

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Expedited Proceeding
No. ARB050014

Hearing Officer – DRP

DECISION

August 10, 2005

Respondent failed to demonstrate a *bona fide* inability to pay an NASD arbitration award. In accordance with Article VI, Section 3 of NASD By-Laws and NASD Procedural Rules 9554 and 9559(n), Respondent’s registration is hereby suspended.

Appearances

Jill Jablonow, Senior Regional Attorney, Los Angeles, CA (Rory C. Flynn, Of Counsel)
for the Department of Enforcement.

Respondent, *pro se*.¹

DECISION

I. Introduction

By letter dated March 8, 2005, NASD’s Office of Dispute Resolution notified Respondent that his registration would be suspended in accordance with NASD Procedural Rule 9554, as a result of his failure to pay the arbitration award rendered in NASD Arbitration No. 00-05723. On March 29, 2005, Respondent requested a hearing.

¹ On April 11, 2005, William T. Kirtley, Esq. withdrew as counsel for Respondent.

Pursuant to Rules 9559(d)(1) and 9559(d)(5), the Hearing Officer conducted a hearing by telephone on May 31, 2005. Enforcement offered thirteen exhibits, which were admitted in evidence without objection. Respondent testified on his own behalf.²

Respondent concedes he has not paid the arbitration award. He contends that he is financially unable to do so, while Enforcement argues that Respondent did not establish a *bona fide* inability to pay. After a review of the entire record, the Hearing Officer finds that Respondent failed to demonstrate a *bona fide* inability to pay the arbitration award. Accordingly, his registration shall be suspended.

II. Background

Respondent entered the securities industry in 1989 and has since been employed by and registered with NASD through various member firms.³ On December 27, 2000, public customer DZ (Claimant) filed an arbitration claim against Respondent and several others. On or about February 15, 2002, an Award was rendered, under which Respondent and others were held jointly and severally liable to pay \$125,000 to Claimant, plus attorney's fees. That same day, NASD Dispute Resolution sent a letter to Respondent's attorney regarding the Award and outlining Respondent's responsibility to pay the Award within 30 days. Respondent received that letter. Subsequently, by letter dated March 8, 2005, NASD's Office of Dispute Resolution

² CX refers to Enforcement's exhibits. Tr. refers to pages of the hearing transcript.

³ Respondent is currently registered with member [Firm M]. He is also an investment advisor representative of [Firm S], and president of [Firm SD]. (Tr. 39, 77-79; CX-1.)

notified Respondent that he would be suspended for failing to pay the Award, and he requested a hearing, as described above.⁴ (Tr. 13-16; CX-2, CX-3, CX-6, CX-7, CX-12.)

III. Discussion

NASD's arbitration process is designed to provide efficient resolution of disputes involving NASD members, their employees and the public.⁵ 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.⁶

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 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.⁷ A respondent may also

⁴ There has been protracted litigation in Florida Circuit Court related to the Award. Most recently, Respondent's attorney filed a motion to stay a March 10, 2005 amended order confirming the Award. The Hearing Officer denied Respondent's oral application to postpone this hearing due to his pending motion to stay, which was filed on May 26, 2005. Respondent's oral application to postpone the hearing to allow him to negotiate a settlement with the Claimant was also denied. Respondent was advised to contact Enforcement and the Office of Hearing Officers if he and the Claimant executed a settlement agreement before this Decision was rendered. (Tr. 4-5, 7-12, 93; CX-5, CX-13.)

⁵ *Eric M. Diehm*, Exchange Act Release No. 33478, 1994 SEC LEXIS 148, at *4 (Jan. 14, 1994) (internal citation omitted).

⁶ 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).

⁷ NASD By-Laws, Article VI, Section 3; NTM 00-55.

assert a *bona fide* inability to pay the award.⁸ Here, Respondent claims a *bona fide* inability to pay.⁹

The burden is on the respondent to establish the alleged inability to pay, “because the scope of his assets is particularly within [his] knowledge.”¹⁰ When respondents raise this defense, NASD is entitled to make a searching inquiry into their assertions.¹¹ Accordingly, on April 4, 2005, the Hearing Officer ordered Respondent to file with the Office of Hearing Officers (OHO) and serve on Enforcement a standard financial disclosure statement, along with all required financial information to support his defense, by May 6.

By letter dated April 5, 2005, Enforcement sent Respondent the standard financial disclosure form and asked him to provide specific information and documentation needed to assess his financial condition. Respondent supplied Enforcement with some of the requested information by May 6; he did not, however, comply fully with Enforcement’s request. Moreover, he did not file any of the information with OHO, as ordered. His financial information was filed with OHO as an exhibit submitted by Enforcement. (CX-8, CX-9, CX-10.)

Enforcement advised Respondent, by letter dated May 13, 2005, that the information he had provided was deficient. That letter further instructed Respondent about the additional

⁸ See, e.g., *William J. Gallagher*, Exchange Act Release No. 47501, 2003 SEC LEXIS 599 (Mar. 14, 2003).

⁹ Though he has not done so, Respondent stated that he hoped to settle the action with Claimant. He also testified that he is on the verge of bankruptcy, but as of the date of this Decision, he has not filed for bankruptcy protection. (Tr. 4, 6-9, 86, 89.)

¹⁰ *Bruce M. Zipper*, Exchange Act Release No. 33376, 1993 SEC LEXIS 3525, at *8 (Dec. 23, 1993).

¹¹ *Daniel Joseph Avant*, Exchange Act Release No. 36423, 1995 SEC LEXIS 2816, at *11 (Oct. 26, 1995); *Zipper*, 1993 SEC LEXIS 3525, at *8.

information he needed to produce. To date, Respondent has not provided the missing documentation. (Tr. 86; CX-10.)

The Hearing Officer reviewed the documents supplied by Respondent, which included federal tax returns for 2002, 2003 and 2004; some wage records for 2005; loan statements for Respondent's residence in Longwood, Florida (as of April 2005, he owes \$408,844.39 on the first mortgage and \$60,175.31 on a home equity line of credit); a mortgage statement and appraisal of a condominium Respondent purchased in July 2003 in Cocoa Beach, Florida for \$154,900 (as of March 2005, he owes \$101,442.46); and 2003 and 2004 tax assessments on the Cocoa Beach property. (CX-9, pp. 5-21, 291, 327-330.)

The records also included statements for Respondent's IRA and SEP IRA accounts at Firm M and statements for a joint brokerage account at Schwab. The three accounts were worth a combined total of \$61,249.08 as of March 2005. Statements for a Schwab SEP IRA account (worth \$11,946.28 as of December 2003) and for a Schwab IRA account (worth \$23,611.87 as of December 2002) were also provided, as were monthly banking statements for two Sun Trust accounts, with combined assets of \$7,813.00 as of April 2005. (CX-9, pp. 22-290.)

The Hearing Officer also reviewed three promissory notes; a list of Respondent's monthly household expenses with copies of recent insurance, electric, phone and wireless service bills; a GMAC account summary for a 2002 Cadillac Escalade; bills for insurance policies, pediatric dental care, veterinary care, monthly landscaping services, pool service, and service for Respondent's boat. Finally, there were monthly statements from credit card companies for four different accounts. (CX-9, pp. 292-326.)

An inability to pay defense may be rejected when the evidence provided by a respondent is insufficient or incomplete,¹² or it appears that the respondent could divert funds from other expenditures to pay the award, or could borrow the funds, or could make some meaningful payment toward the award from available assets or income, even if he is unable to pay the full award.¹³ With these standards in mind, the Hearing Officer finds that Respondent did not meet the burden of proving a *bona fide* inability to pay the Award.

To begin, Respondent failed to provide complete documentation bearing on his financial situation. Most notably, he failed to supply complete credit card information. He only provided statements for three months and only turned over the first page of the monthly statement, which showed the balance due and credit available; in two instances, it showed some of the charges incurred. In each instance, he failed to provide a copy of the complete statement, which would have shown all monthly expenditures. Furthermore, he did not provide schedules or supporting attachments referred to on his federal tax returns for 2003 and 2004. In both instances, he was given an opportunity to supplement the record by Enforcement and failed to do so. (Tr. 82-84; CX-9, pp. 5-10, 304-305, 324-326; CX-10, pp. 3, 6-7.)

Respondent also failed to supply other documents, including those that would support many claimed liabilities. He contends that he has a second mortgage on his Cocoa Beach condominium, yet failed to supply any documentation to that effect. He also stated that in the last three years, he has settled three customer complaints against Firm SD for a total of \$95,000,

¹² *Gallagher*, 2003 SEC LEXIS 599, at **9-12.

¹³ *Dist. Bus. Conduct Comm. v. Escalator Securities, Inc.*, No. C07930034, 1998 NASD Discip. LEXIS 21 (NBCC Feb. 19, 1998); *Dist. Bus. Conduct Comm. v. Cruz*, No. C8A930048, 1997 NASD Discip. LEXIS 62 (NBCC Oct. 31, 1997); *Herbert Garrett Frey*, Exchange Act Release No. 39007, 1997 SEC LEXIS 1796 (Sept. 3, 1997); *Michael H. Novick*, Exchange Act Release No. 37503, 1996 SEC LEXIS 1994 (July 31, 1996); *Dist. Bus. Conduct Comm. v. Zipper*, No. C07910138, 1994 NASD Discip. LEXIS 194 (NBCC Oct. 31, 1994), *aff'd*, Exchange Act Release No. 35606, 1995 SEC LEXIS 981 (Apr. 17, 1995).

but provided no documents to support his claim.¹⁴ Similarly, he asserts that litigation related to this arbitration case has cost him \$150,000, but he failed to submit attorney's bills or other supporting documentation to substantiate this claim. Though specifically requested, Respondent did not provide a copy of appraisals or professional opinions regarding the value of his primary residence; according to a recent mortgage statement, it is valued at \$610,000. (Tr. 43, 53-54, 72-76; CX-8, p. 2; CX-9, pp. 1-3, 291.)

Without complete and reliable information and documentation, the Hearing Officer is unable to ascertain Respondent's true financial situation, and for that reason alone, Respondent has failed to meet his burden of proof. The record nonetheless shows that Respondent has assets he could liquidate that would enable him to make at least a meaningful payment towards the Award. For example, he could recapture the equity in his home by selling it.

Respondent asserts that the current market value of his residence is \$610,000. Taking him at his word, he has sufficient equity in his home to pay the Award, despite his \$408,000 mortgage and \$60,000 he owes from a home equity line of credit. He also appears to have more than \$50,000 in equity in the Cocoa Beach condominium he and his wife bought in 2003 for \$154,900 (with a mortgage of \$101,442.46), which he testified is used by his grandmother for half the year when she is not residing in New York or with Respondent's mother.¹⁵ (Tr. 48-52.)

Furthermore, it appears that Respondent has other assets and expenditures from which he could divert funds to pay the Award. The Hearing Officer notes that on the mortgage application for the condominium, dated July 3, 2003, Respondent and his wife listed their net worth at

¹⁴ Respondent submitted three promissory notes reflecting loans by Firm SD to Respondent totaling \$120,000 "for legal expenses." Respondent signed the notes on his own behalf, as well as on behalf of Firm SD, which casts some doubt as to the validity of these notes. (Tr. 41-43; CX-9, pp. 292-294.)

¹⁵ The Hearing Officer does not credit Respondent's unsubstantiated testimony that he has a \$40,000 second mortgage on this property. (Tr. 53-54.)

\$525,148.51. This figure does not include Respondent's boat or the Cadillac Escalade he drives. Furthermore, he has a line of credit of \$44,718.05 available from his bank and another \$6,241 of credit available from a Visa account. (Tr. 72; CX-9, pp. 185, 324, 335-337.)

Respondent, whose gross income is approximately \$10,500 per month, asserts that his monthly expenses exceed his income. He has several monthly expenditures that undermine his claim that he is struggling financially. For example, he spends \$838.10 per month for his boat, \$835.32 per month for his Cadillac, \$539.32 per month to lease a 2004 Lexus, \$250 per month for yard maintenance and \$89 per month to maintain his swimming pool. According to Respondent, