

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

THOMAS W. OLICK,	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 93-CV-1495
THOMAS NIKLES,	:	
et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

Green, S.J.

March _____, 2002

Presently before the Court is Defendants' Thomas Nikles, Joseph DiMento, DiMento General Agency's ("Defendants" or "moving Defendants") Motion to Vacate the Award of Arbitrators, Plaintiff's Response in opposition thereto and Defendants' Reply. For the following reasons, Defendants' motion will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1993, Plaintiff initiated the instant action against various individuals, including Defendant Thomas Nikles, a National Association of Security Dealers ("NASD") registered representative with John Hancock Distributors, Inc., a securities broker. (See Defs.' Ex. A.) In the Complaint, Plaintiff alleged claims for fraud, defamation and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, arising out of alleged transactions that occurred while Plaintiff was employed by John Hancock Distributors, Inc. (See *id.*) Pursuant to an Order dated November 26, 1993, the case was remanded from federal court to NASD arbitration and captioned Olick v. Nikles, et al., NASD No. 94-05051. (See Defs.' Ex. B.)

In May, 1996, Plaintiff filed a Statement of Claims with the NASD against various

individuals and entities, including John Hancock Distributors, Inc., John Hancock Mutual Life Insurance Company and Larry Carter, an employee of John Hancock Distributors, Inc. (“Hancock Defendants”), alleging fraud, misrepresentation, tortious interference with business relations, slander, libel, and violations of RICO. (See Defs.’ Ex. C.) Plaintiff’s claims were captioned Olick v. John Hancock Distributors, Inc., et al., NASD No. 96-01247. (See id.) Because this matter was related to the NASD arbitration matter captioned Olick v. Nikles, et al., NASD No. 94-05051, the two matters were consolidated on Plaintiff’s motion.

In June, 1996, the Hancock Defendants filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking to enjoin Plaintiff from proceeding against them. In the matter, captioned Hancock v. Olick, the Hancock Defendants moved for summary judgment, alleging that the claims raised by Plaintiff in the 1996 NASD arbitration were barred by the doctrine of *res judicata*. Specifically, the Hancock Defendants alleged that because the claims asserted by Plaintiff in the 1996 NASD arbitration arose from the same factual circumstances as those in the 1992 Carroll v. Hancock, et al., 92-CV-5907 litigation (“Carroll”), *res judicata* should apply.

In Carroll, John J. Carroll and others had sued John Hancock Distributors, Inc. (“Hancock”) and seventeen (17) other defendants, including Plaintiff, in the United States District Court for the Eastern District of Pennsylvania, alleging violations of several federal and state statutes, as well as common law fraud, in connection with a series of alleged limited partnership transactions. On February 8, 1994, Plaintiff, as one of the defendants in that action, moved to assert cross-claims against John Hancock Distributors, Inc. and Joseph DiMento, a general agent with John Hancock Mutual Life Insurance Company and a NASD registered

representative, alleging RICO and various common law violations. (See Defs.’ Ex. E.) Plaintiff also sought to assert third party claims against twenty (20) proposed third party defendants, including Thomas Nikles. (See id.) By order dated June 24, 1994, the District Court denied Plaintiff’s motion, stating that the motion was “untimely and lacks merit.” (Id.) Thereafter, on November 29, 1994, pursuant to Fed.R.Civ.P. 23(b), the plaintiffs in Carroll dismissed the case with prejudice as to all defendants, including Plaintiff, who objected to the dismissal but did not appeal the court’s order. (See Defs.’ Ex. J.)

Considering the events from Carroll, on December 14, 1998, the District Court granted the Hancock Defendants’ Motion for Summary Judgment on all counts, determining that Plaintiff’s claims against them were barred by the doctrine of *res judicata*. (See Defs.’ Ex. D.) On August 2, 1999, the Third Circuit Court of Appeals affirmed the decision of the District Court. (See Defs.’ Ex. F.) Thereafter, on October 5, 1999, the NASD Regulation Office of Dispute Resolution, noting that it was in receipt of the Third Circuit’s Order affirming the December 14, 1998 judgment of the District Court, removed John Hancock Distributors, Inc., John Hancock Mutual Life Insurance Company and Larry Carter from NASD No. 96-01247. (See Defs.’ Ex. G.)

On October 22, 1999, the moving Defendants, along with Quantum Financial Group, Inc. and Quantum Insurance Associates, Inc., filed with the NASD arbitration panel a motion to dismiss Plaintiff’s claims against them. (See Defs.’ Ex. H.) Relying on the August 2, 1999 opinion of the Third Circuit Court of Appeals affirming the December 14, 1999 opinion of the District Court, the moving Defendants argued that Plaintiff’s claims in NASD consolidated arbitrations Nos. 94-05051 and 96-01247 should be barred under the doctrine of *res judicata*

stating that “[a]lthough the Movants were not parties to the Hancock v. Olick injunction proceeding, the same logic and reasoning which was used by the District Court applies to now preclude [Plaintiff] from asserting the same claims against the Movants in this arbitration proceeding.” (Id.)

On July 20, 2001, following three pre-hearing sessions and sixty-nine (69) hearing sessions, the arbitration panel entered a final award against Defendants Joseph DiMento, DiMento General Agency and Thomas Nikles.¹ (See Defs.’ Ex. I.) Pursuant to 9 U.S.C. § 10(a), the moving Defendants instituted an action in this Court seeking to vacate the arbitration award entered against them. Plaintiff responded in opposition to Defendants’ motion and Defendants replied.

II. DISCUSSION

The Federal Arbitration Act (“FAA”) authorizes a district court to vacate an arbitration award in the following limited circumstances:

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) 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 U.S.C. § 10(a) (1994).²

¹The Panel also entered judgment against Edison J. Dippel, Jean Dippel and Wayne Dippel. (See id.)

²As to Defendants’ inference that the arbitration panel reached its decision out of a fear of reprisal from Plaintiff, there is no evidence in the record supporting such allegations.

In addition to these statutory grounds, a judicially created basis for vacating an arbitration award exists when the award was made “in manifest disregard of the law.” First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (citing Wilko v. Swan, 346 U.S. 427, 436-37 (1953), *overruled on other grounds* in Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)). However, because the scope of review under the FAA is “narrow in the extreme,” Amalgamated Meat Cutters & Butcher Workmen v. Cross Brothers Meat Packers, Inc., 518 F.2d 1113, 1121 (3d Cir. 1975), a court may only vacate an arbitration award when the arbitrator’s decision manifests disregard for the law, not merely an erroneous interpretation of the law. See Local 863 Int’l Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc., 773 F.2d 530, 533 (3d Cir. 1985), *cert. denied*, 475 U.S. 1085 (1986) (citing Wilco, 346 U.S. at 436).

In the instant matter, Defendants contend that the arbitration panel acted in manifest disregard of the law by refusing to grant their Motion to Dismiss Plaintiff’s claims against them on the basis of *res judicata*. Defendants argue that the instant action meets the three required elements of *res judicata*: (1) the Carroll litigation operated as a final judgment on the claims Plaintiff sought to bring in the consolidated arbitration matters; (2) they are in the same legal position as the Hancock Defendants, as they were either named parties or targeted parties (by way of Plaintiff’s Motion to File Cross-claims and Third Party Claims); and (3) the issues to be resolved, as alleged by Plaintiff at arbitration, were identical to the claims litigated in Carroll or were sought to be litigated by way of Plaintiff’s motion in Carroll. Therefore, Defendants argue that because the District Court and the Third Circuit Court of Appeals held that *res judicata* should apply to the Hancock Defendants, it should also have been applied to them.

I find Defendants’ arguments unpersuasive. There was no final adjudication of Plaintiff’s

claims against Defendants because no order was entered that relates to the moving Defendants which would justify the application of *res judicata*. The District Court's June 24, 1994 Order in Carroll dismissed Plaintiff's requests to assert cross-claims against Joseph DiMento and join Thomas Nikles as a third party defendant, but did so only by stating that Plaintiff's motion is "untimely and lacks merit."³ Although Defendants argue that this constitutes a final adjudication of Plaintiff's claims, I disagree. Rather, the denial of Plaintiff's motion to assert a cross-claim against Joseph DiMento was a determination by the court that Plaintiff's claim did not meet the requirements of Fed.R.Civ.P. 13(g), such that they did not "aris[e] out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein" Further, the court merely determined that Plaintiff's motion was "untimely." In either case, there is nothing of record to show that the court reached the merits of Plaintiff's claims against Joseph DiMento (or DiMento General Agency). As to Thomas Nikles, I find that the District Court's Order only determined that if this person were joined, the claim would be untimely presented and would not meet the requirements of Fed.R.Civ.P. 14(a).⁴

To the extent that I must determine if the arbitration panel acted in manifest disregard of the law by refusing to recognize Defendants' claim of *res judicata*, I reach two conclusions. One, to the extent that this was an issue for the arbitration panel to determine, I conclude that

³Upon review of Plaintiff's Motion to Assert Cross-claims and Third Party Claims, Plaintiff did not assert a cross-claim against DiMento General Agency.

⁴Fed.R.Civ.P. 14(a) provides in relevant part:

[A] defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to a third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

they determined it correctly. Two, even if Defendants are reasonable in arguing that the arbitration panel erred in its determination, the panel's decision would still not meet the heightened standard of review under "manifest disregard of the law." As evidenced by their acknowledgment of the Third Circuit's August 2, 1999 Order that dismissed the Hancock Defendants from NASD No. 96-01247, the arbitration panel correctly applied *res judicata* by dismissing the named parties in that order. As such, despite Defendants' assertions to the contrary, the arbitration panel did not disregard the Third Circuit's order in "manifest disregard of the law," but merely refused to extend *res judicata* in Defendants' case, apparently finding that one or more of the required elements of *res judicata* had not been met. Even assuming arguendo that this decision is in error, it is not in manifest disregard of the law. Accordingly, I will deny Defendants' motion.

An appropriate order follows.

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et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of March, 2002, upon consideration of Defendants' Thomas Nikles, Joseph DiMento and DiMento General Agency's Motion to Vacate the Award of Arbitrators, Plaintiff's Response in opposition thereto and Defendants' Reply, **IT IS HEREBY ORDERED** that Defendants' motion is **DENIED**.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.