SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

In the Matter of the Arbitration of Certain Controversies Between:	
RICE SECURITIES, LLC d/b/a RICE FINANCIAL PRODUCTS COMPANY, RICE DERIVATIVE HOLDINGS, L.P. d/b/a RICE FINANCIAL PRODUCTS COMPANY, JAMES DONALD RICE, JR. and CRISTAL JACQUE BARON,	Index No. 651054/13
Petitioners,	DECISION AND ORDER
-against-	Motion Sequence No. 001
BRIAN DOUGLAS NEVEL,	
Respondent.	

MELVIN L. SCHWEITZER, J.:

Petitioners bring this proceeding pursuant to CPLR 7503 (b) and CPLR 2201 and the Federal Arbitration Act, 9 U.S.C. sec. 1 *et al.* (FAA) to permanently stay an arbitration by respondent Brian Nevel, an industry professional, before the Financial Industry Regulatory Authority ("FINRA"). The facts involve two corporate entities that do business under the name of Rice Financial Products Company. One of them, Rice Securities, LLC is a FINRA member firm involved in the underwriting and sale of municipal bonds. The other, Rice Derivative Holdings, L.P. (RDH), involved in originating and executing interest rate swaps for municipalities (derivative products) is not a FINRA member.

Petitioners submit that the arbitration must be stayed because the dispute stated in the claim is not related to the business of Rice Securities, LLC and, therefore, is not arbitrable before the FINRA arbitration forum. Petitioners argue that as a FINRA member, the obligations of Rice

Securities, LLC is limited to arbitrating disputes which relate to its municipal bond business. Here, in contrast, say the petitioners, the dispute described in the claim is with RDH, the non-FINRA member, and relates to interest rate swap work done by respondent for that entity and the compensation he is entitled to receive both as his purported partnership share of RDH and also as "Special Profit Allocations" (SPAs) or deferred compensation. Since profits from executed swaps varied from transaction to transaction, the concept of SPAs was created by RDH to allocate anticipated profits among partners of RDH according to their individual transactional contributions as well as RDH's overall expected profitability. According to petitioners, SPAs were not paid for work done on any securities transactions by or related to Rice Securities.

Respondent, in turn, seeks to continue his FINRA arbitration case for his purported partnership share of RDH and for "SPAs" or deferred compensation. In addition, he seeks compensation for allegedly intentional and malicious action taken against him by senior executives of Rice Financial Products Company (including Rice Securities). Respondent argues that "SPAs" are a term of art for bonuses. Respondent argues that his work for Rice Securities, a broker-dealer which was acquired in 1998 by RDH, and which engaged in municipal bond sales and trading and the municipal underwriting business, was an inextricable part of his work for RDH. Respondent asserts that he did substantial work marketing Rice Securities and its services, structuring bond transactions, developing strategy and managing employees for the broker dealer. He contends that these job duties (for which he had to obtain securities licenses and sign a Form U-4 Agreement) were required of him in order to meet his employer's overall goals as directed by Donald Rice, CEO of the Rice family of companies. As a registered representative of Rice Securities, the broker dealer, respondent argues that under the FINRA arbitration code, an

"Associated Person" (a natural person who is registered under the Rules of FINRA) is entitled to request binding arbitration to resolve disputes arising out of their actions associated with a FINRA member. Respondent emphasizes, contrary to petitioners assertions, that he was a key employee of the securities firm. Petitioners assert that respondent's role was "incidental and *de minimis*".

In connection with hearing this dispute, the court issued a temporary restraining order stopping the arbitration from proceeding until a full record could be developed concerning whether the arbitration may proceed or must be enjoined from going forward. That record has now been fully developed, both orally and in writing, to the court's satisfaction.

Discussion

I.

Courts have identified five theories upon which they are willing to enforce an arbitration agreement against a non-signatory. In the course of the hearing of this matter, the court has raised questions as to two of those theories–estoppel and agency. After receiving supplemental briefs from the parties, the court is persuaded that neither of these theories operates to bootstrap RDH into the arbitration agreement signed by Rice Securities.

