

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SPENCER W. WEINER, JUDGE
Justice

PART 54

Index Number : 653787/2016
MICHAEL JAMES DINAPOLI
vs.
UBS FINANCIAL SERVICES INC
SEQUENCE NUMBER : 001
VACATE STAY ORDER /JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion tofor

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

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

to vacate the
arbitration is granted for the reasons
stated on the record of 12/6/16,
which shall be applied. The
arbitration is to be conducted
under New Jersey law.
submit judgment on notice.

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

Dated: _____

- 1. CHECK ONE: CASE DISPOSED
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

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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY: CIVIL TERM: PART 54

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MICHAEL JAMES DINAPOLI, : Index No.
 : 653787/2016
Petitioner(s). :

-against- :

UBS FINANCIAL SERVICES INC. and UBS
CREDIT CORP., :
Respondent(s). :

-----X
60 Centre Street
New York, New York 10007

December 6, 2016

B E F O R E:

THE HONORABLE SHIRLEY WERNER KORNREICH, Justice

A P P E A R A N C E S:

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JEANETTE LAKE-MASON, CSR, RMR
Official Court Reporter

Proceedings

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2 (Whereupon, the following takes place in
3 open court, in the presence of the Court, Mr.
4 Rose, Ms. Arora, and Mr. Lagalante:)

5 THE COURT: Morning.

6 MR. ROSE: Good morning, your Honor.

7 MR. LAGALANTE: Morning, your Honor.

8 THE COURT: Okay. This is a petition brought to
9 vacate a FINRA arbitration, and I assume there's a
10 cross-motion to confirm.

11 MR. LAGALANTE: Actually, your Honor, the CPLR
12 provides that if you deny the motion to vacate, then it
13 automatically confirms.

14 THE COURT: So there is no cross-motion.

15 MR. LAGALANTE: No cross-motion.

16 THE COURT: Okay. And basically, interesting
17 case. There's no dispute, but that the plaintiff really
18 was never served in the sense that he never received notice
19 of the arbitration. What happened was he worked for UBS,
20 who is the respondent here, for several years. I believe
21 it was three, three years approximately, from, I believe it
22 was maybe -- two to three years.

23 MR. ROSE: Just over two years.

24 THE COURT: Yes. 2013 to 2015?

25 MR. LAGALANTE: Correct.

26 THE COURT: And prior --

Proceedings

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2 MR. ROSE: Correct.

3 THE COURT: -- to that, he worked at another
4 financial institution. And I've seen this before;
5 financial institutions make these finance people sign
6 promissory notes that they work for a certain period of
7 time, it's been given; otherwise, I think they're -- I
8 mean, it's a simplified version. They have to pay on
9 notes, and that's what this is about.

10 Apparently, Mr. DiNapoli, the petitioner, he
11 lived in Florida and would come up during the week to work
12 at UBS in New York. He lived at the Athletic Club, had a
13 box where his mail came at the Athletic Club. According to
14 him, human resources at UBS knew about it. In fact, he
15 tried to change his address to the Florida address. They
16 didn't want that done because if he used a Florida address,
17 he would have to be licensed in Florida. Also, he was
18 working in New York. For whatever reasons and regulatory
19 reasons, if they do exist, UBS, knowing he lived in
20 Florida, wanted him to use a New York address. In fact, he
21 complied and was registered at FINRA I believe with three
22 different addresses.

23 MR. ROSE: That's right.

24 THE COURT: The first one being the Athletic
25 Club; the second one being his former address in New York,
26 upstate New York; and finally, his Florida address was

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2 listed with FINRA.

3 UBS, according to him, knew full well he lived in
4 Florida. And according to Mr. DiNapoli's papers, and I
5 don't believe I got an affidavit from Mr. DiNapoli, I think
6 they're lawyers' papers, but there was no, there's nothing
7 from -- in the affidavits of UBS people, who, none of whom
8 had personal knowledge, denying that UBS in fact did know
9 that Mr. DiNapoli did not live in New York, but lived in
10 Florida; and that UBS knew this; and that the -- oh, and
11 that Mr. DiNapoli said that his box at the Athletic Club
12 was discontinued once he moved back to Florida, no longer
13 lived there, they did not forward mail, etc.

14 So the issue is once the arbitration was started,
15 Mr. DiNapoli was served at the Athletic Club; and he
16 claims -- and there's nothing to refute this -- he never
17 received any notice of the arbitration till it was
18 completed. And his employer I believe in Florida,
19 perhaps -- was it in Florida?

20 MR. ROSE: It was a New York employer he was
21 working for again, but it received a copy of the
22 arbitration --

23 THE COURT: And where did he live while he was --

24 MR. ROSE: In Florida.

25 THE COURT: But so he was, he was working in
26 Florida for a New York employer?

Proceedings

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2 MR. ROSE: He was able to do that with that
3 particular company. He would come up from -- when he had
4 to come up.

5 THE COURT: So that employer got the notice; and
6 that's, he claims, the first knew of it; and in fact, he'd
7 lose his job because of this.

8 MR. ROSE: Yes, that's correct.

9 THE COURT: So that's the story here, and it
10 sounds pretty much unrefuted I think.

11 MR. LAGALANTE: Well, that's not, that's not
12 unrefuted.

13 MR. ROSE: Just one point just to correct one
14 thing for your Honor, just so it's clear for the record.
15 The petition that we submitted was verified with
16 Mr. DiNapoli, and he also submitted a reply affidavit.

17 THE COURT: There is a reply affidavit.

18 MR. ROSE: Just so you know, that there was a
19 sworn affirmation.

20 THE COURT: He did verify. I did notice that.
21 Okay.

22 MR. LAGALANTE: So, your Honor, there is, there
23 is a dispute in the -- that recount of the story; and that
24 is, the employer that he works for now is based in New
25 York. He listed for that employer in his U5 with that new
26 employer the New York Athletic Club address. It is the

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current address on file with FINRA today.

THE COURT: Right.

MR. LAGALANTE: Continues to be.

THE COURT: I understand it's a current address, but he's claiming he does not live there.

MR. LAGALANTE: Actually, it's irrelevant to the -- it's irrelevant.

THE COURT: I don't think so, frankly.

MR. LAGALANTE: Well, I do, your Honor.

THE COURT: But that's, you know, that would be for argument. It's not your motion, it's their motion, you oppose, let's hear.

MR. ROSE: Good morning, your Honor. David Rose.

THE COURT: Why don't you have a seat, sir.

MR. LAGALANTE: I'm sorry.

THE COURT: Sit down.

MR. LAGALANTE: Yes.

MR. ROSE: Good morning. David Rose of Pryor Cashman, on behalf of petitioner.

THE COURT: Only the person who's arguing stands.

MR. ROSE: I have my colleague Kaveri Arora with me.

THE COURT: She's not arguing.

MR. ROSE: She's not arguing.

THE COURT: Let's go.

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2 MR. ROSE: She'll sit.

3 So thank you, your Honor. As your Honor
4 indicated, our contention here is that FINRA never served
5 Mr. DiNapoli properly with the Statement of Claim in this
6 case. FINRA's method of service was not reasonably
7 calculated to provide him with notice of the proceeding.

8 THE COURT: I have a question.

9 MR. ROSE: Yes.

10 THE COURT: FINRA sends out a Notice of Claim,
11 but there are pleadings and other papers; am I correct?

12 MR. ROSE: Correct.

13 THE COURT: Those are served by UBS.

14 MR. ROSE: The Statement of Claim is actually
15 transmitted by FINRA, so --

16 THE COURT: I'm not talking about the Statement
17 of Claim. Listen to what I'm saying.

18 MR. ROSE: Yeah.

19 THE COURT: Are there other papers during the
20 arbitration, other pleadings or anything else, that are
21 served by the parties?

22 MR. ROSE: Yes, there are.

23 THE COURT: There are pleadings?

24 MR. ROSE: Yes.

25 THE COURT: And those are served by UBS.

26 MR. ROSE: Those would be served by the parties,

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including UBS; however --

THE COURT: And where did UBS serve that, if at all?

MR. ROSE: It never happened because the initiating document -- so the Statement of Claim is the initiating document.

THE COURT: Right.

MR. ROSE: It's like a complaint. That gets submitted to FINRA. FINRA --

THE COURT: Right.

MR. ROSE: -- then processes it and sends it out or serves it --

THE COURT: Right, that I know.

MR. ROSE: -- on Mr. DiNapoli; so that was the only pleading in the case because Mr. DiNapoli never got it, and so --

THE COURT: UBS never did anything else.

MR. ROSE: UBS never did anything else.

And so FINRA has three addresses on file for Mr. DiNapoli, as you note; and one of them is the Florida address. That Florida address was the same address indicated in Exhibit 2, the Statement of Claim --

THE COURT: And FINRA also knows he's working for somebody else at this point because they have that.

MR. ROSE: Correct.

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2 THE COURT: And they didn't try to send it to his
3 work address.

4 MR. ROSE: No, nothing was ever sent. In fact,
5 it was only sent to the New York Athletic Club, which was
6 not the address that was in the Statement of Claim that UBS
7 had submitted, although the actual address was on file with
8 FINRA; and then --

9 THE COURT: The address in the Statement of Claim
10 was?

11 MR. ROSE: There were two addresses provided with
12 the Statement of Claim. One was his former address in
13 Warwick, New York, and the other was the one in Florida.

14 THE COURT: And neither was -- nothing was sent
15 to either?

16 MR. ROSE: Nothing was sent to either.

17 THE COURT: Or to his employer, which they -- his
18 present employer.

19 MR. ROSE: That's correct.

20 And so the Statement of Claim was sent by FINRA
21 to the New York Athletic Club. When FINRA or UBS didn't
22 receive any response to that, it sent a follow-up mailing,
23 but, again, only sent it pro forma to the New York Athletic
24 Club address, notwithstanding the two other addresses on
25 file and the fact, again, that one of those addresses, or
26 both of those addresses were in fact --

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THE COURT: Were they sent registered mail or anything else?

MR. ROSE: I believe the second one was sent certified mail.

THE COURT: And what happened?

MR. ROSE: No response, nothing. At least that's not -- there's nothing in the record indicating that.

THE COURT: That's what I didn't see in here.

MR. ROSE: There's nothing. He never received anything.

And so when Mr. DiNapoli did not receive -- I'm sorry. When FINRA did not receive and UBS did not receive a responsive pleading from Mr. DiNapoli, knowing that he had other addresses, it was unreasonable for it to simply just send it to the address that elicited no response in the first place if the intention was to provide him with notice of the proceeding. And so that is where Mr. DiNapoli's due process rights --

THE COURT: I think his argument is that it wasn't intended to reach him by -- certainly not by UBS, since they full well knew, according to Mr. DiNapoli, that he didn't live at the Athletic Club, but that he in fact lived in Florida.

MR. ROSE: I think that's right. And, and to the point, I think UBS here is trying very desperately to

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2 preserve a default so it doesn't have address the merits on
3 this. We would love to be addressing the merits on this.
4 And had FINRA sent the follow-up mailing, or the initial
5 mailing, but certainly the follow-up mailing to the other
6 addresses to make sure that notice was received, then we
7 would have had an arbitration on the merits; and we
8 wouldn't be before you today. But we're here because
9 they're trying to ram through a default to get a
10 \$1.44 million gift effectually here; and that's why we're
11 here before you today.

12 And so I think we've dealt with the service issue
13 and the unreasonableness of that service given the actual
14 knowledge that FINRA did have and its obligation to send it
15 to his residence and usual place of abode.

16 In addition to the service issue, the arbitration
17 was conducted pursuant to New York law when the operative
18 documents, the Promissory Note in particular said --

19 THE COURT: That was interesting. All of the
20 documents require New Jersey law specifically --

21 MR. ROSE: Correct.

22 THE COURT: -- all the documents I've read.
23 Interestingly, New Jersey law is a little different from
24 New York law, but it's very similar to the federal law in
25 terms of notice and everything else and vacatur --

26 MR. ROSE: Yes.

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2 THE COURT: -- in terms of vacatur. So even
3 though the parties to some degree refer to New York law in
4 terms of vacatur, probably should be New Jersey law. And
5 under New Jersey law, I found a case, which is Erg
6 Renovation & Construction LLC, 2015 New Jersey Superior
7 Court, unpublished, Lexis 58; and it's from January of
8 2015; and it basically says even if it's FAA, when a
9 document says New Jersey law for arbitration, it's New
10 Jersey law.

11 MR. ROSE: Yes.

12 THE COURT: Go ahead.

13 MR. ROSE: Okay. Thank you.

14 And so that's the point there, you know; and,
15 again, I don't want to --

16 THE COURT: Well, I'm not sure. It's very -- I
17 know that there's an argument that the arbitrator used New
18 York law; but it's not clear from the record, and I can't
19 assume anything.

20 MR. ROSE: Yeah, I, I don't think --

21 THE COURT: The only reason I'm interested in the
22 New Jersey law aspect is because I do think that in terms
23 of the vacatur it may well be New Jersey law we have to
24 look at.

25 MR. ROSE: And I would, I would agree that New
26 Jersey law should be the law that was applied here.

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2 I would say you don't have to assume that this
3 arbitration proceeding was conducted pursuant to New York
4 law because the only reference to any law in the award was
5 § 7507 of the CPLR.

6 THE COURT: I don't even know we have to reach
7 that at this point, but --

8 MR. ROSE: Okay. That's what I would point to if
9 your Honor needed some anchor as to why this is under New
10 York law. You know, the Note was to be enforced pursuant
11 New Jersey law, the arbitration was to be conducted
12 pursuant to New Jersey law; and all we have a New York
13 based document imposing a \$1.44 million judgment against
14 Mr. DiNapoli. So that was -- that's what I would argue
15 there.

16 THE COURT: So what are your -- you're moving to
17 vacate on specifically what grounds, under what statute?

18 MR. ROSE: So we're moving to, we're moving to
19 vacate under 7506 of the CPLR on the grounds that Mr.
20 DiNapoli was never provided with notice of a time and place
21 of the hearing.

22 THE COURT: So -- and, well, you're moving under
23 New York --

24 MR. ROSE: Correct, we are.

25 THE COURT: -- CPLR, which, frankly, it should be
26 under New Jersey.

1 Proceedings

2 MR. ROSE: The reason --

3 THE COURT: The New York CPLR 7511 speaks to
4 grounds for vacatur.

5 MR. ROSE: Yeah.

6 THE COURT: 1(i) says, fraud or misconduct in
7 procuring the award. And there are allegations that UBS
8 knew full well he was in Florida, but went along with his
9 being served only in New York.

10 But also, 2. The award shall be vacated on the
11 application of a party who neither participated in the
12 arbitration, nor was served with a notice of intention.

13 And that's part of what's claimed here.

14 And then also 7511(b)(1)(iv) failure to follow
15 the procedure of this article.

16 And that's what you're arguing right now.

17 There's also 9 U.S.C.S. § 10, which would be, if
18 this was an FAA case, the federal; and that's basically one
19 of those, again, deals with corruption, fraud, or undue
20 means, or any -- and then it speaks to any other
21 misbehavior by which the rights of any party has been
22 prejudiced.

23 And then there's New Jersey and New Jersey law
24 under § 2A:23B-23, again, speaks to fraud or other undue
25 means; but more specifically, under (a)(6) says, The
26 arbitration was conducted without proper notice of the

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2 initiation of an arbitration as required in section 9 of
3 this act as to substantially prejudice the rights of a
4 party to the arbitration proceeding.

