

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

Charles V. Marais

INDEX NO. 121088/02

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Barclays De Zoete Wedd Inc.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 3/21/03

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Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
WALTER B. TOLUB *s.c.*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----x
CHARLES V. MARAIS,

Petitioner,

-against-

Index No. 121088/02

BARCLAYS DE ZOETE WEDD, INC. and BARCLAYS
CAPITAL INC., a/k/a BZW SECURITIES INC.
a/k/a BARCLAYS DE ZOETE WEDD SECURITIES,

Respondents.
-----x

WALTER B. TOLUB, J.:

Petitioner Charles V. Marais moves, pursuant to CPLR 7510 and Section 9 of the Federal Arbitration Act, for an order and judgment confirming an arbitration award rendered by an Arbitration Panel of the National Association of Securities Dealers Dispute Resolution, Inc., in connection with the arbitration proceeding between Marais and his former employers, respondents Barclays de Zoete Wedd, Inc. and Barclays Capital, Inc. a/k/a BZW Securities Inc. a/k/a Barclays de Zoete Wedd Securities (collectively, Barclays). Marais also moves, pursuant to New York Labor Law § 198, for attorneys' fees and costs incurred in this special proceeding.

Barclays cross-moves, pursuant to CPLR 7511, for an order vacating the arbitration award.

FACTS

On June 13, 2000, Marais commenced an arbitration before the National Association of Securities Dealers (NASD) against Barclays. The arbitration proceeding arose out of the

termination of Marais' employment by Barclays on September 18, 1996, after a lengthy investigation into his involvement in providing unverified and incorrect securities price lists to a Barclays client, which the client, in turn, provided to a third party. During the arbitration, Marais alleged that, from the summer of 1995 through December 1998, Barclays used Marais to protect Barclays from taking responsibility for its own regulatory missteps, and to serve as a "friendly" witness for Barclays in a litigation with Morgan Stanley, which had resulted from providing incorrect price lists. Marais further alleged that Barclays insisted on supplying its own lawyer to represent him, while the lawyer was clearly conflicted, based on her role leading an "internal review" of Marais. Moreover, Barclays convinced Marais that the firm would pay him bonuses and keep him in its employ, but concealed from him plans, already in place, to deny him bonuses, and to end his employment. Finally, Marais alleged, Barclays took advantage of the fact that Marais worked in a highly regulated industry, and made him a scapegoat by tainting his regulatory license and record.

Marais' claims in the arbitration included wrongful termination, breach of employment agreement, quantum meruit, fraud, negligent misrepresentation, promissory estoppel, violations of the New York Labor Law, and tortious interference with prospective economic advantage.

During the arbitration, the following facts were revealed, through both testimony and documentation: In October 1990, Marais joined the London office of Barclays de Zoete Wedd Limited as head of the European Warrants Desk. Marais signed a U.K. employment contract, which provided that he "will become a member of [the Pension] Scheme" and the "[l]ength of notice periods will be three months written notice" absent gross misconduct (Cl. Exh. 1 at B55-56¹).

During his employment, Marais consistently earned bonuses based on the firm's regular annual practice, according to which bonuses were announced in the first quarter of the subsequent year. Thus, for each year up to the bonus for 1995 (normally paid in early 1996), the firm paid Marais a bonus.

In mid-October 1993, Marais transferred to New York.. Barclays confirmed in writing that "[t]he terms of Marais' U.K. contract will still apply" (Cl. Exh. 2 at B59).

Beginning in July 1995, Barclays subjected Marais to an "internal review" concerning faxes of price lists sent by Bobby Jain, Marais' colleague, and Marais, to ICAM, a customer of the bank. Geoffrey de Sibert, the principal of ICAM, had utilized faxes sent by Jain and Marais as part of a fraud committed upon participants in an investment fund, inflating the net asset value

¹ References to "Cl. Exh. ___" refer to the claimant's exhibits from the underlying arbitration.

of the fund. This activity ultimately resulted in a lawsuit by Morgan Stanley Luxembourg against Barclays.

As part of the "internal review," Barclays also placed Marais under enhanced supervision. On February 8, 1996, Marais was told that his 1995 bonus was being withheld, pending an investigation into ICAM by the Securities and Futures Authority (SFA), Marais' U.K. regulator. Barclays took this action even though Barclays' chief legal officer, Margaret Grieve, had assured U.K. regulators, as early as January 24, 1996, that Marais "had not violated any valuation procedures" (Cl. Exh. 10 at 3).

Ms. Grieve led the "internal review" of Marais. Despite an obvious conflict, Ms. Grieve also represented him as his legal counsel beginning in mid-1995. Ms. Grieve continue to represent Marais - while simultaneously investigating him - until May 9, 1996. Barclays utilized over 29 in-house and outside lawyers to assist the bank's "internal review" of Marais and the ICAM matter. Ms. Grieve and others guided Marais through interviews with regulators, and edited Marais' interview transcripts. During this time, Barclays and Ms. Grieve discouraged Marais from obtaining his own counsel and pursuing his claims against Barclays, and also discouraged him from resigning.

Although the decision to fire Marais was made by August 22, 1996, he was not terminated until September 11, 1996.

Apparently, Barclays timed the firing in light of the Morgan Stanley lawsuit, so as not to make Marais a hostile witness.

Upon Ms. Grieve's threat to Marais that if he didn't come in immediately, she would have no choice but to terminate his employment, Barclays subjected him to a humiliating 7 ½ hour interview by Samuel Seymour, head of Sullivan & Cromwell's criminal defense and investigations group. This interview occurred on August 30, 1996, eight days after it had already been determined that Barclays would terminate Marais. Although Ms. Grieve had led Marais to believe that Barclays would pay him a 1996 bonus, after Barclays terminated his employment, Barclays failed to pay him any bonus for his work in 1996.

Although H. Rodgin Cohen, Barclay's lead outside attorney, admitted that "none of [the] regulators ever made a finding that Marais had done anything wrong" (T2589²), and Barclays' internal documents plainly showed that "we do not have any evidence of any commission or any dishonest or fraudulent acts by an employee, including C.M. [Marais]" (Cl. Exh. 193), nonetheless, on September 26, 1996, Barclays filed a Form U-5, Uniform Notice of Termination, in which it contended that it had terminated Marais for regulatory misconduct. The Form U-5 is the standard form used in the securities industry to report the termination of a

² References to "T__" refer to the transcript of the underlying arbitration, annexed as Exh. A to the October 8, 2002 Affirmation of Kathrine M. Mortenson.

registered representative's association with a broker dealer. The Form U-5 is often the first indication that the NASD receives regarding possible misconduct by members of the securities industry. Thus, when a terminated member of NASD seeks employment with another member, the potential employer consults the Form U-5 database. Marais' Form U-5 became available through the NASD's Central Registration Depository to regulators, Marais' customers, his potential future employers, and to the public on the Internet.

During the hearings, Barclays admitted that it wrongfully answered yes to three items on the Form U-5. Barclays answered "yes" to question 13A on the form, asking whether the individual was involved in any disciplinary action by a governmental body or self-regulatory organization [SRO], meaning "denial, revocation or suspension of a registration, or a censure, fine, cease and desist order, order of prohibition, temporary restraining order, injunction, bar or expulsion" by a governmental body or SRO. However, the disclosure reporting page explaining Barclays' answer "yes," refers only to an SFA notice of investigation and an SFA interview, neither of which constituted disciplinary action. During the hearings, Ms. Grieve admitted that reporting a disciplinary action under these circumstances was inappropriate (T2850-2851).

Barclays also wrongfully answered "yes" to question 14,

asking whether the individual involved is under investigation by a governmental body or SRO, referring to a supposed Federal Reserve investigation. However, as of September 26, 1996, the date the Form U-5 was signed, Barclays knew there was no Federal Reserve Investigation of Marais. Callum McCarthy, Chief Executive Officer of Barclays' North American Operations, advised in an internal memorandum dated September 10, 1996 that "a formal notice of investigation has not been issued" by the Federal Reserve" (Cl. Exh. 91 at BP11138). During the hearing, Ms. Grieve admitted this error, and stated that the answer should have been "no" (T822).

In addition, Barclays wrongfully answered "yes" to question 15 of the Form U-5, which asks whether the individual was subject to an internal review for fraud or wrongful taking of property, or for violating investment-related statutes, regulations or industry standards of conduct. Ms. Grieve again admitted that the "yes" answer was an error, testifying that she misunderstood the form to include a review that relates to "conduct *** in connection with a matter that is sufficiently serious to raise questions about the appropriateness of an individual's behavior in light of firm policy, NASD regulations, [and] principles of common law" (T 699-700).

Barclays filed the Form U-5, and the equivalent form for Commodities Futures Trading Commission registration, a Form 8-T,

regarding Marais. Despite events reflecting that Marais acted properly, Barclays never updated the Form U-5.

By filing the Form U-5, Barclays effectively banned Marais from continuing his career in the securities industry. Indeed, the negative Form U-5 created by Barclays rendered it impossible for Marais to find employment.

On June 13, 2000, Marais filed his Statement of Claim, in which he asserted that he was due bonuses and other compensation allegedly promised to him. In addition, Marais asserted a claim for tortious interference with prospective economic relations, based on his contention that the Federal Reserve and the SFA - whose investigations of Marais' conduct had been reported on the Form U-5 - had concluded their investigations and determined to take no action against him.

Arbitration hearings were held on 18 days from November 13, 2001 to July 22, 2002 at the offices of the NASD in New York, New York before a duly constituted three-person Arbitration Panel of the NASD. The Panel consisted of the Hon. Walter M. Schackman, a former Justice of this Court, Christina Kallas, Esq., an attorney with work experience in the securities industry, and Dr. Tama Taberman, who served as the industry arbitrator on the Panel. Justice Schackman served as Chair of the Panel.

During the arbitration, Barclays violated three of the Panel's orders. These included orders to provide documents that

were withheld based on Barclays' assertion of an attorney-client privilege, and certain documents withheld based on assertion of a "Federal Reserve privilege." Most significantly, the Panel ordered Barclays to produce an unredacted version of a September 10, 1996 interview memorandum prepared by Barclay's counsel (Cl. Exh. 226 [Mortenson Aff., Exh. J]) that had been redacted based on the Federal Reserve's directions. Barclays refused to produce an unredacted version of the document, on the ground that the Federal Reserve had directed Barclays not to produce the document in its entirety.

On September 26, 2002, the Arbitration Panel issued its award, directing Barclays to pay Marais approximately \$4,000,000, including: (1) \$1,250,000, plus interest, in compensatory damages based on the Form U-5 which Barclays filed with the NASD; (2) \$842,467, plus interest, on Marais' breach of contract claim, including \$66,746 in "notice" pay, and \$236,031 in pension contributions; (3) \$106,242, plus interest, as liquidated damages under Section 198 of the Labor Law; (4) \$248,000 as attorneys' fees under Section 198 of the Labor Law; and (5) \$1,000,000 in punitive damages, based on the Panel's finding that Barclays:

willfully and wantonly disregarded the rights of Claimant in their filing of the Form U-5; in the manner in which Claimant was treated by Respondents from February to September 1996; in withholding records from Claimant's counsel; in consciously disregarding a specific order of the Panel to produce a document after being warned that a sanction

would follow; in subjecting Claimant to humiliation in their various interrogations of him during 1996; in failing to advise Claimant to retain his own counsel at the appropriate time; and misleading Claimant as to the likelihood of his continued employment with Respondent.

Award at 4, ¶ 6 (Petition, Exh. A). The Panel also found that the "Form U-5 filed with NASD for Claimant *** contains defamatory information" and should be expunged (id., ¶ 1).

Marais now moves for confirmation of the award, and Barclays seeks to vacate the portions of the award granting \$1.25 million in compensatory damages, \$1 million in punitive damages, and the notice and pension pay.

DISCUSSION

A. Legal Standard

Since, as the Court of Appeals has held, "the arbitration of disputes concerning employment in the securities industry *** [is] governed by the Federal Arbitration Act (FAA)" (Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc., 85 NY2d 173, 180 [1995]), judicial review of this award is governed by the FAA (see Sawtelle v Waddell & Reed, Inc., ___ AD2d ___, 754 NYS2d 264 [1st Dept 2003]). The FAA embodies a strong "liberal federal policy favoring arbitration agreements" (Green Tree Fin. Corp.-Ala. v Randolph, 531 US 79, 81 [2000]). As a consequence, arbitration awards are subject to very limited judicial review under the FAA (Willemijn Houdstermaatschappij, BV v Standard

Microsystems Corp., 103 F3d 9 [2d Cir 1997]).

Accordingly, all doubts must be construed in favor of confirmation (In re Arbitration between Griffin Indus., Inc. and Petrojam, Ltd., 58 F Supp2d 212 [SD NY 1999]), and an award must be confirmed if there is even a "barely colorable justification" for the award (Willemijn Houdstermaatschappij, BV v Standard Microsystems Corp., supra, 103 F3d at 13). Arbitration awards cannot be vacated under the FAA, even if the decision reached by the arbitrators is "clearly erroneous" (Chisolm v Kidder, Peabody Asset Mgmt., Inc., 966 F Supp 218, 223 [SD NY 1997], affd 164 F3d 617 [2d Cir 1998]). Barclays, as the party moving to vacate, therefore "bears a heavy burden of proof" to overcome the "presumption in favor of confirm[ation]" (Brotman v Sant Cassia Inv. Mgmt., 1997 WL 401671, * 2 [SD NY 1997]; DeGaetano v Smith Barney, Inc., 983 Supp 459 [SD NY 1997]).

The FAA provides for vacating an arbitral award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made" (9 USC §10 [a] [4]). Under this standard, arbitral awards should be vacated in three circumstances. First, "if arbitrators rule on issues not presented to them by the parties, they have exceeded their authority and the award must be vacated" (Fahnestock & Co. v Waltman, 935 F2d 512, 515 [2d Cir] [citation omitted]; cert

denied 502 US 942 [1991]). Second, an award should be vacated "where the arbitrators manifestly disregarded the law" (Greenberg v Bear, Stearns & Co., 220 F3d 22, 27 [2d Cir 2000], cert denied 531 US 1075 [2001]). Finally, an arbitral award should be vacated where its "enforcement would violate a well defined and dominant public policy" (id.[citation omitted]).

Barclays contends that certain portions of the award are invalid on each of the above grounds.

B. The Compensatory Damages Award

The Panel awarded Marais \$1.25 million for "damages [he] has sustained by reason of the defamatory Form U-5 filed for him," and "recommend[ed] the expungement" of certain information from the Form U-5, based on its determination "that the Form U-5 filed with NASD for Claimant on September 26, 1996 contains defamatory information" (Award at 4, ¶ 2 & 3, ¶ 1). Barclays contends that this portion of the award should be vacated on the ground that the arbitrators clearly "exceeded their powers" in awarding relief based on defamation, because Marais never asserted a defamation claim against Barclays.

Barclays' arguments must be rejected. Courts have "consistently accorded the narrowest reading to this subsection, especially where it has been invoked in the context of arbitrators' alleged failure to correctly decide a question on which all concede to have been properly submitted in the first

instance" (Synergy Gas Co. v Sasso, 853 F2d 59, 63 [2d Cir] [citation and quotations omitted], cert denied 488 US 994 [1988]).

Rather than being based on defamation, the Panel's compensatory damage award was based on Marais' tortious interference claim, which both parties litigated. Marais' claim for tortious interference with prospective economic advantage was partially based on Barclay's Form U-5 filing. This claim was submitted in Marais' Statement of Claim (Mortenson Aff., Exh. C at 2, 6-8 and 9), Barclays filed an answer to this claim (id., Exh D. at 11-12), and both parties submitted extensive evidence concerning Barclays' tortious interference, including over 200 pages of testimony by Ms. Grieve concerning Barclays' false statements on Marais' Form U-5, and its failure to update the U-5 (see T460-468; T648-733; T792-874; T939-40; T2805; and T2812-2864). In addition, both parties addressed the tortious interference claim in their post-hearing briefs (see Mortenson Aff., Exh. E at 9-17; Exh. L at 28-30), and both parties made arguments concerning Marais' tortious interference claim during summation (T2911-2929; T3005-3027). The award itself recognizes that "Claimant asserted the following causes of action: *** tortious interference with prospective economic advantage" (Award at 1). Indeed, the award relied on evidence of Barclay's conduct that Marais presented in support of his tortious interference