

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

2005 NY Slip Op 30162(U)

December 14, 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: **HON. CAROL EDMEAD**

PART 35

Index Number : 102755/2004

NASD

vs

FIERO, JOHN J.

Sequence Number : 006

DISMISS ACTION

INDEX NO. 102755/04

MOTION DATE 11/14/05

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 22 2005
NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the defendants' motion for summary judgment to dismiss the amended verified complaint as time barred pursuant to CPLR §§215(5) & 7510 is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the parties shall report for trial in Part 40 on January 3, 2006.

This constitutes the decision and order of the Court.

Dated: 12/14/05



J.S.C.

HON. CAROL EDMEAD

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
COUNTY OF NEW YORK : PART 35

-----X
NATIONAL ASSOCIATION OF SECURITIES
DEALERS, INC.,

Index No. 102755/04

Plaintiff,

-against-

DECISION/ORDER

JOHN J. FIERO and FIERO BROTHERS, INC.

Defendants..

FILED
DEC 22 2005
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, the plaintiff, National Association of Securities Dealers, Inc. ("NASD") seeks a monetary judgment based on a Hearing Panel's decision and determination dated December 6, 2000, and the affirming decision dated October 28, 2002 by the National Adjudicatory Council ("NAC"). The defendants, John J. Fiero ("Mr. Fiero") and Fiero Brothers, Inc. ("Fiero Brothers") (collectively, the "defendants") move for summary judgment to dismiss the amended verified complaint as time barred pursuant to CPLR §§215(5) & 7510.

Background

NASD is a private non-profit Delaware corporation and a self-regulatory organization registered with the SEC as a national securities association pursuant to the Maloney Act of 1938, 15 U.S.C. §§78(o)-3, *et seq.*, amending the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§78(a), *et seq.* It is part of a comprehensive mechanism for regulating the securities markets, acting under the supervision of the United States Securities and Exchange Commission ("SEC"). NASD investigates and commences disciplinary proceedings against NASD member firms and their associated member representatives relating to compliance with the federal

securities laws and regulations. The NASD Code of Procedure, approved by the SEC, governs NASD disciplinary proceedings against securities firms and their representatives. The decisions made by a Hearing Panel of the NASD are appealable to the NASD National Adjudicatory Council ("NAC"), which may affirm, modify or reverse the Hearing Panel's decision. NAC decisions may be appealed to the SEC, and from the SEC to the United States Court of Appeals.

As a result of a complaint filed against the defendants, NASD's Department of Enforcement brought a disciplinary proceeding against the defendants before the Office of Hearing Officers, and a Hearing Panel issued a decision on December 6, 2000 after hearings ("Hearing Panel Decision"). The Hearing Panel found that defendants manipulated the market for certain securities and engaged in an extortion scheme, and that they violated NASD's affirmative determination rule 3370(b)(2)(B). In its decision, the Hearing Panel expelled the defendants from membership in the NASD and barred Mr. Fiero from associating with any member firm in any capacity, effectively immediately, and fined both Mr. Fiero and Fiero Brothers \$1 million (jointly and severally), and ordered them to pay costs (jointly and severally). The defendants appealed this Decision to NAC, which affirmed the Hearing Panel's findings and issued identical sanctions. According to NASD, NAC's decision became final on or about November 19, 2002, the deadline for the defendants to appeal the decision to the SEC, and defendants failed to appeal.

Although NASD demanded payment by defendants, defendants failed and refused to make payment of the said fine (Complaint ¶11). Consequently, NASD commenced this action seeking judgment, plus interests, costs and disbursements.

Parties' Contentions

Defendants argue that the action is an untimely attempt to confirm an arbitration award. Defendants claim that NAC decision is an arbitration award, resulting from private binding dispute resolution and hearing "arbitration" process. According to defendants, no express definition of arbitration is given under the CPLR or the Federal Arbitration Act. Arbitration is a means of private dispute resolution by one or more persons selected as a tribunal to resolve a disputed matter submitted to them by the contending parties in lieu of a formal court proceeding for judgment. Defendants also argue that when an out-of-court dispute resolution tribunal has the characteristics of an arbitration, such tribunal may be deemed an "arbitration," even where it not denominated as "arbitration," where the parties in their agreement that the proceeding should not be deemed arbitration, or where there existed a related process that was called arbitration. Further, arbitrations that are mandated by rules of a self regulatory agency are recognized as proper, and subject to the confirmation procedure.

Defendants further contend that the NAC Decision is an arbitration award, in that the disciplinary proceeding was taken pursuant to an agreement of the parties, the parties had notice and an opportunity to be heard, hearings in which evidence was taken were conducted, decisions were rendered by adjudicators found to be fair, impartial and unbiased, the parties were represented by counsel fo their choice during all stages, and the NASD is a private organization. Defendants also point out that a decision by NAC has been referred to as an arbitration award by Justice Ira Gammerman in another similar proceeding, without objection by NASD. Therefore, since the limitations period for confirming an arbitration award in one year (CPLR § 7510), and this action was commenced more than one year from the NAC decision, the action is untimely.

In opposition, NASD argues that the underlying proceeding against defendants was not an arbitration, but a security industries disciplinary proceeding authorized by the Exchange Act, and subject to exclusive review by the SEC and the United States Court of Appeals. Therefore, argues NASD, Article 75 is inapplicable. There are no cases holding that securities industries disciplinary proceedings are "arbitration" subject to the CPLR, and the word "arbitration" does not appear anywhere in the Exchange Act of 1934, under which the NASD disciplinary proceeding was brought. NASD also contends that there exists no arbitration agreement between it and defendants and the underlying proceedings are different from arbitrations in that the NASD "disciplines" firms and brokers, and is thus not an alternative to court. Moreover, unlike arbitration, the obligation is not mutual. Under the Code of Procedure, NASD has the right to bring disciplinary proceedings against persons and entities like the defendants herein, and the defendants have no such right under the Code of Procedure. Further, unlike arbitration, defendants had no right in the underlying proceeding to "choose" the decision makers, the Hearing Panel, which is composed on a NASD Hearing Officer and two members of the applicable NASD District Committee. Moreover, the standard of review of NASD disciplinary decisions is fundamentally different from the statutory bases for review of an arbitration award under the CPLR. And, regulatory proceedings are distinct from alternative dispute resolution proceedings, in that the former arises from a Congressionally-mandated statutory scheme that has nothing to do with arbitration. With respect to the comment by Justice Gammernan in an unrelated case, Justice Gammernan did not hold that the NAC decision was an arbitration award. As defendants agreed, as a condition of their NASD membership, to pay all fines and penalties imposed by NASD in final disciplinary decisions, this action, commenced less than 14 months

after the decision at issue in this case was issued, is timely.

In reply, defendants argue, *inter alia*, that it did have a say over the composition of the Panel, indirectly by virtue of membership and association with the NASD, and by having the right to challenge a member of the Panel. Further, the differences noted by NASD constitute distinctions without a difference.

Analysis

At the outset, the Court notes that in this action, NASD does *not* seek to “confirm” the underlying determinations. Instead, NASD simply seeks to collect on a fine imposed (*i.e.*, a debt), that defendants promised, yet failed to pay (*breach*) (See Court’s previous decision, dated September 12, 2005). 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-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' insistence that the underlying hearings, and resulting determinations, constitute an "arbitration" and "award," respectively, lacks merit. An arbitration is defined as "a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard" (*Kabia v Koch*, 186 Misc 2d 363, 368, 713 NYS2d 250, 254 (Civ. Ct. N.Y.C. 2000) citing Blacks Law Dictionary 105 (6th ed 1990)). Under these strictures, the NASD disciplinary proceeding at issue, and the resulting decisions upon which NASD's instant action is based, cannot be considered an "arbitration" or an "arbitration award," given that they are subject to a specific system of administrative review under federal law (*see Datek Securities Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 875 F. Supp. 230, 233 (S.D.N.Y. 1995); *Maschler v. Nat'l Ass'n of Sec. Dealers, Inc.* 827 F. Supp. 131 (E.D.N.Y. 1993); *McLaughlin, Piven, Vogel, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 733 F. Supp. 694, 696-697 (S.D.N.Y. 1990)).

The NASD has *quasi* characteristics of a public administrative agency, performing many of the same functions and has been assigned the responsibility by the SEC for conducting investigations and commencing disciplinary proceedings against member firms in compliance with the *federal securities laws and regulations* (*see* 15 U.S.C. §78o-3(b)(7)).

This system allows the administrative agency to utilize its discretion, apply its expertise, correct its own errors and handle its business expeditiously (*Parisi v. Davison*, 405 U.S. 34 (1972)). The NASD, being registered with the SEC pursuant to the Securities Exchange Act of

1934, handles its proceedings under rules and regulations fundamentally different from those governing an ordinary arbitration. NASD disciplinary proceedings are commenced to *discipline* firms and brokers who violate the NASD rules and federal securities laws and therefore is not and “alternative” to court. In this regard, it is important to note that it is uncontested that NASD’s disciplinary proceedings are subject to exclusive review by the SEC and the United States Court of Appeals.

More importantly, defendants failed to point to any specific agreement between NASD and the defendants to arbitrate the type of underlying claims by NASD’s Department of Enforcement. The provisions in the registration forms merely state that the defendants would comply with the NASD’s SEC-approved rules and pay fines.

In addition, an arbitration, by definition, requires a “neutral third party.” However, the NAC is not a neutral third party. The NASD Hearing Panel is composed of a NASD Hearing Officer and two members of the applicable NASD District Committee. The underlying hearing was not one between a NASD broker and another entity or individual, or between brokers, but was a proceeding brought by the Department of Enforcement, a unit of NASD (*see* NAC Decision “Appearances” page 1).

Furthermore, as this Court previously stated, NASD’s complaint is based on defendants’ agreement to pay any fines or sanction issued against them, and their failure to do so gave rise to the instant breach of contract claim against them. As this action is one for breach of contract based on defendants’ failure to pay the fines/sanctions imposed against them, it was timely commenced.

Based on the foregoing, it is hereby

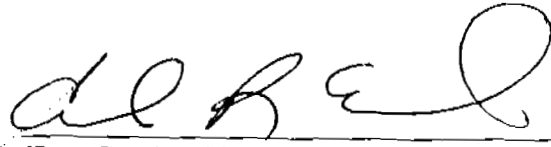
ORDERED that the defendants' motion for summary judgment to dismiss the amended verified complaint as time barred pursuant to CPLR §§215(5) & 7510 is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the parties shall report for trial in Part 40 on January 3, 2006.

This constitutes the decision and order of the Court.

Dated: December 14, 2005



Hon. Carol Robinson Edmead, J.S.C.

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