

14-2767

SANTOS-BUCH v. FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Thurgood Marshall United
3 States Courthouse, 40 Foley Square, in the City of New York,
4 on the 30th day of January, two thousand fifteen.

5
6 **PRESENT: DENNIS JACOBS,**
7 **GUIDO CALABRESI,**
8 **RICHARD C. WESLEY,**
9 **Circuit Judges.**

10
11 -----X
12 **ALAN SANTOS-BUCH,**
13 **Plaintiff-Appellant,**

14
15 **-v.-** **14-2767-cv**

16
17 **FINANCIAL INDUSTRY REGULATORY**
18 **AUTHORITY, INC.,**
19 **Defendant-Appellee.**

20 -----X

21
22 **FOR APPELLANT:** Eric W. Berry, Berry Law PLLC,
23 New York, New York.
24
25 Paul R. McMenamin, McMenamin Law
26 Group, New York, New York.
27

1 **FOR APPELLEE:**

Terri L. Reicher, Angela Pegram
Saffoe, Financial Industry
Regulatory Authority, Inc.,
Washington, District of
Columbia.

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7 Appeal from a judgment of the United States District
8 Court for the Southern District of New York (Scheidlin,
9 J.).

10
11 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
12 **AND DECREED** that the judgment of the district court be
13 **AFFIRMED.**

14
15 Alan Santos-Buch appeals from the judgment of the
16 United States District Court for the Southern District of
17 New York (Scheidlin, J.), granting defendant-appellee's
18 motion to dismiss for lack of subject matter jurisdiction
19 and for failure to state a claim. We assume the parties'
20 familiarity with the underlying facts, the procedural
21 history, and the issues presented for review.

22
23 Santos-Buch worked until 1996 as a stock broker
24 employed by firms that were members of the National
25 Association of Securities Dealers, Inc. ("NASD"). NASD was
26 a self-regulatory organization ("SRO") under the Securities
27 and Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C.
28 § 78s(a), and the Maloney Act of 1938, id. § 78o-3. NASD
29 delegated regulatory responsibility to a subsidiary, NASD
30 Regulation, Inc. ("NASDR").

31
32 In 1997, NASDR began disciplinary proceedings against
33 Santos-Buch for an alleged 1994 violation of NASDR's fair
34 practice rules. Santos-Buch and NASDR resolved the
35 disciplinary proceedings through a settlement contract
36 called an Acceptance, Waiver and Consent ("AWC"). In the
37 AWC, Santos-Buch agreed to a fine of \$10,000 and a 30-day
38 suspension. The AWC also contemplated public notice of the
39 disciplinary action, by providing that "NASDR will make such
40 public announcement concerning this agreement and the
41 subject matter thereof as NASDR may deem appropriate"--a
42 provision limited only by NASD rules. (AWC ¶ 4.) Santos-
43 Buch argues that NASD rules at the time of the AWC limited
44 such public notice to a one-time publication of the
45 disciplinary action.

1 In 2007, the Financial Industry Regulatory Authority,
2 Inc. ("FINRA") succeeded NASD and NASDR, and assumed their
3 self-regulatory functions. Santos-Buch alleges that FINRA
4 currently maintains two internet databases that disclose his
5 disciplinary history to the public: one that includes his
6 disciplinary records pursuant to 1999 and 2009 amendments to
7 NASD and FINRA rules ("BrokerCheck"), and the other, without
8 authorization by any rule at all ("Web File").
9

10 Santos-Buch alleges causes of action for: publishing
11 the 1997 disciplinary records in an internet database
12 without authorization from the FINRA Rules, violation of due
13 process under the Fifth Amendment, violation of the
14 constitutional prohibition against ex post facto laws,
15 invasion of privacy in violation of Washington law, breach
16 of contract, and failure to provide "a fair procedure for
17 the disciplining of members and persons associated with
18 members" of SROs as required by 15 U.S.C. § 78o-3(b)(8).
19 The claims variously seek monetary damages, declaratory
20 relief, and injunctions.
21

22 The district court granted FINRA's motion to dismiss
23 pursuant to Federal Rule of Civil Procedure 12(b)(1) and
24 12(b)(6), on the grounds that: (1) the claims for
25 declaratory and injunctive relief were subject to the
26 (unfulfilled) requirement that Santos-Buch exhaust his
27 administrative remedies before filing a civil action, and
28 (2) the claims for monetary damages were barred by FINRA's
29 immunity to suits for damages in its regulatory capacity.
30 On an appeal from dismissal for lack of subject matter
31 jurisdiction, this Court reviews factual findings for clear
32 error and legal conclusions de novo. Lockett v. Bure, 290
33 F.3d 493, 496 (2d Cir. 2002). The Court reviews de novo the
34 district court's dismissal for failure to state a claim.
35 MFS Secs. Corp. v. New York Stock Exch., Inc., 277 F.3d 613,
36 617 (2d Cir. 2002).
37

38 The doctrine of exhaustion requires a would-be
39 plaintiff to seek available administrative remedies before
40 seeking judicial relief "in cases where the relevant statute
41 provides that certain administrative procedures shall be
42 exclusive." McKart v. United States, 395 U.S. 185, 193
43 (1969). Challenges to SROs' rules must proceed exclusively
44 before the Securities and Exchange Commission ("SEC"), in
45 accordance with "the comprehensive review procedure
46 established by the Exchange Act." Barbara v. New York Stock
47 Exch., Inc., 99 F.3d 49, 57 (2d Cir. 1996) (internal

1 quotation marks omitted). Specifically, no such challenge
2 "may be considered by the court unless it was urged before
3 the [SEC] or there was reasonable ground for failure to do
4 so." 15 U.S.C. § 78y(c)(1). Exhaustion is not required,
5 however, when an agency lacks the power to grant effective
6 relief, including when the agency would be called upon to
7 resolve a substantial constitutional issue. See McCarthy v.
8 Madigan, 503 U.S. 140, 147 (1992).

9
10 The exhaustion requirement bars Santos-Buch's claims
11 for injunctive and declaratory relief with regard to
12 publication of his disciplinary action via BrokerCheck. See
13 Barbara, 99 F.3d at 56-57. Since this case involves no
14 state action, there is no substantial constitutional issue.
15 As a private actor whose conduct in this case is not "fairly
16 attributable" to the government, FINRA could not have
17 violated Santos-Buch's due process rights or the Ex Post
18 Facto Clause. See D.L. Cromwell Invs., Inc. v. NASD
19 Regulation, Inc., 279 F.3d 155, 161-62 (2d Cir. 2002);
20 Desiderio v. Nat'l Ass'n of Secs. Dealers, Inc., 191 F.3d
21 198, 206-07 (2d Cir. 1999); cf. O'Neil v. Vermont, 144 U.S.
22 323, 364 (1892) (Field, J., dissenting) (noting that the Ex
23 Post Facto Clause is an "inhibition against state action").
24

25 While Santos-Buch's claims for injunctive and
26 declaratory relief for publication of his disciplinary
27 action via Web File are not subject to the Exchange Act's
28 exhaustion requirement because they challenge neither the
29 disciplinary action taken by FINRA, nor a FINRA rule, they
30 were also properly dismissed. Santos-Buch alleges that the
31 Web File publication violates his substantive due process
32 rights, but he fails to state a due process claim because
33 FINRA is not a state actor that can be held to
34 constitutional standards. To the extent that his claims for
35 injunctive and declaratory relief rest instead on FINRA's
36 failure to comply with its own rules, as is required by
37 statute, see 15 U.S.C. § 78s(g)(1) ("Every [SRO] shall
38 comply with . . . its own rules."), we have held that there
39 is no implied private right of action to enforce this
40 statutory obligation, see Desiderio, 191 F.3d at 208.
41

42 Santos-Buch's claims for monetary relief are foreclosed
43 by immunity: "an SRO and its officers are entitled to
44 absolute immunity from private damages suits in connection
45 with the discharge of their regulatory responsibilities."
46 Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Secs.
47 Dealers, Inc., 637 F.3d 112, 115 (2d Cir. 2011), cert.

1 denied, 132 S. Ct. 1093 (2012). Because all of the relevant
2 conduct by FINRA (and by NASD and NASDR before it) was
3 undertaken in furtherance of its regulatory responsibilities
4 as an SRO, it is immune from Santos-Buch's claims for
5 damages.
6

7 For the foregoing reasons, and finding no merit in
8 Santos-Buch's other arguments, we hereby **AFFIRM** the judgment
9 of the district court.

10
11 FOR THE COURT:
12 CATHERINE O'HAGAN WOLFE, CLERK
13


