Merrill Lynch, Piece, Fenner & Smith, Inc. v Blackburn
2013 NY Slip Op 33796(U)
July 15, 2013
Supreme Court, New York County
Docket Number: 653273/11
Judge: Barbara R. Kapnick

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK, Justice J.S.C.

PART 39

Index Number : 653273/2011
MERRILL LYNCH PIERCE FENNER & SMITH
vs.
BLACKBURN, KEVIN
SEQUENCE NUMBER : 001
CONFIRM AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

Upon the foregoing papers, it is ordered that this motion is

and Cross-motion are

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

11 653273

Dated: 7/15/13

BARBARA R. KAPNICK, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

----------x

Application of Merrill Lynch, Pierce, Fenner & Smith Incorporated For an Order, Pursuant to CPLR 7510, Confirming an Arbitration Award Between

DECISION/JUDGMENT
Index No. 653273/11
Motion Seq. No. 001

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED

Petitioner,

-and-

KEVIN BLACKBURN,

Respondent.

----------x

BARBARA R. KAPNICK, J.:

In this proceeding, petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") moves for an order, pursuant to CPLR 7510, confirming the September 1, 2011 arbitration award (the "Arbitration Award" or "Award") in the arbitration captioned *Merrill Lynch v. Kevin Blackburn*, FINRA Dispute Resolution Case No. 11-01711 (the "FINRA Arbitration" or "Arbitration"). Respondent cross-moves to vacate the Award pursuant to CPLR 7506(b) and 7511(b).

Background

The facts are taken from the Statement of Claim filed in the FINRA Arbitration (the "Statement of Claim") unless otherwise noted.

Petitioner Merrill Lynch is a national securities brokerage firm and a member firm of FINRA. Respondent Kevin Blackburn ("Blackburn") is a former Merrill Lynch Financial Advisor who was employed in petitioner's New York office and who, for the relevant period, was registered through FINRA. (Ver. Petition, ¶¶ 1, 3-4).

Respondent began his employment with Merrill Lynch on or about August 31, 2007. At the same time, he received a $1,456,560 loan ("Loan") from Merrill Lynch, secured by a promissory note ("Note") dated August 31, 2007, wherein respondent unconditionally agreed to repay the principal amount of the Loan, together with interest at an annual rate of 5.25% per year on a monthly basis, beginning in December 2007 and continuing through August 2015. (Statement of Claim dated April 28, 2011, ¶¶ 8, 10-11).

Pursuant to the Note, respondent further agreed to repay the Loan in the form of monthly deductions from his paycheck in the amount of $19,097.40, and he agreed that Merrill Lynch had the right to recover any deficiency should his compensation for any month be an amount less than $19,097.40. (*Id.*, ¶ 11).

The Note provides that Merrill Lynch, in its sole discretion, could demand payment earlier than the dates recited therein. Moreover, respondent agreed to pay Merrill Lynch's reasonable

attorneys' fees in the event that it needed to initiate legal proceedings to collect the balance due and owing under the Note. (*Id.*, ¶¶ 13-14).

In December 2009, respondent refinanced the principal balance outstanding under the Note (the "Refinance"). In order to effectuate the Refinance, respondent executed an additional promissory note dated December 1, 2009 (the "Revised Note"). The Refinance allowed respondent more time to repay the Loan, lowered the interest rate to 2.95%, and lowered the amount of the monthly payments to $13,670.96, commencing in December 2009 and continuing through August 2017. At the time of the Refinance, the remaining principal loan balance was $1,135,291.33. (*Id.*, ¶¶ 15-18).

The Revised Note provides that "all outstanding principal and accrued interest on the Note shall become immediately payable if (a) the undersigned's employment with Merrill Lynch is terminated for any reason;..." In addition, it provides that respondent "agrees to pay all costs of collection, including reasonable attorneys' fees incurred by the holder in the enforcement of the Note." (*Id.*, ¶¶ 19-20).

