IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

TY KEVIN BAUER,

Plaintiff,

v. No. 04-2428

CARTY & COMPANY, INC.,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

The Plaintiff, Ty Kevin Bauer, has filed this action under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., seeking to set aside an arbitration award entered in favor of the Defendant, Carty & Company, Inc. ("Carty"). Bauer alleges that Carty intentionally failed to disclose certain letters requested by the Plaintiff during the discovery process before the arbitration panel. Before the Court is the Defendant's motion to dismiss pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure. As the Plaintiff has responded to the Defendant's motion, it is now appropriate for disposition.

FACTS

Bauer is a former employee of Carty which is a registered securities broker/dealer providing financial and investment services to the public. (Compl. Vacate Arbitration Award ("Compl.") at 1.) A dispute arose between the parties regarding the appropriate method for accounting for bonds, either at cost or at market value, and whether Carty trained Plaintiff to hold the bonds at cost instead of at market value. (Pl.'s Resp. Def.'s Mot. Dismiss at 1.) Carty

filed a statement of claim and a uniform submission agreement with the National Association of Securities Dealers, Inc. ("NASD") regarding the accounting of bonds. In that statement, Carty alleged that Bauer owed it money under a trading agreement and the Internet Capital Group ("ICG") agreement. As a result of the dispute, the parties engaged in arbitration in December 2002. (Compl. at 2.) During the discovery process, Bauer requested "all documents sent to the NASD with respect to the [ICG] bonds concerning Bauer and the Form 3070 disclosure referenced in footnote 1 in the Claimant's Statement of Claim" and "all correspondence sent to the NASD or received from the NASD regarding [ICG] bonds from October 1, 2000 through the date of response." (Pl.'s Resp. Def.'s Mot. Dismiss at 2.) On February 3, 2003, the arbitration panel found Bauer liable to Carty on its breach of contract claim in the amount of $528,476.00. (Compl. at 2; Def.'s Mem. Supp. Mot. Dismiss at 6.) As a result, Plaintiff filed a voluntary petition for Bankruptcy in the Northern District of Mississippi, in which Carty filed a claim seeking to collect on the arbitration award. (Compl. at 2.) Thereafter, the parties engaged in discovery which resulted in Bauer's uncovering of documents that were requested but not provided to him during the arbitration proceedings. (Compl. at 2.) In the present complaint, Plaintiff claims that these documents were critical to his defense and that Carty intentionally and fraudulently failed to disclose the documents in an attempt to avoid an adverse ruling in the arbitration. (Pl.'s Resp. Def.'s Mot. Dismiss at 2; Compl. at 2-3.) Plaintiff learned of the undisclosed documents on March 22, 2004 and commenced this action seeking to set aside the arbitration award on June 7, 2004. (Pl.'s Resp. Def.'s Mot. Dismiss at 5.) In its motion, Defendant seeks dismissal of Plaintiff's complaint on the grounds of lack of subject matter jurisdiction, the Plaintiff's lack of standing to pursue his

claim while in bankruptcy, and the claim being time-barred. The Court will address each of Defendant's arguments in turn.

STANDARD OF REVIEW

Rule 12(b)(6) permits the dismissal of a lawsuit for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The Rule requires the court to "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief." Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998). A complaint need not "anticipate every defense and accordingly need not plead every response to a potential defense." Memphis, Tenn. Area Local, Am. Postal Workers Union v. Memphis, 361 F.3d 898, 902 (6th Cir. 2004). The court's narrow inquiry on a motion to dismiss under Rule 12(b)(6) "is based upon whether the claimant is entitled to offer evidence to support the claims, not whether the plaintiff can ultimately prove the facts alleged." Osborne v. Bank of Am., Nat'l Ass'n, 234 F. Supp. 2d 804, 807 (M.D. Tenn. 2002) (citations and internal quotations omitted).

ANALYSIS

I. Subject Matter Jurisdiction over Plaintiff's Claim

Carty asserts that Bauer has not sufficiently stated a basis for the Court's subject matter jurisdiction as required by Rule 8(a)(1) of the Federal Rules of Civil Procedure. Rule 8(a)(1) requires a plaintiff to set forth "a short and plain statement" of the grounds upon which the court has subject matter jurisdiction. See Fed. R. Civ. P. 8(a)(1). In his complaint, Plaintiff alleged that this Court has jurisdiction under 9 U.S.C. § 10, which provides that the district

court in the district wherein the arbitration award was made may vacate it upon the application of any party "where the award was procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a). However, as Carty points out, the Federal Arbitration Act "does not independently confer subject matter jurisdiction on the district court." See Green v. Ameritech Corp., 200 F.3d 967, 973 (6th Cir. 2000) (citing Ford v. Hamilton Invs., Inc., 29 F.3d 255, 257 (6th Cir. 1994) ("It is well established . . . that § 10 of the Arbitration Act does not constitute a grant of subject matter jurisdiction.")). In response to Defendant's position, Bauer argues that jurisdiction is also proper under 28 U.S.C. § 1332 because the parties are citizens of different states and the amount in controversy exceeds $75,000.00. See 28 U.S.C. § 1332(a)(1). Bauer is a citizen of Mississippi, and the Defendant has its principal place of business in Memphis, Tennessee and is not incorporated under the laws of Mississippi. The amount in controversy plainly exceeds the jurisdictional threshold. Therefore, the Court concludes that it has jurisdiction based on diversity of citizenship under § 1332.

II. Plaintiff's Standing to Bring Suit While in Bankruptcy

Defendant claims that Plaintiff lacks standing to assert his claim which is part of his bankruptcy estate and under the control of the bankruptcy trustee. However, after Carty filed this motion, the Mississippi bankruptcy court ruled that "since no assets are involved which would increase the size of the bankruptcy estate that neither the Chapter 7 Trustee nor an attorney hired for the estate would have an interest in this matter. . . . Therefore, Scott Kramer [Plaintiff's attorney] may proceed to prosecute the Complaint to Vacate the arbitration judgment." (See Notice of Filing, August 2, 2004 Order.) Since Bauer may proceed on his claim here, the Court finds that the Defendant's motion to dismiss based on lack of standing

is without merit.

III. The Timeliness of Plaintiff's Complaint

Carty argues that Plaintiff's claim is time-barred by the provisions of the FAA. Section 12 of the FAA requires that notice of a motion to vacate an award be served on the opposing party within three months after the award is filed. 9 U.S.C. § 12; see also Corey v. New York Stock Exchange, 691 F.2d 1205, 1212 (6th Cir. 1982) ("Failure to comply with this statutory precondition of timely service of notice forfeits the right to judicial review of the award."). Because Bauer filed this action approximately sixteen months after the arbitration panel awarded it $528,476.00, Defendant insists this Court may not review the decision of the arbitration panel. (Def.'s Mem. Supp. Mot. Dismiss at 6-7.)

In response, the Plaintiff asserts that the three-month time limit is subject to the equitable tolling doctrine. In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry, No. 02-4282, 2004 WL 376493, at **3 (6th Cir. Feb. 26, 2004), the Sixth Circuit acknowledged that it had not previously decided whether a motion to vacate an arbitration award was subject to equitable tolling. Nonetheless, in Berry, the court found that even if such tolling was available, "the facts of this case clearly do not merit equitable tolling." Id. at **3; see also White v. Local46 Metallic and Reinforcing Iron Workers of New York City, No. 01Civ.8277 (RMB)(GWG), 2003 WL 470337, at *4 (S.D.N.Y. Feb. 24, 2003) (finding that the petitioner failed to present an adequate basis to apply equitable tolling to § 12 when he failed to meet the three-month service requirement because of his counsel's apparent lack of knowledge of the applicable rules). District Judge Denise Hood, sitting by designation with the appellate court in Berry, wrote a concurring opinion in which she stated that, in her opinion, "equitable tolling is applicable to

the three-month limitation period under 9 U.S.C. § 12." Berry, No. 02-4282, 2004 WL 376493, at **4 (Hood, J., concurring). Several courts which have addressed the issue have adopted a view similar to Judge Hood's. In Sargent v. Paine Webber, Jackson & Curtis, Inc., 687 F. Supp. 7, 9 (D.D.C. 1988), remanded on other grounds by, 882 F.2d 529 (D.C. Cir. 1989), the court held that the equitable tolling doctrine applied to § 12 because it is akin to a statute of limitations which would be "subject to waiver, estoppel, and equitable tolling." Id. (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982) (applying the equitable tolling doctrine to Title VII discrimination time limits)); see also Foster v. Turley, 808 F.2d 38, 41 (10th Cir. 1986) (concluding that the limitations period in 9 U.S.C. § 12 is "in the nature of a statute of limitations, which is subject to waiver"). The court noted that the Supreme Court has declared that "where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction" the court may apply the tolling doctrine. Id. (quoting Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151, 104 S.Ct. 1723, 1725-26, 80 L.Ed.2d 196 (1984) (per curiam)). Likewise, in Holodnak v. Avco Corporation, 381 F. Supp. 191, 197 (D. Conn. 1974), rev'd in part on other grounds, 514 F.2d 285 (2d Cir. 1975), the court found that plaintiff's service of notice of its motion to vacate which was accomplished one day after the three-month limitations period under § 12 had expired was adequate and not time-barred.

In deciding whether to apply the equitable tolling doctrine to the Truth-in-Lending Act, the Sixth Circuit noted that the "equitable maxim that 'no man may take advantage of his own wrong,' older than the country itself, is deeply rooted in our federal jurisprudence." Jones v. TransOhio Savs. Ass'n, 747 F.2d 1037, 1039 (6th Cir. 1984). Moreover, the court noted that

"the Supreme Court has approved the application of equitable tolling to statutes of limitations to prevent unjust results in cases arising at law as well as at equity." Id. (citations omitted). Furthermore, as the Sargent court observed, the Supreme Court has stated that the equitable tolling doctrine is to be "read into every federal statute of limitations." Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946); Sargent, 687 F. Supp. at 9. Additionally, discussing the congressional purpose behind 9 U.S.C. § 10, the Supreme Court opined that the grounds for vacating an arbitration award "show a desire of Congress to provide not merely for any arbitration but for an impartial one." Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 147, 89 S.Ct. 337, 338, 21 L.Ed.2d 301 (1968). "[W]here one party has by his representations . . . induced the other party . . . to give him an advantage which it would be against equity . . . for him to assert, he would not in a court of justice be permitted to avail himself of that advantage." Insurance Co. v. Wilkinson, 80 U.S. (13 Wall.) 222, 233, 20 L.Ed. 617 (1871). Accordingly, based on the precedents cited and because it would be inequitable to allow a defendant to escape review of an arbitration award if it successfully concealed its wrongdoing for three months, the Court concludes that the equitable tolling doctrine is applicable to the time limit set forth in 9 U.S.C. § 12.

The issue now becomes whether Plaintiff has pleaded sufficient facts for the Court to exercise its equitable power to toll the statute of limitations. See Sargent, 687 F. Supp. at 9. To satisfy the standard of equitable tolling in the fraudulent concealment context, a plaintiff must establish that: "'(1) the defendant took affirmative steps to conceal the plaintiff's cause of action; and (2) the plaintiff could not have discovered the cause of action despite exercising due diligence.'" Matthews v. New Century Mortgage Corp., 185 F. Supp. 2d 874, 883 (S.D. Ohio

2002) (quoting Jarrett v. Kassel, 972 F.2d 1415, 1423 (6th Cir. 1992)) (applying the equitable tolling doctrine to the Federal Truth-in-Lending Act); see also Sargent, 687 F. Supp. at 9 ("In tolling the statute of limitations in the commercial context, courts look for fraud on the part of the defendants and diligence on the part of the plaintiffs.") (citing Osterneck v. E.T. Barwick Indus., Inc., 825 F.2d 1521, 1535 (11th Cir. 1987)). Here, Plaintiff alleges that in the arbitration he requested several documents during the discovery process which would have changed its outcome if the Defendant had not concealed them. (Compl. at 2.) In his complaint, Plaintiff submits that Carty intentionally and fraudulently failed to disclose the requested documents because of their damaging character. Finally, less than three months after Bauer discovered the existence of the documents, he diligently filed this action asking the Court to set aside the arbitration award under 9 U.S.C. § 10. (Pl.'s Resp. Def.'s Mot. Dismiss at 5.) Based on the Plaintiff's allegations, the Court concludes that Bauer has pleaded adequate facts to present the equitable tolling issue to the Court and that he should be allowed to present evidence in support of his contentions.

CONCLUSION

For the foregoing reasons, the Defendant's motion to dismiss is DENIED.

IT IS SO ORDERED this ___ day of April, 2005.

J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE