[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 60

----------x

In the Matter of the Arbitration of a Certain Controversy Between:

CHASE INVESTMENT SERVICES CORP.,

Petitioner

-against-

Index No. 105289/2006

GREGG CUVIN and MORGAN STANLEY, DW, INC.,

Respondents

----------x

Fried, J.:

Respondents Gregg Cuvin (Cuvin) and Morgan Stanley DW Inc. (Morgan Stanley) seek an order vacating an injunction awarded by the arbitration panel, on May 12, 2006, during an arbitration before the National Association of Securities Dealers (NASD). This injunction barred Cuvin and Morgan Stanley for a period of one year:

> Until March 28, 2007from initiating contact of any kind with Respondent Cuvin's former Chase [petitioner Chase Investment Services Corp.] clients, excepting those Former Clients who have of this date transferred their accounts to Respondent Morgan Stanley.

This injunction is similar to a temporary restraining order, I earlier issued pending the NASD arbitration.

Cuvin had been employed by Chase as a financial advisor and financial planner from November 2001 until his resignation, effective March 24, 2006. In seeking vacatur, it is argued that Chase failed to establish a legitimate interest in enforcing restrictive covenants

002

against soliciting or communicating with his customers after he left Chase for a one year period. These restrictions had been part of a Confidentiality and Non-Solicitation Agreement executed by Cuvin. It is also contended that there was no misappropriation of trade secrets, referring to customer information specified as confidential in Chase's Employee Code of Conduct, to which Cuvin was subject.

Briefly, the respondents argument is that the evidence before the Panel failed to establish: (1) that Chase had demonstrated a legitimate interests in enforcing these restrictive covenants: (2) "**that [Chase's] customer names, addresses and phone numbers are trade secrets".** (M.O.L. [Cuvin] in Support of Mot., p. 14 [bold and underline in original]); and (3) that Chase will suffer irreparable harm. Morgan Stanley joins these arguments, adding that the award was an "irrational departure" from the evidence.

Opposing vacatur, Chase contends that this motion is premature, since the arbitration is on-going[1]; and that, if I reach the merits of this motion, it should be denied because respondents have failed to "demonstrate...that the panel's ruling was wholly irrational or somehow violative of public policy" (M.O.L in Opp. to...Motion for Vacatur, p. 8).

While the argument that this motion should be dismissed as premature has some force, in the context of this arbitration it is not persuasive. The award disposed of a discrete issue, and although there are still claims pending, this is a distinct claim, which, under the

---

1

It was also argued that because a request was made by respondent to the Panel to stay the injunctive award, this motion should be dismissed without consideration of the merits. However, this ground has been rendered moot: by letter from Chase, dated November 3, 2006, I have been advised that the panel denied this motion a stay (Order, dated November 2, 2006).

circumstances, appears ripe for review (Southern Seas Navigation Ltd. v. Petroleos Mexicanos, 606 F.Supp. 692 (S.D.N.Y. 1985). Although the proceedings are on-going, it was evident when this motion was made that there would be a change of panelists, causing a substantial delay in the final resolution of the arbitration.[2]

Cuvin, as noted, was a financial planner who left Chase for Morgan Stanley in March 2006. At Chase he was subject to restrictive covenants which barred him from use of Chase's confidential information and from soliciting customers, whom he had serviced while at Chase. Before the panel was evidence that after conferring with Morgan Stanley, Cuvin took information regarding selected customers from the Chase database. None of these were person with whom he had any contact before joining Chase. Cuvin testified that he did this over a couple of weeks before he resigned, and that his supervisor was unaware of what he was doing. He took names, addresses and telephone numbers (for most of the individuals) and then used these names to send them notification that he was moving to Morgan Stanley. In some cases he followed up on these "announcement" by telephone calls, sometimes making "two or three follow-up calls." He also created files for customers he "believe[d] will intend to transfer [to Morgan Stanley] based on my conversations..."

Briefly, before the panel, the evidence was that he compiled a list of some 170 customers out of the approximately 1200 accounts he had serviced at Chase, and that out of

---

2

Indeed, on July 5, 2006, when this motion was filed, it was expected that arbitration hearings would resume on October 16th; since then I have received a copy of an order setting December 15, 2006 as a discovery cut-off; which presumably means that the hearings will not begin sometime after that date. Since the injunctive relief expires on March 22, 2007; it would seem that unless this motion can proceed, respondent will have been deprived of any effective review of the May 12th Award.

these 170, only 80 received notification from Cuvin that he could be found at Morgan Stanley, and then only nine or ten customers had actually transferred their accounts. There was no testimony from any customer stating that she had been solicited by Cuvin.

Not explicitly contending that the award is in manifest disregard of law, e.g., Wein & Malkin v. Hemsley-Spear, Inc., 12 AD3de 65 (20004), Respondents argue that "the NASD arbitration panel either ignored or misinterpreted the applicable law governing restrictive covenants.[3] However, Respondents seek to place at issue that the panel incorrectly concluded, by implication since the award is only two sentences, that the restrictive covenants were enforceable and that the customer lists were protected. Moreover, Respondents citing cases for the proposition that customer lists do not constitute a confidential trade secret, and claim that there was no evidence to the contrary.

Extensive discussion is unwarranted. The arbitrators viewed the evidence before them and must have concluded that the covenants were enforceable and that the customer lists were protected. That they may have been mistaken, which I think may be a questionable conclusion, this is not an issue for me do decide. Here the parties, themselves disagree on the applicable law. Thus, even if the panel misapplied the law governing restrictive covenants, or customer lists, that is not a basis to set aside an arbitration award. (E.g., Lentine v. Fundaro, 29 NY2d 382, 385 [1972]).

3

At argument, counsel agreed it was not manifest disregard of the law; rather he argued that "the situation is a little unique", "because...there are no findings of facts. No rulings of law. Nothing in the award from this panel other than a two line award." (Tr., pp. 4-5)

One last argument should be noted: Respondents contend that because this was a compulsory NASD arbitration, it should be subject to "close scrutiny", and if so, the award should be vacated. This argument has been rejected by the First Department in Whale Securities Co., L.P.. v. Godfrey, 271 AD2d 226 (2000), which decision, of course, is binding upon me.

Accordingly, the motion to vacate the injunctive award is denied.

Dated: November 8, 2006

ENTER:

BERNARD J. FRIED J.S.C.

J.S.C.