

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

KIRLIN SECURITIES, INC.,

Plaintff(s),

INDEX NO. 107696/98

- against –

SMITH BARNEY, INC., STEPHEN P. MURPHY,
and CHRISTOPHER CALLAGY,

Defendant(s).

HON. LUIS A. GONZALEZ:

Petitioner Kirlin Associates, Inc., (“Kirlin”) moves for an order from this Court, pursuant to CPLR § 7502(c), and pending a final confirmed award in the arbitration between it and Respondents Smith Barney, Inc., (“SM”), Stephen P. Murphy (“Murphy”) and Christopher Callagy (“Callagy”) before the National Association of Securities Dealers, Inc., (“NASD”):

1. enjoining Respondents and their agents, employees, officers, attorneys and representatives, from:

a) utilizing Kirlin's records, customer lists, customer leads and other proprietary information and trade secrets;

b) transferring or taking steps to transfer Kirlin customer accounts, other than customers which Respondents Murphy ant Callagy individually combined through social or family contact to SM, Respondent Murphy's and Respondent Callagy's new employer.

c) utilizing or furnishing to any third-party any of the documents misappropriated by Murphy and/or Callagy from Kirlin's premises or extracts or copies thereof; and

d) contacting in any way Kirlin's current customers, other than customers which Murphy and Callagy, as individuals, obtained through social or family contact; and

2 - directing:

a) Murphy and Callagy to list all documents taken by them from Kirlin;

b) Murphy and Callagy to specify where such documents and any copies or extracts thereof are now located; and

c) Murphy, Callagy and SM to return to Kirlin all documents, copies and/or extracts wrongfully removed from Kirlin's premises.

Respondents oppose the relief sought by Petitioner on the grounds that to grant Petitioner's request would preclude the Respondents from earning a livelihood and prevent public securities customer from freely transferring their securities accounts to the brokerage firm of their choice.

Additionally, the Respondents argue that Petitioner's application lacks factual and legal merit.

Petitioner Kirlin is a registered broker-dealer in securities and a member of the NASD. Respondent SM is a registered broker-dealer in securities and a member of the NASD.

Respondents Murphy and Callagy were employed by Kirlin from March 1992 until May 1, 1998 and March 1989 until May 1, 1998, respectively.

On May 1, 1998 both, Respondents left Kirlin's employ and joined Respondent SM. This proceeding ensued.

In order for the Court to issue the relief requested by Petitioner under CPLR §75(2)(c) the Court has to determine whether that is an arbitratable dispute or controversy, and whether absent an injunction Petitioner will suffer irreparable harm, i.e., whether the award to which the Petitioner may be entitled may be rendered ineffectual without such provisional relief.

Respondents Murphy and Callagy entered into agreements with Petitioner containing confidentiality and non-complete accords; the agreements preclude Murphy and Callagy from taking customers supplied to than by Kirlin at the tune they left.

Paragraph 17 of the Agreement provides:

Any and all disputes between Representative (Respondents) and Kirlin shall, at the sole opinion of Kirlin, be submitted to binding arbitration in New York City using the facilities of the National Association on of Securities Dealers, Inc., or the New York Stock Exchange, Inc, if applicable... Subject to the foregoing, any court action to enforce the terms of this Agreement may properly be brought and maintained on the Courts of the State of New York, County of New York and no party shall make objection thereto based on lack of personal jurisdiction or the convenience of the forum....

Based on the above, the Court concludes that there is an arbitrable dispute between Petitioner and Respondents.

Further, the Court concludes that unless the injunctive relief sought by Petitioner is granted by the time an award is issued by an NASD panel, assuming that the award is favorable to Petitioner, the award may be rendered ineffectual. By the time a decision is rendered, once again, assuming a favorable decision for Petitioner,

Petitioner may have suffered irreparable loss of good will, reputation and relationship with its clients.

Accordingly, Petitioner's application for injunctive relief is granted. Additionally, this Court directs that Murphy and Callagy list all documents taken by them from Kirlin; Murphy and Callagy specify where such documents and any copies or extracts thereof are now located; and, Murphy, Callagy and SM return to Kirlin all documents, copies and/or extracts wrongfully removed from Kirlin's premises.

Murphy and Callagy are not prohibited from servicing those accounts conceded by Petitioner at the hearing of this motion as being Murphy's and Callagy's accounts.

Finally, the Court notes that Respondents are not being precluded from pursuing a livelihood, since in addition to their own accounts that they brought with them to SM, they are also servicing any accounts which Respondent SM procure for them.

For the foregoing reasons, Petitioner's motion is granted.

The above constitutes the decision and order of the Court.

Dated: June 8, 1998

J.S.C.