

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

REGULATORY OPERATIONS,

Complainant,

v.

MICHAEL DAVID SCHWARTZ
(CRD No. 4554902),

Respondent.

Expedited Proceeding
No. ARB160019

STAR No. 20160499725

Hearing Officer—RES

DECISION

December 1, 2016

Respondent is suspended from associating with any FINRA member firm in any capacity for failing to pay an arbitration award. The suspension will continue until he produces sufficient documentary evidence to FINRA showing: (1) the award has been paid in full; (2) the Respondent and the arbitration creditor have agreed to settle the matter; or (3) the Respondent has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the award.

Appearances

For the Complainant: Deon McNeil-Lambkin, Esq., Ann-Marie Mason, Esq., Department of Regulatory Operations, Financial Industry Regulatory Authority.

Respondent Michael Schwartz represented himself.

Decision

I. Introduction

On April 21, 2016, FINRA’s Office of Dispute Resolution (“Dispute Resolution”) notified Respondent Michael Schwartz (“Schwartz”) that, under FINRA Rule 9554, his registration would be suspended effective May 12, 2016, because he had not paid an arbitration award (the “Award”).¹ Schwartz timely filed a request for a hearing and claimed a *bona fide* inability to pay the Award, but he subsequently withdrew that defense.² In its place, he asserted the defense that he and the arbitration creditor had settled the Award. On September 1, 2016, the parties presented their cases in a hearing by telephone before the Hearing Officer.

¹ CX-5, at 1; Tr. 60. The Complainant’s hearing exhibits are cited “CX-__” followed by the page number if applicable. The hearing transcript is cited “Tr.” followed by the page number.

² CX-6, at 1; CX-7.

Schwartz concedes he has not paid the Award in full. Instead, he contends he settled the Award with the arbitration creditor. Complainant Department of Regulatory Operations argues he failed to meet his burden of proving settlement of the Award because the settlement agreement he proffers covers only certain assets and not the Award in full.

After the hearing and a review of the record, the Hearing Officer finds Schwartz did not meet his burden of proving a settlement of the Award. Effective immediately, he is suspended from associating with any member firm in any capacity until he produces sufficient documentary evidence to FINRA showing: (1) the Award has been paid in full; (2) he and the arbitration creditor have agreed to settle the matter; or (3) he has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the Award.

II. Legal Standards And Findings Of Fact

A. Schwartz's Background

Schwartz entered the securities industry in 2004.³ From October 2010 through October 2012, he was associated in a registered capacity with Barclays Capital Inc. ("Barclays"), the arbitration creditor.⁴ Since 2015, he has not been associated with a FINRA member firm.⁵

B. Factual and Procedural Background

On July 2, 2012, Barclays filed an arbitration claim against Schwartz with FINRA Dispute Resolution alleging he had not repaid a promissory note to Barclays.⁶ Schwartz appeared in the arbitration hearing and contested Barclays' claim. On September 19, 2013, the FINRA Arbitration Panel rendered the Award in favor of Barclays and against Schwartz in the amount of \$568,568.⁷ Schwartz did not move to vacate the Award.⁸ Although he filed for bankruptcy, the Bankruptcy Court dismissed his petition.⁹

On April 21, 2016, Dispute Resolution issued the Notice of Suspension informing Schwartz the suspension would be effective on May 12, 2016.¹⁰ The Notice stated the suspension would continue until Schwartz produced documentary evidence showing he satisfied one of the defenses to suspension.¹¹ The notice also stated he could request a hearing before the FINRA

³ CX-1, at 6.

⁴ CX-1, at 8.

⁵ CX-1, at 11.

⁶ CX-2, at 1.

⁷ CX-2, at 4. *Accord* Tr. 56-57, 102. The amount of the Award has steadily increased because of the accrual of interest and the accumulation of attorney's fees. *See* Tr. 106-07.

⁸ CX-4.

⁹ CX-9, at 1, 2, 12.

¹⁰ CX-5, at 1; Tr. 61-62, 103.

¹¹ CX-5, at 1. For the recognized defenses, see Section II.C. *infra*.

Office of Hearing Officers and a timely request would stay the effective date of the suspension.¹² Schwartz requested a hearing, stating his defense was a *bona fide* inability to pay.¹³ He later filed a motion changing his defense to assert he had settled the Award.¹⁴

C. Legal Standard

FINRA's arbitration process and applicable rules are designed "to provide a mechanism for the speedy resolution of disputes among members, their employees, and the public."¹⁵ To ensure payment of arbitration awards, FINRA promulgated rules—in particular, FINRA Rule 9554—to allow for expedited suspension proceedings against members, associated persons, and formerly associated persons who have allegedly failed to pay.¹⁶ FINRA Rule 9554(a) provides:

If a member, person associated with a member or person subject to FINRA's jurisdiction fails to comply with an arbitration award ... FINRA staff may provide written notice to such member or person stating that the failure to comply within 21 days of service of the notice will result in a suspension or cancellation of membership or a suspension from associating with any member.

FINRA Rule 9554(a) implements Article VI, Section 3(b) of the FINRA By-Laws, which provides for the suspension of an associated person who does not pay an arbitration award:

The [C]orporation after 15 days notice in writing, may suspend or cancel the membership of any member or suspend from association with any member any person, for failure to comply with an award of arbitrators properly rendered pursuant to the [C]orporation's Rules.

The following defenses are permissible in a suspension proceeding under Rule 9554: (1) the arbitration award has been paid in full; (2) the parties have agreed to installment payments of the award, or have otherwise agreed to settle, and the respondent is not in default of the settlement; (3) the award has been vacated by a court; (4) a motion to vacate or modify the award is pending in a court; and (5) the respondent has a bankruptcy petition pending in United States

¹² CX-5, at 1. FINRA had jurisdiction to serve the Notice of Suspension because Schwartz was terminated from FINRA registration less than two years prior to the Notice. Tr. 76.

¹³ CX-6, at 1.

¹⁴ CX-7. See Tr. 104.

¹⁵ *Regulatory Operations v. DiPietro*, No. ARB140066, 2015 FINRA Discip. Lexis 24, at *5 (OHO June 8, 2015) (quoting *Herbert Garrett Frey*, 53 S.E.C. 146, 153 (1997); *Eric M. Diehm*, 51 S.E.C. 938, 939 (1994)). *Accord Dep't of Enforcement v. Respondent*, (ARB060031) (Apr. 16, 2007), at 4, finra.org/sites/default/files/OHODDecision/p038228_0_0.pdf (same); *Dep't of Enforcement v. Respondent*, (ARB040037) (Mar. 2, 2005), at 3, finra.org/sites/default/files/OHODDecision/p038234_0_0.pdf (same).

¹⁶ FINRA By-Laws, Art. VI, Sec. 3(b); FINRA Rule 9550 *et seq.* *Accord William J. Gallagher*, 56 S.E.C. 163, 171 (2003) ("Honoring arbitration awards is essential to the functioning of the NASD arbitration system."); *Richard R. Pendleton*, 53 S.E.C. 675, 679 (1998) ("[w]e have repeatedly stated that the NASD arbitration system provides a speedy mechanism for settling disputes, which the NASD may foster by taking prompt action against those who fail ... to honor arbitration awards"); NASD Notice to Members 04-57, 2004 NASD LEXIS 90 (Aug. 2004); NASD Notice to Members 00-55, 2000 NASD LEXIS 63 (Aug. 2000).

Bankruptcy Court, or a Bankruptcy Court has discharged the award.¹⁷ The respondent also may assert a *bona fide* inability to pay an award rendered in an industry dispute.¹⁸ The respondent has the burden to prove the defense.¹⁹

D. Discussion: Schwartz's Putative Settlement

In support of his defense, Schwartz proffers a Confidential Settlement Agreement and Release dated May 18, 2016 (the "Settlement Agreement").²⁰ The Settlement Agreement is in form, name, and substance a settlement agreement, signed and dated by both Schwartz and Barclays, and disposes of certain of Schwartz's assets by assigning some of them to Barclays and some of them to Schwartz. The Settlement Agreement does not explicitly say what effect, if any, it has on the Award.²¹

But at the same time they executed the Settlement Agreement, Schwartz and Barclays signed and submitted to the Circuit Court of Cook County, Illinois, a Stipulation and Agreed Order dated May 18, 2016 (the "Stipulation"). The Stipulation is dispositive in defeating Schwartz's defense that the Settlement Agreement is a settlement of the Award in full. It provided that Barclays was still entitled to full satisfaction of the Award:

Subject to the terms of the settlement agreement entered on May 17, 2016, this stipulation shall not be construed as waiving any right of Barclays to full satisfaction of the final judgment in Case No. 2014 CH 15180.²²

The final judgment of which Barclays was entitled to full satisfaction was the final judgment it had obtained in the Circuit Court of Cook County, Illinois recognizing and enforcing the Award.²³

The Settlement Agreement provides that it will be construed in accordance with the law of the State of Illinois.²⁴ Under that law, a settlement agreement is considered a contract and is

¹⁷ NASD Notice to Members 00-55, 2000 NASD LEXIS 63, at *5-6 (listing the defenses). *Accord Dep't of Enforcement v. Respondent*, (ARB060031) (Apr. 16, 2007), at 4-5, finra.org/sites/default/files/OHODDecision/p038228_0_0.pdf.

¹⁸ *See, e.g., William J. Gallagher*, 56 S.E.C. 163 (2003).

¹⁹ OHO Order EXP15-02 (ARB150039) (Dec. 18, 2015), at 3-4, finra.org/sites/default/files/OHO_EXP15-02_ARB150039_0.pdf; OHO Order EXP15-03 (ARB150048) (Dec. 3, 2015), at 4, finra.org/sites/default/files/OHO_EXP15-03_ARB150048_0.pdf. *Accord Robert Tretiak*, 56 S.E.C. 209, 220, (2003) ("[i]t is well settled that a respondent bears the burden of demonstrating his or her inability to pay").

²⁰ CX-18.

²¹ *See* Tr. 91.

²² CX-19.

²³ CX-11, at 1, 4. *Accord* Tr. 83 (Schwartz) ("The judgment is just the confirmation of the arbitration award. They are one in the same."). *See* Tr. 105.

²⁴ CX-18, at 5.

interpreted as such.²⁵ “[T]he objective to be reached in construing a contract is to give effect to the intention of the parties involved,” which “must be ascertained from the language of the contract.”²⁶ If the contract permits only one interpretation, that interpretation controls.²⁷ Here, when the Settlement Agreement and the Stipulation are considered together, the only rational interpretation of the parties’ agreement is that Barclays retained its right to full satisfaction of the Award. The Settlement Agreement only dealt with certain of Schwartz’s assets which Barclays had located in a supplementary proceeding brought under the auspices of the Circuit Court case enforcing the Award. Barclays settled only with respect to those assets, not with respect to the Award as a whole. In the Stipulation, the parties made clear that the Settlement Agreement did not waive Barclays’ right to full satisfaction.²⁸

Provisions in the Settlement Agreement indicate it did not terminate Barclays’ right to recover future amounts from Schwartz under the Award. Paragraph 6 of the Settlement Agreement provides that “[n]othing in this agreement shall prohibit Barclays from perfecting a lawful garnishment of any ... future wages.”²⁹ Under the heading “Non-waiver,” Paragraph 7 provides that Barclays can collect the Award from Schwartz’s future income or assets with a value in excess of \$30,000:

Non-waiver. Judgment Debtor and Barclays agree that nothing in the foregoing shall be understood or construed as a waiver, release or discharge of Barclays’ right to lawfully collect from Debtor’s future income and/or assets he may acquire with a value in excess of \$30,000, until the full, unpaid portion of its money judgment against Judgment Debtor ... is paid in full, or the money judgment against Judgment Debtor becomes vacated.³⁰

It is common for a judgment creditor and a judgment debtor to reach an agreement as to the debtor’s current assets without the creditor giving up its right to enforce the judgment against future assets or income. In these circumstances, the judgment remains in full force and effect. Here, the settlement documents show Barclays and Schwartz adhered to the common practice and did not agree to the aberrational result Schwartz seeks—Barclays’ supposed waiver and

²⁵ *Cushing v. Greyhound Lines, Inc.*, 2013 IL App. (1st) 103197, 991 N.E.2d 28, 92 (Ill. Ct. App. 2013); *Haisma v. Edgar*, 218 Ill App. 3d 78, 86, 578 N.E.2d 163, 161 (Ill. Ct. App. 1991).

²⁶ *In re Doyle*, 144 Ill. 2d 451, 468, 581 N.E.2d 669 (Ill. 1991).

²⁷ *Omnitrus Merging Corp. v. Illinois Tool Works, Inc.*, 256 Ill. App. 3d 31, 628 N.E.2d 1165, 1168 (Ill. Ct. App. 1993).

²⁸ A contract term is ambiguous only if “the language is reasonably or fairly susceptible to more than one construction.” *Tishman Midwest Management Corp. v. Wayne Jarvis, Ltd.*, 146 Ill. App. 3d 684, 689, 500 N.E.2d 431, 434 (Ill. Ct. App. 1986). Here, the Stipulation is not susceptible to the construction that Barclays waived its right to recover the Award in full.

²⁹ CX-18, at 3.

³⁰ CX-18, at 3-4. Part of the supplementary enforcement process consists of the issuance of “Citations” seeking the disclosure of assets owned by the judgment debtor. *See* Tr. 107-08. Here, one of the Whereas clauses of the Settlement Agreement expressed the parties’ intent to limit its scope to the assets located in the citations process: “Judgment-Debtor and Barclays wish to resolve, terminate and settle all disputes, claims and actions arising from the Citations ...” CX-18, at 1.

release of the entire six-figure Award for less than ten cents on the dollar. Schwartz has failed to meet his burden of proving the Settlement Agreement was a settlement of the Award in full.

III. Regulatory Operations' Motion to Dismiss

Two days before the hearing, Regulatory Operations filed a motion to dismiss Schwartz's hearing request on the ground that he had not asserted a valid defense. At the beginning of the hearing, the Hearing Officer orally denied the motion because: (1) it was untimely; (2) Schwartz had raised a factual issue as to whether the evidence supported his defense that a settlement agreement had settled the Award; and (3) there is no FINRA Rule or decision authorizing the Hearing Officer to dismiss a hearing request where the respondent has raised a factual issue regarding his defense. Notwithstanding the Hearing Officer's oral decision, Regulatory Operations requested and proceeded to present arguments in support of its motion orally, and renewed its motion at the end of the hearing, after all the evidence had been presented.

In February 2016, the National Adjudicatory Council issued the decision in *Dep't of Enforcement v. Lundgren*.³¹ In that case, respondent Lundgren filed a motion to dismiss an expedited proceeding to provide time for an investigation into "possible irregularities" by FINRA staff. The decision is dispositive in holding that motions to dismiss are not allowed in expedited proceedings:

As an initial matter, we deny the Motion for two reasons. First, the rules governing these proceedings provide a streamlined, expedited adjudicatory process. That process begins with a request for hearing in which the respondent must assert his defenses, and it culminates in a prompt hearing at which the respondent presents those defenses. ... The rules do not provide an alternative, pre-hearing means for adjudicating defenses. Specifically, the rules do not authorize dispositive motions, such as motions to dismiss, motions for summary disposition, or similar procedural devices. Indeed, allowing such motions would inject an increased level of procedural complexity inconsistent with the expedited nature of these proceedings.³²

Bound by the holding in *Lundgren*, the Hearing Officer finds that the FINRA Rule 9500 Series, which governs expedited proceedings, does not allow for pre-hearing dispositive motions. Regulatory Operations' motion to dismiss was correctly denied.

IV. Conclusion

The Hearing Officer finds, and the parties do not dispute, that Schwartz has not paid the Award in full. Schwartz did not prove the defense he asserted—that he has purportedly settled the Award—on which he had the burden of proof.

³¹ No. FPI150009, 2016 FINRA Discip. LEXIS 2 (Feb. 18, 2016).

³² *Id.* at *11 (citations omitted).

Under Article VI, Section 3(b) of FINRA's By-Laws and Rule 9559(n), Schwartz is suspended from associating with any member firm in any capacity, effective immediately. The suspension shall continue until Schwartz produces sufficient documentary evidence to FINRA showing: (1) the Award has been paid in full; (2) Schwartz and Barclays have agreed to settle the Award in full; or (3) Schwartz has filed a petition in a United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the Award.

Schwartz is ordered to pay FINRA costs of \$2,206.50, which include an administrative fee of \$750 and hearing transcript costs of \$1456.50.³³ These costs are due and payable immediately on issuance of this Decision.

Richard E. Simpson
Hearing Officer

Copies to:

Michael David Schwartz (*via email and overnight delivery*)
Meredith A. MacVicar, Esq. (*via email*)
Deon McNeil Lambkin, Esq. (*via email*)
Ann-Marie Mason, Esq. (*via email*)

³³ The Hearing Officer has considered all arguments made by the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed in this Decision.