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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

Index Number : 603825/2003
WALZER, ANDREW
VS.
MURIEL SIEBERT & CO., INC.
SEQUENCE NUMBER : 002
VACATE

INDEX NO. 603825/03
MOTION DATE 1/6/11
MOTION SEQ. NO. 002

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).

The following papers, numbered 1 to 33 were read on this motion to vacate arbitration award

Notice of Motion— "Preliminary Draft Memo" dated 3/29/10–Exhibit–Affidavit of Service	No(s). 1-2
Affirmation in Opposition–Exhibits 1-15—Affidavit of Service; Memo of Law in Opposition; Transcripts from Arbitration Hearings	No(s). 3-4
Response to Defendant's Affirmation in Opposition to Motion–Exhibits ["Attach 1", "Attach 2"]	No(s). 5
Pltf's Response to Defdt's 'Memo of Law' [Plaintiff's Second Response]; Affidavits of Service	No(s). 6; 7-8
Replying Affirmation in Opposition to Plaintiff's Motion to Vacate— Exhibits16-33—Affidavit of Service	No(s). 9-10
Pltf's Response to: Defdt's 'Memo of Law'–Exhibits 1-13 [Plaintiffs' Third Response]; Additional Papers	No(s). 11; 12-14
Affirmation of Hiram D. Gordon–Exhibits 34-37; Memorandum in Response	No(s). 15
Plaintiff's Exhibits (separately submitted in numbered manila file folders)	No(s). 16- 32
Affidavit of Michael Shannon regarding Plaintiff's November 22, 2010 filings –Exhibits A-E--Affidavit of Service	No(s). 33–34

Upon the foregoing papers, plaintiff's motion is decided in accordance with the annexed memorandum decision, order, and judgment.

Dated: 4/12/11
New York, New York

, J.S.C.

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

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

HON. MICHAEL D. STALLMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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).

ANDREW WALZER,

Plaintiff,

- against -

Index No. 603825/2003

MURIEL SIEBERT & CO., INC.,

Decision, Order and Judgment

Defendant.

HON. MICHAEL D. STALLMAN, J.:

Plaintiff Andrew Walzer moves to vacate an arbitration award dated December 9, 2009 from the Financial Industry Regulatory Authority (FINRA). Muriel Siebert & Co., Inc. opposes the motion.

BACKGROUND

On December 8, 2003, Walzer commenced this action. Walzer essentially asserts that, from July 2002 through October 2002, Muriel Siebert & Co., Inc. applied improper margin requirements to his account with Muriel Siebert & Co., Inc., higher than the margin requirements set by the New York Stock Exchange (NYSE). According to Walzer, Muriel Siebert & Co., Inc. insisted that Walzer maintain funds in his account with defendant equal to 35% of the marginable value of the securities held in it, whereas NYSE's rules allegedly set a 25% margin maintenance requirement. Walzer asserted that he offered to deliver additional collateral into his account to meet the margin requirement, which was rejected. Complaint ¶ 10 (c). According to Walzer, Muriel Siebert & Co., Inc. allegedly sold, or allegedly forced Walzer to sell, various securities during a down market to maintain Muriel Siebert & Co. Inc.'s 35% margin requirement.

Meanwhile, on November 17, 2004, Walzer commenced an action against Muriel Siebert &

Co., Inc., National Financial Services LLC, and other individuals in the United States District Court for the District of New Jersey. Gordon Opp. Affirm., Ex 6. The defendants in the New Jersey federal action moved to compel Walzer to arbitration.

In this action, Muriel Siebert & Co., Inc. also sought an order compelling Walzer to resolve the dispute through arbitration based on a margin account application and agreement between the parties. By decision and order dated August 11, 2004, Justice Tolub directed the parties to appear, with any pertinent witnesses, for a hearing "on the issue of fraud/validity of the arbitration agreements at issue." Justice Tolub apparently held a hearing on October 25, 2004. Plaintiff's Exhibit 19 [Hearing Tr.]. At the hearing, Walzer introduced into evidence a margin application dated May 2, 1992 with Muriel Siebert & Co., Inc., which appeared to bear Walzer's signature. Hearing Tr. at 43. Although Walzer did not recall signing that 1992 application, counsel for Muriel Siebert & Co., Inc. stated that Walzer's former counsel had stipulated that Walzer signed the 1992 application. *Id.* at 47, 52.

