Platzer v Merrill Lynch
2003 NY Slip Op 30239(U)
September 16, 2003
Supreme Court, New York County
Docket Number: 103071/03
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Friedman Justice PART 57

Platzer
Merrill Lynch

INDEX NO. 105071/03

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for grant

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	4,6,7
Memos of Law	2a,3,4a,5,6a,7a

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/16/03

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SCANNED SEP 22 2003

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

FLORENCE and NINA PLATZER,

Petitioner(s),

against

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., and SUSAN BRODY,

Respondent(s),

Index No.: 103071/03

DECISION/ORDER

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this special proceeding, petitioners seek to quash subpoenas served by respondents in connection with an arbitration between petitioners and respondents now pending before the New York Stock Exchange ("NYSE"). In the underlying arbitration, petitioners seek damages for alleged breach of contract, fraud, misrepresentation and negligence arising out of respondents' management of petitioners' investment accounts.

Background

It is undisputed that the parties agreed to arbitrate their dispute before the New York Stock Exchange. The rules of the NYSE provide for pre-hearing discovery and include procedures for the resolution of discovery disputes. (See NYSE Constitution and Arbitration Rules, Rule 619 [Ex. B to Memo. of Law of Intervenor-Respondent NYSE].)

Rule 619(f) provides that "[t]he arbitrator(s) and any counsel of record to the proceedings shall have the power of the subpoena process as provided by law." Rule 619(a) provides that "[t]he parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration." Rule 619(d)(1) provides that, in the

event of a discovery dispute, a pre-hearing conference may be scheduled before a person appointed by the Director of Arbitration who "shall seek to achieve agreement among the parties on any issues that relate to the pre-hearing process or to the hearing, including but not limited to, the exchange of information, exchange or production of documents, * * * and any other matter which will expedite the arbitration proceedings." Issues not resolved at such a conference may be referred to a single arbitrator to be decided. (Rule 619[d][2].) "Such arbitrator shall be authorized to act on behalf of the panel to issue subpoenas, direct appearances of witnesses and production of documents, set deadlines and issue any other ruling which will expedite the arbitration proceeding or is necessary to permit any party to develop fully its case." (Rule 619[e].)

The parties here have participated in voluntary discovery pursuant to the NYSE rules and have appeared before a panel of arbitrators to address discovery disputes. At a hearing held on November 22,2002, the arbitrators considered and ruled on various discovery issues. (Transcript of Hearing, Ex. A to Aff. of Matthew C. Plant, Esq., In Opp.) Subsequent to that hearing, respondents served 14 subpoenas on non-party banks and other financial institutions, as well as on petitioners' accountant, seeking, among other things, documents related to petitioners' bank accounts and investment accounts at financial institutions other than Merrill Lynch. Several of the subpoenas were addressed to out-of-state entities. Respondents assert that they served the subpoenas seeking "the production of documents Petitioners had withheld in violation of the ruling by the Panel of Arbitrators and contrary to Petitioners' agreement with counsel." (Plant Aff., ¶ 5.)

Petitioners contend that the subpoenas should be quashed on the grounds that they were

not signed by or authorized by the arbitrators, improperly seek discovery from non-parties to the arbitration, were served outside the state, and are overbroad and seek confidential information not relevant to the arbitration.

Respondents argue that this court does not have jurisdiction over the instant proceeding to quash the subpoenas at issue because "the proper forum in which to address this discovery dispute is the arbitral forum before which Petitioners voluntarily brought their claims and under whose rules they have agreed to proceed." (Respondents' Memo. of Law in Opp., at 4.) Respondents further argue that "the Panel of Arbitrators not only has the ability to decide discovery matters, but they have already done so in the underlying arbitration proceeding." (Id. [emphasis in original].) In support of this argument, respondents submit a portion of the transcript of the hearing held before the arbitrators on November 22,2002. Respondents also contend, in the alternative, that the subpoenas are valid and enforceable.

Intervenor-respondent NYSE does not contend that this court does not have jurisdiction, but posits that the instant application is premature because the parties' dispute over the subpoenas should first be presented to the arbitrators for resolution.

Discussion

In arguing that this court has jurisdiction to quash the subpoenas, petitioners rely on a letter issued by the NYSE in the underlying arbitration, stating that "a validly issued subpoena may be quashed and/or enforced only by a court of competent jurisdiction unless issued by the arbitrators to individuals within the industry." (NYSE letter dated Mar. 11, 2003, Ex. 4 to Petitioners' Reply Memo. of Law.) Petitioners also note that NYSE has taken the same position in other arbitrations (Exs. D & E to Aff. of Seth Lipner, Esq. In Opp. to Intervention Memo.),

and does not offer any explanation for its apparent reversal of this position in the instant proceeding.

It is undisputed that the letter was not issued on notice to respondents and is merely advisory, and that the NYSE arbitrators did not formally determine, in any proceeding in which both sides to the underlying arbitration had the opportunity to be heard, that the arbitrators lacked authority to quash the subpoenas. Contrary to petitioners' contention, the NYSE's letter is therefore ineffective to confer jurisdiction on this court.

The NYSE's arbitration rules, in contrast, support petitioners' contention that they may resort to this court for relief from the subpoenas. While the NYSE rules provide for the issuance of subpoenas and include procedures for the resolution of discovery disputes (see Rules 619[f],[a]-[e]), the rules do not contain a specific mechanism for either enforcing or quashing subpoenas. The Appellate Division of this Department has opined that given the lack of a specific mechanism in the NYSE rules for enforcing compliance with subpoenas, a petitioner would not necessarily be precluded from seeking a judicial order from Supreme Court compelling compliance pursuant to CPLR 2308(b). (Lissack v Smith Barney, Inc., 232 AD2d 348 [1st Dept 19961. See also CPLR 2304; Matter of Cotter v Shearson Lehman Hutton, 145 Misc 2d 235 [Sup Ct, New York County 19891.) As no basis exists for distinguishing between enforcement and quashing of a subpoena, this court holds, similarly, that Supreme Court has jurisdiction to grant relief from a subpoena issued in the context of an arbitration proceeding.

An issue remains, however, as to whether this court should exercise such jurisdiction. It has long been held that the courts "should order enforcement only to effectuate a decision of the arbitrators, and should avoid intermeddling in the arbitrators' procedural regulation of their own

arbitration, particularly in matters of disclosure and the production of evidence." (Matter of Cotter, 145 Misc 2d at 237-238 [internal citations omitted].) As further explained:

> Where a party agrees to the settlement of disputes by arbitration, he is deemed to have consented to a limitation of his rights and remedies to the extent necessary to give full effect to such agreement and to the jurisdiction of the arbitrators acting thereunder. By voluntarily becoming a party to the contract in which arbitration was the agreed mode for settling disputes thereunder, a party chooses 'to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations.' So, as incidental to an agreement for arbitration, the parties commit to the arbitrators the matter of procedure with reference to the examination of parties and witnesses and the taking and receipt of evidence. The method of assembling the evidence and the effect thereof are to be left entirely to them. Court action, having a tendency to interfere with the prerogatives of the arbitrators or to delay their proceedings is not justified except where shown to be absolutely necessary for the protection of the rights of a party.

(Matter of Motor Veh. Acc. Indem. Corp. v McCabe, 19 AD2d 349, 353 [1st Dept 1963][internal citation omitted].)

It is further settled that court-ordered discovery is not available in arbitration proceedings "except under extraordinary circumstances." (DeSapio v Kohlmeyer, 35 NY2d 402,406 [1974][internal citation and quotation marks omitted].) Here, however, the NYSE arbitration rules provide for discovery that might not otherwise be available from the court. A determination by the arbitrators as to whether the requested discovery is authorized under the NYSE rules thus may obviate any need for a determination by the court as to whether "extraordinary circumstances" warrant discovery.

Moreover, the parties have a substantial dispute as to the scope of the NYSE rules and, in particular, whether Rule 619(f) only authorizes counsel to issue subpoenas to procure the attendance of witnesses at trial, or whether it also authorizes counsel to issue subpoenas to obtain pre-hearing disclosure. Given the proscription against the court's interference with the

arbitrators' procedural regulation of their own arbitration, the scope of discovery under Rule 619(f) should be determined by the arbitrators in the first instance.

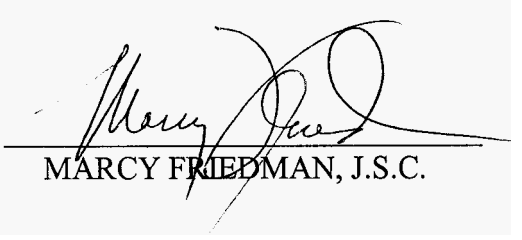
The court accordingly holds that this proceeding is premature. As the NYSE does not appear to have a procedure for staying the subpoenas pending determination of the discovery issues between the parties, the court will stay their enforcement. (See CPLR 3103[a].) All discovery issues, including but not limited to whether the NYSE rules authorize counsel to issue discovery subpoenas, and whether the subpoenas seek documents material and relevant to the defense of the arbitration, shall be left for the arbitrators.

It is accordingly hereby ORDERED as follows:

The petition is granted only to the extent of staying the subpoenas (annexed as Ex. **2** to the Petition) pending resolution by the arbitrators of remaining discovery disputes between the parties.

This constitutes the decision and judgment of the court.

Dated: New York, New York
September 16,2003



MARCY FRIEDMAN, J.S.C.