Seruma v Wiersum
2011 NY Slip Op 33874(U)
September 9, 2011
Sup Ct, New York County
Docket Number: 651754/2011
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD PART 49
Justice

LARRY SERUMA,

Plaintiff,

-against-

MARC WIERSUM,

Defendant.

INDEX NO. 651754/2011
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to compel or stay arbitration

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, plaintiff's motion to compel or stay arbitration is determined in accordance with the attached Decision and Order dated September 9, 2011.

Dated: September 9, 2011

O. PETER SHERWOOD, *J.S.C.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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LARRY SERUMA,

Petitioner,

- against -

DECISION AND ORDER

MARC WIERSUM,

Index No. 651754/2011

Respondent.

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O. PETER SHERWOOD, J.:

In this special proceeding pursuant to CPLR 7503, petitioner seeks a permanent stay of an arbitration proceeding filed by respondent, Marc Wiersum ("Wiersum"), on April 15, 2011 with the Financial Industry Regulatory Authority Dispute Resolution, Inc. ("FINRA"), formerly the NASD (*see Matter of Velez v FINRA,* 2008 WL 2871807 [Sup Ct. N.Y. Co. 2008]). Petitioner contends that the dispute between the parties is not subject to FINRA arbitration because it does not arise out of the business activities of an associated person acting in his capacity as an associated person of a FINRA member. Respondent opposes the application contending that (1) both parties were registered with FINRA (2) during the time period relevant to the underlying dispute (3) the dispute arises out of the business activities of an associated person and (4) the dispute is between and/or among associated persons.

I. BACKGROUND

The dispute was the subject of a previous arbitration complaint filed by respondent against Nile Capital, LLC and Nile Capital Management, LLC ("NCM") in which claims arising out of respondent's purported employment with NCM were asserted. Nile Capital demonstrated through

documentary proof that respondent was employed by a third entity, Nile Global Investors, LLC, ("Nile Global") not by NCM. Nile Global is not a FINRA member firm.

Respondent then withdrew the arbitration claim and filed a new arbitration claim against petitioner, Larry Seruma ("Seruma"), the managing principal of Nile Capital, LLC, the Chief Investment Officer and Managing Principle of NCM, and the managing partner of Nile Global. The claim asserts fraudulent inducement arising from respondent's employment by Nile Global. Respondent claims that petitioner made material misstatements and omissions in order to induce him to leave his employment with Stonehaven LLC and accept employment as Nile Global's Director of Marketing. Respondent relocated from California to New York and commenced employment at Nile Global on or about July 16, 2009.

The Nile Master Fund was one of several funds managed by Banco Bilbao Vizcaya Argentaria's ("BBVA") multi-fund platform known as Proxima Alpha. BBVA closed the Proxima Alpha entity and all funds under it, including the Nile Master Fund, in early 2009. Petitioner, Seruma, then arranged with BBVA/Proxima Alpha to relaunch the Nile Master Fund under his management company platform, namely NCM. Respondent, who had been the portfolio manager for the Nile Master Fund, was recruited to assist in persuading legacy investors to reinvest in the Nile Master Fund on the new platform and to market the Nile Master Fund to other investors.

Respondent claims that petitioner failed to disclose his previous employment with "the now infamous Madoff Securities"[1] and that petitioner materially misrepresented that Nile Global had $30

[1] Respondent notes that Bernard Madoff was arrested and charged with securities fraud on December 11, 2008, three months prior to petitioner's solicitation of him for employment by Nile Global. It is also worth noting that the Proxima Alpha entity, including the Nile Master Fund, closed down shortly after the Madoff fraud became public.

million in assets under management ("AUM"), leading respondent to believe Nile Global had enough capital to cover all costs during the time period respondent would be marketing Nile Global to prospective investors. In or around September 2010, respondent learned from petitioner that Nile Global had only $10 million in AUM. Respondent also alleges that after he sent petitioner an e-mail on December 21, 2009, outlining his complaints concerning Nile Global, petitioner retaliated by locking respondent out of his office and withholding salary earned prior to his departure from the firm.

The employment agreement between respondent Wiersum and Nile Global, dated July 15, 2009, was effective through December 31, 2009. Wiersum's FINRA registration, which he maintained pursuant to his relationship with his former employer, Stonehaven LLC, was terminated when he left his employment with that firm in August 2009. Respondent has not been registered with FINRA since that time.

The employment agreement with Nile Global does not contain an arbitration clause. It states that "this agreement will be governed by, and construed and enforced in accordance with, the laws of the State of New York, without regard to its conflict of laws provisions." (*see* Exhibit "B" to the Petition). In February 2011, petitioner Seruma's FINRA registration, maintained pursuant to his relationship with Nile Capital, was terminated as a consequence of Nile Capital's decision to withdraw from FINRA membership. Petitioner has not maintained FINRA registration since that time.

II. PARTIES' CONTENTIONS

Rule 13200 of the FINRA Code provides: "except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a

member or an associated person and is between or among: Members; Members and Associated Persons; or Associated Persons." (*see* Exhibit "A" to respondent's Opposition to Verified Petition).

Petitioner acknowledges that both parties are considered "associated persons" by virtue of a former relationship in respondent's case and a current relationship with a former FINRA member in petitioner's case. However, petitioner avers that this dispute does not arise out of the business activities of an individual acting in his capacity as an associated person of a FINRA member and, therefore, the dispute is not subject to FINRA arbitration. He bases this contention on the ground that Nile Global, the company on whose behalf petitioner was acting when he made the alleged misstatements and omissions, is not and has never been, a FINRA member and the dispute arises out of business activities of the parties as employees of Nile Global.

