5

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x

NICO RUTELLA, individually and on behalf of other persons similarly situated who were employed by NATIONAL SECURITIES CORPORATION, NATIONAL HOLDINGS CORPORATION and/or any other entities affiliated with or controlled by NATIONAL SECURITIES CORPORATION and/or NATIONAL HOLDINGS CORPORATION,

Plaintiffs,

-against-

NATIONAL SECURITIES CORPORATION, NATIONAL HOLDINGS CORPORATION and/or any other entities affiliated with or controlled by NATIONAL SECURITIES CORPORATION and/or NATIONAL HOLDINGS CORPORATION,

Defendants.

----------x

TRIAL/IAS PART: 12
NASSAU COUNTY

Index No: 601067-16
Motion Seq. Nos. 1 and 2
Submission Date: 8/5/16

Papers Read on these Motions:

Notice of Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Notice of Cross Motion, Affirmation in Support and Exhibits.....x
Affirmation in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Affirmation in Further Support and Exhibit.....x
Reply Memorandum in Further Support/Opposition.....x

This matter is before the court on 1) the motion by Defendants National Securities Corporation ("National Securities") and National Holdings Corporation ("National Holdings") ("Defendants") filed on April 11, 2016, and 2) the cross motion by Plaintiff Nico Rutella ("Plaintiff"), individually and on behalf of other persons similarly situated who were employed

by National Securities, National Holdings and/or any other entities affiliated with or controlled by National Securities and/or National Holdings filed on May 11, 2016, both of which were submitted on August 5, 2016, following oral argument before the Court. For the reasons set forth below, the Court grants Defendants' motion to the extent that the Court stays the above-captioned action ("Instant Action") pending the arbitration of the individual claims of Plaintiff Nico Rutella; and 2) denies Plaintiff's motion with leave to renew following a determination of the arbitration as directed herein.

BACKGROUND

A. Relief Sought

Defendants move for an Order 1) pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the Complaint against National Securities and/or compelling arbitration pursuant to CPLR §§ 2201 and 7503(a); and 2) pursuant to CPLR § 3211(a)(7), dismissing the Complaint against National Holdings with prejudice.

Plaintiff cross moves for an Order, pursuant to CPLR § 2004, granting Plaintiff's application to extend the date to file a motion for class certification until such time that a Preliminary Conference has been held, Defendants have filed their answer, and the Court has set dates 1) to complete pre-class certification discovery; and 2) for Plaintiffs to move for class certification.

B. The Parties' History

The parties' history is set forth in detail in the prior Order ("Prior Order") of the Court dated June 23, 2016 in which the Court directed that the motion and cross motion would be the subject of oral argument, which the Court conducted on July 15, 2016. The Court incorporates the Prior Order by reference as if set forth in full herein.

As noted in the Prior Order, the Class Action Complaint ("Complaint") (Ex. A to Buzzetta Aff. in Supp.) describes this action as follows:

> This action is brought pursuant to New York Labor Law Article 19 §§ 652, 653 and 12 New York Codes, Rules and Regulations (hereinafter referred to as "NYCRR") §§ 142-2.1 and 142-2.2 to recover unpaid minimum wages and overtime compensation owed to Plaintiff and all similarly situated persons who are presently or were formerly employed by [National Securities], [National Holdings] and/or any other entities affiliated with or controlled by [National Securities] and/or [National Holdings] ["Defendants"].
>
> Comp. at ¶ 1.

The Complaint alleges as follows:

Plaintiff Nico Rutella ("Rutella") was employed by Defendant [1] from approximately August of 2013 through February of 2016. Plaintiff alleges, upon information and belief, that National Securities and National Holdings are a "single integrated enterprise" (Comp. at ¶ 9) under New York Labor Law that employed and/or jointly employed Plaintiff and those similarly situated. National Securities is allegedly a wholly owned subsidiary of National Holdings and Defendants "share a common business purpose[], ownership, corporate officers, offices, and maintain common control, oversight and direction over the work performed by Plaintiff" (Comp. at ¶ 10).

The Class Allegations are that 1) this action is brought on behalf of Plaintiff and a putative class consisting of every other person who worked for Defendants selling or marketing financial products in any capacity within the State of New York at any time between February 2010 and the present; 2) the putative class is so numerous that joinder of all members is impracticable, the size of the putative class is believed to be in excess of 50 individuals, and the names of all potential members of the putative class are not known; 3) the questions of law and fact common to the putative class predominate over any questions affecting only individual members; 4) the claims of Plaintiff are typical of the claims of the putative class; 5) Plaintiff and his counsel will fairly and adequately protect the interests of the putative class; and 6) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

Plaintiff alleges that, beginning in or around February 2010, Defendants employed numerous individuals to perform tasks related to selling and/or marketing financial products. Plaintiff and, upon information and belief members of the putative class ("Putative Plaintiffs") were regularly required to perform work for Defendants without receiving minimum wages or overtime compensation for all hours worked. Rutella worked for Defendants [sic] from approximately August of 2013 to February of 2016. While working for Defendants, Rutella primarily made telephone calls to individuals in an attempt to sell financial services and products. Rutella typically worked approximately 55 hours per week consisting of work 1) from Monday through Friday, 8:00 a.m. to 6:00 p.m., and 2) on Saturday from 9:00 a.m. to 2:00 p.m.

During his employment, Rutella was not paid an hourly wage. Instead, Rutella was paid on commission. Rutella received a monthly payment of $1,800.00 from Defendants, but this

[1] The Complaint does not specify which Defendant employed Rutella (*see* Comp. at ¶ 6).

monthly payment was deducted from any commissions that he earned. As a result, Rutella routinely worked more than 40 hours each week, but did not receive overtime wages at time and one-half his regular rate of pay for hours in excess of 40 that he worked. In addition, Rutella did not receive minimum wages for all of the hours that he worked. While employed by Defendants, Rutella 1) "did not have any meaningful duties" (Comp. at ¶ 27), and was not responsible for decisions regarding the hiring, firing, demotion or promotion of employees; 2) did not exercise independent judgment and discretion on matters of significance; and 3) was subject to control by Defendants with respect to the means used to complete the tasks that he performed for Defendants. Plaintiff alleges, upon information and belief, that Defendants wilfully disregarded and purposefully evaded record keeping requirements or applicable New York law by failing to maintain proper and complete time sheets or payroll records. The Complaint contains two (2) causes of action: 1) Defendants violated New York Labor Law ("Labor Law") Article 19 § 663 and 12 NYCRR § 142-2.1 by wilfully failing to pay Plaintiff and other Putative Plaintiffs minimum wages for all hours worked; and 2) Defendants violated Labor Law Article 19 § 663 and 12 NYCRR § 142-2.2 by wilfully failing to pay overtime compensation to Plaintiff and other Putative Plaintiffs.

In support of Defendants' motion, Defendants provide a copy of the Registered Representative Independent Contractor Agreement ("Agreement") between Rutella and National Securities (Ex. B to Buzzetta Aff. in Supp.). The first paragraph of the Agreement states that it is entered into by and between National Securities, referred to as the "Company," and Rutella, referred to as the "Contractor." Section XXVI of the Agreement, titled "Arbitration" ("Arbitration Provision") provides as follows:

> Any controversy between the Company and the Contractor arising out of or relating to this Agreement or the breach thereof, shall be settled by FINRA arbitration. The award of the arbitrators shall be final, and judgment upon the award may be entered in any court, state or federal, having jurisdiction. All statutes of limitation that would apply if the controversy were resolved in court shall be applied and enforced by the arbitrators.

In opposition, Plaintiff provides the following exhibits (Exs. A-F to Newhouse Aff. in Opp.): 1) select relevant pages from a generic Form U-4, 2) a copy of Financial Industry Regulatory Authority ("FINRA") Rule 13204, 3) a copy of regulatory guidance from November 4, 1992, 57 FR 52659, Release No. 34-31371, 4) a copy of regulatory guidance from April 28, 1994, Release No. 34-33939, 59 FR 22032, 5) a copy of an October 22, 2012 decision by the Honorable Charles E. Ramos, Supreme Court, New York County in the matter titled

Tareq Abed on behalf of himself and all others similarly situated v. John Thomas Financial, Inc., d/b/a John Thomas Financial, and Anastasios Belesis, New York County Index Number 650341-11, and 6) a copy of FINRA's Regulatory Notice 12-28 from June 2012.

In reply, Defendants provide a copy of Rutella's Form U-4, dated August 20, 2013 with confidential personal information redacted pursuant to 22 NYCRR § 202.5(e) (Ex. A to Buzzetta Reply Aff.). Paragraph 5 on page 13 of that document reads as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the SROs [Self-Regulatory Organizations] indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction.

C. The Parties' Positions

As outlined in the Prior Order, the parties' positions are as follows:

Defendants submit that it is undisputed that Rutella and National Securities entered into the Agreement in which, pursuant to the Arbitration Provision, the parties agreed that any controversy between them arising out of or relating to the Agreement shall be settled by FINRA arbitration. In light of the Arbitration Provision, the parties must be compelled to litigate this case in an arbitration before FINRA. In addition, any objection to arbitration on the basis that this is a putative class action suit must be heard by FINRA. Defendants contend that Rutella is not permitted to circumvent the Agreement, which he signed, by filing a putative class action lawsuit. Defendants also argue that, to the extent that the Appellate Division, First Department has ruled differently (*see Abed v. John Thomas Financial Inc.*, 107 A.D.3d 578 (1st Dept. 2013); *Gomez v. Brill Sec.*, 95 A.D.3d 32 (1st Dept. 2012)), the Court should not be bound by those cases, both because they are not controlling and because the reasoning in those cases is flawed.

Defendants also contend that the Court should dismiss the Complaint as asserted against National Holdings because the allegations in the Complaint do not provide any basis for naming National Holdings as a defendant. The allegation that National Holdings is a holding company is insufficient to establish a basis for holding National Holdings liable. Moreover, because Plaintiff cannot allege that there was an employment relationship between Plaintiff and National Holdings, the Court should not grant Plaintiff leave to amend his allegations against National Holdings.

In opposition, Plaintiff submits that 1) in light of the fact that the FINRA rules, which are incorporated into the Agreement, include a FINRA rule stating that class action claims may not be arbitrated under the FINRA Code, class action claims are not arbitrable under FINRA's rules and the Court should not compel arbitration of Plaintiff's class action claims; and 2) as Plaintiff never agreed to arbitrate class action claims, he cannot be compelled to do so.

In reply, Defendants submit that 1) the Agreement "clearly, explicitly, and unequivocally" provides that any controversy between Rutella and NSC must be arbitrated (Ds' Reply Memo. of Law at p. 3) and that Rutella, a "sophisticated stockbroker duly qualified and registered *by* FINRA" (*id.*; emphasis in original) is now attempting to circumvent the Agreement that he executed; 2) a class action is a procedure, not a cause of action, and Rutella has no substantive right to bring a class action; and 3) the Complaint is a "ruse" to avoid arbitration (Ds' Reply Memo. of Law at p. 6), as evidenced by Rutella's concession, in his cross motion, that he "lacks sufficient facts to determine precisely the nature of the class, commonality, typicality, and other questions necessary to a motion for class certification (Newhouse Aff. in Supp. at ¶ 11).

Plaintiff cross moves for an Order extending the time to move for class certification to allow time for the Court to render a decision on Defendants' motion to dismiss and compel arbitration, and to allow time for Plaintiff to conduct pre-class certification discovery. Defendants oppose the cross motion submitting that Rutella has no good faith basis for filing the Complaint as a class action, and did so in an effort to evade the arbitration to which he agreed.

RULING OF THE COURT

A. Arbitration

It is firmly established that the public policy of New York State favors and encourages arbitration and alternative dispute resolutions. *Westinghouse Electric Corp. v. New York* City *Transit Authority*, 82 N.Y.2d 47, 53 (1993), citing *Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co.*, 37 N.Y.2d 91, 95 (1975).

Generally, it is for the courts to make the initial determination whether a particular dispute is arbitrable, that is whether the parties have agreed to arbitrate the particular dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d 91, 95 (1975) quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960). On a motion to compel or stay arbitration, the court must determine, in the first instance, whether the parties made a valid agreement to arbitrate. *Brown v. Bussey*, 245 A.D.2d 255 (2d Dept.

1997). Once it is determined that the parties have agreed to arbitrate the subject matter in dispute, the court's role has ended and it may not address the merits of the particular claims. *Brown v. Bussey*, 245 A.D.2d at 256, quoting *Dazco Heating & Air Conditioning Corp. v. C.B.C. Indus.*, 225 A.D.2d 578 (2d Dept. 1996).

Gomez v. Brill Securities, Inc. ("*Gomez*"), 95 A.D.3d 32 (1st Dept. 2012), on which Plaintiff relies in support of his motion, involved a class action suit seeking declaratory relief and monetary damages for a violation of 12 NYCRR 142-2.2 and Labor Law §§ 191(1)(c), 193 and 198-b. The plaintiffs alleged that they, along with all members of the putative class, were brokers employed by defendant Brill Securities, Inc., a full-service broker-dealer offering a comprehensive range of financial and wealth management services for retail investors. The plaintiffs alleged that, while so employed, 1) despite working in excess of 40 hours per week, they were not paid the requisite overtime wages, in violation of 12 NYCRR 142-2.2; 2) the defendants made impermissible wage deductions from their earned wages/commissions, in violation of Labor Law § 193; 3) the defendants made illegal wage deductions from their wages/commissions, in violation of Labor Law § 198-b; and 3) the defendants failed to pay them their wages/commissions as agreed, in violation of Labor Law § 191. *Gomez v. Brill Securities, Inc.*, 95 A.D.3d at 34.

In *Gomez*, the plaintiffs, registered representatives in the securities industry, were required to, and did, execute a Uniform Application for Securities Industry Registration or Transfer (Form U-4). Pursuant to Section 15A(5) of Form U-4, the plaintiffs "agree[d] to arbitrate any dispute, claim or controversy that may arise between me and my firm...that is required to be arbitrated under the rules...of [FINRA]." 95 A.D.3d at 34. FINRA Manual rule 13204(d) prohibits arbitration of class action claims and prohibits enforcement of "any arbitration agreement against a member of a...putative class action with respect to any claim that is the subject of the...class action" until certain conditions, inapplicable to the facts in *Gomez*, are met. 95 A.D.3d at 34. [2]

The First Department, in *Gomez*, concluded that as the agreement to arbitrate, by its terms, clearly precluded arbitration when arbitrable claims were brought as a class action, the

[2] The First Department, in *Gomez*, described a related federal action but concluded that it had no *res judicata* effect on the action before it. 95 A.D.3d at 34-36.

plaintiffs could not be required to arbitrate their class action claims. 95 A.D.3d at 36. The First Department held that the agreement between the parties made it clear that arbitration was governed by the rules promulgated by FINRA, and cited FINRA Manual rule 13204(d). Thus, the First Department concluded, based on the parties' own agreement, which incorporated by reference FINRA Manual rule 13204(d), arbitration of the class action suit before it was barred. 95 A.D.3d at 37. The First Department held that, in light of the agreement precluding arbitration if otherwise arbitrable claims were brought via class action, until such time as class certification was denied, the court could not compel arbitration. 95 A.D.3d at 39. Justice Sweeney dissented based on his conclusion that it was "abundantly clear from the record that plaintiffs are attempting, as they did in their federal court action, to improperly utilize the vehicle of a class action to avoid their written agreement to arbitrate their claims." 95 A.D.3d at 40.

In *Abed v. John Thomas Financial, Inc.* ("*Abed*"), 107 A.D.3d 578 (1st Dept. 2013), on which Plaintiff also relies, the arbitration agreement in the Form U4 signed by the plaintiff provided for the arbitration of disputes "under the rules, constitutions, or by-laws of [FINRA]." 107 A.D.3d at 578. Accordingly, the First Department held, under the plain terms of the agreement, "arbitration shall be governed by the rules promulgated by FINRA," including former FINRA rule 13204(d) (now [a][1]) which prohibits arbitration of class action claims. *Abed*, 107 A.D.3d at 578, quoting *Gomez*, 95 A.D.3d at 37.

The First Department, in *Abed*, reversed the lower court's order granting defendants' motion to stay the class action pending arbitration and to compel arbitration. 107 A.D.3d at 578. The First Department noted that the arbitration clause in the employment agreement between the parties provided that employment disputes shall be resolved in an arbitration "under the auspices of FINRA." *Id.* at 578-79. The First Department held that, contrary to the lower's court's conclusion, the employment agreement, like the Form U4, contemplated that arbitration shall be governed by the rules promulgated by FINRA, including FINRA rule 13204. *Id.* at 579. The First Department observed that a party cannot agree to arbitrate "under the auspices of FINRA" without agreeing to abide by FINRA's arbitration rules and the limits therein, at least not in the absence of an express agreement stating otherwise. *Id.*, citing *Macquarie Holdings [USA] Inc. v. Song*, 82 A.D.3d 566, 567 (1st Dept. 2011). Moreover, as the Form U4 and the employment agreement were executed at substantially the same time and related to the same subject matter,

they would be regarded as contemporaneous writings that must be read together as one. 107 A.D.3d at 579 (citation omitted). Accordingly, the First Department concluded, both the Form U4 and the employment agreement incorporated the FINRA rule prohibiting arbitration of class action claims like the ones at issue before it. *Id.*

B. Application of these Principles to the Instant Action

The Court grants Defendants' motion to the extent that the Court stays the Instant Action pending the arbitration of the individual claims of Plaintiff Nico Rutella; and 2) denies Plaintiff's motion with leave to renew following a determination of the arbitration as directed herein. The Court is mindful of the holdings in *Abed* and *Gomez*, but also mindful of the policy favoring arbitration, and the Arbitration Provision in the Instant Action which clearly reflects the parties' intent to arbitrate the dispute raised in the Complaint. The Court is of the view that the holdings in *Abed* and *Gomez* do not prohibit the resolution fashioned by the Court herein.

ENTER

DATED: Mineola, NY
September 20, 2016

HON. TIMOTHY S. DRISCOLL

J.S.C.