SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LORI S. SATTLER** **PART** **02TR**

Justice

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ANITA FRANKEL

Petitioner,

- v -

SEYMOUR COHEN,

Respondent.

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INDEX NO. 654593/2022

MOTION DATE 12/02/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

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

In this special proceeding brought pursuant to CPLR Article 75, Petitioner Anita Frankel ("Petitioner") seeks confirmation of an arbitration award rendered August 25, 2022 (NYSCEF Doc. No. 6) and an entry of judgment thereon in favor of Petitioner and against Respondent Seymour Cohen ("Respondent"). Respondent opposes.

The proceeding arises out of a Financial Industry Regulatory Authority ("FINRA") arbitration commenced on November 19, 2021. In that matter, Petitioner alleged that Respondent, who was her financial advisor, convinced her to loan him $200,000 from the funds he managed on the promise that it would be repaid with interest upon the sale of a property he owned, and that when she sought repayment more than five years later, she discovered the property was being foreclosed upon. The underlying arbitration also sought relief against Respondent's employer, Wilmington Capital Securities, LLC ("Wilmington"). It alleged breach of fiduciary duty, negligence, and negligent supervision.

Petitioner commenced the arbitration by filing a Statement of Claim (NYSCEF Doc. No. 2) in accordance with the FINRA Code of Arbitration Procedure for Customer Disputes

("Code"). On November 19, 2021, FINRA sent Respondent a letter notifying him that he had been named in the arbitration (NYSCEF Doc. No. 3, "Claim Notification Letter"). The letter provided that Respondent was "required by FINRA rules to arbitrate the dispute," gave instructions for, *inter alia*, using a dispute resolution portal and filing a statement of answer, and enclosed the Statement of Claim and a FINRA Arbitration Submission Agreement ("Submission Agreement") which Respondent was to sign.

According to the instant Petition, Wilmington timely answered the Statement of Claim, as part of which it annexed a "Certification and Attestation" signed by Respondent and dated December 14, 2021 (NYSCEF Doc. No. 18). In that document Respondent stated: "I am a Respondent in FINRA Dispute Resolution Services Arbitration Number 21-02878, *Anita Frankel vs. Wilmington Capital Securities, LLC and Seymour Cohen*." He further conceded that Petitioner was his client, that he borrowed money from her on two occasions "promising to repay her upon the sale of my home," and that he did not disclose these loans to Wilmington and therefore "circumvented the compliance procedures of Wilmington" (*id.*). He maintains that the loans are not due because the property has not yet been sold (*id.* ¶ 9). He further states, "I consent to the use of this attestation as evidence by any party to the Arbitration in any proceedings relating to the Arbitration and the Arbitration itself" (*id.* ¶ 4). Despite providing this document in support of Wilmington's answer, Respondent never answered the Statement of Claim on his own behalf or signed the Submission Agreement. On June 29, 2022, FINRA sent Respondent notice that the claim against him had been bifurcated and would proceed on default (NYSCEF Doc. No. 5).

An arbitration award was rendered on August 25, 2022 (NYSCEF Doc. No. 6). The arbitrator determined that Respondent was served with the November 19, 2021 Claim

Notification Letter by regular mail, a January 11, 2022 Overdue Notice which included the Statement of Claim by regular mail and FedEx, and a February 4, 2022 Notification of Arbitrator by regular mail (*id.*). The arbitrator found that Respondent failed to register for the dispute resolution portal and "did not file a properly executed Submission Agreement but is required to submit to arbitration pursuant to the Code of Arbitration Procedure" (*id.*). The arbitrator found that Respondent was liable to pay Petitioner compensatory damages of $383,158.04 with interest at a rate of 5.43% per annum from January 19, 2010 through June 30, 2022 (*id.*).

Petitioner now seeks confirmation of this award in accordance with CPLR § 7510. Respondent argues confirmation must be denied because he was never served with the underlying arbitration, because Petitioner's claims were time-barred, and because the arbitrator exceeded her authority in rendering an award he claims is higher than what Petitioner sought in her Statement of Claim.

CPLR § 7510 provides: "The court shall confirm an award upon application of a party made within one year after its delivery [], unless the award is vacated or modified upon a ground specified in section 7511" (*see also Bernstein Family Ltd. Partnership v Sovereign Partners L.P.*, 66 AD3d 1, 4-5 [1st Dept 2009]). A party may also oppose confirmation of an arbitration award without seeking to vacate or modify it by objecting to it in opposition to the petition to confirm (*Matter of Pine St. Assoc., L.P. v Southridge Partners, L.P.*, 107 AD3d 95, 100 [1st Dept 2013]).

Respondent first argues he was not properly served with the Statement of Claim. He contends that a copy of the Claim Notification Letter from FINRA, without an affidavit of service from someone with personal knowledge that service was effectuated, is insufficient to demonstrate proper service. He further contends that the Claim Notification Letter does not constitute a notice

of intention to arbitrate as described in CPLR § 7503(c), and therefore the period contained in that section within which a party can seek a stay of arbitration has not begun.

In reply, Petitioner argues that Respondent, as a member of FINRA, has already consented to FINRA's arbitration rules and procedures, including the rules for commencing an arbitration proceeding. She argues that if Respondent's argument were accepted, namely that a Petitioner is required to independently show proof of service of a Statement of Claim, then no FINRA arbitration award could ever be confirmed. She notes that Respondent does not dispute that he was a member of FINRA subject to its dispute resolution procedures.

Parties to an arbitration agreement may set a method of service different from that otherwise required in the CPLR (*Matter of New York Merchants Protective Co. v Mima's Kitchen, Inc.*, 114 AD3d 796, 797 [2d Dept 2014]). This may be done either by stipulating to methods of service in an arbitration clause or by adopting the arbitration rules of an arbitration agency (*Matter of New Brunswick Theol. Seminary v Van Dyke*, 184 AD3d 176, 180 [2d Dept 2020]). When parties agree to the manner in which a demand for arbitration is served, they do not have to comply with the service requirements set forth in CPLR § 7503(c) (*id.*). "Due process does not require actual receipt of notice . . . ; it is sufficient that the means selected for providing notice was reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Beckman v Greentree Sec.*, 87 NY2d 566, 570 [1996] [internal quotation marks and citation omitted] [mailed service of petitioner's arbitration claim in accordance with the National Association of Securities Dealers, Inc. Arbitration Code constituted sufficient service]).

Pursuant to FINRA Code Rule 12200, parties must arbitrate a dispute if arbitration is requested by the customer, the dispute is between a customer and a FINRA member or associated

person of a member, and the dispute arises in connection with the business activities of the member or the associated person (NYSCEF Doc. No. 13). Rule 12300(c)(1) provides: "The Director [of FINRA] will serve the Claim Notification Letter or initial statement of claim on the respondent(s) pursuant to Rule 12302." Rule 12302(c) provides "the Director will effect service as follows: (1) the Director will send the Claim Notification Letter to all non-customer respondent(s) pursuant to Rule 12302." The Code does not require a claimant to effectuate service, nor does it require FINRA to prepare an affidavit of service, and there are no additional requirements for service upon non-customer respondents.

Petitioner annexes the Claim Notification Letter generated by FINRA along with additional notifications addressed to Respondent, as well as the arbitration award in which the arbitrator found that Respondent was served by regular mail and FedEx and the Certification and Attestation in which Respondent acknowledges being a party to the arbitration. Respondent does not dispute that he was a FINRA member at the time Petitioner filed her claim or that he was bound by FINRA's rules and procedures. His only argument, that Petitioner fails to adduce admissible evidence of proper service such as an affidavit of service or "a copy of the mailer's business records showing that proper service occurred" is unavailing because FINRA's service procedure on its face does not make such information available to claimants. The Court finds that the Petition and its exhibits demonstrate that Respondent was served in accordance with FINRA's arbitration procedures (*see Beckman*, 87 NY2d 566; *Matter of DiNapoli v UBS Fin. Servs. Inc.*, 171 AD3d 553 [1st Dept 2019]).

