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

PRESENT: HON. CAROL EDMEAD PART 31

Index Number : 601418/2009
RIGAUD, FLORENT
VS.
MARCO POLO NETWORK INC
SEQUENCE NUMBER : 001
DISMISS ACTION

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

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
The instant motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the application of defendants Marco Polo Network Inc. and Marco Polo Securities Inc. **is granted to the extent that the plaintiff is compelled to arbitrate the matter before the Financial Industry Regulatory Association and this matter is stayed until the arbitration is complete,** and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

FILED
AUG 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/24/09

HON. CAROL EDMEAD J.S.C.

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

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 35

FLORENT RIGAUD,

Plaintiff,

-against-

MARCO POLO NETWORK INC., and
MARCO POLO SECURITIES INC.,

Defendants.

Index No. 601418/2009

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants Marco Polo Network Inc. and Marco Polo Securities Inc. ("Marco Polo Securities" collectively, ("defendants") move for an order: (1) pursuant to CPLR 3211 dismissing the complaint of plaintiff Florent Rigaud ("plaintiff") or, in the alternative, (2) pursuant to CPLR § 7503 compelling plaintiff to arbitrate the matter before the Financial Industry Regulatory Association ("FINRA") and staying the matter in this court until the arbitration is complete.

Defendants' Contentions

Plaintiff has commenced a breach of contract and wage claim action in this court. However, plaintiff agreed to arbitrate with defendant Marco Polo Securities. Plaintiff's claims are also inextricably intertwined with the remaining defendant, Marco Polo Network Inc., and are also subject to FINRA's mandatory arbitration. Consequently, arbitration should be compelled, and the instant action should be dismissed, or, in the alternative, stayed until the outcome of the arbitration.

On November 29, 2007, plaintiff executed an Employment Agreement and an Agreement Regarding Confidentiality and Inventions. These Agreements were executed between plaintiff and Marco Polo Network Inc. As per the Agreements with Marco Polo Network Inc., plaintiff transferred his Series 7 license to Marco Polo Securities Inc. upon his hire, which enabled plaintiff to place trades as a Registered Representative. and executed a Uniform Application for Securities Industry Registration or Transfer, commonly referred to as a Form U-4. Plaintiff executed all trades through Marco Polo Securities which is a licensed brokerage firm and a member of FINRA. Marco Polo Securities is wholly owned by Marco Polo Network Inc.

As part of the Form U-4, plaintiff agreed to "arbitrate any dispute, claim or controversy that may arise between me and my firm or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or by-laws of the SRO's . . . and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction."

Marco Polo Securities, is a member of FINRA. As a Registered Representative employed by Marco Polo Securities, plaintiff is a person associated with a member and as such must arbitrate the instant dispute.

Plaintiff's Opposition

Plaintiff argues that he never executed a single trade through Marco Polo Securities. His job duties were to "identify and engage global and local brokers and institutional investors as clients and users of the MP System and to develop and establish a clearing business for the company . . ." and not execute trades.

It is not contended anywhere that Marco Polo Network, Inc. is a Broker Dealer, was a

member of the NASD or a member of FINRA. Simply stated plaintiff and Marco Polo Network, Inc. never agreed to arbitration. The contention that Marco Polo Network Inc. is the parent company of Marco Polo Securities and the claims of plaintiff against both Marco Polo Network, Inc. and Marco Polo Securities are inextricable intertwined is a red herring.

The reason plaintiff had his series 7 and 63 registrations transferred to Marco Polo Securities was because he was told that if it was not held by a registered Broker Dealer, he would lose them.

Plaintiff argues that since he was not involved in the trading of securities, he did not need series 7 and 63 Licenses to perform his job duties at any time during his employment with the defendants.

Analysis

The Federal Arbitration Act ("FAA") provides that an arbitration provision in "a contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contact." *Diamond Waterproofing Sys. Inc. v 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252, 793 N.Y.S.2d 831, 826 N.E.2d 802 (2005), quoting 9 U.S.C. § 2. "Involving Commerce" is the functional equivalent of the phrase "affecting commerce" signaling congressional intent to exercise its full commerce clause powers. *Id.*, citing *Allied-Bruce Terminix Cos., Inc. v Dobson,* 513 U.S. 265, 273-274, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). As a result, where an arbitration provision "affects" interstate commerce, disputes arising therefrom are subject to the FAA. *Id.*

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration

any dispute which he has not agreed so to submit." *John Hancock Life Ins. Co., Inc. v Wilson,* 254 F.3d 48, 58 (2d Cir.2001), quoting *AT & T Techs., Inc. v Communications Workers of Am.,* 475 U.S. 643, 648-49, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). In deciding questions of arbitrability, the court must determine whether an agreement to arbitrate exists and if the dispute falls within the scope of such agreement. *Spear, Leeds & Kellogg v Central Life Assurance Co.,* 85 F.3d 21, 25 (2d Cir.1996).

Section 8(a) of the FINRA Code of Arbitration provides that:

> [a]ny dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code.

