

Citigroup Global Mkts., Inc. v Fiorilla

2018 NY Slip Op 31919(U)

August 1, 2018

Supreme Court, New York County

Docket Number: 653017/13

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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CITIGROUP GLOBAL MARKETS, INC., and EDWARD
JAMES MULCAHY, JR.,

Petitioners,

-against-

Index No.
653017/13

JOHN LEOPOLD FIORILLA, as Trustee FBO
JOHN LEOPOLDO FIORILLA TRUST U/A/D 06-25-2003,

Respondent.

-----X

Hon. C. E. Ramos, J.S.C.:

Petitioners Citi Group Global Markets Inc. (CGMI) and Edward James Mulcahy Jr. move, pursuant to Rule 130-1.1 of the Rules of the Chief Administrator (Uniform Rule 130-1.1), for an order awarding attorneys' fees and sanctions against respondent John Leopoldo Fiorilla and/or his formal counsel, Alexander Tripp, Esq.

Background

CGMI commenced this special proceeding under Article 4 of the CPLR to set aside an arbitration award entered by FINRA arbitrators involving a dispute that the parties had already settled. As set forth in the petition, in 2006, Fiorilla opened an account with CGMI, and at some point, allegedly suffered massive losses. Fiorilla commenced a FINRA arbitration against CGMI and Mulcahy for various breaches of duty.

Fiorilla and CGMI settled the FINRA arbitration for \$800,000, and FINRA removed the matter from its hearing calendar

(Petition, Exs. 4-6). Following the settlement, Fiorilla disputed that a final settlement had been reached, and requested that FINRA reinstate his claims to the hearing calendar. Under protest by CGMI, a FINRA panel rendered an award in Fiorilla's favor in the amount of \$10.75 million against CGMI, and \$250,000 against Mr. Mulcahy Jr. (the Award).

In 2013, Citi commenced this special proceeding seeking to vacate the Award on the basis of the settlement and other grounds. In his answer, Fiorilla denied that a settlement had been reached.

Based upon the record, including correspondence from Fiorilla's attorney to FINRA stating that the case had been "settled in full," and FINRA's response confirming that it had been notified of the settlement, this Court entered an order and judgment vacating the Award (order and judgment) Judgment") (NYSCEF Doc No 78).

The First Department affirmed this Court's order and judgment, and denied Fiorilla's request for reconsideration or leave to appeal (see *Matter of Citigroup Global Mkts., Inc. v. Fiorilla*, 127 AD3d 491 [1st Dept. 2015]). The Court of Appeals also denied respondents' leave to appeal (26 NY3d 908 [2015]).

Despite losing before this Court, the First Department and Court of Appeals, Fiorilla then commenced, ex parte, a proceeding in France, and obtained an order purporting to recognize the

previously-vacated Award. Fiorilla did not inform the French court that the Award had been vacated by a New York court. Utilizing that ex parte order, Fiorilla instructed a French bailiff to deliver seizure writs both on CGMI and its counter parties, seeking to seize assets of CGMI in France.

Subsequently, CGMI moved before this Court to enjoin Fiorilla from attempting to enforce the Award worldwide, and Fiorilla moved by order to show cause (OSC) to vacate the order and judgment. On January 18, 2017, this Court entered an order enjoining Fiorilla from attempting to collect on the Award, and denied Fiorilla's motion to vacate this Court's judgment and order, while entering an anti-suit injunction against Fiorilla (vacatur order) (NYSCEF Doc Nos 102-27).

Fiorilla unsuccessfully appealed the vacatur order (151 AD3d 665 [1st Dept 2017]). In its decision, the Appellate Department concluded that Fiorilla's main arguments in support of vacating the judgment were the same as he made in the prior appeal, and noted that the record demonstrates that Fiorilla commenced the French proceeding in bad faith (*id.*). The Court of Appeals dismissed Fiorilla's leave to appeal the vacatur order (30 NY3d 665 [2017]).

In July 2017, Fiorilla commenced a federal lawsuit against CGMI seeking a declaratory judgment lifting this Court's vacatur order and anti-suit injunction. CGMI requested that Fiorilla

voluntarily dismiss this lawsuit.

CGMI now moves for imposition of sanctions in the amount of \$20,000 and recovery of its attorneys' fees incurred both in the French proceeding and in opposing the OSC which resulted in the vacatur order, in the total amount of \$213,832.50.

Discussion

Uniform Rule 130-1.1 vests this Court with discretion to award both attorneys' fees, costs and sanctions as a result of frivolous conduct (22 NYCRR § 130-1.1 [a], [b]). Conduct is frivolous if "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR § 130-1.1 [c]).

Courts also consider "whether the conduct was continued when it became apparent, or should have been apparent, that the conduct was frivolous, or when such conduct was brought to the attention of the parties or to counsel" (*Levy v. Carol Mgmt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999]). Simply because an argument fails to persuade the court does not necessitate a finding of frivolous conduct (see *Gelobter v Fox*, 90 AD3d 829, 832 [2nd Dept 2011]).

Throughout this litigation, Fiorilla has pursued a relentless campaign to circumvent this Court's final judgment by attempting to re-litigate already decided matters. He has prolonged this litigation and compelled CGMI to expend significant resources, both in New York and in France. Both the French proceedings and the OSC were frivolous and completely without merit. Thus, the record establishes that Fiorilla's outrageous conduct merits the imposition of sanctions, and an award of reasonable attorneys fees.

Fiorilla's frivolous conduct included making inaccurate and incomplete factual assertions in the French proceedings. To obtain ex parte recognition of the Award in France, Fiorilla submitted a copy of the Award, and omitted the critical fact that this Court had already vacated the Award and entered a final judgment, which was affirmed on appeal. Fiorilla even used the already vacated Award to attempt to seize CGMI's assets in France.

Fiorilla's subsequent OSC to vacate the Award was also frivolous. This is not a simply a circumstance where an argument failed to persuade the Court (see *Gelobter v Fox*, 90 AD3d 829, 832 [2nd Dept 2011]). Rather, Fiorilla and his counsel rehashed arguments in duplicative proceedings that had already been deemed to lack legal merit by this Court and on appeal. Fiorilla cited no new arguments or evidence in support that warranted

reconsideration. Mr. Fiorilla persisted in this conduct despite repeated warnings by this Court and the First Department (see *Tr* 10/11/16 11:20-21, 24:24; *Citigroup Global Markets, Inc.*, 151 AD3d at 666.

The Court wholly rejects Fiorilla's assertion that his conduct was not in bad faith. Fiorilla's opposition to the motion largely ignores the factual record and repeated admonishments, both by this Court and by the First Department pertaining to his conduct.

Accordingly, it is

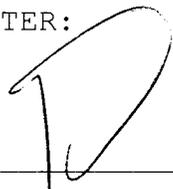
ORDERED that petitioners Citigroup Global Markets, Inc. and Edward James Mulcahy Jr.'s motion is GRANTED, and the respondent is hereby sanctioned in the amount of \$213,832.50 payable to respondents, to be set off against the judgment of \$800,000, in addition to \$20,000 payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210; and it is further

ORDERED that written proof of the payment of these sanctions be provided to the Clerk of Part 53 and opposing counsel within 45 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in accordance with 22 NYCRR 130-1.3, a copy of this order will be sent by the Part to the Lawyer's Fund for Client Protection.

Dated: August 1, 2018

ENTER:



J.S.C.

CHARLES E. RAMOS