Respondent further argues the arbitration award should not be confirmed because Petitioner's claims were time-barred. He relies on a three-year statute of limitations on breach of fiduciary duty and negligence claims and argues that because the later of the two loans was given

in September 2015, the latest Petitioner could have filed her claim was September 2018. In response, Petitioner argues that having been properly served and having failed to appear at the arbitration, Respondent is not entitled to relitigate the merits of the arbitration, including whether the underlying claims were time-barred. She further contends that in any event the claims are not time-barred because, as set forth in the Statement of Claim, Respondent continued to make representations about the repayment of the loan and therefore "induced Claimant not to seek legal recourse for the unpaid note."

New York State favors and encourages arbitration as a means of expediting resolution of disputes and conserving judicial resources (*Rio Algom Inc. v Sammi Steel Co., Ltd.*, 168 AD2d 250, 251 [1st Dept 1990]). For this reason, the grounds to vacate or deny confirmation of an arbitration award are narrowly construed (*Denson v Donald J. Trump for President, Inc.*, 180 AD3d 446, 450 [1st Dept 2020], citing *Frankel v Sardis*, 76 AD3d 136, 139 [1st Dept 2010]). An arbitration award must be upheld even where the arbitrator makes errors of law and/or fact (*Denson*, 180 AD3d at 450, citing *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479-480 [2006]). Likewise, an arbitration award can only be vacated for the limited reasons proscribed by CPLR § 7511(b), namely fraud, impartiality, abuse or imperfect execution of power, and failure to follow procedure. Where a party seeking to vacate an award contends that an arbitrator exceeded or imperfectly executed their power, an award will only be overturned when it violates a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's power (*Denson*, 180 AD3d at 450, citing *Matter of Kowaleski (New York State Dept. of Correctional Servs.)*, 16 NY3d 85, 90 [2010]; *Matter of Silverman [Benmor Coats]*, 61 NY2d 299 [1984]). "It is not for the court to assume the role of overseer of the arbitration; nor may it mold

an award to its sense of justice" (*Denson*, 180 AD3d at 450, citing *Wein & Malkin*, 6 NY3d at 480]).

The Court need not determine whether Respondent can challenge the merits of an award in an arbitration of which he had notice and failed to appear, nor does the Court need to address whether the underlying claims against Respondent were time-barred. Even if the Court were to find that the arbitration was untimely, an error of law is not a basis for denying Petitioner's application to confirm the award. Nor is the arbitrator's determination totally irrational in light of Petitioner's claims that Respondent made ongoing representations about the repayment of the loans after they were given.

Finally, Respondent's claim that the arbitrator exceeded her authority by awarding more in damages than was sought in the statement of claim is without merit. Respondent correctly recites FINRA Code Rule 12801(e), which provides that in a default proceeding "[t]he arbitrator may not award damages in an amount greater than the damages requested in the statement of claim." The Statement of Claim seeks "compensatory damages in an amount according to proof to be offered at the Final Hearing," interest, punitive damages, and costs. The matter then proceeded on default, and the arbitrator awarded Petitioner compensatory damages of $383,158.04 plus interest. Respondent fails to set forth a basis for his contention that this amount is higher than that sought in the Statement of Claim or that it is higher than the proof offered to the arbitrator.

Because the Court finds that Respondent's bases for opposing the Petition are without merit, the arbitration award shall be confirmed in accordance with CPLR § 7510 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 Anita Frankel shall recover from Respondent Seymour Cohen the amount of $383,158.04, plus interest at the rate of 5.43% per annum from January 19, 2010 through and including June 30, 2022, as computed by the Clerk in the amount of $_____ for the total amount of $_____, and that Petitioner have execution therefor.

6/26/2023
DATE

LORI S. SATTLER, 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

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