

**Goldendale Invs., Ltd. v Great E.
Secs., Inc.**

2008 NY Slip Op 31864(U)

June 30, 2008

Supreme Court, New York County

Docket Number: 0600037/2008

Judge: Helen E. Freedman

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

PRESENT: Freedman

PART 39

Index Number : 600037/2008
GOLDENDALE INVESTMENTS, LTD
vs
GREAT EASTERN SECURITIES
Sequence Number : 003
COMPEL OR STAY ARBITRATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *by Defendants Pearson Financial Services and Daniel P. Sam*
to stay arbitration and
Compel arbitration as to them is decided
in accordance with the accompanying
memorandum decision.

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

FILED

JUL 02 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 30, 2008

HSV
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 39

-----X

GOLDENDALE INVESTMENTS, LTD.,
SILVERSTEIN INVESTMENTS, LTD., and
LEVI & KORSINSKY, LLP,

Plaintiffs,

Index No. 600037/08

-against-

GREAT EASTERN SECURITIES, INC., LEGENT
CLEARING, LLC, JEFFREY N. SIME, SEI
INVESTMENTS DISTRIBUTION CO., DANIEL P.
SON, JEFFREY RAMSON, POINTE FINANCIAL
GROUP CORP., POINT CAPITAL, INC. (f/k/a
POINTE CAPITAL, LLC), DANIEL LEVENE,
PAUL RICHARDSON, PENSON FINANCIAL
SERVICES, INC., SEAVIEW MEZZANINE
FUND, LP, and GREAT EASTERN HOLDINGS, INC.,

Defendants.

-----X

HELEN E. FREEDMAN, J.:

Motions with sequence numbers 003 and 004 are consolidated for disposition.

In motion sequence 003, defendant Penson Financial Services, Inc., and individual defendant Daniel P. Son (collectively, "Penson"), seek an order, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, compelling plaintiffs Goldendale Investments, Ltd., Silverstein Investments, Ltd. (collectively, "the Clients"), and Levi & Korsinsky, LLP (the "Law Firm"), to arbitrate their claims, and staying this litigation pending the arbitration decision.

In motion sequence 004, defendant SEI Investments Distribution Co. ("SIDCO"), seeks an order compelling arbitration of the claims against it together with those against Penson or staying the proceedings in this action pending the outcome of that arbitration. Defendants Pointe

Financial Group Corp., Pointe Capital, Inc. (f/k/a/ Pointe Capital, LLC) (collectively, "Pointe"), Daniel Levene ("Levene"), and Paul Richardson ("Richardson"), cross-move seeking to stay litigation of the claims against them pending arbitration.

For the reasons stated below, Penson's motion to compel arbitration of the claims against it is granted, and the motion of SIDCO and cross-motion of Pointe, Levene, and Richardson are granted to the extent that litigation of the claims against those defendants is stayed for three months pending the outcome of arbitration.

The relevant facts, as alleged in the Complaint, are as follows. In August 2005, the Clients each opened a brokerage account with Great Eastern Securities, Inc. ("GES"), and Penson to trade stock over the internet. GES acted as the introducing broker between the Clients and Penson, the clearing firm responsible for executing the transactions and safeguarding the Clients' funds in the brokerage accounts. Individual defendant Son was Penson's Chief Executive Officer. More specifically, the Clients each entered into a Customer Account, Margin and Short Account Agreement (the "Agreement") with Penson, dated August 15, 2005, containing a very broad arbitration provision:

ANY AND ALL CONTROVERSIES, DISPUTES OR CLAIMS BETWEEN THE UNDERSIGNED AND YOU, OR THE INTRODUCING BROKER, OR THE AGENTS, REPRESENTATIVES, EMPLOYEES, DIRECTORS, OFFICERS OR CONTROL PERSONS OF YOU OR THE INTRODUCING BROKER, ARISING OUT OF, IN CONNECTION WITH, FROM OR WITH RESPECT TO (a) ANY PROVISIONS OF OR THE VALIDITY OF THIS AGREEMENT OR ANY RELATED AGREEMENTS, (b) THE RELATIONSHIP OF THE PARTIES HERETO, OR (c) ANY CONTROVERSY ARISING OUT OF YOUR BUSINESS, THE INTRODUCING BROKER'S BUSINESS OR THE UNDERSIGNED'S ACCOUNTS, SHALL BE CONDUCTED PURSUANT TO THE CODE OF

ARBITRATION PROCEDURE OF THE NASD.

Agreement at 2.

After three weeks of trading based on a total initial investment of \$ 2 million, the Clients made a profit of \$ 3.6 million and were charged \$ 8000 in commissions by GES and Penson. Subsequently, upon a request by the Clients that the profits be wired out of the brokerage accounts, GES recalculated the commissions to a much higher amount of \$ 480,000. Notwithstanding the Clients' request to escrow those funds on their behalf, Penson released the recalculated amount to GES.

In November 2005, the Clients filed an arbitration claim with FINRA (f/k/a/ NASD) to recover the allegedly inflated commissions. In August 2006, FINRA issued an interim award directing that approximately \$ 479,000 be segregated on behalf of the Clients until the resolution of the arbitration.¹ The plaintiffs allege that GES ignored FINRA's directions and orchestrated a series of transactions designed to dissipate its assets to several entities that are parties to this lawsuit, including Penson, SIDCO and Pointe, for the purpose of rendering GES insolvent and defrauding the Clients. Those transactions were allegedly performed with full knowledge and acquiescence of Penson, as it was GES' primary clearing firm, and in disregard of the decree that a certain amount of funds was to be escrowed pursuant to the FINRA interim award. The plaintiffs allege that by the time GES closed its business in January 2007, Penson had misappropriated several hundred thousand dollars of GES in commission revenue and GES' deposit to Penson.

With respect to SIDCO, the Complaint alleges that in July 2005, SIDCO entered into a

¹ None of the parties has submitted to the Court a copy of the interim award.

joint-venture agreement with GES to share commission revenue, generated through Penson, for trading stock with GES. Sometime in 2007, Penson paid SIDCO approximately \$ 139,000 in commission revenue allegedly earned in December 2006, after the interim award was issued. The plaintiffs allege that those funds should have been segregated for the benefit of the Clients and belong to them.

The plaintiffs further allege that in November 2006, GES transferred all of its assets to Pointe as part of a scheme to prevent the plaintiffs from collecting their award. That transaction allegedly provided that a portion of the purchase price was to be placed in an escrow account to pay for the liabilities that GES incurred before the Pointe takeover. After Pointe installed Levene and Richardson (both principals of Pointe) as President and CEO of GES, respectively, GES entered into numerous transactions including making loans and advancing commission revenue to Pointe, which allegedly further depleted GES of its assets.

In December 2007, FINRA ruled that GES was liable to the Clients in the amount of \$ 494,175.10 in compensatory damages, and in the amount of \$ 399,156.04 as reimbursement of attorneys fees.² GES has failed to pay this award. In the Complaint, the plaintiffs allege, *inter alia*, claims against Penson, SIDCO, Pointe, Levene and Richardson for fraud and fraudulent conveyance, and seek to impose a constructive trust. Plaintiffs also allege a claim for *alter ego* against Penson, Pointe, Levene and Richardson.

Motion sequence 003

Moving to compel arbitration, Penson argues that this dispute is governed by the arbitration provision because the claims at issue arise out of clearing services that Penson

² There is no indication that the final award has been confirmed .

provided to the Clients pursuant to the Agreement. In opposition, the plaintiffs contend that the dispute is not arbitrable because (1) the claims arise out of misconduct outside the scope of the relationship of the parties under the Agreement, and (2) the Law Firm plaintiff and most defendants are not subject to the Agreement.

Here, the very broad provision to arbitrate encompasses the claims leveled by plaintiffs against Penson, including those brought by Law Firm plaintiff as they are derivative of the claims of the Clients. As the FINRA award was not confirmed, FINRA remains the proper venue for the resolution of the contentious issues remaining between the parties under the Agreement. Thus, the motion to compel plaintiffs to arbitrate their claims against Penson is granted on condition that the parties proceed to arbitration expeditiously. Failure by Penson to proceed forthwith will be deemed to be a waiver.

Motion sequence 004

In its motion, SIDCO, a non-party to the arbitration agreement, contends that if Penson prevails on its motion to compel arbitration, the claims leveled against SIDCO should be arbitrated as well because they are inextricably intertwined with those against Penson or, in the alternative, the action should be stayed pending the outcome of the arbitration because SIDCO's liability is predicated on a finding of liability by the arbitrator against Penson.

It is well established that a party cannot be forced to submit to arbitration in the absence of an express agreement to do so. *National Union Fire Ins. Co. of Pittsburgh v. St. Barnabas Community Enterprises*, 48 A.D.3d 248 (1st Dep't 2008) (citing *Waldron v. Goddess*, 61 N.Y.2d 181 (1984)). Here, SIDCO is not a party to the Agreement and does not have an independent basis to otherwise compel plaintiffs to arbitrate their claims against it. Therefore, this action is

stayed as to plaintiffs' causes of action for fraud, fraudulent conveyance, and constructive trust against SIDCO, insofar as those claims are supported by allegations of transfers of funds between all of the defendants named in this action, for the purpose of thwarting plaintiffs' ability to collect the arbitral award.

The cross-motion of Pointe, Levene and Richardson to stay litigation of the claims against them for fraud, fraudulent conveyance, alter ego and seeking to impose a constructive trust, is granted for the same reasons.

Based on the foregoing, it is hereby


ORDERED that the plaintiffs Goldendale Investments, Ltd., Silverstein Investments, Ltd., and Levi & Korsinsky, LLP, and the defendants Penson Financial Services, Inc., and Daniel P. Son are directed to proceed to arbitration with FINRA forthwith, and it is further

ORDERED that this action is stayed as to all defendants for three months pending the decision of the arbitration tribunal, and it is further

ORDERED that the parties are directed to appear for a preliminary conference on October 7, 2008, at 9:30 a.m. in courtroom 208, 60 Centre Street, New York, New York 10007.

Dated: June 30, 2008

Enter:



Helen E. Freedman, J.S.C.

FILED

JUL 02 2008

**CLERK'S OFFICE
NEW YORK**