

Matter of Wear v Forex Capital Mkts. LLC

2011 NY Slip Op 30389(U)

February 17, 2011

Sup Ct, New York County

Docket Number: 113043/2010

Judge: Saliann Scarpulla

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

PRESENT: _____
Justice

PART 19

Boyd WEAR

INDEX NO. 113043/10

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -

Forex CAPITAL MARKETS
LLC

The following papers, numbered 1 to _____ 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

FILED

FEB 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, It is ordered that this motion

motion and cross-motion are decided in accordance
with accompanying memorandum decision.

Dated: 2/17/11

Saliann Scarpulla
J.S.C.
SALIANN SCARPULLA

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
In the Matter of the Petition of BOYD WEAR,

Petitioner,

For an order pursuant to Section 3102(c) of the
Civil Practice Laws and Rules to compel
pre-action disclosure from

Index No.:113043/2010
Submission Date: 11/17/10

FOREX CAPITAL MARKETS LLC,

DECISION AND ORDER

Respondent.

----- X

For Petitioner:
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Roger J. Bernstein
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New York, NY 10017

For Respondent:
Miller Korzenik Sommers LLP
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Papers considered in review of this petition for pre-action disclosure and cross motion to compel arbitration

| | |
|--------------------------------------|----|
| Order to Show Cause | 1 |
| Verified Petition | 2 |
| Mem of Law in Support | 3 |
| Notice of Cross Motion | 4 |
| Aff in Opp and Support | 5 |
| Mem of Law | 6 |
| Aff in Opp to Cross Motion | 7 |
| Mem of Law | 8 |
| Reply Aff | 9 |
| Reply Mem of Law | 10 |

FILED
FEB 18 2011
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HON. SALIANN SCARPULLA, J.:

Petitioner Boyd Wear (“Wear”) initiated this special proceeding to compel pre-action disclosure pursuant to CPLR 3102(c) from respondent Forex Capital Markets LLC (“FXCM”) by service and filing of an order to show cause and verified petition.

contacted FXCM and as a result received an account summary with comments on it.¹ Wear asserts that from the comments, he “understands that FXCM takes the position that the large losses in [his] account and that were realized on and after February 24, 2009 were not within FXCM’s control, but were the result of a prior trading strategy of ‘doubling down’ put in place by GCM and that by February 24, 2009, it was too late for me or anyone else to do anything about those losses.”

Wear asserts that he does not understand what he presumes to be FXCM’s position, nor does he know why FXCM did not call him between February 24, 2009 and March 3, 2009. Wear initiated this special proceeding to seeking pre-action disclosure to identify the names of those responsible for the trades and an explanation as to why he was not contacted by FXCM between February 24, 2009 and March 3, 2009, so that he may have the information to frame a complaint.

FXCM opposes the petition, and cross moves to compel arbitration pursuant CPLR 7503(a) and section 4 of the Federal Arbitration Act (“FAA”), 9 U.S.C. §4, and to dismiss the petition, or in the alternative stay the petition pending arbitration, pursuant to CPLR 7503(a) and section 3 of the FAA, 9 U.S.C. §3. In support, FXCM points to the arbitration provision contained in the Client Agreement between Wear and FXCM (“Client Agreement”), which Wear refers to as the “account opening agreement.”

¹ Wear indicates that the account summary with comments is attached to the verified petition as “Exhibit D,” however there is no Exhibit D annexed to Wear’s submission.

In particular, the Client Agreement provides as follows:

ARBITRATION AGREEMENT

BY AGREEING TO THIS ARBITRATION PROVISION, TRADER [Wear] MAY BE WAIVING CERTAIN RIGHTS, INCLUDING THE RIGHT TO A JURY TRIAL. TRADER NEED NOT AGREE TO THIS ARBITRATION PROVISION IN ORDER TO OPEN AN ACCOUNT WITH FXCM.

Trader agrees and, by opening one or more accounts for Trader, FXCM also agrees, that any and all disputes, controversies, or claims arising out of this Client Agreement, or the relationship or activities contemplated thereby, including whether or not any such dispute, controversy, or claim is arbitrable, shall be resolved by an Arbitration Panel selected by the National Futures Association ("NFA"), pursuant to the NFA's Code of Arbitration. The award of the NFA Arbitrators, or of the majority of them, shall be final, and judgment upon the award may be entered in any court of competent jurisdiction.

FXCM argues that Wear executed the Client Agreement, and separately acknowledged the arbitration provision, and is therefore bound to arbitration any dispute he may have regarding his FXCM trades. FXCM also argues that Wear has failed to meet the burden required to compel pre-action discovery.

