[* 1]

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

PRESENT: HON. EILEEN BRANSTEN PART 3

Justice

Index Number : 117052/2007

SIMON, SUSAN M.

VS.

AUSTIN HATCH & SMITH LLC

SEQUENCE NUMBER : # 001

VACATE ARBITRATION AWARD

4

INDEX NO. 117052-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

read on this motion to/for Vacate arbitration award + cross-motn to confirm

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1, 2 |
| Answering Affidavits — Exhibits | 3 |
| Replying Affidavits | 4 |

**Cross-Motion:** ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

RECEIVED
OCT 24 2008
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

CJ/SC

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

Dated: 10-20-08

HON. EILEEN BRANSTEN 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 THREE

----------x

In the Matter of the Arbitration Between
SUSAN M. SIMON and ELIZABETH A. JONES,

Petitioners,

-against-

Index No.: 117052/07
Motion Seq. No.: 001
Motion Date: 7/22/08

AUSTIN HATCH & SMITH, LLC d/b/a
CHRISTOPHER STREET FINANCIAL, INC.,

Respondent.

----------x

EILEEN BRANSTEN, J.:

Petitioners Susan M. Simon and Elizabeth A. Jones ("Financial Advisors") seek a judgment vacating the arbitration award issued by the Financial Industry Regulatory Agency ("FINRA") Dispute Resolution Panel that, among other things, dismissed their counterclaims and awarded respondent Austin, Hatch & Smith LLC ("Austin Hatch") d/b/a Christopher Street Financial, Inc. ("CSF") damages. Austin Hatch cross-moves to confirm the award.

## BACKGROUND

The Financial Advisors were employees of CSF. When they joined CSF, it was a member of FINRA (Memorandum of Law in Support of Cross-Motion to Confirm Award and in Opposition to Petition to Vacate ["Opp. Mem."], at ¶ 1). In 2001, the Financial Advisers were informed that to continue their work they would have to become independent

contractors effective January 2002. They continued their work under the CSF name, albeit with a different status, and cleared transactions through CSF.

CSF subsequently associated with a securities firm that merged with Walnut Street Securities, Inc. ("Walnut") in 2003 (Opp. Mem., at ¶ 2).

From August 2003 through August 2005, the Financial Advisers were affiliated with Walnut, which was a FINRA member (Petition ["Pet."], at ¶¶ 6-7). In November 2003, each of them entered into an Association Agreement with CSF (*id.*). The Association Agreement provided that the Financial Advisers would have access to client information that was not generally known to the public and that it was only to be used "for the sole purpose of conducting business" on CSF's behalf (Paduano Affirmation ["Supp. Aff."], Exs. 1,2). The Association Agreement further contained a "non-solicitation-of-company's-client's" provision, pursuant to which the Financial Advisers agreed that for 12 months following termination of their employment with CSF they would not "directly or indirectly" solicit or do business with any CSF client (*id.*).

In August 2005, the Financial Advisers terminated their relationship with CSF and became "associated persons" with Commonwealth Financial Network ("Commonwealth"), a broker-dealer (Opp. Mem., at ¶ 3).

On or about February 1, 2006, Austin Hatch commenced a FINRA arbitration against the Financial Advisers, alleging, among other things, breaches of the Association Agreement,

misappropriation and conversion of alleged trade secrets. According to Austin Hatch, the Financial Advisers solicited customers that they had serviced while working with CSF and transferred their accounts to "Third Eye"--the Financial Advisers' new business venture (Opp. Mem., at ¶ 4).

In addition to interposing defenses and counterclaims before FINRA, the Financial Advisers moved before the tribunal to dismiss the proceeding (Pet., at ¶ 10). In August 2006, dismissal was denied (*id.*, at ¶ 15). In 2007, nine days of hearings were held (*id.*, at ¶ 17). The Financial Advisers' motion to dismiss was renewed on the last day of hearings and was denied once again (*id.*, at ¶ 18).

On November 19, 2007, the panel issued an award (the "Award"), which set forth that:

- The Financial Advisers "did not file with FINRA Dispute Resolution properly executed Uniform Submission Agreements but are required to submit to arbitration pursuant to the Code and, having answered the claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted."

- The Financial Advisers "are jointly and severally liable for and shall pay to Claimant compensatory damages in the amount of $88,150.00 plus interest . . . ."

- "Claimant [Austin Hatch] is liable for and shall pay to [the Financial Advisers] attorneys' fees in the amount of $12,500.00. The Panel is awarding attorneys' fees pursuant to case law where the Panel is authorized to grant attorneys' fees when both parties have made the request."

- The Financial Advisers "are jointly and severally liable for and shall pay to Claimant attorneys' fees in the amount of $27,500.00. . . " (Pet., Ex. A).

The Financial Advisers petition to vacate the Award, urging that "the arbitrators made an award in manifest disregard of the law" (Pet., at ¶ 24). They contend that it was improper to deny their Labor Law counterclaim as Austin Hatch admitted it owed withheld commissions. The Financial Advisers further assert that the arbitrators improperly refused their "proffer of controlling legal authority" at the close of the hearings, improperly denied motions to dismiss that were based on the fact that Austin, Hatch was not a FINRA member firm, and that attorneys' fees were awarded "contrary to New York law" (Pet., at ¶ 25).

