

**Copperill v Sloane**

2012 NY Slip Op 33160(U)

November 28, 2012

Sup Ct, Nassau County

Docket Number: 015723/11

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

\_\_\_\_\_

WILLIAM T. COPPERILL,

Petitioner,

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 015723/11

MOTION DATE: Nov. 21, 2012  
Motion Sequence # 002

For an Order and Judgment Pursuant to  
Article 75 of the Civil Practice Law and Rules

-against-

MITCHELL H. SLOANE,

Respondent.

\_\_\_\_\_

The following papers read on this motion:

- Order to Show Cause..... X
- Affidavit in Opposition..... XX
- Emergency Affirmation in Support..... X
- Reply Affirmation..... X
- Sur-Sur Reply Affirmation..... X
- Memorandum of Law..... XX

Motion by petitioner William Copperill to restrain the brokerage account of respondent's wife, Jeanne Sloan, is **denied**. On the court's own motion, the order of this court dated February 6, 2012, confirming the arbitration award, is **vacated**. The petition to confirm the arbitration award is **denied** with leave to recommence in an appropriate federal court.

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This is a petition to confirm an arbitration award issued by the Financial Industry Regulatory Authority ("FINRA"). Respondent Mitchell H. Sloane was formerly affiliated with Westrock Advisors, Inc, a brokerage firm. Petitioner William Copperill was one of Sloane's customers.

On December 15, 2009, Copperill filed a claim with FINRA against Sloane, Westrock, and Andrew Shapiro, another broker associated with Westrock. Copperill asserted causes of action for fraud, misrepresentation, churning, unsuitable investing, unauthorized trading, mismanagement, breach of fiduciary duty, negligence, failure to supervise, breach of duty of good faith and fair dealing, and unjust enrichment. The charges related to a trade involving shares of Agnico-Eagle Mines, Ltd.

On April 4, 2011, after hearing testimony, FINRA granted an arbitration award in petitioner's favor finding that Sloane and Westrock were jointly and severally liable to Copperill for disgorgement of commissions, interest, and fees in the amount of \$211,592.11. The arbitrator further found that Sloane and Westrock were jointly and severally liable for attorney's fees and costs relating to discovery in the amount of \$19,666.94. The arbitrator found Sloane and Westrock jointly and severally liable to Copperill for the non-refundable portion of the FINRA filing fee in the amount of \$375. The arbitrator found Sloane and Westrock jointly and severally liable for pre-judgment interest in the amount of \$46,483.07.

Finally, the arbitrator found Sloane and Westrock jointly and severally liable for punitive damages in the amount of \$211,592.11, the same amount which had been awarded as disgorgement. The arbitrator noted that punitive damages were available under FINRA's rules, and that under New York law punitive damages could be awarded based upon "a) intentional or deliberate wrongdoing, b) aggravating or outrageous circumstances, c) fraudulent or evil motive, or d) a conscious act that wilfully and wantonly disregards the rights of another."

By notice of petition dated November 3, 2011, petitioner brought this proceeding to confirm the FINRA award. On February 29, 2012, the court issued a judgment confirming the award, as modified to delete the punitive damages award.

By order to show cause dated October 10, 2012, petitioner moves to restrain a brokerage account held by Jeanene Sloane, respondent's wife. In the course of considering the application, the court directed the parties to brief the issue of the court's

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subject matter jurisdiction to confirm the FINRA award (See **FINRA v Fiero**, 10 NY3d 12 [2008]).

If a court lacks subject matter jurisdiction, its judgment is void (Siegel, New York Practice § 8). A court's lack of subject matter jurisdiction is not waivable, but may be raised at any stage of the action. The court may, on its own motion, at any time when its attention is called to the facts, refuse to proceed further and dismiss the action (*Matter of Jose M.*, 951 NYS2d 195 [2d Dept 2012]).

Section 27 of the Securities Exchange Act provides that the district courts of the United States shall have exclusive jurisdiction of violations of the Securities Exchange Act or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by the Act. In *FINRA v Fiero*, *supra*, the Court of Appeals held that state courts are without jurisdiction to enforce a penalty imposed on a broker in a FINRA disciplinary proceeding based upon an Exchange Act violation. In **FINRA**, the defendant was a broker who had violated the Exchange Act by engaging in action to drive down the price of securities underwritten by another firm. After a disciplinary hearing, FINRA fined the broker \$ 1 million. Rather than bringing a proceeding to confirm its award, FINRA brought a breach of contract action on the theory that its regulations constituted a contractual promise by the broker to comply with any penalty which the association imposed (See **NASD v Fiero**, 33 AD3d 547 [1<sup>st</sup> Dept 2006]). In dismissing the suit for lack of subject matter jurisdiction, the Court of Appeals held that an action to enforce a penalty imposed by FINRA, as a result of an Exchange Act violation, does not seek to adjudicate a state law claim.

FINRA is a self-regulatory organization that is responsible for conducting investigations and commencing disciplinary proceedings against member firms and their associated representatives relating to compliance with the federal securities laws and regulations (See *Fiero v FINRA*, 660 F.3d 569, 571 [2d Cir. 2011]). FINRA's jurisdiction includes violations of the federal securities laws arising in disputes between member firms, disputes between firms and brokers, and disputes between brokers and customers (See FINRA Rule 12000 et seq available at [www.finra.complinet.com](http://www.finra.complinet.com), viewed on November 21, 2012).

While FINRA's statutory mandate encompasses the federal securities laws, the customer and the broker, or the member firm and its representatives, may by agreement

submit state law claims to arbitration before the FINRA forum. Where FINRA issues an award upon a state law claim, there is jurisdiction to confirm the award in state court (See *Bear, Stearns & Co. v Intn'l Capital & Management*, 952 NYS2d 106 [1<sup>st</sup> Dept 2012][attorney's fees]; *Mogan Stanley & Co. v Feeley*, 75 AD3d 417 [1<sup>st</sup> Dept 2010][promissory note]).

Petitioner seeks to distinguish *FINRA v Fiero* by arguing that the validity of a FINRA arbitration award is an issue of state law, regardless of whether the underlying basis of the award is a Securities Exchange Act violation. However, CPLR § 7510 provides that the court shall confirm the award, unless the award is vacated or modified upon a ground specified in CPLR § 7511. Among the grounds for vacating the award are that the arbitrator exceeded his or her power by issuing an award which is irrational (CPLR § 7511(b); *Transit Authority v Transit Workers*, 6 NY3d 332 [2005]). If a FINRA award is based upon an Exchange Act violation, the court cannot determine whether the award is irrational without at least some review of the merits of the Exchange Act claim. Stated otherwise, where FINRA finds an Exchange Act violation, a FINRA award in favor of the customer is a liability created by the Exchange Act. Thus, a state court has no more jurisdiction to confirm a FINRA arbitration award based upon an Exchange Act violation than it has to redress the violation in a plenary action.

*Frankel v Sardis*, 76 AD3d 136 [1<sup>st</sup> Dept 2010]), upon which petitioner relies, is not to the contrary. In *Frankel*, the FINRA panel found the broker guilty of churning, a Securities Exchange Act violation. The broker then brought a petition to vacate the award against her on the sole ground that the FINRA arbitrators exceeded their authority by holding her jointly and severally liable with the securities firm which was her employer (76 AD3d at 139). In granting the cross-motion to confirm the award, the court ruled only upon the issue of joint and several liability, a state law claim.

The issue of this court's jurisdiction to confirm the FINRA award in favor of petitioner turns on whether the award is based upon a violation of the Securities Exchange Act. If the arbitrator found such a violation, the federal district courts have exclusive jurisdiction to confirm the award. The provision in the customer agreement, stipulating to submit disputes to FINRA arbitration, is not controlling because the parties cannot confer subject matter jurisdiction on the court. Similarly, the FINRA arbitrator's affirmation of the award pursuant to CPLR § 7507 is irrelevant because the arbitrator cannot confer jurisdiction to confirm her own award.

The FINRA arbitration award does not expressly state which of the causes of action were sustained in finding for the customer. Nevertheless, the court notes that fraud, misrepresentation, churning, unsuitable investing, unauthorized trading, mismanagement, breach of fiduciary duty, negligence, and failure to supervise are all Securities Exchange

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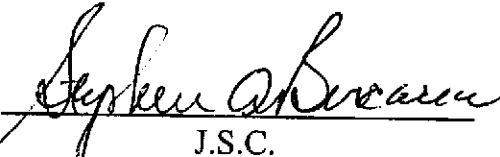
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Act violations (See FINRA Rule 12000 et seq available at [www.finra.complinet.com](http://www.finra.complinet.com), viewed on November 21, 2012.) The award of disgorgement and punitive damages, based upon intentional conduct, aggravating circumstances, and fraudulent motive, makes clear that the arbitrators found one or more of the Exchange Act violations, as opposed to mere breach of duty of good faith or unjust enrichment. Since the arbitration award is based upon a liability created by the Securities Exchange Act, the court is without subject matter jurisdiction to confirm the award.

Accordingly, the order and judgment confirming the award are **vacated**. The petition to confirm the award is **denied** with leave to recommence in an appropriate federal court within six months of the date of this order (See CPLR § 205[a]). In view of this disposition, petitioner's motion to restrain the brokerage account of Jeanene Sloan is **denied**.

So ordered.

Dated NOV 28 2012

  
J.S.C.

**ENTERED**  
**NOV 30 2012**  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE