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| <b>Montaldo v Morgan Stanley Smith Barney, LLC</b>   |
| 2025 NY Slip Op 35391(U)   |
| February 10, 2025  |
| Supreme Court, Dutchess County   |
| Docket Number: Index No. 2025-80002  |
| Judge: Edward T. McLoughlin  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

RICHARD MONTALDO,

Petitioner

DECISION & ORDER

Index No.: 2025-80002

- against -

MORGAN STANLEY SMITH BARNEY, LLC;  
MORGAN STANLEY SMITH BARNEY  
FINANCING, LLC,

Respondents,

\_\_\_\_\_  
MCCLOUGHLIN, J., Acting Supreme Court Justice

The Court read and considered the following papers in determining this petition to vacate an arbitration award and the respondents' cross-petition to confirm the arbitration award:

|                                       | <u>Papers Numbered</u> |
|---------------------------------------|------------------------|
| Notice of Petition .....              | 1                      |
| Verified Petition .....               | 2                      |
| Exhibits (A – C) .....                | 3-5                    |
| Notice of Cross-Petition .....        | 6                      |
| Verified Answer to Petition .....     | 7                      |
| Affidavit of Christine Kendrick ..... | 8                      |
| Exhibits (A – P) .....                | 9-24                   |
| Memorandum of Law .....               | 25                     |

Petitioner commenced this special proceeding with the filing of a verified petition on July 25, 2024. The petition seeks an order pursuant to CPLR Article 75 vacating an arbitration award, dated June 7, 2024, rendered in an arbitration before the Financial Industry Regulatory Authority (“FINRA”) in a matter entitled *Morgan Stanley Smith Barney LLC and Morgan Stanley Smith Barney Financing LLC v. Richard Frank Montaldo, Jr.*, FINRA Case Number 24-00544 (“the Award”). By notice of cross-petition dated October 2, 2024, respondents seek an order: (1) denying the petition; (2) confirming the Award; (3) directing judgment be entered against petitioner in the amount of

\$289,454.43; (4) awarding interest at the statutory rate of 2% per annum from the date of the judgment until payment; (5) awarding costs and disbursements; and (6) such other and further relief as the Court deems just and proper.

#### BACKGROUND

Petitioner is a former employee of respondent Morgan Stanley Smith Barney LLC ("MSSB"), a securities broker-dealer and member of FINRA (*see* Kendrick Aff, ¶¶ 2, 4). Throughout his employment with MSSB, petitioner was a registered person with FINRA under the name Richard Frank Montaldo, Jr. (*id.* at ¶4).

On or about April 21, 2017, petitioner signed a promissory note for a loan he received from Morgan Stanley Smith Barney FA Notes Holdings LLC (*see* Kendrick Aff, Ex. A). The note contains a clause requiring that any controversy or claim concerning the note be submitted to arbitration in accordance with the rules of FINRA and that judgment upon the award entered by the arbitrator could be entered in any court having jurisdiction (*id.*).

Petitioner's employment with MSSB terminated on or about November 21, 2023 (*see* Kendrick Aff, ¶7). Pursuant to the terms of the note, the unpaid balance of the note became immediately due and payable (*id.*). After petitioner failed to pay the balance due on the note, the parties proceeded to arbitration of the dispute before FINRA (*id.*).

On March 11, 2024, MSSB filed its Statement of Claim with FINRA (*see* Kendrick Aff, Ex. B). Petitioner did not submit an answer to the Statement of Claim (*id.*, Ex. D). On May 2, 2024, FINRA sent a letter to the parties in which it advised that, because petitioner had not submitted an answer, the case would be decided based on the pleadings and other materials submitted by the parties, pursuant to FINRA Rule 13807 (*id.*). That same date, FINRA sent the parties a letter regarding the selection of arbitrators (*id.* at Ex. E). The parties were provided with a list of ten potential arbitrators

and each arbitrator's Disclosure Report, which includes the arbitrator's background and prior arbitration awards (*id.*). This letter also advised that parties could strike the names of up to four arbitrators to whom they objected and rank the others in order of preference (*id.*). It further warned that: "If we have not received your lists on or before [May 22, 2024], you will be deemed to have accepted all arbitrators on the lists" (*id.*).

One of the potential arbitrators was Elizabeth Gilbert. Her disclosure report contained a summary of her education and experience, as well as all FINRA awards in which she served as an arbitrator (*id.*). Among the arbitration awards listed were two cases where Morgan Stanley was a party and where hearings were held and testimony was given (*id.*). Arbitrator Gilbert also listed a previous arbitration award in a matter in which petitioner was a party: *Oppenheimer & Co., Inc. v. Richard Frank Montaldo*, FINRA Case Number 17-03078 (*id.*). Petitioner did not file an answer in the *Oppenheimer* arbitration and the award was decided on papers without a hearing and/or testimony (*see Kendrick Aff, Ex. H*).

On May 23, 2024, FINRA sent a letter to the parties advising that Elizabeth Gilbert was appointed as the arbitrator and that the case would be determined on the documentary evidence submitted by the parties (*see Kendrick Aff, Ex. I*). Petitioner did not object to the selection of Elizabeth Gilbert as arbitrator. On May 28, 2024, FINRA served an Oath of Arbitrator and Disclosure Checklist for Arbitrator Gilbert on the parties (*see Kendrick Aff, Ex. K*). Petitioner did not object to the Oath of Arbitrator or Disclosure Checklist. In the section of the Oath for "Personal Disclosures," question number 2 asked: "Have you had any professional, social, or other relationships or interactions with any of the parties or their employers in the arbitration?" Arbitrator Gilbert answered in the affirmative, noting that "I served as an arbitrator on cases in which Morgan Stanley Smith Barney LLC was a party" (*id.*). In the section of the Oath for "Disclosures About the Parties" in the

Case,” question number 4 asked: “Have you been involved in a proceeding in which any of the named parties gave testimony?” Arbitrator Gilbert answered in the affirmative, stating that “I served as an arbitrator on cases in which Morgan Stanley Smith Barney LLC was a party” (*id.*).

On or about June 7, 2024, Arbitrator Gilbert issued an award in favor of respondents, and against petitioner, in the amount of \$289,454.43, including interest, attorneys’ fees, and costs (*see* Kendrick Aff, Ex. M).

Petitioner now moves to vacate the Award pursuant to CPLR §7511[b][1]. His sole basis for vacatur is the alleged partiality of Arbitrator Gilbert. Respondents oppose the requested relief and cross-petition for confirmation of the Award. Respondents contend that: (1) petitioner has not met his burden of demonstrating partiality of the arbitrator; (2) Arbitrator Gilbert’s disclosure reports contained all required information about prior arbitration awards; and (3) even if petitioner had an arguable claim of partiality, he waived any such claim by failing to raise it on multiple opportunities prior to issuance of the Award.

#### DISCUSSION

“[J]udicial review of arbitration awards is extremely limited” (*Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006]). “An award rendered after an arbitration conducted pursuant to the terms of a contract may only be vacated upon one of the grounds set forth in CPLR 7511” (*Matter of Piller v. Eisner*, 173 AD3d 1035, 1036 [2d Dept. 2019] [citation omitted]). Insofar as is relevant to this case, CPLR 7511[b][1][ii] provides that an arbitration award “shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by ... partiality of an arbitrator appointed as a neutral ...” (*see A&L Village Market, Inc. v. 344 Village, Inc.*, 140 AD3d 804, 805 [2d Dept. 2016]; *Matter of Atlantic Purchasing, Inc. v. Airport Properties II, LLC*, 77 AD3d

824, 825 [2d Dept. 2010], quoting CPLR §7511[b][1][i], [ii]). “A party seeking to overturn an arbitration award on one or more grounds stated in CPLR 7511[b][1] bears a heavy burden, and must establish a ground for vacatur by clear and convincing evidence” (*Matter of CEO Business Brokers, Inc. v. 1431 Utica Avenue Corp.*, 187 AD3d 1185, 1186 [2d Dept. 2020] [citation omitted]).

Petitioner has failed to meet his heavy burden of establishing that his rights were prejudiced by any partiality of Arbitrator Gilbert. Contrary to petitioner’s contention, Arbitrator Gilbert’s disclosures were accurate and complied with FINRA rules. Arbitrator Gilbert disclosed her prior involvement in the *Oppenheimer* arbitration, in which petitioner was a party, in the Disclosure Report first provided to the parties during the arbitrator selection process (*see* Kendrick Aff. Ex. E). Furthermore, Arbitrator Gilbert’s responses to questions posed in the Oath of Arbitrator and Disclosure Checklist were also accurate. As to question number 2 in the “Personal Disclosures” section (“Have you had any professional, social, or other relationships or interactions with any of the parties ...”), the failure of Arbitrator Gilbert to identify any prior interaction with petitioner is a reasonable and complete response given that petitioner did not submit an answer and there was no hearing or testimony on the *Oppenheimer* matter. Petitioner has not identified any other past interaction that Arbitrator Gilbert failed to disclose. For these same reasons, Arbitrator Gilbert’s response to question number 4 in the “Disclosures About the Parties in the Case” section was appropriate and in compliance with FINRA rules.

Even if there was a question about whether Arbitrator Gilbert’s disclosures were complete and accurate, petitioner has not proven, by clear and convincing evidence, that Arbitrator Gilbert exercised partiality towards MSSB (or against him) in her determination of the claim (*see A&L Village Market*, 140 AD3d at 806 [“In any event, the seller failed to establish that the prior arbitration had any effect upon the arbitrator’s ability to be neutral in the instant matter”]). “[T]here is no

evidence to demonstrate, or even suggest, that the [*Oppenheimer*] arbitration had any effect upon the arbitrator's ability to be neutral in the instant matter" (*Matter of Atlantic Purchasing, Inc.*, 77 AD3d at 825-826).

Moreover, to the extent that petitioner had a viable claim of arbitrator partiality, he waived his objection by failing to raise it, despite several opportunities, prior to Arbitrator Gilbert's issuance of the Award (*Matter of Atlantic Purchasing, Inc.*, 77 AD3d at 825; see also *Miller Tabak & Co., LLC v. Coppedge*, 166 AD3d 432, 432 [1st Dept. 2018]; *A&L Village Market*, 140 AD3d at 806; *Matter of Raitport v. Salomon Smith Barney, Inc.*, 57 AD3d 904, 906 [2d Dept. 2008]). Petitioner was aware in early May, 2024, that Arbitrator Gilbert was on the list of potential arbitrators provided by FINRA and, despite disclosure of the *Oppenheimer* arbitration, petitioner raised no objection. Petitioner also failed to object to the designation of Ms. Gilbert as the arbitrator on May 23, 2024, or to her Oath of Arbitrator and Disclosure Checklist, sent on May 28, 2024, to which he now belatedly objects.

Based upon the foregoing, the petition to vacate the Award is denied.

Upon denial of a motion to vacate or modify an arbitration award, the court "shall confirm the award" (CPLR §7511[e]). Once an award is confirmed, judgment "shall be entered" (CPLR §7514[a]). Accordingly, the respondents' cross-petition is granted. To the extent respondents seek an award of attorneys' fees related to the petition and cross-petition, they must submit a separate fee application, in writing and on notice to the petitioner, prior to submission of a proposed judgment.

Based upon the foregoing, it is hereby

ORDERED that the application of petitioner Richard Montaldo for an order pursuant to CPLR §7511 vacating the arbitration award, dated June 7, 2024, rendered in an arbitration in a matter entitled *Morgan Stanley Smith Barney LLC and Morgan Stanley Smith Barney Financing LLC v. Richard Frank Montaldo, Jr.*, FINRA Case Number 24-00544, is denied in its entirety; and it is further

ORDERED that the cross-petition of respondents Morgan Stanley Smith Barney LLC and Morgan Stanley Smith Barney Financing LLC is granted; and it is further

ORDERED that the arbitration award, dated June 7, 2024, rendered in an arbitration in a matter entitled *Morgan Stanley Smith Barney LLC and Morgan Stanley Smith Barney Financing LLC v. Richard Frank Montaldo, Jr.*, FINRA Case Number 24-00544, is confirmed; and it is further

ORDERED that respondents shall submit a proposed judgment, consistent with this Decision & Order, on notice to the petitioner, within sixty (60) days.

The foregoing constitutes the Decision and Order of the Court.

Dated: February 10, 2025  
Poughkeepsie, New York



Hon. Edward T. McLoughlin, AJSC

To: Attorney(s) of Record via NYSCEF

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