Austin Hatch cross-moves to confirm the Award and seeks attorneys' fees, costs and disbursements.

## Analysis

The Financial Advisers contend that the Award should be vacated because it was issued in "manifest disregard of the law" (*see* Financial Advisers' Memorandum of Law ["Supp. Mem"], at 14, 20, 22, 26).

> "A court may find an award to be in manifest disregard of the law if the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and that legal principle was well defined, explicit and clearly applicable to the case. But the 'manifest disregard of law' standard rarely results in vacatur because it is limited to those 'rare occurrences of apparent "egregious impropriety" on the part of the arbitrators,' which requires

> 'more than a simple error in law or failure by the arbitrators to understand or apply it;' in other words, it must be 'more than an erroneous interpretation of the law'" (*Cheng v Oxford Health Plans, Inc.*, 45 AD3d 356, 357 [1st Dept 2007] [citations omitted]; *see also Dortheimer v Safir*, 49 AD3d 338 [1st Dept 2008] [nothing in lump-sum award suggested that arbitrators deliberately disregarded Labor Law issues regarding unpaid wages]; *Uram v Garfinkel*, 16 AD3d 347, 348 [1st Dept 2005] [party moving to vacate award based on manifest disregard of the law must meet "high standard" as confirmation is appropriate "as long as there is barely colorable justification for it"], *lv denied* 5 NY3d 717 [2005]).

At the outset, the Financial Advisers argue that the Award must be vacated because, pursuant to NASD rules that were applicable at the time, Austin Hatch had no standing to arbitrate before FINRA. This Court must give "considerable leeway" to the arbitrators' determination that there was jurisdiction over the matter (*see*, *First Options of Chicago, Inc. v Kaplan*, 514 US 938, 943 [1995]). Significantly, the arbitrators colorably, even if incorrectly, could have concluded that Austin Hatch was either an "associated person" or an "other" entity subject to NASD arbitration.

Next, the Financial Advisers urge that the arbitrators manifestly disregarded the law in failing to award them commissions pursuant to New York Labor Law § 191-c(3) (*see* Supp Mem. at 21). They maintain that "in light of [Austin Hatch's] admission under oath that it owed [them] outstanding compensation, the [arbitration panel] as a matter of law should have found in [their] favor under New York Labor Law" (Supp. Mem., at 22). Austin Hatch, however, disputed that money was owed to the Financial Advisers (*see* Supp. Aff., Ex. 13,

at 5) and nothing in the Award suggests that the arbitrators deliberately disregarded the Labor Law as opposed to rejecting the Financial Advisers' arguments.

The Financial Advisers also maintain that the arbitrators manifestly disregarded the law in failing to follow New York cases that they submitted and relied upon. For example, they maintain that they provided the arbitration panel with New York case law demonstrating that restrictive covenants such as those in the Association Agreements are unenforceable. Parties to arbitration, however, are subject to procedures and awards that "often differ from what may be expected in courts of law" (*see Sperry Intern. Trade, Inc. v Government of Israel*, 689 F2d 301 [2d Cir 1982] [citing *Matter of Sprinzen [Nomburg]*, 46 NY2d 623, 632 (1979) as "expressing doubt as to whether court would have enforced restrictive covenant at issue, but stating that courts will not 'second- guess' arbitrator's conclusions"]) and there has been no showing of manifest disregard of the law here.

Finally, the Financial Advisers assert that the attorneys'-fees award to Austin Hatch was in manifest disregard of the law. The Association Agreement, however, provides that in "the event that either party brings legal action or arbitration to enforce this Agreement, the prevailing party . . . shall be awarded its legal fees and expenses in addition to any other damages found therein" (Supp. Aff. Exs. 1 and 2, at ¶ 16). On that basis alone--even setting aside any NASD rules relating to attorneys' fees--the Court cannot conclude that the

arbitrators manifestly disregarded the law in requiring the Financial Advisers to pay attorneys' fees as part of the Award.

Since the Financial Advisers have not established any basis for vacating the Award, their petition is denied and Austin Hatch's cross-motion for confirmation of the Award is granted (*see* CPLR 7511[e] [upon denial of a motion to vacate the court "shall" confirm the award]). To the extent that Austin Hatch moves for attorneys' fees based on "the paucity of support" offered for vacatur of the Award (*see* Opp. Mem., at 13), the cross-motion is denied. Austin Hatch is, however, entitled to costs and disbursements.

Accordingly, it is

ORDERED that the Financial Advisers' motion to vacate the Award is DENIED; it is further

ORDERED that the cross-motion by Austin Hatch to confirm the Award is GRANTED; and it is further

ORDERED that Austin Hatch's cross-motion for attorneys' fees is denied, however, costs and disbursements are granted.

This constitutes the Decision of the Court.

Settle Judgment.

Dated: October 20, 2008
New York, N.Y.

ENTER:

Hon. Eileen Bransten