On or about March 15, 2011, respondent resigned from his employment by faxing a letter of resignation (the "Resignation

Letter") to Merrill Lynch. The Resignation Letter states, in part, that "[a]s you are probably aware I have a balance that may be due on my transition bonus. Please contact my attorney Mr. Alan Rubin @ [his phone number]." Petitioner alleges that at the time of respondent's resignation, the principal balance due on the Loan was $953,202.03. (*Id.*, ¶¶ 31, 52).

By letter dated March 22, 2011, Merrill Lynch, through its counsel, sent a letter to respondent's attorney, Alan Rubin ("Rubin"), demanding that respondent immediately remit the principal and interest due on the Loan. By letter dated March 24, 2011, Rubin's colleague, Michael N. Morea ("Morea"), confirmed that his firm, Cole, Schotz, Meisel, Forman & Leonard P.A. ("Cole Schotz") represented respondent in connection with the separation of his employment from Merrill Lynch, and otherwise responded to Merrill Lynch's demand for repayment of the Loan by alleging that respondent was constructively discharged and, as such, was not obligated to repay the Loan balance.[1]

Between March 24 and April 28, 2011, Susan E. Delaney, counsel for Merrill Lynch, had three conference calls and exchanged at least one email with Rubin to discuss potential settlement of any

---

[1] The March 24 letter directed counsel for Merrill Lynch to contact either Morea or Rubin regarding the foregoing matter. Both respondent Blackburn and Rubin were copied on the letter.

possible claims between petitioner and respondent. The parties, however, were unable to reach a mutually acceptable settlement. (4/26/12 Delaney Affid. at ¶¶ 16-17).

On or about April 28, 2011, petitioner initiated the Arbitration by filing with FINRA the Statement of Claim in which it asserted causes of action for breach of employment agreement, misappropriation of trade secrets, conversion of confidential business information, breach of duty of loyalty, unfair competition, breach of the Promissory Note and unjust enrichment, and sought attorneys' fees, costs and punitive damages.

Attached to the Statement of Claim is a Certificate of Service, dated April 28, 2011 and signed by Delaney. The Certificate of Service certifies that Delaney served a copy of the Statement of Claim via UPS Overnight Delivery to Morea and Rubin at the offices of Cole Schotz in Hackensack, New Jersey. It further specifically identifies Morea and Rubin as counsel for respondent Blackburn.

About one week later, on or about May 4, 2011, FINRA served Blackburn with the Statement of Claim by sending a copy to him at

10 Dogwood Lane, Rockville Centre, New York 11570.[2] Respondent claims that while he had previously resided with his former wife at the Rockville Centre address, he had separated from her and moved from that address on or about July 5, 2009. Respondent further claims that he had openly discussed with three of his supervisors at Merrill Lynch that he had moved from his Rockville Centre address more than a year and a half before he resigned from Merrill Lynch. (Blackburn Affid., sworn to on April 6, 2012, ¶ 7).

In any event, Blackburn failed to respond to the Statement of Claim and, by letter dated July 1, 2011 mailed to the Rockville Centre address, FINRA notified the parties that the matter would be determined on the pleadings, without a hearing, unless Blackburn served an Answer to the Statement of Claim. In addition, by separate letter dated July 1, 2011 and also mailed to the Rockville Centre address, FINRA notified Blackburn that despite his failure to respond to the Statement of Claim, the arbitrator could enter an award against him.

On September 1, 2011, the FINRA arbitrator issued the Arbitration Award which required Blackburn to pay Merrill Lynch

---

[2] This is the address listed on Blackburn's Securities Industry Form U4, which he executed to obtain his general securities representative license as a registered representative of Merrill Lynch. (Exhibit B to Ver. Petition [Respondent's Form U4]).

$953,202.03 in compensatory damages plus interest at the rate of 2.95% *per annum* accruing from March 15, 2011 until the Award is paid in its entirety, and $1,000 in attorneys' fees. The arbitrator also specifically determined that "Respondent Kevin Blackburn was served notice of the Statement of Claim, Overdue Notice, and Notification of Arbitrator by certified mail, as evidenced by the signed signature card on file and is therefore bound by the arbitrator's ruling and determination."

On the same day, FINRA served Blackburn with the Award by mailing a copy to his Rockville Centre address. The Award was also available to the public on FINRA's website. (4/26/12 Delaney Affid., ¶¶ 29-30).

Blackburn failed to comply with the Award and, by letter dated October 28, 2011, FINRA notified Blackburn that it intended to suspend his license effective on November 18, 2011.[3]

Thereafter, in or about November 2011, Merrill Lynch commenced the instant proceeding by filing a Verified Petition to Confirm Arbitration Award pursuant to CPLR 7510. Merrill Lynch alleges in

---

[3] The FINRA Code provides that "[a]ll monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction." (FINRA Rule 13904[j]).

the Verified Petition that Blackburn has failed to satisfy any portion of the Award and, upon information and belief, has not applied to vacate or modify the Award. (Ver. Petition, ¶¶ 11, 13).

Discussion

As a threshold matter, the parties dispute whether Blackburn's cross-motion to vacate the Award was timely made and whether, in answering that question, the Court must apply the Federal Arbitration Act (the "FAA") or CPLR Article 75. The Court of Appeals has held that

> the arbitration of disputes concerning employment in the securities industry and the enforceability of the arbitration clause embodied in petitioners' U-4 Form applications are governed by the Federal Arbitration Act (FAA). If the parties' arbitration agreement contains a choice of law clause providing that the law of a particular State will govern their arbitration, the parties' choice will be given effect if to do so will not conflict with the policies underlying the FAA; otherwise the FAA applies...[O]nly an explicit choice will displace the provisions of the FAA.

Matter of Salvano v. Merrill Lynch, Pierce, Fenner & Smith, 85 NY2d 173, 180 (1995)(internal citations omitted). Here, as in *Salvano*, the parties' agreement to arbitrate is found in the Form U4 which Blackburn executed. Moreover, neither party asserts that a choice of law was made that would displace the provisions of the FAA. Thus, this Court's review of the Award is governed by the FAA and not the CPLR. *See Sawtelle v. Waddell & Reed*, 304 AD2d 103, 107-08

(1st Dep't 2003)(judicial review of an arbitration award found to be governed by the FAA in a dispute between a mutual fund broker and his former employer); *Barclays Capital Inc. v. Shen*, 20 Misc.3d 319, 320 (Sup Ct, NY Co. 2008)(specifically finding that the decisions and awards of an NASD arbitration panel must be examined applying federal law, and not CPLR Article 75).

Merrill Lynch argues that Blackburn's cross-motion must be dismissed on procedural grounds because it was not timely made. Specifically, it asserts that under the FAA, "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or *delivered*." 9 USC § 12 (emphasis added); *see also White v. Local 46 Metallic Lathers Union*, 2003 WL 470337 (SDNY Feb. 24, 2003). It further contends that a party may not move to vacate, modify, or correct an arbitration award after the three month period has run *even if raised as a defense to a motion to confirm, citing Florasynth, Inc. v. Pickholz*, 750 F2d 171, 175 (2d Cir. 1984); *White* at *4. Merrill Lynch reasons that because the instant Award was filed on September 1, 2011, Blackburn had until December 1, 2011 to move to vacate it. However, he did not serve his notice of cross-motion to vacate until on or about April 6, 2012. Therefore, Merrill Lynch insists that Blackburn's motion was made more than four months after the statutory cut-off and should

be dismissed as untimely.

Blackburn, on the other hand, argues that his cross-motion to vacate the Award *was* timely because the three-month time period for filing it did not begin to run until he *actually received* the Award, *citing Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F2d 529, 531 (DC Cir. 1989), *cert. den.* 494 US 1028 (1990) (motion to vacate found to be timely where filed within three months of movants' *receipt* of the award, notwithstanding that the motion was filed more than three months after the date of the award). The *Sargent* case differs from the instant one, however, because there the Sargents acknowledged receipt of the decision on the same day it was delivered to them, and their complaint and motion were served within the required three months thereafter. By contrast, the issue articulated here by Blackburn turns on the meaning of "delivered" as used in 9 USC § 12 and whether any copy of the Award that he may have received was sufficiently "delivered" to him under that statute. Blackburn seems to suggest that delivery under the FAA is synonymous with service of process under the applicable procedural rules. (Oral Arg. Tr. 27:20-28:3, June 11, 2012). He further states in his affidavit, sworn to on May 24, 2012, that

> until early March, 2012, I never received notice or had any actual knowledge that an arbitration proceeding had been commenced or was pending against me; never received **or** had any actual knowledge of any communications directed to me by FINRA or by any arbitrator appointed by FINRA; never received any communications **or** had any

> actual knowledge that an arbitration award had been entered against me; and never received any communications **or** had any actual knowledge that Merrill had begun this Court proceeding to enforce the award that was entered in that arbitration (emphasis in original).

(5/24/12 Blackburn Affid., ¶ 2; see also 4/6/12 Blackburn Affid., ¶ 2). Yet, Blackburn does not dispute that various FINRA communications were addressed to him at his Rockville Centre address (4/6/12 Blackburn Affid., ¶¶ 29-30), or that Merrill Lynch sent a "courtesy copy" of the Statement of Claim to his attorneys at Cole Schotz, (4/6/12 Blackburn Affid., ¶¶ 12, 20; Oral Arg. Tr., 27:14-28:3 ["...he doesn't deny...he was aware [Cole Schotz] got it"]). He argues, rather, that FINRA failed to follow its own procedures in notifying him of the Arbitration, that "only FINRA itself can serve the initial claim on the responding party" and that "under FINRA's rules, any Notice of Claim was required to be served on me, and...unless and until one was, no arbitration proceeding against me could be started." (4/6/12 Blackburn Affid., ¶¶ 2, 16, 20).

The FAA does not, by its terms, define or describe what constitutes "delivery" of an arbitration award sufficient to start the clock running on the three-month filing period. Thus courts, in construing the terms of that statute, have looked to the applicable procedural rules governing service of process. *See Sargent,* 882 F2d at 531 (applying the Federal Rules of Civil

Procedure); *Holodnak v. Avco Corp.*, 381 F.Supp. 191, 198 (D. Conn. 1974), *rev'd in part on other grounds*, 514 F.2d 285 (2d Cir. 1975)(applying Federal Rules of Civil Procedure). Here, Blackburn and Merrill Lynch do not dispute that they are bound by the FINRA Rules and, in particular, those applicable to arbitrations. FINRA Rule 13300 details how documents in a FINRA arbitration, such as the Arbitration in this case, are to be filed and served. That rule provides, in pertinent part, as follows:

> 13300. Filing and Serving Documents
>
> (a) Initial statements of claim must be filed with the Director, with enough copies for each other party and each arbitrator. . .The Director will serve the statement of claim on the other parties, and send copies of the statement of claim to each arbitrator.
>
> * * *
>
> (d) Pleadings and other documents may be filed and served by: first class mail; overnight mail or delivery service; hand delivery; facsimile; or any other method, including electronic mail, that is approved or required by the panel.
>
> (e) Filing and service are accomplished on the date of mailing either by first-class postage prepaid mail or overnight mail service, or, in the case of other means of service, on the date of delivery....
>
> (f) A party must inform the Director and all other parties in writing of any change of address during an arbitration.

Blackburn argues that pursuant to subsection (f) of this rule,

it was Merrill Lynch's responsibility to inform FINRA that his address had changed and that its failure to do so was deliberate. (4/6/12 Blackburn Affid., ¶¶ 23, 30, 38). Blackburn further claims that Merrill Lynch was aware that he was no longer residing at the Rockville Centre address and "either they decided not to pass that information along to the [FINRA] Director, or FINRA simply ignored it." (*Id.*, ¶ 22).[4] However, in asserting that the duty to updated his address lay with Merrill Lynch and not with himself, Blackburn ignores the clear mandate found in Article 5, Section 2(c) of the FINRA By-laws, which provides that

> [e]very application for registration filed with [FINRA] shall be kept current at all times by supplementary amendments via electronic process or such other process as [FINRA] may prescribe to the original application. Such amendment to the application shall be filed with [FINRA] not later than 30 days after learning of the facts or circumstances giving rise to the amendment.

In this case, the original application in question is the Form U4 which Blackburn executed and submitted to FINRA. In section 11 of

---

[4] Blackburn also argues that Cole Schotz was not authorized to accept papers on his behalf and that the papers mailed to that firm were merely a courtesy copy of the Statement of Claim that did not constitute service on, or notice to, him and did not start the clock running on any obligation on his part to respond. (5/24/12 Blackburn Affid., ¶¶ 27, 29). This argument conflates the issues of the filing or delivery of the Award under the FAA, which would start the clock running on the three-month period for Blackburn to move to vacate the Award, and service of the Statement of Claim at the outset of the arbitration.

that form, which is entitled "Residential History," Blackburn indicates that his current address is the Rockville Centre address. He does not dispute that he provided that address to FINRA in the first instance or that he failed to update it as required under the FINRA By-laws. As such, Blackburn clearly was at fault for not informing FINRA of his change of address.

Furthermore, the Court need not decide whether Merrill Lynch, under certain circumstances, could have had a duty to update Blackburn's address with FINRA pursuant to FINRA Rule 13300(f), because there is no reasonable basis in the record to even conclude that Merrill Lynch knew or should have known that the Park Avenue address provided in Blackburn's March 15, 2011 Resignation Letter constituted a formal change of address. The Resignation Letter merely requests that a U5 Form be forwarded to Blackburn's personal email address or be mailed to a particular Park Avenue address. It in no way identifies this address as Blackburn's residence, permanent or otherwise, and does not indicate that it should be used for any purpose other than for forwarding a U5 Form.

Moreover, it was entirely reasonable under the circumstances for Merrill Lynch to believe that Blackburn was on notice of the Arbitration based on its having voluntarily sent a courtesy copy of the Statement of Claim to the attorney identified in the

Resignation Letter. The Court is not persuaded by Blackburn's arguments that, based on the language in the Resignation Letter, *supra* at 4, Merrill Lynch should have, and did, know that Rubin was not authorized to accept service of process in the Arbitration, a dispute directly related to the repayment of the "balance that may be due on [his] transition bonus," specifically identified by Blackburn in the Resignation Letter. Blackburn's counsel even acknowledged on the record during oral argument that Blackburn was aware that his attorneys at Cole Schotz were in receipt of the Statement of Claim. (Tr. 27:20-28:3).

Therefore, for all the reasons stated above, the Court determines that the Award was properly "delivered" to Blackburn in accordance with the FAA when the Award was served on him by FINRA on September 1, 2011. As such, Blackburn had three months from that date - or until December 1, 2011 - to timely file his motion to vacate the Award, which he did not do. The Court, therefore, agrees with Merrill Lynch that Blackburn's cross-motion to vacate the Award is time-barred.

Accordingly, Blackburn's cross-motion to vacate the Award must be denied, and it is hereby

ADJUDGED that the petition is granted and the Award rendered

in favor of petitioner and against respondent is confirmed; and it is further

ADJUDGED that petitioner Merrill Lynch, having an address at One Bryant Park, New York, New York 10036, do recover from respondent Blackburn, having an address at 8 Spruce Street, Apt. 38A, New York, New York 10038,[5] the amount of $953,202.03, plus interest at the rate of 2.95% per annum from the date of March 15, 2011, as computed by the Clerk in the amount of $_____, together with attorneys' fees in the amount of $1,000.00 as awarded by the Arbitrator, for the total amount of $_____, and that the petitioner have execution therefor.

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

Date: July 15, 2013

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

11 653273

[5] This is the most recent address provided by Blackburn. (4/6/12 Blackburn Affid., ¶ 36).