

Morgan Stanley & Co. Inc. v Feeley

2010 NY Slip Op 30024(U)

January 5, 2010

Supreme Court, New York County

Docket Number: 602459/09

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 602459/2009
MORGAN STANLEY & CO.
 VS.
FEELEY, MICHELLE
 SEQUENCE NUMBER : 001
 CONFIRM AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

1-3

4-6

7-8

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 *is decided by*
the attached memorandum decision
order & judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1-5-10

[Signature]
JANE S. SOLOMON
 J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 55

-----X

MORGAN STANLEY & CO. INC.,

Petitioner,

INDEX NO. 602459/09

-against-

DECISION, ORDER and
JUDGMENT

MICHELLE FEELEY,

Respondent

JANE S. SOLOMON, J.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

In this special proceeding to confirm an arbitral award, petitioner Morgan Stanley & Co., Inc. (Morgan Stanley) moves, pursuant to CPLR 7510, for an order confirming the award and directing entry of judgment (motion sequence no. 001). Morgan Stanley also moves, pursuant to CPLR 3211 (a) (5), to dismiss the counterclaims of respondent Michelle Feeley (Feeley) (motion sequence no. 002). Motion sequence numbers 001 and 002 are consolidated for disposition.

BACKGROUND

Feeley worked as a financial advisor for Morgan Stanley from March 2006 until February 2008. The terms of Feeley's employment were governed by an employment agreement (the Employment Agreement). The agreement contained an arbitration clause, which provided that claims relating to Feeley's employment or the agreement itself would be settled by arbitration before either the National Association of Securities

Dealers, Inc. (NASD) or the New York Stock Exchange, Inc. (NYSE).

On March 10, 2006, Feeley executed a promissory note (Note One) in Morgan Stanley's favor, in the principal sum of \$123,000, with 4.75% annual interest rate, and an annual repayment schedule of principal in the amount of \$24,600 on March 10th of 2007, 2008, 2009, 2010, and 2011 (Petition, exhibit 4). On July 23, 2007, Feeley executed another promissory note (Note Two)¹ in Morgan Stanley's favor, in the amount of \$30,750, with 5% annual interest rate, and the annual principal repayment amount of \$8,150 payable on July 23rd of 2008, 2009, 2010, and 2011 (Petition, exhibit 5). Both Notes provided that they would become immediately due and payable if Feeley's employment with Morgan Stanley was terminated for any reason prior to the due date of any payment under the note. The Notes also provide for arbitration of claims pertaining to them according to the rules of NASD.

Feeley resigned from Morgan Stanley on February 29, 2008. When she did not pay the amounts due on the Notes, Morgan Stanley submitted the matter to NASD's successor, Financial Industry Regulatory Authority, Inc. (FINRA), for arbitration. In February 2009, Feeley's relative, an attorney, placed a phone call to Morgan Stanley's attorney with respect to the Dispute and

¹ Note One and Note Two are collectively referred as the Notes.

participated in a pre-hearing teleconference with FINRA, agreeing to a discovery, motion, and hearing schedule and to the composition of the arbitrators' panel (09/02/09 Feeley Aff., A17-A26). However, at the April 20, 2009 hearing, Feeley, by telephone, challenged FINRA's jurisdiction over the subject matter and herself and when she did not prevail, the call ended (Petition, exhibit 1).

FINRA determined that it had jurisdiction over the parties and the dispute. On May 5, 2009, it issued an award (the Award), holding that Feeley is liable to Morgan Stanley as follows: \$140,542.15 in compensatory damages, \$13,807.68 in pre-award interest, \$18.50 per day in post-award interest, and \$46,304.95 in attorneys' fees (*id.* at 2).

Morgan Stanley then brought this special proceeding to confirm the Award. Feeley answered and asserted two counterclaims. She alleges that the Notes represented forgivable loans. The First Note allegedly was for a signing bonus, namely an incentive for her to switch from Merrill Lynch to Morgan Stanley. The Second Note allegedly was for her 2007 bonus. She contends that Morgan Stanley represented that she would not owe anything under the Notes if, upon termination of her employment, she transferred her book of business to another Morgan Stanley employee, which she claims that she did. Feeley alleges that Morgan Stanley engaged in tax evasion by structuring her bonus

payment as loans. She seeks a declaration that the Notes are void and unenforceable because, as contracts, they do not have a certain price (first counterclaim), and an order directing Morgan Stanley to pay appropriate taxes on the loan amounts, because they really were bonus payments to her (second counterclaim).

Feeley opposes Morgan Stanley's petition to confirm the Award, and Morgan Stanley's motion to dismiss the counterclaims.

DISCUSSION

Morgan Stanley's Motion to Confirm the Award

CPLR 7510 provides that "[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511."

Although Feeley did not move within 90 days of the Award to vacate or modify it, she may raise her objections now in opposition to Morgan Stanley's petition to confirm it (*Karlan Constr. Co. v Burdick Assoc. Owners Corp.*, 166 AD2d 416, 416-417 [2d Dept 1990]).

Feeley contends that FINRA did not have jurisdiction because she did not agree to arbitrate before it. The first question is whether she may raise this objection at this juncture. Typically, a party who challenges the existence of an agreement to arbitrate must apply to a court for a stay of arbitration within 20 days of receiving a notice to arbitrate

(see CPLR 7503 [c]). However, "a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate" may seek vacature of an award based on a lack of "a valid agreement to arbitrate" or that "the agreement to arbitrate had not been complied with" (see CPLR 7511 [b] [2] [i], [ii]).

Feeney argues that she did not participate in the arbitration, although the arbitrators found that she did. Nevertheless, the issue of whether the parties agreed to submit the question of the Dispute's arbitrability to arbitration, in this case, may be reviewed by the court.

The parties agree that arbitration disputes which arise out of employment in the securities markets are governed by the Federal Arbitration Act (FAA). The United States Supreme Court has held that, under FAA, where a party "did not clearly agree to submit the question of arbitrability to arbitration, ... the arbitrability of the ... dispute [is] subject to independent review by the courts" (*First Options of Chicago, Inc. v Kaplan*, 514 US 938, 947 [1995]; see also *Matter of Lubin & Schlesinger, Inc. [Scheinberg]*, 168 Misc 2d 291 [Sup Ct, NY County], *revd on other grounds*, 234 AD2d 203 [1st Dept 1996]).

The Notes' arbitration clause provides:

[a]ny controversy or claim arising out of or relating to this Note shall be settled by arbitration in accordance with the rules of the National Association of Securities Dealers, Inc. and judgment upon the award entered by the arbitrator(s) may be entered

in any court having jurisdiction thereof (see Petition, exhibits 4, 5). Accordingly, Feeley clearly agreed to arbitrate a dispute pertaining to the Notes. She contends that she did not agree to arbitrate before FINRA. However, as Morgan Stanley argues, FINRA is a new name for NASD, after NASD assumed "the member firm regulation and enforcement functions" previously administered by NYSE Regulation, Inc., a wholly-owned subsidiary of New York Stock Exchange LLC (*Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 14 n [2008]; see also 09/04/09 Brodheron Reply Aff., exhibit 1, NASD Proposed Rule Change, § 1 [NASD changed its name to FINRA]; 08/10/09 Brodheron Aff., exhibit 2, 08/01/07 Federal Register at 42191 [the Security and Exchange Commission notes that FINRA is NASD's new name]). Additionally, it appears that FINRA's arbitration forum continued to follow the same rules followed by NASD, and Feeley agreed to arbitrate in accordance with NASD's rules (see Petition, exhibits 4, 5). Accordingly, FINRA had jurisdiction over the parties and the dispute.

Feeley next argues that the Award should be vacated, pursuant to CPLR 7511 (b) (1) (iii), because it violates a public policy against enforcement of an unconscionable, illusory contract, which here also violates tax withholding obligations.

Judicial intervention on public policy grounds falls within a narrow exception to broad powers of arbitrators to

fashion fair determinations of the parties' rights and remedies (see e.g. *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 6-7 [2002]). A court will not vacate an award where doing so would require preliminary fact finding (see e.g. *Matter of Town of Haverstraw [Rockland County Patrolmen's Benevolent Assn.]*, 65 NY2d 677, 678 [1985]). In view of Feely's argument that the notes represent camouflaged bonus payments or forgivable loans, which Morgan Stanley disputes,² the court would have to engage in prohibited fact finding. Finally, nothing on the face of the Award indicates that it enforced an unconscionable, illusory contract, violative of tax regulations (see e.g. *Matter of Metrobuild Assoc., Inc. v Nahoum*, 51 AD3d 555, 557 [1st Dept 2008]). Feeley's arguments that FINRA's new proceedings for promissory notes favor employers, and that FINRA unjustifiably suspended her registration, are unavailing.

Morgan Stanley's Motion to Dismiss Counterclaims

As Morgan Stanley argues, the Award has the effect of claim and issue preclusion with respect to the disputes over the Notes (see CPLR 3211 [a] [5]; see also *Waverly Mews Corp. v Waverly Stores Assoc.*, 294 AD2d 130, 132 [1st Dept 2002]).

² Feely made one installment payment of \$13,207.85 on the First Note to Morgan Stanley before she left its employ (see 09/02/09 Feely Aff., A51-52).

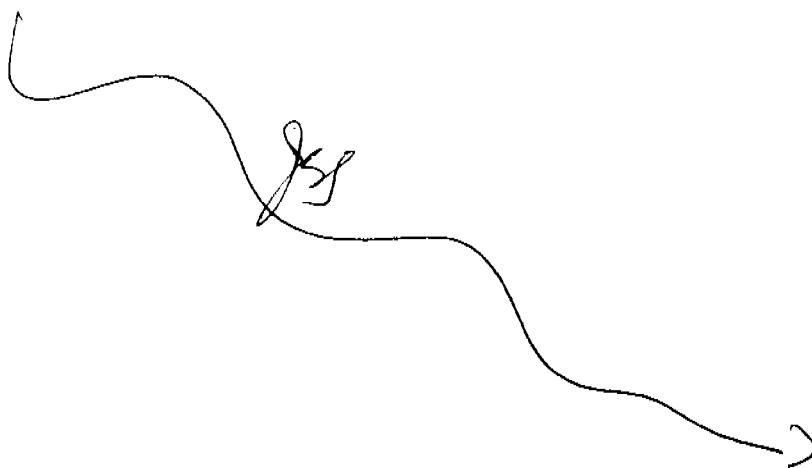
Feeley should have presented the arguments which she now asserts in her counterclaims at the hearing. In any event, her decision not to participate in the hearing (see Award, at 2) constitutes a waiver of her right to raise these issues here.

CONCLUSION

For the reasons set forth above, Morgan Stanley's motion is granted and Feeney's counterclaims are dismissed, and it hereby is

ORDERED that the motion of petitioner Morgan Stanley & Co. Inc. to dismiss respondent Michelle Feeley's counterclaims (motion sequence no. 002) is granted and counterclaims are dismissed; and it is further

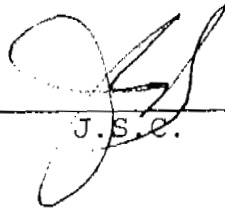
ORDERED that the petition of petitioner Morgan Stanley & Co., Inc. to confirm the arbitration award (motion sequence no. 001) is granted; and it is further

A large, stylized handwritten flourish or signature, possibly reading 'J.S.', is written in black ink. It starts with a small loop on the left, then curves down and to the right, ending in a larger loop on the right side.

ORDERED and ADJUDGED that petitioner Morgan Stanley & Co., Inc, having an address at _____, have judgment and recover against respondent Michelle Feeley, having an address at 344 East 63rd Street, Penthouse A, New York, New York 10065, in the amount of \$154,349.83, plus interest at the rate of \$18.50 per day from May 5, 2009, as computed by the Clerk in the amount of \$ _____, together with attorney's fees in the amount of \$46,304.95, costs and disbursements in the amount of \$ _____ as taxed by the Clerk, for the total amount of \$ _____, and that the petitioner have execution therefor.

Dated: January 5, 2010

ENTER:



 J. S. C.
 JAMES S. SOLOMON

UNFILED JUDGMENT
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