Upon his hire by Marco Polo Network, plaintiff moved his Series 7 License to Marco Polo Securities Inc. Plaintiff also executed a Form U-4. And, as part of the this Form U-4, plaintiff agreed to "arbitrate any dispute, claim or controversy that may arise between me and my firm or a customer, or any other person, that is required to be arbitrated under the rules...."

In the instant action, plaintiff has sued not only Marco Polo Network, but also Marco Polo Securities. As noted above, plaintiff agreed to arbitrate any disputes with Marco Polo Securities Inc.

With respect to defendants' argument that plaintiff's claims as against Marco Polo Network should also be arbitrated, *McMahon Securities Co. LP v Forum Capital Markets LP,* 35 F.3d 82 (2d Cir. 1994), is instructive.

In *McMahon*, the appeal to the Second Circuit addressed the extent to which parties

involved in the securities industry must arbitrate certain disputes surrounding the departure of numerous members of an existing securities firm to start up their own securities firm. Plaintiffs filed a multicount complaint in federal district court alleging that defendants violated various federal and state laws by misappropriating certain of plaintiffs' assets when they left plaintiffs' firm to create their own. Defendants in turn sought to compel arbitration of the disputes pursuant to industry arbitration regulations.

The Second Circuit held that

> [An entity such as Marco Polo Network] is sufficiently immersed in the underlying controversy for it to be considered a "certain other[ ]" party under § 8(a). A person who is neither a member nor an associated person is nevertheless appropriately joined in the arbitration where that party plays an active role in the securities industry, is a signatory to a securities-industry arbitration agreement (or is an instrument of another party to the arbitration), and has voluntarily participated in the particular events giving rise to the controversy underlying the arbitration. *Cf. Farrand v. Lutheran Bhd.*, 993 F.2d 1253, 1254-55 (7th Cir.1993) ("or others" in § 1(2) refers to " 'others' *similar* to" those expressly mentioned in the NASD Code).

Marco Polo Network is, as acknowledged by plaintiff in his complaint, the parent of Marco Polo Securities, Inc., was plaintiff's direct employer, and a defendant herein. As the parent of Marco Polo Securities, Inc., Marco Polo Network is obviously closely affiliated with co-defendant Marco Polo Securities, Inc., and as it has been directly sued by plaintiff, is enmeshed in the underlying dispute. Finally, Marco Polo Securities, Inc., which is subject to arbitration, is intimately connected with Marco Polo Network. The cumulation of all these circumstances, warrants Marco Polo Network a proper party to arbitration.

The case of *Burns v New York Life Insur. Co.*, 202 F3d 616 (2d Cir. 2000) is distinguishable. In *Burns,* the Second Circuit held that an employer which was parent of

"member" of the National Association of Securities Dealers could not compel arbitration of employment discrimination claim under the NASD code of arbitration procedure as a "certain other" who may participate in arbitration; because the employer was not a "certain other," and even if it were, "certain others" are not authorized to compel arbitration under the NASD Code.

In *Burns,* New York Life and its subsidiaries sold life insurance and other financial products. NYL Securities, an indirect, wholly owned subsidiary of New York Life, was staffed entirely by employees of the parent company. As a registered broker-dealer of securities products, NYL Securities is regulated by the Securities and Exchange Commission ("SEC"), the NASD, and state regulatory agencies. NYL Securities was a "member" of the NASD; New York Life was not. Employees of New York Life who work in the sale of securities products through its subsidiary NYL Securitics, such as the plaintiff, are required to register as representatives with the NASD.

In *Burns,* New York Life was the only defendant in the suit. The complaint plead that New York Life engaged in a pattern of discrimination against black employees and (in particular) black managers, and that New York Life foreclosed Burns from opportunities for corporate advancement available to white managers; there is no mention of any officer or employee of NYL Securities, or of any events that took place in the course of business that Burns conducted on behalf of NYL Securities. It is undisputed, however, that Burns's employment entailed daily oversight of employees engaged in securities transactions on behalf of NYL Securities.

Burns conceded that he was a "person associated with a member" and it was undisputed that NYL Securities was a "member" of NASD. New York Life, however was the only named

defendant and the only party that sought to compel arbitration in that case.

In the instant case, as distinguished from *Burns,* although the motion is made on behalf of both defendants, the arguments made to compel arbitration are made by Marco Polo Securities, a FINRA member. And, Marco Polo Securities argues that Marco Polo Network should be joined in the arbitration.

Further, in the instant case, as distinguished from *Burns,* throughout the complaint, plaintiff refers to both entities as "Marco Polo," and plaintiff has identical claims, and seeks identical remedies, against both defendants.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the application of defendants Marco Polo Network Inc. and Marco Polo Securities Inc. **is granted to the extent that the plaintiff is compelled to arbitrate the matter before the Financial Industry Regulatory Association and this matter is stayed until the arbitration is complete,** and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: August 24, 2009

FILED
AUG 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Carol Robinson Edmead, J.S.C.
HON. CAROL EDMEAD