

**Matter of Banc of Am. Inv. Servs. v Strauss**

2007 NY Slip Op 33519(U)

October 17, 2007

Supreme Court, New York County

Docket Number: 0105481/2007

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART 10

Index Number : 105481/2007  
BANC OF AMERICA INVESTMENT  
vs  
STRAUSS, GARY  
Sequence Number : 001  
VACATE

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
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: Deletion  Yes  No (confirmed)

Upon the foregoing papers, It is ordered that this motion

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

**FILED**  
OCT 30 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: Oct 17 2007

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----x  
In the matter of the application of  
Banc of America Investment Services  
f/k/a Quick & Reilly, Inc.,

Petitioner,

-against-

Gary Strauss,

Respondent/  
Cross Petitioner

-----x

**DECISION/ORDER**

Index No.: 105481/07

Seq. No.: 001

Present:

Hon. Judith J. Gische, JSC

**FILED**

OCT 30 2007

**NEW YORK  
COUNTY CLERKS OFFICE**

Recitation, as required by CPLR § 2219 [a], of the papers filed in the review of this/these motion(s):

**Papers**

**Numbered**

Notice of Pet & Pet (BAIS) vacate award .....	1,2
JED affid in support, exhs .....	3
JED supp affid in support, exhs .....	4
GS answer w/Notice of Cross Pet and Pet confirm award, exhs .....	5,6
EHP affid in opp to pet, support of cross pet, exhs .....	7
Affid of service (sep back) Notice of Pet & Pet, etc .....	8
2 Binders of exhs (transcript) .....	9, 10

*Upon the foregoing papers the court's decision is as follows:*

*GISCHE, J.;*

Petitioner Banc of America Investment Services, Inc. f/k/a Quick & Reilly, Inc.

("BAIS") has brought this petition to have the award in favor of respondent Gary Straus ("Strauss" or "shareholder") vacated in its entirety. Strauss has brought a cross petition to have the award confirmed and for the court to impose sanctions under 22 NYCRR § 130-1.1 [c]. Issue has been joined as to each petition.

[\* 3 ]

### **The underlying dispute**

Strauss owned 250 shares of preferred stock in a company ("Genta") that he deposited into an account with Quick & Reilly (now BAIS). The stock was converted by Genta to common stock in 2000. In 2004, Strauss sought to convert (what he believed was still) the preferred stock to common stock so he could sell it before an upcoming shareholder's meeting. After a number of missteps, not only did Strauss discover that the stock had already been converted, by then the meeting had already taken place and the price of the stock had dropped from approximately \$16.00 per share to \$3.00 per share. Strauss submitted the dispute for arbitration before the NASD. Quick & Reilly (now BAIS) brought a third party claim against U.S. Clearing n/k/a ADP Clearing and Outsourcing Services, Inc. ("ADP"), BAIS's clearing agent, for indemnification. The arbitrators severed/ bifurcated the 3<sup>rd</sup> party action, assigning it a separate case number. The panel also deferred the issue of whether ADP was notified of the stock conversion in 2000.

BAIS contends that the award is internally inconsistent, and therefore irrational, because the panel should have agreed to first decide whether ADP was properly notified of the conversion in 2000. Therefore, it is BAIS's contention that because the panel did not first resolve that issue, it could have (and should not have) proceeded make an in favor of Strauss. The gravamen of this argument is that in the absence of actual notice, BAIS (and its agent, ADP) is not legally responsible for Strauss' monetary loss.

Strauss's cross petition is to confirm the award in its entirety. Strauss contends

[\*4]

that the award is not irrational or internally inconsistent because even without deciding whether BAIS or ADP had actual notice of the conversion, the panel could have found - - and did find - - BAIS liable to the petitioner. Strauss also seeks entry of judgment in the amount of the award, and the imposition of sanctions upon BAIS pursuant to Part 130.

### **Discussion**

CPLR § 7511 [b] sets forth the narrow grounds upon which an arbitrator's award may be vacated. An award may be vacated by the court only if the petitioner can prove: it was procured by corruption, fraud, or misconduct, the arbitrator was not impartial, the arbitrator exceeded his or her power, or executed it so imperfectly that the award is indefinite or not final. It may also be vacated if there was a complete failure to adhere to required arbitration procedures.

Although in certain extraordinary circumstances, an award may be vacated if the petitioner can prove it is "utterly arbitrary or violative of public policy," this is a difficult burden to meet, and an award will not be vacated by the court merely because the arbitrator may have committed an error of law or fact. Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 NY3d 471 (2006).

The court should not assume the role of overseer to mold an award to conform to its sense of justice. In the matter of Sprinzen v. Nomberg, 46 NY2d 623, 629;. Therefore, judicial review of an arbitration award is extremely limited and it must be upheld when the arbitrator has offered "even a barely colorable justification for the outcome reached." Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 NY3d at 479.

BAIS has not met the heavy burden in connection with its petition to vacate the award in favor of Strauss. BAIS makes no claim that the award is tainted by corruption, fraud or misconduct, or that any panelist was not neutral. Nor is there any claim that any necessary protocols in connection with the arbitration process were not adhered to, or that the panel failed to issue a final decision in the dispute between BAIS and Strauss. The sole basis for BAIS's petition is that it is dissatisfied with the result it achieved at arbitration and its conjecture that had the panel agreed to first decide whether its clearing agent had actual notice of the conversion of the stock from preferred to common, the decision/award may have been more favorable to BAIS. This is not a statutorily enumerated basis upon which to vacate the award, and there is no showing that the award is utterly arbitrary or violative of public policy. In this regard the court need not consider what legal effect notice may have had on the award. Even if BAIS's argument is valid, and the arbitrators made a mistake by not deciding that dispute first, the award is nonetheless still viable and there is no basis for the court to affect it in any way. Wien & Malkin LLP v. Helmsley-Spear, Inc., *supra*. Therefore, the petition by BAIS must be and hereby is denied.

Based upon the same reasoning, the cross petition by Strauss, for entry of a money judgment in the sum awarded, which is brought timely, must be and hereby is granted. The Clerk shall enter judgment in favor of respondent/ cross-petitioner Gary Strauss against petitioner/ cross-respondent Banc of America Investment Services, Inc. f/k/a Quick & Reilly, Inc., as awarded by the NASD panel, to wit: the sum of Two Hundred Seven Thousand Eight Hundred Forty Two and 42/100 Dollars (\$207,842.42),

[\*6]  
with interest from March 7, 2007, the date of the award.

Strauss also seeks the imposition of monetary or other sanctions under 22 NYCRR § 130-1.1. Such sanctions are available where a party or attorney engages in frivolous conduct which is by definition conduct completely without merit in law and cannot be supported by a reasonable argument, or undertaken primarily to delay or prolong the resolution of the litigation, or to harass or injure another, or the assertion of false statements. 22 NYCRR §§130-1.1 [c] 1 through 3. Though BAIS's petition was denied, it was not frivolous within the meaning of the rules. Therefore, Strauss's application for such relief is denied.

#### **Conclusion**

In accordance with the foregoing,

*It is hereby*

**ORDERED** that the petition of Banc of America Investment Services, Inc. f/k/a Quick & Reilly, Inc., vacating the award by the NASD arbitration panel in the matter of the arbitration between Gary Strauss v. Quick & Reilly, Inc., *et al* Case Number 05-01326 is hereby **DENIED**; and it is further

**ORDERED** that the cross- petition of respondent/ cross petitioner Gary Strauss confirming the award by the NASD arbitration panel in the matter of the arbitration between Gary Strauss v. Quick & Reilly, Inc., *et al* Case Number 05-01326 is hereby **GRANTED** in part; and it is further

**ORDERED** that the Clerk shall enter judgment in favor of respondent/ cross-petitioner Gary Strauss against petitioner/ cross-respondent Banc of America

[\* 7 ]  
Investment Services, Inc. f/k/a Quick & Reilly, Inc. as awarded by the NASD panel, to wit: the sum of Two Hundred Seven Thousand Eight Hundred Forty Two and 42/100 Dollars (\$207,842.42), with interest from March 7, 2007, the date of the award; and it is further


**ORDERED** that the application by respondent/ cross-petitioner for the imposition of sanctions against the respondent on its cross petition (Banc of America Investment Services, Inc. f/k/a Quick & Reilly, Inc.) is hereby denied for the reasons stated; and it is further

**ORDERED** that any relief requested that has not been addressed has nonetheless been considered and is hereby denied; and it is further

**ORDERED** that this constitutes the decision, order and judgment of the court.

Dated: New York, New York  
October 17, 2007

**So Ordered:**

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
OCT 30 2007  
NEW YORK  
COUNTY CLERK'S OFFICE