

**Wolfsohn v Trident Partners, Ltd.**

2014 NY Slip Op 32783(U)

October 28, 2014

Supreme Court, New York County

Docket Number: 652555/2014

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

FRANCESCA WOLFSOHN and SYDELLE WOLFSOHN,
Petitioners,

INDEX NO. 652555/2014
MOTION DATE 10/22/2014
MOTION SEQ. NO. 001
MOTION CAL. NO.

For a Judgment Pursuant to Article 75 of the C.P.L.R.

-against -

TRIDENT PARTNERS, LTD., BRIAN FRANCIS SCHANTZ,
EDWARD PATRICK FLYNN SR., and FINANCIAL INDUSTRY
REGULATORY AUTHORITY ("FINRA"), and ANTOINETTE ALOISE,
Individually And as Executrix of the Estate of Mary Lamia,

Respondents.

The following papers, numbered 1 to 6 were read on this Order to Show Cause seeking an order staying arbitration.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, and rows for 1-4, 4-5, 6.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that this petition to stay arbitration is granted, arbitration of the cross-claims against Francesca Wolfsohn and third-party claims against Sydelle Wolfson is permanently stayed.

Mary Lamia opened a brokerage account and an IRA account (herein "Accounts") with Trident Partners, LTD (herein "Trident") in January of 2008. Francesca Wolfsohn, an employee of Trident, was listed as the broker for the Accounts. In May of 2009, Lamia opened a joint customer account at Trident with her sister Antoinette Aloise, with right of survivorship (herein "Joint Account"). After opening the Accounts and the Joint Account, Lamia passed away.

As broker for the Accounts and Joint Account, Wolfsohn recommended and purchased unsuitable investments, sold products that were not authorized by Trident, and embezzled over \$580,000 from the Accounts and Joint Account. Upon investigation, Trident discovered Wolfsohn's embezzlement and notified Aloise, but only as to Wolfsohn's selling of unauthorized products and not of the embezzled funds.

By selling unauthorized products, Wolfsohn was in violation of various Financial Industry Regulatory Authority, Inc (herein "FINRA") regulations. In June of 2012, Aloise commenced a FINRA arbitration proceeding individually and as Executrix by submitting a Statement of Claim asserting claims against Trident, the managing partner's of Trident, Wolfsohn, and First Clearing, LLC. Trident timely answered the Statement of Claim and asserted cross-claims against Wolfsohn, third-party claims against Sydelle Wolfsohn, and a counterclaim against Aloise.

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

In August of 2012, Aloise entered into a settlement agreement with Francesca and Sydelle Wolfsohn (herein "Petitioners"). Trident agreed to a limited withdrawal of the cross-claims and third party claims asserted against the Petitioners by entering into a Limited Withdrawal of Claims (herein "Stipulation"). The Stipulation stated, in relevant part:

**WHEREAS, Francesca Wolfsohn represents that other than the claims set forth by the Aloise Claimants in the Aloise Claims, Francesca Wolfsohn is unaware of any claims or potential claims that may be asserted against Francesca Wolfsohn or the Trident Respondents by the Aloise Claimants.**

**The Trident Respondents shall dismiss without prejudice [the claim] ... [and] Said dismissal shall be deemed to be the Trident Respondents release and discharge of Francesca Wolfsohn from any claims and contentions that the Trident Respondents have asserted or could have asserted against her in the First Claim that solely arise from or in connection with the Aloise Claims; but otherwise, the Trident Respondents expressly reserve, and do not in any fashion release, acquit or discharge Francesca Wolfsohn from, liability for any other claims and contentions that they have asserted or could have asserted against her in the First Claim. For the sake of clarity and for purposes of example only, in the event any third-party other than the Aloise Claimants initiates a claim against the Trident Respondents, or any of their agents, representatives, successors, affiliates or assigns, or any one of them, for conduct arising from or relating to the acts or omissions of Francesca Wolfsohn, nothing herein shall prevent the Trident Respondents from proceeding with any and all claims against Francesca Wolfsohn for [the claim], and all such claims shall survive this Agreement.**

Similar language was used in the Stipulation to dismiss the cross-claims for indemnification and contribution, breach of contract, common law fraud, and claims arising from the New York Debtor and Creditor Law as against Francesca Wolfsohn and the Third-Party claims as against Sydelle Wolfsohn. The Petitioners were released from the FINRA arbitration, and the remaining parties proceeded with the FINRA arbitration.

In May of 2014, Trident, Brian Francis Schantz, and Edward Patrick Flynn, Sr. moved before the FINRA arbitration panel to refile the cross-claims and third-party claims against the Petitioners based upon newly obtained evidence giving rise to new claims for fraud and conversion. Trident alleges that Francesca Wolfsohn changed the name and address on security accounts (herein "Security Accounts") held by Lamia and not under the control of Trident. The alleged changes made to the Security Accounts were in violation of FINRA regulations and unknown to Trident at the time they entered into the Stipulation. The Petitioners participated and opposed the motion before the FINRA arbitration panel for leave to refile the cross-claims and third-party claims as against the Petitioners, and the panel subsequently granted the motion; No new parties were added, nor new claims asserted by Trident as against the Petitioners.

In response to the FINRA arbitration panel's decision, the Petitioners commenced an Article 75 proceeding. In their Petition, the Petitioners argue that the FINRA panel exceeded its jurisdiction, lacked authority, and violated public policy in allowing Trident to reassert the cross-claims and third-party claims. The instant motion, brought by Order to Show Cause, seeks a stay of the pending FINRA arbitration, which is the same relief sought in the Petition. The Petitioners argue that the prior claims have not been amended as against them and no new claims have been added. As such, the claims are barred by the Stipulation. Neither FINRA nor Aloise have taken a position in the instant proceeding.

In opposition, Trident argues that the Stipulation does not bar the reassertions of the cross-claims and third-party claims against Petitioners since the Stipulation was a limited agreement made without prejudice. In the alternative, they argue that the Petitioners violated the Stipulation by withholding information pertaining to the security accounts and misrepresenting the alleged amount embezzled by the Petitioners.

"It is well recognized that strong policy considerations favor the enforcement of settlement agreements" (Calavano v. New York City Health & Hosps.Corp, 246 A.D.2d 317, 318, 667 N.Y.S.2d 351, 353 [1<sup>st</sup> Dept., 1998] citing to, Rocanova v. Equitable Life Assur. Socy., 83 NY2d 603, 616, 634 N.E.2d 940; 612 N.Y.S.2d 339 [1994]). "Therefore, a release may not be treated lightly since "[it] is a jural act of high significance without which the settlement of disputes would be rendered all but impossible. It should never be converted into a starting point for renewed litigation except under circumstances and under rules which would render any other result a grave injustice" (Id., at 319, citing to, Mangini v. McClurg, 24 NY2d 556, 563, 249 N.E.2d 386, 301 N.Y.S.2d 508 [1969]).

Here, Trident agreed to discontinue their cross-claims and third-party claims against the Petitioners contingent on no new claims or causes of action arising from the Petitioners' embezzlement of funds from Lamia and Aloise being asserted by third-parties. No new claims have been made, therefore, the Stipulation is binding on the parties and bars the FINRA arbitration from proceeding.

Trident argues that the Petitioners participated in the FINRA arbitration by opposing Trident's motion to reassert the cross-claims and third-party claims, and thereby waived their right to now seek a stay of the FINRA arbitration.

"A party who has participated in arbitration cannot later seek to vacate the award on the ground that the controversy was not arbitrable (Rochester City School Dist. v. Rochester Teachers Asso., 41 N.Y.2d 578, 583, 362 N.E.2d 977, 891, 394 N.Y.S.2d 179, 182 [1997]. By statute that question must be raised before arbitration, and if it is not it is deemed to be waived" (Id.); see CPLR 7503; National Cash Register Co. v. Wilson, 8 N.Y.2d 377, 208 N.Y.S.2d 951, 171 N.E.2d 302 [1960] ). A party may waive "any argument that the arbitrators lacked jurisdiction" by participating "fully in the arbitration proceedings," never [seeking] a stay of the arbitration, and [not raising] the argument before the arbitrators or before the Supreme Court" Matter of Emerald Claims Mgt. for Ullico Cas. Ins. Co. v. A. Cent. Ins. Co., 2014 N.Y. App. Div. LEXIS 6895 (1<sup>st</sup> Dept., 2014) citing to, Rochester City School Dist. v Rochester Teachers Assn., 41 NY2d 578, 583, 362 N.E.2d 977, 394 N.Y.S.2d 179 [1977]; Matter of Philadelphia Ins. Co. [Utica Natl. Ins. Group], 97 AD3d 1153, 1153, 948 N.Y.S.2d 501 [4<sup>th</sup> Dept., 2012]).

Here, the Petitioners' opposition to Trident's motion in the FINRA arbitration was a continuation of the June 2012 arbitration. Trident sought to reassert the same claims against the same parties as it did in the June 2012 arbitration. The Statement of Claim is the same and Trident has not submitted an Amended Statement of Claims adding new parties or new claims. The Stipulation states that "the Trident Respondents expressly reserve, and do not in any fashion release, acquit or discharge Francesca Wolfsohn from, liability for any other claims and contentions that they have asserted or could have asserted against her in the [claim]," thereby releasing the Petitioners from the claims Trident now seeks to reassert in the FINRA arbitration.

