

**Zech v Financial Indus. Regulatory Auth., Inc.
(FINRA)**

2019 NY Slip Op 32811(U)

September 12, 2019

Supreme Court, New York County

Docket Number: 653998/2019

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

NOW, upon the application of Bressler, Amery & Ross, P.C., attorneys for Petitioner, it is hereby

ORDERED that the Petition is hereby granted solely to that portion of the arbitration panel's Award in the FINRA Arbitration recommending expungement, and is confirmed consistent with the below:

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

- I. The Arbitrator recommends the expungement of all references to Occurrence Nos. 1487495 and 1213532 from registration records maintained by the CRD, for Claimant Barbara Zech (CRD No. 2261924), with the understanding that, pursuant to Notice to Members 04-16, Claimant must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to Rule 13805 of the Code, the Arbitrator has made the following Rule 2080 affirmative finding of fact:

- The claim, allegation or information is factually impossible or clearly erroneous; and
 - The claim, allegation, or information is false.
- II. The Arbitrator has made the above Rule 2080 finding based on the following reasons:

Claimant testified under oath on her behalf. The Petition for Expungement and Answer of Respondent were admitted as Arbitrator's Exhibit 1. Claimant entered into evidence exhibits A through N, plus the Affidavit of Service, as to the notice to the two customers of the expungement hearing and neither participated, which were reviewed and considered as part of the deliberations.

As to Occurrence No. 1213532:

According to the testimony this occurrence involves two different clients. The first are the customers from Occurrence No. 1213532 – after several years of investing in CDs and FIDs, these customers raised a complaint with Respondent regarding their misunderstanding about the callable nature of

their CD accounts. The customers had invested in callable CDs before transferring their account to Respondent and working with Claimant. Respondent investigated the internal complaint. Claimant participated in the investigation along with document review. Respondent determined that there was no liability to the firm or to Claimant and denied the customers' complaint. Based on the testimony of Claimant, she produced very detailed notes as to her conversations and interactions with the customers. There were notations as to informing the customer that the "issuer" made the decision as to the date to redeem, not the investor or Respondent or Claimant. After Respondent denied their complaint, the customers did not pursue the matter further and did not initiate any litigation or arbitration against Claimant or Respondent. The customers did transfer their accounts to another firm in the form of a self-directed account. This testimony was not refuted. There was no payment or settlement. The uncontroverted testimony was that the claim was false and clearly erroneous.

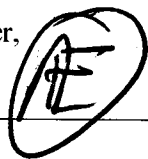
As to Occurrence No. 1487495:

The second customer complaint involved the customer from Occurrence No. 1487495. This customer filed a Statement of Claim with FINRA against Respondent only. Claimant testified she was not named in the arbitration and had nothing to do with any settlement, award or payment. The customer was retiring from Bell South and wanted to make her investments last through retirement. In 2007, Claimant met and spoke extensively with the customer and created four different allocation proposals, which were all reviewed with the customer. The customer finally agreed to a plan that Claimant proposed and she began to set up the accounts. Eventually, the customer filed a Statement of Claim with FINRA (Case No. 09-06370) against Respondent claiming breach of fiduciary duty, breach of contract, unsuitability, negligence and gross negligence, fraud and failure to supervise. Claimant testified as to her many conversations with the customer as referred to in her notes, about the hysteria of the customer after watching television and reading about the market crisis. Claimant's notes reflect that the customer was hysterical and yelling at times during their conversations. There were notes and testimony that the customer did not remember conversations. The customer executed a Fund Solution Agreement in May 2008 and her funds were invested based on the allocation plan agreed upon. The customer had an "auto-rebalancing" feature in her account which was designed to protect her accounts. Claimant testified that a form was sent to the customer several times to remove or change the "auto rebalance" feature which the customer did not return. The customer's accounts were serviced based on her wishes and income requirements and instructions. The customer received various documents as to her investments and the strategies and was informed of the risks associated and involved.

The customer did file an arbitration with FINRA against Morgan Stanley only. Claimant testified she was not named in the arbitration and had nothing to do with any settlement, award or payment. The Arbitrator did review the public Award, which does not mention Claimant. The Statement of Claim was for compensatory damages, return of fees and punitive damages. The Award was for a small amount based on the amount demanded. The Panel in the Award did not mention Claimant or any other Morgan Stanley employee and did not refer Claimant or any other Morgan Stanley employee for any disciplinary matter. There are no specifics as to the finding of the Panel in the Award. The market crash—financial crisis in 2008—was not the fault or cause of anything done by Claimant. Unprofitability of an account does not make it unsuitable. The uncontroverted testimony was that the claim was false and clearly erroneous.

The testimony, documents reviewed by the arbitrator and the argument of counsel demonstrate that Claimant has met the burden of proving that the Petition for Expungement is granted based on FINRA Rule 2080(b)(1)(A) and (C).

ORDERED that the Award is confirmed and that all references to Occurrence Numbers 1213532 and 1487495 be expunged from the FINRA CRD records of Barbara J. Zech (CRD# 2261924).

Enter,  9/12/19
_____, J.S.C.

HON. ARTHUR F. ENGORON