

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Geoffrey Garratt
New York, NY,

Respondent.

DECISION

Expedited Proceeding No. ARB210001

Dated: August 31, 2021

Registered representative failed to comply with an arbitration award and failed to timely make a motion to vacate or modify the award. Held, registered representative is suspended until he demonstrates that he has either: 1) paid the award in full; 2) entered into a fully-executed, written settlement with the arbitration claimant and is in compliance with its terms; 3) petitioned for bankruptcy protection; or 4) the award has been discharged in bankruptcy.

Appearances

For the Complainant: Jennifer Crawford, Esq., Michael Manning, Esq., Loyd Gattis, Esq.,
Department of Enforcement, Financial Industry Regulatory Authority

For Respondent: Pro se

Decision

This matter comes before us pursuant to a call for review under FINRA Rule 9559(q). In accordance with Article VI, Section 3 of the FINRA By-Laws and FINRA Rule 9554, Geoffrey Garratt was notified that he was subject to suspension of his association with any FINRA member in any capacity for failure to comply with an award rendered in a FINRA customer arbitration. Garratt requested a hearing, asserting that he had timely made a motion in state court to vacate the arbitration award and that motion was pending. A hearing officer was appointed to the matter and a hearing was held on March 26, 2021. The Hearing Officer prepared a proposed

written decision and provided it to the National Adjudicatory Council's ("NAC") Review Subcommittee. The Review Subcommittee called this proceeding for review.

After a review of the entire record, including arguments presented at the March 26, 2021 hearing, we find that Garratt has failed to comply with the arbitration award and failed to establish an available defense. As a result, Garratt is suspended until he demonstrates that he has either: 1) paid the award in full; 2) entered into a fully-executed, written settlement with the arbitration claimant and is in compliance with its terms; 3) petitioned for bankruptcy protection; or 4) the award has been discharged in bankruptcy.

I. Background and Facts

A. The Customer Arbitration Award

Garratt registered with FINRA as a general securities representative in 2006. On or about October 31, 2018, Garratt's customer, RG, filed a statement of claim against Garratt and a FINRA member firm, requesting compensatory damages of \$81,000 related to various securities purchases.¹ A hearing was held on January 2, 2020, and an arbitration award was issued ordering Garratt to pay RG \$58,873.10 in compensatory damages, \$12,500 in attorneys' fees, and \$3,650 in costs and fees (the "Award").

The Award was served on Garratt on January 3, 2020. In a memorandum enclosing a copy of the Award, Garratt was notified that he had 30 days to pay the Award and that he could be suspended from association if he failed to comply with the Award "unless a motion to vacate has been filed with a court of competent jurisdiction." The memo further advised Garratt that "[t]here are limited grounds for vacating an arbitration award, and a party must bring a motion to vacate within the time period specified by the applicable statute." Garratt did not pay the Award to his customer.

B. The First Notice of Suspension

On February 12, 2020, FINRA Dispute Resolution Services ("DRS") sent Garratt a notice pursuant to FINRA Rule 9554² (the "First Suspension Notice") advising him that he would be suspended effective March 4, 2020, for failure to comply with the arbitration award unless, before that date, he demonstrated that he had: 1) paid the award in full; 2) entered into a fully-executed, written settlement agreement with the claimant, and his obligations thereunder were current; 3) timely filed an action to vacate or modify any award and such motion has not been denied; or 4) filed a petition in bankruptcy and the bankruptcy proceeding is pending, or the

¹ RG subsequently filed a notice of dismissal with prejudice of his claims against the FINRA member firm.

² Rule 9554 authorizes FINRA to bring expedited suspension proceedings when a member or associated person fails to comply with an arbitration award.

bankruptcy court has discharged the award or payment owed under the settlement agreement. The First Suspension Notice further advised Garratt that he had the right to request a hearing during which he could assert any of the enumerated defenses and that a timely request for a hearing would stay the suspension.³

In response to the First Suspension Notice, Garratt provided to FINRA a document captioned *In the Matter of the Application of Geoffrey Garratt v. [RG]*, Supreme Court of the State of New York, County of New York (Index No. 100178/2020), titled “Notice of Petition and Verified Petition to Vacate,” and dated February 3, 2020 (the “Petition”). The Petition indicated that it was filed on February 4, 2020, and that it sought vacatur of the Award. In the Petition, Garratt wrote that he “moves to vacate the [A]ward under section 10 of the federal [sic] Arbitration Act . . . and section 7511 of New York’s civil Practice law and rules [sic].” On the basis of the Petition, FINRA stayed the suspension proceedings on February 27, 2020.

