In the Matter of the Arbitration Between:

Claimant
Rebecca Frederick

vs.

Respondent
Morgan Stanley Smith Barney, LLC

Nature of the Dispute: Customer vs. Member

REPRESENTATION OF PARTIES

For Rebecca Frederick: Mark S. Simms, Esq., Simms Law, P.A., Fort Lauderdale, Florida until on or about August 21, 2019. Thereafter, Claimant appeared pro se.


CASE INFORMATION

Statement of Claim filed on or about: July 24, 2018.
Rebecca Frederick signed the Submission Agreement: July 24, 2018.

Statement of Answer filed by Respondent on or about: September 12, 2018.
Morgan Stanley signed the Submission Agreement: September 12, 2018.

CASE SUMMARY

Claimant asserted the following causes of action: breach of fiduciary duty; negligence; negligent supervision; fraud; breach of contract; third party beneficiary breach of contract; and violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5 of the Securities and Exchange Commission. The causes of action relate to Claimant’s investment in a Pruco Life Insurance Company (Prudential) Premier Retirement B Series variable annuity.

Unless specifically admitted in the Statement of Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested: compensatory damages in the range of $50,000.00 to $100,000.00; punitive damages; interest; costs; and such other and further relief deemed just and proper by the Arbitrator.
In the Statement of Answer, Respondent requested: denial of Claimant’s claims; expungement of the claims from non-party Ryan Lurie’s (“Lurie”) Central Registration Depository (“CRD”) records; and, assessment of all costs and fees to Claimant.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges that he has read the pleadings and other materials filed by the parties.

On or about September 19, 2018, Respondent filed a Motion to Dismiss pursuant to Rule 12206 of the Code of Arbitration Procedure (“the Code”), in which Respondent asserted that more than six years elapsed since the events or occurrences giving rise to Claimant’s claims. In her response dated November 5, 2018, Claimant stated that Respondent’s misconduct continued beyond the initial recommendation to purchase the annuity at issue, and well within the six-year eligibility period espoused by FINRA Rule 12206, when the allocation of the annuity’s subaccounts gradually shifted from a primarily growth/equity portfolio to a largely fixed income portfolio. In its reply dated November 9, 2018, Respondent stated that Claimant’s attempt to extend the date of occurrence or event giving rise to the claim should fail because the asset allocation adjustments in Claimant’s annuity were: (1) permitted by the Prudential annuity contract that Claimant signed at the time of purchase; (2) clearly and consistently communicated to Claimant in the Prudential quarterly account statements; and (3) made by Prudential, not Respondent. On or about November 20, 2018, the Arbitrator heard oral arguments on Respondent’s Motion to Dismiss and thereafter issued an Order that denied the Motion.

On or about July 27, 2019, Claimant filed a Notice of Settlement and Withdrawal of Claims with Prejudice. Therefore, the Arbitrator made no determinations with respect to any of the relief requests contained in the Statement of Claim.

On or about September 12, 2019, Respondent filed a Petition for Expungement on behalf of non-party Lurie, to which no response was filed.

On or about September 16, 2019, Claimant filed notice with FINRA Office of Dispute Resolution that she did not intend to participate in the expungement hearing.

The Arbitrator conducted a recorded telephonic hearing on September 25, 2019 so the parties could present oral argument and evidence on Respondent’s Petition for Expungement.

Claimant did not participate in the expungement hearing and did not contest the request for expungement.

The Arbitrator reviewed the BrokerCheck® Report for non-party Lurie and the settlement documents, considered the amount of payments made to any party, and considered other relevant terms and conditions of the settlement. Specifically, the Arbitrator considered the testimony of Respondent that the amount of settlement was the result of a business decision in order to avoid the costs and uncertainty of litigation.
The Arbitrator noted that the settlement was not conditioned on Claimant not opposing the request for expungement. The Arbitrator also noted that non-party Lurie did not contribute to the settlement amount.

The Arbitrator noted that non-party Lurie did not previously file a claim requesting expungement of the same disclosure in the CRD.

In recommending expungement, the Arbitrator relied upon the following documentary or other evidence: Petition for Expungement; Claimant’s Statement of Claim; Respondent’s Answer to the Statement of Claim and Affirmative Defenses; Settlement Agreement; non-party Lurie’s BrokerCheck Report; and an Affirmation email issued by Respondent to Claimant advising her of her right to monitor and participate in the expungement hearing by, among other things, offering oral testimony, cross examining witnesses and introducing evidence.

AWARD

After considering the pleadings, the testimony and evidence presented at the recorded telephonic hearing, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. The Arbitrator recommends the expungement of all references to the above-captioned arbitration (Occurrence No. 1987300) from registration records maintained by the CRD for non-party Ryan Lurie (CRD# 5013463), with the understanding that, pursuant to Notice to Members 04-16, non-party Ryan Lurie must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to Rule 12805 of the Code, the Arbitrator has made the following Rule 2080 affirmative findings of fact:

The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; and

The claim, allegation, or information is false.

The Arbitrator has made the above Rule 2080 findings based on the following reasons:

Non-party Lurie’s recommendation to purchase a Prudential Ten Year Retirement Annuity was appropriate to meet Claimant’s stated need at the time of her investment. Claimant was 54 years old when she made the investment on December 10, 2010, and wanted to use the realized funds from the annuity for income during her retirement years, which she estimated would start approximately
12 years later. Claimant told non-party Lurie that she already had an approximate net worth of $1,000,000.00 with a total liquid net worth of $500,000.00.

Claimant sought an investment that would produce an annual cash flow ten years down the line. The annuity guaranteed that if Claimant made no withdrawals during the ten-year annuity period, she would then begin collecting 5% of the Protected Withdrawal Value on an annual basis for the rest of her life. The annuity, therefore, suitably met Claimant's investment objective in the year 2010.

Non-party Lurie ceased being Claimant's broker of record in March 2012. During the 15-month period that non-party Lurie was broker of record, Claimant not only received quarterly statements from Prudential, but she also monitored the account online as well. She never once complained to non-party Lurie or Prudential during that period that her investment was unsuitable for her. The Arbitrator therefore finds that the claim is false.

Since non-party Lurie ceased being Claimant’s broker of record in March 2012, the Arbitrator also finds that non-party Lurie could not have been involved in the alleged investment related sales practice violations from that time through 2018.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees
FINRA Office of Dispute Resolution assessed a filing fee* for each claim:

Initial Claim Filing Fee = $975.00

*The filing fee is made up of a non-refundable and a refundable portion.

Member Fees
Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge = $1,100.00
Member Process Fee = $2,250.00

Hearing Session Fees and Assessments
The Arbitrator has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s) that lasts four (4) hours or less. Fees associated with these proceedings are:

Three (3) pre-hearing sessions with the Arbitrator @ $450.00/session = $1,350.00
Pre-hearing conferences:
- November 12, 2018 1 session
- November 20, 2018 1 session
August 30, 2019  1 session

One (1) hearing session on expungement request @ $450.00/session  =$  450.00
Hearing Date: September 25, 2019  1 session

Total Hearing Session Fees =$1,800.00

The Arbitrator has assessed $225.00 of the hearing session fees to Claimant.

The Arbitrator has assessed $1,575.00 of the hearing session fees to Respondent.

All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.
I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument, which is my award.

Arbitrator's Signature

Monroe Mitchel

Monroe Mitchel
Sole Public Arbitrator

October 02, 2019

Date of Service (For FINRA Office of Dispute Resolution office use only)