5 Okay.

6 MR. ROSE: Correct, yeah.

7 And just so your Honor understands where our
8 thought process as to why we brought it under CPLR in
9 Article 75, it's because of that certification of the
10 arbitrator at the end of the award that we said, okay,
11 well, this is, again, an award that was made under Article
12 75 of the CPLR, so we need to vacate it under Article 75;
13 and all the sections that you identified and also the one I
14 started with, 7506(b), provide -- I believe it's 7506(b),
15 provide the basis for us to move to vacate.

16 Just so I'm clear for the record, it was 7506(b).
17 I was correct.

18 Those are the fundamental grounds on which we are
19 seeking to vacate. And, again, just to recap them, they
20 were the failure to properly serve, to give notice,
21 violations of due process, and fundamental fairness, the
22 conduct of the arbitration, the conduct of the arbitration
23 under New York law as opposed to New Jersey law; and then
24 also just in a broader sense, obviously, courts in New York
25 and courts generally prefer to resolve --

26 THE COURT: Fundamental fairness as to the

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2 federal courts and the New Jersey courts, and all of them
3 speak to notice --

4 MR. ROSE: Correct.

5 THE COURT: -- as being part of fundamental
6 fairness and due process.

7 MR. ROSE: And also resolution on the merits, and
8 that's what we want to get to.

9 THE COURT: Okay.

10 MR. ROSE: Thank you.

11 THE COURT: Let me hear from the other side.

12 MR. LAGALANTE: Your Honor, the argument here is
13 that Mr. DiNapoli did not receive actual notice and that's
14 a violation of due process and fundamental rights under it;
15 however, the Court of Appeals has made clear, that due
16 process requires only that "means selected for providing
17 notice was reasonably calculated under all the
18 circumstances to apprise interested parties of the action
19 and afford them an opportunity to present their objections.

20 THE COURT: Wasn't it reasonably calculated when
21 the parties seem to have known where he worked --

22 MR. LAGALANTE: Your Honor, may I --

23 THE COURT: -- seemed to have known that he lived
24 in Florida --

25 MR. LAGALANTE: Your Honor.

26 THE COURT: -- and never sent it to any of those

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places?

MR. LAGALANTE: Your Honor, the FINRA rules which are promulgated pursuant to statute, the SE -- the 1934 act through the SEC, through public notice and have the force of law, provide that UBS doesn't have to do anything other than file a Statement of Claim with FINRA. FINRA then works on the, on the records that are provided to it by the registered representative.

THE COURT: Which also had the Florida address.

MR. LAGALANTE: It had a Florida address; however, as you could see from the affidavit of Mr. Salzman, the affidavit of Mr. Salzman, who is the FINRA representative, he looked in their records, he sent it to the New York Athletic Club, and the information was never returned to him. If it was returned --

THE COURT: Knowing the mail system, at this point, that means nothing.

MR. LAGALANTE: I'm sorry.

THE COURT: That means nothing. The mail system doesn't have the funds to return mail. It happens all the time. It's happened to me.

MR. LAGALANTE: Your Honor, you're sugges -- what Mr. DiNapoli is suggesting and what your Honor seems to agree with is that FINRA is somehow under a requirement or an obligation to, to pour through the Statement of Claim --

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THE COURT: No, that's not what I am suggesting.

MR. LAGALANTE: -- to look at the, to look for an address that is not stated within the statute --

THE COURT: That is not what I am suggesting. I am suggesting that UBS, who fully knew that -- and there's nothing to refute it -- that Mr. DiNapoli lived in Florida, went along with this; and whether or not that is fundamental fairness, whether that's some kind of fraud, whether that --

MR. LAGALANTE: Well, your Honor --

THE COURT: -- undermines the --

MR. LAGALANTE: First of all --

THE COURT: -- entire proceeding.

MR. LAGALANTE: Your Honor, no one except the Court has suggested fraud in this case. Only you have raised the issue of fraud in the case.

THE COURT: Not really.

MR. LAGALANTE: And there's nothing in the pleadings --

THE COURT: Please, please, let me talk.

MR. LAGALANTE: Your Honor, there is nothing in the pleadings to suggest that UBS --

THE COURT: Do you want to change spots?

MR. LAGALANTE: No. I think that it's --

THE COURT: Can I say something? Can I have

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permission to speak?

The papers from the petitioner suggest that UBS all along knew -- over and over again it suggests this -- that he lived in Florida and did nothing to make certain that he was apprised of the proceeding.

MR. LAGALANTE: UBS is not under any obligation, and, in fact, is precluded from serving the Statement of Claim on Mr. DiNapoli. That is FINRA's obligation pursuant to federal law.

THE COURT: Are they precluded from saying anything to FINRA that he lives in Florida? Are they preclude from letting him know, not sending the claim, but letting him know that this is ongoing?

MR. LAGALANTE: They are not precluded from doing it.

THE COURT: Or from saying something when they realized he'd been only served at the Athletic Club?

MR. LAGALANTE: Your Honor, that is a far cry, what you're suggesting, from fraud I would, I would respectfully submit.

Putting aside that, I would suggest to you that if there's any fraud here, it is in the pleadings that have been submitted by Mr. DiNapoli, and not with respect to UBS' actions.

THE COURT: What exactly are you saying?

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2 MR. LAGALANTE: And what I am saying is that the
3 affidavit of Raymond Robertello including the U5 that was
4 filed by Mr. DiNapoli after the fact, lists his address as
5 the Athletic Club. Again, this is the address that was in
6 place that was sworn to Mr. DiNapoli to be his residence
7 address.

8 THE COURT: Why is that in any way fraud on the
9 part of the attorney?

10 MR. LAGALANTE: Because, well, what I'm
11 suggesting to you, your Honor, is if you compare that to
12 the -- if you compare that to the allegations that are in
13 the Statement of Claim or in the petition that suggest that
14 he canceled his account at the Athletic Club, that he no
15 longer uses it, he had never used it --

16 THE COURT: Subsequent to filing this. The whole
17 issue here that you made -- and it's an issue of law -- is
18 whether by filing these, the address as well as two other
19 backup addresses, he agreed to be served there by FINRA.

20 MR. LAGALANTE: And clearly, he did.

21 THE COURT: And that is the issue, not anything
22 else. But there's a lot of evidence here to show that UBS
23 knew better and UBS went along with the fact that he was
24 served at an address at which he didn't live; that's
25 according to the other side; and there is not one affidavit
26 from HR at UBS or anybody else with knowledge to say

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otherwise.

MR. LAGALANTE: But UBS is not within -- it's not within its control to be serving the Statement of Claim.

THE COURT: No one said it is.

MR. LAGALANTE: But this is the first address that he provided to FINRA for purposes of being served. If you read the instructions for completing it, it makes very clear that you have to provide all -- five years of your residence addresses. It also says that he's swearing it's true; so either he's, either he's lying to FINRA, or he's lying in this petition.

THE COURT: Well, that was before. The point is he's, he's -- you know, he may have an obligation to update it.

MR. LAGALANTE: And he does.

THE COURT: The petition, if you read it carefully, this was done before the arbitration; but even so, UBS knew that was not his address --

MR. LAGALANTE: Well --

THE COURT: -- at some point.

MR. LAGALANTE: -- your Honor --

THE COURT: And he didn't show up.

MR. LAGALANTE: Your Honor, it's, it is, it is my, it is, it is my contention, your Honor, that due process requires that notice be given that is adequate

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2 under the circumstances. The circumstances, or the notice
3 provisions that have been instituted by the SEC and FINRA
4 and carry the force of law were completely complied with
5 here.

6 Now, you can suggest that there is -- that, that
7 UBS knew something that it should have acted on; but given
8 the strong, the strong public policy against vacating
9 arbitration awards, it seems clear to me that that is
10 speculative at best. Now, the, the simple fact is that --

11 THE COURT: What is speculative at best?

12 MR. LAGALANTE: It's speculative to suggest that
13 UBS knew something about where its former employee was
14 living.

15 THE COURT: The reason that isn't is because Mr.
16 DiNapoli has specifically said UBS knew he lived in
17 Florida; and no one with knowledge from UBS, although there
18 are affidavits from UBS from people without knowledge
19 saying whatever they said, but no one from UBS refuted that
20 statement.

21 MR. LAGALANTE: But, your Honor, what we do have
22 in the record is the statement that Mr. DiNapoli was using
23 this address and swore that it was his residence in New
24 York --

25 THE COURT: We've gone through this --

26 MR. LAGALANTE: -- at the time service was made.

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2 THE COURT: He had filed something prior, and he
3 had an obligation to update it; but it also had his Florida
4 address.

5 I'm not faulting FINRA. What I'm trying to say
6 is if UBS knew otherwise, perhaps UBS should have said
7 something or done something; and in fact, when they filed
8 their Notice of Claim, they never used the Athletic Club as
9 one of the addresses, from what I remember.

10 MR. LAGALANTE: Your Honor, Raymond Robertello's
11 affidavit says the CRD shows no amendment to section 11
12 residential history between the December 18 filing and
13 May 12, 2016, which is the date of the award. He does have
14 an obligation to update it under 15 (a)(9) of the
15 amendment. He does have an affidavit. He does have
16 obligation to read and affirm under oath that this
17 was -- that the information provided was true and correct.
18 It was in fact at the time that it was served, was
19 February 1, that's when the letter was sent.

20 THE COURT: Counsel, I agree with all of that.
21 That's not my problem. My problem is that UBS, who was the
22 other side of this, knew full well he didn't live there and
23 they just let it go on with the service and a default at an
24 address that, according to him, UBS full well knew he
25 didn't live. And that is the problem here.

26 MR. LAGALANTE: But it's not -- but this record

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2 does not support that he does not live at the Athletic
3 Club, for at least two reasons. First of all, his CRD,
4 which is a sworn statement, says that that, that that
5 address was current from 2013 to the present, to at least
6 December 31.

7 THE COURT: I'm conceding --

8 MR. LAGALANTE: And second of all --

9 THE COURT: -- that's what it says. It also has
10 two other addresses on it. I am conceding that's what he
11 says, and he says he at one point did live there but no
12 longer did during the arbitration. There is nothing to
13 refute that.

14 Why don't you have a seat, sir.

15 Let me just say I am vacating the arbitration in
16 this case for lack of notice. I believe all of the
17 documents refer to New Jersey; and I cited a New Jersey
18 appellate case before which said that when the documents
19 require an arbitration under New Jersey law, even were it
20 an FAA case, it's New Jersey law that controls. I believe
21 it should be New Jersey law which would control the vacatur
22 here. Under § 2A:23B-23A.6, proper notice was required of
23 the arbitration. I think it would be the same results
24 really under the FAA and under New York law; but first
25 referring to New Jersey law, I do believe that notice is
26 required.

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2 But looking even at New York law, and I would
3 refer to -- let me see -- the case of In the Matter of the
4 Arbitration Between Nationwide Mutual Insurance Company, 75
5 AD2d 765, a First Department case. And basically, it talks
6 to arbitration; and it says, it found service in that case
7 to be a nullity. The function of process is to give
8 notice. Process must be served in a manner calculated to
9 notify the opposing party of the relief sought and must
10 give that party an opportunity to defend or oppose. Due
11 process requires that the notice be served in such a manner
12 as to apprise the interested party of the pendency of the
13 proceeding and afford an opportunity to resist or present
14 objections. When notice is a person's due process which is
15 a mere gesture, it's not due process. A method of service
16 which is misleading or seeks to prevent actual knowledge of
17 the contents before it is too late to interpose opposition
18 is no service at all.

19 Again, there are -- another, another case,
20 Jonathan Smith, which -- oh, that's -- let me look at the
21 federal case, I mean, the state cases first. Kaplan, which
22 is -- these are all federal cases. One second, let me look
23 at it. I have another straight case I believe. Oh, yes.

24 The Matter of Arbitration of McMahon & Company,
25 230 AD2d 1, again, a First Department case, which basically
26 says the same thing, that fundamental unfairness often

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2 involves insufficient notice. Fundamental unfairness is
3 enough to vacate an arbitration.

4 Then there are a number of federal cases that go
5 basically the same way. Kaplan, which is a Southern
6 District case, 1996 U.S. District Lexis 16455, and
7 basically also requires notice. And it basically
8 says -- one second -- that, again, an award can be vacated
9 when the arbitrators were guilty of misconduct in refusing
10 to hear evidence pertinent and material to the controversy.
11 Although an arbitrator is not required to comport with the
12 strictures of formal court proceedings in conducting the
13 arbitration hearing, he or she must nevertheless grant the
14 parties a fundamentally fair hearing. A fundamentally fair
15 hearing requires that the parties be permitted to present
16 evidence and cross-examination -- and cross-examine adverse
17 witnesses. A fair hearing also requires that all parties
18 receive notice and an opportunity to be heard. If this
19 procedural due process requirement is not met, a district
20 court will not hesitate to vacate the award -- the award.

21 And similarly, Smith, which is 419 F. Supp. 2d
22 437, from 2005, another district court case which speaks to
23 the requirement of notice; and Matter of Arbitration of
24 Konkar, K-O-N-K-A-R, 668 F. Supp. 267, another Southern
25 District case. All of these cases require fundamental
26 fairness, due process.

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2 In a case such as this, which should be governed
3 by New Jersey law, which specifically requires notice,
4 where UBS on this record was fully aware that Mr.
5 DiNapoli lived in Florida, I think this vacatur is required
6 when he only received notice at an address at which he did
7 not reside, where UBS informed FINRA of an address other
8 than the one where FINRA served notice, and where those
9 addresses were on the registration that Mr. DiNapoli swore
10 to.

11 So for all of these reasons, I am vacating the
12 arbitration award and ordering a new hearing; and the new
13 hearing is to be conducted under New Jersey law.

14 MR. ROSE: Thank you, your Honor.

15 MR. LAGALANTE: Your Honor, should the Statement
16 of Claim be served on counsel for Mr. DiNapoli so that
17 there's no question as to, no question as to the pendency?

18 THE COURT: Is he willing to receive that
19 Statement of Claim?

20 MR. ROSE: I haven't checked with Mike, but I'm
21 almost certain that would be fine.

22 MR. LAGALANTE: Okay.

23 THE COURT: And your client still lives at that
24 Florida address.

25 MR. ROSE: Yes, your Honor.

26 THE COURT: Am I correct?

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MR. ROSE: Yes, he does.

THE COURT: And, Counsel, could you order the transcript and E-file it.

MR. ROSE: Yes, your Honor. Thank you.

THE COURT: Submit a judgment on notice. Okay?

MR. ROSE: Yes, your Honor. Thank you, your Honor.

THE COURT: So I am going to need that quickly.

MR. ROSE: So we'll do a Notice of Settlement and submit it to you. Okay. Thank you.

THE COURT: It doesn't have to be settled, but has to be on notice.

MR. ROSE: On notice, sure.

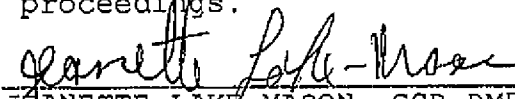
MR. LAGALANTE: Thank you.

(Whereupon, the matter concluded.)

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C E R T I F I C A T E

This is certified to be a true and accurate transcription of the stenographic minutes taken in the above proceedings.


JEANETTE LAKE-MASON, CSR, RMR
Official Court Reporter