C. The Second Notice of Suspension

Approximately one year later, DRS emailed Garratt requesting a status update on the Petition. Garratt did not respond to DRS’s email. On February 16, 2021, DRS sent Garratt a second notice of suspension pursuant to FINRA Rule 9554 (the “Second Suspension Notice”).⁴ The Second Notice of Suspension explained that “FINRA has been advised that you have not complied with the award or satisfactorily responded to its request for information concerning the status of compliance.” The Second Suspension Notice also advised Garratt that he would be suspended effective March 9, 2021, unless he demonstrated that he had paid the Award in full, filed a timely motion to vacate or modify the Award, or established one of the other enumerated defenses. The Second Suspension Notice further explained that a timely request for a hearing would stay Garratt’s pending suspension. On February 23, 2021, Garratt sent an email asserting that the Petition was timely filed and was “currently pending.” Garratt also requested a hearing.

II. Procedural History

A hearing was held on March 26, 2021. At the hearing, Garratt presented evidence that the Petition was served on RG on March 13, 2021, more than 13 months after Garratt filed the Petition in state court and just 13 days before the hearing in this matter.

³ The parties stipulated that Garratt was properly served with the First Suspension Notice and that he received it on February 13, 2020.

⁴ The parties stipulated that Garratt received the Second Suspension Notice on February 17, 2021.

Consistent with FINRA Rule 9559(o)(1), the Hearing Officer provided a proposed written decision to the NAC's Review Subcommittee.⁵ On May 13, 2021, FINRA's Office of General Counsel ("OGC") notified the parties that the Review Subcommittee had called the proceeding for review pursuant to FINRA Rule 9559(q)(1).⁶ On May 26, 2021, the NAC Subcommittee appointed to hear the matter directed the parties to submit briefs on the relevant legal issues.⁷

III. Discussion

The main issue in this case is the construction of Article VI, Section 3(b) of FINRA's By-Laws—specifically, whether the By-Laws require associated persons to have timely served a motion to vacate or modify an arbitration award in order to assert this defense or whether timely filing of such a motion is sufficient. This is a legal issue of first impression for the NAC.

A. FINRA Is Authorized to Suspend an Associated Person for Failure to Comply with an Arbitration Award Unless He Can Show that a Timely Motion to Vacate the Award Is Pending

Article VI, Section 3(b) of FINRA's By-Laws ("Section 3(b)") authorizes FINRA to suspend a member or associated person for failure to comply with an arbitration award. It provides, in relevant part, that FINRA,

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 [FINRA's] Rules, *where a timely motion to vacate or modify such award has not been made pursuant to applicable law* or where such a motion has been denied.

(Emphasis added.) Section 3(b) provides a strictly limited exception to the obligation that arbitrations awards be paid promptly, when a timely motion to vacate has been made and has not been denied. *See Keith Patrick Sequeira*, Expedited Proceeding No. ARB160035, 2016 NASDR

⁵ FINRA Rule 9559(o)(1) provides that "[w]ithin 60 days of the date of the close of the hearing, the Hearing Officer shall prepare a proposed written decision and provide it to the [NAC's] Review Subcommittee."

⁶ FINRA Rule 9559(q)(1) authorizes the NAC Review Subcommittee to call for review a proposed decision prepared by a hearing officer in a proceeding initiated under the FINRA Rule 9550 series within 21 days after receipt of the proposed decision from the Office of Hearing Officers.

⁷ Garratt did not submit a brief.

OHO LEXIS 68, at *5 (FINRA OHO Nov. 18, 2016), *aff'd*, Exchange Act Release No. 85231, 2019 SEC LEXIS 286 (Mar. 1, 2019), *aff'd*, 816 F. App'x 703 (3d Cir. 2020).

FINRA Rule 9554 provides an enforcement mechanism for Section 3(b) by authorizing expedited suspension proceedings against members and associated persons who have allegedly failed to comply with an arbitration award. *See Dep't of Enf't v. Shimko, Jr.*, Expedited Proceeding No. ARB200002, STAR No. 20200653076, 2020 FINRA Discip. LEXIS 41, at *8 (FINRA OHO Sept. 15, 2020). Rule 9554(a) provides that:

[i]f a member, person associated with a member or person subject to FINRA's jurisdiction fails to comply with an arbitration award or a settlement agreement related to an arbitration or mediation under Article VI, Section 3 of the FINRA By-Laws . . . 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.

Under Rule 9554(d) a suspension notice becomes effective 21 days after service, unless stayed by a request for a hearing under Rule 9559. If a hearing is not requested timely, the notice of suspension constitutes FINRA's final action, as provided by Rule 9554(f). The defenses available in a suspension proceeding for failure to pay an arbitration award are limited to demonstrating that: 1) the member or associated person has made full payment of the award; 2) the parties have agreed to installment payments of the amount awarded or have otherwise agreed to settle the action; 3) the award has been modified or vacated by a court; 4) a motion to vacate or modify the award is pending in a court; or 5) the member or associated person has a bankruptcy petition pending in U.S. Bankruptcy Court pursuant to Title 11 of the United States Code or the award in the action has been discharged by a U.S. Bankruptcy Court. *See NASD Notice to Members 00-55*, 2000 NASD LEXIS 63, at *5-6 (Aug. 2000).

B. A Motion to Vacate or Modify Must be Timely Served on the Adverse Party

1. The Text of Section 3(b)

We look first to the language of Section 3(b), which states that an associated person may be suspended for failure to comply with an arbitration award where a “timely motion to vacate or modify such award *has not been made pursuant to applicable law.*” (Emphasis added.) We hold that this By-Law provision requires an associated person to both timely file and serve a motion to vacate an arbitration award (or a motion to modify) pursuant to applicable federal or state law. In the Petition, Garratt stated that he was seeking vacatur of the Award under the Federal Arbitration Act (“FAA”) and Section 7511 of New York’s Civil Practice Law and Rules (“CPLR”). Both the FAA and CPLR § 7511 require that a person seeking vacatur of an arbitration award serve the adverse party within a specified time. Section 12 of the FAA provides that “[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.” 9 U.S.C. § 12. Section 7511 of the CPLR provides that “[a]n application to vacate or modify an

award may be made by a party within ninety days after its delivery to him,” and under CPLR Section 306-b, such an application must be served on the adverse party within 105 days of delivery of the award to the petitioner.⁸ See N.Y. CPLR § 7511 (2012), N.Y. CPLR § 306(b) (2012). The requirement of Section 3(b) that a motion to vacate be “made pursuant to applicable law” means that the motion to vacate must be both filed and served within the required time period regardless of whether the FAA or CPLR is applied.

Comparison of the terminology used in Section 3(b) to other FINRA rules further confirms this reading of the By-Laws. Specifically, when the time specified in a rule is tolled by the filing of a motion alone, the rule uses the term “filed.” For example, Rule 12904(j) of the Code of Arbitration applicable to customer disputes provides that “[a]ll monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction.” The use of different terminology in Section 3(b)—i.e., referring to a motion being “made pursuant to applicable law”—is consistent with Section 3(b) requiring something more than filing only.

The use of different terminology in Section 3(b) and Rule 12904(j) is also reasonable in practice. The FAA and New York law provide time periods of 90 days or more for service of a motion to vacate. Accordingly, it makes sense that filing a motion to vacate an arbitration award alone tolls the payment obligation under the shorter 30-day period of Rule 12904(j). Section 3(b), however, is a defense raised later in the process in the context of an expedited proceeding. At this later time, a petitioner must demonstrate that the motion to vacate was timely filed *and* served for the motion to be considered timely made.

We acknowledge that in rule filings and regulatory notices, FINRA staff has referred to a motion to vacate as having to be “filed,” without any mention of service. See, e.g., NASD Notice to Members 93-16, 1993 NASD LEXIS 90, at *3 (Mar. 1993) (stating that the amendments allow NASD to employ its summary revocation procedures when a member or associated person does not pay an arbitration award and “a timely motion to vacate or modify the arbitration award has either not been filed or has been denied”); *Notice of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Failures to Comply with Arbitration Awards*, Exchange Act Release No. 31609, 1992 SEC LEXIS 3255, at *6 (Dec. 16, 1992) (stating that the proposed rule change provides that revocation proceedings are “available only where a timely motion to vacate or modify the arbitration award has not been filed”).

⁸ CPLR Section 306-b provides that, when the applicable statute of limitations is less than four months, “service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires.” Because CPLR Section 7511 provides that a motion to vacate an arbitration must be made within 90 days of delivery of the arbitration award—i.e., less than four months—the time to serve the adverse party is 105 days from the date of delivery of the award. See, e.g., *Gisors v Dept. of Educ.*, 2010 N.Y. Misc. LEXIS 2807, 2010 NY Slip Op. 31599(U) (June 22, 2010) (explaining that the time to serve a motion to vacate an arbitration award is 15 days after the date on which the statute of limitations expires).

We do not give these statements any weight to our decision here for two reasons. First, none of these filings or releases explicitly addresses the requirements for establishing a defense under Section 3(b)—i.e., whether the defense requires both the timely filing and service of a motion to vacate pursuant to applicable law. The filings and releases only summarize the rules without interpreting the meaning of the language “made pursuant to applicable law.”

Second, basing an interpretation of the By-Laws on statements made in these notices and filings is imprecise because the notices explain the requirements using inconsistent terminology. For example, the rule filing cited above noted that FINRA is proposing to amend Section 3 to permit it to suspend a party who has failed to comply with an arbitration award “where the award *is not the subject of* a motion to vacate or modify the award.” *Notice of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Failures to Comply with Arbitration Awards*, 1992 SEC LEXIS 3255, at *3 (emphasis added). Similarly, in NASD Notice to Members 92-1, FINRA stated that “[t]he amendment to Article VI, Section 3 of the NASD By-Laws would permit the NASD to suspend the membership or registration of a party that has failed to comply with a valid arbitration award in situations when the award *is not the subject of* a motion to vacate or modify the award or when such a motion has been denied.” NASD Notice to Members 92-1, 1992 NASD LEXIS 40, at *2 (Jan. 1992) (emphasis added); *see also* Notice to Members 00-55, 2000 NASD LEXIS 63, at *5-6 (explaining that one of the defenses for nonpayment of an arbitration award is that a “motion to vacate or modify the award *is pending* in a court”) (emphasis added). In summary, the alternate use of “filed” or “pending” or “the subject of” in these notices and filings appears to be unintentional, and does not provide any guidance for interpreting the language of Section 3(b). Accordingly, these notices and releases do not change our analysis.⁹

2. Our Interpretation Is Consistent with the Purposes of Arbitration and FINRA’s Expedited Suspension Rules

Interpreting Section 3(b) to require both the timely filing and service of a motion to vacate an arbitration award to establish this defense in a suspension proceeding follows from the language of the By-Law and is also consistent with the purposes of arbitration and the expedited suspension proceeding rules.

It is well settled that arbitration proceedings have the “dual goals . . . [of] settling disputes efficiently and avoiding expensive litigation.” *Dep’t of Enf’t v. Barnes*, 1998 NASD Discip. LEXIS 55, at *6-7 (NASD Bd. June 26, 1998). To further these goals, the SEC has approved FINRA’s adoption of rules for the arbitration of disputes between members, associated persons, and public customers, including the rule that requires the payment of monetary arbitration awards within 30 days of receipt unless a motion to vacate is filed. *Id.* at *7; *see also* Rule 12904(j). Additionally, “[h]onoring arbitration awards is essential to the functioning of the [FINRA] arbitration system, and requiring associated persons to abide by arbitration awards

⁹ Additionally, there is no evidence in the record that Garratt relied on any of these sources when he filed but failed to timely serve the Petition.

enhances the effectiveness of the arbitration process.” *Michael David Schwartz*, Exchange Act Release No. 81784, 2017 SEC LEXIS 3111, at *18 (Sept. 29, 2017) (internal quotation mark omitted).

To promote compliance with arbitration awards, the Commission has approved FINRA rules authorizing expedited suspension proceedings against a member or associated person when they fail to comply with an arbitration award. The Commission has stated that “[a]llowing members or their associated persons that fail to pay arbitration awards to remain in the securities industry presents regulatory risks and is unfair to harmed customers.” *Order Approving Proposed Rule Change Relating to FINRA Rule 9554 to Eliminate Explicitly the Inability-to-Pay Defense in the Expedited Proceedings Context*, Exchange Act Release No. 62211, 2010 SEC LEXIS 1800, at *4 (June 2, 2010). As a result, Rule 9554 “further[s] FINRA’s investor protection mandate by promoting a fair and efficient process for taking action to encourage members and associated persons to pay arbitration awards to customers.” *Id.* at *12. As the Commission has explained “[t]he payment of arbitration awards and the facilitation of the arbitration process, in general, will assist in the protection of investors and further the public interest.” *Order Granting Approval of Proposed Rule Change Relating to Suspension or Cancellation of Membership or Registration for Failure to Comply with Arbitration Awards*, Exchange Act Release No. 31763, 1993 SEC LEXIS 124, at *7 (Jan. 26, 1993).

Our reading of Section 3(b) to require both the timely filing and service of a motion to vacate furthers these goals. A contrary reading would result in emboldening associated persons to delay payment of arbitration awards while remaining in the industry simply by filing a motion to vacate, but intentionally failing to serve it on the arbitration claimant or otherwise prosecuting it. This result would undermine the efficiency of arbitration and the investor protection goals of requiring FINRA members and associated persons to promptly pay arbitration awards.

C. Garratt Failed to Timely Serve the Petition on RG Under Both the FAA and New York Law

We find that Garratt failed to timely serve the Petition on RG under both the FAA and New York Law.

The issue of whether the FAA or state law applies to determining the time for service when a petitioner moves to vacate a FINRA arbitration award in state court is unresolved. Courts have held that the substantive provisions of the FAA apply to FINRA arbitrations because the securities industry concerns interstate commerce. *See, e.g., Morgan Stanley DW Inc. v. Afridi*, 788 N.Y.S.2d 11, 12 (N.Y. App. Div. 2004), *citing Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003). The United States Supreme court has held, however, that the FAA does not completely preempt state law, but rather only displaces state law to the extent it is inconsistent with the FAA’s policies in favor of arbitration. *See Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477 (1989). In particular, it is unsettled whether the procedural rules of the FAA, including the time provided therein for service of a motion to vacate or modify an award, preempts state law when such a motion is brought in state court to vacate or modify a FINRA arbitration award. Courts that have addressed the issue of whether Section 12 of the FAA preempts state law concerning the timing for serving a motion to vacate disagree. *Compare*

Moscatiello v. Hilliard, 595 Pa. 596, 603 (2007) (finding that Section 12 of the FAA did not preempt the shorter time limit under Pennsylvania law for challenging an arbitration award), *with Cigna Ins. Co. v. Huddleston*, No. 92-1252, 1993 U.S. App. LEXIS 40575, at *27 (5th Cir. Feb. 16, 1993) (finding that in the absence of explicit incorporation of state law, the state arbitration law is preempted to the extent it conflicted with the three-month requirement for filing motions to vacate under Section 12 of the FAA).

In any event, we need not determine whether the FAA or New York Law applies to the service of the Petition in this case because the record establishes that Garratt’s service of the Petition was untimely whether we apply the FAA or New York law. It is undisputed that the Award was delivered to Garratt on January 3, 2020. Section 12 of the FAA provides that “[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.” 9 U.C.S. § 12. Garratt did not serve the Petition on RG until March 13, 2021, more than a year after delivery of the Award to Garratt. The Petition was thus untimely under the FAA.

Garratt’s service of the Petition was also untimely if we apply New York law. CPLR Section 7511 provides that “[a]n application to vacate or modify an award may be made by a party within ninety days after its delivery to him,” and under CPLR Section 306-b, such an application must be served on the adverse party within 105 days of delivery of the award to the petitioner. While Garratt timely filed the Petition under New York law, his service of it on RG was long after the expiration of the 105-day period.

At the hearing, Garratt argued that his time to serve the Petition on RG under New York law was tolled by an Executive Order by the Governor of New York, executed on March 20, 2020, in response to the COVID-19 pandemic. The Executive Order provided that “any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the . . . the civil practice law and rules . . . is hereby tolled.” N.Y. Exec. Order No. 202.8 (Mar. 20, 2020). Assuming that the Executive Order tolled Garratt’s time to serve the Petition, his service was still untimely. On October 4, 2020, the Governor of New York issued another Executive Order that provided that the last day of tolling would be November 3, 2020. N.Y. Exec. Order No. 202.67 (Oct. 4, 2020). Even assuming that Garratt’s time to serve RG “reset”—i.e., that Garratt had another 105 days to serve the Petition as of that date—rather than continued to run as of November 4, 2020, the deadline for service of the Petition was February 16, 2021, almost a full month before Garratt’s served RG on March 13, 2021.

Accordingly, we find that while Garratt timely filed his motion to vacate the Award under New York law, he did not serve the motion on RG for more than a year—long after the time required to do so under both the FAA and CPLR. By failing to serve timely or otherwise prosecute the motion, Garratt harmed RG by delaying payment of the Award. *See Regul. Operations v. Pincus*, Expedited Proceeding No. ARB180031, STAR No. 20180600911, 2019 FINRA Discip. LEXIS 7, at *21-22 (FINRA OHO Feb. 7, 2019). Suspending Garratt until he complies with the award gives him an incentive to pay the Award and thereby “furthers the public interest and the protection of investors.” *See Michael Albert Dipietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *23-24 (Mar. 17, 2016) (stating that suspension

gives an associated person incentive to pay an arbitration award, which “in turn, furthers two central purposes of the Exchange Act—serving the public interest and the protection of investors”).

IV. Conclusion

Garratt is suspended from association with any FINRA member in any capacity until he demonstrates that he has either: 1) paid the Award in full; 2) entered into a fully-executed, written settlement with MG and is in compliance with its terms; or 3) filed a bankruptcy petition that is pending in U.S. Bankruptcy Court pursuant to Title 11 of the United States Code or the Award has been discharged by a U.S. Bankruptcy Court.

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary