

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

STEPHEN B. WEBSTER
(CRD No. 1835980)

Respondent.

Expedited Proceeding
No. ARB040032

Hearing Officer – DRP

DECISION

January 7, 2005

In accordance with Article VI, Section 3 of NASD By-Laws and NASD Procedural Rules 9554 and 9559(n), Respondent's registration is suspended for failing to pay an arbitration award.

Appearances

Carole R. Sherman, Regional Attorney, Los Angeles, CA (Rory C. Flynn, Of Counsel) for the Department of Enforcement.

David A. Zisser, Esq., Issacson, Rosenbaum, Woods & Levy, P.C., Denver, CO for the Respondent.

DECISION

I. Introduction

By letter dated August 19, 2004, NASD's Office of Dispute Resolution notified Stephen B. Webster (Webster or Respondent) that his registration would be suspended in accordance with Article VI, Section 3 of NASD By-Laws and Rule 9554, as a result of his failure to pay the arbitration award rendered in NASD Arbitration No. 02-00946. On September 1, 2004, Respondent requested a hearing. Pursuant to Rule 9559(d)(1) and 9559(d)(5), the Hearing Officer conducted a hearing by telephone on October 25, 2004.

Respondent concedes he has not paid the arbitration award. He contends that he is not required to do so, because final judgment has not been entered on the arbitration claimant's motion to enforce the award, which is related to Respondent's motion to vacate or modify the award (motion to vacate). Though the court denied Respondent's motion to vacate, Respondent argues that the motion to vacate is pending until final judgment is entered on the claimant's motion to enforce the award. Enforcement asserts that Respondent is obligated to pay the award, because his motion to vacate was denied, and there is no court order staying compliance with the award.

The Hearing Officer determined that the sole issue was legal in nature, and the parties concurred that there was no factual dispute.¹ After a review of the entire record and the relevant law, the Hearing Officer finds that Respondent failed to demonstrate that a motion to vacate the arbitration award is pending or that a court has issued an order staying compliance with the award. Accordingly, Webster's registration shall be suspended for failure to pay the award.

II. Background

Respondent was registered with First Union Securities, Inc. (First Union) from September 1998 through December 2001. After his registration with First Union was terminated, the firm initiated an arbitration claim against Respondent for breach of promissory notes. On or about December 8, 2003, an NASD arbitration panel issued an award against Respondent, requiring him to pay \$81,490.67 plus interest, attorney's fees, and arbitration costs. NASD's Office of Dispute Resolution notified Respondent's attorney of the award by letter dated December 8, 2003. (CX-1, CX-3, CX-4.)

¹ The parties stipulated to the admissibility of Enforcement's exhibits (CX-1 – CX-11) and Respondent's exhibits (attached to his pre-hearing brief as Exhibits A, B, C).

Respondent filed a motion to vacate the award in the District Court, City and County of Denver on January 15, 2004, which was removed to U.S. District Court for the District of Colorado. In his motion, Respondent argued that the award should be vacated, because the arbitrators did not require First Union (now known as Wachovia Securities, Inc. or Wachovia) to surrender the original promissory notes. Wachovia moved to dismiss Respondent's motion to vacate for failure to state a claim for relief and filed a cross petition to confirm the arbitration award. On August 3, 2004, Senior District Judge Richard P. Matsch issued an order denying the motion to vacate and confirming the arbitration award. The court also directed the procedure for entry of judgment, which required Wachovia to surrender the promissory notes to Respondent. By letter dated August 19, 2004, NASD's Office of Dispute Resolution notified Respondent that he would be suspended, and he requested a hearing, as described above. (CX-8, CX-9, CX-10, CX-11.)

III. Discussion

NASD's arbitration process is designed to provide efficient resolution of disputes involving NASD members, their employees and the public.² To ensure compliance with arbitration awards, NASD has promulgated rules to allow for expedited suspension proceedings against members and associated persons for failing to abide by such awards.³

A respondent may assert certain limited defenses in an expedited suspension proceeding. These include: (1) the award has been paid in full; (2) the parties have agreed to installment payments of the amount awarded or have otherwise agreed to settle the action; (3) the award has been modified or vacated by a court; (4) a motion to vacate or modify the award is pending in a

² *Eric M. Diehm*, Exchange Act Release No. 33478, 1994 SEC LEXIS 148, at *4 (Jan. 14, 1994) (internal citation omitted).

³ NASD By-Laws, Article VI, Section 3; NASD Procedural Rule 9550, *et seq.* See also Notice to Members 00-55 (August 2000) and 04-36 (May 2004).

court; (5) the respondent has a bankruptcy petition pending in U.S. Bankruptcy Court pursuant to Title 11, or the award has been discharged by a U.S. Bankruptcy Court.⁴ A respondent may also assert a *bona fide* inability to pay the award.⁵ Here, Respondent claims there is a motion to vacate the award pending in a court.

On January 15, 2004, Respondent filed a motion to vacate the award in order to obtain the original promissory notes from Wachovia that formed the basis for the arbitration award against him. Respondent sought the original notes to protect himself from additional liability if the notes are assigned or used as the basis for other proceedings against him. (Tr. 11; CX-8, CX-9.)

On August 3, 2004, the court dismissed Respondent's motion to vacate the award and granted Wachovia's motion to enforce the arbitration award by entry of a judgment against Respondent. The court ordered the parties to "submit a stipulation as to the amount of the judgment or provide their respective positions if [the amount] is disputed[,] and the Clerk will withhold entry of the judgment until [Wachovia] surrenders the original notes ... or provide[s] appropriate proof of loss ... in accordance with applicable Colorado law." According to Respondent, Wachovia has not complied with the order requiring surrender of the notes or proof of loss, and final judgment has not been entered. He thus argues that the motion to vacate is still pending, and his license should not be suspended. (Tr. 22; CX-9.)

The Hearing Officer rejects Respondent's argument. The court noted at a status conference in April 2004 that the award was valid and should not be vacated or modified, and unequivocally dismissed Respondent's motion to vacate the award on August 3, 2004. The court simultaneously granted Wachovia's motion to enforce the arbitration award. Though the court

⁴ NASD By-Laws, Article VI, Section 3; NTM 00-55.

⁵ See, e.g., *William J. Gallagher*, Exchange Act Release No. 47501, 2003 SEC LEXIS 599 (Mar. 14, 2003).

has apparently withheld entering final judgment enforcing the award, that omission does not provide a defense to this proceeding. *Cf. Perpetual Securities, Inc.*, Exchange Act Release No. 48433, 2003 SEC LEXIS 2096, at *8 (Sept. 3, 2003) (there is “no requirement under NASD’s rules that an arbitration award be confirmed by a court before NASD can commence [suspension] proceedings”).

Furthermore, a delay in entering judgment enforcing the award does not change the status of the separate motion to vacate the award, which was denied. The delay in entering judgment was apparently a creative device employed by the court to provide Respondent the relief he sought – obtaining the original promissory notes from Wachovia. The order does not, however, confer upon Respondent any substantive rights in this matter, which is governed by NASD’s rules. *Cf. Perpetual*, 2003 SEC LEXIS at *9.

NASD Rules require an award to be paid immediately when a court denies a motion to vacate or modify the award, absent a court order staying compliance with the award.⁶ Thus, Respondent was required to pay the award when the court denied his motion to vacate on August 3, 2004, notwithstanding the delay in entering a judgment enforcing the award. Respondent has failed to establish a defense for failing to pay the arbitration award rendered in NASD Arbitration No. 02-00946, and his license shall be suspended.⁷

IV. Conclusion

The Hearing Officer finds, and the parties do not dispute, that Respondent has failed to pay any portion of the arbitration award at issue. The Hearing Officer further finds that

⁶ See NTM 00-55, endnote 5.

⁷ This Decision is not intended to alter or undercut the court’s directive that judgment would not be entered (to enforce the arbitration award) until Wachovia surrendered the original promissory notes to Respondent. The Hearing Officer notes that Wachovia’s failure to abide by the court’s instruction may subject the firm to disciplinary action. *Cf. Dep’t of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6 (NAC June 2, 2000) (failure to comply with court order in an arbitration-related case violated NASD Conduct Rule 2110).

Respondent has failed to establish any of the limited defenses permitted by NASD rules or case law. Respondent's motion to vacate the award was denied on August 3, 2004, and no court order staying compliance with the award has been issued. Absent a stay, Respondent is required to pay the arbitration award.

Pursuant to Article VI, Section 3 of NASD By-Laws and Rule 9559(n), it is hereby ordered that Respondent Stephen B. Webster's registration shall be suspended effective as of the date this Decision is issued, and that such suspension shall continue until he provides documentary evidence to NASD showing: (1) he has made full payment of the award; or (2) claimants have agreed to settle the award; or (3) that the award has been discharged by a U.S. Bankruptcy Court.

In addition, a total of \$1,121.75 in costs will be imposed on Respondent, which includes an administrative fee of \$750 and hearing transcript costs of \$371.75.⁸

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: January 7, 2005
Washington, DC

Copies to: David A. Zisser, Esq. (*via facsimile and first class mail*)
Stephen B. Webster (*via overnight and first class mail*)
Carole R. Sherman, Esq. (*via electronic and first class mail*)
Rory C. Flynn, Esq. (*via first class mail*)

⁸ The Hearing Officer has considered all of the arguments made by the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.