

15-2513-cv(L)
Moss v. First Premier Bank

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 _____
4
5 August Term, 2015

6
7 (Argued: April 8, 2016

Decided: August 29, 2016)

8
9 Docket Nos. 15-2513-cv(L); 15-2667-cv(CON)

10
11 _____
12
13 DEBORAH MOSS, on behalf of herself and
14 all others similarly situated,

15
16 *Plaintiff-Appellee,*

17
18 v.

19
20 FIRST PREMIER BANK, a South Dakota
21 state-chartered bank, and BAY CITIES BANK,
22 a Florida state-chartered bank,

23
24 *Defendants-Appellants.*¹

25
26 _____
27
28 Before: POOLER, LIVINGSTON, and LOHIER, *Circuit Judges.*
29

¹ The Clerk of Court is respectfully directed to amend the caption as above.

1 Appeal from a July 16, 2015 order of the United States District Court for
2 the Eastern District of New York (*Bianco, J.*), vacating a prior order compelling
3 arbitration. The parties agreed to arbitrate their disputes before the National
4 Arbitration Forum (“NAF”), which no longer accepts consumer arbitrations. The
5 district court held that it could not appoint a substitute arbitrator because the
6 language of the arbitration agreement contemplated arbitration only before NAF.
7 We agree with the district court and therefore AFFIRM.

8 Affirmed.

9
10 _____
11 ERIC RIEDER, Bryan Cave LLP (Megan Awerdick
12 Pierson, *on the brief*), New York, NY, *for Defendant-*
13 *Appellant Bay Cities Bank.*

14 Bryan R. Freeman, Lindquist & Vennum LLP,
15 Minneapolis, MN; Bryan Craig Meltzer, Herrick,
16 Feinstein LLP, *for Defendant-Appellant First PREMIER*
17 *Bank.*

18
19 J. AUSTIN MOORE, Stueve Siegel Hanson LLP
20 (Norman E. Siegel, Steve N. Nix, Stueve Siegel Hanson
21 LLP; Darren T. Kaplan, New York, NY; Hassan
22 Zavareei, Jeffrey D. Kaliel, Tycko & Zavareei,
23 Washington, D.C., *on the brief*), Kansas City, MO, *for*
24 *Plaintiff-Appellee.*
25

1 POOLER, *Circuit Judge*:

2 Deborah Moss signed an arbitration agreement providing that any
3 disputes between her and her payday lender would be resolved by arbitration
4 before the National Arbitration Forum (“NAF”). When she tried to take her case
5 to arbitration, however, NAF refused to accept it pursuant to a consent decree
6 that prohibited NAF from accepting consumer arbitrations. The district court
7 (*Bianco, J.*) construed the arbitration agreement as contemplating arbitration *only*
8 before NAF and declined to compel Moss to arbitrate before a different
9 arbitrator. We agree with the district court’s construction of the agreement and
10 accordingly affirm.

11 **BACKGROUND**

12 Deborah Moss took out three payday loans from an online payday lender,
13 SFS, Inc. (“SFS”). When a payday lender such as SFS agrees to loan a customer
14 money, it relies on banks to serve as middlemen to debit the customer’s account.
15 These banks are known as “Originating Depository Financial Institutions,” or
16 “ODFIs.” First Premier Bank and Bay Cities Bank each served as an ODFI for one
17 of Moss’s payday loans with SFS.

1 When Moss applied for the loans, she electronically signed an application
2 that included an arbitration clause. The arbitration clause on one of the
3 applications provided,

4 Arbitration of All Disputes: You and we agree that any and all
5 claims, disputes or controversies between you and us, any claim by
6 either of us against the other . . . and any claim arising from or
7 relating to your application for this loan, regarding this loan or any
8 other loan you previously or may later obtain from us, this Note,
9 this agreement to arbitrate all disputes, your agreement not to bring,
10 join or participate in class actions, regarding collection of the loan,
11 alleging fraud or misrepresentation . . . including disputes regarding
12 the matters subject to arbitration, or otherwise, shall be resolved by
13 binding individual (and not joint) arbitration by and under the Code
14 of Procedure of the National Arbitration Forum (“NAF”) in effect at
15 the time the claim is filed. . . . Rules and forms of the NAF may be
16 obtained and all claims shall be filed at any NAF office, on the
17 World Wide Web at aww.arb-forum.com, by telephone at 800-474-
18 2371, or at “National Arbitration Forum, P.O. Box 50191,
19 Minneapolis, Minnesota 55405.” Your arbitration fees will be waived
20 by the NAF in the event you cannot afford to pay them.

21 App’x at 168. The following notice is printed directly beneath the arbitration
22 provision: “NOTICE: YOU AND WE WOULD HAVE HAD A RIGHT OR
23 OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT AND HAVE
24 A JUDGE OR JURY DECIDE THE DISPUTES BUT HAVE AGREED INSTEAD

1 TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.” App’x at 168.

2 The other applications Moss signed contained similar arbitration clauses.

3 Moss filed a putative class action against First Premier Bank and Bay Cities
4 Bank in federal court, alleging violations of the Racketeer Influenced and
5 Corrupt Organizations Act, 18 U.S.C. § 1962, and state law. In short, Moss
6 alleged that the banks unlawfully facilitated high-interest payday loans that have
7 been outlawed in several states.

8 The banks moved to compel arbitration on the basis of the arbitration
9 agreements that Moss signed when she applied for the loans. Although the banks
10 were not parties to those agreements, they argued that they were entitled to
11 enforce the agreements against Moss under principles of estoppel. The district
12 court agreed and initially granted the banks’ motion to compel arbitration and
13 stayed the proceedings.

14 After the district court ordered the parties to arbitrate, Moss sent a letter to
15 NAF indicating her intent to arbitrate her claims. NAF responded that it was
16 unable to accept Moss’s dispute pursuant to a consent judgment that it had
17 entered into with the Minnesota Attorney General. In 2009, the Minnesota

1 Attorney General had sued NAF for consumer fraud, deceptive trade practices,
2 and false advertising. The complaint alleged that, although NAF represented
3 itself as an independent and impartial arbiter, the forum was in fact “work[ing]
4 alongside creditors behind the scenes . . . to convince [them] to place mandatory
5 pre-dispute arbitration clauses in their customer agreements and to appoint
6 [NAF] as the arbitrator of any disputes that may arise in the future.” App’x at
7 455-56. NAF also allegedly “ma[de] representations that align[ed] itself against
8 consumers” to solicit creditors to use its arbitration services. App’x at 457. To
9 settle the lawsuit, NAF entered into a consent decree that prohibited it from
10 accepting consumer arbitrations such as Moss’s.

11 After NAF declined to accept her dispute, Moss returned to federal court
12 and moved to vacate the district court’s order compelling arbitration, arguing
13 that she could not arbitrate her claims because NAF declined to arbitrate her
14 case. The district court granted the motion. *See Moss v. BMO Harris Bank, N.A.*,
15 114 F. Supp. 3d 61, 63 (E.D.N.Y. 2015). The court concluded that the language of
16 the arbitration agreements reflected the parties’ intent to arbitrate exclusively
17 before NAF. *Id.* at 66. The court further concluded that, under this Court’s

1 decision in *In re Salomon Inc. Shareholders' Derivative Litigation*, 68 F.3d 554 (2d Cir.
2 1995), a district court may not appoint a substitute arbitrator under such
3 circumstances. *Moss*, 114 F. Supp. 3d at 66. The court vacated its prior order and
4 lifted its stay of the proceedings, holding that Moss "cannot be compelled to
5 arbitrate her claims against Bay Cities Bank and First Premier Bank." *Id.* at 68.
6 This appeal followed.

7 DISCUSSION

8 We have jurisdiction to review an order "refusing a stay of any action
9 under section 3" of the Federal Arbitration Act. 9 U.S.C. § 16(a)(1)(A). Here, the
10 order appealed from lifted a prior stay under Section 3 and vacated a prior order
11 compelling arbitration. Because the order appealed from "was effectively one
12 'refusing a stay,'" we have jurisdiction to review it. *Pre-Paid Legal Servs., Inc. v.*
13 *Cahill*, 786 F.3d 1287, 1290 (10th Cir.), *cert. denied*, 136 S. Ct. 373 (2015); *see also*
14 *Dobbins v. Hawk's Enters.*, 198 F.3d 715, 716 (8th Cir. 1999) (holding that court had
15 jurisdiction to review order lifting stay of arbitration because it was an "order
16 refusing to compel arbitration"); *Corpman v. Prudential-Bache Sec., Inc.*, 907 F.2d
17 29, 30 (3d Cir. 1990) (same). We review the district court's order de novo. *See*

1 *Mediterranean Shipping Co. S.A. Geneva v. POL-Atl.*, 229 F.3d 397, 402 (2d Cir.
2 2000).

3 Section 2 of the Federal Arbitration Act (FAA) provides that “[a] written
4 provision in . . . a contract . . . to settle by arbitration a controversy thereafter
5 arising out of such contract . . . shall be valid, irrevocable, and enforceable.”
6 9 U.S.C. § 2.

7 This text reflects the overarching principle that arbitration is a
8 matter of contract. And consistent with that text, courts must
9 rigorously enforce arbitration agreements according to their terms,
10 including terms that specify with whom the parties choose to
11 arbitrate their disputes and the rules under which that arbitration
12 will be conducted.

13 *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. ___, 133 S. Ct. 2304, 2309 (2013)
14 (alterations, emphasis, citations, and internal quotation marks omitted). As with
15 any contract, “the parties’ intentions control.” *Stolt-Nielsen S.A. v. AnimalFeeds*
16 *Int’l Corp.*, 559 U.S. 662, 682 (2010) (internal quotation marks omitted). To discern
17 the parties’ intentions, we look to the language of the agreement. *PaineWebber Inc.*
18 *v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996).

19 The arbitration agreement in this case provides that any disputes shall be
20 resolved “by binding individual (and not joint) arbitration by and under the

1 Code of Procedure of the National Arbitration Forum (“NAF”) in effect at the
2 time the claim is filed.” App’x at 168. The agreement does not address how the
3 parties should proceed in the event that NAF is unable to accept the dispute. The
4 question is whether a court may compel arbitration when the designated
5 arbitrator is unavailable.

6 We addressed that question in *In re Salomon Inc. Shareholders’ Derivative*
7 *Litigation*, 68 F.3d 554 (2d Cir. 1995). There, a group of shareholders brought a
8 derivative suit against former executives of Salomon Brothers. *Id.* at 555. The
9 executives had signed arbitration agreements with Salomon Brothers providing
10 that “any controversy . . . arising out of [the employee’s] employment . . . shall be
11 settled by arbitration at the instance of any such party in accordance with the
12 Constitution and rules then obtaining of the [New York Stock Exchange].” *Id.* at
13 558. The executives moved to compel arbitration, and the district court granted
14 the motion, referring the matter to the New York Stock Exchange (“NYSE”). *Id.* at
15 555. NYSE declined to arbitrate the dispute, invoking its discretion under its
16 constitution to decline to arbitrate cases referred to it. *Id.* at 555-56. The
17 executives then returned to the district court and requested that the court

1 appoint a substitute arbitrator pursuant to Section 5. *Id.* at 557. The court denied
2 the motion. *Id.*

3 We affirmed. We held that where “the parties ha[ve] contractually agreed
4 that *only* [one arbitrator] could arbitrate any disputes between them,” a district
5 court must “decline[] to appoint substitute arbitrators and compel arbitration in
6 another forum.” *Id.* at 559. This is because

7 [a]lthough the federal policy favoring arbitration obliges us to
8 resolve any doubts in favor of arbitration, we cannot compel a party
9 to arbitrate a dispute before someone other than the [designated
10 arbitrator] when that party had agreed to arbitrate disputes only
11 before the [arbitrator] and the [arbitrator], in turn, exercising its
12 discretion . . . , has refused . . . to arbitrate the dispute in question.

13 *Id.* at 557-58. Once the designated arbitrator refuses to accept arbitration, there is
14 “no further promise to arbitrate in another forum.” *Id.* at 557.

15 Thus, under *Salomon*, the question in this case is whether the language of
16 the parties’ agreement contemplates arbitration before only NAF, or whether it
17 contemplates the appointment of a substitute arbitrator should NAF become
18 unavailable. In *Salomon*, we concluded that the parties’ agreement to arbitrate “in
19 accordance with the Constitution and rules then obtaining of the NYSE” evinced

1 their intent to “designat[e] . . . an exclusive arbitral forum.” *Id.* at 558, 561
2 (alteration omitted).

3 The same is true here. The arbitration agreement in this case contains
4 numerous indicators that the parties contemplated one thing: arbitration before
5 NAF. The agreement provides that disputes “shall be resolved by binding
6 individual (and not joint) arbitration by . . . the National Arbitration Forum.”
7 App’x at 168. It provides that the arbitration shall be conducted “under the Code
8 of Procedure of the National Arbitration Forum.” App’x at 168. It requires that
9 claims “shall be filed at any NAF office.” App’x at 168. And it provides that, if
10 the claimant is unable to pay the costs of the arbitration, fees may be waived
11 “by . . . NAF.” App’x at 168. Further, the agreement makes no provision for the
12 appointment of a substitute arbitrator should NAF become unavailable. In view
13 of this mandatory language, the pervasive references to NAF in the agreement,
14 and the absence of any indication that the parties would assent to arbitration
15 before a substitute forum if NAF became unavailable, we conclude that, as in
16 *Salomon*, the parties agreed to arbitrate only before NAF.

1 Appellants contend that the district court was required to appoint a
2 substitute arbitrator pursuant to Section 5 of the FAA. Section 5 provides,

3 If in the agreement provision be made for a method of naming or
4 appointing an arbitrator or arbitrators or an umpire, such method
5 shall be followed; but if no method be provided therein, or if a
6 method be provided and any party thereto shall fail to avail himself
7 of such method, or if for any other reason there shall be a lapse in
8 the naming of an arbitrator or arbitrators or umpire, or in filling a
9 vacancy, then upon the application of either party to the controversy
10 the court shall designate and appoint an arbitrator or arbitrators or
11 umpire, as the case may require, who shall act under the said
12 agreement with the same force and effect as if he or they had been
13 specifically named therein

14 9 U.S.C. § 5. Appellants contend that NAF's inability to accept this case
15 constitutes a "lapse" within the meaning of Section 5 such that the district court
16 was required to appoint a substitute arbitrator.

17 In *Salomon*, we held that the "lapse" referred to in Section 5 "means a lapse
18 in time in the naming of the arbitrator or in the filling of a vacancy on a panel of
19 arbitrators or some other mechanical breakdown in the arbitrator selection
20 process." *Id.* at 560 (citations and internal quotation marks omitted). A district
21 court may not, however, "use [Section] 5 to circumvent the parties' designation
22 of an exclusive arbitral forum." *Id.* at 561. We concluded that because the district

1 court “promptly referred the matter to the NYSE for arbitration,” there “was no
2 lapse or breakdown in selecting the arbitrator.” *Id.*

3 Under *Salomon*, there was no “lapse in the naming of an arbitrator” in this
4 case. Here, as in *Salomon*, the parties designated an exclusive arbitral forum, the
5 district court compelled the parties to arbitrate before that forum, and the forum
6 declined to accept the case. In *Salomon*, we held that, under such circumstances, a
7 court cannot use Section 5 to circumvent the clear text of the parties’ agreement
8 and appoint a substitute arbitrator.

9 Appellants try to distinguish *Salomon* on the ground that, in that case,
10 NYSE “exercise[d] its discretion” not to accept the arbitration, whereas, here,
11 NAF is unavailable because it cannot accept consumer arbitrations pursuant to a
12 consent decree. Appellants’ Br. at 18. We do not find this to be a meaningful
13 distinction. Under *Salomon*, the dispositive factor is not why the designated
14 arbitral forum is unavailable, but rather whether the designated forum was
15 “exclusive.” Where the forum is exclusive, the district court may not “use
16 [Section] 5 to circumvent the parties’ designation of an exclusive arbitral forum.”
17 *Salomon*, 68 F.3d at 561.

1 Appellants also rely on two pre-*Salomon* cases in support of their position
2 that Section 5 required the district court to appoint a substitute arbitrator in this
3 case. See *Astra Footwear Indus. v. Harwyn Int'l, Inc.*, 442 F. Supp. 907 (S.D.N.Y.
4 1978); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972). But
5 *Salomon* considered and distinguished both of these cases. 68 F.3d at 560-61.
6 Moreover, *Astra* was a district-court decision. It was affirmed in a one-word,
7 unpublished opinion. *Astra Footwear Indus. v. Harwyn Int'l Inc.*, 578 F.2d 1366 (2d
8 Cir. 1978). Thus, to the extent the district court's reasoning in *Astra* conflicts with
9 *Salomon*, we are bound to follow *Salomon*. And in *Erving*, the arbitration
10 agreement provided that disputes would be arbitrated before a designated
11 arbitrator or that person's designee, undercutting the notion that the parties
12 intended to arbitrate exclusively before the designated arbitrator. 468 F.2d at
13 1066 n.1. Further, the court in *Erving* did not analyze the language of Section 5 or
14 address whether a "lapse" within the meaning of Section 5 had occurred in that
15 case. Thus, like the district court, we find *Salomon* to be more instructive on the
16 applicability of Section 5 than either *Astra* or *Erving*.

1 Finally, we acknowledge that there is a difference of opinion among the
2 circuits on this issue. *Compare Flagg v. First Premier Bank*, No. 15-14052, 2016 WL
3 703063, at *4 (11th Cir. Feb. 23, 2016) (unpublished opinion) (holding that
4 “[b]ecause the choice of the NAF as the arbitral forum was an integral part of the
5 agreement to arbitrate, we conclude that the district court properly denied First
6 Premier’s motion to compel arbitration and appoint a substitute for NAF”), *and*
7 *Ranzy v. Tijerina*, 393 Fed. Appx. 174, 176 (5th Cir. 2010) (unpublished opinion)
8 (following *Salomon* to conclude that district court properly denied motion to
9 compel arbitration given NAF’s unavailability), *with Green v. U.S. Cash Advance*
10 *Ill., LLC*, 724 F.3d 787, 793 (7th Cir. 2013) (holding that Section 5 required court to
11 appoint substitute arbitrator), *and Khan v. Dell Inc.*, 669 F.3d 350, 356 (3d Cir.
12 2012) (finding *Salomon* “unpersuasive” and holding that NAF’s unavailability
13 constituted a lapse within the meaning of Section 5). Like the district court,
14 however, we are bound by *Salomon*. Thus, while some circuits have chosen to
15 follow *Salomon* and others have not, we are not free to make that choice. The only
16 question that we can decide is whether, applying *Salomon*, the district court

1 correctly declined to compel Moss to arbitrate her claims before a forum to which
2 she did not agree. We hold that it did.

3 **CONCLUSION**

4 For the foregoing reasons, we AFFIRM the order of the district court and
5 REMAND for further proceedings.

6

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

Date: August 29, 2016
Docket #: 15-2513cv
Short Title: Moss v. BMO Harris Bank, N.A.

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 13-cv-5438
DC Court: EDNY (CENTRAL
ISLIP)DC Docket #: 13-cv-5438
DC Court: EDNY (CENTRAL
ISLIP)
DC Judge: Brown
DC Judge: Bianco

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

Date: August 29, 2016
Docket #: 15-2513cv
Short Title: Moss v. BMO Harris Bank, N.A.

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 13-cv-5438
DC Court: EDNY (CENTRAL
ISLIP)DC Docket #: 13-cv-5438
DC Court: EDNY (CENTRAL
ISLIP)
DC Judge: Brown
DC Judge: Bianco

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to
prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature