

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PATRICK HOWELL, et al,

Plaintiffs,

v.

Case No: 2014-142113-CZ

Hon. Wendy Potts

THE ATHENA FINANCIAL GROUP,

Defendant.

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OPINION AND ORDER RE: DEFENDANT'S MOTION FOR SUMMARY  
DISPOSITION

At a session of Court  
Held in Pontiac, Michigan

On  
OCT 16 2014

From June 2009 through April 2014, Plaintiff Patrick Howell was an independent financial advisor for Royal Alliance Associates, Inc. Howell is the sole member of Plaintiff Birmingham Investments, LLC, which he used to conduct his financial services business. Howell claims that when he began representing Royal Alliance, the company assured him that it had no interest in his client base. Howell further claimed that Royal Alliance agreed that it would not solicit his clients to remain with Royal Alliance if Howell terminated his representation and would not reassign his accounts until ninety days after his termination. Howell resigned his representation of Royal Alliance effective April 11, 2014. Howell claims that on April 14, Royal Alliance wrote Howell's clients advising them that their accounts were reassigned to Diane Young, another independent advisor. Young is the sole owner of Defendant The Athena Financial Group, Inc.

On May 30, 2014, Howell filed an arbitration claim through FINRA Dispute Resolution, Inc. against Royal Alliance, Ms. Young, and Rita Robbins, another independent advisor for Royal Alliance. In the arbitration proceeding, Howell is alleging claims for tortious interference with a business relationship, misappropriation of trade secrets, unfair competition, fraud and misrepresentation, breach of the covenant of good faith and fair dealing, and negligence. On July 30, 2014, Howell and Birmingham Investments filed this action against Athena alleging claims for tortious interference and unfair competition.

Athena now moves for summary disposition under MCR 2.116(C)(6), which allows dismissal where “[a]nother action has been initiated between the same parties involving the same claim.” The rule is intended to “stop parties from endlessly litigating matters involving the same questions and claims as those presented in pending litigation.” *Fast Air Inc v Knight*, 235 Mich App 541, 546; 599 NW2d 489 (1999).

As an initial matter, Plaintiffs attempted to orally raise an issue about the propriety of Athena filing a motion for summary disposition as its first response to the complaint. Citing MCR 2.110, Plaintiffs assert that a dispositive motion does not qualify as a pleading and Athena is in default for failing to timely answer the complaint. Although Plaintiffs may be correct that there is no rule expressly authorizing a defendant to file a motion as a first response to a complaint, our courts have allowed defendants to move for dismissal of a complaint in lieu of an answer for several decades. See e.g., *Hosner v Brown*, 40 Mich App 515, 532; 199 NW2d 295 (1972). Further, the court rules setting the time for answering a pleading anticipate that a motion under MCR 2.116 can be raised before filing a responsive pleading and suspends the time for answering until 21 days after the motion is denied. MCR 2.108(C)(1). In addition, entry of a default is proper only if Defendant “failed to plead or otherwise defend.” MCR 2.603(A)(1).

Because a dispositive motion is an effort to “otherwise defend” against a complaint, there is no merit to Plaintiffs’ claim that Athena is in default.

Turning to the merits of Athena’s motion, it asserts that dismissal is proper under (C)(6) because Howell’s FINRA arbitration is “another action” between the same parties. However, neither Birmingham Investments nor Athena is a party to the arbitration. Although Athena is correct that “complete identity of the parties is not necessary” for a motion under (C)(6), *J D Candler Roofing Co v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986), the rule anticipates that the claims in this case could be brought in the prior action. For example, the rule does not apply where the prior action is no longer pending. *Fast Air, supra* at 545. Plaintiffs assert, and Athena does not dispute, that the claims in this case could not have been brought in the FINRA arbitration.

Moreover, Athena presents no authority for the notion that a pending arbitration constitutes “another action” under (C)(6). Athena cites no case in which our courts have dismissed an action under (C)(6) because similar parties were arbitrating similar claims. Although the court rule does not define the term “action,” the commonly understood meaning of the term is a “civil or criminal judicial proceeding.” Black’s Law Dictionary (9<sup>th</sup> ed, 2009), p. 32. Because arbitration is not a judicial proceeding, it is not an action under (C)(6), and Defendant’s motion to dismiss is not warranted on this ground.

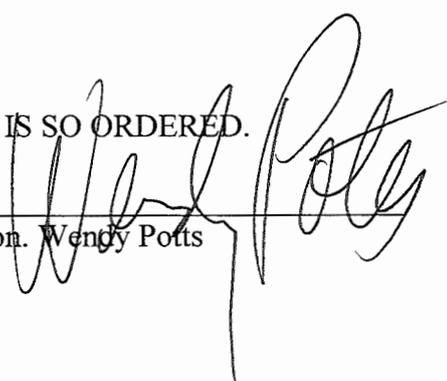
Athena also appears to be asserting that Howell should be compelled to arbitrate these claims. As noted above, Plaintiffs’ claims against Athena could not be brought in the FINRA arbitration proceeding. Further, there is no evidence that Birmingham Investments or Howell agreed to arbitrate their claims against Athena. Arbitration is a matter of contract and Plaintiffs cannot be compelled to arbitrate a dispute that they did not agree to arbitrate. *Arrow Overall*

*Supply Co v Peloquin Enterprises*, 414 Mich 95, 98; 323 NW2d 1 (1982). Because there is no arbitration agreement between these parties, Athena's apparent request for the Court to dismiss these claims in favor of arbitration is denied.

Although Plaintiffs claims cannot be dismissed based on the pending arbitration proceeding, the Court agrees with Athena that it is problematic to allow this case to proceed while nearly identical claims are arbitrated against Athena's principal Ms. Young. Therefore, the Court stays this action while the arbitration proceeding is pending. The Court sets the matter for a status conference on March 17, 2015 at 10:00 a.m. to discuss the progress of the arbitration and whether the stay should be continued.

Dated: **OCT 16 2014,**

IT IS SO ORDERED.

  
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Hon. Wendy Potts