

Elkin v American Portfolios Fin. Servs., Inc.
2019 NY Slip Op 32872(U)
September 25, 2019
Supreme Court, New York County
Docket Number: 654241/2019
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Index No.: **654241/2019**

GEORGE GARY ELKIN,

Petitioner,

ORDER AND JUDGEMENT

-against -

**AMERICAN PORTFOLIOS FINANCIAL
SERVICES, INC.,**

Respondent.

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HON. DEBRA A. JAMES:

This is an action by George Gary Elkin (“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 September of 2001.

In 2012, a public customer (the “Customer”) of Petitioner submitted a written complaint to FINRA, alleging that one or more persons (purportedly including Petitioner) altered certain account transfer documentation which had been signed by Customer (the “Customer Complaint”).

Petitioner never met with the Customer, never spoke with him and played no role in the preparation nor alteration of any of the Customer’s paperwork.

Respondent and FINRA investigated the Customer Complaint and took no action against Petitioner, finding another person responsible for the alterations and finding the alterations immaterial. There was no settlement and thus no payments to the Customer by Respondent 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 July 13, 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 #: 18-02538, George Gary Elkin 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 December 19, 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 Dated February 8, 2019, 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; Petitioner was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; 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

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’s Rule and Venue

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.

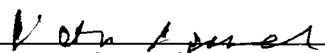
Accordingly, it is,

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

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

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

Dated: SEP 25 2019, 2019
New York, New York



Hon. Justice Debra A. James
DEBRA A. JAMES