

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

REGULATORY OPERATIONS,

Complainant,

v.

MICHAEL ALBERT DIPIETRO
(CRD No. 2811047),

Respondent.

Expedited Proceeding
No. ARB140066

STAR No. 20140430876

Hearing Officer—KBW

DECISION

June 8, 2015

Respondent failed to pay an arbitration award and failed to demonstrate that he had a *bona fide* inability to pay the award or any other valid defense. In accordance with Article VI, Section 3 of the FINRA By-Laws and FINRA Rules 9554 and 9559, Respondent is suspended from associating with any FINRA member firm in any capacity and ordered to pay hearing costs.

Appearances

Meredith MacVicar, Esq., and Ann-Marie Mason, Esq., for FINRA Regulatory Operations, Complainant.

Kevin Mirch, Esq., and Marie Mirch, Esq., for Michael Albert DiPietro, Respondent.

DECISION

I. Introduction

On October 7, 2014, FINRA's Office of Dispute Resolution notified Respondent Michael Albert DiPietro that his registration would be suspended effective October 28, 2014, because of his failure to pay an arbitration award. On October 24, 2014, DiPietro timely filed a request for a hearing, in which he asserted three defenses. First, DiPietro claimed a *bona fide* inability to pay the arbitration award. Second, DiPietro contended that he cannot be suspended because he appealed the order denying his motion to vacate the arbitration award and the appeal is still pending. Third, DiPietro asserted that he cannot be suspended because he filed with a court a motion to stay payment on the award.

FINRA Regulatory Operations argues that the first defense fails because DiPietro has not established that he is unable to pay the award or some meaningful portion of it. Regulatory

Operations argues that the second and third defenses fail because DiPietro was obligated to pay the award after the court denied his motion to vacate the award, and the pendency of the appeal and the filing of a motion for stay do not further stay his payment obligation.

On February 18, and March 2, 9, and 16, 2015, the parties participated in a telephone hearing before the Hearing Officer on the first defense.¹ After a review of the record, the Hearing Officer finds that DiPietro has failed to establish a valid defense for his failure to pay the award. Accordingly, the Hearing Officer suspends DiPietro from associating with any member firm in any capacity.

II. Findings Of Fact And Conclusions Of Law

A. Background

DiPietro entered the securities industry in 1999. He associated in a registered capacity with First Allied Securities, Inc. from 2005 to 2008, and with Centaurus Financial Inc. from 2009 to May 2014. In May 2014, DiPietro voluntarily left Centaurus and associated with Transamerica Financial Advisors, Inc. DiPietro is currently associated with Transamerica.²

In addition to being a registered representative with retail clients, DiPietro is a certified public accountant with an active accounting practice. In 2014, DiPietro's income was more than \$250,000.³

In September 2012, one of DiPietro's clients filed a claim against First Allied. First Allied filed a third party claim against DiPietro asserting a claim for indemnification. In February 2014, a FINRA Dispute Resolution arbitration panel rendered an award in favor of First Allied and against DiPietro in the amount of \$157,506.79 plus interest.⁴ In February 2014, FINRA's Office of Dispute Resolution notified DiPietro that the arbitration panel had rendered the award and he was obligated to pay the award within 30 days unless a motion to vacate has been filed with a court of competent jurisdiction.⁵

¹ The hearing transcript is cited "Tr." followed by the page number. Regulatory Operations' exhibits are cited "CX-" followed by the exhibit number. Respondent's exhibits are cited "RX-" followed by the exhibit number. Stipulations are cited as "Stip." followed by the paragraph number of the stipulation.

² CX-24, at 2.

³ According to DiPietro's testimony, in 2014, his compensation from the member firms with which he was associated was approximately \$199,000 (\$151,000 from Centaurus and \$48,000 from Transamerica). Tr. 169-71. DiPietro's compensation from his accounting practice was \$30,000. Tr. 144. In addition, his compensation from various health plans for which he served as an agent was approximately \$14,500. Tr. 133; CX-29, at 7-11. Finally, his compensation from a bank for which he was a director was approximately \$12,000. Tr. 131.

⁴ Stip. ¶¶ 1, 2; CX-1; CX-2; CX-3.

⁵ CX-3; CX-4; Stip. ¶¶ 1, 2.

In March 2014, DiPietro filed a motion in the U.S. District Court, District of Arizona, to vacate the award.⁶ On October 1, 2014, the District Court issued an order denying DiPietro's motion to vacate the award and confirming the award.⁷ Two days later, DiPietro filed a Notice of Appeal of the order.⁸ The appeal is pending.

By letter dated October 2, 2014, First Allied notified FINRA that DiPietro had not paid the award and DiPietro's motion to vacate had been denied.⁹ On October 7, 2014, FINRA properly served on DiPietro a notice of suspension pursuant to FINRA Rule 9554.¹⁰

DiPietro then filed in the District Court a motion to stay the order confirming the arbitration award.¹¹ The District Court denied the motion.¹²

DiPietro has not paid any portion of the arbitration award.¹³ Thus, FINRA's Office of Dispute Resolution issued the notice of suspension pursuant to Rule 9554.¹⁴

B. Expedited Proceedings

FINRA's arbitration process is designed "to provide a mechanism for the speedy resolution of disputes among members, their employees, and the public."¹⁵ To ensure compliance with arbitration awards, FINRA's rules allow for expedited suspension proceedings against members, associated persons, and formerly associated persons for failing to abide by such awards.¹⁶

A respondent may assert certain limited defenses in an expedited suspension proceeding under FINRA Rule 9554. These include: (1) the award has been paid in full; (2) the parties have agreed to settle the action, and the respondent is not in default of the terms of the settlement

⁶ Stip. ¶ 3.

⁷ Stip. ¶ 4; CX-5.

⁸ Stip. ¶ 5.

⁹ CX-6.

¹⁰ Stip. ¶¶ 6, 7.

¹¹ Stip. ¶ 7.

¹² Stip. ¶ 10.

¹³ Stip. ¶ 13.

¹⁴ Stip. ¶ 6.

¹⁵ *Herbert Garrett Frey*, 53 S.E.C. 146, 153 (1997); *Eric M. Diehm*, 51 S.E.C. 938, 939 (1994).

¹⁶ FINRA By-Laws, Article VI, Section 3; FINRA Rule 9550, *et seq.* See also *Richard R. Pendleton*, 53 S.E.C. 675, 679 (1998) ("We 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 either to honor arbitration awards or to seek to have them set aside.").

agreement; (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 U.S. Bankruptcy Court, or a U.S. Bankruptcy Court has discharged the award.¹⁷ A respondent may also assert a *bona fide* inability to pay the arbitration award.¹⁸

A respondent in an expedited proceeding may not attack the merits of the underlying arbitration award.¹⁹ To permit such collateral attacks would subvert FINRA's procedures, which are designed to promote prompt payment of arbitration awards.²⁰

C. Inability To Pay Standard

A respondent bears the burden of establishing a *bona fide* inability to pay.²¹ The SEC has stated that, "[b]ecause the scope of [a respondent's] assets is peculiarly within [his] knowledge, [the respondent] should properly bear the burden of adducing evidence with respect to those assets."²² Furthermore, FINRA is entitled to make a searching inquiry into a respondent's assertion of inability to pay.²³

To establish an inability-to-pay defense, a respondent must show more than a current lack of funds on hand to pay the award in full.²⁴ "An inability-to-pay defense may be rejected if it appears that the respondent is capable of reducing his living expenses, has the ability to divert funds from other expenditures to pay the award, could borrow the funds, or could make some meaningful payment toward the settlement of the award from available assets or income, even if

¹⁷ FINRA By-Laws, Article VI, Section 3; NASD Notice to Members 00-55, 2000 NASD LEXIS 63, at *4; *Dep't of Enforcement v. Respondent*, FINRA Expedited Proceeding No. ARB060031, at 4-5 (Apr. 16, 2007), http://www.finra.org/sites/default/files/OHODecision/p038228_0_0.pdf.

¹⁸ *William J. Gallagher*, 56 S.E.C. 163, 169 (Mar. 14, 2003); OHO Redacted Decision ARB060031, at 5.

¹⁹ *Robert Tretiak*, 56 S.E.C. 209, 221 (2003) (citing *Herbert Garret Frey*, 53 S.E.C. 146, 150 (1997)).

²⁰ *Tretiak*, 56 S.E.C. at 221.

²¹ *Gallagher*, 56 S.E.C. at 169; *Frey*, 53 S.E.C. at 151.

²² *Bruce M. Zipper*, 51 S.E.C. 928, 931 (1993).

²³ *Tretiak*, 56 S.E.C. at 220.

²⁴ *Dep't of Enforcement v. Respondent*, FINRA Expedited Proceeding No. ARB010013, at 9 (Jan. 25, 2002), http://www.finra.org/sites/default/files/OHODecision/p006654_0_0.pdf.

he could not pay the full amount of the award.”²⁵ An inability-to-pay defense may be rejected when the evidence provided by a respondent is insufficient or incomplete.²⁶

D. Discussion

As set forth below, DiPietro’s decision not to pay the arbitration award, or at least a meaningful portion of the award, by obtaining funds based on his assets “hinges more on his own asset-allocation choices than on a genuine inability to pay.”²⁷

1. Accounting Practice

There is conflicting evidence regarding the value of DiPietro’s accounting practice, Michael DiPietro CPA, Inc.²⁸ However, all of the evidence indicates that the value was substantial. A loan application DiPietro submitted in 2011 estimated the value of the practice at \$1,750,000.²⁹ A schedule of information that DiPietro submitted to Regulatory Operations before the hearing estimated the value of the practice at \$500,000.³⁰ At the hearing, DiPietro estimated the value of his practice at between \$800,000 and \$1,100,000.³¹

DiPietro testified that accounting practices can be sold and purchasers typically make a down payment that is equivalent to a large percentage of the sale price.³² DiPietro did not identify any obstacle to his selling all or a portion of his accounting practice. Based on DiPietro’s estimate of the value of his practice and his testimony regarding the marketability of accounting practices, the Hearing Officer finds that DiPietro’s practice had a value sufficient to fund the payment of at least a meaningful portion of the arbitration award.

²⁵ *Dep’t of Enforcement v. Respondent*, FINRA Expedited Proceeding No. ARB010001, at 11 (July 26, 2001), http://www.finra.org/sites/default/files/OHODDecision/p006655_0_0.pdf; *Dep’t of Enforcement v. Respondent*, FINRA Expedited Proceeding No. ARB010032, at 3 (Mar. 15, 2002), http://www.finra.org/sites/default/files/OHODDecision/p006652_0_0.pdf (“To establish [the inability-to-pay defense], a respondent must demonstrate that he is unable to make some meaningful payment toward the award from available assets or income. . . . An inability-to-pay defense may be rejected if it appears that the respondent has either the ability to divert funds from other expenditures or the ability to borrow the funds.”).

²⁶ *Gallagher*, 56 S.E.C. at 169-170.

²⁷ OHO Redacted Decision ARB010032, at 5.

²⁸ Tr. 106.

²⁹ RX-19a-2, at 7; Tr. 114-15.

³⁰ CX-27; RX-10.

³¹ Tr. 106-07, 554.

³² Tr. 556-57.

2. Myrtle Avenue Property

In approximately 2009, DiPietro purchased the Myrtle Avenue property for \$2,750,000 from an individual named MP.³³ DiPietro told Regulatory Operations that “the monies for the purchase of the [Myrtle Avenue property] were provided by [FB] for my children as a legacy asset. It was initially not setup to the kids because [MP] whom [sic] was the seller of the property wouldn’t allow the children to have ownership until I paid off the note he held on the building.”³⁴ In addition to any money that FB might have provided, DiPietro assumed substantial personal liabilities in connection with financing the purchase.³⁵ In addition, through his accounting practice, DiPietro has covered the ongoing expense of owning the property.³⁶

The record contains several indications of the market value of the Myrtle Avenue property. The loan application that DiPietro submitted in 2011 estimated the value of the property at \$2,700,000.³⁷ As of June 2012, an appraiser for Wells Fargo estimated the value of the Myrtle Avenue property at \$1,750,000.³⁸ In the schedule of information that DiPietro submitted to Regulatory Operations before the hearing, he listed as one of his assets an interest in Myrtle Avenue Properties, LLC (the “limited liability company”) valued at \$276,000, based on the limited liability company owning the Myrtle Avenue property and the Myrtle Avenue property having a market value of \$2.2 million.³⁹ With respect to this valuation, DiPietro testified that \$2.2 million was a low estimate of value.⁴⁰ In June 2014, DiPietro, as president of the limited liability company, signed an agreement to list the Myrtle Avenue property for sale at \$2,900,000.⁴¹ DiPietro subsequently lowered the list price to \$2,600,000 and instructed the listing broker that the sales price can go as low as \$2.4 million.⁴² One prospective buyer offered to purchase the building for \$2.6 million but did not qualify for financing.⁴³

DiPietro owes a total of approximately \$1,407,875 in connection with the Myrtle Avenue property. This liability consists of two loans. DiPietro testified that, as of September 2014, he owed approximately \$1,257,875.41 on a commercial loan related to the Myrtle Avenue

³³ Tr. 117.

³⁴ CX-25, at 4.

³⁵ Tr. 111-12, 186, 263-64, 532, 540, 541, 569, 626-27, 699.

³⁶ Tr. 266-267.

³⁷ RX-19a-2, at 7; Tr. 563-67.

³⁸ CX-33, at 3-4.

³⁹ CX-27, at 1; Tr. 108-10.

⁴⁰ Tr. 109-10.

⁴¹ Tr. 190-92.

⁴² Tr. 190-91.

⁴³ Tr. 625.

property.⁴⁴ He testified that he was also liable on a \$150,000 loan relating to the Myrtle Avenue property.⁴⁵ Thus it appears that there is substantial equity in the Myrtle Avenue property.⁴⁶

The record is not clear regarding exactly what members of the DiPietro family own what interests in Myrtle Avenue Properties, LLC, and the Myrtle Avenue property. At one point in the hearing, DiPietro testified that he owned a 12% interest in the Myrtle Avenue property.⁴⁷ At another point, DiPietro testified that “my position is that the LLC owns the [Myrtle Avenue] property for the kids” and “one hundred percent of the equity is owned by the kids.”⁴⁸ It appears, however, that no document reflects that his children own 100% of the equity; when asked if any document reflects that his children own 100% of the equity, DiPietro responded that there is a trust for the children, but – for tax reasons – the Myrtle Avenue property was not put in the trust.⁴⁹ At another point in the hearing, DiPietro testified that he and his wife transferred to his children 100% of the Myrtle Avenue property and 88% of the limited liability company.⁵⁰ Gift tax returns that DiPietro and his wife filed in March 2014 indicate that on December 31, 2013, they transferred 88% of the “real property” located on Myrtle Avenue to their children.⁵¹ In November 2014, the limited liability company issued Schedule K-1s to DiPietro, his wife, and his children indicating that his children owned an 88% interest in the company.⁵² On the other hand, a 2009 operating agreement is the only governing document of the limited liability company that is in the record, and it shows DiPietro as owning an 87.5% voting interest in the company and 100% of the company’s profits and losses and MP owning a 12.5% voting interest in the company.⁵³ DiPietro testified that the operating agreement has not been amended since

⁴⁴ Tr. 532; RX-3d2, at 3.

⁴⁵ Tr. 698.

⁴⁶ DiPietro testified that he obtained some of the debt on his residence in order to refinance debt on the Myrtle Avenue property. Tr. 582. Debt on DiPietro’s residence is not relevant to the ability of DiPietro to obtain funds by selling the Myrtle Avenue property, even if he contracted the debt in connection with refinancing the Myrtle Avenue property. Accordingly, debt on DiPietro’s residence is not included in this discussion of the Myrtle Avenue property.

⁴⁷ Tr. 108-109.

⁴⁸ Tr. 108-109.

⁴⁹ Tr. 528-529. Although DiPietro told Regulatory Operations in advance of the hearing that MP, the person who sold the property, would not allow the DiPietro children to have ownership until DiPietro paid off a note MP held on the property. CX-25, at 4. DiPietro testified at the hearing that it was because of tax concerns that the Myrtle Avenue property was not put in a trust for his children.

⁵⁰ Tr. 621.

⁵¹ CX-34, at 6-7; Tr. 622.

⁵² CX-30, at 175-381.

⁵³ CX-28, at 573.

MP's interest in the building was paid off, explaining that he was waiting for the property to be sold before properly amending the operating agreement.⁵⁴

Despite the lack of clarity regarding the ownership of the Myrtle Avenue property and the limited liability company, DiPietro did not demonstrate that he is unable to raise funds based on the equity in the Myrtle Avenue property. If DiPietro and his wife own the limited liability company and the Myrtle Avenue property, then DiPietro failed to meet his burden of showing why he and his wife cannot sell the property. DiPietro's testimony indicated a reluctance to sell the Myrtle Avenue property at a "steep loss." Although this reluctance might be understandable, it does not excuse him from his obligation to timely pay the award.

Alternatively, if the DiPietro children own the company or the property, then DiPietro still failed to meet his burden of establishing that the Myrtle Avenue property is not a potential source of substantial funds. Especially in light of DiPietro's role in financing the acquisition of the building and in covering the ongoing costs of the building, he did not demonstrate that his children would be unwilling to sell the Myrtle Avenue property (or an interest in that property) in order to give or lend him money so that he could pay all, or a meaningful portion of, the award.⁵⁵ In fact, DiPietro testified that he and his children are "tight," his children love him and he believes that they would probably give him the money if he needed it.⁵⁶

3. Residence

DiPietro owns a residence in which he, his wife, and five of his children live.⁵⁷ In July 2012, an appraiser valued the residence at \$1,310,000.⁵⁸ DiPietro disputes this appraisal, asserting that the house is actually worth approximately \$850,000-950,000.⁵⁹ DiPietro did not identify any flaws either in the information on which the appraiser relied or in the methodology that the appraiser applied. In addition, DiPietro did not offer any evidence that the value of residential real estate in his neighborhood has declined since July 2012.

As of October 2014, DiPietro owed approximately \$969,000 on his residence. This debt consisted of a balance of approximately \$579,424 on a home mortgage and a balance of approximately \$389,534 on a home equity line of credit.⁶⁰ At the hearing, DiPietro testified he

⁵⁴ Tr. 620.

⁵⁵ *Dist. Bus. Conduct Comm. v. Bruce M. Zipper*, No. C07910138, 1994 NASD Discip. LEXIS 194, at *12 (NBCC Oct. 31, 1994) (in upholding the finding that respondent had not met his burden of showing inability to pay award, NAC considered possibility that he could have obtained money from his father).

⁵⁶ Tr. 319, 602, 624-25.

⁵⁷ Each of the five children is over the age of 18, and only one is in high school. Tr. 159, 305. DiPietro did not demonstrate that the four older children are unable to support themselves.

⁵⁸ CX- 33, at 1-2; Tr. 183.

⁵⁹ Tr. 584.

⁶⁰ CX-33, at 5, 11.

has since made additional draws against the home equity line of credit and the balance on the line is now \$400,000.⁶¹ Accordingly, it appears that DiPietro now owes approximately \$980,000 on his residence.

Based on the appraisal, the absence of evidence identifying any flaws in the appraisal or indicating that housing prices have declined since the date of the appraisal, and DiPietro's testimony regarding the debt on his residence, the Hearing Officer finds that there is substantial equity in the residence.

E. Other Defenses

The Hearing Officer rejects DiPietro's other two defenses. The District Court denied DiPietro's motions to vacate and for a stay. There is no need to defer this proceeding while his appeal is pending. As the SEC has noted in a decision rejecting a similar argument:

Article VI, Section 3 of the NASD's By-Laws authorizes the NASD to initiate proceedings to suspend registration for failing to pay an arbitration award if a "timely motion to vacate or modify such award has not been made pursuant to applicable law or where such motion has been denied." It does not require the NASD to delay its process until all appeals of that denial are exhausted. We conclude that the NASD's suspension determination was in accordance with its rules.⁶²

Similarly, Article VI, Section 3 of FINRA's By-Laws authorize FINRA to initiate proceedings to suspend the registration of a registered individual for not paying an arbitration award if 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," without requiring FINRA to delay its process until all appeals of that denial are exhausted.

III. Conclusion

The Hearing Officer finds, and the parties do not dispute, that Respondent Michael Albert DiPietro has failed to pay any portion of the arbitration award. At the hearing, DiPietro made comments exhibiting hostility to the award, explaining that he should not have to pay for a fraud that First Allied had committed against his client.⁶³ Based on these comments and the information in the record regarding the assets available to DiPietro, it appears that the issue is not DiPietro's inability to pay the arbitration award, but his refusal to pay an award that he finds unjust.

⁶¹ Tr. 700.

⁶² *Gallagher*, 56 S.E.C. at 171 (citations omitted).

⁶³ Tr. 374-75, 616.

The Hearing Officer finds that Respondent has failed to establish any of the defenses permitted by FINRA rules or case law, including a *bona fide* inability to pay.⁶⁴

Accordingly, pursuant to Article VI, Section 3 of FINRA's By-Laws and Rule 9559(n), Respondent Michael Albert DiPietro is suspended effective as of the date of issuance of this Decision from associating with any member firm in any capacity. The suspension shall continue until Respondent provides documentary evidence to FINRA showing that: (1) the arbitration award has been paid in full; (2) he has entered into a fully-executed, written settlement agreement with the claimant; (3) the arbitration award has been vacated or modified by a court of competent jurisdiction; or (4) he has filed a petition in a United States Bankruptcy Court and the arbitration award debt has been discharged by a United States Bankruptcy Court.

In addition, Respondent is ordered to pay FINRA costs of \$6,612.26, which includes an administrative fee of \$750, and hearing transcript costs of \$5,862.26. The costs shall become due upon the issuance of this Decision.

Kenneth Winer
Hearing Officer

⁶⁴ The Hearing Officer has considered all of the arguments made by the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.