

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

2006 NY Slip Op 30302(U)

May 11, 2006

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
HON. CAROL EDMEAD

Index Number : 102755/2004

PART 35

NASD

vs

FIERO, JOHN J.

INDEX NO.

102755-04

MOTION DATE

4/28/06

Sequence Number : 007

MOTION SEQ. NO.

607

SUMMARY JUDGMENT

MOTION CAL. NO.

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

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
It is hereby

ORDERED that the motion of plaintiff National Association of Securities Dealers, Inc. for an order pursuant to CPLR 3212 granting summary judgment in favor of NASD and against defendants John J. Fiero and Fiero Brothers, Inc., and for judgment in the amount of \$1,010,809.25 in fines and costs, plus interest from December 2, 2002, is granted. It is further

ORDERED and ADJUDGED that the plaintiff, National Association of Securities Dealers, Inc., having an address at 1735 K Street, N.W., Washington, D.C. 20006, shall have judgment and recover against defendants, John J. Fiero, having an address at 7980 North French Drive, #402, Pembroke Pines, FL 33024 and/or 6104 Southwest 55th Court, Davie, FL 33314, and Fiero Brothers, Inc., having an address at 115 Broadway, Suite 1201, New York, NY 10006 and/or 485 Route 1 South, Building G, Iselin, NJ 08830, in the amount of \$1,010,809.25, plus interest from December 2, 2002 at the statutory rate as computed by the Clerk, together with costs and disbursements in the amount of _____ as taxed by the Clerk, and plaintiff shall have execution thereof; and it is further

ORDERED that plaintiff shall serve a copy of this order with Notice of Entry upon defendants within 20 days from the date of entry of this Order.

The foregoing constitutes the decision, order, and judgment of this Court.

Dated:

5/12/06

[Signature]

HON. 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):

This Judgment has been entered and notice of entry must appear in person at the Judgment Clerk's Desk (Room 141B). LIMITED JUDGMENT PAPERS NUMBERED

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. 007

JOHN J. FIERO and FIERO BROTHERS, INC.

Defendants.

-----X

CAROL R. EDMEAD, J.:

MEMORANDUM DECISION

Plaintiff National Association of Securities Dealers, Inc. ("NASD") moves for an order pursuant to CPLR 3212 granting summary judgment in favor of NASD and against defendants John J. Fiero ("Fiero") and Fiero Brothers, Inc. ("Fiero Brothers") (collectively "defendants" or "Fiero defendants"), and for judgment in the amount of \$1,010,809.25 in fines and costs, plus interest from December 2, 2002.

The defendants oppose the motion arguing that this motion is brought pre-discovery, and due to issues of material fact, must be denied. Further, NASD does not submit the supporting proof necessary for its motion for summary judgment.

The court reiterates the facts as articulated in Motion Sequence 004.

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.

Analysis

Summary Judgment

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perl binder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff

would have been successful in the underlying negligence action)). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra; Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413

NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Although a motion for summary judgment may be denied if the facts essential to establish opposition “may exist but cannot then be stated” (CPLR 3212[f]), “[m]ere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis . . . for postponing a decision on a summary judgment motion” (*Fulton v Allstate Ins. Co.*, NYLJ Jan. 18, 2005 p 26 col 3, citing *Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33, 38 [1999], quoting *Kennerly v Campbell Chain Co.*, 133 AD2d 669 [1987]).

In the instant case, NASD has met its burden of establishing a *prima facie* basis for entitlement to summary judgment. Documentary evidence submitted conclusively establishes a basis for entitlement to summary judgment. Further, this documentary evidence and undisputed facts obviate the need for discovery.

This case really amounts to a collection action to recover fines and costs levied by NASD against the Fiero defendants in a NASD disciplinary proceeding.

The “selective enforcement” affirmative defense is insufficient to overcome the plaintiff’s entitlement to summary judgment. To the degree that this court’s order dated September 12, 2005 at page 6 stated that a question of fact was raised by the affirmative defense of selective enforcement, on review and reconsideration, this court was in error. Said defense is neither legally or factually sufficient to justify denial of summary judgment.

Conclusion

Based on the foregoing, it is hereby

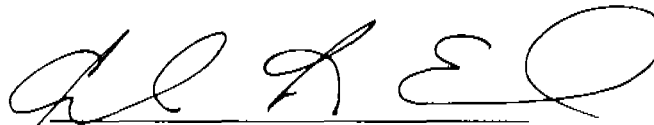
ORDERED that the motion of plaintiff National Association of Securities Dealers, Inc. for an order pursuant to CPLR 3212 granting summary judgment in favor of NASD and against defendants John J. Fiero and Fiero Brothers, Inc., and for judgment in the amount of \$1,010,809.25 in fines and costs, plus interest from December 2, 2002, is granted. It is further

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ORDERED that plaintiff shall serve a copy of this order with Notice of Entry upon defendants within 20 days from the date of entry of this Order.

The foregoing constitutes the decision, order, and judgment of this Court.

Dated: May 11, 2006


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

and notice of this Court's judgment must be served on the Clerk's Desk. The Clerk's Desk must be notified of this Court's judgment by the Clerk's Desk. The Clerk's Desk must be notified of this Court's judgment by the Clerk's Desk. The Clerk's Desk must be notified of this Court's judgment by the Clerk's Desk.