

Weinstein v ETrade Sec. LLC

2023 NY Slip Op 33753(U)

October 4, 2023

Supreme Court, New York County

Docket Number: Index No. 655132/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

(FINRA)¹ pursuant to 9 USC § 2 and CPLR 7503 (NYSCEF Doc. No. 21, *notice of motion*) [Mot. Seq. 001]. In support of its application, defendant submits, *inter alia*, the affidavit of Erik Renga (“Renga”), who states that the E*Trade Customer Agreement in effect at the time plaintiff’s account was transferred to E*Trade,² contained a pre-dispute arbitration clause that provided, in pertinent part:

“I agree to resolve by binding arbitration any controversy that may arise between E*Trade Securities its affiliates and me relating in any way to my relationship with E*Trade Securities, any Account held with E*Trade Securities, or any service provided by E*Trade Securities to me. This arbitration agreement includes any controversy involving transactions of any kind made on my behalf by or through E*Trade Securities, or (b) the performance, construction or breach of this Agreement or any other written agreement between E*Trade Securities and me. Such arbitration shall be conducted in accordance with the rules then in effect of the NASD.” (NYSCEF Doc. No. 24, pg 38-39 § 8[B]).

Renga also affirms that the E*Trade Customer Agreement currently in effect also provides, in pertinent part, as follows:

“The Account Holder agrees to resolve by binding arbitration any controversy that may arise between E*Trade Securities or its affiliates and the Account Holder relating in any way to the Account Holder's relationship with E*Trade, any Account held with E*trade, or any service provided to the Account Holder by E*Trade. This arbitration agreement includes any controversy involving transactions of any kind made on the Account Holder's behalf by or through E*Trade or the performance, construction, or breach of this Customer Agreement or any other written agreement between E*Trade and the Account Holder. Such arbitration will be conducted in accordance with the FINRA rules then in effect unless the rules of another self-regulatory organization to which E*Trade is subject mandate arbitration before that organization.” (NYSCEF Doc. No. 25, pg 34 ¶ 12, *March 2021 Customer Service Agreement*).

By memorandum of law, defendant argues that the Federal Arbitration Act governs the customer agreements and that all claims against defendant are subject to FINRA arbitration. As a result, it contends that the court must stay the matter against defendant pending arbitration (NYSCEF Doc. No. 26, *memorandum of law*).

Plaintiff opposes the motion, arguing that this Court is the proper forum to adjudicate the instant dispute since the promissory note designates Supreme Court, New York County as the proper forum to adjudicate any matter arising out of the promissory note. He argues that, since his complaint seeks, in part, an order that plaintiff is not required to pay defendant the \$40,000.00 under the promissory note, due to the violation of Reg. T, the action was properly commenced in this court and arbitration is not appropriate. Plaintiff further claims that

¹ On July 30, 2007, the NASD and the NYSE merged and became the Financial Industry Regulatory Authority (FINRA).

² Plaintiff’s account was transferred to defendant after defendant’s acquisition of BrownCo, LLC (“BrownCo”) in 2006.

defendant, by executing the promissory note, waived its right to arbitrate. According to plaintiff, the November 2005 customer agreement is invalid and unenforceable because in March 2020, defendant restricted his account, and he was not allowed to trade. Additionally, plaintiff maintains that he never signed that he received the March 2021 customer agreement. As to the claim that the issue with respect to the promissory note is not ripe for litigation, given that the action and motion was filed prior to the maturity date of the note, plaintiff contends that it was compelled to file his complaint to not run afoul of the statute of limitations.

In reply, defendant reiterates that the crux of this action is whether the subject trading activity in plaintiff's E*Trade account violated Reg T and that the existence of the promissory note does not preclude arbitration. Defendant further argues that, since plaintiff agreed for his BrownCo account to be transferred to E*Trade, he assented to the arbitration provision in the customer agreement. As to the argument that the right to arbitration was waived, defendant argues that the only element that it agreed to litigate in this Court were claims relating to a breach of the payment terms under the promissory note, which, at the time of the return date of this motion, had not yet been due. It also maintains that plaintiff's concerns regarding discovery in the arbitration proceeding are baseless because he shall have ample opportunity to seek discovery in said proceeding (NYSCEF Doc. No. 34, *reply memorandum of law*).

New York has a strong policy favoring arbitration. (See *Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 49 [1997].) However, “[a] party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties’ ‘clear, explicit and unequivocal’ agreement to arbitrate[.]” (*God’s Battalion of Prayer Pentecostal Church, Inc. v Miele Assocs., LLP*, 6 NY3d 371, 374 [2006] [internal citation omitted].) Thus, “the court must first determine whether the parties made a valid arbitration agreement[.]” (*Harriman Group v Napolitano*, 213 AD2d 159, 162 [1st Dept 1995].)

Here, after due consideration of all arguments advanced and all exhibits furnished, defendant's motion to compel arbitration is granted insofar as this court finds that there was a valid agreement between the parties to arbitrate the issues raised in this action, to wit, claims that defendant violated Reg. T. To the extent plaintiff attempts to advance the bald assertion that he never assented to the customer agreement, this argument is rejected. Although plaintiff attempts to argue that the promissory note designates this court as the proper forum, there are no claims that the promissory note was in any way breached; rather, plaintiff references the promissory note to contend that he should not be obligated to pay the \$40,000.00 due thereunder given defendant's alleged violation of Reg. T.³ Insofar as this court is persuaded that the crux of plaintiff's claims concerns the alleged violation of Reg. T, which plaintiff does not dispute is governed by the customer agreement that contains the arbitration provision, and that the relief sought based on the promissory note is ancillary to the customer agreement, this court finds that defendant has established its entitlement to arbitration (*Wu v Uber Tech., Inc.*, ___ AD3d ___, ___, 2023 NY Slip Op 04706, *1-2 [1st Dept 2023]; *Brooks v Lang*, 216 AD3d 505, 507 [1st Dept 2023]).

³ This court notes that plaintiff filed the instant action prior to the maturity date of the promissory note, which was on April 30, 2023.

Given the foregoing, Mot. Seq. Nos. 003; 004; and 005 are denied, without prejudice. Accordingly, it is hereby

ORDERED that defendant ETRADE SECURITIES LLC's motion to compel arbitration and to stay this action (Mot. Seq. 001) is granted; and it is further

ORDERED that plaintiff RAYMOND M. WEINSTEIN shall arbitrate his claims against defendant ETRADE SECURITIES LLC in accordance with this decision and order; and it is further

ORDERED that plaintiff's motions under Mot. Seq. Nos. 003; 004; and 005 are denied, without prejudice; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration.

This constitutes the decision and order of this court.

October 4, 2023

HON. VERNA L. SAUNDERS, JSC

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