

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CIVIL TERM : PART 48

-----X
ROY KEVIN STEVENS

Plaintiff

- against -

Ind. No.
150208/12

JOHN C. LEE CAPITAL MANAGEMENT LLC, LCM, INC.
SCOTTRADE, INC.,

Defendants
-----X

60 Centre Street
New York, New York
October 10, 2012

B E F O R E :

HONORABLE JEFFREY K. OING

Justice

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

FITAPELLI LAW
Attorneys for Plaintiff
475 Park Avenue South
New York, NY 10016
BY: MARC FITAPELLI, ESQ.

THE LAW OFFICE OF JOHN A. FIALCOWITZ, LLC
Attorneys for Defendant
89 Headquarters Plaza
Morristown, NJ 07960
BY: JOHN FIALCOWITZ, ESQ.

Kathy Y. Jones
Official Court Reporter

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2 THE COURT: The Court has before it the matter
3 of Roy Stevens versus John Lee, et al, index number 150208
4 of 2012.

5 This is motion sequence number one which is
6 defendant Scottrade's motion to compel to stay
7 proceedings and compel arbitration.

8 Parties enter their appearances s for the record.
9 For the plaintiff.

10 MR. FITAPELLI: Mark Fitapelli.

11 THE COURT: Thank you.

12 For defendant.

13 MR. FIALCOWITZ: Good morning, your Honor, John
14 Fialcowitz for the defendant Scottrade.

15 THE COURT: Thank you.

16 This is your motion to compel.

17 By previous order that I granted, you have a
18 default judgment against the defendants John Lee, Lee
19 Capital Management LLC LCM, Inc. Those are the Lee
20 defendants.

21 Now, we have the remaining defendants here which
22 are Scottrade, Inc.

23 Tell me why I am compelled to stay the
24 proceedings.

25 MR. FIALCOWITZ: On April 10, 2011, Scottrade
26 and plaintiff Mr. Stevens entered into a Scottrade

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2 brokerage account agreement. We put this in our papers as
3 part of the first affidavit of Robert Haire and in
4 paragraphs 29 and paragraphs 30 of the Scottrade brokerage
5 account agreement makes all disputes, sweeping language
6 with regard to arbitration. Particularly paragraph 29
7 explains to Mr. Stevens that what arbitration is all
8 about, that you waive your right to a jury trial, things
9 of that nature and then paragraph 30 of the agreement is
10 pretty unequivocal in that all disputes, anything relating
11 to the services should be subject to FINRA arbitration.

12 There is really no dispute that as I review these
13 papers that Mr. Stevens signed these agreements because
14 in fact, your Honor, if you look at Mr. Steven's
15 arbitration in opposition to the motion.

16 THE COURT: I have one quick question. Who
17 originated the trading authorization, the power of
18 attorney? Who asked for that from the plaintiff? Do you
19 know?

20 MR. FIALCOWITZ: Well, Scottrade requires it in
21 order to have --

22 THE COURT: I understand that but did Scottrade
23 itself contact the plaintiff and say I need the trading
24 authorization from you?

25 MR. FIALCOWITZ: I don't know if that happened
26 or not in this case.

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THE COURT: Can you answer that?

Who asked Mr. Stevens for that trading authorization?

MR. FITAPELLI: Mr. Lee solicited it.

THE COURT: Mr. Lee solicited it. Scottrade did not?

MR. FITAPELLI: No.

THE COURT: Okay.

MR. FITAPELLI: In fact, if we stick with the trading authorization for a second which is attached as Exhibit B to Mr. Stevens' affidavit.

THE COURT: Let me ask you this. I looked at the papers here. It doesn't seem like Scottrade has any business relationship or any relationship whatsoever with the individual defendants or the other corporate defendants.

MR. FIALCOWITZ: Correct. That's in the separate affidavit of Robert Haire.

