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

PRESENT: HON. NICHOLAS FIGUERON PART 46

0115444/2004

FRIEDMAN, SARAH
VS
RITTEREISER, ROBERT

INDEX NO. 115444/04

MOTION DATE 1/10/05

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

SEQ 1

VACATE OR MODIFY AWARD

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

See Decision and Order

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/19/05

_____ J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

SARAH FRIEDMAN,

Petitioner,

- against -

ROBERT RITTEREISER, LEE FENSTERSTOCK, HENRY GOTTMANN, JOANNE MARREN, ABE BORENSTEIN and SAUL FEDERMAN,

Respondents.

Index No. 115444/04

DECISION AND ORDER

Nicholas Figueroa, J.:

Petitioner moves pursuant to CPLR 7511, and the Federal Arbitration Act, 9 USC §10, to vacate an arbitration panel's decision dismissing her claim without a hearing. Petitioner asserts that the arbitration panel of the National Association of Securities Dealers (NASD) unlawfully disposed of her claim without an evidentiary hearing, while also denying her request for pre-arbitration discovery.

Petitioner's arbitration claim alleges that various officers and executives at the now defunct securities firm, Gruntal & Co., LLC, caused her to suffer significant financial losses by failing to advise her that her investments were inappropriate, churning her account, making unauthorized trades, and by failing to supervise her broker. Said broker was petitioner's son, Michael Friedman, who, although a respondent in the arbitration proceeding, was not named by petitioner as a respondent in the instant proceeding.

The respondents constitute former officers of the defunct securities firm. None of these individuals worked at the branch office where petitioner maintained her account and where her son was employed. Petitioner alleges that these persons are all liable as "control persons" (see Securities and Exchange Act of 1934, 15 USC §78(a)).

Respondents Federman and Borenstein are former branch managers at the Gruntal office where petitioner maintained her account. Petitioner alleges that in addition to being control persons, they were "designated supervisors," as the term is commonly used in the securities industry.

By way of background, petitioner and her late husband had established a successful business that they sold in 1986. The proceeds were invested with another brokerage firm. In 1999, petitioner, then in her seventies, was asked by her son to transfer her account, in excess of a million dollars, to Gruntal. She alleged that soon thereafter over twenty million dollars in stock purchases were posted to her account, followed by about $13 million dollars in March, 2000.

According to petitioner's statement of claim, respondents failed to advise her of appropriate investments and strategies and by failing to supervise her son's transactions in his capacity as her stock broker. Petitioner claims that the recommended investments were not "suitable for her." She asserts that respondents "misrepresented the great risks that her account faced, by stating that the investments they recommended were suitable for her". She also accuses respondents of engaging in unauthorized trading and churning, thereby enabling Gruntal to profit from excessive commissions and margin interest. She asserts that "Claimant should not have been placed on margin," since petitioner "lacked sophistication in securities matters" and that Gruntal "took advantage of [her] ignorance by not describing the risks inherent in the securities

recommended."

According to petitioner's statement of claim, she eventually lost 2.3 million dollars as a result of Gruntal's alleged misconduct. She alleged that there was over $750,000 in margin debt and that her entire Gruntal account consisted of speculative technology stocks inappropriate for a person her age, including such speculative, high-risk securities as Amazon.com (at $128 a share), AOL (at $99 a share) and Microsoft (at $93 a share).

Continuing, she asserted that the named Gruntal executives encouraged her son "directly or indirectly" to generate as much revenue in his accounts as possible in order to portray Gruntal as an attractive takeover target. The statement of claim alleges that petitioner's son consequently made "an abundance" of trades without authorization or permission. She further asserts that petitioner was at a disadvantage since she "lacked the skill or experience to interpret the confirmation slips and monthly statements" and that Gruntal erroneously relied on her son "for any relevant information regarding the account."

In support of this allegation, her son would testify "that the compliance award supervisory effort at Gruntal was virtually non-existent," and that respondents Federman and Borenstein knew that petitioner was of advanced age, had no substantive investment experience, and was in poor health.

