

<b>Matter of Bortman v Lucander</b>
2014 NY Slip Op 31457(U)
June 2, 2014
Sup Ct, NY County
Docket Number: 652924/13
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of the Application of

DAWN BORTMAN,  
Petitioner,

Index No. 652924/13  
Motion Seq. No. 001

Pursuant to Article 75 of the CPLR for  
Confirmation of a FINRA Dispute Resolution  
Arbitration Award and Entry of Judgment Against:

HENRY LUCANDER,  
Respondent.

-----X  
SCHLESINGER, J.:

Petitioner Dawn Bortman commenced this proceeding with the assistance of counsel for an order pursuant to CPLR Article 75 confirming the May 2013 Award issued by the Financial Industry Regulatory Authority (FINRA) (Case Number 12-01118, Exh 1 to Petition) after an arbitration involving respondent, Henry Lucander. As significant here, in the Award FINRA found Lucander liable to Bortman for \$110,000.00 in compensatory damages, plus interest at the rate of 4.75% from the date of the Award until the date of payment. Additionally, Lucander was held liable for \$250.00 to reimburse Bortman for the arbitration filing fees, but Bortman's claims for punitive damages and attorneys' fees were denied.

Lucander opposes the petition on four grounds:

1. The arbitration was wrongly held in Florida, rather than New York;
2. Lucander did not agree to arbitrate;
3. FINRA Rules bar an arbitration when neither party is a member at the time of arbitration; and
4. Arbitrators Boerke and Shuster were biased.

## Background Facts

At the time in question, 2007 and 2008, Henry Lucander was a registered representative of the now-defunct brokerage firm McGinn Smith & Co., Inc. According to Lucander's own account submitted to FINRA and supplied to this Court, while he was prospecting for new clients in Florida, he met petitioner Dawn Bortman at her West Palm Beach townhouse. Bortman, "an elderly widow", had apparently accumulated substantial savings working for various "well-heeled elite" families in Palm Beach, and Lucander persuaded her to open a brokerage account with him with the goal of having her savings grow.

At some point Bortman became disenchanted with Lucander's services, and she had her attorney file a Statement of Claim with FINRA dated March 23, 2012. There she complained that Lucander had caused her to incur substantial financial losses by selling her grossly unsuitable investments. The Claim specified fourteen different investments for a total amount of \$210,000. Over half of the amount, or \$110,000, was invested in Firstline Trust 2007 (\$60,000) and TDM Luxury Cruise Trust (\$50,000), which Bortman claimed proved to be worthless. Bortman claims that the Securities and Exchange Commission (SEC) ultimately shut down McGinn Smith & Co., Inc. for selling similar worthless securities to unsophisticated investors. Lucander's own registration lapsed in 2009. Asserting five different theories for relief, Ms. Bortman requested in the FINRA arbitration compensatory damages for lost profits, as well as punitive damages.

Bortman filed an Answer to the Claim, denying any wrongdoing and insisting that Ms. Bortman made money overall. He further insisted that he explained everything to Ms. Bortman and that she was an "eager student and quick learner [who] caught on" to

the financial industry and "seemed to enjoy daily market fluctuations, trends and charts." Also, he denied that Firstline and TDM were worthless.

In addition to filing an Answer, Lucander filed various motions to dismiss with FINRA. The Arbitration Award indicates that motions were filed by Lucander on or about February 28, 2013 and April 10, 2013 and were denied, but only the April motion is discussed in any detail. What is more, at the first oral argument before this Court on January 8, 2014, Mr. Lucander indicated that he had also made a motion in August of 2012. Therefore, the Court asked the parties to produce the papers relating to the motions, most of which consisted of email exchanges. A review of all the documents suggests the following procedural history.

In his first motion, Lucander sought to disqualify two of the three arbitrators who had been appointed based on selections made by both parties; upon receipt of the Arbitrator Disclosure Checklist following the appointments, Lucander learned information that he believed rendered the arbitrators biased against him. One arbitrator, Robert S. Shuster, indicated that he had worked for attorneys who represented claimants. Bortman's attorney responded that Shuster had never worked with him or on behalf of Ms. Bortman, and Shuster confirmed that fact. FINRA denied the motion on September 4, 2012, merely stating that the grounds asserted did not constitute cause.

The second arbitrator, Steven Gerard Goerke, indicated that he had filed for personal bankruptcy. Bortman's attorney responded that Lucander had not demonstrated how the bankruptcy filing rendered Goerke biased or unqualified. He also quoted the FINRA Code of Arbitration Procedures, which provides that:

The Director will grant a party's request to remove an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration. The interest or bias must be definite and capable of reasonable demonstration, rather than remote or speculative. Close questions regarding challenges to an arbitrator by a customer under this rule will be resolved in favor of the customer.

FINRA denied that motion on September 12, 2012, again merely stating that the grounds asserted did not constitute cause.

In his motions, Lucander also asserted that he could not be compelled to submit to arbitration because he was not an active member under FINRA Rule 12202 and had not agreed to arbitrate. That motion was denied on April 2, 2013 without much discussion. However, in the Award, the arbitrators acknowledged that Lucander had not filed a properly executed Submission Agreement with FINRA. Nevertheless, they found that he was "required to submit to arbitration pursuant to the Code of Arbitration Procedure (the "Code") and, having answered the claim, is bound by the determination of the Panel on all issues submitted." More specifically, they found that Lucander was an "associated person" subject to FINRA Rule 12200. The Award further indicates that Lucander's motion for reconsideration was denied on or about April 10, 2013.

As to the actual arbitration, the matter was finally scheduled for April 24, 2013 in Boca Raton, Florida, where the claimant Ms. Bortman resided. According to the Award, FINRA received notice that morning from Lucander that he was unable to attend. The panel attempted to contact Lucander via telephone and left a message with information as to how Lucander could participate by telephone, but he did not call. The hearing proceeded, with Ms. Bortman represented by counsel and no appearance by Lucander.

A post-hearing submission from Lucander, to which Bortman responded, was rejected on the ground that post-hearing submissions were not permitted, and the panel reached its determination based on the pleadings and the evidence adduced at the arbitration.

In the Award, issued on or about May 2, 2013, the panel found Lucander liable on the claim of unsuitability, and it directed him to pay Bortman compensatory damages in the amount of \$110,000.00 to reimburse her for the purchase of the Firstline and TDM securities, the only securities at issue in the arbitration. Interest was also awarded at the rate of 4.75% from the date of the Award until payment. Upon satisfaction of the Award, the securities in Bortman's account were to be deemed assigned to Lucander. Lucander was also assessed the \$250,000 filing fee paid by Bortman. All other claims, including those for punitive damages and attorney's fees, were denied. The Panel also assessed a total hearing session fee of \$4,000.00 to Lucander, but that amount was later waived by FINRA.

Bortman then commenced this proceeding to confirm the Award and, as indicated above, Lucander opposed. Oral argument was held on January 8, 2014 and then again on February 26, 2014 after both sides were given an opportunity to submit some of the documentation that had been considered in connection with the motions and the arbitration itself.

#### Discussion

It is undisputed that Bortman has timely moved to confirm the FINRA Arbitration Award pursuant to CPLR § 7510. Lucander opposed, raising arguments as if he were seeking to vacate the Award. However, and quite significantly, Lucander did not move

to vacate the Award. Nor could his opposition be deemed to be such a motion, as it would not have been timely pursuant to CPLR § 7511. The Court will nevertheless use CPLR § 7511 as a guide for this analysis.

“It is a bedrock principle of arbitration law that the scope of judicial review of an arbitration proceeding ... is extremely limited ....” *Frankel v Sardis*, 76 AD3d 136, 139 (1st Dept 2010)(citations omitted). “Courts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined.” *Matter of Goldfinger v Lisker*, 68 NY2d 225, 231 (1986). “Accordingly, an award will not be overturned ‘unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator’s] power.’” *Frankel*, 76 AD3d at 139, quoting *Matter of Silverman (Benmore Coats)*, 61 NY2d 299, 308 (1984).

The enumerated limitations are set forth in CPLR § 7511. The only ground for vacating an award that even remotely relates to Lucander’s claims here is found in subdivision (b)(1)(ii). That provision allows a court to vacate an arbitration award “if the court finds that the rights of that party were prejudiced by ... partiality of an arbitrator appointed as a neutral ....”

The Court finds that FINRA properly denied Lucander’s motion objecting to the arbitrators as “biased”, and Lucander has not demonstrated here either bias by the arbitrators or prejudice to him. The objection to Arbitrator Shuster was based on an apparent misunderstanding by Lucander of information provided by Shuster on his questionnaire, and the objection to Goerke is speculative, at best.

The relevant question regarding Shuster, 24B, asks the arbitrator: “Have you, your spouse, or an immediate family member ever represented an investor in a

securities-related dispute.” Shuster answered “yes” and later explained: “While working for Claimants’ attorneys, I was part of their team assisting in all aspects of data collection, analysis, reports, discovery, etc. as a legal assistant.” Lucander understood this comment to mean that Shuster had worked for Bortman’s attorneys, but both Shuster and Bortman’s counsel Christopher Gray adamantly denied any such relationship. Shuster had merely worked for a law firm that represented claimants. That experience, without more, does not render Shuster unable to fairly and impartially arbitrate the FINRA claims that come before him.

As for Arbitrator Goerke, he merely answered “yes” on his form to the question whether he had “ever declared personal bankruptcy.” No other information was given, nor comments made. Lucander does not explain why the bankruptcy filing somehow makes the arbitrator “unfit for the task” or biased. In the opinion of the Court, it does not establish the type of “definite” bias required for disqualification.

As for the three procedural objections raised by Lucander in this petition, they are not among the limited grounds recognized by the statute allowing a court to vacate an award. What is more, by filing an answer to Bortman’s claim, by filing motions, and by otherwise participating in the arbitration process (albeit not at the hearing), Lucander has forfeited his right to challenge the Award on certain procedural grounds. See *Meisels v Uhr*, 79 NY2d 526 (1992).

In any event, the objections are baseless. The arbitration was properly held in Florida under FINRA rules that allow the claim to proceed in the state where the claimant resides. As Bortman’s counsel and FINRA properly noted in response to Lucander’s motion, as a registered representative of a brokerage firm at the time in

question, he agreed to arbitrate disputes, whether or not he maintained his registration at the time Bortman filed her claim. Indeed, Bortman's counsel notes that pursuant to Form U-4 signed by Lucander at the time of his employment with McGinn Smith, he agreed to arbitrate all claims arising from his work there, even after the termination of his employment.

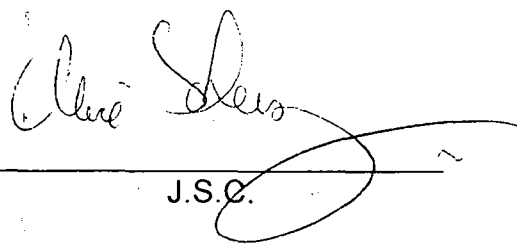
In sum, Bortman has established her entitlement to confirmation of the Award, and Lucander has failed to put forth any valid opposition, except for FINRA's waiver of the \$4000.00 for hearing session fees. Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted and the May 2013 Award rendered by FINRA in favor of petitioner and against respondent is confirmed, except for the \$4000.00 hearing session fees which FINRA later waived.

Settle judgment on notice by filing in Room 119 with proof of service by regular mail and e-mail.

Dated: June 2, 2014

JUN 02 2014

  
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J.S.C.

**ALICE SCHLESINGER**