

**Frankel v Sardis**

2009 NY Slip Op 31216(U)

June 1, 2009

Supreme Court, New York County

Docket Number: 115836/08

Judge: Emily Jane Goodman

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

PRESENT: **EMILY JANE GOODMAN**

PART 17

*Justice*

Index Number : 115836/2008

FRANKEL, SOFIA

vs.

SARDIS, JEFFREY

SEQUENCE NUMBER : # 001

MODIFY

INDEX NO. 115836-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

\_\_\_\_\_ 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

*per attached and case referred*

*per attached*

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

Dated: 6/21/09

EMILY JANE GOODMAN 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 17

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SOFIA FRANKEL,

Petitioner,

Index No. 115836/08

-against-

JEFFREY SARDIS, LAUREN SARDIS, JAS  
HOLDING CORPORATION, GOLDMAN SACHS  
& CO., and LEHMAN BROTHERS, INC.,

Respondents.

-----X

Emily Jane Goodman, J.S.C.:

Petitioner Sofia Frankel brings this Article 75 proceeding against respondents to vacate or modify an arbitration award rendered against her in an arbitration before the Financial Service Regulatory Authority (FINRA), claiming that the arbitrators ruled on a matter not submitted to them in rendering the award. Respondents Jeffrey Sardis, Lauren Sardis and JAS Holding Corporation (together, respondents) cross-move to confirm the award.

**I. Background**

Frankel was a trader who worked for respondent Goldman Sachs & Co (Goldman Sachs) from 1994 until 2000, and then for respondent Lehman Brothers from 2000 until 2008. Respondents had an account at Goldman Sachs, and then at respondent Lehman Brothers, following petitioner's move from Goldman Sachs.

In May 2004, respondents commenced an arbitration in front of FINRA's predecessor, NASD, against all of the named respondents, claiming that Frankel had committed fraud by obtaining discretionary control over their accounts, and then overtrading on high margin, and charging large commissions and other costs, so as to cause respondents considerable damage during the time she worked for both Goldman Sachs and Lehman Brothers. Claims against Goldman Sachs and Lehman Brothers were based on negligent hiring and retention of petitioner.

Respondents filed a 44-page Statement of Claim with FINRA, detailing the wrongs allegedly committed against them by petitioner, Goldman Sachs and Lehman Brothers. In conclusion, respondents' "Damages" clause sought various categories of money damages "against Goldman Sachs and Frankel, jointly and severally ... ." In the next paragraph, respondents delineated several categories of loss "against Lehman Brothers ... ." There was no paragraph in the Damages clause for a joint and several recovery against petitioner and Lehman Brothers, as there was between petitioner and Goldman Sachs.

Thirty-seven hearings were held over a period of two years. During the course of these hearings, substantial evidence was offered to indicate petitioner's alleged wrongdoing while she was employed by both firms, including, as applicable here, acts which occurred while she was employed by Lehman Brothers.

The arbitration panel issued a determination on September 19, 2008 (the Award). Aff. of Geoffrey A. Mort, Ex. C. In the Award, in the section entitled "Relief Requested," the panel noted that respondents herein "requested compensatory damages jointly and severally against Goldman Sachs and Frankel," in a specified amount, but that respondents "requested compensatory damages *solely against Lehman Brothers* [emphasis supplied]" in a specified amount.

In the "Award" portion of the Award, the panel found that "Goldman Sachs and Frankel are jointly and severally liable for and shall pay to the claimants \$1,000,000 as compensatory damages plus interest ... ." However, despite the above language to the effect that respondents sought compensatory damages for Frankel's acts while at Lehman Brothers solely against Lehman Brothers, the panel held that "Lehman Brothers and Frankel are jointly and severally liable" for damages to all of the respondents herein, in the total sum of \$2.5 million.

Petitioner brings this proceeding to vacate or modify the award to remove the language making her jointly and severally liable along with Lehman Brothers for any damages respondents may have suffered due to Frankel's actions while she was employed by Lehman Brothers. Petitioner notes that an Award should be modified if "the arbitrators have awarded upon a matter not submitted to them and the award shall be corrected without

affecting the merits of the decision upon the issues submitted." CPLR 7511 (c) (2); Federal Arbitration Act, 9 USC § 110 (b).<sup>1</sup> Thus, she argues that she should not be held liable jointly and severally with Lehman Brothers for any award due to her acts while at Lehman Brothers,<sup>2</sup> as the issue was not before the arbitrators, as indicated both in the demand to arbitrate and in the Award. Respondents, on the other hand, maintain that petitioner's misfeasance while employed by Lehman Brothers was outlined in detail in the demand for arbitration, and forcefully brought to the fore throughout the 37 hearings, so that all parties were well aware that petitioner would be implicated in any liability found against Lehman Brothers.

## II. Discussion

It is settled law that "[a]n arbitration award may be vacated on three narrow grounds: 'it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power'" *Matter of United Federation of Teachers, Local 2, AFT, AFL-CIO v Board of Education of City School District of City of New York*, 1 NY3d 72, 79 (2003), quoting *Matter of Board of Education of Arlington Central School District v Arlington Teachers Federation*, 78 NY2d

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<sup>1</sup>The parties allude to both the Federal Arbitration Act and New York law concerning the modification and vactur of arbitration awards.

<sup>2</sup>Lehman Brothers in now in bankruptcy.

33, 37 (1991). An award is irrational "if there is no proof whatever to justify the award ... [citation omitted]." *Matter of Matra Building Corp. v Kucker*, 2 AD3d 732, 734 (2d Dept 2003); see also *Matter of Erin Construction Co., Inc. v Meltzer*, 58 AD3d 729 (2d Dept 2009). Moreover, "courts are obligated to give deference to the decisions of the arbitrator." *Matter of New York City Transit Authority v Transport Workers' Union of America, Local 100, AFL-CIO*, 6 NY3d 332, 336 (2005).

As previously indicated, under CPLR 7511 (c) (2), an award may be modified, rather than vacated, if "the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted."

It has also been held that "[a]n arbitrator can bind the parties only on issues that they have agreed to submit, and whether the arbitrator has exceeded those bounds is a proper issue for judicial determination." *Lackawanna Leather Co. v United Food & Commercial Workers International Union, AFL-CIO & CLC District Union No. 271*, 692 F2d 536, 538 (8th Cir 1982), citing *International Association of Machinists & Aerospace Workers District 776 v Texas Steel Company*, 639 F2d 279, 283 (5th Cir 1981). "Thus if an arbitration panel rules on issues not presented to it by the parties, it has exceeded its authority and the award must be vacated." *Matter of Dighello v Busconi*, 673 F

Supp 85, 87 (D Conn 1987), *affd* 849 F2d 1467 (2d Cir 1988).

This rule is tempered, however, by the "strong preference for arbitration" reflected in court decisions. See e.g. *Telenor East Invest AS v Altimo Holdings & Investments Ltd.*, 567 F Supp 2d 432, 439 (SD NY 2008).

The evidence from the hearings reveals that the issue of petitioner's personal liability for her misdoings while at Lehman Brothers was always in issue; was raised in opening statements; was the subject of testimony; and was referred to in closing briefs. Petitioner's own attorney questioned her about her actions while at Lehman Brothers, and provided her with a defense for those actions. Further, petitioner and Lehman Brothers brought a motion dismiss, seeking dismissal of the claims "against Lehman and Ms. Frankel (with respect to the Lehman period)" and argument was made on behalf of both Lehman Brothers and petitioner. Although petitioner is correct in noting that no liability could be assessed against Lehman Brothers unless respondents established that petitioner committed wrongful acts, that does not change the fact that the arbitration was conducted as if respondents were seeking to hold petitioner jointly and severally liable with Lehman Brothers.

Thus, even though the issue of joint and several liability was not initially plead in the Damages clause, the issue was fully litigated and defended by petitioner, who was aware from

the onset that she was a target in the arbitration<sup>3</sup> (*United Buying Serv. Int'l Corp. v United Buying Serv. Of Northeast New York, Inc.*, 38 AD2d 75, 79 (1st Dept 1971), *aff'd*, 30 NY2d 822 (1972) ["the record discloses that the particular item was voluntarily submitted by the parties...[a]t no time did the petitioner or its counsel object to the consideration by the arbitrator of the particular damage claims put on the record for his determination, and the parties must be deemed to have acquiesced in the submission of the same to the arbitrator"]). Therefore, the arbitrators did not act irrationally, or exceed their powers, by fashioning a remedy which tracked the subject of the arbitration with regard to petitioner's liability for her own actions while employed by Lehman Brothers. Even the courts, which are not as free as arbitrators to render determinations, could have merely amended the pleadings to the proof in this matter (*Sociedad Armadora Aristomenis Panama, S.A. v Tri-Coast Steamship*, 184 F Supp 738, 741 (SDNY 1960) ["[e]ven in the courts, supposedly beset by technical limitations of which arbitration is free, a pleading may be amended to conform to the

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<sup>3</sup>Petitioner, in a "Form U" entitled "Uniform Application for Securities Industry Registration or Transfer," in which traders are asked to answer numerous questions with regard to their employment, disclosed that she was the subject of claims by respondents for wrongful activities at Goldman Sachs and Lehman Brothers, for acts occurring between 1999 through 2001. Thus, petitioner herself acknowledged that she was the focus of a claim for damages for her actions while at Lehman Brothers, and not just as a witness in respondents' action against Lehman Brothers.

proof" ] ).

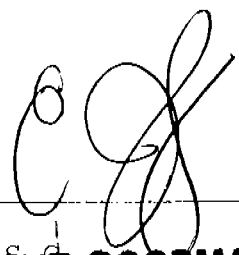
Under these circumstances, petitioner cannot rely on CPLR 7511 (c), to simply "modify" the decision. The modification sought, petitioner's total release from any liability for her misfeasance while at Lehman Brothers, would "grossly affect the merits of the decision upon the issues submitted," by completely altering the nature of Lehman Brothers' exposure to the Award, and respondents' ability to collect on the Award. Thus, it is evident that petitioner is actually seeking partial vacatur, not modification, and, as stated above, she has no grounds for such relief.

Accordingly, the petition to vacate the arbitration award is denied, the cross motion to confirm the award is granted, and the proceeding is dismissed.

Submit Order and Judgment on Notice.

**This Constitutes the Decision and Order of the Court.**

Dated: June 1, 2009

ENTER:   
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**EMILY JANE GOODMAN**  
J.S.D.