

Lek Sec. Corp. v Elek
2019 NY Slip Op 31770(U)
June 14, 2019
Supreme Court, New York County
Docket Number: 653120/2019
Judge: Joel M. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

-----X

LEK SECURITIES CORPORATION, SAMUEL LEK, CHARLES LEK	INDEX NO.	<u>653120/2019</u>
Petitioners,	MOTION DATE	<u>05/29/2019</u>
- v -	MOTION SEQ. NO.	<u>001</u>
ISTVAN ELEK,		
Respondent.	DECISION + ORDER ON MOTION	

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46
were read on this motion for STAY OF ARBITRATION.

Petitioners initiated this action seeking to stay, pursuant to CPLR § 7503(b) and the Federal Arbitration Act (9 U.S.C. § 1 et seq.), a FINRA arbitration that was commenced by Respondent on March 22, 2019. Oral argument was held on June 14, 2019.

For the reasons set forth below and as stated on the record at a hearing held on June 14, 2019, Petitioners' motion to stay the arbitration is Granted, and Respondent's cross-motion to compel arbitration is denied.¹

¹ Given the exigent circumstances requiring a prompt decision after argument, familiarity with the facts and arguments of the parties as set forth in their briefs is assumed.
653120/2019 LEK SECURITIES CORPORATION vs. ELEK, ISTVAN Page 1 of 4
Motion No. 001

Analysis

The question whether a dispute is subject to mandatory arbitration is for the Court to decide, unless the parties have clearly indicated in their arbitration agreement that the issue is to be decided by the arbitrator. Recent federal decisions persuasively conclude that the fact that an organization (such as FINRA) has rules providing for arbitrators to construe organizational rules does not by itself require the Court to abandon its traditional role in deciding whether a dispute should be arbitrated. See *Met Life v. Buscek*, 919 F.3d 184 (2d Cir. 2019); *Citigroup v. Abbar*, 761 F.3d 268 (2d Cir. 2014). To the extent the Second Circuit's decision in *Alliance Bernstein v. Schaffran*, 445 F.3d 121 (2006) (suggesting that NASD rules generally convey an agreement that arbitrability should be decided by the arbitrators) survives those more recent decisions, it has been narrowed so that it does not apply here.

Although disputes about the scope of an arbitration agreement generally are resolved in favor of arbitration, that is not true with respect to whether there was an arbitration agreement in the first place. See *Abbar*, 761 F.3d at 274; *Brean Capital LLC v. NewOak Capital LLC*, 2014 WL 7269750 at *3 (Sup. Ct. N.Y. Cty. Dec. 22, 2014). Under either standard, on these facts the evidence clearly shows this dispute is not subject to mandatory FINRA arbitration.

In this case, the record demonstrates convincingly that the parties did not agree to arbitrate the claims asserted by Respondent. The only tether to FINRA arbitration is the assertion by Respondent that he is suing as a customer of Lek US, which is a member of FINRA. The record shows that is not the case. Respondent's customer relationship clearly was with Lek Securities UK Limited ("Lek UK"), not with Petitioner

Lek Securities Corporation (“Lek US”). Respondent’s attempt to shoehorn this into a customer dispute with Lek US is unavailing.

Abbar is directly on point. First, it held that the existence of a customer relationship under FINRA turns mainly on (i) whether an account was opened with the FINRA member; and (ii) whether the plaintiff purchased services from the FINRA member. 761 F.3d at 275. Second, the case involved a customer relationship between the plaintiff and a UK securities entity in which a related US entity took on the role of implementing transactions on behalf of the UK entity. The same is true here. Respondent’s account was opened with Lek UK, not with Lek US. Further, there is no evidence that Respondent purchased any services from Lek US. Instead, the record indicates that the services performed by Lek US were on behalf of Lek UK, which paid for those services in a manner that was not based on transaction volume and thus not tied to Respondent’s trading.

Triad Advisors, Inc. v. Siev, 60 F.Supp.3d 395 (E.D.N.Y. 2014), upon which Respondent relies, is distinguishable. In that case, an investment advisor (Tehan) referred his purported “customer” (Siev) to real estate venture firm (B&B), which had no selling agreement or agency agreement with Tehan. Tehan was paid a finder’s fee by B&B for the referral. The court found that Siev was a customer of Tehan (and therefore his firm, a FINRA member) because Tehan provided a service to Sieve “and he was paid for it,” even though it flowed to him indirectly through B&B. The court distinguished *Abbar* on the ground that the issue there (as here) was about *which Citigroup entity* had a customer relationship with the investor, not whether a customer relationship existed at all (which it clearly did with Tehan, who rendered services to Siev and received a

finder's fee for his efforts). Moreover, unlike in the present case, the payment received by Tehan was directly and specifically traceable to Siev because it was "transaction-based selling compensation." The Court concludes that *Abbar* is directly on point and provides a persuasive basis for concluding that Respondent was a customer only of Lek UK, not of Lek US.

Accordingly, because there is no basis for triggering mandatory arbitration under FINRA rules, the petition to permanently stay the arbitration under CPLR § 7503(b) and under the Federal Arbitration Act is granted. It is, therefore:

ORDERED that Petitioner's motion to stay FINRA Arbitration Number 19-00800 is Granted; it is further

ORDERED that Respondent's cross-motion to compel arbitration is Denied; and it is further

ORDERED that the Clerk is directed to enter judgment staying FINRA Arbitration Number 19-00800.

This constitutes the decision and order of the Court.

6/14/2019
DATE


JOEL M. COHEN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>				<input type="checkbox"/>	FIDUCIARY APPOINTMENT