Respondent contends that the parties entered into a binding arbitration agreement and that the instant dispute is subject to such agreement as it arose as the result of the business activities of associated persons. The basis for this argument is that all registered FINRA representatives must sign a "Uniform Application for Securities Industry Registration or Transfer", commonly referred to as "Form U-4", which contains an arbitration provision by which the registered person agrees "to arbitrate any dispute, claim or controversy that may arise between [the registered person] and [his or her] firm, or a customer, or any other person that is required to be arbitrated under the rules, constitutions, or by-laws of the SROs"[2] and also a Pre-Arbitration Clause that restates the arbitration provision of Form U-4 and advises that the registered person is "giving up the right to sue a member, customer, or another associated person in court."

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[2] SRO stands for self regulatory organizations including FINRA (*see Matter of Velez v FINRA*, 2008 WL 2871807, *supra*).

Respondent contends that the fact that neither party is presently registered with FINRA is not relevant on the issue of the arbitrability of the dispute as the FINRA by-laws state in Section 4 (a) thereof that "[a] person whose association with a member has been terminated and is no longer associated with any member * * * or a person whose registration has been revoked or canceled shall continue to be subject to the filing of a complaint under the [FINRA] Rules based upon conduct that commenced prior to the termination, revocation, or cancellation." The claim must be filed within two years of such termination, cancellation or revocation.

Respondent contends that the FINRA Rules do not require that an associated person be acting on behalf of a FINRA member firm. Rather, it is enough that the dispute is between associated persons. Respondent also contends that the fact that the employment agreement does not contain an arbitration clause is of no moment given that both parties signed the Form U-4 which contains a valid agreement to arbitrate.

III. DISCUSSION

The initial inquiry in a proceeding to stay or compel arbitration is always whether there is a valid agreement to arbitrate (*see God's Battallion of Prayer Pentecostal Church, Inc. v Miele Assoc. LLP*, 6 NY3d 371 [2006]). The court in the first instance must determine whether the parties have agreed to arbitrate (*see Matter of Fiveco, Inc. v Haber*, 11 NY3d 140, 144 [2008]; *MF Global, Inc. v Morgan Fuel & Heating Co., Inc.*, 71 AD3d 420 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]). A court will not order a party to submit to arbitration absent evidence of that party's 'unequivocal intent to arbitrate the relevant dispute'" (*Primavera Labs. v Avon Prods.*, 297 AD2d 505 [1st Dept 2002], quoting *Matter of Helmsley [Wien]*, 173 AD2d 280, 281 [1st Dept 1991]; *accord, Matter of Pharmacia & Upjohn Co. v Elan Pharmaceuticals*, 10 AD3d 331, 333 [1st Dept 2004]).

As noted above, although Wiersum's FINRA registration expired after he left his prior employment with a FINRA registered entity and Seruma's FINRA registration terminated when Nile Capital decided to withdraw from FINRA membership, both parties continue to be associated members or a person associated with a member as defined by the FINRA Code. Pursuant to the FINRA Code and by virtue of Form U-4, which both parties executed as registered FINRA members, associated members are required to arbitrate if the dispute arises out of the business of a member or an associated member and is between or among associated members.

Petitioner contends that because Nile Global is not, and has never been, a FINRA registered entity, the dispute does not "arise [ ] out of the business activities of a member" (FINRA Rule 13200). Instead, the dispute involves respondent's employment by Nile Global and petitioner was acting in his capacity as Nile Global's representative. The court agrees that the negotiation and execution of the employment agreement by petitioner, an "associated person" on behalf of Nile Global, which is not a FINRA member, are not the business activities of a FINRA member *(see Murtha v Yonkers Child Care Ass'n, Inc.*, 45 NY2d 913 [1978] [corporate officers are not personally liable on contracts of their corporations provided they did not purport to bind themselves personally under the contracts]; *Citicorp Retail Svs, Inc. v Wellington Merchantile Svs., Inc.*, 90 AD2d 532 [2d Dept 1982]). Similarly, the actions of petitioner in his employment capacity are not the "business activities of an associated member." They are the activities of Nile Global (*see Lehman Bros. Securities and Erisa Litigation*, 706 F Supp 552, 561 [SDNY 2010]). Any other interpretation of Rule 13200, would require (as respondent maintained at oral argument on the motion) FINRA arbitration of any claim for property damage arising out of an automobile accident between taxi cabs being driven by petitioner and respondent while both were moonlighting as taxi cab drivers. FINRA

arbitration is not mandated in every case merely because the dispute involves "business activities" of any sort between two associated members of FINRA, however attenuated from FINRA regulated activities. Finally, the court notes that the parties to the employment agreement never intended to submit disputes arising out of respondent's employment to arbitration. The terms of that agreement does not contain an arbitration clause. Instead it provides that "[t]his agreement will be governed by, and construed and enforced in accordance with the laws of the State of New York." The petition must be granted.

It is hereby

ADJUDGED that the petition to stay arbitration is GRANTED and the arbitration is and shall be permanently stayed.

Dated: September 9, 2011

ENTER

O. P. Sherwood

O. PETER SHERWOOD, J.S.C.

O. PETER SHERWOOD