

GunnAllen Fin., Inc. v Jade Sec., LLC

2008 NY Slip Op 31443(U)

May 20, 2008

Supreme Court, New York County

Docket Number: 0102552/2008

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER

PART 16 **JA Part 16**

Justice

Gunnallen Financials Inc., Et Al.

INDEX NO.

102552/08

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

JADE Securities, LLC

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~~ petition to permanently stay arbitration and denies the cross-motion.

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

MAY 20 2008

Dated: _____

Alice Schlesinger
ALICE SCHLESINGER c.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

DO NOT POST

DEFERENCE

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

-----X
GunnAllen FINANCIAL, INC., and DAVID H. JARVIS,

Petitioners,

-against-

Index No. 102552/08
Motion Seq. No. 001

JADE SECURITIES, LLC,

Respondent.

-----X
SCHLESINGER, J.:

Before the Court is a petition brought pursuant to CPLR §7502 staying or dismissing the arbitration commenced by Jade Securities, LLC against GunnAllen Financial, Inc. and David H. Jarvis. Jarvis is General Counsel to GunnAllen. In response, Jade Securities has cross-moved to dismiss the petition. The arbitration was commenced in December 2007 by the filing of a Statement of Claim with FINRA Dispute Resolution.¹

The claim itself concerns an assertion by Jade, successor to Javi Securities, LLC, that pursuant to an Affiliation Agreement ("Agreement") between the parties dated February 10, 2005, GunnAllen was obligated to collect fees from a third party, Charys Holding Company, and from those fees, pay commissions to Jade. The fees paid were to be based on a schedule found in the Agreement. It is respondent's position that the services provided to Charys were on behalf of GunnAllen and are worth millions of dollars in fees. Jade alleges that petitioners (Jarvis, acting on behalf of GunnAllen) have refused to secure these fees and pay Jade its share.

¹FINRA is the successor to the National Association of Securities Dealers, Inc. (NASD).

As indicated in this brief summary of the claim, Jade relies on the Affiliation Agreement as the basis for its claim.²

Significantly, the Affiliation Agreement contains no arbitration mandate. In fact, the document does not even mention the word. That is one of the arguments made by petitioners. Ultimately, it is the argument that predominates and decides this controversy.

Counsel for GunnAllen and Jarvis also contend that this dispute between the parties falls outside the categories defined by Section 13200(a) of the new FINRA Code of Arbitration Procedure. There are three categories that lend themselves to mandatory FINRA arbitration. The categories deal with the status of the parties. Those are disputes between members, disputes between members and associated persons, and disputes between associated persons. These terms are all further defined in other sections of the FINRA Code.

It is petitioners' contention that while GunnAllen is a member, Jade Securities or its predecessor Java is neither a member nor an associated person and thus cannot compel arbitration. Jade does not argue that it fits into one of these categories. However, its counsel argues that since it was the agent of GunnAllen and since this is the kind of dispute typically resolved in a FINRA Arbitration, that process should continue.

²As the motions were argued before this Court and as additional papers were allowed to be submitted, the Court was informed that claimant had amended its statement of claim. I asked for a copy of the amended statement. It appears the amendment serves merely to add Abraham Mirmar and Michael Mirmar to the title and identify them respectively as principal of Javi and present Managing Member of Jade (Abraham) and broker for Javi and present principal of Jade (Michael). However, the claim itself is identical, including reliance on the Affiliation Agreement as its basis.

It is clear to me that the concept of agency does not work here for the respondent. Nor does the argument that this is the kind of dispute NASD or FINRA normally hears. When a party is compelled to arbitrate a claim, they do so in lieu of resolving the matter in a judicial setting with all of the attendant rights observed in that setting. Thus, it must be voluntary on both parties' parts or there must be a rule or agreement between the parties compelling it. Therefore, the remainder of this decision will discuss whether these parties actually agreed to arbitrate this dispute.

First some background is necessary. By the February 10, 2005 Affiliation Agreement which the parties signed (Respondent Jade was then Javi Securities), Javi was to establish an independent affiliated branch of GunnAllen. The Agreement further states that those activities that were performed in the Branch would be "regulated and supervised by the NASD." The goals of the relationship were then briefly discussed.

Section 2 set out a payout schedule which would be used to calculate payments made by GunnAllen to Javi. Section 3 refers to a promissory note, for a loan in the amount of \$350,000 from GAF to Javi to be guaranteed by Avi Mirman and Jeffrey Kivit. The note then is to be attached to "this Term Sheet". Section 4, regarding charges and clearing, expenses is not relevant to the dispute. Nor is Section 5 which discusses a smooth transition or transfer of customer accounts to GAF. Section 6 deals with registrations by GAF of Javi's associated registered representatives and the waiver of all such fees for the year 2005. Section 7 deals with insurance coverage and the payment for same.

Finally Section 8 titled "Independent Agreement/Separation" says in relevant part.

JS [Javi] and its associated registered representatives will be required to enter into [GunnAllen's] Independent Contractor

Agreement that provides for the various rights and responsibilities of each party in connection with a registered representative's registered status. GAF's Independent Contractor Agreement contains a provision that GAF does not assert any ownership rights to JS' customer accounts, or to any of its other assets. JS, subject to proper protocol and procedure, may move client accounts to other broker-dealers.

The two final paragraphs of this section and the Agreement deal with confidentiality and exclusivity and are not relevant to this controversy.

Thus, it should be noted that this Affiliation Agreement refers to two other agreements, one as an attachment to it, the Promissory Note, and two, the Independent Contractor Agreement. It should also be noted because it gets to the core of the argument that each of these other agreements do, in fact, contain arbitration clauses.

The Promissory Note, the attachment, has the same date as the Affiliation Agreement, February 10, 2005. It is two pages with eleven paragraphs. It contains definitions and payment information. It also has a funding schedule. It discusses how the Note shall be repaid or what happens in the event of a default by the Borrower (JAVI).

It is paragraph 4, "Arbitration Agreement" that bears scrutiny. It says:

Javi and the Company agree that any controversy arising out of or relating to this Note shall be settled by arbitration in accordance with the rules of the Board of Governors of the National Association of Securities Dealers, Inc. Notice preliminary to, in conjunction with, or incidental to such arbitration proceeding may be sent to Javi by mail and personal service is hereby waived. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof, without notice to either party. Any forbearance to enforce an agreement to arbitrate shall not constitute a

waiver or any rights under this Note.

Turning now to the Independent Registered Representative Agreement, signed by Abraham and Michael Mirmar and others, as well as a representative from GunnAllen. This is a multi-page document entered into after February 5th. In Michael's case, on February 18, 2005 and in Abraham's case on March 1, 2005. This document as well as the other two, were all drafted by GunnAllen.

The Representative Agreement emphasizes that the representatives are independent brokers, not employees of GunnAllen. Therefore, a good part of it deals with their separateness and spells out, for example, all the expenses that the representative himself is responsible for. It also discusses how the Agreement can be terminated by either party after giving notice and how the representative must abide by all laws and good, honest business practices in the securities field.

Paragraph 11 speaks of Payment of Commissions and Fees. It refers to an "Exhibit A" which is allegedly a commission/fee schedule pursuant to which the representative will be compensated. However, no one has attached this schedule. Moreover, neither counsel suggests that this clause is, in any way, related to the payout schedule referenced in the Affiliation Agreement, the document and schedule respondent repeatedly refers to in its claim before FINRA. Therefore, I cannot give any significance to it.

Paragraph 14 deals with confidential business information, paragraph 15 to licensing of the Representative, paragraph 16 to GunnAllen's right to immediately suspend a Representative, and paragraph 17 speaks to the Representative's agreement to carry various kinds of insurance.

Paragraph 18 (the first so called, as there are two designated 18) interestingly discusses in subdivision (a) the Representative's obligation to indemnify GunnAllen, and GunnAllen's obligation to indemnify the Representative in subdivision "(b)". In supplemental papers filed by respondent, a March 5, 2008 letter to Jade and the Mirmans is attached. It is from counsel for GunnAllen referencing the pending arbitration and Paragraph 18(a). This was apparently notice of such a claim for indemnification directed by GunnAllen to be served pursuant to Paragraph 18(c).

While Abraham Mirmar, the author of the supplemental affidavit, disputes GunnAllen's right to any indemnification under these circumstances, he urges that the March 5 letter is significant because it shows petitioner is relying on the Independent Registered Representative Agreements as central to the dispute, arguably the same way in which, respondent is.

But is this really the case? The intervening paragraphs 18 (the second such designated) through 22, while important to the agreement are not relevant to this dispute. But paragraph 23, entitled "Arbitration" very definitely is. That paragraph reads, in its entirety, as follows:

The parties agree that any dispute, claim, or controversy that may arise between GunnAllen and the Representative and/or that is required to be arbitrated under the rules, constitutions, or by-laws of the NASD will be filed and heard with and through NASD Arbitration and that any award rendered against Representative may be entered as judgment in any court of competent jurisdiction.

Respondents argue that the above language "the parties agree that any dispute, claim or controversy that may arise... will be filed and heard with and through NASD"

(FINRA's predecessor) mandates that this dispute be arbitrated. The Mirmar brothers, both representatives and signators to these agreements, have joined the dispute explicitly as claimants. They also make a similar argument, vis-a-vis the Note signed the same date as the Affiliation Agreement and referred to in the Affiliation Agreement. The Note as mentioned earlier also contains an arbitration clause.

However, I disagree. Neither one of the other agreements, the Note and the Representative Agreement, was incorporated either implicitly or explicitly into the Affiliation Agreement. And it is the Affiliation Agreement which is solely and exclusively relied upon in the claim. The other agreements are referred to in the Affiliation Agreement but there is nothing that says that these other Agreements' clauses, particularly the ones mandating arbitration, control disputes under the Affiliation Agreement. Nor can it be shown that the agreements in question are somehow mutually dependent on each other. While they are certainly related and share a common interest, they are not inextricably tied to each other.

Not only must parties to an agreement explicitly agree to arbitrate a dispute with each other (see *Waldron v. Goddess*, 61 NY2d 181, 1984), they must also agree to arbitrate the particular subject matter of the dispute (*In re Application of Hugo Bunzl*, 224 AD2d 245, First Dept, 1996).

The Promissory Note, entered into between Javi (Jade's predecessor) and GunnAllen directs arbitration for "any controversy arising out of or relating to this Note." The dispute described in the claim has nothing to do with the Note. In fact, the parties seem to agree that the Note has been paid in its entirety well before the controversy emerged and the claim for arbitration filed.

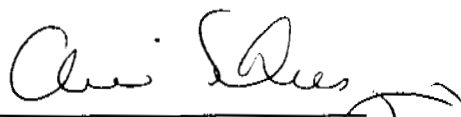
As to the Representatives Agreement, Javi did not sign those. Nor was it a party to any of them. Jarvis did not sign these either. However, equally significant is the fact that the disputes to be arbitrated there are between individual Representatives and GunnAllen and say nothing about any disputes concerning the commissions based on the payout schedules referenced in the Affiliation Agreement. This is the dispute involving Jade, GunnAllen and Charys, the dispute spelled out in the claim.

Therefore, despite the fact that arbitration may be a favored means of resolving a dispute, parties who are not signatories to such arbitration agreements cannot be forced to use such means. Similarly, the dispute at issue must explicitly be covered by an arbitration clause. Neither is the case here.

Accordingly, this Court grants the petition in its entirety to permanently stay the arbitration commenced by Jade Securities, LLC and continued as amended by Abraham and Michael Mirmar and denies the cross-motion. This decision constitutes the judgment of this Court.

Dated: May 20, 2008

MAY 20 2008


ALICE J. SCHLESINGER

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 1413).