

Clark v American Portfolios Fin. Servs., Inc.
2019 NY Slip Op 31615(U)
June 6, 2019
Supreme Court, New York County
Docket Number: 651529/2019
Judge: William Franc Perry
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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. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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INDEX NO. 651529/2019

MICHAEL CLARK

MOTION DATE 04/08/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

AMERICAN PORTFOLIOS FINANCIAL SERVICES, INC.,

**DECISION, ORDER AND
JUDGMENT**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2
were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT

This is an action by Michael Francis Clark (“Petitioner”) to confirm an arbitration
award pursuant to CPLR § 7510. Respondent American Portfolios Financial Services, Inc.
 (“Respondent”), has received notice and does not oppose the action.

Petitioner has been a registered representative affiliated with Respondent American
Portfolios Financial Services, Inc. (“Respondent”), a securities broker-dealer and member of the
Financial Industry Regulatory Authority (“FINRA”), since July of 2006.

In 2005, a married couple that were customers (the “Customers”) of Petitioner submitted
a written complaint to the U.S. Securities and Exchange Commission (the “SEC”), alleging that
Petitioner had recommended unsuitable investments for them (the “Complaint”). At the time of
the activities alleged in the Complaint, Petitioner was registered with Walnut Street Securities,
Inc. (“Walnut Street”), which no longer exists as a registered broker-dealer.

Petitioner provided the SEC with a response to the allegations in the Complaint, with a
copy to the Customers and to the Walnut Street compliance department. In his response,
Petitioner denied the Complaint, refuting the allegations and demonstrating the suitability of his
recommendations and his appropriate handling of the Customers’ investments.

The Walnut Street compliance department took no action against Petitioner. The SEC took no action against Petitioner. There was no settlement and thus no payments to the Customers by Walnut Street nor by Petitioner.

Even though the Complaint was denied, pursuant to FINRA's rules it was nevertheless required to be reported on Petitioner's industry record through the Central Registration Depository (known as the CRD), through which it remains publicly disclosed on the FINRA BrokerCheck website.

On or about May 10, 2018, Mr. Clark initiated an arbitration by filing a Petition for Expungement of the Complaint with FINRA Dispute Resolution, pursuant to FINRA Rule 12805 and FINRA Rule 2080 (FINRA Arbitration Case #: 18-01834, Michael Francis Clark vs. American Portfolios Financial Services, Inc., the "Expungement Arbitration").

In accordance with FINRA Rule 12805, the parties to the Expungement Arbitration and the arbitrator presiding thereover (the "Arbitrator") participated in a recorded, in-person hearing on November 12, 2018 to consider Petitioner's request for expungement. The Customers were notified of the Expungement Arbitration and of their right to participate and be heard regarding expungement of their Complaint from Petitioner's records, and they did not do so.

As reflected in the Award rendered in the Expungement Arbitration (the "Expungement Award"), the Arbitrator heard argument from counsel and testimony from Petitioner, and reviewed Petitioner's FINRA BrokerCheck Report, the pleadings, exhibits and other documentation provided by the parties and considered other relevant factors.

Following the Expungement Arbitration hearing, the Arbitrator delivered the Expungement Award on November 30, 2018, granting Petitioner's request for expungement and setting forth the detailed reasons and grounds for his decision. With respect to the Complaint, the

Arbitrator made the following affirmative findings of fact: the claim, allegation, or information is factually impossible or clearly erroneous; and the claim, allegation, or information is false.

In the Expungement Award, the Arbitrator recommended the expungement of all references to the Complaint from Mr. Clark's registration records. The Arbitrator's recommendation was made with the understanding that Mr. Clark must obtain confirmation of the Expungement Award from a court of competent jurisdiction pursuant to FINRA Rule 2080 before FINRA will expunge the Complaint from his records.

Pursuant to CPLR § 7510, Petitioner now seeks confirmation from this court of the arbitration award.

DISCUSSION

CPLR § 7510 states: "The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." N.Y. C.P.L.R. § 7510. The First Department, in interpreting CPLR 7510, gives "the word 'shall' its ordinary meaning" and the Court is "directed unequivocally by CPLR 7510 to confirm an arbitration award if a timely application is made whenever the award is not vacated or modified under CPLR 7511." *Bernstein Family Ltd. P'ship v. Sovereign Partners, L.P.*, 66 A.D.3d 1, 5 (1st Dept 2009). As long as the Respondent is not seeking to vacate or modify the award, the court does not run into the problem of inserting itself into dispute resolution when only confirmation of an arbitration award has been sought. *See id* at 7.

Here, Petitioner, in seeking the confirmation of the FINRA award, has satisfied all of the procedural requirements. Petitioner has made a timely application within one year of receipt of the award. (Petition, ¶ 13) Furthermore, Respondent has not made a motion to modify the award under § 7511. Conclusively, (i) "The Customers were notified of the Expungement Arbitration

and of their right to participate, and they did not do so,” (Petition, ¶ 11), and (ii) Respondent has had ample time and notice but has made no motion to modify or to vacate and does not contest Petitioner’s efforts to have the Expungement Award confirmed by this court (Acknowledgement of Service ¶ 3).

FINRA Rule 2080(a) provides that a petitioner, who seeks to expunge information from his CRD record, “must obtain an order from a court of competent jurisdiction directing such expungement or confirming an arbitration award containing expungement relief.” Additionally, FINRA Rule 2080(b) requires a petitioner seeking expungement under 2080(a) to name FINRA as an additional party and serve FINRA with all appropriate documents, unless FINRA waives this obligation upon request of petitioner. FINRA granted Petitioner’s request for a waiver of the obligation to name and serve FINRA. (Petition, Exhibit C).

Venue is proper as there is no specification giving sole jurisdiction to a different tribunal and the original arbitration’s venue was New York County. See e.g., *Big-W Const. Corp. v. Horowitz*, 24 Misc. 2d 145, 148 (Sup. Ct. 1959), *aff’d*, 14 A.D.2d 817 (2d Dept 1961) (“In the absence of a specification in a contract or submission to arbitration giving sole jurisdiction to a particular tribunal ‘the supreme court for the county in which one of the parties resides or is doing business, or in which the arbitration was held, shall have jurisdiction’”). Therefore, this Court has jurisdiction to direct expungement of the arbitration from Petitioner’s CRD records.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted, and the award rendered in favor of Petitioner and against Respondent is confirmed; and it is further

ORDERED and ADJUDGED that this Court directs entry of judgment of the arbitration award; and it is further

ORDERED and ADJUDGED that there be an expungement of any mention of the Complaint from Petitioner's CRD and BrokerCheck records.

Any requests for relief not otherwise discussed have nonetheless been considered and are hereby denied and this constitutes the decision, order and judgment of the court.

6/6/2019

DATE



W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE