

Matter of UBS Fin. Servs., Inc. (Gibson)

2007 NY Slip Op 33726(U)

November 15, 2007

Supreme Court, New York County

Docket Number: 0103188/2007

Judge: Marcy Kahn

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

PRESENT: Hon. Marcy L. Kahn PART 50K
Justice

In the Matter of the Arbitration of Certain
Controversies Between
UBS Financial Services, Inc. and
Karen A. Kurrasch,

Petitioners,

-and-

Marshal D. Gibson and
NASD Dispute Resolution,

Respondents.

INDEX NO. 102188/07

MOTION DATE _____

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

FILED

NOV 19 2007

**COUNTY CLERK'S OFFICE
NEW YORK**

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

	<u>Papers Numbered</u>
Notice of Motion/ Order to Show Cause - Affidavits - Exhibits _____	<u>1, 2</u>
Answering Affidavits - Exhibits <u>Memorandum of Law</u>	<u>3, 4</u>
Replying Affidavits <u>Memoranda of Law</u>	<u>5, 6</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION (WRITTEN) EXPLAINING COURT'S
AUGUST 21, 2007 ORAL RULING.**

Dated: NOV 15 2007

ENTER: *Marcy L. Kahn*

HON. MARCY KAHN

J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CIVIL TERM: IAS PART 50K

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 In the Matter of the Arbitration of :
 Certain Controversies Between :
 : DECISION AND
 UBS Financial Services, Inc. and : ORDER PURSUANT
 Karen A. Kurrasch, : TO CPLR §§1012, 1013
 :
 Petitioners, :
 : Motion Seq. No. 2
 -and- :
 : Index No. 103188/07
 Marshal D. Gibson and :
 NASD Dispute Resolution, :
 Respondents. :
 -----x

FILED
 NOV 19 2007
 COUNTY CLERK'S OFFICE
 NEW YORK

MARCY L. KAHN, J.:

By notice of petition and petition filed March 23, 2007, UBS Financial Services, Inc. ("UBS") and Karen A. Kurrasch ("Kurrasch") (collectively, "petitioners") commenced this proceeding pursuant to section 7510 of the Civil Practice Law and Rules ("CPLR") and Rule 2130 ("Rule 2130") of the National Association of Securities Dealers, Inc. ("NASD")¹ to confirm an arbitration award in NASD Dispute Resolution Case Number 06-00520 ("the arbitration") rendered by an arbitrator appointed by respondent NASD Dispute Resolution, Inc. ("respondent NASD") on February 6, 2007, after a hearing involving petitioners and respondent Marshal D. Gibson. The award, inter alia, recommended that all reference to the subject matter of the arbitration

¹ On July 30, 2007, while this motion was pending, the NASD was merged with the member regulation, enforcement and arbitration operations of the New York Stock Exchange to become the Financial Industry Regulatory Authority ("FINRA"). For purposes of consistence and clarity, in this opinion the court will continue to reference the organization as "NASD."

be expunged from the records on petitioners maintained by the NASD in its Central Registration Depository ("CRD").

By notice of motion and affirmation filed April 23, 2007, the Attorney General of the State of New York (the "Attorney General") seeks leave of court to intervene in this proceeding as an intervenor-respondent for the purpose of opposing confirmation of so much of the arbitration award as recommends expungement of records from the CRD. Petitioners UBS and Kurrasch have opposed the Attorney General's motion, arguing that there are no grounds either for its intervention or for vacatur of the award. The Attorney General contends that his office has an interest in the CRD records, that the arbitrators exceeded their authority in granting expungement relief and that the arbitration process and findings were insufficient to support the expungement recommendation. Respondent Marshal D. Gibson has not appeared in this proceeding, and the NASD has not opposed the Attorney General's intervention application.²

This court heard oral argument on the intervention issue and on the motion to confirm in this case and another case raising the same issue on August 21, 2007.³ At that time, this

² The court has permitted the Securities Industry and Financial Markets Association ("SIFMA") and the North American Securities Administrators Association, Inc. ("NASAA") to appear in the confirmation proceeding as amicus curiae. Neither of the amici has taken any position on the Attorney General's motion seeking intervention.

³ The matter was joined for argument on the same issues in Elizabeth Johnson v. Summit Equities, Inc., Peter O'Neil and NASD, Inc., Index No. 104034/07 (N.Y. Co.).

court granted the motion to intervene in each case in an oral ruling, but reserved decision on the motions to confirm. This written decision further explains the court's oral ruling granting intervention in this case.

I. BACKGROUND

The CRD system is an electronic database used by NASD, the Securities and Exchange Commission ("SEC"), state securities regulators and others which contains information relating to registration and licensing decisions made by those bodies. (NASD Notice to Members 99-54 [July 1999], attached as Exh. A to the Affirm. of Christopher Massey, Esq., sworn June 13, 2007 ["Massey Affirm."]). The information contained in the system includes criminal histories, disciplinary information, customer complaints, certain arbitration awards, and other information which is submitted by registered broker/dealers and regulatory authorities, and is accessible both to regulators for their official use and to the investing public. (Id.). The effectiveness of the centralized national CRD system depends on its containing complete and accurate information. State regulators such as the Attorney General rely on the CRD in lieu of maintaining their own separate licensing and regulatory record systems.⁴

Effective in 2004, the SEC approved amendments to NASD Rule 2130, which provides for the expungement from the CRD of certain

⁴ The records are maintained exclusively by electronic means.

customer dispute information. Since that time, expungement is limited to cases in which NASD arbitrators make an affirmative finding that certain specified circumstances exist (NASD Rule 2130[b][1])⁵, where they recommend expungement in their arbitral award, and where a court of competent jurisdiction confirms the award. (NASD Rule 2130[a]).

In this case, on February 2, 2006 respondent Gibson filed a statement of claim against petitioners UBS and Kurrasch alleging breach of contract, negligence, failure to supervise, misrepresentation, omission of facts and unsuitability. Petitioners filed a joint answer on April 18, 2006. A contested arbitral evidentiary hearing was held by a single arbitrator on January

⁵ That portion of Rule 2130 states in relevant part:

(b) Members or associated persons . . . seeking judicial confirmation of an arbitration award containing expungement relief must name NASD as an additional party . . . unless this requirement is waived . . .

(1) Upon request, NASD may waive the obligation to name NASD as a party if NASD determines that the expungement relief is based on affirmative judicial or arbitral findings that:

(A) the claim, the allegation or information is factually impossible or clearly erroneous;

(B) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or

(C) the claim, allegation, or information is false.

24, 2007. On February 6, 2007, the arbitrator issued his award, dismissing Gibson's claims in their entirety. The award also recommended the expungement of all reference to the arbitration from petitioner Kurrasch's registration records maintained in the CRD. (Award, NASD Dispute Resolution Arbitration No. 06-00520 [the "award"], attached as Exh. A to the Verified Petition of UBS and Kurrasch ["petition"]). In conformity with Rule 2130, the arbitrator advised petitioner Kurrasch that she had to obtain confirmation of the award, including the expungement recommendation, by a court of competent jurisdiction before NASD would expunge the information from her record in the CRD.

On March 29, 2007, petitioners commenced the instant proceeding seeking confirmation of the award by this court. Respondent Gibson has not appeared. The Attorney General's motion to intervene followed on April 23, 2007, and was deemed fully submitted for purposes of the instant motion upon oral argument on August 21, 2007.

II. PARTIES' CONTENTIONS

The Attorney General argues that leave to intervene as of right pursuant to CPLR §1012 should be granted, because the data in the records of the CRD belong jointly to the applicant, NASD and state securities regulators, and because these records are necessary to performance of his statutory duties as New York State's regulator of securities brokers, dealers and their salespersons. He maintains that these duties would be compromised if information concerning registered brokers and

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dealers were expunged from the depository. He avers that NASD contemplates the intervention of state regulators in judicial confirmation proceedings when a registrant seeks a court order confirming an expungement award.

Petitioners respond that the Attorney General has presented no grounds for vacating the award that fall within the scope of CPLR Article 75. They observe that the arbitrator found Gibson's claims lacked merit and made an affirmative finding as provided by Rule 2130, and that the NASD determined that expungement is appropriate in this case. They argue that the Attorney General cannot prevail on the merits because Rule 2130 preempts any contrary state regulation.

Petitioners further contend that the Attorney General has no right to intervene because the SEC has determined that the State of New York does not have an ownership interest in the records of the CRD. They further maintain that New York State has no legitimate interest which has not been adequately represented through the participation in the drafting of Rule 2130 by NASAA, which represents securities regulators of the fifty states. They argue that the court should deny permissive intervention because the State's claim and the relief sought in this confirmation proceeding lack the commonality required for the granting of intervention under CPLR §1013. They also argue that the court should deny discretionary intervention because it would place an unfair burden on persons seeking expungement, such as petitioners, who have previously obtained the requisite

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findings and relief needed for expungement in an arbitral award.

The Attorney General replies that its interests are real, are recognized by NASD, and would be compromised if information in the CRD pertaining to dealers licensed in New York were expunged improperly. He maintains that his interest in preserving an accurate and reliable database for his regulatory and licensure purposes, and the investing public's right to complete and accurate information about brokers they may wish to engage, have not been adequately represented in these proceedings. With respect to the argument for permissive intervention under CPLR §1013, the Attorney General states that his claim raises common issues of law and fact with those that the court will be deciding in the underlying proceeding.

III. DISCUSSION

A. Intervention as of Right

Section 1012 of the CPLR provides in pertinent part:

Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:

. . . .

2. When the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment

(CPLR § 1012[a]).⁶

The CRD was established, and its records are maintained, for the benefit of all securities regulators, which include both

⁶ Leave of court is required prior to intervention in any special proceeding. (CPLR § 401).

[*9]

the NASD, a nationwide self-regulatory organization, the federal government, acting through the SEC, and the regulatory agencies of each individual state. (See § 3.10(a) of the CRD Agreement between the NASD and NASAA, dated January 6 and 8, 1993, as amended November 18, 1997, attached as Exh. 6 to the Affirmation of R. Verle Johnson, Esq., in support, filed April 23, 2007 ["Johnson Affirm."], at ¶ 38). State regulators rely on the data in the CRD to present a complete and accurate record of each broker/dealer firm which can be used in conjunction with, inter alia, license renewals or revocations, requests for public inspection and to ascertain the existence of patterns of misconduct warranting regulatory intercession. If information regarding complaints against registered brokers and dealers is expunged from this depository and no longer available to the New York Attorney General, the ability of that office to perform its licensing and regulatory duties and to keep the public informed may be compromised.

Notwithstanding the vigorous protestations to the contrary by petitioners, the agreement establishing the CRD demonstrates that the NASD recognizes that a participating CRD state has a joint property interest in the information contained in the CRD. The CRD agreement between NASD and NASAA provides as follows:

The data on the CRD Uniform Forms filed with the CRD shall be deemed to have been filed with each CRD State in which the applicant seeks to be licensed and with the NASD and shall be the joint property of NASD and these CRD States (and, in the case of Forms BD and BDW, the SEC). The compilation constituting the CRD database as

a whole shall be the property of the NASD. (CRD Agreement, § 3.10[a]). The information in the CRD, therefore, is joint property of the State of New York and the NASD, while the CRD database itself remains the exclusive property of the NASD.

Contrary to petitioners' contention on this motion, the interest of the state regulators in the CRD data maintained by the NASD is not diminished by a comment in the SEC's statement approving Rule 2130. (SEC Order Granting Approval of Proposed Rule Change, Dec. 16, 2003, 68 Fed.Reg. 74667, 74672 [Dec. 24, 2003] ["SEC approval statement"]). In this comment, the SEC rejected the notion that because the CRD system contains data having has public record status, its records comprise a privileged class of public record documents necessarily exempt from expungement. While the SEC allowed for expungement of data under certain circumstances, it still acknowledged the "state 'public record' status" of this data. (Id.). In other words, while the disposition of documents and data in the CRD is not exclusively determined by the needs of state regulatory authorities such as the Attorney General's Investor Protector Division, and expungement may occur without the consent of state regulators, both NASD and the SEC expressly recognize that such agencies have a legitimate interest in the CRD data and in its disposition. This is the dispositive issue for the instant motion, not whether the Attorney General has an exclusive ownership interest in the data, or whether he will necessarily

prevail on the question of confirmation. The Attorney General clearly has an interest which may be affected by the court's judgment, and which not been adequately represented by any other party, since respondent Gibson, the complainant in the arbitration proceeding, has failed to appear and has not opposed expungement in this case. Moreover, granting or disallowing intervention causes no prejudice to respondent Gibson.

The remaining party, the NASD, which has a dual role as a regulator and as an association constituted of the dealers whom it regulates, has not opposed expungement in this case. In fact, it is in just this situation, where NASD declines to oppose expungement, that the SEC and NASD contemplate intervention by state regulators in court confirmation proceedings. In supporting adoption of the amendments now constituting NASD Rule 2130, the NASD noted that:

states will be able to intervene if they have concerns regarding whether investor protection or regulatory issues have been fairly considered by the NASD.

(SEC approval statement, 68 Fed.Reg. at 74671). The NASD explains that state participation in the court confirmation proceeding:

is an additional safeguard to ensure that courts are aware of the standards of Rule 2130 and relevant regulatory and investor protection interests. . . . The Rule gives NASD and the States the opportunity to participate . . . and make courts fully aware of . . . concerns relating to inappropriate expungements.

(Johnson Affirm., Exh. 10, NASD 2130 Frequently Asked Questions, Question #9, <http://www.nasd.org/RegulatorySystems/CRD/Filing>

Guidance/NASDW_005224, now found at <http://www.finra.org/RegulatorySystems/CRD/FilingGuidance/p005224> [last accessed Nov. 1, 2007]). Thus, the drafters of Rule 2130 expressly acknowledged that states have a legitimate interest and should be allowed to intervene in cases of this kind to protect that interest.

Accordingly, since the New York Attorney General has an interest in this proceeding which may not be adequately be represented by the existing parties, the criteria for intervention under CPLR § 1012(a) are met in this case.

B. Intervention by Permission

Section 1013 of the CPLR provides:

[A]ny person may be permitted to intervene in any action . . . when the person's claim or defense and the main action have a common question of law or fact.

The decision to permit intervention under this section rests in the court's sound exercise of discretion, and turns on whether the proceeding and the intervenor's claim have issues in common. Intervention should be liberally allowed, in order to give the intervening party an opportunity to protect its interest. (Matter of Teleprompter Manhattan CATV Corp. v. State Bd. of Equalization & Assessment, 34 AD2d 1033 [3rd Dept. 1970]). Where a prospective intervenor has a real or substantial interest in the outcome of the case, it is an abuse of discretion to deny intervention. (Plantech Housing, Inc. v. Conlan, 74 AD2d 920, 921 [2nd Dept. 1980]).

If the threshold requirement of a common question of law or fact is met, the court may then exercise its discretion in deciding whether to permit intervention.

(Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B [1997], CPLR C1013, at 183.

In Teichman v. Community Hospital of Western Suffolk, 87 NY2d 514 (1996), the Court of Appeals stated that in exercising their discretion under this section, trial courts should consider whether the intervenor's claim would be adversely affected without intervention, whether there are common issues of law and fact, and the extent of prejudice to the existing parties if intervention is allowed.

Here, the Attorney General's claim would be adversely affected without intervention, as the data upon which his office relies would be eliminated from the national database used by his office to perform its official regulatory and licensing duties. Further, the Attorney General's claim has in common many questions of law in fact with the confirmation relief sought in this proceeding. These include whether the petitioners are entitled to expungement, the scope of this court's authority to review the arbitral recommendation of expungement, the standard to be employed in such review, and the propriety of expungement of data owned jointly by NASD and the CRD states.

Finally, involvement of the Attorney General in this proceeding will not unduly prejudice the parties. This is not a case where the presence of the intervenor will complicate a

lengthy discovery or trial process, as neither discovery nor trial is contemplated in this special proceeding. No substantial rights of any party will be prejudiced: petitioners' award remains in place, and their position will be fully considered on the issue of confirmation, vacation or modification of that award. In sum, the presence of the Attorney General will simply insure that both sides of the novel and complex legal issues are presented in this proceeding. Therefore, the Attorney General should be allowed to intervene on the basis of permissive intervention, as well.

Accordingly, upon the Notice of Petition and Petition of Petitioners UBS and Kurrasch, filed on March 29, 2007; the Notice of Motion and Affirmation of R. Verle Johnson, Esq., filed April 23, 2007, the Memorandum of Law in Support of the Attorney General's Motion to Intervene, filed April 23, 2007; the Affirmation of Christopher Massey, Esq. in Opposition, sworn June 13, 2007; Petitioners UBS and Kurrasch's Memorandum in Opposition, dated June 13, 2007; the Reply Affirmation of R. Verle Johnson, Esq. in Support, sworn June 25, 2007; the Reply Memorandum of Law in Support, dated June 25, 2007; and the oral argument heard on August 21, 2007; it is hereby

ORDERED, that the motion to intervene is granted and that the Attorney General of the State of New York be permitted to intervene in the above-entitled proceeding as an intervenor-respondent; and it is further


ORDERED, that the notice of petition and petition in the

above-entitled proceeding be amended by adding the Attorney General of the State of New York as an intervenor-respondent; and it is further

ORDERED, that the attorney for the intervenor shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein.

The foregoing constitutes the decision and order of this court.

ENTER:



Marcy L. Kahn, J.S.C.

Dated: New York, New York
November 15, 2007

FILED
NOV 19 2007
COUNTY CLERK'S OFFICE
NEW YORK