

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MERRILL LYNCH, PIERCE, FENNER & SMITH,  
INC. and TOM PURSEL,

UNPUBLISHED  
July 16, 1996

Plaintiffs-Appellees,

v

No. 178188  
LC No. 94-000912

TED J. WINIARZ and ELWIRA GOLYGOWSKA  
WINIARZ,

Defendants-Appellants.

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Before: Murphy, P.J., and Griffin and E.R. Post,\* JJ.

PER CURIAM.

Defendants appeal as of right a trial court order granting plaintiffs' motion to permanently stay arbitration proceedings and denying defendants' motion for summary disposition. We affirm.

Defendants opened a Cash Management Account at plaintiff Merrill Lynch's Detroit office in February 1984. Plaintiff Tom Pursel was the Merrill Lynch financial consultant who serviced defendants' account. When they opened the account, defendants signed a Customer Agreement, which contained the following provisions:

**11. Agreement to Arbitrate Controversies**

It is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., as the undersigned may elect. . . .

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\* Circuit judge, sitting on the Court of Appeals by assignment.

## 12. The Laws of the State of New York Govern

This agreement and its enforcement shall be governed by the laws of the State of New York . . . .

Defendants subsequently purchased interests in two limited partnerships. These transactions occurred on February 13, 1985, when defendants purchased ten units of MRI Business Properties Fund II limited partnership, and on April 19, 1985, when defendants purchased eight units of MLH Income Realty Partners V limited partnership. On December 21, 1993, defendants sent a letter to the National Association of Securities Dealers, Inc. (NASD) commencing arbitration proceedings against plaintiffs regarding the limited partnership units defendants purchased in 1985. According to the letter, defendants' claims against plaintiffs were based on fraud and deceit, negligence, breach of fiduciary duty, breach of contract, and, as to plaintiff Merrill Lynch, negligent supervision and negligent or fraudulent marketing.

On February 18, 1994, plaintiffs filed a complaint and application for stay of arbitration, arguing that the dispute was ineligible for arbitration under § 15 of the NASD Code of Arbitration Procedure (NASD Code) and that defendants' claims were barred by the relevant statutes of limitations. Plaintiffs thereafter moved to permanently stay arbitration, and defendants moved for summary disposition. The trial court heard both motions and issued a written opinion and order denying defendants' motion for summary disposition and granting plaintiffs' motion for a permanent stay of arbitration. In granting plaintiffs' motion, the trial court ruled that defendants' claims were ineligible for arbitration under § 15 because defendants' last investment occurred more than six years before they sought arbitration. Defendants appeal as of right.

Defendants first argue that the trial court did not have jurisdiction to stay the arbitration proceedings because arbitrators, not courts, must decide questions involving the applicability of § 15 of the NASD Code. We disagree. As noted above, defendants signed a Customer Agreement that contained an arbitration provision and a New York choice of law provision. Therefore, New York law governs the issue whether the trial court or arbitrator decides if a claim is eligible for arbitration under § 15. Under New York law, § 15 is an eligibility requirement rather than a statute of limitations, and its applicability must therefore be determined by the court. *Merrill Lynch, Pierce, Fenner & Smith Inc v DeChaine*, 194 AD2d 472; 600 NYS2d 459, 460 (1993). Accordingly, the trial court had jurisdiction to determine the applicability of § 15.

Defendants also argue that the trial court lacked jurisdiction to stay arbitration based on the applicable statutes of limitations because certain sections of New York's arbitration law, which

authorize a trial court to find that arbitration is barred if the claim would have been barred by limitation of time if the claim had been asserted in a state court, are preempted by the Federal Arbitration Act. The trial court did not stay arbitration based on statute of limitations grounds. However, we note that in *Merrill Lynch, Pierce, Fenner & Smith, Inc v Luckie*, 85 NY2d 193; 623 NYS2d 800; 647 NE2d 1308 (1995), the Court of Appeals of New York rejected the argument that the FAA preempts the portions of New York's arbitration law which defendants contend are preempted.

Defendants also argue that the trial court erred in granting plaintiff's motion to permanently stay arbitration proceedings. We disagree. Section 15 of the NASD Code provides, in part, that "[n]o dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy." The trial court determined that defendants' claims were not arbitrable under § 15 because defendants' last investment occurred more than six years before they sought arbitration. The event which triggers the six-year eligibility period is the purchase or sale of the relevant security. *Merrill Lynch v Ohnuma*, 161 Misc 2d 423; 613 NYS2d 811, 814 (1994). Defendants purchased interests in limited partnerships in February and April of 1985 and defendants did not commence arbitration proceedings until December 21, 1993. Thus, defendants' arbitration claim was not timely filed under § 15.

According to defendants, plaintiffs fraudulently concealed the declining values in the limited partnerships by sending defendants monthly statements which stated the original purchase price as the market value of the limited partnerships. Defendants contend that plaintiffs' alleged fraudulent concealment tolled the six-year period. Under New York law, because the eligibility requirement in § 15 is a substantive or jurisdictional limitation on arbitrability, and not a statute of limitations, it cannot be tolled by allegations that plaintiffs fraudulently concealed the declining value of defendants' investments. *Id.*, 816. Accordingly, defendants' fraudulent concealment claim does not toll the eligibility requirement in § 15, and because defendants did not seek arbitration within the six-year period, defendants are ineligible for arbitration under § 15.

Affirmed.

/s/ William B. Murphy  
/s/ Richard Allen Griffin  
/s/ Edward R. Post