

**National Association of Securities Dealers, Inc. v
Fiero**

2005 NY Slip Op 30161(U)

September 12, 2005

Supreme Court, New York County

Docket Number: 0102755/2004

Judge: Carol R. Edmead

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

PRESENT:

~~Carol Edmead~~
CAROL EDMEAD

J.S.C. Justice

PART 8

0102755/2004

INDEX NO.

0102755/04

NASD, INC.

MOTION DATE

5/19/05

VS

MOTION SEQ. NO.

004

FIERO, JOHN J.

MOTION CAL. NO.

SEQ # 4

DISMISS ACTION

this motion to/for

PAPERS NUMBERED

FILED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits

Replying Affidavits

SEP 14 2005

NEW YORK COUNTY CLERKS OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

The motion is decided in accordance with the accompanying memorandum decision. It is hereby

ORDERED that the motion of defendants John J. Fiero and Fiero Brothers, Inc., to dismiss the complaint of plaintiff National Association of Securities Dealers, Inc., is denied. It is further

ORDERED that counsel for defendants shall serve a copy of the memorandum decision and order with notice of entry within twenty days of entry on counsel for plaintiff. It is further

ORDERED that defendants shall serve their Answer on or before November 1, 2005.

Dated: 9/12/05

[Signature]
CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY I.A.S. PART 35

-----X

NATIONAL ASSOCIATION OF SECURITIES
DEALERS, INC.,

Plaintiff,

DECISION/ORDER

-against-

Index No. 102755/04

Mot. Seq. No. 004

JOHN J. FIERO and FIERO BROTHERS, INC.

Defendants.

FILED

SEP 14 2005

NEW YORK
COUNTY CLERK'S OFFICE

CAROL R. EDMEAD, J.:

MEMORANDUM DECISION

Following disciplinary proceedings which resulted in defendants John Fiero and Fiero Brothers, Inc. (the "Fiero defendants") being permanently barred from the securities industry, the National Association of Securities Dealers, Inc. ("NASD") seeks to collect the \$1 million fine and costs imposed by the NASD panel. The Fiero defendants move to dismiss the complaint, arguing that the NASD's enforcement action is an unprecedented effort to convert a "private administrative fine into a judgment" without basis in "any theory of law or substantive or procedural statutory provision" (Graifman aff., para. 2). As discussed below, despite defendants' rhetoric, the NASD's claim is firmly based on ordinary principles of contract law, since defendants voluntarily submitted themselves to the disciplinary authority of the NASD when they became members and executed SEC-approved registration forms in which they expressly agreed to comply with all NASD rules, including the imposition of fines and sanctions. The other grounds for dismissal are patently without merit. Accordingly, the motion to dismiss is denied.

Factual Background

Fiero Brothers was an NASD member firm and a broker-dealer registered with the SEC, and Fiero was a registered representative and sole employee of Fiero Brothers. Upon registering in the securities industry, defendants executed SEC-approved securities industry registration forms (Form U-4 and BD), in which they agreed to comply with all NASD rules, including the payment of fines and sanctions.

On February 6, 1998, the NASD's Department of Enforcement initiated a disciplinary complaint alleging that the Fiero defendants had engaged in a "bear raid," involving the short selling of ten securities traded by another firm, Hanover Sterling, in order to manipulate their prices, which caused the collapse of that firm and the underwriter's clearing firm while generating significant profits of over \$550,000 for Fiero Brothers in the first stage of trading.

After a disciplinary hearing was conducted in New York City, the hearing panel issued a decision dated December 6, 2000, which concluded that the Fiero defendants had engaged in short sales in violation of Rule 3370, knowingly participated in an extortion scheme, and manipulated the market for certain stocks in violation of Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110 (amended complaint, exhibit B, pp. 34, 43, 46). The panel explained that the \$1 million fine and expulsion from membership were appropriate sanctions under the NASD Sanction Guidelines, giving consideration to the factors that the conduct was egregious and intentional, took place over a lengthy period of time, and resulted in substantial gains to defendants and injury to the investing public (*id.*, pp. 46-48).

The Fiero defendants appealed to the NASD's National Adjudicatory Council ("NAC"), which issued a 48-page, single spaced decision, dated October 28, 2002, affirming the panel's

decision. The NAC concluded that the Fiero defendants' "misconduct violated the public trust and jeopardized market integrity," and that the "egregiousness" of their conduct warranted the sanction of a bar from the industry in order to protect the public from recurrence of similar misconduct (complaint, exhibit C, p. 47).

Defendants had a statutory right to appeal the NAC decision to the Securities and Exchange Commission ("SEC"), and then to the United States Court of Appeals (15 U.S.C. §§ 78s [d], 78y), but did not do so. Had the NASD decision been affirmed by the SEC, the SEC would have had authority to bring an action to collect the fine imposed.

Legal Discussion

Defendants' primary argument is that the NASD has no viable theory of recovery or recognized cause of action because the administrative fine was not affirmed by the SEC, confirmed by a court, or otherwise converted into a judgment. In opposition, the NASD contends that its authority derives from defendants' express agreement to be bound by the rules of the NASD when they became members and executed the securities industry registration forms.¹

The NASD's attempt to collect its fines is not wholly novel, as 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 (see, *Sigma Phi Soc. (Inc.) (Alpha of New York) v. Rensselaer Fraternity Managers Ass'n, Inc.*, 114 A.D.2d 711 [3d Dept. 1985], association was authorized by Not-For-Profit Corp. Law § 507(a) to "impose reasonable

¹The Fiero defendants affirmatively allege in their counterclaims that the relationship between the Fiero defendants and the NASD is contractual in nature, based on the terms of the certifications filed as a condition of membership, including their agreements to comply with NASD rules and to pay fines (see NASD Memorandum in Opposition, p. 2; Answer and Counterclaims, para. 79).

finer or other penalties upon its members for violations of its rules and regulations"; *Merchants' Ladies Garment Asso. v. Coat House of William M. Schwartz*, 152 Misc. 130 [], association may impose fines "when expressly authorized by statute, by the charter or by the by-laws"; see also *Colodney v. New York Coffee and Sugar Exchange*, 4 A.D.2d 137 [1st Dept. 1957], *aff'd*, 4 N.Y.2d 698 [1958], dismissing members' action seeking rescission of fines levied against them by self-regulatory organization).

Of course, the NASD is not "just a private club," but a self-regulatory organization, federally-mandated under the 1975 amendments to the Exchange Act to discipline its members and enforce the federal securities laws as well as its own SEC-approved rules (see *Austin Mun. Sec., Inc. v. NASD*, 757 F.2d 676, 690 [5th Cir. 1985], "[T]he procedural safeguards imposed by the Maloney Act and the SEC and NASD rules on the NASD disciplinary process are sufficient to check abuses").² When defendants became members of the NASD they "voluntarily submitted [themselves] to the discipline of what is largely a self-regulating association" (*D'Alessio v. SEC*, [2d Cir. 2004], citing *Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994); see also *Sloan*, 489 F.2d at 4, "[W]hen appellants became members of the Exchange they consented, quite knowingly and intelligently to [its] disciplinary procedures").

As a condition of membership, defendants executed and filed securities industries registration forms, in which they agreed to "submit to and comply with all requirements, rulings, orders, directives, and decisions of, and penalties, prohibitions, and limitations imposed by the jurisdictions and organizations, subject to right of appeal or review as provided by law" (Form U-

²see Stone and Perino, "Not Just a Private Club: Self-Regulatory Organizations as State Actors When Enforcing Federal Law," 1995 Colum. Bus. L. Rev. 453.

4 Certifications; see also Form BD, which states that the firm seeking registration agrees to subject itself to NASD rules, regulations and policies). The NASD relies on Article XIII of its By-Laws, which authorizes the board of governors to impose “appropriate sanctions” including fines on members and persons associated with members, and on the NASD rule authorizing imposition of a fine following a disciplinary proceeding (NASD Rule 8310[a]). The NASD rules further provide that “each party to a proceeding resulting in a sanction shall be deemed to have assented to the imposition of the sanction unless such party files a written application for appeal, review or relief . . .” (NASD Rule 8319[b]). As for costs, Rule 8310 provides that the costs of disciplinary proceedings shall be borne by the disciplined member or associated person “as the Adjudicator deems fair and appropriate under the circumstances.” These by-laws and rules, which defendants agreed to be bound by, clearly authorize imposition of fines and costs, and embody the member’s consent to imposition of such fines and costs.

Defendants further argue that the NASD’s decision to institute an action to collect a disciplinary fine from a former member and associated person represents a fundamental change in policy, not authorized by any rule. The NASD does not dispute that, traditionally, it did not seek to enforce collection of fines against a member barred from the industry, unless and until the member sought reinstatement (see Reicher aff., exhibit 2, NASD Notice to Members 90-21). However, the NASD submits a notice to members sent in 1999, which states that its policy is to “pursue the collection of any fine in sales practice cases, even if the individual is barred, if there has been widespread, significant, and identifiable harm; or the respondent has retained substantial ill-gotten gains” (Notice to Members 99-86 at p. 646). Defendants argue that the NASD has never actually pursued such policy and that the NASD is, in effect, improperly

implementing a rule change without approval of the SEC (15 U.S.C. §78s[b][1]).

The NASD rules relied on by plaintiff appear to authorize imposition and collection of fines. To the extent defendants argue that the rules are being enforced in bad faith, in a selective, discriminatory or vindictive manner, or that the NASD has previously interpreted the rules differently, their arguments are in the nature of affirmative defenses and raise issues of fact that cannot be determined in the context of this pre-answer motion to dismiss.³

Defendants' remaining arguments are patently meritless. The defendants argue that jurisdiction is lacking because the typeface in the amended summons is too small, but jurisdiction over the defendants was obtained by service of the original summons and complaint. Finally, the argument that NASD may collect only \$1,018, because a typist inadvertently used a decimal point instead of a comma in paragraph 9 of the complaint does not merit additional ink.

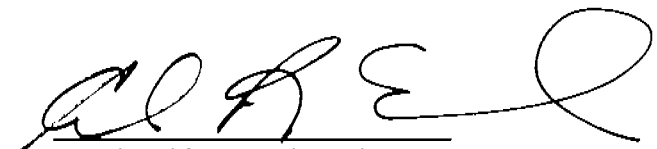
Conclusion

Accordingly, defendants' motion to dismiss is denied.

This decision constitutes the order of the court.

Dated: September 12, 2005

FILED


Carol Robinson Edmead

SEP 14 2005

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³The court gave the parties notice that it might treat the motion to dismiss as a motion for summary judgment, which would enable it to search the record and grant summary judgment to the nonmoving party. Upon review of the entire record, including arguments contained in the restated counterclaims, the court concludes that such procedural course is inappropriate. Since defendants have not yet answered, the court cannot determine whether defendants have any potential affirmative defenses which may have any legal or factual merit.