SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50D
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In the Matter of the Application of
CAROL HESS,

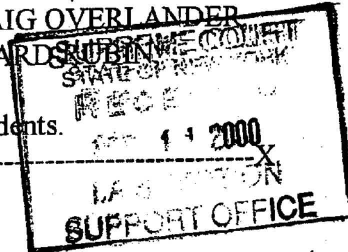
Petitioner,

DECISION & ORDER
Ind. No. 118861/97

-against-

BEAR STEARNS & CO., INC., CRAIG OVERLANDER,
LAWRENCE HOFFMAN and HOWARD RUBIN,

Respondents.



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DANIELS, J.:

By Order to Show Cause, petitioner seeks an order vacating the demand for arbitration served by respondents upon her on the grounds that no agreement between the parties provide for arbitration by the National Association of Securities Dealers, Inc. (NASD). Respondent cross-move for an order compelling petitioner to arbitrate third-party claims asserted against them by respondents, or in the alternative granting respondents the right to expedited limited document and deposition discovery of petitioner.

A group of multi-employer Taft-Hartley pension and health and welfare funds (Funds) commenced an arbitration proceeding against the respondents claiming, inter alia, that respondents breached their fiduciary duty and committed fraud in connection with the sale to the Funds of derivative securities. One of the Funds is Amalgamated Insurance Fund-Insurance (Insurance Fund). Petitioner is "Vice President, Investment & Money Management, Director, Investment & Banking" of Amalgamated Life Insurance Company, Inc. (ALICO) and is president of Alivest Incorporation (Alivest). She was also a portfolio manager for fixed-income

investments for the Funds and for ALICO Resources Corporation (ARC). Alivest was not the investment advisor for any of the Funds nor did it purchase any of the derivative securities which are the subject of the arbitration.

ALICO is owned by Alico Services Corporation (ASC) which is owned by the Insurance Fund. ASC owned the common stock of ARC and ARC owned one hundred percent of the common stock of Alivest. Both ALICO and Alivest were registered as investment advisors under the Investment Advisors Act of 1940. The Security Exchange Commission filings for these companies indicate that ALICO and Alivest executed indemnification agreements in favor of respondent Bear Stearns which were sign by Ira Schwartz, the senior vice president. The agreements stated, in pertinent part:

> We act as investment advisor for a number of clients (see attached list) with full discretionary power to invest on their behalf, including the execution of orders to buy and sell securities. *** [W]e have client authorization to direct orders in a discretionary manner for all accounts that we may place orders for through you. [W]e give you an order with respect to securities, we agree to indemnify and hold you harmless in the event that any such account should make claim against you, that your execution of any order on the basis of our instruction was without authority.

Respondents, in their joint answer to the arbitration claim, interposed third-party claims for contribution and indemnification against, inter alia, petitioner, ALICO, Alivest, ASC, and ARC alleging that they were responsible for the loss.

Respondents argue that in fairness petitioner must arbitrate as she made all the decision as to all transactions made by Bear Sterns, a NASD member. They claim that they were not permitted to execute any trade without petitioner's explicit instructions. Respondents argue that through petitioner's active participation in the securities industry, and in the Fund's transaction in

particular, she consented to participating in the arbitration.

Arbitration is a creature of contract and it is for the courts to determine whether the parties agreed to submit their disputes to arbitration (see, Matter of County of Rockland (Primiano Constr. Co.), 51 NY2d 1 [1980]). It is settled that a party will not be compelled to arbitrate absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes (see, Matter of Waldron (Goddess), 61 NY2d 181, 183 [1984]). "[A] nonsignatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency law'" (see, Thomson-CSF, S.A. v American Arbitration Assoc., 64 F3d 773, 776 [2d Cir. 1995], quoting McAllister Bros., Inc. v A & S Transp. Co.,621 F2d 519, 524 [2d Cir. 1980]).

Respondents rely primarily on two cases McMahan Securities Co. v Forum Capital Markets (35 F3d 82, 87 [2d Cir.1994]) and In re Salomon, Inc. (1994 WL 533595 [SDNY 1994]). In McMahan, the Second Circuit found that an investment management limited partnership, who sought to compel arbitration, was a "certain other" under section 8 [a] of the NASD Code (now section 10201 [a]). That section provides that "any dispute, claim, or controversy ...between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code." The Court noted that the NASD By-Laws do not define the term "certain others" (id at 87). Nevertheless, the Court found that "[a] person who is neither a member nor an associated person is nevertheless appropriately joined in the arbitration where the party plays an active role in the securities industry, is a signatory to a securities-industry arbitration agreement (or is an instrument of another party to the arbitration),

and has voluntarily participated in the particular events giving rise to the controversy underlying the arbitration (id. at 88). The Court reasoned that "if individuals could avoid the NASD arbitration requirements merely by affiliating with members only indirectly though a business entity such as a corporation or partnership, they could easily frustrate the NASD's firm policy of submitting industry disputes to binding arbitration" (id. at 87-88).

In In re Salomon, Inc. (supra), the plaintiffs were stockholders of Salomon, Inc. who were resisting arbitration. The District Court, relying on McMahon, held that Salomon, Inc. was bound by an arbitration agreement signed by its subsidiary Salomon Brothers finding that "Salomon Inc. is the sole parent of Salomon Brothers, and plaintiffs' claims on behalf of Salomon Inc. are largely predicated on the conduct of the business of its subsidiary and agent Salomon Brothers." The Court focused on the fact that the plaintiffs were relying on the relationship of Salomon, Inc. to Salomon Brothers to assert claims in a judicial forum, and therefore they could not now eschew that relationship to avoid arbitration.[1] Thus, a plaintiff cannot escape an arbitration agreement by suing the parent corporation when the claims are based on the parent's relationship to its subsidiary (see also, Heller v MC Fianacial Services Ltd., 1998 WL 190288 [SDNY 1998]; Vitzethum v Dominick & Dominick, Inc., 1996 WL 19062 [SDNY 1996]).

The petitioner cannot be compelled to arbitration under either McMahon or In re Salomon cases. She is the vice president of ALICO, an investment advisory firm in connection with the purchase of the derivative securities which are the subject of the arbitration. She was also the

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[1]It is interesting to note that although the Saloman matter was referred to the New York Stock Exchange (NYSE), the arbitral forum, NYSE declined to arbitrate the dispute, in part, because Salomon, Inc. had not consented to arbitration (see, In re Salomon Inc., 68 F3d 554 [2d Cir. 1995]).

portfolio manager for fixed-income investments for the Funds. Although in McMahon, an investment advisor limited partnership was found to play an active role in the security industry, it did not address the issue whether its officers would be similarly situated. The indemnification letter sent by Alico to respondent Bear Stearns indicate that Alico had discretionary power to invest on behalf of the Funds, there is no mention that petitioner, herself, had such power. Moreover, petitioner was not employed by the Funds. Accordingly, petitioner cannot be compelled to arbitrate the third-party claims asserted against her by respondents. Neither McMahon nor In re Saloman, Inc., change the basic rule that an agent, who acts on behalf of a disclosed principle, will not be individually bound absent explicit evidence of the agent's intention to bind himself or herself instead of or as well as the principal (see, Lerner v Amalgamated Clothing & Textile Workers Union, 938 F2d 2, 4 [2d Cir. 1991][New York law requires arbitration be stayed against president and chief executive officer who signed, on behalf of corporation, an agreement stating that he was individually bound, where there was no showing of his intent to be personally bound]; see also, Metamorphosis Construction Corp. v Glekel, 247 AD2d 231 [1st Dept. 1998]["The court properly stayed arbitration of the counterclaim against petitioner-corporation's president since he did not contract with respondent or agree to arbitration in his individual capacity]). There is no indication that the petitioner, herself, intended to be personally bound to arbitrate. Absent such an intention, there is "no legal principle that an employee-agent is individually bound by an arbitration agreement entered into by his employer-principal" (see, Matter of Application of CBS, Inc. v Snyder, 798 FS 1019, 1025 [NYSD 1992], aff'd 989 F2d 89 [2d Cir. 1993]).

Respondents also seek limited disclosure in the event that this court is unable to

determine, based on the present record, that petitioner is required to arbitrate. New York courts have permitted narrowly-tailored discovery where there is a showing of ample need (see, Benjamin Shapiro Realty Co. v Henson, 162 Misc2d 1, 9 [Civ. Ct., NY County 1994]). The court has broad discretion in granting or denying such disclosure requests (see, Matter of Grossman v McMahon, 261 AD2d 54 [3rd Dept. 1999]). The court finds that the discovery sought by respondents is unnecessary. Since the court determined that the parties did not make an agreement to arbitrate, that concludes the matter (see, Matter of We're Associates, 163 AD2d 393 [2d Dept. 1990]).

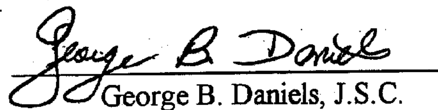
Accordingly, it is hereby

ORDERED that the petition is granted and the demand for arbitration served by respondents upon petitioner is vacated; and it is further

ORDERED that the cross-motion is denied in its entirety.

This opinion shall constitute the decision and order of the court.

DATED: April 10, 2000
New York, New York



George B. Daniels, J.S.C.