stanley could have been brought before the District Court for the conclusion of the case. The cases cited by Morgan Stanley to support the conclusion that staying the action serves no purpose when all claims are arbitrable are inapposite. None of the cases cited by Morgan Stanley involve numerous defendants, an Indian Tribe, government, or a RICO enterprise. *See Kozma v. Hunter Scott Fin., L.L.C.*, 2010 WL 724498, *2 (S.D. Fla. 2010); *see also Fedmet Corp. v. M/V Buyalyk*, 194 F. 3d 674, 678 (5th Cir. 1999). The

District Court should have stayed the claims pending arbitration, rather than arbitrarily dismiss all claims against Morgan Stanley.

III. AN EVIDENTIARY HEARING WAS REQUIRED IN ORDER FOR THE DISTRICT COURT TO RULE ON MORGAN STANLEY'S MOTION TO DISMISS

The court's decision to rule on a motion to dismiss without an evidentiary hearing is reviewed for abuse of discretion. *Sunseri v. Macro Cellular Partners*, 412 F. 3d 1247, 1250 (11th Cir. 2005). The Miccosukee Tribe did not allege that Morgan Stanley had requested an evidentiary hearing. Instead, the Miccosukee Tribe made it clear that Morgan Stanley had requested oral argument, which the Court did not grant and instead ruled on the papers. Morgan Stanley's request for oral argument on the motion was indicative that the Court should have entertained Counsels' arguments. Morgan Stanley filed a Motion to Set Oral Argument on the Motion to Compel Arbitration and to Dismiss on May 15, 2013. D.E. No. 226. The Miccosukee Tribe did not oppose the motion because it agreed that the best manner in resolving this motion was allowing the District Court to hear argument.

"Where resolution of the motion to dismiss turns on credibility, however, the proper exercise of discretion may be to hold an evidentiary hearing." *See Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir.1981). Resolution of Morgan Stanley's motion was based on the District Court believing that Morgan Stanley had a good faith basis to believe Defendant Cypress had the authority to bind the

Miccosukee Tribe. It would have been appropriate to hold a hearing on this matter due to the complexity of the issues. Appellee Morgan Stanley relies upon *Variblend Dual Dispensing Systems, LLC v. Seidel GMBH & Co.*, No. 13-2597, 2013 WL 4528902 (S.D.N.Y. 2013), for the proposition that an evidentiary hearing is not necessary to the determination regarding the validity of an arbitration agreement when there is an extensive evidentiary record. In this case, there was no extensive evidentiary record because Morgan Stanley was dismissed as a party before the Miccosukee Tribe had the opportunity to engage in substantive discovery. In fact, Morgan Stanley cites to *Virablend* but does not note what extensive evidence exists to demonstrate that there was an arbitration agreement. The District Court simply believed Morgan Stanley's version of events, finding them credible. Because that was the case, an evidentiary hearing would have been the appropriate route. *See Williamson*, 645 F. 2d at 414. Therefore, it was abuse of discretion for the District Court to decide Morgan Stanley's Motion without holding oral argument or an evidentiary hearing.

CONCLUSION

The Miccosukee Tribe respectfully requests this Honorable Court to quash the District Court's Order granting Morgan Stanley's Motion to Compel Arbitration and dismissing the Miccosukee Tribe's Second Amended Complaint as to Morgan Stanley and remand the case to the district court. D.E. No. 227.

Respectfully submitted on this 22nd day of January, 2014.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the type-volume limitation set forth in FED.R.APP.P. 32(a)(7)(B). This Brief contains 2,004 words, excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii). This Brief complies with the typeface requirements of FED.R.APP.P. 32(a)(5) and the type style requirements of FED.R.APP.P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman, size 14.

Dated: January 22, 2014.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 22, 2014 I electronically served the foregoing document to all counsel of record for the parties.

Respectfully Submitted,

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Eleventh Circuit Court of Appeals

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