

**Merrill Lynch, Pierce, Fenner & Smith, Inc. v
Kirkland**

2014 NY Slip Op 32234(U)

August 15, 2014

Supreme Court, New York County

Docket Number: 653698/2012

Judge: Jeffrey K. Oing

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL PART 48

-----x

MERRILL LYNCH, PIERCE, FENNER &
 SMITH, INC.

Petitioner,

Index No. : 653698/2012

- against -

Mtn Seq. No. 001

JACQUELYN D. KIRKLAND,

DECISION AND ORDER

Respondent.

-----x

JEFFREY K. OING, J.:

In this Article 75 proceeding, petitioner Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") petitions the Court to vacate in part a Financial Industry Regulatory Authority ("FINRA") arbitration award (the "Award") issued to respondent Jacquelyn Kirkland sometime in or about September 2012. Kirkland cross-petitions pursuant CPLR 7510 to confirm the same Award.

The underlying facts are set forth on the record at oral argument and familiarity therewith is presumed for purposes of this decision and order (11/15/2013 Transcript, Mtn Seq. No. 001). The parties previously appeared before the Court for an oral argument on November 15, 2013. The unanimous Award at issue, partially in Kirkland's favor, ordered Merrill Lynch to pay Kirkland \$50,000 in compensatory damages and an additional \$139,635.03 in "attorneys' fees." The arbitration panel also, inter alia, denied Kirkland's request to expunge her Form-U5, finding that the language included on it -- "failure to perform

to standards" -- was not defamatory and did not constitute unfair business practice or tortious interference with prospective business relations.

At oral argument on the instant petition and cross petition, following consideration of the Award, the underlying documents and the arguments raised by both sides, this Court remanded this matter back to the arbitration panel to further elaborate on the basis for their decision in light of the arguments raised by both parties.

The arbitration panel issued a FINRA Dispute Resolution Order dated February 25, 2014 (the "Resolution Order") in which the panel considered: (1) the transcript of the petition by Merrill Lynch to vacate the Award and Kirkland's cross-petition to confirm; (2) the letter dated January 9, 2014 from Merrill Lynch's counsel; (3) the letter dated January 31, 2014 from Merrill Lynch's counsel; and (4) the prior FINRA Award dated September 24, 2012, originally issued by the panel.

The panel explained that its "award of attorneys' fees was based upon the implied contract of employment (Merrill Lynch's Employment Handbook) which provided for a mediation process" and that "the failure of Merrill Lynch to mediate the matter prior to its arbitration was a breach of the contract to mediate, and as a result of that breach, Ms. Kirkland incurred, in the arbitration, approximately \$140,000.00 in attorneys fees which the Panel

awarded in the arbitration award" (FINRA Case 10-04339 Dispute Resolution ORDER, 2/25/2014, p. 1).

In a supplemental brief in support of its petition to vacate the Award in part, Merrill Lynch now argues that the panel's "implied contract" theory for attorneys' fees is contrary to the "American Rule" governing New York law, FINRA policy, and the documents at issue (Pet. Supp. Memo., p. 1). In that regard, Merrill Lynch takes issue with what it characterizes as the panel's abandonment of its original basis for the award of attorneys' fees and the purported creation of "an entirely new justification in an apparent attempt to salvage the Award" (Id., p. 4). Merrill Lynch argues that "in doing so, the Panel further exceeded the scope of its authority and, once again, completely disregarded bedrock governing principles of New York law with respect to awards of attorneys' fees" (Id.).

Merrill Lynch's contention that the arbitration panel manifestly disregarded the law is unavailing. Manifest disregard of the law means more than an error or misunderstanding of the applicable law (Transparent Value v Johnson, 93 AD3d 599 [1st Dept 2012]). Rather, to modify an award on this basis, a court must find both that: (1) the arbitrators knew of a governing legal principle and refused to apply or ignored it altogether, and that (2) the law ignored by the arbitrators was well-defined, explicit and clearly applicable to the case (Id. at 601).

Critically, it is a well-settled that an arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached (Wien & Malkin LLP v Helmsley-Spear, Inc., 6 NY3d 471 [2006]). Judicial review of arbitration awards is thus, necessarily, extremely limited (Id.).

In arguing that the award of attorneys' fees in the instant case is in clear contravention of the "American Rule" under which a prevailing party may not collect attorneys' fees from the losing one unless authorized by contract, statute or court rule, Merrill Lynch misapprehends the stated basis for the Award. As noted above, the February 25, 2012 Dispute Resolution Order makes clear:

The Panel's award of attorneys fees was based upon the implied contract of employment (Merrill Lynch's Employment Handbook) which provided for a mediation process.

The failure of Merrill Lynch to mediate the matter prior to its arbitration was a breach of the contract to mediate, and as result of that breach, Ms. Kirkland incurred, in the arbitration, approximately \$140,000.00 in attorneys' fees which the Panel awarded in the arbitration award.

(FINRA Case 10-04339 Dispute Resolution ORDER, 2/25/2014, p. 1).

Thus, it appears that the award of some \$140,000 to Kirkland was not an improper award of attorney's fees, but simply a measure of her damages for what the panel determined was Merrill Lynch's breach of the contract to mediate. The cases cited by Merrill Lynch for the proposition that courts "routinely vacate

awards attorneys' fees in the absence of express contractual authority for such fees" are, therefore, entirely distinguishable (Pet. Supp. Memo., pp. 7-8) (e.g., Matter of UBS Warburg (Auerbach, Pollack & Richardson), 294 AD2d 245 [1st Dept 2002] [finding arbitrators erred in awarding attorneys' fees to respondent because agreement only provided for such fees in petitioner's favor]).

To the extent that Merrill Lynch contends that the stated explanation for the Award differs in the February 25, 2014 FINRA order from that originally stated by the panel, Merrill Lynch fails to cite any case for the proposition that a deviation in rationale for an arbitration award upon a request to clarify is, in itself, grounds for vacatur of the initial Award.

Finally, nothing in the record supports a finding that the arbitration panel exceeded the scope of its authority in fashioning this Award. As is well-established, "[i]t is not for the courts to interpret the substantive conditions of the contract or to determine the merits of the dispute" (Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. City of N.Y., 1 NY3d 72 [2003][quotation and citation omitted]). This principle is true regardless of whether a court believes that the "apparent, or even the plain, meaning of the words of the contract has been disregarded," and even where the award may "entail a misapplication of substantive rules

Index No. 653698/2012
Mtn Seq. No. 001

Page 6 of 6

of law," provided it is not "totally irrational or violative of a strong public policy" (Maross Constr. v Central N.Y. Regional Transp. Auth., 66 NY2d 341, 346 [1985] [internal quotation and citation omitted]). Simply put, a "court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one" and "[i]ndeed even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice" (Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York [94 NY2d 321, 236 [1991]]).

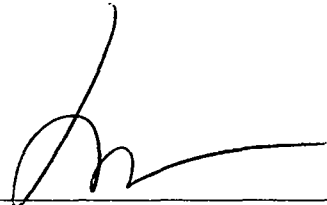
Accordingly, it is

ADJUDGED that the petition to vacate the Award is denied and the cross petition to confirm the Award is granted, and the Award rendered in favor of respondent and against petitioner is confirmed to the extent indicated in this decision and order, and prior oral argument held on November 15, 2013; and it is further

ORDERED that the parties are directed to submit to Part 48 a proposed judgment on notice on or before September 19, 2014.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/15/14


HON. JEFFREY K. OING, J.S.C.