In opposition to the cross motion to compel arbitration, Wear argues that pursuant to the NFA rules and Commodities Futures Tradition Commission ("CFTC") regulation, the arbitration provision contained in the Client Agreement is void. Specifically, Wear argues that the arbitration provision does not conform with CFTC Regulation 166.5(c)(7), 17 C.F.R. §166.5(c)(7), as the typeface of the arbitration provision is not in large, boldface type including certain proscribed cautionary language. Wear also argues that the Client Agreement fails to provide a separate endorsement for the arbitration provision, in violation

of CFTC regulation 166.5, 17 C.F.R. §166.5(c)(2). Wear does not dispute that he executed the Client Agreement, and annexed a copy of the agreement to his verified petition.

In reply, FXCM argues that CFTC Regulation 166.5 was not applicable to over-the-counter forex transactions², the type of transactions at issue here, at the time Wear signed the Client Agreement. FXCM further asserts that, whether the Client Agreement and arbitration provision comply with the NFA Code is a question to be determined by NFA arbitrators.

Discussion

“Because this proceeding arises out of a written agreement to arbitrate a ‘contract evidencing a transaction involving commerce,’ this court will apply federal law.” *In re Engel v. Refco, Inc.*, 193 Misc. 2d 91, 99, n. 8 (Sup. Ct. N.Y. Co. 2002) (citing Federal Arbitration Act, 9 U.S.C. 2; *Singer v. Jeffries & Co., Inc.*, 78 N.Y.2d 76, 82 (1991)).³

Here there are two questions: first, whether there is an arbitrable dispute, and second, whether this Court or an NFA arbitration panel has the authority to determine arbitrability. “Whether a dispute is arbitrable is generally an issue for the court to decide unless the parties clearly and unmistakably provide otherwise.” *Zachariou v. Manios*, 68 A.D.3d 539 (1st Dep’t

² “Forex” is short for “foreign exchange.” As defined in the Client Agreement, Wear opened his account “to speculate and/or purchase and/or sell cash or spot foreign currency . . . through the [over the counter] foreign exchange markets”

³ The purchase or sale of foreign currency is certainly a “transaction involving commerce.” However, the analysis is the same under New York State law. “New York law [] follows the same standard as federal law with respect to who determines arbitrability: generally, it is a question for the court unless there is ‘a clear and unmistakable agreement to arbitrate arbitrability.’” *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 208, n. 1 (2d Cir. 2005) (quoting *Shaw Group, Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115, 121 (2d Cir. 2003)).

2009). The United States Supreme Court observed in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995), “[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration?”

Under *First Options of Chicago*, the Supreme Court provides that when “determining whether parties agreed to arbitrate arbitrability, explaining that subject to an ‘important qualification[,]’ ordinary state law contract principles govern.” *Engel*, 193 Misc. 2d at 100 (citing *First Options of Chicago*, 514 U.S. at 944). The “important qualification” provides that “[courts] should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable evidence that they will do so.’” *First Options of Chicago*, 514 U.S. at 944 (citation omitted). Accordingly, there must be “clear evidence of the parties’ intent to submit the matter to arbitrators.” *Engel*, 193 Mis. 2d at 100.

Here, the language of the arbitration provision makes clear the parties’ intent to leave the question of arbitrability to the arbitration panel. The language provides, in pertinent part, “any and all disputes, controversies, or claims arising out of this Client Agreement, or the relationship or activities contemplated thereby, including whether or not any such dispute, controversy, or claim is arbitrable, shall be resolved by an Arbitration Panel selected by the National Futures Association (“NFA”), pursuant to the NFA’s Code of Arbitration.” This evidences the parties’ clear and unmistakable intent to have the question of arbitrability

determined by the panel of arbitrators. “[W]hen, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator.” *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005). *See also Arrigo v. Blue Fish Commodities, Inc.*, 704 F. Supp. 2d 299, 303 (S.D.N.Y. 2010) (where parties agreed that arbitrator shall have exclusive authority “to resolve any dispute relating to . . . this Agreement . . .,” the arbitrator, and not the Court, should determine arbitrability). As such, the question of arbitrability – including whether or not this arbitration provision complies with the NFA Code and whether any pre-arbitration discovery is warranted – is to be determined by an arbitration panel.

In accordance with the foregoing, it is

ORDERED that the Boyd Wear’s petition for pre-action disclosure is denied as moot; and it is further

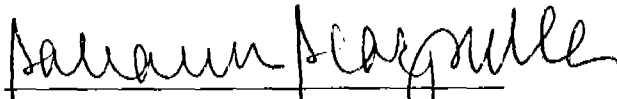
ORDERED that the cross motion of respondent Forex Capital Markets LLC to compel arbitration and dismiss Wear’s petition pending arbitration is granted; and it is further

ORDERED that the parties proceed to arbitration, and that Forex Capital Markets LLC serve a copy of this order on the arbitral tribunal within thirty (30) days of the date of this order.

This constitutes the decision and order of the Court.

Dated: New York, New York
February 17, 2011

ENTER:



Hon. Saliann Scarpulla, J.S.C.

FILED
FEB 18 2011
NEW YORK
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