Fava v Morgan Stanley Smith Barney, Inc.
2020 NY Slip Op 33358(U)
October 9, 2020
Supreme Court, New York County
Docket Number: 651919/2020
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS MOTION 61EFM**

Justice

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FRANK FAVA,

Petitioner,

- v -

MORGAN STANLEY SMITH BARNEY, INC.,

Respondent.

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DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

Petitioner Frank Fava ("Fava") asks the Court in this proceeding to vacate the Arbitration Award issued by the Financial Industry Regulatory Authority ("FINRA") sent to Fava on April 21, 2020 ("the Award", NYSCEF Doc. No. 5). Respondent Morgan Stanley Smith Barney, Inc. ("MS") opposes the petition and asks the Court to confirm the Award. For the reasons stated below, the petition is denied and the Award is confirmed.

The facts are detailed in the parties' papers and were set forth on the record of the oral argument held on October 7, 2020. They are summarized here.

Fava was employed by MS as a Financial Advisor from about October 2007 through October 2011. Thereafter a dispute arose between the parties regarding Fava's repayment of certain Promissory Notes issued during his employment. In accordance with the terms of the Notes, MS in January 2012 initiated a FINRA arbitration against Fava related to those monies, which resulted in an Award in favor of MS of about $450,000. In July 2013 the parties entered into a Settlement Agreement giving Fava about three years to pay the monies due without compromising his license, in exchange for certain promises in favor of MS such as a non-disparagement clause and the exchange of mutual releases (NYSCEF Doc. No. 7). As particularly significant here, the parties in that Agreement agreed that "the state and federal

courts of the State of New York shall decide any cause or controversy arising from this Agreement …, and the Parties hereby consent to submit to the jurisdiction of the New York courts for this purpose."

Fava paid only about $120,000 under the Agreement and failed to make any other payments due. MS then commenced an arbitration at FINRA to recover the balance of the payments, claiming Fava had breached the Settlement Agreement, or alternatively, that MS was entitled to an award based on *quantum meruit.* Fava moved to dismiss the arbitration, relying on the forum selection clause in the Agreement. FINRA denied the motion without stating its reasoning and proceeded with a hearing (NYSCEF Doc. No. 11). Fava participated fully in the arbitration after that, engaging in discovery and even moving to disqualify counsel, while consistently maintaining his objection to the arbitration throughout the proceedings. In the April 2020 Award, FINRA held that Fava was required to pay MS $449,697.00 plus interest at the legal rate from March 27, 2020, plus pre-award interest in the amount of $28,229.11, plus attorney's fees in the amount of $31,712.30, in addition to FINRA filing fees.

Fava now seeks to vacate the Award, claiming FINRA exceeded its authority when it proceeded with the arbitration over Fava's objection based on the provision in the parties' Settlement Agreement wherein the parties explicitly agreed to raise any disputes in court, knowing full well that FINRA rules provided for arbitration. However, Fava's claim fails. Although CPLR § 7511(b)(1) allows a party who participated in the arbitration to move to vacate the award on the ground that the arbitrators "exceeded their authority", Fava's claim here really is that no valid agreement to arbitrate exists. In *Barclays Capital Inc. v. Leventhal*, 2017 WL 7732816, 2017 N.Y. Slip Op. 51982(U) (N.Y. Co July 25, 2017), Justice Lucy Billings rejected a similar claim by a party who had participated in the arbitration, stating as follows:

> While respondent characterizes the arbitrator's actions as exceeding his power, respondent's actual contention is only that the arbitrator lacked the authority to arbitrate the dispute absent an agreement. An arbitrator acts in excess of his power in enforcing or interpreting an agreement only when he violates strong public policy, acts irrationally, or exceeds a contractually specified power. In fact, an excess of power necessarily presupposes power in the first instance. Respondent's claim, which is simply that the dispute under the promissory note must be litigated in another forum, is not a basis to challenge confirmation of the award.

This analysis is further bolstered by the unambiguous language in CPLR § 7511(b)(2)(ii), which provides for vacatur of an arbitration award where "a valid agreement to arbitrate was not made" but ***only*** in the case of a "party who neither participated in the arbitration nor was served with a notice of intention to arbitrate." The record here establishes that Fava participated in the arbitration to the fullest extent, despite his objection to FINRA's jurisdiction. Fava had the option under CPLR § 7503 to "apply to stay arbitration on the ground that a valid agreement was not made", but he chose not to pursue that option. Having charted his course, Fava cannot now argue that FINRA exceeded its authority by proceeding with the hearing when no valid arbitration agreement existed.

An alternative ground offered by Fava for the requested vacatur of the Award is "manifest disregard of the law." As the Court explained in *Zurich Am. Ins. Co. v Team Tankers A.S.*, 811 F.3d 584, 589 (2d Cir. 2016): "A court may vacate an arbitral award on this ground only if the court finds both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case" (internal quotation marks and citation omitted). It appears Fava is relying for this argument on cases such as *New York Bay, LLC v Cobalt Holdings, Inc*, 2020 U.S. Dist. LEXIS 74583 (2d Cir), wherein the Court granted a preliminary injunction enjoining a FINRA arbitration based on the parties' agreement to proceed in court.

This argument fails for several reasons. First, *New York Bay* is distinguishable not only because it was a preliminary injunction motion but also because it involved FINRA rules related to customers, whereas the FINRA rules here applicable to associates such as Fava are different. If anything, *New York Bay* supports this Court's decision here because it illustrates the need for a motion in court to stay arbitration where an agreement exists that purportedly requires proceedings in court in lieu of an arbitration

What is more, the criteria for manifest disregard have not been met. Because, among other things, the arbitrators did not state their reasoning, the Court cannot find that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case. In any event, Fava's argument still boils down to the claim that FINRA proceeded when no agreement to arbitrate existed, and CPLR § 7511(b)(2)(ii) bars that argument where, as here, Fava participated in the arbitration.

Although the result may be harsh as it may well result in Fava's loss of his license, the result is one compelled by both the law and equity. Fava entered into an agreement in 2013 to pay MS a sum of money, in exchange for which he received significant benefits, including the right to maintain his license during the three-year period provided for payment. Fava failed to make the payments. The FINRA Award does little more than compel Fava to pay the amount he agreed to pay seven years ago plus prejudgment interest. Fava could have moved in this court to stay the FINRA arbitration but chose not to do so. He must now accept the results.

Accordingly, it is hereby

ORDERED that the petition by Frank Fava to vacate the FINRA Award is denied, and the request by Morgan Stanley Smith Barney, Inc. to confirm the Award is granted, and the Clerk is

directed to enter judgment in favor of Morgan Stanley Smith Barney, Inc. against Frank Fava in the amount of $449,697.00 plus interest at the statutory rate of 9% per annum from March 27, 2020, plus pre-award interest in the amount of $28,229.11, plus attorney's fees in the amount of $31,712.30, upon respondent's efiling of a Proposed Judgment directed to the County Clerk.

Dated: October 9, 2020

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE