

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 79798 / January 13, 2017

Admin. Proc. File No. 3-17752

In the Matter of the Application of

MICHAEL DAVID SCHWARTZ

For Review of Disciplinary Action Taken by

FINRA

Motion filed: December 27, 2016
Last brief received: January 4, 2017

ORDER DENYING STAY

Michael David Schwartz appeals from a FINRA decision suspending him from associating with any FINRA member firm for failing to pay an arbitration award.¹ Schwartz moves to stay that decision pending our consideration of his appeal. FINRA opposes the motion. For the reasons discussed below, Schwartz's motion is denied.

I. Background

Rule 9554 of FINRA's Code of Procedure allows for expedited suspension proceedings for a failure to pay an arbitration award. The rule requires FINRA staff to provide the associated person with written notice that a suspension will take effect within 21 days if the award is not satisfied. The associated person may request a hearing, and Schwartz did so here.

Following that hearing, a FINRA hearing officer issued a decision on December 1, 2016, finding that Schwartz had failed to pay an arbitration award (the "Award") that he owed to his former member firm, Barclays Capital Inc. As a result, the hearing officer suspended Schwartz from associating with any FINRA member firm. The decision stated that the suspension would continue until Schwartz "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

¹ *Regulatory Operations v. Schwartz*, Expedited Proceeding No. ARB160019, 2016 FINRA Discip. LEXIS 53 (FINRA Hearing Officer Dec. 1, 2016).

(3) he has filed a petition in the United States Bankruptcy Court, or a United States Bankruptcy Court has discharged the debt representing the Award.”

The hearing officer rejected Schwartz’s defense that although he had not paid the Award in full he had settled the matter with Barclays. The hearing officer found that the proffered settlement agreement concerned only certain of Schwartz’s assets that Barclays had located in a court proceeding to enforce the Award, and otherwise preserved Barclays’ right to full satisfaction of the Award. The hearing officer relied on two provisions of the settlement agreement: (i) Paragraph 6 stating that “[n]othing in this agreement shall prohibit Barclays from perfecting a lawful garnishment of any . . . future wages”; and (ii) Paragraph 7 stating that “nothing in the [agreement] shall be understood . . . as a waiver . . . of Barclays’ right to lawfully collect from [Schwartz’s] future income and/or assets he may acquire with a value in excess of \$30,000, until . . . its money judgment against [Schwartz] . . . is paid in full.” The hearing officer further relied on a contemporaneously signed court stipulation between Schwartz and Barclays, which stated: “Subject to the terms of the settlement agreement . . . , this stipulation shall not be construed as waiving any right of Barclays to full satisfaction of” the Award.

II. Analysis

In deciding whether to grant a stay, we consider: (i) the likelihood that the moving party will eventually succeed on the merits of the appeal; (ii) the likelihood that the moving party will suffer irreparable harm absent a stay; (iii) the likelihood that another party will suffer substantial harm as a result of a stay; and (iv) a stay’s impact on the public interest.² The moving party has the burden of establishing that a stay is warranted.³ Schwartz has failed to discharge this burden.

Our analysis of the merits of Schwartz’s appeal is necessarily preliminary because “[f]inal resolution must await the Commission’s determination” after full briefing.⁴ At this stage, however, there does not appear to be a strong likelihood of success. Schwartz disputes the hearing officer’s findings generally but provides no support for his conclusory contentions.

For example, Schwartz asserts “that FINRA should have immediately backed away from its intent to pursue his suspension following receipt of verification that he in fact entered into a fully negotiated settlement agreement with” Barclays. But he does not identify any flaws in the hearing officer’s conclusion, based on the terms of the settlement agreement and stipulation, that he had not settled the matter.⁵ Indeed, the hearing officer’s interpretation of those terms appears correct.

² *Michael T. Toland*, Exchange Act Release No. 71875, 2014 WL 1338145, at *2 (Apr. 4, 2014).

³ *Id.*

⁴ *Harry W. Hunt*, Exchange Act Release No. 68755, 2013 WL 325333, at *4 (Jan. 29, 2013).

⁵ Schwartz did not include the settlement agreement, stipulation, or other evidence in support of his motion, as required by our rules. *See* Commission Rule of Practice Rule 401(a),

Schwartz also challenges the “fairness” of both the Rule 9554 proceeding and the underlying arbitration proceeding by claiming that FINRA acted “as an outsourced agent” for Barclays in order to retaliate against him for reporting fraud as a “whistleblower.” According to Schwartz, Barclays brought the arbitration proceeding “to diminish” his whistleblower claims, and its outside counsel engaged in conduct “akin to jury tampering” leading up to the arbitration. These contentions appear unlikely to succeed because Schwartz fails to support them.⁶ Schwartz also “may not collaterally attack” the underlying arbitration award because, as we have long held, permitting that “tactic would subvert [FINRA’s] procedures, which are designed to promote prompt payment of arbitration awards.”⁷

Schwartz contends further that the Rule 9554 proceeding was unfair because FINRA (i) pursued it “in direct opposition to written guidance” from the Associate Director of its Office of Dispute Resolution, who assured him that no Rule 9554 proceeding would be instituted because Barclays had not requested one; (ii) colluded with Barclays’ outside counsel to bring the Rule 9554 proceeding and “to commit ethical violations in pursuit of an untimely filed motion to dismiss” the hearing; and (iii) violated its protocols by including Barclays as a party to the Rule 9554 proceeding. Again, Schwartz fails to provide details about these claims or evidence to support them. And the Commission’s “*de novo* review of the evidence cures whatever bias, if any, that may have existed” in the Rule 9554 proceeding below.⁸

(... *continued*)

17 C.F.R. § 201.401(a) (“A request for a stay . . . shall state the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. Portions of the record relevant to the relief sought, if available to the movant, shall be filed with the motion.”). FINRA provided a copy of the settlement agreement and stipulation with its opposition brief.

⁶ It is unclear if Schwartz made the same fairness arguments to the hearing officer as he makes here. The hearing officer only addressed—and rejected—Schwartz’s request “that action be taken against” Barclays’ outside counsel for breaching his attorney-client privilege to Barclays, and against FINRA counsel for “aiding and abetting the breach.” According to the hearing officer’s order denying that request, Schwartz argued that the breach happened when Barclays’ outside counsel stated, in support of a motion to dismiss the hearing, that Barclays did not “intend that the Settlement Agreement . . . be a settlement of . . . the Award.”

⁷ *Robert Tretiak*, Exchange Act Release No. 47534, 2003 WL 1339182, at *5 (March 19, 2003); *see also John G. Pearce*, Exchange Act Release No. 37217, 1996 WL 254675, at *2 (May 14, 1996) (rejecting applicant’s attack on “the fairness of the underlying arbitration proceeding” because permitting “a party dissatisfied with an arbitral award to attack it collaterally for legal flaws in a subsequent disciplinary proceeding” for failure to pay that award “would subvert the salutary objective that the NASD’s [arbitration] resolution seeks to promote”). The hearing officer noted in his decision that Schwartz did not seek to vacate the Award.

⁸ *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *19 (May 27, 2011), *aff’d*, 693 F.3d 251 (1st Cir. 2012); *Cleantech Innovations, Inc.*, Exchange Act Release No. 66064, 2011 WL 6811202, at *3 (Dec. 28, 2011) (finding argument that SRO was biased did
(*continued* ...)

In addition to failing to establish a likelihood of success on the merits, Schwartz has not shown, or even claimed, that he will suffer irreparable harm without a stay.⁹ Nor has Schwartz made any argument concerning the potential harm to third parties and the public interest. In light of FINRA's finding that Schwartz failed to pay an arbitration award, we find that allowing Schwartz to associate with a FINRA member firm during the pendency of this proceeding raises a risk of harm to the public;¹⁰ thus, a stay would not serve the public interest.

Accordingly, IT IS ORDERED that Schwartz's motion for a stay is denied.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Brent J. Fields
Secretary

(... *continued*)

not help applicant establish likelihood of success on the merits because the Commission's "*de novo* review of the evidence cures whatever bias, if any, that may have existed").

⁹ We note that any financial or reputational detriment to Schwartz from not staying FINRA's suspension does not rise to the level of irreparable harm warranting a stay. *See, e.g., Michael A. Rooms*, Admin. Proc. File No. 3-11621, 2004 SEC LEXIS 3158, at *5 (Nov. 14, 2004) (finding that financial loss and reputational damage to applicant from NASD bar "[d[id] not rise to the level of irreparable injury" warranting a stay).

¹⁰ *Cf. Order Approving Proposed Rule Change Relating to FINRA Rule 9554*, Exchange Act Release No. 62211, 2010 WL 2233764, at *2 (June 2, 2010) ("The ability to work in the securities industry carries with it . . . an obligation to comply with the federal securities laws, FINRA rules, and orders imposed by the disciplinary and arbitration processes. Allowing . . . associated persons that fail to pay arbitration awards to remain in the securities industry presents regulatory risks and is unfair to harmed customers."); *William J. Gallagher*, Exchange Act Release No. 47501, 2003 WL 1125378, at *4 (March 14, 2003) (finding that suspending applicant's NASD membership to induce him to pay an arbitration award "furthers the public interest and the protection of investors," and stating that the applicant "harmed the arbitration claimants by forcing them to wait for an extended period of time to satisfy the award and by requiring them to pursue legal avenues, such as garnishment procedures, to collect the amount they are due"); *Herbert Garrett Frey*, Exchange Act Release No. 39007, 1997 WL 539495, at *4 (Sept. 3, 1997) ("Failure to make prompt, good faith efforts to pay an arbitration award constitutes conduct inconsistent with just and equitable principles of trade.").