THE COURT: You're just out there. You're sort of a clearinghouse for anybody to come and say we want to use you as a sort of a facilitator of trades that we need to do and you are there to say, okay, you got to pay us a fee and this is where we're at and open a calendar and we're done.

MR. FIALCOWITZ: That's it. You're exactly

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2 right, your Honor.

3 If you look at the trade authorization in
4 paragraph two indemnity and applicable law. Basically
5 the form that Mr. Stevens signs explains to him that I
6 understand that most of transactions conducted by the
7 authorized agent are at my own risk.

8 THE COURT: And the authorized agent is John
9 Lee?

10 MR. FIALCOWITZ: Correct. That it's his agent,
11 not our agent.

12 THE COURT: You are not there as a go between in
13 a sense. In order to trade, you need to have an account
14 somewhere.

15 MR. FIALCOWITZ: Right. If it's not Scottrade,
16 Etrade.

17 THE COURT: Ameritrade.

18 MR. FIALCOWITZ: Merrill Lynch.

19 THE COURT: Correct. Thank you.

20 I looked at the papers here. Unless you are
21 going to tell me there's a relationship between Scottrade
22 and John Lee and the other corporate defendants, they're
23 a stand-alone entity. That's why I asked the question
24 who actually asked for the trading authorization.

25 If your answer would have been, well, Scottrade
26 directly contacted the plaintiff Mr. Stevens and said,

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2 all right, we need a trading authorization from you, here
3 it is and now you got to go to get John Lee to fill out,
4 figure it out, then there may be some argument or nexus
5 but you candidly said to us, no, John Lee got it to us
6 and we had to fill it out.

7 MR. FITAPELLI: Your Honor, what I think we can
8 do is take a step back.

9 THE COURT: I've taken several steps back.

10 MR. FITAPELLI: Well, the threshold matter here
11 is there has to be an enforceable contract in order for
12 you to compel arbitration today. So, the first thing we
13 need to decide whether or not this contract was
14 enforceable and in our papers, I mean, we submit to the
15 Court that the whole nature of this transaction of the
16 contract with Scottrade was to facilitate unlicensed
17 activity by Mr. Lee. .

18 THE COURT: But they don't know that. Scottrade
19 is not managing Mr. Lee. Scottrade has no relationship
20 with Mr. Lee. In other words, they are not overseeing
21 what he does. They are there to have -- you have a
22 brokerage account at Scottrade for you to trade and for
23 you to buy, sell securities according to that broker
24 account. There is nothing in that record here that
25 actually has Scottrade principals overseeing or colluding,
26 to borrow that kind of nefarious word, with Mr. Lee in

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2 transacting with your client.

3 Your client here in this case according to this
4 record is basically between John Lee and your client Roy
5 Stevens. That's where it was and he lost \$5,000 on the
6 first go around which is like what the heck are you
7 doing, you lost money like that in a week, what are you
8 doing but there is nothing in the record that said that
9 Scottrade was involved in any way with those trades, with
10 those decisions.

11 MR. FITAPELLI: Well, your Honor, you are
12 correct that we were involved with the trades but they
13 were involved with the opening of the account.

14 THE COURT: So what? So, you are going to tell
15 me every time somebody opens an account at an entity that
16 entity is going to be subject to liability if there are
17 losses in that account arising out of relationship between
18 the two people that are actually doing business. That
19 doesn't make any sense.

20 MR. FITAPELLI: Your Honor, it doesn't have
21 anything to do with the losses. It has to do with
22 facilitating unlicensed activity. So, Scottrade either
23 knew or should have known that John Lee was a registered
24 broker, was engaged in unlawful activity and they should
25 have done something to stop this. They accepted
26 commissions. They allowed him to open up this account and

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2 the whole nature of this account is unlawful.

3 THE COURT: In that regard, that kind of
4 argument should go before the arbitrator because you have
5 an agreement here that's a binding agreement where you are
6 subject to arbitration.

7 Is that Exhibit C you are talking about?

8 MR. FIALCOWITZ: No, it was Exhibit B of the
9 Haire, initial Haire.

10 THE COURT: The Exhibit B is the brokerage
11 account agreement. Okay.

12 Your Exhibit C to the opposition is something
13 else. That's an agreement between Mr. Lee and
14 Mr. Stevens.

15 This Scottrade agreement is pretty comprehensive
16 in terms of the arbitration requirement and the arguments
17 you are raising now with respect to what your duties and
18 obligations are under this agreement because you are
19 saying that they had a duty or an obligation to make sure
20 that Mr. Lee and all his business cohorts were licensed
21 brokers. That rises out of this brokerage agreement
22 which can and should be dealt with in arbitration, not in
23 the court.

24 What's your response to that?

25 MR. FITAPELLI: Our position -- we don't dispute
26 that there is an arbitration provision in the contract.

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2 We can't get away from that but our position is that the
3 contract was void because the underlying transaction was
4 unlawful and courts can't enforce unlawful agreements.

5 THE COURT: Your response to that?

6 MR. FIALCOWITZ: Your Honor, almost every FINRA
7 case has a securities fraud claim in it and they agreed
8 there's no claim here that there is like fraudulent
9 inducement to get into the agreement. It's only that
10 there was alleged wrongful acts after the parties lawfully
11 entered a lawful agreement and the arbitration provisions
12 in the Scottrade brokerage account agreement are lawful,
13 binding. They should be enforced and nothing prevents
14 them in arbitration from raising any of these claims and
15 that's where they belong.

16 THE COURT: Okay. Have a seat, folks. Have a
17 seat.

18 Paragraph 30 of this agreement provides as
19 follows and this goes to plaintiff's counsel argument
20 about how the underlying transactions were fraudulent or
21 they were illegal or invalid such that it would take out
22 this dispute that's between plaintiff and Scottrade from
23 the arbitration clause. I will refer to paragraph 30 of
24 the agreement of the arbitration -- of the Scottrade
25 brokerage agreement and it says Agreement to Arbitrate
26 Controversies. You agree that any controversy, dispute,

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claim or grievance between us, any of our affiliates or our or their shareholders, officers, directors, employees, associates or agents on the one hand and you or, if applicable, your shareholders, officers, directors, employees, associates or agents on the other hand arising out of or relating to this agreement or any service provided by us including transactions of any kind made on your behalf through us shall be resolved by Financial Industry Regulatory Authority FINRA arbitration in accordance with FINRA's code of arbitration procedure.

That's pretty comprehensive, that sentence. That basically covers your argument saying that, Judge, those transactions were illegal, they were invalid. That's the dispute arising out of this trade -- this brokerage agreement. It's a pretty broadly worded phrase.

So that I hear what you're saying but the bottom line is you got an airtight arbitration agreement here that your client signed. I don't think there's any dispute here unless he's saying that he didn't know what he was signing. I didn't see that argument that he didn't know what he was signing.

So, he signed this agreement. In fact, he signed a second agreement which was, what was the second agreement, the trading authorization was the second agreement?

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2 MR. FIALCOWITZ: Actually, your Honor, if I
3 could point out, he signed the trading authorization two
4 times, April 12th and then on April 13th.

5 THE COURT: He really wanted to do it. He hit
6 it twice. He signed it twice, not only once but twice,
7 yes, I do agree and, yes, I do agree.

8 MR. FIALCOWITZ: Again.

9 THE COURT: Absolutely okay.

10 Anything else, counsel?

11 MR. FITAPELLI: Your Honor, it's important to
12 mention that he wasn't directed to Etrade. He wasn't
13 directed to any other discount broker.

14 Mr. Stevens had a relationship with Scottrade.
15 He represented to our client that he knew people, that
16 they would help him set up the account.

17 THE COURT: You mean, Mr. Lee.

18 MR. FITAPELLI: I am sorry, Mr. Lee.
19 Represented to our client that he knew people at
20 Scottrade, they would take care of him, they would help
21 him open the account. This is all part of this illegal
22 transaction that Scottrade was a part of.

23 So, while on the one hand we don't dispute that
24 there is an arbitration provision in the agreement, the
25 entire agreement is void.

26 THE COURT: But you know that's the only way you

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2 are going to get me to agree with you that this case
3 doesn't go to arbitration, that the agreement falls and at
4 this point everything you just said in terms of what Mr.
5 Mr. Lee had said -- represented to Mr. Stevens, that all
6 is part and partial of the arbitration agreement.

7 FINRA can handle all of that. They handle fraud.
8 They handle misrepresentation. It's a complex and broad
9 range of authority that they have there to resolve these
10 kinds of dispute. They happen every day.

11 What you're saying is nothing new. It's not
12 something that I haven't heard yet already.

13 Having said that, that's the argument that you
14 are making, it's fine. But any way.

15 Anything else you want to add?

16 MR. FITAPELLI: No.

17 MR. FIALCOWITZ: Thank you, your Honor.

18 THE COURT: This is my decision and order with
19 respect to the motion.

20 Based on this record that I have here, there is
21 no doubt in my mind that I find in this case that the
22 Scottrade brokerage agreement as well as the trading
23 authorization agreement are stand-alone agreements
24 separate and apart from the relationship with the
25 plaintiff, with the individual defendant and other
26 corporate defendants.

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2 The Scottrade and plaintiff have separate
3 agreements here that are valid, enforceable and binding
4 and those agreements do provide for mandatory arbitration
5 of any disputes arising out of the relationship between
6 Stevens and Scottrade with respect to trading and by
7 selling equities and so forth at the brokerage account.

8 Accordingly, based on that fact and based on the
9 fact that I don't see any disputes here with respect to
10 their relationship, in particular, nothing in this record
11 indicates that Scottrade had a nexus, a business nexus or
12 any other relationship with the individual defendant John
13 Lee or the other corporate defendants such that in that
14 case perhaps an argument can be made that the arbitration
15 agreement can be company fault. That doesn't exist in
16 this record.

17 So accordingly, based on those facts, I find that
18 the arbitration clause in the brokerage agreement is
19 enforceable and valid.

20 Accordingly, I'm going to grant the motion to
21 stay the action in this case and direct the parties to
22 proceed to arbitration with respect to defendant
23 Scottrade.

24 That's my decision and order.

25 Counsel, you are the moving party. Order the
26 transcript. I'll so order it and you will have it for

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your records.

MR. FIALCOWITZ: Thank you very much, your Honor.

MR. FITAPELLI: We have a default judgment now against the other defendants.

THE COURT: I don't know where you're at with that. Where are we at with that?

MR. FITAPELLI: We sent an order last week. We sent an order downstairs to process. I think that they're sending it up. I think the 14th.

THE COURT: Terrific. That's fine.

I'll sign it as soon as I get it and you proceed to arbitration with respect to Scottrade.

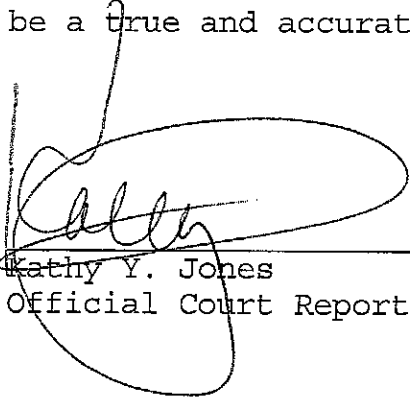
MR. FITAPELLI: Thank you very much.

THE COURT: Thanks very much.

Have a great day.

C E R T I F I C A T E

Certified to be a true and accurate transcript of the proceedings.


Kathy Y. Jones
Official Court Reporter