United States Court of Appeals
For the Eighth Circuit

No. 18-3679

Scott A. Seldin

Plaintiff - Appellant

Derry Seldin; Traci Seldin Moser

Intervenor Plaintiffs

v.

Theodore M. Seldin; Stanley C. Silverman; Mark Schlossberg

Defendants - Appellees

Appeal from United States District Court
for the District of Nebraska - Omaha

Submitted: August 22, 2019
Filed: September 20, 2019
[Unpublished]

Before LOKEN, GRUENDER, and KOBES, Circuit Judges.

PER CURIAM.

Scott Seldin appeals the district court's[1] dismissal of his diversity action seeking an accounting of a family trust. Having carefully reviewed the record and the parties' arguments on appeal, see Abdurrahman v. Dayton, 903 F.3d 813, 816 (8th Cir. 2018) (de novo review of mootness dismissal), we find no basis for reversal.

The judgment is affirmed. See 8th Cir. R. 47B.

[1] The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SCOTT A. SELDIN,

Plaintiff,

v.

THEODORE M. SELDIN, STANLEY C. SILVERMAN, and MARK SCHLOSSBERG,

Defendants.

8:16CV372

ORDER

(Filed Nov. 14, 2018)

This matter is before the Court on the parties' responses to the court's order to show cause. Filing Nos. 50 and 52. The matter was remanded from Eighth Circuit Court of Appeals ("Eighth Circuit") for proceedings consistent with its opinion. *See Seldin v. Seldin*, 879 F.3d 269, 273 (8th Cir. 2018); Filing No. 45, Eighth Circuit Opinion. The Eighth Circuit authorized this Court on remand to hear a challenge to the enforcement of the arbitration award, but stated the Court could not "consider whether the state court's order to arbitrate accounting claims was appropriate." *Id.*

Plaintiff Scott Seldin urges the Court not to dismiss the action. The record shows that the arbitration award has been confirmed in state court and is on appeal. Filing No. 50, Exs. A-D. Relying on *Brown v. Brown-Thill*, 762 F.3d 814, 825 (8th Cir. 2014), he argues that he can maintain a trust accounting claim in this Court. He states that although defendant, Theodore Seldin, has not filed an answer after remand,

he expects the defendant to challenge enforcement of the arbitration awarded in this action.

Defendant Theodore Seldin, on the other hand, argues that Scott Seldin's position ignores the clear mandate of the Eighth Circuit that this Court on remand may only consider a challenge to the parties' final arbitration award. He contends that Scott Seldin has presented no such challenge in this court and cannot do so because he unsuccessfully pursued vacatur of the award in state court.

The plaintiff continues to seek a trust accounting. No challenge to the enforcement of the arbitration award has been raised. The Court finds *Brown-Thrill* does not provide authority for the pursuit of an accounting claim in the face of the Eighth Circuit's express directive to this Court. The Court agrees with Theodore Seldin that the Eighth Circuit's mandate allows the Court only to entertain a challenge to the arbitration award and expressly prohibits consideration of any challenge to the state court's determination that the accounting claim was subject to arbitration.[1]

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[1] Though the Eighth Circuit did not rely on the *Rooker-Feldman* doctrine in its decision, the Appeals Court agreed that the doctrine would apply to bar Scott Seldin's claim "to the extent that Scott is a 'state court loser challenging his [sic] the state court's order for his accounting claims to be arbitrated[.]' " *Seldin*, 879 F.3d at 273; *see D.C. Court of Appeals v. Feldman*, 103 S. Ct. 1303, 1311 (1983); *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 415 (1923) (barring losing state court litigants from attempting to indirectly attack state court findings in federal district courts).

It appears that there are no issues for resolution by the Court. The Court finds the plaintiff has not made a satisfactory showing that the action is not subject to dismissal. Accordingly,

IT IS ORDERED that this action is dismissed pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit.

DATED this 14th day of November, 2018.

BY THE COURT:

/s/ Joseph F. Bataillon
Joseph F. Bataillon
Senior United States
District Judge

United States Court of Appeals
For the Eighth Circuit

No. 17-1045

Scott A. Seldin

Plaintiff - Appellant

Derry Seldin; Traci Seldin Moser

Intervenor Plaintiffs

v.

Theodore M. Seldin; Stanley C. Silverman; Mark Schlossberg

Defendants - Appellees

No. 17-1047

Scott A. Seldin

Plaintiff - Appellee

Derry Seldin; Traci Seldin Moser

Intervenor Plaintiffs - Appellants

v.

Theodore M. Seldin; Stanley C. Silverman; Mark Schlossberg

Defendants - Appellees

Appeals from United States District Court
for the District of Nebraska - Omaha

Submitted: November 16, 2017
Filed: January 2, 2018

Before BENTON, SHEPHERD, and KELLY, Circuit Judges.

SHEPHERD, Circuit Judge.

In 2010, feuding members of the Seldin family entered into a Separation Agreement to divide jointly owned assets. The Separation Agreement contained an arbitration clause, requiring the parties to arbitrate any claims involving their jointly owned property. Rather than arbitrating, Appellant Scott Seldin ("**Scott**") filed a lawsuit for an accounting of a trust that he claims was not included in the Separation Agreement. The district court dismissed his claim, finding that the federal courts lacked subject matter jurisdiction to hear the lawsuit. We disagree.

I. Background

Millard Seldin ("**Millard**"), Scott's father, created the Millard Seldin Children's Master Trust ("**MSCM Trust**") in 1992. Theodore Seldin and Stanley Silverman (together "**Appellees**") were designated as two of

the trustees for the MSCM Trust. Scott, along with his siblings, Derry Seldin and Traci Seldin Moser (together "**Intervenors**"), were the beneficiaries of the trust. The MSCM Trust required an annual accounting of the trust assets. Scott alleges that Appellees breached their fiduciary duties as trustees and never submitted a trust report to Scott or Intervenors. The trust was dissolved in 2002.

In February 2010, Scott and Millard entered into the Separation Agreement with Appellees in order to split the assets in which they had joint interests. The Separation Agreement included an arbitration clause to settle any disputes arising out of or relating to the Separation Agreement or the parties' joint ownership properties or entities. In October 2011, the parties initiated arbitration proceedings. In February 2012, the parties agreed to mediate, using the arbitrator as the mediator. The mediation fell apart, and the arbitration resumed. Following the mediation, Scott began lodging complaints against the arbitrator/mediator, calling for his resignation, but the arbitrator/mediator refused.

Scott then filed three separate lawsuits against Appellees in the Douglas County, Nebraska District Court regarding the parties' joint interests, and each of the lawsuits was dismissed. Scott filed his first state court lawsuit in April 2012, alleging claims that were already pending in arbitration. Among his claims was a cause of action for a full accounting from 1987 to present. The court dismissed Scott's claim, finding that he was required to submit to arbitration.

In June 2012, Scott filed a second state court lawsuit, amending the complaint on October 10, 2012. In March 2013, the state court similarly dismissed the second lawsuit, ordering the parties to resolve their issues through arbitration. In September 2012, Scott filed a demand with the American Arbitration Association (the "**AAA**") for the disqualification of the arbitrator. The AAA reaffirmed the arbitrator. Scott filed a Motion to Reconsider or Clarify Ruling, and the AAA denied the motion.

In December 2012, Scott filed a third lawsuit asking the state court to vacate the AAA ruling or to enjoin arbitration, remove the arbitrator, and reinstate the first lawsuit. In April 2013, the state court dismissed the third lawsuit. Scott appealed each of the lawsuits. Pending the appeals, the arbitrator stepped down, and the designated replacement arbitrator refused to serve. The parties agreed to select a new arbitrator through the AAA. Appellees moved to dismiss the appeals as moot, and on August 28, 2013, the Nebraska Supreme Court granted their motion.

In October 2013, a new arbitrator was appointed, and the arbitration recommenced. On July 29, 2016, Scott filed a lawsuit in federal court against Appellees, requesting an accounting of the MSCM Trust. Intervenors attempted to intervene, but their motion was denied. Appellees filed a motion to dismiss for lack of subject matter jurisdiction. The district court granted Appellees' motion to dismiss, holding that the court did not have jurisdiction because there was a binding arbitration agreement which gave the arbitrator the

authority to first decide the extent of his jurisdiction. Furthermore, the court stated it did not have jurisdiction because res judicata and issue preclusion applied. Finally, the court also found that the Rooker-Feldman doctrine barred the court from hearing Scott's claim.

On April 27, 2017, after all of the briefing was submitted for this appeal, the arbitrator entered a Final Award, finding that the Appellees are entitled to recover from Scott a net amount of $2,977,031, plus post-award simple interest from the date of the award.[1] On May 23, 2017, Appellees filed a Motion to Confirm Arbitration Award as Judgment in state court.

II. Discussion

The sole issue decided in this appeal is whether the district court erred in granting Appellees' motion to dismiss for lack of subject matter jurisdiction. "We review de novo the grant of a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1)." City of Benkelman v. Baseline Eng'g Corp., 867 F.3d 875, 879-80 (8th Cir. 2017) (quoting Great Rivers Habitat Alliance v. FEMA, 615 F.3d 985, 988 (8th Cir. 2010)).

The district court granted Appellees' 12(b)(1) motion, finding that the court lacked subject matter jurisdiction to hear Scott's claim because the parties had

[1] We grant Appellees' Motion for Judicial Notice, requesting that this Court recognize that the arbitrator entered his Final Award and that Appellees have moved for the award to be confirmed as judgment.

entered into an arbitration agreement. This case is controlled by our decision in City of Benkelman v. Baseline Engineering Corp., where we held that a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is not the appropriate mechanism to use to attempt to compel arbitration. Benkelman, 867 F.3d at 880-81. An arbitration agreement alone, without other statutory or binding jurisdictional limitations, does not divest the federal courts of subject matter jurisdiction. Id. (holding that "an arbitration agreement has no relevance to the question of whether a given case satisfies constitutional or statutory definitions of jurisdiction"). Rather, Rule 12(b)(6) or Rule 56 motions are the appropriate means for parties seeking to compel arbitration. Id. at 881.

Here, the parties entered an arbitration agreement, but the existence of that agreement alone does not deprive the federal courts of jurisdiction. Because a valid arbitration clause alone does not strip the federal courts of subject matter jurisdiction, we find that the district court erred in dismissing Scott's claim on that basis. See id. The appropriate procedure would have been for the district court to stay or dismiss the case based on a Rule 12(b)(6) or Rule 56 motion pending arbitration. See id.

The district court alternatively stated that it lacked subject matter jurisdiction over Scott's claim because res judicata and collateral estoppel apply. The Supreme Court has stated that "[p]reclusion, of course, is not a jurisdictional matter." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 293 (2005); see

also In re Athens/Alpha Gas Corp., 715 F.3d 230, 235 (8th Cir. 2013) (stating that res judicata is a "non-jurisdictional question"). Because preclusion is not a jurisdictional matter, the district court erred when it found that res judicata and collateral estoppel were sufficient grounds to grant a Rule 12(b)(1) motion. Rather, Rule 12(b)(6) or Rule 56 motions are the more appropriate vehicles for a dismissal based on preclusion. See A.H. ex rel. Hubbard v. Midwest Bus Sales, Inc., 823 F.3d 448, 453 (8th Cir. 2016) (Rule 12(b)(6)); Smith v. United States, 369 F.2d 49, 53 (8th Cir. 1966) (Rule 56).

The district court also found it lacked subject matter jurisdiction based on Rooker-Feldman. To the extent that Scott is a "state court loser" who is challenging the state court's order for his accounting claims to be arbitrated, we agree with the district court that Rooker-Feldman would apply, barring his claim in federal court. See Exxon Mobil, 544 U.S. at 284. However, we think that it is unnecessary to reach the question of whether Rooker-Feldman applies here because the arbitration to which Scott was ordered to submit has already been completed. Thus, on remand the district court may hear a challenge to the enforcement of the arbitration award, but may not consider whether the state court's order to arbitrate accounting claims was appropriate. Furthermore, for the same reasons, we find it is unnecessary to consider Intervenors' appeal of the denial of their motion to intervene.

III. Conclusion

We reverse and remand to the district court for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SCOTT A. SELDIN,

Plaintiff,

vs.

THEODORE M. SELDIN, STANLEY C. SILVERMAN, and MARK SCHLOSSBERG,

Defendants.

8:16CV372

MEMORANDUM AND ORDER

(Filed Dec. 6, 2016)

This matter is before the Court on defendant Theodore Seldin's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), Filing No. 17, and a motion by the plaintiff, Scott Seldin, for an accounting pursuant to Fed. R. of Civ. P. 3, Filing No. 2.[1] The plaintiff Scott Seldin seeks an accounting pursuant to Neb. Rev. Stat. § 30-3890(b)(4) related to a trust in which he was the beneficiary and Theodore Seldin and Stanley Silverman served as the trustees.[2] Scott Seldin contends that this matter arises from the unauthorized and undisclosed self-dealing by these two trustees of the family trust. Scott Seldin requests an accounting from 1992 through 2002 of the MSCM trust, discussed hereinafter. Filing No. 1 and Filing No. 2. Plaintiff asks this

[1] Plaintiff also moves to file a sur-reply brief and evidence, Filing No. 31, and defendant Theodore Seldin opposes said request, Filing No. 32. The Court will deny the motion, as it has received more than enough briefing in this case to make a decision.

[2] Stanley C. Silverman passed away on September 7, 2016.

Court to exercise its power in this case and order the trustees to account for the properties by allowing access to the records by an independent third-party auditor. Defendant Theodore Seldin contends that this Court lacks subject matter jurisdiction, as there is an agreement to arbitrate that binds the parties. Filing No. 17.

BACKGROUND

Ted, Stan and Mark Seldin served as trustees for a trust, Millard Seldin Children's Master Trust ("MSCM Trust"), created by Scott Seldin's father, Millard R. Seldin. Scott Seldin is named in the MSCM Trust as a beneficiary along with his two siblings, Traci Seldin Moser and Derry Seldin. Scott's father, Millard, established a trust for Scott and his siblings. Scott's uncles, Ted and Stan Seldin, now estranged from Millard and Scott, were designated as two of the trustees (Ted and Stan Seldin will be collectively referred to as "Trustees"). Among other things, the Trustees allegedly overcharged on lease commissions paid to them under management agreements related to the trust in breach of their fiduciary duties. Also, according to Scott Seldin, the Trustees never submitted a trust report to Scott Seldin or any other beneficiary as required by Nebraska law. Filing No. 1, Complaint, ¶ 8. The MSCM trust required an accounting at least annually.[3]

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[3] The arbitrator found:

"[T]he MSCM Trust provide[s] that the 'Trustees shall render an account at least once each twelve months' "

On February 18, 2010, the parties entered into a Separation Agreement, designed to split the assets in the many trusts with the help of a mediator. Filing No. 18-2, Ex. 1. The purpose of the agreement was to (1) help separate out the interests between the Omaha Seldins and the Arizona Seldins,[4] and (2) establish arbitration as the exclusive remedy.

Millard Seldin, Ted and Stan Seldin, Scott Seldin and others entered into a Separation Agreement. With regard to the MSCM Trust, the arbitrator determined that "there is little meaningful evidence . . . to explain how the Trustees handled their annual reports" to Scott. (Filing No. 18-44, Award 1 ¶¶ 15, 16 at 5). The arbitrator found it "was not until October 2008 that [the Trustees] provided [Scott] with sufficient detailed financial information for [him] to reasonably recognize on a per property basis that the management fee provisions in the Management Agreements may have

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> (Award 1 ¶ 15 at 5). "MSCM Trust . . . limits . . . powers and authority of the Trustees, by providing, 'none . . . shall be construed to enable . . . Millard . . . [or] the Trustees . . . to . . . dispose of either the principal or the income of the Trust for less than adequate consideration . . . '" (Award 8 ¶ 1 at 1-2; Award 1 ¶ 10 at 3). "Millard anticipated there could be an appearance of impropriety if future transactions occurred between the MSCM Trust and one or more of the family-owned business entities; even when the parties acted in good faith and exchanged adequate consideration"

Filing No. 18, (Award 8 ¶ 1 at 1-2; Award 1 ¶ 7 at 3).

[4] Scott and Millard Seldin are referred to as "Arizona Seldins" and Ted and Stan Seldin are referred to as "Omaha Seldins".

been erroneously applied by Seldin Company over an extended period of time" (Filing No. 18-47, Award 8 ¶ 1 at 1-2; Filing No. 18-45, Award 2 ¶ 20 at 5). The arbitrator further found, on January 27, 2016, that:

> "On several occasions, the authorized representatives of the Seldin Company, including Stan, unilaterally and erroneously charged the Owners [including Scott or entities holding his interests] lease fees. . . . The Seldin Company has breached the Management Agreements by overcharging [Scott and others] lease commissions . . . Thus, the overcharged lease commissions paid by [Scott and others] total $257,392. "[T]here is no factual, legal or equitable basis to support findings that . . . the commissions paid to the Seldin Company . . . for the lease transactions . . . were the result of a mutual mistake . . . "

Filing No. 18-47, Award 8 ¶¶ 11, 13 at 4-5).

The arbitrator further determined that there existed over fifteen hundred boxes of paper records and an electronic Timberline financial accounting system used by the Trustees since 1998. (Filing No. 18-47, Award 8 ¶ 1 at 1-2; Filing No. 18-44, Award 1 ¶ 29 at 11).

On July 4, 2015, the arbitrator also found that Scott Seldin "breached . . . fiduciary duties of care and loyalty, which [he allegedly] owed to SD&M, MTS, Ted and Stan, and that [Scott allegedly] violated applicable securities statutes when Millard [allegedly] orchestrated the Sky Financial Transactions" (Filing No.

18-50, Award 13 ¶ 73 at 21). The arbitrator found "[Scott has] failed to meet [his] burden of proving that Millard properly disclosed the Sky Financial Transactions and . . . MSCM Trust's investment in SVP Restaurant to SD&M and MTS . . . (Filing No. 18-50, Award 13 ¶ 46 at 14). The arbitrator further found, despite that "SD&M and MTS . . . received a 100.043% total return on . . . the Sky Financial Transactions[,] . . . [t]he breach of fiduciary duties and securities law violations committed by . . . [Scott allegedly has] damaged . . . [the Trustees]" (Filing No. 18-50, Award 13 ¶¶ 65, 74 at 19, 21). The arbitrator stated: "On or before August 1, 2016, [Scott] shall provide to [the Trustees] a reasonably detailed written accounting of all distributions received directly or indirectly by . . . the MSCM Trust . . . from or through SVP Restaurant . . . since November 2000 arising out of or related to the management of Sky Financial" (Filing No. 18-50, Award 13 at ¶ 75 at 22).

Scott Seldin filed a motion on November 17, 2015, asking the arbitrator to clarify whether the arbitrator believed he had no jurisdiction to require an accounting under Nebraska trust law or whether the trustees were somehow exempt from such an accounting. The arbitrator replied on November 29, 2015. He denied the motion, giving no explanation for his decision.

Three previous lawsuits were filed in this case. First, on April 17, 2012, the Arizona Seldins filed an action in Douglas County Nebraska District Court. It was dismissed on August 8, 2012. The Arizona Seldins filed a second lawsuit in Douglas County Nebraska

District Court. Following a motion to dismiss by the Omaha Seldins, the court dismissed this case likewise. The Arizona Seldins then filed a demand for arbitration. On December 27, 2012, the Arizona Seldins filed a third lawsuit in Douglas County Nebraska District Court. On April 1, 2013, the court again dismissed the lawsuit. The Arizona Seldins filed 4 appeals. On February 14, 2014, the Arizona Seldins sued Mr. Tucker and Venable, LLP, (the previous arbitrators) alleging negligence, breach of contract, tortious interference. The Douglas County Nebraska District Court granted summary judgment against the plaintiffs on all claims. The Omaha Seldins then filed a suggestion of mootness and motion for summary dismissal with the Nebraska Supreme Court. The Nebraska Supreme Court granted the motion and dismissed the appeals on August 13, 2013.

Thereafter, the American Arbitration Association appointed Eugene R. Commander as the new arbitrator and the arbitration proceedings recommenced in October 2013. Multiple claims were bifurcated and hearings held and some decisions entered by the arbitrator. Some of the claims were still under advisement as of October 3, 2016. The ancillary damages alleged by the Arizona Seldins exceeded $30 million.

DISCUSSION

"Collateral estoppel applies when an issue of ultimate fact has been determined by a final judgment, and that issue cannot again be litigated between the

same parties in a future lawsuit. *Pipe & Piling Supplies v. Betterman & Katelman*, 596 N.W.2d 24, 28 (Neb. Ct. App. 1999). "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party [(or his or her privy)] to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979) (citations omitted). "The doctrine of res judicata . . . provides that a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action." *Petska v. Olson Gravel, Inc.*, 500 N.W.2d 828, 833 (1993) (citing Kerndt v. Ronan, 458 N.W.2d 466 (Neb. 1990)).

For the reasons set forth herein, the Court finds that the plaintiff is collaterally estopped from reasserting these claims in this Court and that res judicata applies as well. The Court finds that the parties entered into a valid and enforceable arbitration agreement as concluded by the Douglas County District Court. Two judges of the Douglas County District Court have entered four judgments finding Scott Seldin cannot avoid his obligation to arbitrate as required by the Separation Agreement. Filing No. 18-7, Ex. 6; Filing No. 18-9, Ex. 8; Filing No. 18-12, Ex. 11; Filing No. 18-20, Ex. 19. Those findings encompass the accounting claim Scott Seldin seeks to pursue here. The state court ordered Scott Seldin to arbitrate his claims. He is required to arbitrate these claims in the first instance. In the alternative, however, the Court

will address Scott Seldin's claim that these doctrines do not apply.

If, in the alternative, neither collateral estoppel nor res judicata apply, Scott Seldin urges this Court to find that the arbitrator has no authority to order trustees of the MSCM to account for the holdings. However, the Court disagrees.[5] It is up to the arbitrator to determine what is in his jurisdiction and subject to arbitration. *See e.g.*, *Valspar Corp. v. National Union Fire Ins. Co. of Pittsburgh*, 104 F. Supp.3d 977, (D. Minn. 2015) (finding that an arbitration clause reserved to arbitrators exclusive jurisdiction over questions as to arbitrability, and that "even if some doubt exists whether this matter should be arbitrated or litigated, that question has been 'clearly and unmistakably delegated to the arbitrators' to decide in the first instance."). Second, the Nebraska State District Courts likewise found that it was up to the arbitrator to decide the issue of arbitrability.

Third, this Court independently concludes that the arbitrator has a right to make this determination

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[5] The Court also believes it is barred by the *Rooker-Feldman* doctrine, which prevents losing state court litigants from attempting to indirectly attack state court findings in federal district courts. *See Friends of Lake View Sch. Dist. No. 25 v. Beebe*, 578 F.3d 753, 758 (8th Cir. 2009) (quoting 18B Charles A. Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure* § 4469.1 at 97, 101 (2d ed. 2002)) (" 'only the United States Supreme Court has been given jurisdiction to review a state-court decision,' so federal district courts generally lack subject-matter jurisdiction over 'attempted appeals from a state-court judgment.' ").

first. The Separation Agreement incorporates AAA Commercial Rules, including Rule 7, which allows the arbitrator to determine his own jurisdiction.[6] "'Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter.'" *Fallo v. High-Tech Inst.*, 559 F.3d 874, 877 (8th Cir. 2009) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). Further, these issues have been involved in arbitration for over 5 years, and it appears that some of these exact claims have already been asserted before the arbitrator. *See* Filing No. 18-1 at ¶ 48, Ex. 42 ¶ 74 p. 52, ¶ 113 p. 59, ¶ 178 p. 88, ¶ 265 p. 94, ¶ 335 p. 118; Filing No. 29-1 at ¶ 2, Exs. 54-62. It appears that many of the assets initially held in the MSCM are now part of the Separation Agreement assets. The parties are in the midst of addressing many of these issues in arbitration. Accordingly, for these reasons, the Court finds the arbitrator is entitled to determine arbitrability in the first instance.

The final question is whether the Court should stay these proceedings or dismiss the case during arbitration. It is true that Section 3 of the FAA specifically instructs the Court to stay the proceeding, but the

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[6] Rule 7(a) of the AAA Rules provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Affidavit of Colin J. Bernard, Oct. 3, 2016, Filing No. 18-55, ¶ 3, Ex. 1 R-7(a).

Eighth Circuit has set forth a rule "which indicates district courts may, in their discretion, dismiss an action rather than stay it where it is clear the entire controversy between the parties will be resolved by arbitration." *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769-70 (8th Cir. 2011); *see also Unison Co. v. Juhl Energy Dev., Inc.*, 789 F.3d 816, 821 (8th Cir. 2015) (stating that a district court on remand may decide to dismiss or stay an action in federal court, pending the outcome of an arbitration). Section 9.14.1 of the Separation Agreement states:

> The Arizona Seldins, on the one hand, and the Omaha Seldins and the Management Company, on the other hand, will in good faith attempt to resolve promptly and amicably ***any dispute*** between them arising out of or relating to this Agreement (including claims for breach of a representation, warranty, or covenant of this Agreement), relating to or based upon an Ancillary Claim or otherwise arising from or relating to the Parties' joint ownership of the Properties or Entities (a "Dispute"). (emphasis added)

Filing Nos. 18-1 and 2, Affidavit of Robert L. Lepp, ¶ 2, Ex. 1 p. 36 § 9.14.1. This is broad and encompassing language. *See Fleet Tire Serv. v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997). This language coupled with the subject matter in dispute and the issues already presented to the arbitrator leads the Court to the conclusion that this case should be dismissed at this time.

THEREFORE, IT IS ORDERED THAT:

1. Plaintiff's motion to file a sur-reply brief, Filing No. 31, is denied.

2. Plaintiff's motion for an accounting, Filing No. 2, is denied.

3. Defendant's motion to dismiss, Filing No. 17, is granted. This case is referred to the arbitrator for further review. The case is otherwise dismissed.

4. A separate judgment will be entered in accordance with this memorandum and order.

Dated this 6th day of December, 2016

BY THE COURT:

s/ Joseph F. Bataillon
Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3679

Scott A. Seldin

Appellant

Derry Seldin and Traci Seldin Moser

v.

Theodore M. Seldin, et al.

Appellees

Appeal from U.S. District Court for the
District of Nebraska - Omaha
(8:16-cv-00372-JFB)

ORDER

The petition for rehearing by the panel is denied.

October 28, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans