

**Granite Assoc., Inc. v Rolon**

2008 NY Slip Op 30769(U)

March 20, 2008

Supreme Court, Nassau County

Docket Number: 4647-07/

Judge: Daniel R. Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

C  
ENTERED  
IN  
COMPUTER

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----X  
**GRANITE ASSOCIATES, INC.,**

**TRIAL TERM PART: 48**

**Petitioner,**

**-against-**

**ROMNIE EDUARDO ROLON,**

**Respondent.**  
-----X

**INDEX NO.: 4647/07**

**MOTION DATE: 4-10-07  
SUBMIT DATE: 2-7-08  
SEQ. NUMBER - 001**

**MOTION DATE: 11-29-07  
SUBMIT DATE: 2-7-08  
SEQ. NUMBER - 002 & 003**

**MOTION DATE: 1-7-08  
SUBMIT DATE: 2-7-08  
SEQ. NUMBER 004**

**The following papers have been read on this motion:**

- Notice of Petition, dated 3-9-07.....1**
- Notice of Motion, dated 10-10-07.....2**
- Affirmation in Further Support, dated 11-14-07.....3**
- Memorandum of Law (pet.), dated 11-14-07.....4**
- Reply Affirmation, dated 11-26-07.....5**
- Notice of Motion, dated 11-20-07.....6**
- Notice of Cross Motion, dated 1-1-08.....7**

The petition to confirm the arbitration award of National Association of Securities Dealers (NASD) arbitrator Walter W. Jensen in favor of petitioner and against respondent is granted. The motion by respondent to vacate that award is denied. The motion by respondent for a default judgment on his counterclaims as asserted in his answer to the petition is denied. The cross motion by the petitioner to compel arbitration of the claims asserted in such counterclaims is granted.

This dispute stems from the employment of the respondent as an independent contractor and registered representative of the petitioner, a securities dealer, pursuant to an employment agreement dated January 6, 2004. On that day petitioner signed an "Independent Contractor Agreement", a "Registered Representative Agreement" (RRA), and, as part of the latter, a "Negotiable Promissory Note" for \$25,000. The Agreements recite that they are to be governed by the laws of the State of Florida. The Promissory Note, however, recites that it has been made and delivered in New York and is to be construed under New York law.<sup>1</sup>

Under the RRA, the "Term" paragraph recites that the agreement would remain in effect during respondent's association with petitioner as a registered representative, "except for those clauses covering obligations after termination as registered representative, which shall survive termination as a registered representative." Under the paragraph entitled "Compensation" the RRA refers to the giving of a \$25,000 loan, which was to be forgiven if the respondent remained a full-time representative of the petitioner for 30 months. It refers to the Promissory Note as representing that loan, which by its terms was to be forgiven in equal monthly installments of \$833.33. The Note recites that in the event the respondent ceased to be employed by the petitioner for any reason, the note became due, with all remaining payments and accrued interest to be paid. Under the section entitled "Remedies", "any claim or controversy arising out of or relating to this Agreement... shall be settled by arbitration under the then prevailing Rules of the [NASD]. Judgment based upon the

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<sup>1</sup> Neither party has asserted that Florida law has any application to this present dispute, and this decision and order therefore is made without reference thereto.

decision of the arbitrators may be entered in any court having jurisdiction thereof.”

It is undisputed that petitioner was at all relevant times a member of NASD, and that respondent was registered with NASD under Form U4, the Uniform Application for Securities Industry Registration or Transfer.<sup>2</sup> Under section 15A, entitled “Individual/Applicant’s Acknowledgement and Consent” respondent agreed “to arbitrate any dispute, claim or controversy that may arise between me and my *firm*... that is required to be arbitrated under the rules, constitutions or by-laws of the *SROs* indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent *jurisdiction*. (Emphasis in original.)<sup>3</sup>

Respondent’s employment by petitioner terminated on July 22, 2004. Pursuant to the terms of the RRA and the Note, petitioner owed the unforgiven balance, \$19,166.67. When payment was not forthcoming, petitioner filed a claim with Dispute Resolution of NASD. There was no response, and an arbitration was held without the respondent being present. By way of NASD Dispute Resolution Award dated April 11, 2006 the arbitration resulted in an award for the balance sought, with interest at 3% per annum from January 6, 2004 until

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<sup>2</sup> In his verified answer to the petitioner, respondent refers to the transfer of his NASD license upon his becoming employed with petitioner, and never denies being a registered representative with NASD. In addition, the documents concerning which respondent alleges signing under duress, and as the result of petitioner’s misrepresentations, do not include the U-4. See, Answer ¶¶ 31-39. Petitioner asserts that a U-4 was signed upon respondent’s employment as well, and this is not denied.

<sup>3</sup> A copy of the U-4 signed by respondent is not submitted, but respondent has submitted a sample form containing this provision. Respondent attacks this submission as inadmissible because it is unsigned, but there is no denial from respondent himself that he did in fact sign such a form, or that the submission made to the Court is not the form utilized by NASD and which respondent would have signed upon becoming employed as a registered representative.

[\* 4 ]  
July 6, 2006, the date of payment, which ever came first.

The Court agrees with the petitioner that under the RRA, the Note and NASD rules it is entitled to have its award confirmed and entered as a judgment of the New York State Supreme Court. CPLR 7510; CPLR 7514. Arbitration agreements and awards resulting therefrom are to be upheld absent a bar of public policy. *New York City Trans. Auth. v Transport Workers Union of America, Local 100*, 99 NY2d 1 (2002). This is true in employment cases, even where rights protected by federal law are in controversy. *Hamilton v Cantor Fitzgerald Securities*, 265 AD2d 526 (2d Dept. 1999). On its face, the controversy here flowed directly from respondent's employment relationship with the petitioner and his termination, which were covered by the broad arbitration clause.

The Court cannot agree with respondent that there is a basis for setting aside the award on the grounds that the arbitrator exceeded his power and/or that there was no valid agreement to arbitrate. CPLR 7511(b). These contentions are based on his claim that his signature on the agreements and Note were procured by fraud and duress. He further alleges that misrepresentations about his future were made to induce him to join the petitioner. He contends that he was pressured into signing the documents referred to above in that he had no choice because he already had left his previous job, and, in addition, was given no time at all to review the agreements and Note. Finally, he asserts that his due process rights were violated by NASD because he was not served at his then-address, denying him notice and an opportunity to be heard.

The Court must reject the respondent's argument that he was not bound to arbitrate because he was coerced and under economic duress, and that no time was given to him to read the agreement containing the arbitration clause. Respondent was separately bound to

arbitrate by his registration with NASD. *Matter of Hamilton v Cantor Fitzgerald Securities, supra*. Therefore, even if the Court were to agree with respondent regarding the circumstances surrounding his acceptance of the RRA, he was still bound to arbitrate.

The cases upon which respondent relies are inapposite, because they either do not concern the securities industry or the U-4 (*Brennan v Bally Total Fitness*, 198 F Supp 2d 377 [SDNY 2002]; *Chanchani v Salomon/Smith Barney, Inc.*, 2001 WL 204214 [SDNY 2001]), or because the issue was whether the plaintiff/employee was unfairly induced to sign the U-4 itself, containing the NASD arbitration clause (*Berger v Cantor Fitzgerald Securities*, 942 F Supp 963 [SDNY 1996]). In the instant matter no such allegation regarding the U-4 is made. The respondent attacks only the agreements made with the petitioner, but as noted the respondent's registration with the NASD and the U-4 made arbitration of the present dispute mandatory. *Matter of Hamilton v Cantor Fitzgerald Securities, supra*.

Further, and in any event, the claim that respondent was coerced into signing the agreement with the petitioner containing the petitioner's own arbitration clause fails in view of his ratification of that agreement through acceptance of the benefits of the employment relationship. See, *Scarfone v Village of Ossining*, 23 AD3d 540 (2d Dept.2005); *Cappelli Enters., Inc. v F. & J. Cont. Food Corp.*, 16 AD3d 609 (2d Dept. 2005).

With regard to respondent's claim of defective service, and insofar as is asserted here, CPLR 7511(b).2 provides that an award shall be vacated upon application of a party who neither participated nor was served with a notice of intention to arbitrate if the Court finds that no valid agreement to arbitrate was made, or that one of four enumerated conditions existed as set forth in CPLR 7511(b).1 (Insofar as is asserted in his papers, the respondent effectively points to (b).1.(i) and (iii), that there was fraud or misconduct in procuring the

award and that the arbitrator exceeded his power.) As indicated above, none of these factors have been established.

However, the respondent relies on more than the specific grounds provided in CPLR 7511(b), specifically, an appeal to the Court under the fundamental notion of notice and opportunity to be heard. He focuses on the fact that the petitioner's Statement of Claim filed with NASD, and all documents regarding the arbitration itself sent by NASD, were sent to 50 Hemlock Drive in East Hills, New York. This was a residence where respondent at one time lived with his parents, until he moved to 177 Westbury Avenue, Mineola, New York, an address that appears on the agreements with petitioner.

However, insofar as is relevant here, NASD rule 10302, by which respondent was bound, provides that it was NASD's responsibility "to serve promptly by mail or otherwise" a copy of the Statement of Claim. There is no authority presented that in the context of arbitration this kind of service provision violates due process. *See, Giant Used Cars A/S v Baptiste*, 177 Misc 2d 1013 (Sup Ct Queens County 1998). Further, there is no independent showing by respondent that the method utilized very likely would not have provided respondent with notice, and in fact did not. *See, Matter of Brucha v Topaz Electronics, Inc.*, 233 AD2d 276 (1<sup>st</sup> Dept. 1996). In that regard, respondent acknowledges that the Statement of Claim had been taped to his parents' door, and that all correspondence from NASD had been sent to that address. He does not indicate that his parents no longer lived there when service was made. Under such circumstances, the Court would expect that he would be able to produce an affidavit from a person living at that the East Hills address to the effect that respondent was never told that these documents had arrived, which might serve as proof that he had not had notice of the claim or of the arbitration itself. *Id.* The burden of proving

proper service cannot be shifted to the petitioner given the fact that it had no role to play in doing so under NASD rules. Accordingly, the Court has not been provided with a sufficient basis for setting aside the award on due process grounds.

The sole remaining basis for vacating the award is that the arbitrator's decision was totally irrational. This is based on the alleged failure to recognize that there was no reason for terminating respondent under the RRA, as the only conceivable basis was "for cause", and he was never given any reason for his termination. Therefore, urges respondent, there was no basis for the award. However, all that the arbitrator needed to find as a predicate for calling in the Note was that the respondent had been terminated, as by its terms it stated that it was due and payable "[i]f for any reason Maker [respondent] shall cease to be associated with Payee [petitioner] as a registered representative for any reason regardless whether the Maker's association with the Payee was voluntarily or involuntarily terminated during the term of this Note..." There is no direct incorporation, by reference or otherwise, of the relevant RRA definition of what constitutes a valid termination. Further, to the extent that the phrase "for any reason" contradicts the RRA itself, the arbitrator was free to interpret the two documents and make an award on such interpretation. The Court simply is not free to substitute its own judgment or interpretation, even if it believes that the arbitrator made errors of law. *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. Of City School Dist. of City of N.Y.*, 1 NY3d 72, 82-83 (2003). It therefore cannot be said that making an award under the Note was "totally irrational," especially as the respondent had, in fact, been involuntarily terminated.

The motion by respondent for a default judgment on his counterclaims is denied, and the cross motion to compel arbitration of these claims is granted to the extent that the

counterclaims are severed and the parties are directed to proceed to arbitration under NASD rules. Because the Court has found that respondent was bound to arbitrate any dispute arising out of his employment with petitioner, it cannot grant the relief sought even if it agreed with respondent that petitioner had defaulted in pleading. In addition, granting the motion would then open up the possibility of a motion by the petitioner to seek relief from the default under CPLR 5015(a), which would require an evaluation of the merits. *See, e.g., Gray v B.R. Trucking Co.*, 59 NY2d 649 (1983). Accordingly, the parties should proceed to arbitration on the counterclaims. The respondent may advance any procedural or substantive argument he wishes in that forum.

Petitioner may enter one judgment for \$19,166.67, with interest at 3% per annum from January 6, 2004 until July 6, 2006, and at the legal rate commencing July 7, 2006.<sup>4</sup> The judgment shall also recite that the counterclaims are severed and that the parties are directed to proceed to arbitration under the rules of the NASD or a named successor organization with regard to such claims.

Submit judgment on notice.

This shall constitute the Decision and Order of this Court.

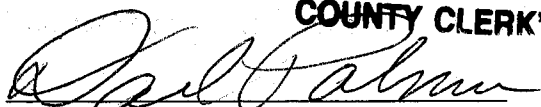
DATED: March 10, 2008

ENTER

**ENTERED**

MAR 12 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

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<sup>4</sup> The petitioner is entitled to interest from the date of the award, April 11, 2006 (*see, Aetna Cas. & Sur. Co. v Mantovani*, 240 AD2d 566 [2d Dept. 1997]), but here the arbitrator fixed a certain percentage for a time beyond the award. Accordingly, to give full effect to the award, interest should not begin to run at the legal rate until the expiration of the lower interest period fixed by the arbitrator.

**[\* 9 ]**  
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