

678 So.2d 376
District Court of Appeal of Florida,
Third District.

SMITH BARNEY SHEARSON, INC., Appellant,

v.

Howard E. BERMAN, et al., Appellees.

Nos. 94–2909, 94–2636.

|
June 26, 1996.

Synopsis

Customer brought suit against securities broker, to compel arbitration of claim. Broker commenced suit against customer in New York state court, seeking determination that period for seeking arbitration under governing customer agreement had expired. The Circuit Court, Dade County, Harold Solomon, J., granted temporary injunction precluding broker from pursuing New York action, and appeal was taken. The District Court of Appeal held that injunctive relief was not available, as customer's cause of action had not accrued when suit was commenced, since broker had not refused to submit to arbitration.

Reversed.

West Headnotes (3)

[1] Injunction

🔑 Grounds in general; multiple factors

Temporary injunction can be granted only when there is showing of likelihood of irreparable harm; unavailability of adequate remedy at law; substantial likelihood of success on merits; considerations of public interest.

4 Cases that cite this headnote

[2] Alternative Dispute Resolution

🔑 Remedies and Proceedings for Enforcement in General

Action to compel arbitration under Federal Arbitration Act accrues only when respondent

unequivocally refuses to arbitrate, either by failing to comply with an arbitration demand or by otherwise unambiguously manifesting an intention not to arbitrate subject matter of dispute. 9 U.S.C.A. § 4.

Cases that cite this headnote

[3] Alternative Dispute Resolution

🔑 Performance, breach, enforcement, and contest of agreement

Securities brokerage customer, who had sued broker to compel arbitration, was not entitled to temporary injunction to bar broker from pursuing New York state court action seeking determination that period for bringing of arbitration claim had expired; customer's Florida cause of action had not accrued, as broker had not refused to arbitrate at time suit was commenced.

Cases that cite this headnote

Attorneys and Law Firms

*376 Homer & Bonner and Peter Homer and John Borgo, Miami, for appellant.

*377 Green, Kahn & Piotrkowski and N. Fraser Schuh III, Miami Beach, for appellees.

Before NESBITT, LEVY and FLETCHER, JJ.

Opinion

PER CURIAM.

Defendant-appellant Smith Barney Shearson, Inc. (Shearson) appeals from an order temporarily enjoining it from proceeding with an action in a New York state court. We reverse.

Plaintiffs-appellees (collectively “Berman”) purchased various investments from Shearson. Berman's investment agreements with Shearson provided that any disputes arising out of the agreements were to be submitted to arbitration in front of the National Association of Securities Dealers, Inc. (NASD). A dispute arose and Berman filed an action in the lower court seeking to

compel Shearson to submit to arbitration under [section 4](#) of the Federal Arbitration Act.

Soon thereafter, Berman filed a statement of claim with the NASD. On receipt of that claim from the NASD, Shearson filed an action in New York state court and obtained an order requiring Berman to show cause why the arbitration proceeding should not be permanently stayed on the grounds that the claims were not arbitrable because they were time barred under section 15 of the NASD Code of Arbitration Procedure. In response to that action, Berman returned to the lower court and obtained an order temporarily enjoining Shearson from proceeding in its New York action. That order is the subject of the instant appeal.

[1] “[A] temporary injunction can be granted only when there is a showing of (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) considerations of the public interest.” *Naegele Outdoor Advertising Co. v. City of Jacksonville*, 659 So.2d 1046, 1047 (Fla.1995). In the instant case, Berman did not demonstrate a substantial likelihood of success on the merits, that is, that he would prevail on his claim to compel arbitration.

[2] [3] “[A]n action to compel arbitration under the Federal Arbitration Act accrues only when the respondent unequivocally refuses to arbitrate, either by failing to comply with an arbitration demand or by otherwise

unambiguously manifesting an intention not to arbitrate the subject matter of the dispute.” *PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1066 (3d Cir.1995). It is indisputable that at the time Berman filed his complaint in the lower court Shearson had not refused to arbitrate Berman's claims. Thus, at the time Berman commenced the action, his cause of action had not accrued. This renders his claim fatally defective. See *Hasam Realty Corp. v. Dade County*, 178 So.2d 747, 748 (Fla. 3d DCA 1965), cert. dismissed, 192 So.2d 499 (Fla.1966)(“If a plaintiff has no valid cause of action on the facts existing at the time of filing suit, the defect cannot ordinarily be remedied by the accrual of one while the suit is pending.”); see also *Rolling Oaks Homeowner's Ass'n, Inc. v. Dade County*, 492 So.2d 686 (Fla. 3d DCA 1986), rev. denied, 503 So.2d 328 (Fla.1987)(same); *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So.2d 607 (Fla. 4th DCA 1975)(stating the general rule that a “plaintiff may not be permitted to cure the defect of non-existence of a cause of action when suit was begun, by amendment of his pleadings to cover subsequently accruing rights”).

Consequently, because of the defects in Berman's claim to compel arbitration, he clearly did not, and could not, demonstrate a substantial likelihood of success on the merits. Accordingly, the order granting Berman's motion for a temporary injunction is reversed.

All Citations

678 So.2d 376, 21 Fla. L. Weekly D1483

Citing References (8)

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	1. Bacardi U.S.A., Inc. v. Gallo Wine Distributors, L.L.C. 829 So.2d 963, 965 , Fla.App. 3 Dist. LITIGATION - Injunction. There was no legal basis for issuance of temporary injunction.	Oct. 30, 2002	Case		1 So.2d
Cited by	2. Heslop v. Moore 716 So.2d 276, 279 , Fla.App. 3 Dist. FAMILY LAW - Marital Property. Former husband could not demonstrate a substantial likelihood of success in civil fraud action against his former wife, who won lottery while parties...	May 20, 1998	Case		1 So.2d
Mentioned by	3. United Auto. Ins. Co. v. Sanar Clinical Rehab Center, Inc. 766 So.2d 356, 357 , Fla.App. 3 Dist. TORTS - RICO. Insurance company was not entitled to temporary injunction preventing rehab center from utilizing assets.	July 19, 2000	Case		1 So.2d
Mentioned by	4. Miami-Dade County v. Church & Tower, Inc. 715 So.2d 1084, 1087 , Fla.App. 3 Dist. GOVERNMENT - Municipalities. County commission was not bound to hearing examiner's recommendation in bid protest.	Aug. 12, 1998	Case		1 So.2d
—	5. 4 Florida Practice Series s 1.610:16, The Temporary Injunction-Standards for Granting a Temporary Injunction-No Adequate Remedy at Law Florida Practice Series Because injunctive relief is an equitable remedy, the case law also recognizes, as a separately enumerated requirement for issuance of an injunction, that the applicant establish...	2018	Other Secondary Source	—	1 So.2d
—	6. 8 Florida Practice Series s 19:13, Compelling and staying arbitration Florida Practice Series In deciding whether to compel arbitration of a dispute you must go through a decision tree. First, is there an enforceable arbitration agreement? Second, does the agreement cover...	2018	Other Secondary Source	—	2 So.2d
—	7. P 12,448 BACARDI U.S.A., INC. AND MHW, LTD., APPELLANTS V. GALLO WINE DISTRIBUTORS, LLC, DBA PREMIER WINES & SPIRITS, INC., APPELLEE. Bacardi U.S.A., Inc. and MHW, Ltd., Appellants v. Gallo Wine Distributors, LLC, dba Premier Wines & Spirits, Inc., Appellee. ¶ 12,448. District Court of Appeal of Florida, Third...	2002	Other Secondary Source	—	1 So.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	<p>8. P 9916 UNITED AUTOMOBILE INSURANCE COMPANY, A FLORIDA CORPORATION, APPELLANT V. SANAR CLINICAL REHAB CENTER, INC., A FLORIDA CORPORATION, AND CARLOS M. GARCIA, INDIVIDUALLY, APPELLEES.</p> <p>RICO Business Disputes Guide</p> <p>United Automobile Insurance Company, a Florida corporation, Appellant v. Sanar Clinical Rehab Center, Inc., a Florida corporation, and Carlos M. Garcia, individually, Appellees. ¶...</p>	2000	Other Secondary Source	—	<p>1</p> <p>So.2d</p>