

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

EILEEN BOLICK : CIVIL ACTION
 :
 v. :
 :
 :
 : NO. 05-CV-4532
 MERRILL LYNCH, PIERCE, FENNER :
& SMITH INC., ET AL. :

SURRICK, J.

JANUARY 30, 2006

MEMORANDUM & ORDER

Presently before the Court are Plaintiff's pro se Motion To Vacate Judgment (Doc. No. 1), and Defendant's Response To Motion (Petition) To Vacate And Cross-Petition To Confirm Arbitration Award (Doc. No. 6). For the following reasons, we will deny Plaintiff's Motion and grant Defendant's Cross-Petition.

I. BACKGROUND

Plaintiff Eileen Bolick entered into an agreement with Defendants to have Defendants manage her individual retirement account. (Doc. No. 1 ¶ 11.) On or about June 14, 2004, Plaintiff filed a Statement of Claim against Defendants with the New York Stock Exchange ("NYSE") alleging unsuitability, churning, misrepresentation, failure to supervise, and breach of fiduciary duty with respect to investments in her accounts. (Doc. No. 1, Ex. D.) Plaintiff elected to submit to Simplified Arbitration pursuant to NYSE Rule 601,¹ and thus maximized her

¹ NYSE Rule 601 provides, in pertinent part:

(a) Any dispute, claim or controversy, arising between a customer(s) and an associated person or a member subject to arbitration under this Code involving a dollar amount not exceeding \$25,000 exclusive of attendant costs and interest, shall be arbitrated as hereinafter provided.

damages at \$25,000. (Doc. No. 1 ¶ 15; Doc. No. 6 ¶ 4.) The NYSE Director of Arbitration subsequently selected G. Rick O’Shea as the arbitrator to decide Plaintiff’s claim. On May 24, 2005, O’Shea entered an arbitration award in Plaintiff’s favor in the amount of \$4,000 (“Arbitration Award”). O’Shea stated that this amount was an approximation of the fees that Plaintiff had paid to Defendants for what O’Shea believed was “an unsuitable recommendation of investment vehicle.” (Doc. No. 1, Ex. D.)

Plaintiff has filed this Motion to vacate the arbitration award pursuant to Section 10 of the Federal Arbitration Act.² Plaintiff claims that O’Shea is biased because he has a “direct financial

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(f) The dispute, claim or controversy shall be submitted to a single public arbitrator knowledgeable in the securities industry selected by the Director of Arbitration. Unless the public customer demands or consents to a hearing, or the arbitrator(s) calls a hearing, the arbitrator shall decide the dispute, claim or controversy solely upon the pleadings and evidence filed by the parties. If a hearing is necessary, such hearing shall be held as soon as practicable at a locale selected by the Director of Arbitration.

NYSE Rule 601.

² The Federal Arbitration Act (“FAA”) provides, in pertinent part:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(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; or

and personal interest in the outcome of the arbitration.” (Doc. No. 1 ¶ 18.) She contends that due to the bias of the arbitrator, the award was inappropriate and inadequate. (*Id.* ¶¶ 22-23, 37). Plaintiff further alleges that O’Shea’s conduct was fraudulent. (*Id.* ¶ 45.)

II. LEGAL STANDARD

“The party moving to vacate an arbitration award has the burden of proof.” *Grosso v. Barney*, No. 03-115, 2003 WL 22657305, at *1 (E.D. Pa. Oct. 24, 2003). “Review of arbitration awards under the FAA is extremely deferential.” *Metromedia Energy, Inc. v. Enserch Energy Svcs., Inc.*, 409 F.3d 574, 578 (3d Cir. 2005) (internal citations omitted), *cert. denied*, 74 U.S.L.W. 3131 (U.S. Jan. 9, 2006) (No. 05-295). “Vacatur is appropriate only in ‘exceedingly narrow’ circumstances, such as where arbitrators are partial or corrupt, or where an arbitration panel manifestly disregards, rather than merely erroneously interprets, the law.” *Id.*

III. LEGAL ANALYSIS

A. Plaintiff’s Claim of Bias

An arbitration award may be vacated where “evident partiality” exists. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 147 (quoting 9 U.S.C. § 10). The challenging party “must show that ‘a reasonable person would have to conclude that the arbitrator was partial to the other party.’” *Smith, Breslin & Assocs. v. Meridian Mortgage Corp.*, Civ. A. No. 96-424, 1997 WL 158119, at *4 (E.D. Pa. Apr. 7, 1997) (citing *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989)). However, an award should not be vacated where “both parties

(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.

are informed of the [business] relationship in advance, or if they are unaware of the facts but the relationship is trivial.” *Commonwealth Coatings Corp.*, 393 U.S. at 150 (White, J., concurring). “To overturn an award on the grounds of evident partiality, the moving party must demonstrate more than an appearance of impropriety.” *Forest Elec. Corp. v. HCB Contractors*, Civ. A. No. 91-1732, 1995 WL 37586, at * 3 (E.D. Pa. Jan. 30, 1995) (internal citations omitted). The party alleging such bias “must establish specific facts which indicate improper motives on the part of the arbitrator, and which establish that the arbitrator’s conduct was so biased and prejudiced as to destroy fundamental fairness.” *Id.*

According to Plaintiff, O’Shea was improperly named a “public arbitrator” by the NYSE because the affiliations of O’Shea and his son with the securities industry resulted in O’Shea being biased in the arbitration of her complaint. (Doc. No. 1 ¶¶ 16-18.) In support of her bias claim, Plaintiff relies on the language of NYSE Rule 607. Under Rule 601, the Director of Arbitration is required to select “a single public arbitrator knowledgeable in the securities industry” to decide the controversy in arbitration. NYSE Rule 601. Under Rule 607, a “public arbitrator” is defined as an arbitrator not from the securities industry. NYSE Rule 607(a)(3). Rule 607 further provides that an arbitrator is deemed as being from the securities industry if he or she:

- (i) is a person associated with a member, broker/dealer, government securities broker, government securities dealer, municipal securities dealer or registered investment adviser, or
- (ii) has been associated with any of the above within the past five (5) years, or
- (iii) is retired from or spent a substantial part of his or her business career in any of the above, or

(iv) is an attorney, accountant or other professional who devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two (2) years, or

(v) Is an individual who is registered under the Commodity Exchange Act or is a member of a registered futures association or any commodity exchange or is associated with any such person(s).

NYSE Rule 607(a)(2). In addition, “[a] person will not be classified as a public arbitrator if he or she has a spouse or other member of the household who is a person associated with a registered broker, dealer, municipal securities dealer, government securities broker, government securities dealer or investment adviser.” NYSE Rule 607(a)(3). In further support of her claim, Plaintiff cites to the NYSE’s Guidelines For Classification of Arbitrators, which requires that “close family relationships with broker/dealers” be disclosed.

Plaintiff’s claims are without merit. In accordance with the NYSE’s guidelines and rules, O’Shea’s neutral profile discloses his son’s affiliation with the securities industry, as well as his own affiliations with the industry. (Doc. No. 1, Ex. C.) Contrary to Plaintiff’s assertions, the substance of these disclosures alone does not support finding evident partiality. Indeed, O’Shea’s profile and disclosures only serve to underscore the fact that O’Shea was properly deemed a public arbitrator by the NYSE. By disclosing such information, O’Shea was complying with NYSE regulations, and neither his affiliations nor his son’s affiliations are grounds for classifying O’Shea as an industry arbitrator instead of a public arbitrator. *See* NYSE Rule 607. Plaintiff provides no other evidence in support of her claims of bias.

In addition, Plaintiff does not contest the fact that she received O’Shea’s profile in advance of the arbitration hearing, as required by the NYSE rules. She accepted O’Shea as the arbitrator after she had received his profile. “A party to an arbitration, however, ‘may not sit idle

through an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse.” *Smith, Breslin & Assocs.*, 1997 WL 158119 at *3 (quoting *Marino v. Writers Guild of Am., East, Inc.*, 992 F.2d 1480, 1484 (9th Cir. 1993)). “Such waiver of a ground for vacatur even extends to the issue of bias which goes to the heart of fairness” *Id.* Plaintiff’s claim of bias must therefore fail.

Similarly, Plaintiff’s claim that O’Shea committed fraud does not survive scrutiny.

Although a court may vacate an arbitration award if the award was procured by fraud, “in order to protect the finality of arbitration decisions, courts must be slow to vacate an arbitral award on the ground of fraud.” *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9th Cir.1982); *see also Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986). “The party asserting fraud must establish it by clear and convincing evidence, and must show that due diligence could not have resulted in discovery of the fraud prior to arbitration.” *Foster*, 808 F.2d at 42. Plaintiff offers no specific facts indicating the nature of O’Shea’s alleged fraud. We see no indication of fraud based upon the evidence before the court. Furthermore, we find no “manifest disregard of the law” to justify vacating the Arbitration Award. *See United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379 (3d Cir. 1995); *Grosso*, 2003 WL 22657305, at *2. We will not disturb an arbitration award based on the speculative allegations of a plaintiff dissatisfied with the amount of her award.

B. Defendant’s Motion for Confirmation of Arbitration Award

Defendant requests that the Court confirm the Arbitration Award. Section 9 of the FAA provides:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon *the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title*. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9 (emphasis added). Pursuant to the provisions of the FAA, we will confirm the Arbitration Award.

An appropriate Order follows.

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| & SMITH INC., ET AL. | : | |

ORDER

AND NOW, this 30th day of January, 2006, upon consideration of Plaintiff's Motion To Vacate Judgment and Defendant's Response To Motion (Petition) To Vacate And Cross-Petition To Confirm Arbitration Award, it is ORDERED that Plaintiff's Motion is DENIED and Defendant's Cross-Petition is GRANTED. The Arbitration Award is hereby CONFIRMED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge