

=====
This opinion is uncorrected and subject to revision before
publication in the New York Reports.

1 No. 2
Financial Industry Regulatory
Authority, Inc., Formerly Known
as National Association of
Securities Dealers, Inc.,
 Respondent,
 v.
John J. Fiero et al.,
 Appellants.

Brian D. Graifman, for appellants.
Terri L. Reicher, for respondent.

READ, J.:

In the early 1990s, John J. Fiero registered with the National Association of Securities Dealers (NASD) (now called the "Financial Industry Regulatory Authority," or "FINRA"), a self-regulatory organization (SRO), as a securities representative. Relatedly, Fiero Brothers -- a broker-dealer firm owned by Fiero,

the company's president and sole employee -- became a member of NASD.* SROs are quasi-governmental entities with a duty under the Securities Exchange Act of 1934, as amended, "to promulgate and enforce rules governing the conduct of [their] members" (Barbara v New York Stock Exchange, Inc., 99 F3d 49, 51 [2d Cir 1996]; see 15 USC § 78c[a][26]; § 78f[b]; § 78s[g]). The SEC must approve or reject any rule, practice, policy or interpretation proposed by an SRO (see 15 USC § 78s[b]; Barbara, 99 F3d at 51 [describing role of SROs in enforcing federal securities laws]).

When Fiero applied for securities industry registration with NASD, he signed Form U-4 in which he "agree[d] to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by [NASD], subject to rights of appeal or review as provided by law." Similarly, Fiero Brothers subjected itself to NASD's rules and discipline when it filed Form BD to apply for broker-dealer registration.

*On July 26, 2007, the Securities and Exchange Commission (the Commission or SEC) gave the final regulatory approval needed for consolidation of NASD and NYSE Regulation, Inc., a wholly-owned subsidiary of New York Stock Exchange LLC, to form FINRA. Essentially, the member firm regulation and enforcement functions and employees from NYSE Regulation transferred to NASD, which then adopted FINRA as its new corporate name. As a result of the consolidation, FINRA is the sole SRO providing member firm regulation for securities firms that do business with the public in the United States (see 72 Fed Reg 42169, 42170 [Aug. 1, 2007]).

On February 6, 1998, NASD's Department of Enforcement filed a disciplinary complaint alleging that Fiero and Fiero Brothers (collectively, the Fieros) had carried out a so-called "bear raid" to drive down the price of securities underwritten by another NASD member, causing that firm and its clearing firm to collapse while generating significant profits for the Fieros. In October 1999, an NASD hearing panel held a disciplinary hearing on the complaint; on December 6, 2000, the panel issued a decision finding that the Fieros had violated section 10(b) of the Exchange Act (15 USC § 78j[b]), SEC Rule 10b-5 and NASD Rules 2120 and 2110. The panel ordered Fiero Brothers expelled from NASD membership; barred Fiero from associating with any member firm in any capacity; fined the Fieros, jointly and severally, \$1 million; and imposed hearing costs totaling \$10,809.25. The Fieros appealed to NASD's National Adjudicatory Council, which affirmed the panel's findings and upheld its sanctions in a decision dated October 28, 2002.

The Fieros did not exercise their statutory rights to appeal the NASD's final disciplinary disposition to the SEC and, if aggrieved by the Commission's final order, the United States Court of Appeals (see 15 USC § 78s[d], § 78y[a]). The SEC may bring an action in federal district court to enforce its order affirming sanctions imposed by NASD for violation of the Exchange Act and its implementing rules (see 15 USC § 78u[e][1]; see also SEC v Vittor, 323 F3d 930 [11th Cir 2003]).

On December 22, 2003, NASD commenced an action in Supreme Court, alleging that the Fieros had refused to pay the fine and costs, "although due and duly demanded," and seeking judgment against them in the amount of \$1,010,809.25, plus interest, costs and disbursements. The Fieros subsequently moved to dismiss the complaint, principally claiming that NASD lacked authority to recover the fine because it "was not affirmed by the SEC, confirmed by a court, or otherwise converted into a judgment"; for its part, NASD moved to dismiss numerous counterclaims asserted by the Fieros.

On September 12, 2005, Supreme Court granted NASD's motion and denied the Fieros' motion, concluding that "NASD's claim [was] firmly based on ordinary principles of contract law" since the Fieros "expressly agreed to comply with all NASD rules, including the imposition of fines and sanctions" when they executed NASD registration forms. The court further observed that "New York State courts have long recognized the right of a private membership organization to impose fines on its members, when authorized to do so by statute, charter or by-laws", and that "NASD is not 'just a private club,' but a self-regulatory organization, federally-mandated under . . . the Exchange Act to discipline its members and enforce the federal securities laws as well as its own SEC-approved rules." Supreme Court concluded that "[t]he NASD rules relied upon by [NASD] appear[ed] to authorize imposition and collection of [the] fines" at issue.

The Fieros soon thereafter moved for summary judgment dismissing the complaint as time-barred under CPLR 215(5) and CPLR 7510, which prescribe one-year limitations periods for an action upon an arbitration award and a proceeding to confirm an arbitration award respectively. On December 14, 2005, Supreme Court denied this motion, rejecting the notion that the disciplinary proceeding was an arbitration.

Next, NASD moved for summary judgment, and on May 11, 2006, Supreme Court granted the motion, awarding NASD over \$1.3 million in fines and costs plus interest from December 2, 2002. Supreme Court observed that "NASD [had] met its burden of establishing a *prima facie* basis for entitlement to summary judgment" by submitting documentary evidence demonstrating undisputed facts in what "really amount[ed] to a collection action to recover fines and costs levied by NASD against [the Fieros] in a . . . disciplinary proceeding." The court also concluded that the Fieros' affirmative defense of selective enforcement was not "legally or factually sufficient to justify denial of summary judgment."

The Fieros appealed Supreme Court's order and judgment granting NASD summary judgment. On October 26, 2006, the First Department unanimously affirmed in an opinion endorsing Supreme Court's reasoning. We subsequently granted the Fieros' motion for leave to appeal, and now reverse on the ground that state courts do not have subject matter jurisdiction over this lawsuit.

Although the issue of subject matter jurisdiction was not raised in the lower courts, "a court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action, and the court may, ex mero motu [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action" (Matter of Fry v Village of Tarrytown, 89 NY2d 714, 718 [1997] [quotation marks and citation omitted]).

Section 27 of the Exchange Act provides that "[t]he district courts of the United States . . . shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder" (15 USC § 78aa [emphasis added]). In this case, NASD is not seeking to adjudicate a state law claim. Instead, NASD brought this action to enforce a penalty imposed on the Fieros as a result of disciplinary proceedings provided for by the Exchange Act for violations of the Exchange Act and its implementing rules. Section 27 vests federal district courts with exclusive jurisdiction to entertain such a suit. Thus, state courts do not possess the power to hear and decide this controversy (see American Distilling Co. v Brown, 295 NY 36 [1945]). Because of our disposition of this appeal, we do not reach and express no opinion on any of the other issues raised by the parties and

decided by the courts below.

Accordingly, the Appellate Division's order should be reversed, with costs, and the complaint dismissed.

* * * * *

Order reversed, with costs, and complaint dismissed. Opinion by Judge Read. Chief Judge Kaye and Judges Ciparick, Graffeo, Smith, Pigott and Jones concur.

Decided February 7, 2008