Petitioner claims she would have prevailed had she been granted the required discovery, including: account analysis and reconciliations, notes regarding the accounts, correspondence, commission sums, documents relating to compensation, supervisory and research reports for the securities in question. The discovery demand also sought unspecified information about Gruntal's compliance, supervisory efforts and sales practices, both "generally, and with Michael Friedman."

Notably, neither the opposition to the motion to dismiss her arbitration claim nor the statement of claim were signed by petitioner, but by her attorney. Although alleging that her son, Michael Friedman, was cooperating with petitioner's attorney, her son did not submit an affidavit in support of petitioner's claim.

Upon filing her claim, the arbitration panel, with one dissent, granted the motion to dismiss the arbitration claim without a hearing. Petitioner contends dismissal was improper; and, that she was entitled to an evidentiary hearing. The court disagrees. Petitioner has failed to demonstrate that the award should be vacated either under CPLR §7511(b)(I) to (iv), or under the Federal Arbitration Act. Petitioner has not demonstrated that the arbitration panel was corrupt or partial, that it exceeded its powers or that it imperfectly executed the award (CPLR §7511, *supra*). Nor has she shown, as required under the Federal Arbitration Act, that the arbitrators knew of a governing legal principle but refused to apply it and that the law the panel ignored was well-defined, explicit and clearly applicable to the case (see *Di Russa v. Dean Witter Reynolds*, 121 F.3rd 818, 821).

Petitioner did not have an absolute right to an evidentiary hearing. She was given the opportunity to respond to the motion to dismiss the claim, both in her written response and in conference calls with the panel; therefore, she had a "fundamentally fair proceeding" and the NASD had the authority to dismiss her claim if it was facially deficient (*Sheldon v. Vermonty*, 269 F.3rd 1202, 1206).

In order to prevail, petitioner had the burden of proving that the respondents were control persons, under the Securities and Exchange Act of 1934, §20(a). To do that, petitioner was obligated to show a primary violation by the controlled person and control of that person. Petitioner did not meet her burden.

Although alleging that the various respondents had control over Michael Friedman, petitioner nevertheless failed to make any factual showing that they could have controlled or actually controlled his actions. Consequently, the case she relies on, *Acacia National Life Insurance v. Kay Jewelers, Inc.*, 203 AD2d 40, is inapposite. Similarly, her reliance on *G.K. Scott & Co. V. Kross*, 721 AD2d 288 is misplaced. In that case, two individuals were named as control persons. The First Department held that arbitration against these individuals would not be stayed, as there was a prima facie showing that their fraudulent acts injured an investor. In the instant case, petitioner made no threshold showing that any of the respondents caused her loss. Rather, the record shows that her investments were consistent with her self-stated objectives and that she was aware of the risks involved with her investments. Petitioner's showing does not establish control person liability, as it does not demonstrate any securities law violation by the controlled person, her son Michael, who acted as her broker (see *Securities and Exchange Commission v. First Jersey Securities*, 101 F.3rd 1450, 1462). Petitioner has not only failed to show that her son acted illegally, she has failed to show that anything he may have done was at the direction of the other respondents (*id.*).

Moreover, because the panel dismissed petitioner's claim against Michael Friedman, and petitioner has not named him as a respondent in this proceeding, she may not now assert that he acted wrongfully (see *Ryan v. New York Telephone Company*, 62 NY2d 494). Going a step further, since she cannot show wrongdoing by the controlled person, she cannot assert that the relevant respondents are liable for his alleged misconduct.

Correspondingly, there is no merit to petitioner's contention that the dismissal ought to be vacated because she was unable to obtain discovery. Petitioner has failed to show that the lack of discovery was prejudicial or resulted in a fundamental unfairness.

There is no explanation concerning how discovery would have aided petitioner, particularly in proving control person liability. Rather, it appears that the discovery request is an attempt to establish liability on the "mere hope" that the material will do so (see *National Union Fire Insurance Company of Pittsburgh, Pa. v. Marangi*, 214 AD2d 469). Petitioner, having failed to demonstrate any grounds for liability in her Statement of Claim, may not belatedly seek discovery in an attempt to cure a deficient claim.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding dismissed.

This constitutes the decision and judgment of the court.

Dated: July 19, 2005

ENTER

J.S.C.