

**Merrill Lynch, Pierce, Fenner & Smith Inc. v
Financial Indus. Regulatory Auth., Inc.**

2016 NY Slip Op 30017(U)

January 5, 2016

Supreme Court, New York County

Docket Number: 162259/15

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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MERRILL LYNCH, PIERCE, FENNER
& SMITH INC.,

Petitioner,

-against-

FINANCIAL INDUSTRY REGULATORY
AUTHORITY, INC. (FINRA),

Nominal Respondent.

-----X

KATHRYN E. FREED, J.S.C.

DECISION AND ORDER

Index No. 162259/15

Mot. Seq. No. 001

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

| PAPERS | NUMBERED |
|---|-----------------|
| NOTICE OF PETITION AND PETITION..... | 1, 2 |
| HANTMAN AFFIRMATION AND EXHIBITS ANNEXED..... | 3 (Exs. A-E, A) |

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Petitioner Merrill Lynch, Pierce, Fenner & Smith Inc. (“Merrill Lynch”) moves, pursuant to CPLR 7510, for an order confirming an arbitration award issued on October 1, 2015 in an arbitration proceeding before the nominal respondent Financial Industry Regulatory Authority (“FINRA”),¹ entitled *Moore v Merrill Lynch, Pierce, Fenner & Smith Inc.*, FINRA Dispute Resolution Arbitration No. 13-03472 (“the FINRA Arbitration”). After a review of petitioner’s papers and the relevant statutes and case law, the petition, which is unopposed, is **granted**.

¹By letter dated November 19, 2015, FINRA waived its right under FINRA Rule 2080 to be named as a party to this proceeding seeking the expungement relief contained in the award and its right to be served with notice of court documents in this proceeding. Ex. E to Hantman Aff. Merrill Lynch affirms that FINRA is named as a nominal respondent in this proceeding because New York Supreme Court E-filing forms require that a defendant/respondent be listed before the petition will be accepted for filing. Hantman Aff., at ¶ 17.

FACTUAL AND PROCEDURAL BACKGROUND:

In an affirmation submitted in support of the petition, David I. Hantman, an associate of the firm Bressler, Amery & Ross, P.C., attorneys for petitioner, stated that George Moore, claimant in the underlying arbitration that is the subject of this proceeding, maintained various brokerage accounts with Merrill Lynch that were serviced by non-parties Erik Bjerke and Mark Wazevich, employed by petitioner as financial consultants. Hantman Aff., at ¶¶ 3-4. Claimant commenced an arbitration before FINRA by filing an amended statement of claim dated March 14, 2014. Ex. A.² Merrill Lynch, respondent in the arbitration, filed its statement of answer on May 28, 2014, which denied claimant's allegations and requested expungement of the matter from Bjerke and Wazevich's Central Registry Depository records ("CRDs"). Ex. B. On or about April 22, 2015, claimant settled his claims against Merrill Lynch. Hantman Aff., at ¶ 8; Ex. D, at 2. Pursuant to FINRA registration reporting rules, despite the fact that Bjerke and Wazevich were not named as parties in the underlying arbitration, Merrill Lynch was required to amend their CRDs based on the allegations contained in the amended statement of claim. Hantman Aff., at ¶ 9. On or about July 29, 2015, Merrill Lynch filed a petition for expungement of the matter from Bjerke's and Wazevich's CRDs. *Id.*; Ex. D, at 2. On September 21, 2015, a hearing was held before FINRA arbitrators to determine whether the FINRA arbitration matter should be expunged from their CRDs. Hantman Aff., at ¶ 10; Ex. D, at 2.

Claimant consented to Merrill Lynch's request for expungement of the FINRA arbitration

²Unless otherwise noted, all references are to the exhibits annexed to the Hantman Affirmation.

from Bjerke's and Wazevich's CRDs and did not participate in the expungement hearing. Ex. C. In its award, the arbitration panel stated that after considering the pleadings, testimony, and evidence presented at the hearing, it determined that, upon confirmation of the award by a court of competent jurisdiction, all references to the FINRA arbitration would be expunged from Bjerke's and Wazevich's CRDs. Hantman Aff., at ¶ 12; Ex. D, at 2. The arbitration panel made affirmative findings of fact related to FINRA Rule 2080 with respect to Bjerke and Wazevich that "[t]he claim, allegation, or information is factually impossible or clearly erroneous; and [t]he claim, allegation, or information is false." Ex. D, at 2; Hantman Aff., at ¶ 12. The award contained further affirmative findings of fact as to each non-party, such that:

Each acted appropriately and in conformance within his fiduciary obligations, and

The Panel finds the above grounds supported by the evidence submitted in the Petition. Specifically:

Claimant knew or should have known the elementary principles of asset allocation and portfolio diversification. Despite that, the Panel finds that non-parties Bjerke and Wazevich provided Claimant with sufficient information concerning these matters and the array of securities options available. The Panel believes that each of the non-parties has fully met his fiduciary obligations to Claimant.

Evidence Presented:

Exhibit N (ML 009949) "Option Information – Individual, Joint and Trust Accounts: Personal and Financial Data Furnished By Client" (the "Form"). Claimant's signed Form reflects the level of experience of a sophisticated investor. That is, experience with Options, 20 years; Stocks, 25 years; and Bonds, 25 years. Additionally, before opening the subject discretionary account (and transferring an already concentrated

portfolio to Respondent), Claimant had experience working with two other brokerage firms.

Exhibit H (ML 010206-01234) “Private and Executive Wealth Management.” This “Risk Profile” provided Claimant with a wealth of information (including information on “asset allocation,” “diversified portfolio construction,” and “rebalancing”). Claimant subsequently took actions based on this advisory.

Ex. D, at 2-3; Hantman Aff., at ¶ 12. The arbitration panel made the above FINRA Rule 2080 findings with respect to Bjerke and Wazevich after reviewing the pleadings and the signed settlement agreement, considering the amounts paid and conditions of the settlement, reviewing their BrokerCheck Reports; and the other relevant terms and oral arguments made at the expungement hearing. Ex. D, at 3.

On or about October 1, 2015, FINRA delivered a copy of the award to each party in accordance with CPLR 7507. Hantman Aff., at ¶ 13; Ex. D.

POSITION OF THE PETITIONER:

Merrill Lynch asserts that the within petition has been brought one year after the aforesaid delivery of the award to petitioner, the award has not been vacated or modified, and that no prior request for the relief sought herein has been made. Merrill Lynch further asserts that this Court has jurisdiction to confirm the award granting relief because FINRA maintains its Northeast Regional Office in New York City. Merrill Lynch only seeks confirmation of that portion of the award recommending expungement of the FINRA arbitration from Bjerke’s and Wazevich’s CRDs, directing FINRA to expunge all references to said arbitration from their CRDs. The instant petition does not seek any relief against claimant, nor does it seek confirmation of any other relief granted

in the award, and, thus, claimant is not a necessary party to this action and there are no applicable notice requirements with respect to him.

LEGAL CONCLUSIONS:

CPLR 7510 provides that a “court shall confirm an arbitration award upon application of a party made within one year of its delivery . . . unless the award is vacated or modified upon a ground specified in section 7511.” Arbitration awards are accorded “substantial deference” and are provided extremely limited judicial review. *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 475 (2006). An arbitration award will be upheld provided there is “even a barely colorable justification for the outcome reached.” *Id.*, at 479, quoting *Andros Compania Maritima, S.A. v Marc Rich & Co., A.G.*, 579 F2d 691, 704 (2d Cir 1978). Here, it is evident from the arbitration award that the arbitration panel which rendered the award carefully analyzed the evidence presented as to the involvement of non-parties Bjerke and Wazevich. Ex. D. Therefore, the conclusion reached by the arbitrators was well-reasoned and justified.

CPLR 7511(a) allows a party to move to vacate or modify an arbitration award within 90 days after its delivery. Here, since no such motion was made within 90 days of October 1, 2015, the date on which FINRA served copies of the arbitration award (Hantman Aff., at ¶ 13; Ex. D), and the instant petition to confirm the award has been made within one year of that date, the petition to confirm must be granted. Moreover, despite being served with the instant petition, FINRA waived its right to participate in this proceeding.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that petitioner's notice of petition to confirm the arbitration award to the extent of the relief requested therein is granted; and it is further,

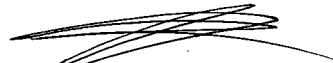
ORDERED that all references to the FINRA Arbitration captioned *Moore v Merrill Lynch, Pierce, Fenner & Smith Inc.*, FINRA Case No. 13-03472, be expunged from the FINRA Central Registration Depository records of Erik Bjerke (CRD # 2998546) and Mark Wazevich (CRD # 4248417); and it is further,

ORDERED that this constitutes the decision and order of this Court.

Dated: January 5, 2016

JAN 05 2016

ENTER:



KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT