

Matter of NASD v Bacchus

2008 NY Slip Op 31668(U)

June 13, 2008

Supreme Court, New York County

Docket Number: 0109678/2007

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN
Justice

PART 57

BNY

INDEX NO. 109678/07

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

Bacchus E

The following papers, numbered 1 to _____ were read on this ~~motion~~ ^{petition} to/for confirm award

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Memos of Law M1-M3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ ^{petition} is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

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

Dated: 6-13-08


MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK -- PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

In the matter of the NASD Arbitration of certain
controversies between BNY INVESTMENT
CENTER INC., and GERALD DEBENEDICTIS,

Index No.: 109678/07

DECISION/ORDER

Petitioners,

- against -

ELMIE BACCHUS,

Respondents.

_____ x

This is a proceeding brought by BNY Investment Center Inc. ("BNY") and Gerald DeBenedictis to confirm a National Association of Securities Dealers Arbitration Stipulated Award, with a service date of May 18, 2007 ("NASD Award"). This Award recommended expungement of all references to a complaint against DeBenedictis in the registration records maintained in the Central Registration Depository ("CRD") by the NASD, now known as the Financial Industry Regulatory Authority, Inc. ("FINRA"). The New York State Attorney General moves to intervene in this proceeding and opposes expungement.

The Attorney General's motion to intervene is granted. The State has an important interest in the maintenance of accurate CRD records for the protection of the investing public. Intervention is therefore proper.

The NASD Award recommended expungement pursuant to NASD Rule 2130, which provides in pertinent part:

(a) Members or associated persons seeking to expunge information from the CRD system arising from disputes with customers must obtain an order from a court of competent jurisdiction directing such expungement or confirming an arbitration award containing expungement relief.

(b) Members or associated persons petitioning a court for expungement relief or seeking judicial confirmation of an arbitration award containing expungement relief must name NASD as an additional party and serve NASD with all appropriate documents unless this requirement is waived pursuant to subparagraph (1) or (2) below.

(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, 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.

Here, the arbitration panel that issued the NASD Award “made the following affirmative findings of fact: The claim, allegation, or information is factually impossible or clearly erroneous; and The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.”

The Attorney General argues that the panel merely tracked the language of Rule 2130, and that, because the panel did not cite evidence or facts to support the general findings, the court cannot perform “meaningful review” in order to determine whether the panel’s recommendation of expungement is justified. (See Attorney General’s Memo. Of Law In Supp. [“AG Memo”] at 19.)

Ordinarily, review of an arbitration award, whether conducted pursuant to the Federal

Arbitration Act (9 USC §§ 1 et seq.) (“FAA”) or CPLR Article 75, is limited.¹ Section 10 of the FAA and the substantially similar CPLR 7511(b) provide for vacatur of an award only where the award was procured by fraud or misconduct, there was partiality in the arbitrator, the arbitrator exceeded his or her power or so imperfectly executed it that a final and definite award on the subject matter submitted was not made, or, as set forth in CPLR 7511(b)(iv), the arbitrator failed to follow the statutory arbitration procedure. Under the FAA, it has been held that an arbitrator’s “manifest disregard of the law” constitutes an additional ground for vacatur of the award. (See e.g. Hoelt v MVL Gp., Inc., 343 F3d 57, 65 [2d Cir 2003]; Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d 471 [2006], cert dismissed ___ US ___, 127 S Ct 34 [applying FAA].) However, the viability of the manifest disregard for law basis for vacatur is now in doubt. (See Hall St. Assocs., L.L.C. v Mattel, Inc., 128 S Ct 1396, supra.) Cases interpreting CPLR 7511 have repeatedly held that an “award may not be vacated unless it is violative of a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator’s power.” (Matter of Town of Callicoon [Civil Serv. Empls. Assn.], 70 NY2d 907, 909 [1987]; Matter of Silverman [Benmor Coats], 61 NY2d 299 [1984].) It is well settled under both the federal and state statutes that the arbitrator is not obligated to explain the basis for the award. (Hoelt v MVL Gp., Inc., 343 F3d 57, supra.; Halligan v Piper Jaffray, Inc., 148 F3d 197 [2d Cir 1998], cert denied sub nom Piper Jaffray, Inc. v Halligan, 526 US 1034 [1999] [FAA].) An

¹The AG purports to move for relief from the Award pursuant to CPLR 7511(b)(1). While it appears that the FAA should govern the review (see Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc., 85 NY2d 173 [1995]), the court does not reach the issue as it has not been argued by the parties. In any event, the FAA was based on the New York arbitration statute (Hall St. Assocs., L.L.C. v Mattel, Inc., ___ US ___ 128 S Ct 1396 [2008]) and, as discussed above, the provisions of the FAA and the CPLR that are at issue in the instant case have been applied in a consistent manner.

award subject to the FAA will be upheld when the grounds for the award “can be gleaned from the record.” (Matter of Sobel [Hertz, Warner & Co.], 469 F2d 1211, 1215 [2d Cir 1972] [FAA].) Similarly, an award subject to CPLR 7511 will not be vacated as irrational unless there is no proof whatsoever in the record to justify the award. (See Matter of Peckerman v D&D Assoc., 165 AD2d 289, 296 [1st Dept 1991]; Matter of Matra Bldg. Corp. v Kucker, 2 AD3d 732 [2d Dept 2003], lv denied 2 NY3d 708 [2004]. See also Matter of Spear, Leeds & Kellogg, 291 AD2d 255 [1st Dept 2002].)

To the extent that Rule 2130 adds a requirement that the arbitrator state the basis for the award, the Rule has been complied with under the particular circumstances of this case. Not only has the arbitration panel made an express finding as required by the Rule, but there is substantial support in the record for the arbitrators’ recommendation that the complaint against DeBenedictis be expunged from the CRD.

Claimant, Elmie Bacchus, filed a claim against BNY and against investment advisers Ronald Schecter and Gerald DeBenedictis, alleging losses of \$72,000. The complaint alleged that respondent Schecter solicited unsuitable investments for claimant’s IRA and individual accounts, causing them to lose value, and that after respondent DeBenedictis took control over the accounts, approximately one year after they were established, they lost further value due to the unsuitable trades and failure to supervise. The claim was settled by letter agreement, dated September 21, 2004, which provided for BNY to make a payment to claimant of \$24,000 in full settlement of her claims. By agreement dated May 12, 2006, claimant agreed that DeBenedictis “had no involvement in the transactions underlying the claims made in the Arbitration,” and that the complaint against DeBenedictis should be expunged from the records filed with the NASD.

[* 6]
Claimant was represented by the same counsel at all stages of the proceedings.

There was thus a substantial basis in the record for the arbitration panel's expungement recommendation based on claimant's independent evaluation, made with the benefit of counsel, that her losses were attributable to the other adviser and were not caused by wrongdoing on DeBenedictis' part. Contrary to the Attorney General's contention, this is not a case in which a private claimant had an incentive to agree to expungement in order to obtain a settlement payment. Rather, claimant agreed to the expungement, without any additional compensation, two years after the settlement was paid. Contrary to the Attorney General's further contention, there is no evidence in the record to put into question claimant's representation that DeBenedictis was not involved in any wrongdoing, or to show that DeBenedictis made any unsuitable trades on claimant's accounts and that her losses were attributable to his acts rather than the acts of the broker who initially handled the accounts. The court therefore finds that confirmation of the NASD Award recommending expungement is not against public policy.

As the NASD has recognized, expungement of a CRD record "should be used only when the expunged information has no meaningful regulatory or investor protection value." (FINRA Rule 2130 Frequently Asked Questions, No. 18.) This standard is met on the record, and the petition should therefore be granted.

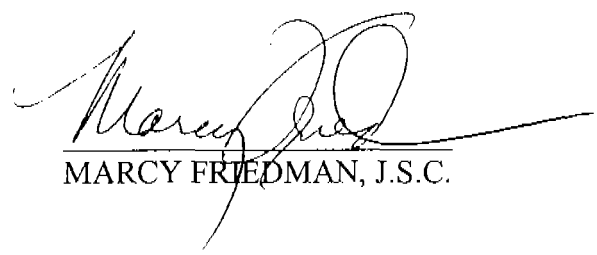
In so holding, the court notes that the Attorney General questions in passing whether an expungement recommendation is subject to confirmation "since it is not an 'award.'" (See AG Memo at 29.) The Attorney General submits no authority that it is not. Moreover, Rule 2130 expressly contemplates a court proceeding for an order "confirming an arbitration award containing expungement relief." The Attorney General also argues that the arbitration panel

exceeded its power in making the award because it did not make detailed findings of fact. This contention is unsupported by any legal authority and is plainly without merit. An arbitrator “exceeds his powers when he rules on issues not presented to him by the parties.” (Hoeft, 343 F3d at 71 [internal quotation marks and brackets omitted].) To the extent that the Attorney General further contends that CRD records are official records subject to the requirements for retention of such records (see AG Memo at 20), the Attorney General fails to identify any requirements, other than those imposed by Rule 2130, that must be met. The court has considered the Attorney General’s remaining contentions and finds them to be without merit on the record presented.

It is accordingly hereby ORDERED that the petition of BNY Investment Center Inc. and Gerald DeBenedictis is granted to the extent of confirming the NASD Award.

This constitutes the decision and order of the court. Settle judgment on notice, with a copy of this order and a copy of the Award.

Dated: New York, New York
June 13, 2008


MARCY FRIEDMAN, J.S.C.