First, with respect to estoppel, as it might apply to petitioners' initial participation in the arbitration process, petitioners' supplemental submission makes it clear that their participation was confined to doing what they felt they needed to do to bring on before FINRA an effective motion to dismiss respondent's petition to arbitrate. This exercise of petitioners' procedural rights to object to the arbitration forum cannot be said to have waived any of petitioners' rights not to participate in the arbitration on the merits. Their consistent position has been that they

were not subject to an arbitration agreement because they never signed one and the nature of the dispute was confined to compensation allegedly owed to respondent by RDH as a non-signatory.

Second, with regard to agency, the court identified a possible issue stemming from a management agreement which existed between RDH and Rice Securities whereby RDH provided management services to Rice Securities for which it received a management fee as noted in footnotes to the audited financial statements of Rice Securities. The question posed by the court to the parties was whether Rice Securities, as FINRA signatory and agent of non-signatory principal RDH, could bind RDH to arbitrate. As stated in *Merrill Lynch Int'l Fin., Inc v Donaldson*, 2010 NY Slip OP 20024 [27 Misc 3d 391) "a non-signatory who exploits a contract containing an arbitration clause is estopped from repudiating that clause (*see Matter of SSL Intl., PLC v Zook*, 44 AD 3d 429 [1st Dep't 2007] [non-signatory affiliate that received service fees generated from transactions under agreement estopped from avoiding arbitration clause])." But as petitioners correctly point out, in the *Merrill Int'l* case the dispute directly stemmed from Donaldson's employment with a FINRA member firm which was a signatory to the arbitration agreement; and in the *SSL Intl*, decision, the court found that the respondent established that the non-signatory appellants to the license agreement were estopped from seeking to avoid an arbitration provision since they derived direct benefits from the agreement. As discussed below, the court has found that with respect to respondent's work for Rice Securities, respondent has not been able to sustain his burden of demonstrating that RDH received significant direct benefits from that work.

II.

This dispute does not stem from respondent's role as a registered representative of Rice Securities, the broker dealer. Rather, it arises from respondent's partnership interest and employment as a swap banker with RDH, a non-FINRA member firm. The dispute here concerns what amount is owed to respondent under RDH's SPAs and respondent's partnership share in RDH. The court has reviewed an extensive document prepared by petitioners at the court's request which details all municipal bond underwriting transactions between 1998 and 2006 (from the time Rice Securities was acquired by RDH until the time respondent left the firm). It reveals respondent was a "banking team member" on deals which produced aggregate revenues to Rice Securities over 9 years of $179,717 or less than $20,000 per annum over that period of time. In a firm like RDH with millions of dollars of revenue from swaps transactions, it is not an understatement to say that RDH did not receive a quantifiable direct benefit from Rice Securities bond transactions when respondent was a "banking team member." The minuscule amount of money generated from deals on which respondent acted as a securities professional obviously was absorbed into the operating expenses of Rice Securities. In testimony by Mr. Rice, as confirmed by charts based on Rice Securities' books and records pertaining to respondent's activities as a municipal banker, respondent is not shown as having acted as a banker on any of the small number of deals for which Rice Securities was the senior manager – the only deals that sometimes produced significant revenues for Rice Securities. Mr. Rice testified that on those deals respondent was involved in "clerical support" functions such as answering phones on sales day–but not running books or numbers.

To be sure, respondent points to his marketing support functions in many presentations that were made to get business and which led to swaps business by virtue of getting in the door through bond presentations. But as the cases make clear, these marketing support activities are insufficient to bind a non-signatory to an arbitration agreement. *See The Ayco Company, L.P. v William R. Becker*, 2011 U.S. Dist. LEXIS 92380 (NDNY 2011) ("the Court recognizes that Plaintiff received a benefit from Defendant signing the Form U-4 Agreement and obtaining securities licenses in that Defendant's ability to sell securities became an additional service that he could offer to his clients. However, to bind a non-signatory to an arbitration agreement under principles of estoppel, 'the benefits of the agreement to the non-signatory must be direct–that is, flow directly from the agreement.' *Phoenix Co., Inc. v Abrahamsen*, 2005 U.S. Dist. LEXIS 43615 (SDNY 2006)). . . ." In short, Rice Securities has absolutely no relationship to the dispute between the parties pertaining to respondent's compensation from RDH–a non-signatory to the arbitration agreement.

The partnership agreement and SPAs which are the subject of this dispute involve only RDH which is not a party to any provision to arbitrate. As petitioners point out, although RDH, a non-signatory, received a fee from Rice Securities for its management services, there is no agreement that is involved in this dispute that is directly related or even stems from an agreement to which Rice Securities is a signatory and which would bind RDH to arbitrate under an agency by estoppel theory. Rather, the matter under dispute stems solely from a partnership interest and agreement made directly between RDH and respondent. Rice Securities was not a signatory to that partnership agreement, nor did it derive a benefit from that agreement.

It is well settled that a court will not order a party to submit to arbitration absent evidence of that party's 'unequivocal intent to arbitrate the relevant dispute' *Matter of Helmsley [Wein]* 173 AD2d 280,281 and unless the dispute falls clearly within that class of claims which the parties agreed to refer to arbitration. *See Matter of Bunzl[Battanta]*, 224 AD2d at 246. The fact remains that in the case before the court, a partnership agreement between RDH and respondent and SPAs to be paid by RDH to respondent are what are at issue in this dispute. RDH did *not* agree to arbitrate these issues but rather to have them heard in a court of law. None of the distinctions and permutations in other cases change these facts.

III.

With regard to respondent's claim before FINRA that Mr. Rice, as the Principal of Rice Financial Products Company and the Manager of Rice Securities (by virtue of the agency agreement between RDH) and perhaps other senior executives of Rice Financial Products Company (including Rice Securities) allegedly acted intentionally and maliciously to inflict reputational damage upon respondent as a securities professional in July and August of 2007, by allegedly writing letters and making oral statements to a Ken Gibbs, for whom respondent was going to work, threatening legal action because respondent was in violation of a partnership agreement and accusing respondent of taking employees with him: these are not matters that strictly pertain to RDH, but go well beyond RDH to respondent's reputation as a professional in the securities industry. They pertain to his conduct with all Rice entities and beyond the Rice family of companies. They clearly relate to allegations of trade disparagement which may have adversely reflected on respondent with his new employer and others within the industry.

Respondent, as an employee of Rice Securities, clearly has a right to pursue these allegations in a FINRA arbitration against his principals and managers.

WHEREFORE, based on the foregoing,

1. EXCEPT AS SET FORTH IN "2" BELOW, petitioners Rice Securities, LLC d/b/a Rice Financial Products Company, Rice Derivative Holdings, L.P. d/b/a Rice Financial Products Company, James Donald Rice, Jr. and Cristal Jacque Baron are AWARDED JUDGMENT PERMANENTLY STAYING AND BARRING that portion of FINRA Dispute Arbitration No. 12-01260 instituted by respondent Brian Douglas Nevel, captioned Brian Douglas Nevel v Rice Financial Products Company, James Donald Rice and Cristal Jacque Baron which seeks respondent's purported share of partnership Special Profit Allocations referenced in respondent's Statement of Claim as "deferred compensation," as well as the value of respondent's terminated partnership interest in Rice Derivative Holdings, L.P.

2. Respondent Brian Douglas Nevel IS AWARDED JUDGMENT LIFTING THE TEMPORARY RESTRAINING ORDER which heretofore has stayed that portion of FINRA Dispute Arbitration No. 12-01260 which seeks compensation for respondent's claim of malicious trade disparagement and damage to reputation, which portion of such FINRA Dispute Arbitration shall now proceed before FINRA forthwith.

3. Petitioners' demand for judgment awarding them costs, disbursements and reasonable attorneys' fees is DENIED.

Dated: February 26, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER