SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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CATHY CARTER,

Plaintiff,

- v -

ROYAL ALLIANCE ASSOCIATES, INC.,GARY BASRALIAN

Defendant.

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INDEX NO. 650293/2019

MOTION DATE 05/09/2019, 06/28/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 44

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43

were read on this motion to/for JUDGMENT - DEFAULT.

Motion sequence numbers 001 and 002 are consolidated for disposition. In motion sequence number 001, petitioner Cathy (Carter) moves, pursuant to CPLR 7510, to confirm an award (Award), issued on January 15, 2019, by the Financial Industry Regulatory Authority (FINRA). The Award, which was issued unanimously by a three-person panel (Panel), grants Carter $2,113,665.00 in compensatory damages, $15,277.55 in costs, and $500, 000.00 in attorneys' fees. Respondent Royal Alliance Associates, Inc. (Royal) cross-moves, pursuant to section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, and CPLR 7511(b), to vacate that part of the Award that pertains to attorneys' fees. In motion sequence number 002, petitioner moves for a default judgment against respondent Gary John Basralian (Basralian). That motion is unopposed. Basralian was a branch manager for Royal, before he was arrested, and pleaded guilty to stealing funds from Carter and other clients.

The motion and cross motion in motion sequence number 001 raise the following two principal issues, which will be addressed seriatim: (1) whether the award of attorney's fees was proper; and (2) whether the arbitration award was tainted by the non-disclosure of possible bias by the chair of the Panel.

Some weeks prior to the scheduled arbitration hearing, Royal sent Carter a settlement offer, which bore the caption "Offer of Judgment." Petitioner responded by letter, dated November 9, 2018, which letter states, in relevant part:

> "Ms. Carter accepts this offer without any modification or amendment. She also accepts it without waiver to any of her rights at law, including her right to pursue costs as well as attorneys' fees as a prevailing party.
>
> Simultaneously with accepting this offer, Ms. Carter is filing a motion for a hearing on costs and attorney's fees as prevailing party."

NYSCEF Doc. No.20 at 1. It is hard to imagine a clearer statement that Carter's acceptance of the sum offered to her would not bar her from seeking attorneys' fees in addition, and that she intended to do so in the then-pending arbitration proceeding. Royal argues that "the law does not grant any such right to continue pursuing a claim . . . after that party has granted a full release of all claims." NYSCEF Doc. No.9, at16-17. Similarly, at the oral argument on these motions, counsel for Royal stated:

> "if we . . . signed a settlement document and the settlement document said 2.1 million in exchange for full release of all claims, and we all signed it, and they say notwithstanding signing the agreement, we want to go to a hearing, I think to me the legal effect is the same thing."

NYSCEF Doc. No, 44, at 15-16. Here, however, there was no temporal lag. The reservation of rights appears in Carter's letter, not in some subsequent document. The court notes that, at the arbitration, Royal's counsel, who argues, here, that Carter signed a settlement in which she

relinquished all claims against Royal, expressly acknowledged that no settlement agreement had been signed . *See* transcript, NYSCEF Doc. No. 24, at 45, ll 9-11.

The court also notes that Royal's offer is not merely captioned "OFFER OF JUDGMENT," a phrase that refers to Rule 68 of the FRCP, which provides that, if a party to whom such an offer is made rejects it, and ultimately recovers less than was offered, that party will be liable for the other party's legal fees, incurred after the offer was made. Royal's letter begins "On behalf of respondent . . . we write to convey a formal Offer of Judgment." NYSCEF Doc. No. 19, at 1. At the hearing on attorney's fees, Royal's counsel, who took pains to explain that Royal never intended to seek legal fees from Carter, suggested that Royal's use of the term "was form over substance." NYSCEF Doc. No. 24, at 152.

Whether intended as a settlement offer, or as a formal offer of judgment, neither Royal's letter, nor Carter's response to it, bar her claim for attorneys' fees. Carter's initial submission to FINRA specified that she was acting, inter alia, pursuant to the Racketeer Influenced & Corrupt Organizations Act (RICO), 18 USC 1961, *et seq.* To the extent that Royal's offer was what its heading denoted, and its first sentence stated, it was invalid as a bar to seeking attorneys' fees, because it failed explicitly to mention costs, including attorney's fees, although such costs are provided for by RICO. *See, e.g. Sanchez v Prudential Pizza, Inc.* 709 F3d 689, 691 (7th Cir 2013) (remanding for determination of costs and fees, where offer of judgment was silent as to costs provided for by statute); *see also Steiner v Lewmor, Inc.*, 816 F3d 26, 34-35 (2d Cir 2016) (holding that the plaintiff was not precluded from seeking attorneys' fees pursuant to the Connecticut Unfair Trade Practices Act, where Rule 68 offer did not unambiguously bar such recovery). To the extent that Royal's offer was not what its heading implied and its first sentence said that it was, Carter's letter, reserving a right that was not mentioned in the offer, constituted a counteroffer. *See e.g.*

Brown v Cerberus Capital Mgt., L.P., 173 AD3d 513, 513 (1st Dept 2019). Accordingly, this court need not resolve the ambiguity in Royal's position. Whether Royal's offer was, or was not, an offer of judgment, Carter was not barred from seeking attorneys' fees.

The non-disclosure about which Royal complains is that, more than ten years before the Award, which was unanimously issued by the Panel, the chair of the Panel, who was then in private practice, had represented an elderly woman, whose savings had been stolen by her financial advisor. Upon learning of this representation, Royal's attorneys wrote to FINRA, which, at Royal's request, referred the inquiry to the Chair. The Chair responded by writing, in part,

> "I did once represent an elderly (approximately age 85) woman some of whose savings were stolen by her financial advisor. I believe that representation was earlier than 2005, although I have long since destroyed the file as my client died in approximately 2011 or 2012. I assume the reference to this matter was deleted from my Report [of matters possibly related to those coming before FINRA] because it was much more than ten years before I last updated my Disclosure. In that matter, there was no claim filed with FINRA or the NASD."

Quoted, *id.*, at 11. The Chair also stated, in his correspondence with Royal, that he did not believe that his long-ago representation biased him in the pending arbitration.

For tactical reasons, Royal did nothing further. As Royal's attorney explained:

> "after the arbitration hearing has been completed, now we have to object, at that point, all it would be is futile and essentially making an accusation of bias against the person deciding our case [who] already said he doesn't see any bias. You are being asked to inflame him for no potential gain."

Id., at 14. Having remained silent at the arbitration, Royal may not, now, claim bias on the part of the Chair. *Matter of Goldstein v 12 Broadway Realty, LLC*, 105 AD3d 506, 506 (1st Dept 2013), *citing Matter of J.P. Stevens & Co. v* Rytex Corp., 34 NY2d 123, 129 (1974).

Royal also argues that the conduct of the arbitration, with regard to attorney's fees, was flawed. At the outset of his presentation of evidence at the hearing, one of Carter's attorneys introduced declarations from 12 attorneys who practice before FINRA, and none of whom received

a fee from Carter, or her attorneys stating that a fee between 33% and 40% is reasonable. The fee request from Carter's lawyers called for a 30% fee. Those lawyers' fee request also included, for purposes of comparison, a request for a lodestar recovery with a multiplier.

Royal presented two witnesses. One of them testified that Royal had settled with other customers who had been victimized by Basralian and who had not retained counsel. Royal complains that the Chair upheld an objection to the introduction in evidence of a settlement that Royal had entered into with an unrepresented customer. Inasmuch as Royal could hardly demand that customers who had been victimized by Basralian not retain counsel, it was not improper to rule that the terms of an agreement with an unrepresented customer were irrelevant to the fee request of Carter's attorneys. When Royal's witness argued that the relevance was to show that Carter's attorneys had spent too much time on her case, the Chair pointed out that those attorneys had requested a contingency fee, and that fee would have been the same had they spent much less time on the case. On cross examination, Royal's attorney found no fault in the declarations of those of Carter's witnesses whom he knew, and he acknowledged both that Royal had retained attorneys from two law firms to work on Carter's case, and that, while Royal had tried to pay Carter, it had not paid any other victim of Basralian. *See* NYSCEF Doc. No.24, at 103-104. Finally, with regard to this point, the Chair reopened the hearing, after the parties had moved on to their closing statements, to allow Royal to question Carter's attorneys about their hours working on her case. Royal's attorneys failed to do so.

CPLR 7511(b) provides that an arbitration award may be vacated:

> if the court finds the rights of [a] party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral . . . ; or (iii) an arbitrator . . . exceeded his power; or iv) failed to follow the procedure of this article . . . .

Royal argued that the arbitrators lacked power to award attorneys' fees to Carter, because she had settled her action against Royal, and that the Chair was biased. For the reasons given above, this court concludes that Carter had not settled her case, prior to the arbitration, and that whether or not the Chair was biased, Royal waived that complaint. In short, Royal has given no persuasive reason for this court not to confirm the arbitration.

Carter requests attorneys' fees for having had to litigate this motion. There is no warrant for such an award.

Finally, the Award imposed no liability upon Basralian Accordingly, such relief as petitioner or Royal may seek against him will have to be sought outside of this proceeding.

Accordingly, it is hereby

ORDERED that in motion sequence number 001, the motion of petitioner Cathy Carter is granted and the January 15, 2019 arbitral award in FINRA case number17-03339, is hereby affirmed, with interest at the statutory rate from January 15, 2019 and costs as calculated by the Clerk of the Court upon the presentation of an appropriate bill of costs and it is further ordered that the cross motion of respondent Royal Alliance Associates, Inc. to vacate said award is denied; and it is further

ORDERED that in motion sequence number 002, the motion of petitioner Cathy Carter is denied.

6/30/2020
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE