

The Department of Enforcement filed a Motion for Summary Disposition (“Complainant’s Motion”), challenging the sufficiency of Respondent’s evidence in support of his claimed inability to pay the arbitration award, which was opposed by Respondent.¹

Based on a review of the record, the Hearing Panel granted Complainant’s Motion and held that Respondent violated Rule 2110 by failing to pay the arbitration award. The Hearing Panel fined Respondent \$10,000 and suspended him until the arbitration award is satisfied (by payment or fully paid settlement), plus 30 additional business days. The Hearing Panel further ordered that the fine be increased by \$100 per day if the arbitration award is not satisfied within 30 days of the date this Decision becomes final, until such time as the award is satisfied.

APPEARANCES

Sylvia M. Scott, Esq., Regional Counsel, NASD Regulation, Inc., Department of Enforcement, District 2, Los Angeles, CA and Rory C. Flynn, Esq., Chief of Litigation, NASD Regulation, Department of Enforcement, Washington, DC for Complainant.

Robert Tretiak, *pro se*.

DECISION

I. Procedural Background

On December 21, 1998, the Department of Enforcement (“Enforcement”) filed a Complaint against Tretiak alleging that he violated NASD Conduct Rule 2110 by failing to pay the final arbitration award entered on September 21, 1994, in NASD Arbitration Proceeding Sam and Mae Loguidice v. Robert Tretiak, et al., (No. 93-03693). On May 6, 1999, Tretiak

¹ Respondent also filed a Motion for Summary Judgment (“Respondent’s Motion”), which was opposed by Complainant. The Panel treated Respondent’s Motion as a Motion for Summary Disposition pursuant to Code of Procedure Rule 9264(a), and denied the Motion.

filed an Amended Answer admitting that the award had been entered against him in the amount of \$52,360 and that it was a final award.² Attached to his Amended Answer was a Settlement Agreement signed on April 29, 1999, which recited that only \$2000 had been paid to Mr. and Mrs. Loguidice.³ Tretiak included in his Amended Answer affirmative defenses asserting that he had not paid the award because he was insolvent and that this proceeding should be dismissed because he had reached a settlement with the claimants. Tretiak also moved to dismiss the Complaint on the ground that he had complied with the NASD Rules of Conduct by entering into the Settlement Agreement.

On June 1, 1999, Tretiak filed several motions, including one entitled “Re-Urge Of Motion To Dismiss”⁴ and a number of exhibits regarding his financial condition, including two sworn financial disclosure forms.⁵ One form purported to show his financial condition as of July 31, 1997 (the “1997 Disclosure”), and the other as of December 31, 1998 (the “1998 Disclosure”).⁶ On June 10, 1999, in response to the May 19 Pre-Hearing Conference Order,

² The award was confirmed and reduced to judgment by order of the California Superior Court for the City and County of San Francisco by order entered December 18, 1995. Complainant’s Motion, Ex. 1.

³ Mr. Loguidice died before the arbitration hearing, and Mrs. Loguidice died in 1998. Thus, the Settlement Agreement is between Tretiak and the Loguidice Family Trust. It is not clear whether the Settlement Agreement attached to Tretiak’s Amended Answer ever became effective. By its terms, the Agreement was contingent upon Tretiak supplying certain financial information to the Loguidice Family Trust.

⁴ The other motions sought changes in the hearing location and schedule. Motion for Venue Setting; Memorandum in Support of Motion For Venue; Motion for Re-Setting of Hearing Date; Re-Urge of Motion to Dismiss; Production of Documents Pursuant to Order (“collectively referred to as “Motion to Dismiss”).

⁵ Tretiak submitted 10 exhibits (R-1 through R-10) to show that he “had the inability either to pay the arbitration award in full or to settle the matter.” (Motion to Dismiss at 6.) Tretiak also submitted five other exhibits (Exs. A-E). Exhibit A is a witness list, and Exhibits B-E are documents relating to an NASD Arbitration which is unrelated to this proceeding.

⁶ Exhibits R-4 and R-1, respectively.

Tretiak made an omnibus filing⁷ which included a half page captioned “Motion For Summary Judgment.”⁸ Tretiak did not update his 1998 financial disclosure form or submit any additional financial information.

On June 11, 1999, Enforcement filed its Motion,⁹ and on June 16, 1999, Tretiak filed his papers in opposition to Enforcement’s motion.¹⁰ Tretiak argued that the Hearing Panel should deny Enforcement’s motion and allow him to present evidence at the hearing to show that he diligently had attempted to settle with the arbitration claimants and was unable to pay the award in full as they demanded. Most of his opposition, however, was devoted to complaining about Enforcement’s repeated requests that he provide complete and accurate financial information, including copies of supporting documentation. Tretiak did not dispute Enforcement’s Statement of Undisputed Facts supporting its Motion.

By Order dated July 16, 1999, the Panel granted Enforcement’s Motion and denied Tretiak’s Motion. This decision sets forth the Hearing Panel’s findings with respect to liability and sanctions.

⁷ Amended Witness List; Memorandum in Support of Motion for Venue Setting; Production of Financial Disclosure Form; Motion for Summary Judgment; Motion for Leave to Use Telephone Testimony (“Omnibus Filing”).

⁸ Tretiak argued he was entitled to judgment since he had made a good faith effort to pay the award and that he was prevented from reaching a settlement because of “[a]n intractable position by arbitration claimant demanding a lump sum in excess of that which was available to Respondent * * *.” Omnibus Motion at 4. Complainant filed its Opposition to Respondent’s Motion on June 11, 1999. For the same reasons that the Hearing Panel granted Enforcement’s Motion as discussed herein, the Panel denied Respondent’s Motion.

⁹ In support of its Motion, pursuant to Code of Procedure 9264(c), Enforcement submitted a Statement of Undisputed Facts; a Memorandum of Points and Authorities; the Declaration of Eugene G. Horwitz, a Special Investigator at the Office of NASD Regulation, Inc. (“NASD Regulation”) in Los Angeles, California; and three exhibits.

¹⁰ Tretiak’s opposition was accompanied by eight exhibits.

II. Findings of Fact

The Complaint alleged, and it was not denied, that Tretiak first registered with the NASD as a General Securities Representative in October 1985 and that from about March 1993 to September 1998 he was associated with RFCA Financial Services, Inc., an NASD member firm.¹¹

A. Arbitration Award

On September 21, 1994, an arbitration award in the sum of \$52,360 was entered against Tretiak in NASD Arbitration Proceeding Sam and Mae Loguidice v. Robert Tretiak, et al., (No. 93-03693).¹² Tretiak did not seek to vacate the award, which was confirmed and reduced to judgment by the California Superior Court for the City and County of San Francisco on December 18, 1995,¹³ nor did he pay the award within 30 days of his receipt of the award, as required by Code of Arbitration Procedure Rule 10330(h).¹⁴ At most, between the date of the award and April 29, 1999, Tretiak paid \$2,000 to Mr. and Mrs. Loguidice.¹⁵

B. Tretiak's Financial Disclosure

Tretiak was obligated to pay the arbitration award in full by October 21, 1994. He failed to submit any information regarding his financial condition at the time the award became due and payable or at any subsequent time prior to 1997. He did submit 1997 and 1998 Financial Disclosures, but the information is incomplete and much of it is irrelevant.

¹¹ See Complaint at ¶1 and Amended Answer at ¶1.

¹² Id. at ¶2.

¹³ Complainant's Motion, Ex. 1.

¹⁴ Complainant's Statement of Undisputed Facts at ¶3; Horwitz Decl. at ¶2.

1. Financial Disclosure Forms

The 1997 Disclosure is incomplete and the 1998 Disclosure does not contain the required schedules of Tretiak's assets, liabilities, and income. Tretiak's 1998 Disclosure shows that he earned just \$6,412 in 1998 but paid expenses totaling \$38,356, including "tithing donations" of \$5,500.¹⁶ The Disclosure does not explain the source of the funds Tretiak used to pay the expenses in excess of his claimed income.

Further, the 1998 Disclosure reflects that Tretiak had at least two unscheduled assets. First, the 1998 Disclosure shows that Tretiak received an IRA distribution of \$1,600, but neither the 1997 Disclosure nor the 1998 Disclosure identifies the IRA from which the distribution was made.¹⁷ Second, the first page of the 1998 Disclosure includes a note referring to the sale of land for \$13,000, but this property is not disclosed as an asset on either the 1997 Disclosure or the 1998 Disclosure.¹⁸

In addition to being incomplete, the disclosure forms actually establish that Tretiak had the ability to pay a substantial portion of the award, but elected not to do so. At a minimum, Tretiak could have paid Mr. and Mrs. Loguidice the \$10,249 he made in donations in 1997 and 1998.¹⁹ In addition, according to the Disclosures, Tretiak received approximately \$26,600 in IRA distributions -- \$25,000 in 1997 and \$1,600 in 1998 -- and \$13,000 from the sale of land

¹⁵ Attached to Respondent's Amended Answer is a Settlement Agreement signed on April 29, 1999, between Tretiak and the Loguidice Family Trust which recited that \$2,000 of the award had been paid.

¹⁶ R-1 at 4-5.

¹⁷ Id. at 4. The 1997 Disclosure also shows an IRA distribution of \$25,500. R-4 at 3.

¹⁸ Some of the correspondence between Tretiak and the attorney for Mr. and Mrs. Loguidice included in Exhibit R-1 indicates that Tretiak owned an interest in several lots in Nye County, Nevada.

¹⁹ See R-1 at 5 and R-4 at 4.

that he could have used to pay part of the award. Instead, Tretiak spent four years trying to force Mr. and Mrs. Loguidice to accept less than the award to which they were entitled.

2. Tax Returns

The 1997 and 1998 tax returns submitted by Tretiak are also incomplete and, therefore, do not reliably reflect his financial condition. Although the returns reflect that he filed Schedules A, C, D and SE with the Form 1040, with the exception of Schedule C, Tretiak failed to include such schedules. Moreover, the business expenses on the 1998 return (which appear excessive) are unsubstantiated.²⁰ Accordingly, the tax returns are insufficient to support Tretiak's claim of financial inability to pay the award.

In fact, Tretiak's income, as disclosed in his tax returns, suggests that he could have paid all or a substantial portion of the award by 1997. According to his returns, Tretiak had gross income of \$71,741 in 1994 and \$124,487 in 1997.²¹ Tretiak did not explain why more of the funds were not available to pay all or part of the arbitration award.

3. Federal Tax Lien

Tretiak also points to an IRS tax lien in support of his argument that he was unable to pay the arbitration award. The tax lien, however, was not issued until October 1997, three

²⁰ Schedule C attached to Tretiak's 1998 tax return, reports gross receipts and sales totaling \$183,219.00 and expenses totaling \$176,807.00, resulting in net profits of only \$6,412.00. See R-1, 1998 Federal Income Tax Return, Schedule C. The reported expenses are especially suspect since in 1997 they amounted to only \$21,799.00. See R-1, 1997 Federal Income Tax Return, Schedule C.

²¹ See R-4, 1994 Federal Income Tax Return in comparison with Tretiak's Disclosure of Assets and Financial Information Form as of July 31, 1997.

years after the arbitration award, and it covers tax liabilities that apparently accrued after the award was rendered.²²

III. Conclusions of Law

A. Jurisdiction

Although it is not clear from the record if Tretiak remains registered with the NASD, the Panel finds that the NASD has jurisdiction of him for purposes of this proceeding. Pursuant to Article V, Section 4 of the NASD's By-Laws, a person remains subject to the Association's jurisdiction for two years after the effective date of termination of his or her registration. In this case, the Complaint alleged, and it was not denied by Tretiak, that he was registered with the NASD and associated with RFCA Financial Services, Inc. at the time of the alleged offense and at least until September 1998. Enforcement filed the Complaint on December 21, 1998. Thus, even assuming Tretiak's registration terminated in September 1998, the Complaint was filed timely.

B. Summary Disposition Standard

Code of Procedure Rule 9264(d) provides that the Hearing Panel "may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law." It is well-established that the moving party, in this case Enforcement, bears the initial burden of showing "the absence of a genuine issue of material fact."²³ The substantive law governing the case will identify those facts which are material and "only disputes over facts that might affect the

²² R-4, at 2.

outcome of the suit under the governing law will properly preclude the entry of summary judgment.”²⁴

If the moving party meets that initial burden, the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact.²⁵ In so doing, the non-moving party “must do something more than simply show that there is some metaphysical doubt as to the material facts.”²⁶ “The pivotal question will always be whether the non-moving party has produced sufficient evidence that a reasonable jury could find for him at a trial on the matter.”²⁷

In this case, there is no issue of material fact in dispute. Tretiak admits that he has not paid the arbitration award.

C. Failure to Pay Arbitration Award

Rule 10330(h) of the Code of Arbitration Procedure, requires that “[a]ll monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction.” In addition, NASD Code of Arbitration Procedure IM-10100(d) states that the failure to honor an award, where timely motion has not been made to vacate or modify the award or where such motion has been denied, may be deemed conduct

²³ Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

²⁴ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

²⁵ Id. at 249.

²⁶ Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (citations omitted).

²⁷ Pickett v. RTS Helicopter, 128 F.3d 925, 928 (5th Cir. 1997).

inconsistent with just and equitable principles of trade and a violation of Conduct Rule 2110.²⁸ Tretiak, as an associated person, should have been aware of the importance of honoring the arbitration award in a timely manner.²⁹

Tretiak repeatedly contends that he should not be found to have violated Rule 2110 because he made “good faith” efforts to settle with Mr. and Mrs. Loguidice and made a partial payment of \$2,000. In effect, Tretiak argues that these efforts somehow excuse his failure to pay the award in full. They do not. Even if Tretiak’s conduct could be characterized as evidencing “good faith,” “there is no such defense expressly provided for in the applicable rules.”³⁰

Moreover, the Hearing Panel finds that Tretiak did not act in good faith. The earliest documented effort at settlement from Tretiak to counsel representing Mr. and Mrs. Loguidice is dated October 18, 1995 -- one year after payment was due.³¹ The next documented settlement communication is dated March 19, 1996, which indicates that Tretiak still had not made a firm settlement offer.³² Then, in a communication dated May 31, 1996, Tretiak states that he could not meet Mr. and Mrs. Loguidice’s counteroffer to accept \$23,000 in complete settlement of the award unless he submitted to “onerous conditions.”³³ Instead, and despite the fact that he

²⁸ See also, District Bus. Conduct Comm. for Dist. No. 8 v. Frey, Complaint No. C8B930020, 1997 NASD Discip. LEXIS 22, at *8 (NBCC Mar. 11, 1997) aff’d, Exchange Act Release No. 39007, 1997 SEC LEXIS 1796 (Sept. 3, 1997), and cases cited therein.

²⁹ District Bus. Conduct Comm. for Dist. No. 7 v. Zipper, Complaint No. C07910138, 1994 NASD Discip. LEXIS 194, at *4 n.3 (NBCC Oct. 31, 1994).

³⁰ Department of Enforcement v. Michael A. Bronzino, 1998 NASD Discip. LEXIS 54 (NAC June 29, 1998) (non-summary suspension proceeding).

³¹ R-1.

³² Id.

³³ Id.

also indicated that he had \$8,000 available, he asked Mr. and Mrs. Loguidice to make another lower offer.

On September 27, 1996, Tretiak sent his first payment of \$1,000, which he stated would be the first of “many monthly payments.”³⁴ There is no evidence that Tretiak made any further payments. Similarly, there is no evidence that Tretiak made any further settlement efforts until March 1998, after the NASD started the investigation that led to the filing of the Complaint in this matter. And the settlement correspondence in 1998 from claimants’ counsel to Tretiak repeatedly requested that Tretiak provide complete and accurate information concerning his financial condition, which he refused to do.³⁵

Tretiak clearly violated his obligation under Conduct Rule 2110. Tretiak refused to pay Mr. and Mrs. Loguidice anything unless they agreed to accept less than 50% of the face amount of the award. Not able to force the settlement to a level that he could meet comfortably, Tretiak used his available funds for other purposes, including, according to Tretiak’s own documents, hiring attorneys to resist paying the award.³⁶ It was not until after the death of both Mr. and Mrs. Loguidice and the initiation of this disciplinary proceeding that Tretiak finally agreed to the terms of a settlement. This course of conduct does not evidence good faith.³⁷

³⁴ Id.

³⁵ R-1.

³⁶ The documents submitted by Tretiak in support of his inability to pay defense include statements from counsel for professional services in reference to “Loguidice v. Tretiak.” See Exhibit 2.

³⁷ See In re Herbert Garrett Frey, Exchange Act Release No. 39007, 1997 SEC LEXIS 1796, at *14 (Sept. 3, 1997).

D. Inability to Pay Arbitration Award

A respondent in a disciplinary proceeding bears the burden of establishing his bona fide inability to pay an arbitration award where it is raised as a defense to his failure to pay the award.³⁸ Since a respondent's ability to pay is peculiarly within the respondent's knowledge, it is appropriate that the respondent bear this burden.³⁹

To meet this burden, a respondent must show more than a current lack of funds on hand to pay the award in full.⁴⁰ The respondent must also show that he is incapable of reducing his living expenses, diverting funds from other expenditures, or borrowing funds to pay the award.⁴¹ An inability to pay defense also may be rejected if it appears that a respondent could make some meaningful payment toward the award from available assets or income, even if he could not pay the full award.⁴² In addition, because the obligation to pay an arbitration award arises when the award is received, a respondent who claims inability to pay as a defense must establish that at no time after the award became due did he have the ability to pay all or any

³⁸ See In re Tony L. Reed, Exchange Act Release No. 37572, n.12, 62 S.E.C. Docket 1543 (Aug. 14, 1996); In re Bruce M. Zipper, Exchange Act Release No. 33376, 55 S.E.C. Docket 2002 (Dec. 23, 1993) ("Because the scope of his assets is particularly within Zipper's knowledge, we think Zipper should properly bear the burden of adducing evidence with respect to those assets.").

³⁹ See, e.g., District Bus. Conduct Comm. for Dist. No. 10 v. Gerald Cash McNeil, Complaint No. C3B960026, 1999 NASD Discip. LEXIS 3, at *26 (NAC Jan. 21, 1999); In re Toney L. Reed, Exchange Act Release No. 37572, (Aug. 14, 1996).

⁴⁰ Id.

⁴¹ District Bus. Conduct Comm. for Dist. No. 7 v. Escalator Securities, Inc., Complaint No. C07930034 (NBCC Feb. 19, 1998); District Bus. Conduct Comm. for Dist. No. 8 v. Miguel Angel Cruz, Complaint No. C8A930048 (NBCC Oct. 31, 1997); Frey, 1997 SEC LEXIS 1796; Michael H. Novick, Exchange Act Release No. 37503, 62 S.E.C. Docket 1129 (July 31, 1996); District Bus. Conduct Comm. for Dist. No. 7 v. Bruce M. Zipper, Complaint No. C07910138 (NBCC Oct. 31, 1994) aff'd, Exchange Act Release No. 35606, 58 S.E.C. Docket 235 (April 17, 1995).

⁴² Id.

meaningful amount of the award. It is not sufficient for the respondent to show that at some later time his assets were insufficient to pay the award.⁴³

In this case, Tretiak failed to meet this burden. As discussed above, Tretiak failed to prove that he was unable to pay the award when it became due in 1994 and at all times thereafter. To the contrary, the evidence shows that Tretiak had substantial income in 1994, which later increased. Tretiak failed to establish that none of that income was available to pay the award or any meaningful portion thereof. To the contrary, the documents Tretiak submitted also show that he had funds he could have used to pay the award, including distributions from his IRA, proceeds from the sale of land, funds he donated to charity, and funds paid for legal and accounting fees that he incurred resisting Mr. and Mrs. Loguidices' attempts to collect the money due them. Consequently, the Hearing Panel rejects Tretiak's claim that he was unable to pay the award, and finds that he violated Conduct Rule 2110, as alleged in the Complaint.

IV. Sanctions

For failure to honor an arbitration award, the applicable NASD Sanction Guideline suggests that a respondent be fined at least \$5,000 and suspended until the award is satisfied, plus at least 30 additional business days.⁴⁴ In egregious cases, the Guideline suggests incorporating a daily escalator into the fine amount until the award is satisfied.

⁴³ District Bus. Conduct Comm. for Dist. No. 7 v. Richard J. Lanigan, Complaint No. C07940042 (NBCC Dec. 8, 1994), aff'd, Exchange Act Release No. 34-36028, 59 S.E.C. Docket 2212 (July 27, 1995).

⁴⁴ Sanction Guidelines at 18.

In addition to the principal consideration that adjudicators always should consider in determining sanctions,⁴⁵ the applicable Guideline suggests that adjudicators consider whether respondent has paid any portion of the arbitration award and whether respondent has made a good-faith effort to satisfy the award, in whole or in part, including the promptness of any such effort.

The Hearing Panel considers this to be an egregious case. Tretiak did everything he could to resist paying the arbitration award. Not only did he refuse to make payments using the assets and cash he had available, but he conducted a four year battle to wear down Mr. and Mrs. Loguidice and force them to accept a small percentage of what they were due. Indeed, both Mr. and Mrs. Loguidice died before they received any more than \$2,000.

Accordingly, recognizing that one of the purposes of the Guidelines is to “deter future misconduct and to improve overall business standards in the securities industry,”⁴⁶ the Panel fines Tretiak \$10,000 and suspends him in all capacities until the arbitration award is satisfied (by payment or fully paid settlement), plus 30 additional business days. The Hearing Panel also orders that the fine be increased by \$100 per day if the award is not satisfied within 30 days of the date this Decision becomes final, until such time as the award is satisfied.

⁴⁵ *Id.* at 8-9.

⁴⁶ Guidelines at 3, ¶1.

V. Order

Therefore, having considered all of the evidence,⁴⁷ Respondent Robert Tretiak is fined \$10,000 and suspended in all capacities from association with any member firm in any capacity until the arbitration award is satisfied (by payment or fully paid settlement), plus an additional business 30 days. The fine will increase by \$100 per day if the award is not satisfied within 30 days of the date this Decision becomes final, until such time as the award is satisfied.

These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after the date this Decision becomes the final disciplinary decision of the NASD.

Hearing Panel

By _____
Ellen A. Efros
Hearing Officer

Copies to:

Robert Tretiak (by Airborne Express, next day delivery, and first-class mail)
Sylvia M. Scott, Esq. (by first-class and electronic mail)
Rory C. Flynn, Esq. (by first-class and electronic mail)

⁴⁷ The Hearing Panel considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.