

Merkin v Berman

2014 NY Slip Op 30199(U)

January 22, 2014

Sup Ct, New York County

Docket Number: 652415/2012

Judge: Richard B. Lowe III

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT:

HON. JUSTICE J. LOUWE III

Justice

PART 56

Index Number : 652415/2012
MERKIN, J.EZRA
vs.
BERMAN, ON BEHALF OF JOSHUA
SEQUENCE NUMBER : 002
RENEWAL



INDEX NO. _____
MOTION DATE 12/11/13
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED
MEMORANDUM DECISION.

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

Dated: 1/22/14

[Signature]
HON. JUSTICE J. LOUWE III
_____, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X

J. EZRA MERKIN,

Petitioner,

Index No. 652415/2012

-against-

JOSHUA M. BERMAN, on behalf of JOSHUA M.
BERMAN Individual Retirement Accounts,

Respondents.

-----X

Hon. Richard B. Lowe, III:

Respondent/Cross-Petitioner Joshua M. Berman (“Berman”) moves pursuant to CPLR 3212 for an order directing Petitioner J. Ezra Merkin (“Merkin”) to consent to Berman participating in the settlement achieved in *Cuomo v Merkin* [Index No. 450879/090] (the “AG’s action), or in the alternative for a judgment in the amount of \$530,590.00 against Merkin. Berman also moves pursuant to CPLR 3211 for an order dismissing the indemnification claims brought against him.

Background

Berman, an investor in Ascot Partners, L.P. (“Ascot”), suffered personal losses as it was revealed that Ascot’s sponsor and general partner, Merkin, invested all of its assets with Bernard L. Madoff (“Madoff”) and therefore was a victim of Madoff’s ponzi scheme. Rather than participating in the AG’s action brought by the New York Attorney General (“AG”) against Merkin, after consultation with his attorney, Berman chose to bring an arbitration against Merkin pursuant to Ascot’s governing documents.

Berman acknowledges that when he invested in Ascot, he knew that substantially all of its assets were being invested with Madoff. Berman contends he initiated the arbitration based on his counsel's "speculation . . . that [investors] who were not aware [of Madoff's role in Ascot] might be getting a substantial recovery but those who were aware could expect very little" (Resp. Br. At 7). Berman does not dispute that when choosing to arbitrate pursuant to the Ascot agreement, he knew he would be precluded from participating in any potential recovery in the AG's action (Ex A to the Steiner Affirmation]).

The arbitration commenced in November 2001 with a three day evidentiary hearing and oral argument was held in April, 2012. After post hearing briefing, the matter was pending before the arbitrators.

Thereafter, a settlement was entered into in the AG's action on June 13, 2012. The general terms of the settlement were revealed by the AG in a June 25, 2012 press release.

On June 27, 2012, a settlement/status conference was conducted by this court attended by Merkin's counsel and Berman's counsel. During this conference, Berman's counsel was again advised that if an investor chose to litigate an arbitration to an award, he/she would not be entitled to participate in the AG's settlement. Berman chose not to withdraw his arbitration, but rather chose to continue with the arbitration.

On June 28, 2012, the arbitrators issued their award denying Berman's claims against Merkin in their entirety.

Berman now brings this motion seeking to participate in the settlement alleging that the AG's press release was misleading and further alleging that Merkin had a duty to advise him of the specific terms of the settlement. Berman also seeks to dismiss Merkin's claims for

indemnification brought pursuant to the terms of Ascot's governing documents.

Discussion

Berman's contention that he should be allowed to participate in the AG's settlement, alleging he would have withdrawn his arbitration had he known its precise terms, is without merit.

New York Law does not require the AG to disclose to potential beneficiaries of a Martin Act litigation the progress of the litigation or the terms of the settlement, nor is the AG required to distribute the proceeds of a settlement to specific investors. Rather it is a regulatory tool "aimed at vindicating public policy objectives" (*See Keren Matana v Merkin* 2013 WL 3940825, at *9 [SDNY July 20, 2013]).

Berman seeks relief against Merkin alleging he misinterpreted the AG's press release and Merkin should have told him the precise terms of the settlement. There is no fiduciary duty between Berman and Merkin and therefore any alleged omissions are not actionable (*See Mandarin Trading Ltd. v Wildenstein* 16 NY3d 173, 179-81 [2011]; *Wender v Gilberg Agency, Inc.* 304 AD2d 311, 311-12 [1st Dept 2007])("Absent a 'special relationship' of trust and confidence [defendant] was under no duty to disclose to plaintiff his contractual commitments. . . ."). Berman's attempt to rely on the special facts doctrine is misplaced as it applies only in "business dealings" between "a party to a prospective transaction with another party" (*See Triple Z Postal Servs., Inc. v United Parcel Serv., Inc.*, 13 Misc. 3d 1241(A), No. 118057/06, 2006 WL 3393259, at *14 [Sup Ct N.Y Cty Nov. 4 2006]). Berman's decision, made with the advice of his own counsel, to proceed with arbitration rather than participate in the settlement was not a

business transaction with Merkin.

Berman does not allege that Merkin or his counsel made any misrepresentations or false statements regarding the AG's settlement. Rather, he seems to assert that it was Merkin and Merkin's attorney's responsibility to interpret the AG's press release for Berman and further counsel him as to whether to participate in the settlement. Berman, knowing that there had been a settlement in the AG's action, and armed with the advice of his own counsel, chose to proceed with arbitration. Therefore, the request to undo that decision and order Merkin allow Berman to participate in the AG's settlement or enter judgment against Merkin is denied.

Berman also seeks to have indemnification claims dismissed arguing that under the AG's Settlement agreement, Merkin agreed to be responsible for the litigation expenses associated with all claims brought by separately litigating investors.

Potential indemnification is determined by the Ascot subscription agreement under which the arbitration was brought. In the Ascot subscription agreement, Berman agreed "to indemnify and hold harmless the . . . General Partner . . . against any and all loss, liability, claim, damage and expense whatsoever (including all expenses reasonably incurred in investigating, preparing or defending against any claim whatsoever) arising out of or based upon . . . any action for securities law violations instituted by the Investor which is finally resolved by judgment against the Investor."

Despite the text of the subscription agreement, Berman argues that the AG's settlement prohibits Merkin from seeking indemnification. As an initial matter, Berman is not a party to the AG settlement and cannot claim to be a beneficiary under it. Second, the AG settlement provides that Merkin will not seek to recover from third parties the amounts payable by him

under the Settlement agreement. The monies Merkin seeks from Berman are not part of that agreement, but rather are limited to fees and costs associated with the separate arbitration proceeding brought by Berman pursuant to the Ascot subscription agreement. Therefore, the motion for dismissal is denied.

Lastly, Berman argues that Merkin committed perjury in the arbitration proceedings and therefore the award should be vacated. He relies on a Third Amended Complaint filed by Irving H. Picard, Trustee for the liquidation of the BLMIS (the "Trustee"), in the Trustee's action brought in another court. These pleadings have not been litigated and no issues have been determined regarding them. Therefore, at this stage they are hearsay and not grounds for a vacatur of the arbitration award.


Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED, that the motion is denied in its entirety.

This shall constitute the Order and Decision of the Court.

Dated: January 22, 2014

ENTER:


J.S.C.