

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

FIRST MONTAUK SECURITIES CORP. : MISCELLANEOUS ACTION
: :
v. : :
: :
MUKESH AGARWAL, p/o/a for : :
PRAKASH AGARWAL, MARIE HANLON, : :
ANN R. McLAUGHLIN, JOAN C. : :
MILEWSKI, DAVID NIEDERMAN, : :
KENNETH R. OLINGER, and : :
JAMES J. POPELARSKI : NO. 03-186

MEMORANDUM AND ORDER

Fullam, Sr. J.

December , 2003

Petitioner First Montauk Securities Corporation seeks to vacate an arbitration award rendered in a proceeding before the National Association of Securities Dealers ("NASD"), Agarwal, et al. vs. Brian D'Alfonso and First Montauk Securities Corporation, NASD Case No. 01-04742. The claimants have filed a cross-motion to confirm the award.

It appears that one Brian M. D'Alfonso was employed by First Montauk as a registered representative, working out of an office on Bustleton Avenue in Philadelphia, which displayed the Montauk securities logo. Mr. D'Alfonso resigned in July 1999, but continued to work from the same office for some months thereafter. The seven claimants ("Agarwal, et al.") were induced by Mr. D'Alfonso invest in a corporation named "Tech-Vest." It is undisputed that Montauk had never approved any such

investments and had never authorized Mr. D'Alfonso to engage in such activities. Apparently, "Tech-Vest" was a largely fictitious entity; at any rate, all of the claimants lost all of the money they had invested. The arbitrators rendered an award in favor of the claimants totaling \$616,236, against First Montauk and Mr. D'Alfonso. Mr. D'Alfonso has not appeared in this action.

As both sides recognize, this Court's scope of review is "exceedingly narrow"; an arbitration award which has some support in the record cannot be vacated. *Eichleay Corp. v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 944 F.2d 1047, 1055-1056 (3d Cir. 1991). Montauk challenges this award on essentially two bases: (1) that the arbitrators exhibited total disregard of applicable law, because all of claimants' investments were "irregular on their face" and, as reasonable persons, they should have realized that D'Alfonso was not acting within the scope of his employment when he touted the Tech-Vest enterprise; and (2) in any event, Montauk cannot lawfully be held liable for investments which were made after D'Alfonso resigned in July 1999. As to the second point, Montauk makes the related argument that the arbitrators acted in manifest disregard of the law when they failed to give effect to a stipulation of counsel which, according to Montauk, conceded that each of the claimants had been notified that D'Alfonso had

resigned and was no longer employed by Montauk after July 1999.
I reject these arguments.

There was ample evidentiary support for the proposition that none of the claimants acted unreasonably in assuming that D'Alfonso was authorized by Montauk to sell the Tech-Vest investments. He was operating out of what appeared to be a Montauk branch office, used Montauk stationery, etc. Each of the claimants testified that they had never been informed of D'Alfonso's resignation. The stipulation which Montauk relies upon to establish the contrary is, to say the least, ambiguous. The stipulation reads as follows:

"With respect to activity that took place on the termination/resignation of Brian D'Alfonso in July of 1999, First Montauk has a standing policy to send out a form letter to clients of registered representatives who leave the firm, advising the client that the representative is no longer associated with the firm. First Montauk obtains a list of customer names, addresses, and account numbers and merges that list with the form letter, a copy of which was provided to plaintiffs' attorney. There is nothing that indicates that procedure was not followed by Montauk in this case."

That stipulation is a far cry from a stipulation that any of the claimants actually received notice of D'Alfonso's termination. Indeed, there was evidence to the effect that when, on an earlier occasion, D'Alfonso had been suspended by Montauk, no notice of that suspension was given to any of his customers; and there was also evidence that if, in fact, the usual practice had been

followed in this case, company records should have reflected the names and addresses of clients to whom the letter was sent, and the date on which the letter was sent.

In short, the parties bargained for binding arbitration. That is what they received. There is no basis upon which this Court can properly interfere with the arbitrators' resolution of these disputes. The petition to vacate the arbitration award will be denied, and the cross-motion for confirmation will be granted.

An Order follows.

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

FIRST MONTAUK SECURITIES CORP. : MISCELLANEOUS ACTION
: :
v. : :
: :
MUKESH AGARWAL, p/o/a for : :
PRAKASH AGARWAL, MARIE HANLON, : :
ANN R. McLAUGHLIN, JOAN C. : :
MILEWSKI, DAVID NIEDERMAN, : :
KENNETH R. OLINGER, and : :
JAMES J. POPELARSKI : NO. 03-186

ORDER

AND NOW, this day of December 2003, IT IS

ORDERED:

1. The petition of First Montauk Securities Corporation for an order vacating the award of arbitrators in NASD Case No. 01-4742, dated August 22, 2003 is DENIED.

2. The motion of the claimants/respondents for confirmation of the arbitrators' award in NASD Case No. 01-4742, dated August 22, 2003 is GRANTED. Judgment is entered upon the award.

John P. Fullam, Sr. J.