

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES B. ROPP,
SECURITIES COMMISSIONER FOR
THE DIVISION OF SECURITIES OF
THE STATE OF DELAWARE
DEPARTMENT OF JUSTICE,

Plaintiff,

v.

1717 CAPITAL MANAGEMENT
COMPANY, INC.

Defendant.

Civil Action No. 02-1701-KAJ

MEMORANDUM OPINION

Peter O. Jamison, III, Esq., Deputy Attorney General, Department of Justice, State Office Building, 5th Floor, 820 N. French Street, Wilmington, Delaware, 19801, counsel for plaintiff.

Henry E. Gallagher, Jr., Esq., Connolly Bove Lodge & Hutz LLP, 1220 Market Street, P.O. Box 2207, Wilmington, Delaware, 19899, counsel for defendant.

Wilmington, Delaware
January 14, 2004

JORDAN, District Judge

I. INTRODUCTION

On December 30, 2002, plaintiff James B. Ropp, the Securities Commissioner for the Division of Securities of the State of Delaware Department of Justice (the "Commissioner"), filed a complaint seeking a declaratory judgment that he may pursue restitution, and any other appropriate victim-specific relief, in a state administrative proceeding against defendant 1717 Capital Management Company, Inc. ("1717"), despite the fact that 1717 entered into a predispute arbitration agreement with the victims involved in the state administrative proceeding. (Docket Item ["D.I."] 1; D.I. 32 at 1.) On January 29, 2003, 1717 filed an answer to the Commissioner's complaint. (D.I. 4.) Presently before me is a motion for summary judgment filed by the Commissioner (D.I. 31) and a cross-motion for summary judgment filed by 1717 (D.I. 35). Jurisdiction is grounded on the Commissioner's claim regarding the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* and 28 U.S.C. § 1331. For the reasons that follow, the Commissioner's motion will be denied and 1717's cross-motion will be granted.

II. BACKGROUND

The material facts giving rise to this proceeding are undisputed by the parties. In April 1997, Lisle and Patricia Shaffer applied through 1717 and one of its representatives, Raymond N. Ianni, to open a brokerage account. (D.I. 32 at 3, D.I. 36 at 3.) The Shaffers completed an application form and an account agreement from 1717, both of which contained predispute arbitration clauses.¹ (*Id.*) In August 2001, Mr.

¹The predispute arbitration clause in the application form stated:
It is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted before the National Association of

Shaffer filed a complaint with the Division of Securities of the State of Delaware Department of Justice (the "Division") regarding the manner in which 1717 and Mr. Ianni were handling his brokerage account.² (D.I. 32 at 4, D.I. 36 at 3.) After investigating Mr. Shaffer's complaint,³ the Division filed an administrative complaint with the Commissioner on May 2, 2002, alleging that 1717 and Mr. Ianni had engaged in "dishonest and unethical conduct" and that 1717 had "failed to reasonably supervise Mr. Ianni," in violation of the Delaware Securities Act, 6 Del. C. §§ 7316 and 7325. (D.I. 32 at 4-5, D.I. 36 at 4.) 1717 filed an answer to the administrative complaint on July 15, 2002, including a defense that "[t]he Securities Division is precluded from seeking, and

Securities Dealers, Inc. and in accordance with its rules.
(D.I. 32 at 3, D.I. 33 at A2-A5.)

The predispute arbitration clause contained in the account agreement stated:

It is agreed that any controversy between or among the account holder, Pershing [the borkerage firm through with 1717 was clearing securities transactions] and Introducing Financial Institution or any of them arising out of Pershing's or Introducing Financial Institution Business or this agreement, shall be submitted to arbitration before the New York Stock Exchange, Inc. Or any other nation securities exchanges on which a transaction giving rise to such claim took place (and only before such exchange) or the National Association of Securities Dealers, Inc., as the account holder may elect and in accordance with the rules obtaining of the selected organization... . (D.I. 32 at 4, D.I. 33 at A11.)

²The Division is authorized by 6 Del. C. § 7325 to regulate the securities business in Delaware.

³The Division's investigation is authorized by 6 Del. C. § 7319.

the Hearing Officer⁴ is precluded from awarding, any relief sought in the [administrative complaint] that may be sought or awarded in an arbitration initiated as provided in the Shaffers' account agreement." (D.I. 36 at 4.)

After a pre-hearing conference with the Hearing Officer, 1717 filed, on December 3, 2002, a "Motion to Preclude Restitution and Other Relief Available Through Arbitration." (D.I. 32 at 4, D.I. 36 at 5.) The Division opposed this motion on December 27, 2002, (*id.*), and the Commissioner filed the instant complaint for declaratory judgment three days later. On January 22, 2003, based on the parties' stipulation, the Hearing Officer stayed the administrative proceeding pending resolution of this matter. (D.I. 36 at 5.)

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

IV. DISCUSSION

The parties agree that the Third Circuit's decision in *Olde Discount Corp. v. Truman*, 1 F.3d 202 (3d Cir. 1993), is controlling here, and that the outcome of their motions for summary judgment hinges on whether I find that *Olde* was effectively

⁴Delaware Deputy Attorney General Richard W. Hubbard is the Hearing Officer presiding over the administrative proceeding concerning the Division's complaint against 1717 and Mr. Ianni. (D.I. 36 at 5.)

overruled by the Supreme Court's decision in *EEOC v. Waffle House*, 534 U.S. 279 (2002). (D.I. 32 at 8, D.I. 36 at 6.)

The Commissioner acknowledges that the facts in *Olde* are almost identical to this case, involving another couple who opened a brokerage account with Olde Discount, signed an account agreement containing a predispute arbitration clause, and subsequently filed a complaint about Olde Discount with the Delaware Division of Securities. (D.I. 32 at 8-9 (citing *Olde*, 1 F.3d at 215).) This court enjoined the Division from pursuing a rescission remedy against Olde on the ground that the Division's statutory authority to pursue rescission was preempted by the FAA, a decision which was affirmed by the Third Circuit. *Olde Discount Corp. v. Tupman*, 805 F. Supp. 1130, 1139 (D. Del. 1992), *aff'd*, 1 F.3d 202, 203 (3d Cir. 1993). The Commissioner accurately frames the Third Circuit's holding in *Olde* as follows: "[W]here a broker and a client enter into a predispute arbitration agreement, a state securities regulator may not, in any subsequent enforcement action arising out of a controversy between the broker and the client, pursue a rescission remedy against the broker on behalf of the client." (D.I. 32 at 7.) Thus, the law of the Third Circuit forecloses the Commissioner from seeking the type of victim-specific relief he would like to pursue in this case on behalf of the Shaffers, unless the *Olde* decision has been overruled by a subsequent decision or contradicted by a statutory enactment.

The Commissioner's argument that *Olde* has been effectively overruled by the Supreme Court's *Waffle House* decision, however, is unpersuasive.⁵ The question presented in that case was

whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the Equal Employment Opportunity Commission (EEOC) from pursuing victim specific judicial relief, such as backpay, reinstatement, and damages, in an enforcement action alleging that the employer has violated Title I of the Americans with Disabilities Act of 1990 (ADA).

Waffle House, 534 U.S. at 282 (citations omitted). The Court held that a predispute arbitration agreement between an employer and an employee does not bar the EEOC pursuing victim-specific relief. *Id.* at 285. As 1717 points out, *Waffle House* deals with the federal statutory framework governing employer-employee disputes, while *Olde* involves a dispute under Delaware state law between investors and securities brokers. (D.I. 32 at 7.) Nothing in the *Waffle House* decision indicates that its holding applies beyond the arena of employment disputes or implicitly overrules the Third Circuit's opinion in *Olde*, and I decline to read it as such. See *U.S. v. Gay*, 967 F.2d 322, 327 (9th Cir.), *cert denied*, 506 U.S. 929 (1992) (a decision of the Supreme Court overrules that of a Court of Appeals only when it undermines the lower court's decision and is closely on point). Quite simply, the *Waffle House* decision is not closely on point. The *Olde* decision remains controlling law unless and until either the Third Circuit or the Supreme Court explicitly overrules it or there is a statutory enactment that contradicts it, which has not happened to date.

⁵I have considered the Commissioner's other arguments in favor of summary judgment and find them to be without merit.

V. CONCLUSION

Because it is clear, under *Olde*, that the Commissioner cannot pursue the victim-specific relief he now seeks, his motion for summary judgment (D.I. 31) will be denied and 1717's cross-motion for summary judgment (D.I. 35) will be granted. An appropriate order will issue.

