

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

PRESENT: ANIL C. SINGH  
Justice

PART 45

Index Number : 653975/2016

JOHN TARPINIAN

VS.

SEQUENCE NUMBER : 001

STAY ARBITRATION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion *by petitioner for a permanent stay of arbitration is denied for the reasons stated on the record of this date.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/24/16

*ANIL C. SINGH*, J.S.C.  
ANIL C. SINGH

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: TRIAL TERM PART 45

----- X  
JOHN TARPINIAN,

Plaintiff,

- against -



Defendant.

----- X  
Index No. 653975/2016

August 24, 2016  
60 Centre Street  
New York, New York 10007

B E F O R E: THE HONORABLE ANIL C. SINGH, Justice.

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Terry-Ann Volberg, CSR, CRR  
Official Court Reporter

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## Proceedings

1  
2 THE COURT: Good afternoon, counsel.

3 MR. RICHAN: Good afternoon, your Honor.

4 MR. SPARER: Good afternoon.

5 MR. MEISSNER: Good afternoon.

6 THE COURT: In this special proceeding the  
7 petitioner, John Tarpinian, moves by order to show  
8 cause for a permanent stay of arbitration with respect  
9 to claims raised by the respondent, [REDACTED]  
10 in an arbitration pending before FINRA. [REDACTED] opposes  
11 the application.

12 So I will hear first from the petitioner.

13 MR. RICHAN: Thank you, your Honor.

14 Do you wish that I remain seated?

15 THE COURT: I have no preference.

16 MR. RICHAN: I will stand.

17 Good afternoon, your Honor.

18 This is the mysterious case of the plaintiff  
19 who doesn't want her day in court. Her own --

20 THE COURT: She wants her day in  
21 arbitration.

22 MR. RICHAN: A very different forum, your  
23 Honor. Her own preference is not notwithstanding this  
24 matter, this dispute, does not belong in FINRA  
25 arbitration.

26 To either the alleged conduct arose out of  
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## Proceedings

1  
2 the business of the parties, or did not arise out of  
3 the business of the parties, or if it did, it falls  
4 under the sexual harassment federal and state statutes,  
5 and all you have to do --

6 THE COURT: Before we get to that, isn't  
7 there a claim for intentional infliction of emotional  
8 distress?

9 MR. RICHAN: Yes.

10 THE COURT: Why would that necessarily fall  
11 within the sexual harassment?

12 MR. RICHAN: Because the cases hold that it  
13 is subsumed in the statutes because the statute  
14 provides for that relief.

15 THE COURT: So the threshold issue here, in  
16 my view, and when we discussed this some weeks ago as  
17 to whether or not your client participated in the  
18 arbitration, you have, as I recall, 45 days from the  
19 time the petition was filed to serve an answer. So  
20 more than enough time to come into court to seek a  
21 permanent stay of arbitration pursuant to CPLR 7503.

22 You chose not to do that. Why?

23 MR. RICHAN: Well, first of all, let me  
24 correct the time line. The statement of claim was  
25 filed on April 8th. We obtained a letter from FINRA  
26 claiming that they served it on my client on

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## Proceedings

1  
2 April 15th. As a matter of fact, my client was not  
3 served with the statement of claim. An acquaintance of  
4 him saw a posting on Mr. Meissner's website boasting  
5 about his filing of this FINRA arbitration against my  
6 client, and my client got wind of that, and my client  
7 hired counsel in Boston, and counsel in Boston  
8 contacted FINRA, and it wasn't until May 4th or 5th  
9 that we actually got the statement of claim. So the  
10 seven week time line is not accurate.

11 THE COURT: Fair enough.

12 Accepting that, you still have an option,  
13 right? You have two options. One, you could  
14 proceed -- three options -- one, you could proceed to  
15 arbitration; two, could you contest whether or not the  
16 issue was arbitrable by bringing a special proceeding  
17 before the Supreme Court or as you did in your case,  
18 you contested whether or not the issues were subject to  
19 arbitration before the director of FINRA.

20 MR. RICHAN: The reason for that, your  
21 Honor, is because the director of FINRA, he doesn't  
22 hear the merits of the case, but he is authorized to  
23 deny FINRA jurisdiction.

24 THE COURT: If he believes that the suit  
25 shouldn't be arbitrated.

26 MR. RICHAN: That's correct.

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## Proceedings

1  
2 THE COURT: So why then when he chose to  
3 make that determination and the director denied your  
4 application should I give you a second bite of the  
5 apple?

6 MR. RICHAN: Because there is no evidence,  
7 there is no record before the director what he  
8 considered, whether it's just a default that we accept  
9 anything by --

10 THE COURT: We know what he considered. You  
11 made a motion. Your adversary opposed and you replied.  
12 So that's the record. Your position was that the  
13 conduct had nothing to do with business activities.  
14 Your adversary's response was, well, that's not  
15 accurate, Mr. Tarpinian was a owner or partner of  
16 Newport Coast Securities, and that the based on certain  
17 overrides, Tarpinian received, I think, 30 percent of  
18 commissions earned by [REDACTED] Presumably the  
19 arbitrator considered all of that in making the  
20 determination that the issue was subject to  
21 arbitration.

22 MR. RICHAN: We have no idea, your Honor,  
23 what the director --

24 THE COURT: But by going or making the  
25 application before the arbitrator didn't you, didn't  
26 you put your client at risk that an arbitrator would

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## Proceedings

1  
2 say yes or no as opposed to coming to court where there  
3 would be a full record as we are making now?

4 MR. RICHAN: That's a distinction -- we did  
5 not put it before an arbitration panel or arbitrator,  
6 we put it before the director. The director makes  
7 administrative-based decisions.

8 THE COURT: So your position is that because  
9 it's the director, it's technically not part of the  
10 arbitration process?

11 MR. RICHAN: We did not participate in the  
12 arbitration the way the courts have ruled what  
13 participation is. Specifically, including the cases  
14 cited by my adversary, the courts repeatedly say if you  
15 continually reserve your rights and protest  
16 jurisdiction, they allow all kind of things, ranking of  
17 arbitrators, filing of an answer --

18 THE COURT: So the distinction you are  
19 making is what, is that because we made an application  
20 to the director, we didn't participate in arbitration,  
21 presumably if you made it to the panel, then it would  
22 be a different result?

23 MR. RICHAN: My, and I think it's a correct  
24 read of all of the cases, the concern over  
25 participation is that you don't want parties monkeying  
26 around, arbitrating between arbitration and court on

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## Proceedings

1  
2 the merits. That's not what we are doing. We don't  
3 want to present the merits to the panel, and we have  
4 not. All we want to do is get this in the proper  
5 forum.

6 THE COURT: Is that really accurate? Take a  
7 look at your answer. Tell me whether or not your  
8 answer contains any affirmative defenses on the merits.

9 MR. RICHAN: It contains affirmative  
10 defenses, you are correct.

11 THE COURT: So then is that an accurate  
12 statement that you are not attempting to get a decision  
13 on arbitration on the merits?

14 MR. RICHAN: Let's put it this way, if this  
15 was truly an answer on the merits, we would have said a  
16 heck a of a lot more than is in the answer. That  
17 answer is barebones. It says more about reserving or  
18 as much about reserving rights as it does about  
19 anything substantive on the merits.

20 I also want to point out to your Honor, there  
21 is no real prejudice to the respondent for us having  
22 gone to the director first. We get two bites of the  
23 apple, so does he. The two bites of the apple in the  
24 cases that he cites, that's about the merits. That's  
25 about people participating for eight months, nine  
26 months, in arbitration, then saying, oh, on the eve of

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## Proceedings

1  
2 hearing, literally that's one of the cases, on the eve  
3 of the hearing, after they set hearing dates, agreed to  
4 hearing dates, they so, oh, we want to go to  
5 arbitration. That's not what we did. We clearly  
6 reserved our rights and emphatically from day one.

7 And I think the court also has to look at the  
8 underlying merits, and that is that this clearly does  
9 not belong -- FINRA arbitrations are supposed to hear a  
10 battery of cases. I mean, to the extent this does  
11 arise out of the business, his allegation -- her  
12 allegations and characterization of the allegations,  
13 they track the federal statutes. It's exactly what  
14 FINRA was talking about, this kind of case. We don't  
15 want these kind of cases.

16 THE COURT: Okay. Go on. Anything else?

17 MR. RICHAN: Not for now, thank you.

18 THE COURT: Counsel.

19 MR. MEISSNER: Thank you, your Honor.

20 I want to thank the court for accommodating  
21 my tentative disability.

22 THE COURT: Hopefully it's for a short time.  
23 For a lawyer not being able to hear, that's a bad  
24 thing.

25 MR. RICHAN: Or speak.

26 MR. MEISSNER: I am getting packing taken

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## Proceedings

1  
2 out tomorrow.

3 In any event, I just wanted to focus in on  
4 the facts here. First of all, it was approximately  
5 four months before the petitioner decided to come to  
6 court. I don't know if there is an eight month cutoff  
7 or six month cutoff. It wasn't two weeks.

8 THE COURT: Counsel's position is that, in  
9 fact, his client was never served, and so that it took  
10 the natural course of time for it to work its way out.

11 MR. MEISSNER: I heard that, but there is no  
12 affidavit saying that. That's counsel's  
13 representation.

14 The facts here are simple. Instead of a  
15 couple of days before the deadline of filing their  
16 answer, they instead decided to go to the director of  
17 FINRA to seek a decision from him preventing us from  
18 pursuing the arbitration in that forum. They chose a  
19 forum to make that argument.

20 THE COURT: What about counsel's point that  
21 they went to the director, it's not as if they went to  
22 the arbitration panel to argue the case on the merits,  
23 they went to the director who had authority under the  
24 FINRA's rules to say yea or nay to whether or not the  
25 dispute was subject to arbitration?

26 MR. MEISSNER: I don't think that makes a

## Proceedings

1  
2 difference. I think under the law it is the same  
3 thing. I will get to that.

4 But just so it's clear, they litigated that,  
5 several submissions, went back and forth. They lost.  
6 When they lost, what did they do? They filed their  
7 answer. As you noted, it was not just reserving  
8 rights. There were affirmative defenses in there. And  
9 then what did they do? Did they come to court then?  
10 No, they sat back and waited to get the arbitrator list  
11 so we can see who would be the potential arbitrators on  
12 this case. I think that is significant because that  
13 narrows who will be on this case.

14 And then they decide to come to court after  
15 they got the list. They came and asked for a temporary  
16 stay that was denied by your Honor. I think your Honor  
17 suggested if they wanted to go to the Appellate  
18 Division for an emergency stay, they can. They decided  
19 not to do that. They decided to just go back to FINRA,  
20 ask for an extension in time, which is fine, they could  
21 ask for it. That was denied. And they didn't, again,  
22 didn't go to the Appellate Division, they went and  
23 filed their arbitrator selections.

24 These are all decisions being made. This is  
25 not, you know, oh, my G-d, we forgot to get a stay from  
26 the Appellate Division. They took all of those steps,

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## Proceedings

1  
2 and then --

3 THE COURT: Any steps they took after the  
4 TRO -- any steps they took after I denied the TRO, they  
5 were forced to do that, right? It wasn't --

6 MR. MEISSNER: Well, they could have  
7 appealed.

8 THE COURT: They could have gone to the  
9 Appellate Division. They got boxed in a corner as a  
10 result of me not granting a TRO.

11 MR. MEISSNER: They had about ten days  
12 before the arbitrator selections had to be put in.  
13 Instead, they are sending letters to FINRA. Again,  
14 they could have sought a stay. In fact, I think it was  
15 a little, not this counsel, but misleading to FINRA in  
16 stating what your Honor's decision was in asking for  
17 the extension. I think at the end of the day there is  
18 controlling authority here.

19 THE COURT: Let's talk about the issue. The  
20 issue is whether or not the petitioner in this  
21 proceeding participated in the arbitration by making  
22 the application with respect to arbitrability to FINRA.

23 MR. MEISSNER: Right. I believe, I submit  
24 that, your Honor, there is controlling authority from  
25 the Court of Appeals here in a case cited by both  
26 sides, although not clearly because it is right on

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## Proceedings

1  
2 point on this particular case, these particular facts  
3 and this particular issue, and that's the Kidder,  
4 Peabody v. Marvin case, which the petitioner cited to,  
5 to support that there is no waiver. However, if you  
6 read the case, which I urge the court to do, it appears  
7 this case is controlling. I am going to read one  
8 paragraph from that case if I may. That's 161 Misc.2d  
9 12. "Neither party" -- I stand corrected. It's a  
10 Supreme Court case, not Court of Appeals. "Neither  
11 party informs the court --"

12 THE COURT: When you say Supreme Court?

13 MR. MEISSNER: New York County, Judge Crane.

14 "Neither party informs the court whether  
15 Smith Barney has answered a statement of claim. It is  
16 petitioner's burden to establish that it did not  
17 participate in arbitration. Whether or not," I am  
18 reading from page 1015, "Whether or not Smith Barney  
19 filed an answer, however, it did seek from a director  
20 of arbitration the same relief it now seeks from the  
21 court, dismissal of respondent's claim as barred by  
22 NASD Section 15." NASD is the predecessor of FINRA.  
23 "Indeed, Smith Barney was successful in part of that  
24 application given the structure of the NASD arbitration  
25 procedure and the role of its director of arbitration,  
26 this activity of Smith Barney is not different in

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## Proceedings

1  
2 substance than the actions of petitioners who ask the  
3 arbitrators themselves to recognize their contentions  
4 of non-arbitrability. This action alone that Smith  
5 Barney took some six months before moving in court to  
6 stay arbitration suffices to establish a waiver of the  
7 right to litigate."

8 I think it's right on point, your Honor.  
9 It's the same exact action. On that basis, I think  
10 it's pretty clear.

11 THE COURT: So your position is I should  
12 follow the Supreme Court case as being persuasive  
13 authority?

14 MR. MEISSNER: Yes. I think obviously we  
15 have multiple other arguments in our papers which we  
16 rely on, but with regard to the threshold issue, I  
17 think it's pretty clear here.

18 THE COURT: Okay.

19 Counsel.

20 MR. RICHAN: I just want to again, going  
21 back to participation, first of all, the Kidder case,  
22 in that case the director, in part, granted some of the  
23 relief they were seeking. I don't know whether there  
24 was a reasoned decision or not.

25 THE COURT: So your concern there is whether  
26 there was a reasoned decision, right? But don't you

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## Proceedings

1  
2 take that risk whenever you make a motion to an  
3 arbitrator that you are going to get just yes, no,  
4 granted, denied, and is it incumbent upon you then to  
5 make a decision? This is what may happen before the  
6 arbitrator or I can go into court where the judge is  
7 obligated to put his or her reasons for granting or  
8 denying the petition, and then I have a remedy, I can  
9 go to the Appellate Division, et cetera, et cetera.

10 MR. RICHAN: I can't tell you what, I am not  
11 passing the buck, I can't tell you what Boston counsel  
12 was doing when they submitted the letter to the,  
13 arguments to the director, but I will tell you that the  
14 cases, other than this one quote, the cases are  
15 concerned with active participation where somebody is  
16 trying to game the system so they can go as far as they  
17 want in arbitration, see what result they get, then if  
18 they don't like, it they can --

19 THE COURT: Couldn't you make that same  
20 argument here, that your predecessor counsel went, made  
21 a motion before FINRA to see what result they could  
22 get, and then if the result was not what they wanted,  
23 they could come back to the Supreme Court and make the  
24 same application again?

25 MR. RICHAN: I mean, that's true. That is  
26 true. That's what he did.

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## Proceedings

1  
2 THE COURT: Well, when you say that's what  
3 he did --

4 MR. RICHAN: That's what we did.

5 THE COURT: -- what occurred?

6 MR. RICHAN: That's what occurred, yes.

7 THE COURT: Wouldn't that same argument hold  
8 here?

9 Mr. RICHAN: We don't believe it does. We  
10 don't believe that's a fair adjudication of this  
11 important threshold issue. We are not participating on  
12 the merits. We have vehemently protested to  
13 participate on the merits.

14 By the way, this notion that we sat back and  
15 waited for the arbitrators selection list to come see  
16 what we got, the arbitrators, potential arbitrators  
17 selection list had 31 names on it. We had to pick  
18 three. The arbitration panel was three. The notion  
19 that we waited to see a list of 31, and, by the way,  
20 FINRA picks them anyway so we really would have had to  
21 wait to see who was on the panel, not who's on the  
22 arbitration selection list. That's just misleading.  
23 So I don't think that should weigh at all because we  
24 did not do that. We did not sit back, wait to see what  
25 would happen when the list came.

26 THE COURT: Okay. Thank you.

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## Proceedings

Anything else, counsel?

MR. RICHAN: No, your Honor.

THE COURT: On April 8th, 2016 the respondent, [REDACTED] filed a statement of claim with FINRA alleging that she's a financial advisor registered with FINRA for 17 years. Further, that in January 2015 [REDACTED] was recruited to join Newport Coast Securities in New York. She met with members of the firm including respondent, John Tarpinian, who told her that the person she was supposed to meet was no longer with the firm, but that he would speak with her as "partner/owner."

The parties allegedly engaged in a conversation regarding personal matters, and subsequently Tarpinian advised Austin that an offer letter was being put together, and that she would be part of his team.

The petition goes on to allege that Tarpinian made it clear that she would be on his team. As a result, Tarpinian would receive a 30 percent override from Austin's commissions which as of October 2015 amounted to the sum of \$56,000.

Austin in the arbitration proceeding seeks damages for sexual harassment and abuse arising out of two incidents. She alleges that on February 12, 2015

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## Proceedings

1  
2 and April 15, 2015 Tarpinian forced her physically to  
3 engage in unwanted sexual contact. Subsequently she  
4 reported the abuse to a compliance officer at Newport  
5 Coast Securities. Tarpinian was allegedly banned from  
6 the office and thereafter left the company.

7 In the petition [REDACTED] seeks compensation for  
8 Tarpinian's alleged abuse and damages for severe  
9 emotional distress. Rather than commencing a special  
10 proceeding in Supreme Court seeking a stay of the  
11 arbitration, Tarpinian on May 27, 2016 moved before the  
12 director of arbitration to dismiss the arbitration  
13 contending that the claims do not arise from any  
14 business activity which is a predicate for arbitration  
15 under FINRA's code of arbitration procedure. Further,  
16 it was the position of Tarpinian that the code excludes  
17 claims for sexual harassment from mandatory  
18 arbitration. And, finally, it was Tarpinian's position  
19 that he did not agree to submit this matter to FINRA  
20 arbitration.

21 [REDACTED] opposed the motion alleging that the  
22 claims arose out of business activities of Tarpinian  
23 who was alleged to be a partner or owner of Newport  
24 Coast Securities receiving a 30 percent override from  
25 commissions [REDACTED] earned. Further, it was the  
26 position of [REDACTED] that Tarpinian had used his position

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## Proceedings

1  
2 to physically abuse her.

3 Tarpinian replied again arguing that business  
4 activities were not alleged as this was a private  
5 dispute with no connection to activities regulated by  
6 FINRA.

7 The director of FINRA's office of dispute  
8 resolution denied the motion to dismiss by a  
9 communication dated July 15, 2016.

10 On July 21st, 2016 Tarpinian filed his answer  
11 with FINRA denying the allegations of sexual harassment  
12 and abuse as well as damages. His first affirmative  
13 defense was that there was no agreement between the  
14 parties to arbitrate the matter. The second defense  
15 alleges that the statement of claim fails to state a  
16 claim upon which relief can be granted. The third  
17 defense alleges lack of subject matter jurisdiction.  
18 In his fourth defense Tarpinian alleges that the claims  
19 are barred by the doctrine of laches and waiver or  
20 estoppel. The fifth defense alleges that Austin did  
21 not suffer any harm based on the actions of John  
22 Tarpinian. The sixth defense asserts that the conduct  
23 that [REDACTED] complains of was consensual or welcomed and  
24 was not undesirable or offensive. The seventh defense  
25 asserts that [REDACTED] has failed to mitigate her damages.  
26 The eighth defense alleges that the claims are barred

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## Proceedings

1  
2 by the statute of limitations. The ninth affirmative  
3 defense maintains that Austin has failed to join  
4 necessary parties.

5 In this court's view this case is controlled  
6 by the First Department's decision in Flintlock  
7 Construction Services, LLC v. Weiss, 122 A.D.3d 51  
8 [First Department 2014] where the petitioner sought a  
9 permanent stay of arbitration of claims of punitive  
10 damages. The motion was first made to the arbitration  
11 panel which denied the application without prejudice.  
12 Thereafter, the petitioner moved before the Supreme  
13 Court to permanently enjoin the arbitrator from  
14 awarding punitive damages.

15 The First Department affirmed the lower  
16 court's denial of the petition noting at page 54 as  
17 follows, "Petitioner's motion to stay the arbitration  
18 should be denied for the further reason that they have  
19 participated in the arbitration precluding late resort  
20 to CPLR 7503(b). CPLR 7503(b) authorizes motions to  
21 stay arbitration by parties "who have not participated  
22 in the arbitration." Petitioners participated in the  
23 arbitration process for nearly eight months selecting  
24 arbitrators, participating in preliminary proceedings  
25 before registering an objection to the arbitrability of  
26 respondent's claim for punitive damages. Even then

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## Proceedings

1  
2 petitioners chose not to move to stay the arbitration,  
3 but to make a motion to dismiss the claim squarely  
4 placing the issue of arbitrability and availability of  
5 punitive damages before the arbitrators. Having  
6 chartered their own course, in the words of the motion  
7 court, they cannot now avail themselves to the  
8 mechanisms set forth in CPLR 7503(b).

9 Now in my view although there are some  
10 factual distinctions between Flintlock and this case,  
11 the Flintlock arbitration proceedings were go going on  
12 for several months, here Tarpinian's litigation  
13 strategy was to submit the dispute of arbitrability to  
14 the director of FINRA's office of dispute resolution  
15 rather than making a motion for a permanent stay  
16 pursuant to CPLR 7503. Not only did counsel put the  
17 issue of arbitrability affirmatively before FINRA,  
18 Tarpinian then interposed an answer which in addition  
19 to preserving his arbitrability defenses also raised  
20 affirmative defenses on the merits that what occurred  
21 between the parties was consensual and did not cause  
22 any harm to [REDACTED]. In short, Tarpinian's answer seeks  
23 to do more than reserve his rights.

24 On this record I hold that Tarpinian  
25 participated in the arbitration, first, by putting the  
26 issue of arbitrability before FINRA, and then, second,

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Proceedings

answering on the merits, and may not now resort to seeking a stay of arbitration pursuant to CPLR 7503(b).

So for these reasons, the petition to stay arbitration is denied, and the parties are directed to proceed forthwith with arbitration in accordance with the rules of FINRA.

This decision constitutes the order and judgment of this court.

Thank you, counsel.

MR. MEISSNER: Thank you, your Honor.

MR. RICHAN: Thank you, your Honor.

\*\*\*

C E R T I F I C A T E

I, Terry-Ann Volberg, C.S.R., an official court reporter of the State of New York, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

*Terry Ann Volberg*  
Terry-Ann Volberg, CSR, CRR  
Official Court Reporter.

SO ORDERED:

*ACC*

SSC ANIL C. SINGH

Sept 1, 2016