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

PRESENT : DONNA M. MILLS **PART** 58
Justice

THE IRINA ARONSON IRREVOCABLE TRUST,

Petitioner,

-v-

TOD BRETTON,

Respondent.

INDEX NO. 100118/11

MOTION DATE

MOTION SEQ. NO. 001 & 002

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion to _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits– Exhibits	2
Replying Affidavits	3

CROSS-MOTION: _____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 7/12/11

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ___ NON-FINAL DISPOSITION

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).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

THE IRINA ARONSON IRREVOCABLE TRUST,

Petitioner,

Index No.: 100118/2011

-against-

TOD BRETTON,

Respondent.

TOD BRETTON,

Petitioner,

Index No.: 101178/2011

-against-

THE IRINA ARONSON IRREVOCABLE TRUST,

Respondent.

DONNA MILLS, J.:

Pro se petitioner The Irina Aronson Irrevocable Trust (Aronson Trust) moves for an order, pursuant to CPLR 7510, confirming a November 2010 Financial Industry Regulatory Authority (FINRA) arbitration award against pro se respondent Tod Bretton (Bretton) in the amount of $175,000, plus 9% interest from March 23, 2007. The Aronson Trust also seeks to recoup the $300.00 filing fees paid to FINRA and the $305.00 paid in fees for this action. Bretton moves, in a separate action and with a separate index number, for an order pursuant to CPLR 7511, vacating the arbitration award. Bretton also moved, in response

to petitioner's action, for an order to dismiss.

BACKGROUND AND FACTUAL ALLEGATIONS

Nonparty Prestige Financial Center, Inc. (Prestige) is a full-service broker dealer who had been providing the Aronson Trust with investment advice since 1995. In 2007, the Aronson Trust received financial advice from Bretton, who, at the time, was the chief compliance officer for Prestige. At some point, the Aronson Trust's accounts were maintained by nonparty Friedman Schnaier Asset Management, LLC d/b/a Friedman Schnaier & Associates (FSA), through Prestige. FSA is a minority shareholder in Prestige.

In early 2007, Bretton advised the Aronson Trust to provide $250,000.00 in financing to the Paivis Corporation (Paivis), which was a penny-stock company. Allegedly, Bretton demanded compensation from Paivis for the transaction, without informing the Aronson Trust. The Aronson Trust further alleges that when Paivis did not want to meet Bretton's demands, Bretton threatened Paivis by misrepresenting the Aronson Trust's interests. In brief, allegedly due to Bretton and others' actions, Paivis refused to deliver the Paivis shares to the Aronson Trust, and filed an interpleader action in Colorado against the Aronson Trust. The Aronson Trust believes that, as a direct result of Bretton's conduct, it has been mired in costly litigation with Paivis.

[* 4]

In December 2008, the Aronson Trust filed a claim with FINRA against Prestige, FSA, and Bretton, initiating arbitration. The Aronson Trust sought $250,000.00 in damages and any other appropriate damages. The Aronson Trust claimed that Bretton, Prestige and FSA's conduct constituted:

> 1) a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder; 2) a violation of Section 36b-29(a) of the Connecticut Securities Act; 3) breach of fiduciary duty; 4) negligence and failure to supervise; 5) negligent misrepresentation, and 6) common law fraud.

Statement of Claim, at 11.

Bretton, Prestige and FSA, together, answered the claim and denied any wrongdoing. FSA alleged that the Aronson Trust inappropriately named it as a party, under the misinformation that it was a d/b/a of Prestige. Counsel for the three parties requested the following:

> 1) That the claims as against them be dismissed in their entirety;
> 2) That an Order of Expungement Issue for Respondent Bretton;
> 3) That the costs of the hearing not be held against Respondents;
> 4) And for any other just and equitable relief not specifically pled.

Statement of Answer, at 10.

In February 2010, the Aronson Trust settled with Prestige for $75,000.00 and subsequently withdrew its FINRA claim against Prestige. The Aronson Trust states that Bretton was informed about the mediation prior to the settlement. Bretton denies

receiving any notification about the settlement. Also in February 2010, Bretton received a letter that the arbitration between the parties and the Aronson Trust was being adjourned until further notice.

Shortly afterwards, Bretton was suspended as a member of FINRA. Bretton claims that he requested a hearing on the matter in February 2010. However, he also writes that, in April 2010, after being advised by counsel, he "regretfully" signed an agreement with FINRA that barred him from the industry. Bretton Affidavit, ¶ 14.

A hearing on the Aronson Trust's claim was held over the course of August 18, 19, 20, and 25, 2010. Bretton did not appear on the first day of the hearing. The next day, FSA's counsel spoke to Bretton and advised him that the hearing had begun. Bretton claims that he was never told about the new dates of the hearing, and that he would not be able to retain counsel on such short notice. He claims to have called FINRA and explained the situation. The hearing continued despite Bretton's absence.

The Aronson Trust attaches a letter from FINRA, that was written at the request of the Aronson Trust. The letter confirms that Bretton received a mailed notice of the August 2010 hearings.

On November 3, 2010, the arbitration panel issued their

award, in which they determined that Bretton was liable to the Aronson Trust for damages. The award sets forth the following:

> After considering the pleadings, the testimony and evidence presented at the hearing, and post hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:
> 1. Bretton is liable for and shall pay to Claimant compensatory damages in the amount of $175,000.00 plus interest at the rate of 9% per annum from March 23, 2007 until the award is paid.
> 2. Bretton is liable for and shall pay to Claimant $300.00 to reimburse Claimant for the non-refundable portion of the filing fee previously paid to FINRA Dispute Resolution.
> 3. Bretton's request for expungement is denied.
> 4. Any and all relief not specifically addressed herein, including punitive damages, is denied.

Aronson Trust, Exhibit A, at 3.

Bretton was also obligated to pay $9,000.00 for the cost of the hearings. The other parties were also assessed member fees for the hearings. FSA did not have to pay anything other than procedural costs for the arbitration.

With respect to Bretton's lack of attendance at the hearings, the panel stated:

> Respondent Bretton did not appear at the hearings. The Panel determined that Bretton received due notice of the August 18, 19, 20 and 25, 2010 hearings, and that the hearings would proceed without Bretton present, in accordance with the Code of Arbitration Procedure (the "Code").

Id.

The arbitration panel consisted of Robert Goldstein, Wallace Anthony Showman and William Crowe.

Bretton seeks to vacate the arbitration award for a plethora of reasons. For instance, Bretton contends that he did not receive due process since he was not informed about the hearing. Bretton further alleges that one of the panel members was biased since another FINRA panel member works for FSA. Bretton additionally asserts that the Aronson Trust made false statements, and Bretton denies the truth of the Aronson Trust's allegations. He also alleges that the Aronson Trust should have been estopped from pursuing this claim in New York, since a similar action was already maintained in Colorado, and allegedly won by the Aronson Trust.

Bretton continues that FINRA violated its own rules by not considering the "inability-to-pay defense." He claims that, at the time the arbitration panel made its determination, it was aware that he was unemployed and that his house was in foreclosure. Bretton cuts and pastes part of an SEC news release which states the following:

> Under FINRA rules, once an arbitration award has been issued by the arbitration panel, a member or associated person has thirty days in which to pay the award. Failure to timely pay results in FINRA initiating an expedited proceeding against the member or associated person. A member or associated person may be suspended if they either fail to pay the award or fail to request a hearing before FINRA. If a member requests a hearing, one of the defenses available to prevent a suspension is establishing a bona fide inability-to-pay the award. If the member or associated person demonstrates an inability-to-pay, they will not be suspended and the customer is precluded from collection on the arbitration award.

Bretton Affidavit, ¶ 13.

After stating the above, without providing any citations, Bretton maintains that he was deprived of a hearing before he was suspended, and that the arbitration panel "exceeded" its powers since it should have considered his inability to pay as a defense. *Id.*, ¶ 15.

The Aronson Trust responds to Bretton's allegations as follows, "[t]he real reason for Mr. Bretton for not [*sic*] attending FINRA hearing was a strategy used by him and his employers to avoid liability." The Aronson Trust Reply Affidavit, ¶ 2.

Bretton wrote a letter to FINRA on December 8, 2010, stating how he believed the award to be "unfair and unjust." Bretton's Exhibit C. The letter contains many of the same arguments as Bretton sets forth in his petition to the court.

DISCUSSION

In an effort to "foster the use of arbitration as an alternative method of settling disputes," the court's role in reviewing an arbitrator's award is severely limited. *Matter of Civil Serv. Empls. Assn. Inc., Local 1000, AFSCME, AFL-CIO (Albany Hous. Auth.)*, 266 AD2d 676, 677 (3d Dept 1999), citing *Matter of Goldfinger v Lisker*, 68 NY2d 225, 230 (1986). Courts are reluctant to disturb an arbitrator's award, and it may not be vacated unless it is irrational, violative of public policy or

exceeds the power given to the arbitrator. *Id.* at 677; *see also Azrielant v Azrielant*, 301 AD2d 269, 275 (1st Dept 2002) ("Only if a party's rights were prejudiced by corruption, fraud or misconduct [CPLR 7511 (b) (1) (i)], bias [cl (ii)], excess of power [cl (iii)] or procedural defects [cl (iv)] should an award be vacated"). The person seeking to vacate the award "bears a heavy burden." *Frankel v Sardis*, 76 AD3d 136, 140 (1st Dept 2010). "[C]ourts are obligated to give deference to the decision of the arbitrator [internal quotation marks and citation omitted]." *Matter of Henneberry v ING Capital Advisers, LLC*, 10 NY3d 278, 284 (2008).

Bretton argues that he did not receive notice about the hearings in August 2010. He then notes that he was told about the hearing, but did not have time to secure counsel and requested an adjournment. The panel, in its award, has already considered Bretton's lack of due process allegations. It stated, "Bretton received due notice of the August 18, 19, 20 and 25, 2010 hearings ... ." The panel then continued to proceed without him.

Since the arbitration panel has already specifically addressed Bretton's due process concerns, this court will not address them. As the Appellate Division, First Department, has held, "[t]he doctrines of *res judicata* and collateral estoppel are applicable to issues resolved by arbitration." *Ziegler v*

Raskin, 100 AD2d 814, 815 (1st Dept 1984); see *also Morgan Stanley & Co., Inc. v Feeley*, 75 AD3d 417, 418 (1st Dept 2010) ("Res judicata precludes defendant's counterclaims ... ").

Bretton claims that, since he was suspended prior to the hearing taking place, in order for the arbitration to take place, he would have to consent in writing. However Bretton's analysis is mistaken. When the complaint was initially filed, Bretton was not suspended. He, through counsel, agreed to participate in the arbitration by submitting a statement of answer. It is well settled that "once a party participates in an arbitration proceeding, without availing itself of all its reasonable judicial remedies, it should not be allowed thereafter to upset the remedy emanating from that alternative dispute resolution forum." *Matter of Commerce and Industry Insurance Company v Nester*, 90 NY2d 255, 262 (1997); see *also Morgan Stanley & Co., Inc. v Feeley*, 75 AD3d at 418 ("Defendant submitted to the jurisdiction of the FINRA arbitration panel by her counsel's participation in a pre hearing conference without raising a jurisdictional objection or seeking a stay").

Bretton accuses the arbitration panel of accepting the Aronson Trust's allegations. However, the court will not disturb the arbitration panel's award. Courts have held that, even when an arbitrator has "erred in judgment either upon the facts or the law," the arbitration award will not be set aside. *Matter of*

Goldfinger v Lisker, 68 NY2d at 230. Arbitrators do not have to provide a reason for their decisions. *Matter of Solow Building Company, LLC v Morgan Guaranty Trust Company of New York*, 6 AD3d 356, 356-357 (1st Dept 2004), *cert denied* 543 US 1148 (2005).

Bretton asserts that the Aronson Trust is "double dipping," since the arbitration panel has allegedly heard the same claim as the court in Colorado. Bretton Affidavit, ¶ 17. However, Bretton's claim is not supported. Considering that different parties are involved in the Colorado action, including Paivis, the Aronson Trust's claim in arbitration is not the same as the Colorado action.

Bretton states "FINRA had no authority to allow" Prestige to settle with the Aronson Trust. *Id.*, ¶ 20. However, evidently, the Aronson Trust settled with Prestige and dropped its FINRA claim against it, which is the Aronson Trust's prerogative. Bretton is not a party to that transaction and does not require notice. Consequently, this settlement is of no import to the arbitration award which is the subject of these actions.

Bretton alleges that the award should be vacated because his rights were prejudiced by fraud since a newly appointed FINRA member, Kenny Norensberg (Norensberg), is also an employee of FSA. Bretton's contentions cannot be substantiated, since Norensberg was not one of the members of the arbitration panel which presided over the arbitration.

In a convoluted way, Bretton tries to insinuate that the arbitration panel should have taken his financial situation into account when forming its award. As mentioned in the facts, Bretton quotes a FINRA rule, without providing a citation. The quotation summarizes that the FINRA member is entitled to a hearing before suspension and that a failure to pay an award is a defense to suspension. For example, after an award is given, a claimant has 30 days to collect an award or the member is suspended. If the member objects and claims that he cannot pay the award, he may not get suspended from FINRA. Thus, even if the rule applies, in no way does this absolve the member's responsibility to pay the claimant.

As such, Bretton's suspension from FINRA or his alleged lack of a hearing about this suspension is irrelevant to the arbitration award in dispute.

The court has located the SEC release which Bretton referred to: Securities and Exchange Commission, Release # 34-62211 File NO. SR-FINRA-2010-014, June 2, 2010. In actuality, FINRA has abandoned the "inability-to-pay" defense as of July 2, 2010.[1] The press release states the following, "FINRA proposed to amend FINRA Rule 9554 to eliminate explicitly the inability-to-pay

[1]Firms and associated persons will no longer be able to rely on the inability-to-pay defense for failure to comply with an arbitration award if the action was initiated after July 2, 2010.

defense in the expedited proceedings context when a member or associated person fails to pay an arbitration award to a customer."

As evidenced by the language, this "inability-to-pay defense" is one that is issued after the award has already been determined. It is not to be used as a defense during the hearing and is not a mandatory consideration for the arbitrators. As such, the arbitrators did not "exceed their powers" when they did not consider the inability-to-pay defense when forming their award.

The court denies the Aronson Trust's request for the fees incurred in filing this action.

The court has considered Bretton's other contentions, including Bretton's request to remove certain documentation from the arbitrators' review, and finds them without merit.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED that the petition of Tod Bretton to vacate the arbitration award is denied in its entirety; and it is further

ORDERED that the petition of The Irina Aronson Irrevocable Trust is granted, confirming the November 2010 arbitrators' award, FINRA 08-04753, and is denied for the request of any additional fees; and it is further

ADJUDGED that The Irina Aronson Irrevocable Trust have judgment and recover against Tod Bretton, in the amount of $175,000.00 plus interest at the rate of 9% per annum from the date of March 23, 2007, as computed by the Clerk in the amount of $_____, together with the FINRA filing fees in the amount of $300.00 as taxed by the Clerk, for the total amount of $_____, and that The Irina Aronson Irrevocable Trust have execution therefor.

Dated: 7/12/11

ENTER:

J.S.C.

DONNA M. MILLS, 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).