Later in the hearing, Walzer questioned a witness for Muriel Siebert & Co., Inc. about a 1996 agreement that Walzer contended was a forgery. Walzer apparently believed that if he could prove that the 1996 agreement was forgery, then the 1992 agreement would be invalidated as well, relying on *Meyer v Huneke* (55 NY 412 [1874]). Walzer stated at the hearing, "It [*Meyer v Huneke*] states that where a contract is evidenced by several writings, and if one of them is – has been fundamentally altered, they're all thrown out. It invalidates all of them." Hearing Tr. at 164.

By decision dated December 21, 2004, Justice Tolub granted Muriel Siebert & Co., Inc.'s cross motion to compel arbitration, based on the 1992 margin account application and agreement. The decision quoted a section printed above the signature line of the 1992 application and

agreement:

> "I represent that I have read the terms and conditions (on the reverse side of this document) as currently in effect and agree to be bound by such terms as may be amended from time to time. This account is governed by a pre-dispute arbitration clause which is enclosed. I acknowledge receipt of the pre-arbitration clause."

Gordon Opp. Affirm., Ex 5 at 2. The decision did not quote the terms of the pre-dispute arbitration clause referenced in the 1992 margin application and agreement. As to Walzer's argument that "his signature on a subsequent 1996 account [agreement] is a forgery and that this somehow taints the enforcement of the 1992 agreement to arbitrate" (*id.*), Justice Tolub ruled, "as a business major, Mr. Walzer knew or should have known that if the 1996 agreement . . . was a forgery and voided, the 1992 agreement would be in full force and effect, which would of course compel arbitration." *Id.* at 2-3.

In conclusion, Justice Tolub ruled, "Accordingly, the cross-motion of the defendant to compel arbitration is granted and the complaint is dismissed. Settle order on notice." Gordon Opp. Affirm., Ex 6, at 3. Justice Tolub signed an order on January 27, 2005. The order, however, did not provide for dismissal of the complaint, but rather stayed the action "pending the conclusion of the arbitration between plaintiff and defendant of the claims set forth in plaintiff's Verified Complaint." Plaintiff's Third Response, Ex 1. A portion of the order was blackened out, though it is still somewhat legible on the copy submitted to this Court. The crossed out portion states, "The Court having found that plaintiff Andrew Walzer was aware of and consented to arbitration in his 1992 margin account application and agreement with defendant Muriel Siebert & Co. . . ." *Id.*

On June 30, 2005, the federal district court (Debevoise, J.) dismissed Walzer's federal action. *See* Gordon Opp. Affirm., Ex 7. On appeal, the United States Court of Appeals for the Third Circuit

affirmed in part, and reversed in part, Judge Debevoise's decision. The Court of Appeals stated, "Although we agree with the District Court that Walzer's state claims are barred by the New York judgment compelling arbitration, we disagree regarding whether the New York judgment mandates arbitration of his Exchange Act claims." Gordon Opp. Affirm., Ex 8. On remand to the district court, United States Magistrate Judge Shipp stayed the federal action. Gordon Opp. Affirm., Ex 9.

Meanwhile, Walzer signed a submission agreement on July 16, 2008, thereby submitting to arbitration before FINRA all the matters set forth in a statement of the claim. Gordon Opp. Affirm., Ex 34. Walzer's statement of claim, dated July 16, 2008 (*see* Gordon Opp. Affirm., Ex 10), was purportedly filed with FINRA on July 23, 2008. *See* Gordon Opp. Affirm., Ex 1, at 1. Muriel Siebert & Co., Inc. and the two individuals named in the arbitration filed a motion to dismiss on or about October 20, 2008. *Id.* National Financial Services LLC, which was named as a respondent in the arbitration proceedings, also filed a motion to dismiss on or about October 20, 2008. *Id.* FINRA arbitration hearings were held before three arbitrators on November 4, 2009 and December 17, 2009.

The arbitrators issued an award dated December 23, 2009. According to the award, Walzer asserted causes of action for

> "fraudulent production of certain documents, withholding of other agreements, fraud, forgery, misrepresentations, omissions, breach of fiduciary duty, breach of contract, negligence, failure to produce records, failure to supervise, violation of State anti-fraud and general business laws, violation of NASD & NYSE margin rules, illegal conversion, criminal possession and assertion of a forged agreement, and false statement of credit terms."

Gordon Opp. Affirm., Ex 1, at 2. The award also recites that the full panel heard in-person arguments on the respondents' motions to dismiss. *Id.* at 2-3. The award states, in pertinent part:

> "The Statement of Claim, submissions, documents, and Claimant's oral presentations failed to support his claim for damages. Even if the claim were meritorious, had

> Claimant mitigated damages within a reasonable period of time there would not have been any monetary loss. After due deliberation, the Panel granted Respondents' Motions and dismissed Claimant's claims with prejudice and on the merits."

Id. at 3. The arbitrators dismissed Walzer's claims in their entirety and dismissed the counterclaim of respondent National Financial Services LLC in its entirety. *Id.* The award also states, "Any and all relief not specifically addressed herein, including punitive damages, is hereby denied." *Id.*

The defendants in the federal district court action moved to confirm the arbitration award and moved to dismiss Walzer's claims in the federal district court action. By an opinion dated August 10, 2010, Judge Debevoise denied the defendants' motions to confirm the arbitration award, reasoning, "Since all parties acknowledge that the FINRA panel's award was issued in the Southern District of New York, this Court is without power under the FAA to confirm that award." *Walzer v Muriel Siebert & Co., Inc.*, 2010 WL 3174458, *5 (D NJ 2010); *see also* Shannon Aff., Ex A. Judge Debevoise granted the defendants' motions to dismiss Walzer's federal claims under the Exchange Act, and those claims were dismissed with prejudice. *Id.* at *10. Walzer moved for reconsideration of Judge Debevoise's decision, and his motion was denied. *Walzer v Muriel Siebert & Co., Inc.*, 2010 WL 4366197, *14 (D NJ 2010); *see also* Shannon Aff., Ex B.

ANALYSIS

"An arbitration award may be vacated where there has been 'corruption, fraud or misconduct in procuring the award,' the arbitrator ' exceeded his [or her] power' or where there was a 'failure to follow the procedure of this article' (CPLR 7511 [b] [1] [i], [iii], [iv])." *Matter of Henneberry v ING Capital Advisers, LLC*, 10 NY3d 278, 283 (2008).

> "An award in [a FINRA]arbitration subject to the [Federal Arbitration Act], such as this, can be vacated on the ground of 'manifest disregard of the law.' 'But manifest disregard of the law is a severely limited doctrine. It is a doctrine of last resort limited

> to rare occurrences of apparent egregious impropriety on the part of the arbitrators ... To modify or vacate an award on the ground of manifest disregard of the law, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case."

McLaughlin, Piven, Vogel Securities, Inc. v Ferrucci, 67 AD3d 405, 406 (1st Dept 2009).

"It is a bedrock principle of arbitration law that the scope of judicial review of an arbitration proceeding is extremely limited. Indeed, '[c]ourts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined.'" *Frankel v Sardis*, 76 AD3d 136, 139 (1st Dept 2010) (internal citations omitted). "Therefore, the 'showing required to avoid summary confirmation of an arbitration award is high,' and a party moving to vacate the award has the burden of proof." *U.S. Elecs., Inc. v Sirius Satellite Radio, Inc.*, 73 AD3d 497, 498 (1st Dept 2010).

Many of Walzer's contentions can be reduced to three main contentions: (1) the arbitrators refused to allow him to present arguments and evidence that he wished to present at the hearings, and refused to compel the respondents to produce discovery that he sought; (2) the arbitrators entertained the respondents' motion to dismiss, contrary to Rule 12504 of the FINRA Code of Arbitration Procedure for Customers Disputes; and (3) the arbitrators' award lacked any detailed analysis or explanation of the causes of action that he submitted to arbitration. Based on those contentions, Walzer concludes that the arbitrators were biased or partial, that the arbitrators had denied him basic due process, that they manifestly disregarded federal and state law, and that they violated procedure.

The Purported Lack of Explanation

"[I]t is well established that an arbitrator's failure to set forth his findings or reasoning does

not constitute a basis to vacate an award." *Berman v Congregation Beth Shalom*, 171 AD2d 637, 637 (2d Dept 1991). Arbitrators are not required "to make detailed factual findings or specify the formula relied upon to reach their conclusions." *Matter of RRN Associates (DAK Elec. Contr. Corp.)*, 224 AD2d 250 (1st Dept 1996). Thus, the fact that the award did not provide a detailed explanation or analysis about dismissing each and every cause of action in Walzer's statement of claim does not constitute a basis for vacating the award. The law does not require arbitration awards to resemble the kind of extensive analysis of some judicial decisions that Walzer apparently expected to see.

> "An arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached.' Indeed, we have stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice."

Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d 471, 479 (2006) ; *ConnTech Dev. Co. v Univ. of Connecticut Educ. Props., Inc.*, 102 F3d 677, 686 (2d Cir 1996) ("Thus, as long as some ground for the arbitrators' award can be inferred from the facts, the award should be confirmed.").

Here, the award states, "Even if the claim were meritorious, had Claimant mitigated damages within a reasonable period of time there would not have been any monetary loss." Gordon Opp. Affirm., Ex 1 at 3. During the arbitration hearings, Walzer asserted,

> "I had the ability to meet the margin calls. . . . I - -I had sufficient net worth - - against my house, uh, CDs I tried to pledge. . . . if I had been given this agreement when it was required, as they're now claiming this one, then my actions might well have been different, I'd show it to a lawyer, and said, you know what, you're going to be at risk, make those margin calls, I could have and would have made them."

Arbitration Tr. (12/17/09) at 21. Walzer then argued before the arbitrators that, "even if their [respondents'] position is it's the '92 agreement . . . what I'm pointing out is this shows that they

violated the SEC and NYSE rules by not giving it [the agreement] to me in a timely fashion." *Id.* at 24. One arbitrator asked, "[I]f you wanted to own stocks, why didn't you buy them back the next day? With or without the agreement? If you felt that it was wrong, why didn't you just buy back the stocks and go after them [the respondents] for the difference?" Arbitration Tr. (12/17/09) at 32. Walzer answered, "Um, I felt it was wrong, I tried to get the agreement because in prior years at Siebert I'd been told otherwise . . ." *Id.* Given all the above, the Court is satisfied that the arbitrators offered a "colorable justification for the outcome reached." *Wien & Malkin LLP*, 6 NY3d 471, *supra.*

Although Walzer asserted many causes of action in his statement of claim, the relief requested was the same:

> "That the Defendants compensate for the difference in value of Walzer's securities the defendants illegally or coercively sold without benefit of contract in 2002, vs. the highest intermediate price these securities traded at following their wrongful margin sellouts during the time period the Defendants have continued to falsely maintain forged and/or unlawful agreements control [*sic*] the account, less amounts realized upon forced sale. Such difference is estimated at $1.2 million."

Gordon Opp. Affirm., Ex 10. Walzer also sought attorneys' fees and punitive damages. *Id.* Based on the arbitrators' statements in the hearing transcript and the award, the Court finds that the arbitration award adequately addressed all of Walzer's causes of action in the statement of claim.

To the extent that Walzer believes that the arbitrators erred in determining that Walzer had a duty to mitigate his damages, an error of fact or law is not a basis for vacating the award.

Fraud

Walzer argues that counsel to the respondents in the arbitration perpetuated a fraud upon the arbitration panel by stating, "We do not believe, for example, that this panel should be looking at

whether Mr. Walzer is bound by the 1992 Margin Agreement because five judges have already decided that" (Arbitration Tr. (11/4/09) at 12), and by stating, "As we walk through this, we're going to show you that five judges have already ruled that Mr. Walzer is bound by the 1922 [*sic*] Margin Agreement." *Id.* at 31.

"To vacate an arbitration award on the ground of fraud, a party must establish by clear and convincing evidence the existence of fraud, that the fraud would not have been discoverable upon exercise of due diligence prior to or during the arbitration, and that the fraud materially related to an issue in arbitration." *Imgest Fin. Establishment v Shearson Lehman Hutton*, 172 AD2d 291, 291 (1st Dept 1991). Here, Walzer fails to establish that the purported misstatements about the court decisions constituted fraud upon the arbitrators, because the arbitrators did not need to rely upon the purported misstatements; they had the opportunity to exercise due diligence during the arbitration to read the court decisions for themselves. Indeed, one arbitrator stated, "We read the court opinion." Arbitration Tr. (11/04/09) at 107.

Walzer also contends that Muriel Siebert & Co., Inc. is misleading the Court, in that it submitted Justice Tolub's decision but not the order, and that it did not enclose the text of FINRA Rule 12504, but commentaries about the effective date of FINRA Rule 12504. However, the Court is not persuaded that Muriel Siebert & Co., Inc. concealed any pertinent information from the Court in determining whether the arbitration award should be vacated. In this Court's opinion, the differences in the parties' submissions reflect the parties' differing views as to what factual and legal issues must be considered when deciding whether the award should be vacated, and as to what evidence would be considered relevant to those issues.

Misconduct, Partiality, & Due Process

Based on the transcripts of the arbitration hearings, Walzer apparently argued before the arbitration panel that Muriel Siebert & Co., Inc. had no legal basis to insist upon the 35% margin maintenance requirement. Walzer contended before the arbitrators, the way he did in the hearing before Justice Tolub, that a 1996 agreement purportedly between Walzer and Muriel Siebert & Co., Inc. was a forgery. It would appear that Walzer pressed for discovery about, among other things, the arbitration clause that was purportedly referenced in the 1992 margin account application and agreement.

The chairperson of the arbitration panel stated,

> "Let me direct you, Mr. Walzer, to the Motion to Dismiss. The Motion to Dismiss is on the merits. That has nothing to do with discovery. We're talking about the merits of the case. Unless you deny that there was a margin account and that things were sold and that it was not proper, that's what we're here to determine, not whether there is a 1991, 1992, 1996 forged agreement, whatever. It has already been determined that it's arbitrable. We're here at an arbitration. I don't want to see discovery at this point."

Arbitration Tr. (11/4/09) at 104.

At the conclusion of the first hearing day, the chairperson stated, "We don't want to hear about a 92 agreement or a 96 forgery. We don't want to hear about that. We only want to hear what was done improperly with your account, and that's what this arbitration is about." Arbitration Tr. (11/4/09) at 116. Walzer responded, "Yes, but part of the merits here is what agreement controls." *Id.* at 137. An arbitrator stated, "It's not. We've read the statement from the court; we don't agree with your interpretation. The courts have found there's a valid margin agreement. That's the ruling of the arbitrators, so that issue is gone. Now we're interested in what they did wrong." *Id.*

Walzer argues that he was denied due process because the arbitrators would not permit him discovery about the agreements and would not let him discuss which agreement controls.

"Arbitrators need only receive evidence that is 'pertinent and material,' and such determination will only be set aside if it deprives a party of a fundamentally fair hearing." *Kaminsky v Segura*, 26 AD3d 188, 189 (1st Dept 2006); *see also* 9 USC § 10 (a) (3).

> "While it is true that Federal courts have expressly held that fundamental unfairness can constitute a ground for vacatur of an arbitration award independent of the four grounds explicitly set forth in section 10 of the statute, fundamental fairness is not to be equated with the full panoply of judicial procedural safeguards and legal 'niceties' of the courtroom. Due process in arbitration means satisfying 'minimal requirements of fairness.' That standard is met when the parties have had adequate notice and opportunity to be heard by unbiased decision makers. Fundamental unfairness often involves insufficient notice or refusal to receive appropriate evidence."

Matter of McMahan & Co. (Dunn Newfund I), 230 AD2d 1, 4 (1st Dept 1997) (internal citations omitted).

Given that Walzer continued to call for production of the pre-dispute arbitration clause purportedly referenced in the 1992 margin account and application, one might conclude that Walzer disagreed with Justice Tolub's decision. After all, Justice Tolub determined that Walzer and Muriel Siebert & Co., Inc. agreed to arbitrate Walzer's causes of action in this complaint, even though the terms of such an arbitration clause were not set forth in the decision. The United States Court of Appeals for the Third Circuit commented, "Siebert [Muriel Siebert & Co., Inc.] did not produce the 1992 arbitration clause in the New York case, and it is unclear what the enclosed arbitration agreement said." Gordon Opp. Affirm., Ex 8, at 6. The absence of the terms of the pre-dispute arbitration clause led Walzer to contend before the arbitrators, "I don't believe it's true at all that we're proceeding here on any 1992 arbitration clause. And as you've already heard, the United States Appeals Court said the New York judge never found one - - refused to ever show us." Arbitration Tr. (11/4/09), at 93.

The rulings in Justice Tolub's decision, which was appealable, are now law of the case. "Under the law of the case doctrine, parties or their privies are 'preclude[d from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue.'" *Briggs v Chapman*, 53 AD3d 900, 901 (3d Dept 2008). "[A] court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction." *Matter of Dondi v Jones*, 40 NY2d 8, 15 (1976). Thus, this Court may not entertain any arguments that seek to relitigate Justice Tolub's rulings.

The arbitrators did not wish to revisit Justice Tolub's decision, which resulted in limiting those issues that the arbitrators deemed pertinent and material. Thus, the arbitrators' denial of Walzer's discovery requests reflect their determination that the discovery sought was not pertinent and material, which was "at most unreviewable error of law and did not constitute misconduct. . . ." *Matter of Merrill Lynch, Pierce Fenner & Smith (Dougherty & Co.–Lazard & Laidlaw—Matthews & Wright)*, 198 AD2d 181 (1st Dept 1993). "Errors of fact or law do not demonstrate partiality." *Lee v Omni Berkshire Place Hotel*, 302 AD2d 286, 287 (1st Dept 2003).

As discussed above, the arbitrators reasoned that Walzer failed to mitigate any damages that may have flowed from the alleged sale of Walzer's securities to meet the margin calls of Muriel Siebert & Co., Inc. The arbitrators reasoned that this failure to mitigate was fatal to Walzer's claim, even if Walzer could establish that Muriel Siebert & Co., Inc. wrongfully sold or forced Walzer to sell securities. Under these circumstances, that the arbitrators did not wish to receive Walzer's evidence as to whether Muriel Siebert & Co., Inc. wrongfully sold for or forced him to sell securities did not amount to fundamental unfairness justifying vacatur of the award. The arbitration hearing transcripts indicate that the arbitrators gave Walzer an opportunity to be heard on the issues that they

felt were material as to whether he could recover against Muriel Siebert & Co., Inc., i.e., why Walzer did not repurchase all the stock that he claimed was either wrongfully sold or wrongfully forced to sell.

Under these circumstances, the Court does not find that the arbitrators committed misconduct or denied Walzer basic due process.

Procedural Irregularities

CPLR 7511 (b) (iv) provides that a procedural violation a ground for vacating an award only if it is a "failure to follow the procedure of this article," i.e., CPLR Article 75. CPLR 7511 (b) (iv). Thus, neither the purported violation of FINRA Rule 12504, the purported violation of 22 NYCRR 208.40,[1] nor the purported violation of arbitration rules of New Jersey constitutes a procedural defect that is a ground under CPLR 7511 to vacate the award.

To the extent Walzer argues that the purported violation of FINRA Rule 12504 demonstrated that the arbitrators exceeded their powers, "New York courts have uniformly held that an arbitrator exceeds his powers only when he ignores specific limitations on the powers delegated to him in the arbitration clause or he gives a completely irrational construction to the provisions of the parties' agreement, thereby effectively rewriting it" *Fishman v Roxanne Mgt.*, 24 AD3d 365, 366 (1st Dept 2005). Because the parties have not submitted the terms of the arbitration clause for the record, it cannot be determined whether the FINRA Code of Arbitration Procedure for Customer Disputes was part of the arbitration clause, and thus a specific limitation on the powers delegated to the arbitrators. The parties have not cited any cases where a FINRA arbitration award was vacated based on either

[1] The Court notes that 22 NYCRR 208.40 applies only to an arbitration program established by the Chief Administrator of the Courts. An arbitration before FINRA is not an arbitration program established by the Chief Administrator of the Courts.

violations of the FINRA Code of Arbitration Procedure for Customer Disputes (the Customer Code), or violations of the FINRA Code of Arbitration Procedure for Industry Disputes (the Industry Code).

Assuming, for the sake of argument, that the Customer Code constitutes a specific limitation on the powers of the arbitrators, Walzer has not demonstrated that the arbitrators violated FINRA Rule 12504. As Walzer points out, the Customer Code "applies to claims filed on or after April 16, 2007." Plaintiff's Third Response, Ex 7. But Muriel Siebert & Co., Inc. points out that Rule 12504 did not become effective, and therefore did not become part of the Customer Code, until February 23, 2009. Gordon Opp. Affirm., Ex 11 [FINRA Regulatory Notice]. In anticipation of the adoption of Rule 12504, FINRA imposed a moratorium on filing motions to dismiss, effective from January 23, 2009 until February 23, 2009. *Id.* However, the FINRA Regulatory Notice states, in pertinent part:

> "The moratorium will not apply to motions to dismiss filed prior to the date of this *Notice*. Arbitrators may consider and act on motions filed prior to the date of the *Notice*, using the current procedures established for motions under the Codes, until the effective date of the new rules."

Id. According to the arbitration award, Muriel Siebert & Co., Inc. filed its motion to dismiss Walzer's claims in the arbitration proceeding on October 20, 2008, which was prior to the effective date of the moratorium. *See* Gordon Opp. Affirm., Ex 1. Thus, it appears that the moratorium on motions to dismiss did not apply to motions to dismiss filed in the FINRA arbitration. In any event, Rule 12413 of the Customer Code states, "the panel has the authority to interpret and determined the applicability of all provisions under the code. Such interpretations are final and binding upon the parties." Gordon Opp. Affirm., Ex 27. Therefore, Walzer has not demonstrated that the arbitrators violated FINRA Rule 12504 in entertaining the motions to dismiss.

Walzer's remaining arguments in support of vacating the award are either without merit or unavailing. For instance, contrary to Walzer's assertion, Muriel Siebert & Co., Inc. has demonstrated that the arbitrators took the oath required under CPLR 7506 (a). *See* Gordon Affirm., Ex 37. In another example, Walzer's belief that the complaint was "swept under the rug . . . for an old influential NYSE member, Ms. Siebert" (Plaintiff's Third Response, at 11) is nothing more than speculation.

CONCLUSION

Walzer did not meet his high burden of proof that grounds exist for vacating the FINRA award dated December 9, 2009. Therefore, his motion is denied. CPLR 7511 (e) provides that, "upon denial of a motion to vacate or modify, it [the court] shall confirm the award."

Although National Financial Services LLC and others were named as respondents to the arbitration proceeding, the award is confirmed only between Walzer & Muriel Siebert & Co., Inc., because National Financial Services, LLC and the others are not parties to this action, and they were not personally served with Walzer's motion to vacate the award.

Accordingly, it is hereby

ORDERED that plaintiff's motion to vacate the arbitration award is denied; and it is further

ADJUDGED that the award is confirmed between plaintiff Andrew Walzer and defendant Muriel Siebert & Co., Inc.

Dated: April 12, 2011
New York, New York

ENTER:

J.S.C.

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).

15

HON. MICHAEL D. STALLMAN