

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 12**

---

JOSEPH GUNNAR & CO., LLC  
and MICHAEL CAMP,

Petitioners,

INDEX NO.: 015603/2006  
MOTION DATE: 12/20/2006  
MOTION SEQUENCE: 001

-against-

**X X X**

CLYDE BRIDGEMAN,

Respondent.

---

The following papers read on this motion:

Order to Show Cause.....	1
Verified Petition to Stay Arbitration.....	2
Affidavit of Joseph Alagna in Support & Exhibits Annexed.....	3
Memorandum of Law in Support of Petitioners' Motion to Stay and Dismiss Arbitration.....	4
Respondent's Memorandum in Opposition to Petitioners' Motion to Stay and Dismiss Arbitration & Exhibits Annexed.....	5
Respondent's Exhibit C.....	6
Petitioners' Reply Memorandum.....	7

This motion by petitioners, Joseph Gunnar & Co., LLC (Gunnar) and Michael Camp, for an order pursuant to CPLR § 7502(b) & 7503(b) staying the arbitration filed by

respondent and dismissing the Statement of Claim filed in NASD Arbitration No. 06-03584 on the grounds that all claims are barred by the applicable statute of limitations is denied.

Between August of 1998 and the year 2000, respondent opened three brokerage accounts with Gunnar, a broker-dealer registered with the National Association of Securities Dealers (NASD). The last date of activity in any of the accounts was April 2002. They were closed in 2004. The Statement of Claim was filed on or about August 7, 2006. At all times respondent was a resident of the State of Illinois, and petitioners claim that the arbitration is time barred by the Illinois three year limitations period. They have not submitted a Statement of Answer, as they move for a stay of arbitration.

The issue before the court is whether the parties agreed to leave timeliness issues to the court.

Respondent alleges that although Gunnar and it's employee Camp, promised to give him, an unsophisticated investor, sound financial advice, guidance and protection for his investments, it in fact assumed complete discretion over his accounts and put them at risk by using margins, trading options, and concentrating in a single industry. He lost approximately \$660,000 allegedly as a result of Gunnar's investment strategy, while petitioners profited from margin account interest and commissions.

When he expressed dissatisfaction over his losses, petitioners assured him they were all market related, were temporary, and that the accounts would recover. Finally, when they did not recover, he transferred one account in mid 2004 and the others in February 2005. The claims to be arbitrated include Breach of Fiduciary Duty, Negligence and Failure to Supervise, and Breach of Contract.

Petitioner argues that pursuant to New York law timeliness is a threshold issue for the court to decide, citing to Smith Barney, Harris, Upham & Co. v Luckie, 85 N.Y.2d 193, cert. den. 516 U.S.193 (1995), and of course section 7502(b) of the CPLR. Luckie is

of some importance; it reaffirms that if a claim would be time barred if brought in state court it is time barred as to arbitration, and, where governed by New York law, timeliness is a question for the courts not the arbitrator, as it would be under FAA. Id. at 202; CPLR § 7502(b).

Petitioner concedes that Federal Courts hold that timeliness issues in claims brought under the Federal Arbitration Act, 9 U.S.C. §§ 1 - 14, are decided by arbitrators. Paine Weber v Bybyk, 81 F.3d 1193 (2d Cir. 1996).

Yet, in Diamond Waterproofing Systems v 55 Liberty Owners Corp, 4 N.Y.3d 247 (2005) the highest court of this State tempered the rule slightly; it held that “a choice of law provision which states that New York law shall govern ‘the agreement *and its enforcement*’ adopts as binding New York’s rule that the threshold Statute of Limitations questions are for the courts.” Id. at 253 (emphasis in original).

Stated simply, the parties’ Agreement (the Client Account Agreement) provides for a New York choice of law, including enforcement, and under New York’s borrowing statute, CPLR 202, the Illinois Statute steps up to be satisfied. Petitioner argues that the applicable Illinois Statute of limitations is three years under its securities statute, and hence the Claim is time barred.

The question then that follows is how does respondent avoid the import of Luckie and Diamond Waterproofing and proceed to arbitration where it may find that the claim is time barred?

The court declines to engage in analysis of the proper limitations period under Illinois law, as to the view of the court the overriding matter of importance to be addressed is whether the court or the arbitrators are the proper decision makers. Several factors militate in favor of arbitration.

The securities industry, of which Gunnar is a member, has agreed as a whole that a “forum for the resolution of disputes involving public investors and broker-dealers, and

members of the American Stock Exchange, International Stock Exchange, Nasdaq Liffe Markets ...” is desirable, appropriate and beneficial to the industry. See Petitioner’s Exh. A to Affidavit of Alagna. Hence the formation of the National Association of Security Dealers, NASD, and the comfort both sides expect from NASD expertise.

The terms of the subject Client Account Agreement provide in pertinent part at paragraphs 18 and 20:

This agreement and its enforcement shall be construed and governed by the laws of the State of New York and shall be binding upon my heirs, executors, administrators, successors and assigns. ...

I agree, and by carrying an account for me CSC agree(s), that any and all controversies which may arise between me and CSC ... concerning any account, transaction, dispute or the construction, performance or breach of this or any other agreement, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration.

Any Arbitration under this agreement shall be held under and pursuant to and be governed by the Federal Arbitration Act. ...

The indicia is strong that petitioner both as a member of NASD and by it’s agreements welcomes and empowered arbitrators rather than courts to decide broker - client disputes. In this Agreement arbitrators are empowered to apply the law of New York State so as “to encompass substantive principles that New York courts would apply.” Smith Barney Shearson, Inc. v Sacharow, 91 N.Y.2d 39, 49 (1997) citing to Mastrobuono v Shearson Lehman Hutton, 514 U.S.52, 63-64. This Agreement which brings within its ambit both New York law and the Federal Arbitration law is logically harmonized in this way. Pellegrino v Auerbach, 2006 WL565643 (S.D.N.Y.). Close examination shows insufficient textual authority to support a finding that these parties

carved out of the FAA and NASD jurisdiction the provision of New York law that limitations questions are for the courts. CPLR § 7502(b).

Significantly, the parties agreed that the FAA applies thereby relieving the court of determining whether it should apply as affecting interstate commerce.. See Diamond Waterproofing, 4 N.Y.3d at 252; Baronoff v Kean Development, 12 Misc.3d 627, 629 (Nas. Sup. 2006). Where the FAA does apply there is a presumption “that the arbitrator should decide allegation[s] of waiver, delay, or a like defense to arbitrability.” Id.

The court in Diamond Waterproofing, citing to Luckie, took things further and held that since arbitration is a matter of contract and private parties have the right to freely contract, in agreements to arbitrate which include a choice of law provision, the inclusion of a choice of law provision is an “express[ion] of an intention to have the courts determine statute of limitations issues. ...” A choice of law provision, which states that New York law shall govern both ‘the agreement and *its enforcement*’ adopts as ‘binding New York’s rule that threshold Statute of Limitations questions are for the courts.’” Id. at 253, emphasis in original. Not all courts agree. See contra Smith Barney Shearson, Inc., 91 N.Y.2d at 47 (“A boiler plate choice of law clause does not necessarily signify the parties’ acceptance of limitations imposed by New York law with respect to the contractually conferred power on an arbitrator to determine all issues, including arbitrability. Sharper probity and particularization of analysis are necessary.”)

Two differences distinguish this case from the foregoing statement of New York State law. Diamond Waterproofing was a construction case where the parties voluntarily entered into an arbitration agreement unlike a securities case where there is presumed NASD arbitration of all disputes arising out of the parties dealings. It is hard to imagine a time when such substantive issues would be heard by the courts. And, incidently, the subject agreement in Luckie had a choice of law provision but did not expressly state that the FAA would apply leaving it to conjecture where state law begins and federal

arbitration law leaves off.

But, and much more importantly, when the statute of limitations began to run is the issue in this case. The question is whether respondent's portfolio suffered losses because of market forces or because of management that was inappropriate to the needs of the client. And, in like vein, whether petitioner should be estopped from invoking the statute of limitations where it saw time being on its side in reversing any mismanagement.

The court holds that the language in the agreement between the parties did not delegate to the courts the issue of timeliness, especially as it is, in the present context, not a matter of enforcement but of substantive of law. It is the kind of dispute, like a “procedural question which grow[s] out of the dispute and bear[s] on its final disposition’ [which] are presumptively for the arbitrator to decide.” Pellegrino at 2, citing to Howsand v Dean Witter Reynolds, Inc., 537 U.S. 79 (2000) and John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-547 (1964).

The petition is, accordingly, dismissed and the parties are directed to proceed to arbitration.

Dated: March 7, 2007

---

J.S.C.

**X X X**