

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MICHAEL JAMES DINAPOLI,

Petitioner,

-against-

**UBS FINANCIAL SERVICES INC. and UBS
CREDIT CORP.,**

Respondents.

Index No.

**PETITION TO VACATE
ARBITRATION AWARD**

Petitioner, Michael James DiNapoli (“DiNapoli”), by his attorneys, Pryor Cashman LLP, for his Petition to vacate an arbitration award obtained against him by Respondents UBS Financial Services Inc. (“UBSFS”) and UBS Credit Corp. (“UBSCC” and with UBSFS, collectively, “UBS”), alleges as follows:

NATURE OF THE PROCEEDING

1. DiNapoli brings this proceeding against UBS for an Order vacating an Arbitration Award of the Financial Industry Regulatory Authority (“FINRA”) dated May 12, 2016 (the “Award”), on the grounds that: (1) he was never served with the Statement of Claim or any other documents relating to the arbitration, in violation of his basic due process rights; (2) he was never notified of the time and place of the arbitration hearing as required by CPLR § 7506(b); and (3) the arbitrator exceeded her authority in affirming the award under New York law, when the arbitration agreement states that the arbitration should be conducted pursuant to the arbitration laws of the State of New Jersey. A copy of the Award is annexed as Exhibit A.

2. DiNapoli joined UBSFS as a financial advisor on December 12, 2012 and was terminated on September 9, 2015. Subsequent to DiNapoli’s termination, UBS initiated a

FINRA arbitration proceeding against him based on a dispute arising out of DiNapoli's compensation package with UBSFS.

3. However, DiNapoli was never served with the Statement of Claim commencing the arbitration or any other documents relating to it. In fact, DiNapoli did not even learn of the existence of the arbitration or of the Award until approximately June 21, 2016 when his current employer received a copy of a letter from FINRA dated June 15, 2016, stating that DiNapoli's license in the securities industry would be suspended. A copy of FINRA's June 15, 2016 letter is annexed as Exhibit B. Indeed, DiNapoli was never provided notice of the time and place of the hearing as required by CPLR § 7506(b). As a result, DiNapoli was never afforded the opportunity to appear in the proceeding and defend against the allegations asserted by UBS, which have no substantive basis in any event.

4. Accordingly, DiNapoli seeks an order vacating the Award.

THE PARTIES

5. Upon information and belief, UBSFS is a Delaware corporation licensed and qualified to do business as a broker-dealer in the State of New York. UBSFS maintains offices in New York City. UBSFS is a member organization of FINRA.

6. Upon information and belief, UBSCC is a Delaware corporation and an affiliate of UBSFS.

7. DiNapoli was employed by UBSFS from December 12, 2012 until he was terminated on September 9, 2015. At all relevant times, DiNapoli was a person associated with a member of FINRA.

8. Since May 2013, DiNapoli has maintained his residence in Ocala, Florida.

RELEVANT FACTS

A. UBS And FINRA Know That DiNapoli Resides In Florida

9. On December 12, 2012, DiNapoli joined UBSFS as a financial advisor.

10. After DiNapoli moved to Florida in May 2013, he would typically travel to New York City each week and spend Tuesdays, Wednesdays and Thursdays working out of the UBS office located at 200 Park Avenue, New York, New York.

11. However, following his move to Florida, UBSFS's Human Resources Department ("UBS HR") required DiNapoli to provide it with a New York address since he would be working in New York and because he did not have a Series 66 License which is required in Florida, but not in New York. UBS HR also indicated to DiNapoli that because he would be working out of the New York office, he was not permitted to have a Florida address on file.

12. While in New York City, DiNapoli would stay at the New York Athletic Club (the "NYAC"), located at 180 Central Park South, New York, New York 10019. The NYAC is a private club that, among other things, provides mail drop boxes for its members. Accordingly, DiNapoli set up a mail drop box at the NYAC (the "NYAC Box") so that he would have a New York address for UBS HR.

13. During his employment, DiNapoli asked UBS HR if he could change his address on file to reflect his Florida home address, but UBS rejected his request. Further, because the NYAC is considered a commercial establishment, mail cannot be forwarded from the NYAC to any other location. Accordingly, DiNapoli checked his mail regularly while working at UBSFS and staying at the NYAC.

14. When DiNapoli was terminated by UBSFS, he requested an address change for all mail that he believed was being sent to the NYAC Box, including mail from UBS HR.

15. Critically, at all relevant times, UBS has known that DiNapoli lives in Florida.

16. DiNapoli never provided FINRA with the NYAC Box address, which, upon information and belief, was provided to FINRA by UBS.

17. Further, FINRA had actual knowledge that the NYAC Box address was not DiNapoli's correct or current address at the time it served the Statement of Claim. UBS's Statement of Claim states that DiNapoli maintains residences in both New York and Florida. A copy of the Statement of Claim is annexed as Exhibit C. In Exhibit C to the Statement of Claim, UBS includes a letter addressed to DiNapoli in Warwick, New York (a previous home address for DiNapoli) and also a letter addressed to DiNapoli's Florida home address. Nowhere in the Statement of Claim or the exhibits attached to it did UBS include any reference to the NYAC Box address.

18. Thus, FINRA had actual knowledge that the NYAC Box address was not the proper address for DiNapoli based on the very pleading it was tasked with serving.

19. DiNapoli terminated his membership at the NYAC on or about October of 2015 and no longer used the NYAC Box after that.

B. The Arbitration Agreement

20. DiNapoli joined UBSFS pursuant to a Letter of Understanding (the "LOU"), which confirmed DiNapoli's compensation package in his role as a financial advisor. A copy of the LOU is annexed as Exhibit D. In connection with the LOU, DiNapoli and UBS also executed a Promissory Note and Transition Agreement. Copies of the Promissory Note and the Transition Agreement are annexed as Exhibits E and F, respectively.

21. The LOU, Promissory Note and Transition Agreement state that “any disputes concerning compensation, benefits or other terms or conditions of employment and termination of employment . . . will be determined by arbitration as authorized and governed by the arbitration law of the state of New Jersey.” These documents also direct any arbitration to be conducted by FINRA.

C. The Arbitration Proceeding

22. Upon information and belief, on or about January 26, 2016, UBS filed its Statement of Claim (*see* Ex. C) with the Director of FINRA Dispute Resolution against DiNapoli, purportedly pursuant to Section 13302(a) of the Code of Arbitration Procedure for Industry Disputes (the “Industry Dispute Rules”). A copy of the Industry Dispute Rules are annexed as Exhibit G.

23. In the Statement of Claim, UBS alleged it was owed a principal amount of \$1,441,157.60, plus interest and attorneys’ fees and costs under the Promissory Note given by DiNapoli to UBS in connection with his employment. *See* Ex. C, ¶ 1.

24. UBS also stated in its Statement of Claim that “DiNapoli maintains residences in both New York and Florida currently” despite its knowledge that DiNapoli’s only residence is in Florida. *Id.* ¶ 5.

25. For purposes of the arbitration, DiNapoli is considered an “associated person” as he was, at all relevant times, associated with UBS, a member of FINRA. Under section 13301 of the Industry Dispute Rules, FINRA is required to “serve the initial statement of claim on an associated person directly at the person’s residential address or usual place of abode.” Ex. G, Section 13301.

26. Upon information and belief, FINRA mailed the Statement of Claim to the NYAC Box only, despite the fact that – as indicated above – the document annexed as Exhibit C to the Statement of Claim established that the NYAC Box was not DiNapoli’s residential address or usual place of abode.

27. In fact, at all relevant times, FINRA has known that DiNapoli has a residence in Florida, based both on the Statement of Claim submitted by UBS and FINRA’s own records.

28. As DiNapoli no longer belongs to the NYAC and no longer uses the NYAC Box, he was never notified that any mailing from FINRA was sent to him there and has no basis to know whether in fact it ever actually was sent to him there.

29. Accordingly, DiNapoli never received the Statement of Claim, nor any documentation pertaining to the arbitration and was never afforded an opportunity to file a Statement of Answer or appear in the arbitration.

30. Nevertheless, on May 12, 2016, FINRA entered the Award against DiNapoli, finding him liable to UBS in the amount of \$1,441,157.60, plus interest and costs. The Award was certified by the arbitrator pursuant CPLR § 7507, indicating that the arbitrator was ostensibly conducting the proceeding pursuant to Article 75 of the CPLR and thus, New York law.

31. However, DiNapoli only learned of the arbitration and the Award against him when his current employer, Park Avenue Securities, received a copy of a letter from FINRA indicating that DiNapoli’s securities license was in jeopardy of suspension owing to non-payment of the Award. *See* Ex. B. Thus, because he was never properly served with notice of the arbitration proceeding, the proceeding violated Article 75 of the CPLR and the Award must be vacated.

THE ARBITRATION AWARD MUST BE VACATED

32. An arbitration award must be vacated “if basic procedural due process requirements including adequacy of notice and opportunity to defend . . .” are violated. *Mount St. Mary’s Hosp. of Niagara Falls v. Catherwood*, 26 N.Y.2d 493, 513 (1970) (Burke, J. concurring) (citation omitted); *see e.g. Farber v. Himmell*, 28 A.D.3d 762 (2d Dep’t 2006) (finding that an arbitration award must be vacated and new arbitration ordered if the lower court found that respondent was not served in accordance with the NASD Code of Arbitration); *MBNA Am. Bank, N.A. v. Pacheco*, 12 Misc. 3d 1194(A), 2006 N.Y. Misc. LEXIS 2172 (Cty. Ct. N.Y. 2006) (denying petition to confirm arbitration award where petitioner failed to properly serve notice to arbitrate in accordance with National Arbitration Forum’s Code of Procedure); *Taylor v. Brodt*, 90 Misc. 2d 793 (Sup. Ct. 1977) (denying motion to confirm award because party was never served notice of arbitration).

33. Under Section 13301(a) of the Industry Dispute Rules, FINRA was required to serve DiNapoli (an associated person) at his “residential address or usual place of abode” Ex. G. The Award must be vacated owing to FINRA’s failure to do so as set forth above. *See e.g., MBNA Am. Bank*, 2006 N.Y. Misc. LEXIS 2172, at ***2-3 (denying petition to confirm arbitration award where petitioner failed to properly serve notice to arbitrate in accordance with National Arbitration Forum’s Code of Procedure).

34. Additionally, CPLR § 7511(b) requires the court to vacate an arbitration award on the application of a party if the court finds that the rights of that party were prejudiced by failure to follow arbitration procedures set forth in Article 75, including those set forth in CPLR § 7506(b). This section requires that an arbitrator “appoint a time and place for the hearing and notify the parties in writing personally or by registered or certified mail not less than eight days

before the hearing.” See *Transamerica Ins. Co. v. Fifth Avenue Realty*, 194 A.D.2d 544, 544 (2d Dep’t 1993) (vacating arbitration award where notice of arbitration hearing was not served in accordance with CPLR 7506(b) and (d)).

35. At all relevant times, DiNapoli has lived in Ocala, Florida.

36. At all relevant times, UBS has known that DiNapoli resides in Florida. In fact, DiNapoli only set up the NYAC Box because UBS HR required DiNapoli to provide a New York address while employed with UBSFS. It was then UBS HR – *not DiNapoli* – that gave FINRA DiNapoli’s NYAC Box address. DiNapoli never advised FINRA to use the NYAC Box. Accordingly, since it was UBS – not DiNapoli – that had advised FINRA to use the NYAC Box for DiNapoli, he was of the belief that UBS would in turn advise FINRA to use the Florida address after DiNapoli was terminated and after UBS itself had begun using his Florida address.

37. Indeed, when DiNapoli was terminated, he requested that UBS use his Florida address for all communication (since he was unable to forward mail from the NYAC).

38. Moreover, at all relevant times, FINRA has known that DiNapoli lives in Florida. Both the Statement of Claim and FINRA’s records indicate that DiNapoli resides in Florida. Accordingly, the Statement of Claim and other documents relating to the arbitration should have been served on DiNapoli at his Florida address.

39. However, DiNapoli was never served with the Statement of Claim (nor any other documentation relating to the arbitration), nor was he provided with notice of the time and place of the hearing. In fact, DiNapoli only learned of the arbitration after the Award had been issued against him.

40. Upon information and belief, FINRA mailed the Statement of Claim and other relevant documents to the NYAC Box, which DiNapoli no longer uses and did not use at the

time the Statement of Claim was sent there; he only used it during the period of his employment by UBSFS. Because FINRA knew that DiNapoli maintained a residence in Florida, FINRA should have served DiNapoli by mailing the Statement of Claim and other relevant documentation to his Florida address in the first instance. Moreover, when FINRA did not receive a Statement of Answer or any other response from DiNapoli, and knowing that he lived in Florida, it should have then sought to serve DiNapoli at his Florida address to provide notice of the proceeding rather than simply sending a proforma follow-up mailing to the same address that produced no response from him. That is especially true given the sum of money at issue in this case and the potential loss of livelihood if DiNapoli's license is suspended.

41. Accordingly, DiNapoli was not afforded his basic procedural due process right to defend himself against the allegations asserted against him. Further, he was prejudiced by the arbitrator's failure to follow procedures outlined in CPLR 7506(b). Both require vacatur of the Award. Moreover, "[t]he public policy of [New York] prefers that cases be decided on the merits." *Heist v. Cameron*, 211 A.D.2d 429, 430 (1st Dep't 1995); *see also Dean v. Dean*, No. 14/3166, 2016 WL 1367929, at *3 (Sup. Ct. Apr. 4, 2016).

42. The Award should be vacated for the additional and independent reason that CPLR § 7511(b)(iii) prohibits an arbitrator from "exceed[ing] his power or so imperfectly execut[ing] it that a final and definite award upon the subject matter submitted was not made." The LOU, Promissory Note and Transition Agreement required that that arbitration be governed by the arbitration laws of the state of New Jersey. The arbitrator, however, affirmed the final arbitration award under CPLR § 7507, indicating that she conducted the arbitration under New York arbitration law, rather than the applicable New Jersey statute. Accordingly, the arbitrator did not conduct the arbitration under New Jersey arbitration law as required by the LOU,

Promissory Note and Transition Agreement. In doing so, the arbitrator exceeded her authority in violation of CPLR § 7511(b)(iii), warranting vacatur of the Award.¹

WHEREFORE, DiNapoli respectfully requests that the Court enter an Order:

- (1) Vacating the Award;
- (2) Awarding DiNapoli the reasonable attorneys' fees and costs he has incurred in connection with this proceeding; and
- (3) Granting DiNapoli such other and further relief as the Court may deem just and proper.

Dated: July 19, 2016
New York, New York

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¹ FINRA also acted in violation of CPLR § 7511(b)(iii) when it failed to properly serve DiNapoli with the Statement of Claim and provide him with notice of the hearing. In failing to do so, FINRA “imperfectly executed” its authority, so that a final and definite award could not be made on the subject matter at issue.

VERIFICATION

STATE OF FLORIDA)
) ss.:
COUNTY OF MARION)

MICHAEL JAMES DINAPOLI, being duly sworn, deposes and says:

1. I am the above-referenced Petitioner.
2. I have read the Verified Petition and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

Michael James Dinapoli
MICHAEL JAMES DINAPOLI

Sworn to before me this
19 day of July, 2016

Teresa Torres
Notary Public

