

**TD Ameritrade, Inc. v Purshe Kaplan Sterling Inv.,
Inc.**

2020 NY Slip Op 34120(U)

December 9, 2020

Supreme Court, New York County

Docket Number: 650733/2020

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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TD AMERITRADE, INC.,

Petitioner,

- v -

PURSHE KAPLAN STERLING INVESTMENTS, INC.,

Respondent.

-----X

INDEX NO. 650733/2020

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 17, 18, 19, 20, 21, 23, 24, 25

were read on this motion to/for STAY OF ARBITRATION.

Petitioner TD Ameritrade, Inc. (TD Ameritrade) brings this proceeding for a stay of a cross-claim brought against petitioner by respondent Purshe Kaplan Sterling Investments, Inc. (PKSI) in an arbitration proceeding before the Financial Industry Regulatory Authority (the FINRA proceeding or arbitration). (Petition, ¶ 1 [NYSCEF Doc. No. 1].) The FINRA proceeding was filed by former clients of PKSI’s registered representative and his affiliated independent registered investment advisor, Thomson Financial Advisors (TFA), against PKSI. (Id., ¶ 5.) In the FINRA proceeding, claimants allege that Thomson Financial Advisors and its principals made unsuitable option trades in their accounts and that PKSI failed to supervise the transactions. (Statement of Claim, at 9-10, 14 [NYSCEF Doc. No. 4].) In its answer in the underlying arbitration, PKSI asserted a cross-complaint (i.e., cross-claim) against TD Ameritrade. (Petition, ¶ 10.) The cross-claim alleges that the trades at issue were made in claimants’ accounts that were “custodied at TD Ameritrade” and for which TD Ameritrade served as “clearing broker-dealer. . . .” (PKSI Answer and Cross-Complaint, at 4-6 [NYSCEF

Doc. No. 5].) The cross-claim further alleges that TD Ameritrade “failed to adequately supervise Thom[]son Financial’s options trades in Claimants’ accounts, as TD Ameritrade was required to do pursuant to FINRA Rule 2360.” (Id., at 13.) TD Ameritrade asserts that, under FINRA rules, “TD Ameritrade is not required to arbitrate PSKI’s (sic) Cross-complaint.” (Petition, ¶ 15.) TD Ameritrade accordingly argues that the court “should stay PSKI’s (sic) Cross-complaint against TD Ameritrade in the Arbitration.” (Id., ¶ 17.)

TD Ameritrade moves to stay the arbitration pursuant to CPLR 7503 (b), which provides:

“Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.”

The parties have not directly addressed the issue of whether the Federal Arbitration Act (9 USC § 1 et seq.) (FAA) or state law governs the determination as to whether PKSI’s claim is arbitrable. Petitioner cites New York law, and respondent cites federal, New York, and Arizona law. The court need not, and does not, determine the choice of law issue, as neither party points to, and the court’s own research has not revealed, any material difference between federal law decided under the FAA and New York or Arizona law.

Under the FAA, “[a]rbitration is contractual by nature—a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” (Thomson-CSF, S.A. v American Arbitration Assn, 64 F3d 773, 776 [2d Cir 1995] [internal quotation marks and citations omitted]; see First Options of Chicago, Inc. v Kaplan 514 US 938, 945 [1995].) Under New York law, similarly, a party “may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties’ clear, explicit and unequivocal agreement to

arbitrate.” (Matter of Fiveco, Inc. [v Haber], 11 NY3d 140, 144 [2008] [internal quotation marks and citation omitted], rearg denied 11 NY3d 801.)

Here, the parties do not dispute that the arbitrability of this matter is an issue for the court to decide. Nor could they do so, as the parties did not clearly and unmistakably evidence their intention to have the arbitrator decide issues of arbitrability. (Henry Schein, Inc. v Archer and White Sales, Inc., ___ US ___, 139 S Ct 524, 531 [2019]; Matter of Smith Barney Shearson Inc. [v Sacharow], 91 NY2d 39, 45-46 [1997].)

TD Ameritrade argues that the arbitration should be stayed because there is no written arbitration agreement between TD Ameritrade and PKSI, and because the applicable FINRA Rules—namely, the Code of Arbitration Procedure for Customer Disputes (Customer Code) and the Code of Arbitration Procedure for Industry Disputes (Industry Code)—do not require TD Ameritrade to arbitrate the cross-complaint. (Pet.’s Memo. in Supp., at 6-7 [NYSCEF Doc. No. 13].) More particularly, TD Ameritrade argues that the Customer Code is inapplicable because “PKSI, a broker-dealer, is not a customer of TD Ameritrade.” (Id., at 8.) It further argues that the Industry Code is inapplicable because “it only mandates arbitration in disputes involving exclusively industry parties” and claimants are not industry parties. (Id., at 9.)

PKSI argues that, as a FINRA member, “TD Ameritrade has agreed to be bound by FINRA Rules, including the FINRA Code of Arbitration, and must participate in any FINRA arbitration matter to which it is named as a party.” (Resp.’s Memo. in Opp., at 13 [NYSCEF Doc. No. 18].) PKSI further argues that TD Ameritrade was properly brought into the arbitration under FINRA Rule 12303, which “does not require a separate arbitration agreement between the parties to the third party claim” and which does not “include a requirement that a third party claim be supported by a customer requesting arbitration against the third party claimant.” (Id., at

14 [internal quotation marks and brackets omitted].) PKSI also notes that arbitration is particularly appropriate in this matter because “[a]ll 53 Claimants in the Arbitration were TD Ameritrade customers and the transactions at issue were executed in TD Ameritrade accounts, the securities from which were custodied by TD Ameritrade, and the fees from which were collected by TD Ameritrade.” (Id., at 12.)

The parties do not dispute that there is no written agreement between them to arbitrate. (Pet.’s Memo. in Supp., at 4; Resp.’s Memo. in Opp., at 1.) FINRA members are, however, required by FINRA Rules to arbitrate certain disputes. As both TD Ameritrade and PKSI are members of FINRA (Pet.’s Memo. in Supp., at 2; Resp.’s Memo. in Opp., at 13), resolution of TD Ameritrade’s petition turns on whether FINRA Rules require arbitration of PKSI’s cross-claim. That this determination “require[s] interpretation of the Financial Industry Regulation Authority (FINRA) Code does not make it any less a matter for the court.” (MF Global, Inc. v Morgan Fuel & Heating Co., Inc., 71 AD3d 420, 420 [1st Dept 2010], lv denied 15 NY3d 711.) “The arbitration rules of an industry self-regulatory organization such as FINRA are interpreted like contract terms; the organization’s arbitration provision should thus be interpreted to give effect to the parties’ intent as expressed by the plain language of the provision.” (Citigroup Global Markets Inc. v Abbar, 761 F3d 268, 274 [2d Cir 2014] [internal quotation marks and citation omitted].)

FINRA Customer Code Rule 12200 provides:

“Parties must arbitrate a dispute under the Code if:

- Arbitration under the Code is either:
 - (1) Required by a written agreement, or
 - (2) Requested by the customer;
- The dispute is between a customer and a member or associated person of a member; and

- The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.”

FINRA Industry Code Rule 13200 provides, in relevant part:

“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.”

FINRA Customer Code Rule 12303 provides, in relevant part: “The answer to the statement of claim may include any counterclaims against the claimant, cross claims against other respondents, or third party claims, specifying all relevant facts and remedies requested, as well as any additional documents supporting such claim.”

Petitioner argues that FINRA Rule 12200 is inapplicable because “there is no written arbitration agreement between TD Ameritrade and PKSI. . . , and PKSI is not and has never been a customer of TD Ameritrade.” (Pet.’s Memo. in Supp., at 7.) This argument ignores that Rule 12303 expressly provides for third party claims, without limiting such claims to disputes between a customer and a member. Significantly also, TD Ameritrade cites no authority in support of its contention that in an arbitration initiated by customers against a broker-dealer, the named broker-dealer may not assert third party claims related to the transaction against another member broker-dealer. Merrill Lynch, Pierce, Fenner & Smith, Inc. v Cantone Research, Inc. (427 NJ Super 45 [App. Div. 2012]), on which TD Ameritrade relies, is factually inapposite. In that case, the defendants were broker-dealers and associated persons against which the claimant-investors had brought the arbitration, and the plaintiffs were a broker-dealer and associated person against which the defendants sought to assert a third party claim in the arbitration for contribution or indemnification. The court stayed the arbitration against the plaintiffs, holding that the

defendants were not authorized by the FINRA Customer Code to bring the third party claim. The court reasoned that “the Customer Code does not apply to plaintiffs because neither defendants nor the investors are customers, as defined by the Customer Code, of [plaintiffs].” (*Id.*, at 62.) Here, in contrast, by petitioner’s own admission, “the Claimants were customers of TD Ameritrade. . . .” (Pet.’s Memo. in Supp., at 7.)

Moreover, the arbitration in fact involves claims by the claimants not only against PKSI, but also against TD Ameritrade. At the time the petition was initially briefed, claimants in the arbitration had not asserted any claims against TD Ameritrade. By letter dated September 8, 2020, PKSI informed the court that claimants had filed a motion to amend their Statement of Claim to include TD Ameritrade in the arbitration, and that the motion had been granted. (NYSCEF Doc. No. 26; *see* Second Amended Statement of Claim [NYSCEF Doc. No. 28].) In a September 14, 2020 letter to the court, TD Ameritrade acknowledged that claimants had submitted claims against it, but still sought a stay. (NYSCEF Doc. No. 30.) In a further letter, dated November 30, 2020, TD Ameritrade informed the court that it had settled the arbitration with the claimants. (NYSCEF Doc. No. 31.) TD Ameritrade cites no authority that the third party claims in the arbitration may no longer be properly arbitrated under FINRA’s Customer Code as a result of its settlement with the claimants, or that the third party claim is otherwise improper under the circumstances.

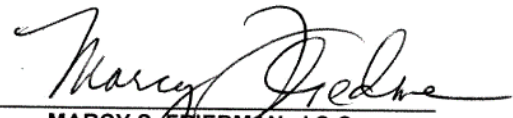
In view of the above holding, the court need not determine whether the third party claims were properly brought under the FINRA Industry Code. Petitioner’s claims that it will be prejudiced by the conduct of the arbitration are properly addressed by the arbitration panel, rather than the court, in the first instance.

It is hereby ORDERED that the petition of TD Ameritrade, Inc. for a stay of arbitration is denied, and the petition is dismissed; and it is further

ORDERED that respondent's counsel shall serve a copy of this decision and order upon the arbitral tribunal.

This constitutes the decision and order of the court.

12/09/2020
DATE


MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: