SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

---

x

GILMAN CIOCIA, INC.,

Plaintiff,

-against-

DOMINICK RIOLO,

Defendants.

---

x

Corrected
DECISION AND ORDER

Index No: 50652/2017

The following papers were read and considered on defendant's motion to compel arbitration:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS 1-6

AFFIDAVIT IN SUPPORT
EXHIBITS A-D
MEMORANDUM OF LAW IN SUPPORT

AFFIDAVIT IN OPPOSITION
AFFIRMATION IN OPPOSITION
EXHIBITS A-K
MEMORANDUM OF LAW IN OPPOSITION

Plaintiff commenced this action alleging defendant violated a non-compete clause and employment contract. Defendant moves pursuant to CPLR §7503 for an order compelling plaintiff to submit the dispute to arbitration with the Financial Industry Regulation Authority ("FINRA"). **Defendant** further moves to stay this proceeding pending the outcome of an arbitration.

To determine whether a party is required to submit its claims to arbitration, this court must make a determination as to whether the parties have entered into a valid arbitration agreement and, if so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement. CPLR §7503; Harriman Group v Napolitano, 213 AD2d 159 (1st Dep't 1995).

Defendant submitted an affidavit stating that he is a certified financial planner and was first registered with a member-firm of FINRA in 1985. He states that he holds FINRA licenses as a general security representative, a uniformed security agent and a uniform investment advisor. **Defendant** worked for 11 years as a financial advisor and registered broker-dealer prior to commencing employment for plaintiff in 1996. Plaintiff is a tax and financial planning services company engaged in the preparation of tax returns accounting and bookkeeping services. It is not registered with a Security Exchange Commission or FINRA and thus is not authorized to charge or receive commission from security transactions. Defendant maintains that plaintiff is part of a network of affiliated entities through which he offered brokerage services to clients. One of these entities is Prime Capital Services, Inc., an entity licensed to offer brokerage services. **Defendant** states that while employed for this entity he did not perform any accounting or tax preparation services. In fact, he states he is not licensed as a Certified Public Accountant or Certified Tax Preparer. While **Defendant** was employed by a tax and financial services company, he did not offer those services but instead operated as a broker-dealer through plaintiff's affiliate, Prime Capital. While employed by plaintiff, defendant was registered as an associated person with Prime Capital as a Certified Financial Planner. He states that in 2013, National Security Corporation ("NSC") purchased Prime Capital and consequently he became registered as an associated person through NSC. Defendant further maintains that plaintiff and NSC are wholly-owned subsidiaries of National Holding Corporation and that NSC is a FINRA-registered broker-dealer.

On February 3, 2010, defendant signed a "Tax Preparer and Accountant Employment Agreement" ("TPEA"). That agreement was made between defendant and plaintiff, Prime Capital, Prime Financial Services, Inc. and Asset & Financial Planning, Ltd. It contains a non-compete clause stating that defendant would not directly or indirectly conduct any accounting, tax preparation, financial planning, insurance or investment business for two years after the termination of the agreement within five miles of a specified office area. The agreement further provides that any dispute or controversy arising thereunder would be determined in either a law suit or an arbitration proceeding at the plaintiff's option. Defendant resigned from Gilman Ciocia, Inc. in July 2014 and began performing brokerage services for another entity. This action followed.

Defendant claims that during the entire period he worked for plaintiff, he was performing brokerage and financial planning services for Prime Capital and other licensed brokerage entities. He emphasizes that plaintiff is not a registered broker-dealer and is legally barred from charging and receiving commissions on security transactions. In support of his motion, he submits unrefuted evidence that the FINRA code compels mandatory arbitration of employment disputes arising out of the business activities of a member or an associated person. Defendant maintains that the subject matter of this action is an employment dispute arising out of brokerage work he performed for Prime Capital and subsequently NSC, both of whom were undisputably required to arbitrate employment disputes under the FINRA code. Defendant further emphasizes that both Prime Capital and NSC signed a U4 form pursuant to FINRA Rule 2263 which member firms are required to provide to regulated brokerage employees notifying them of FINRA's strict membership requirements.

In opposition to the motion, plaintiff relies upon the TPEA which gives plaintiff, in its

discretion, the authority to litigate an employment dispute in State Court. Plaintiff does not refute defendant's assertions that he performed only brokerage related work for Prime Capital and NSC while employed by it and that he was not qualified and did not perform any tax preparation or accounting services.

To compel a party to arbitrate pursuant to contractual agreement, there must be no substantial question as to whether a valid agreement was made or complied with. Manos v Interbank of NY, 202 AD2d 403 (2nd Dep't 1994); CPLR §7503. Defendant makes unrefuted allegations that in his capacity as an employee with plaintiff he performed only brokerage and securities related work, activities that plaintiff was not licensed to perform. It is further unrefuted that the FINRA code required Prime Capital, NSC and the defendant to arbitrate any employment disputes pursuant to the FINRA code of arbitration procedure. Plaintiff may not circumvent this arbitration requirement by structuring affiliated business entities in a manner that circumvents FINRA's strict arbitration requirements. During the period of employment at issue in this case, defendant was a FINRA registered broker-dealer performing work for FINRA member entities. He did not perform any tax preparation or accounting work and was not qualified to do so. On such facts, the court finds that any dispute arising from defendant's employment with plaintiff and the security work he performed in such capacity is subject to FINRA's rules of arbitration. Plaintiff is required to arbitrate any disputes arising out of defendant's employment with the conglomerate of affiliated entities based upon the arbitration provisions applicable to the security work that defendant was performing. Such provisions require that the dispute before this court be subjected to FINRA arbitration.

Based on the foregoing, it is hereby

ORDERED that defendant's motion for an order pursuant to the Federal Arbitration Act, 9 USC §§3,4(i) compelling the plaintiff to proceed to arbitration to resolve all claims set forth in its complaint is granted. In light of the strong public policy favoring arbitration and pursuant to the strict requirements of arbitration under FINRA, the court rejects plaintiff's claim that defendant waived his right to move to compel arbitration by participating in this litigation. It is further

ORDERED that any actions in this proceeding are stayed pending such arbitration or the receipt of a stipulation of discontinuance based upon the court's findings herein.

This constitutes the decision and order of the court.

Dated: November 20, 2017
Poughkeepsie, New York
Corrected version signed April 8, 2019
nunc pro tunc

ENTER:

MARIA G. ROSA, J.S.C.

Kenneth L. Kutner, Esq.
Law Offices of Kenneth L. Kutner
1185 Avenue of the Americas, 18th Floor
New York, NY 10036

James E. Heavey, Esq.
Barton, LLP
Graybar Building
420 Lexington Avenue, 18th Floor
New York, NY 10170

Scanned to the E-File System only

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.