

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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PRESENT: BERNARD J. FRIED
Justice

PART 60

Merrill Lynch International Finance Inc.,

INDEX NO. 601176/2009

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

Todd Gutkin,

MOTION CAL. NO. _____

Defendant.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

This action arises out of Defendant Todd Gutkin's alleged failure to pay the amount owed on a promissory note executed in connection with Defendant's employment as a financial advisor with Merrill Lynch, Pierce, Fenner & Smith Incorporated (MLPFS). In connection with its merger with Bank of America, MLPFS created a bonus retention program, subject to which MLPFS made loans available to certain employees on favorable terms, with the intention that the loans would provide an incentive for those employees to stay with the company after the merger was completed. When Gutkin resigned following MLPFS's merger with Bank of America, this suit was initiated to recover the unpaid amount on such a loan that was made to Gutkin.

The facts surrounding Gutkin's execution of the promissory note pursuant to which he received the loan are in dispute. After reading the papers submitted and hearing argument, it is not clear to me what Gutkin may have signed or when and

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under what circumstances he may have signed it. Nonetheless, there is no dispute that the loan made to Gutkin was somehow assigned or otherwise transferred to Merrill Lynch International Financial, Inc. (MLIFI), a sister entity of MLPFS. (MLIFI and MLPFS are subsidiaries of the same parent company.) On July 1, 2009, MLIFI filed a motion for summary judgment in lieu of a complaint, seeking, *inter alia*, judgment in its favor equal to the unpaid balance on the note. That motion, Motion Sequence 001, is held in abeyance pending the outcome of this motion.

Rather than opposing that motion, Gutkin moved to compel arbitration of the dispute between himself and MLIFI (the instant motion, Motion Sequence 002), arguing that the dispute arises out of his employment with MLPFS, which is bound to arbitrate any employment-related disputes under rules of the Financial Industry Regulatory Authority, Inc. (FINRA). MLIFI responds that it is the lender of the loan at issue and that it is not subject to mandatory arbitration under FINRA rules because it is not a member of FINRA.

As discussed above, there is a factual question as to whether (1) Gutkin signed a contract with MLPFS, to which MLIFI was later substituted as the lending party without Gutkin's knowledge, or (2) the contract with which Gutkin was presented listed MLIFI as the lending party and Gutkin did not realize this at the time. For purposes of this motion, however, this question need not be answered. In either case, I hold that MLIFI is compelled to arbitrate its dispute with Gutkin.

If Gutkin was not informed that MLIFI would be substituted for MLPFS as the lending party until after Gutkin signed the promissory note on the loan, then the agreement to which Gutkin believed he would continue to be a party should be enforced. This requires that a dispute concerning a note in connection with a

retention incentive loan from a FINRA-member employer be subject to arbitration.

If, however, before signing the promissory note, Gutkin was provided with a document (which could be the note itself) indicating that MLIFI, not MLPFS, was the party making the loan and Gutkin did not read the document or somehow overlooked the information, it is hornbook law that Gutkin, a sophisticated party, would ordinarily be bound by the terms of the document he signed, regardless of whether he knew what he was signing. *Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300 (2001) (A party who signs a document is conclusively bound by its terms, absent a valid excuse for having failed to read it.); *Metzger v. Aetna Ins. Co.*, 227 NY 411 (1920) (same).

Here, however, application of that rule would permit MLPFS to avoid compulsory FINRA arbitration by substituting another party, MLIFI, in its place as the lender on the note. This would be tantamount to forcing Gutkin to waive his right to arbitrate what is clearly an employment-related dispute, because he was not involved in the decision to make the substitution. Put another way, the substitution of the lending party is only permissible insofar as Gutkin has the same rights with respect to the substituted lender as he had with respect to the original lender. Indeed, it has been held that, to permit MLPFS to avoid compulsory FINRA arbitration by simply inserting a non-FINRA member in its place would be a clear violation of public policy and I refuse to do so here. *Accord Thomas James Assocs., Inc. v. Jameson*, 10 F.3d 60, 66-67 (2d Cir. 1996). Consequently, I impose MLPFS's obligations under the note on MLIFI and among these is the obligation to arbitrate this dispute with Gutkin.

Thus, it is not necessary for me to determine whether Gutkin knew that

MLIFI would be substituted as the lender on the note in place of MLPFS and I decline to do so here. In either circumstance, MLPFS cannot escape its obligation to arbitrate under FINRA by substituting MLIFI in its place. Accordingly, it is

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ORDERED that Defendant's motion is GRANTED, and it is further

ORDERED that the parties shall proceed to arbitration in accordance with the terms of the agreement between them, and it is further

ORDERED that this action is stayed pending the outcome of arbitration.

Dated: 12/17/09



HON. BERNARD J. FRIED
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE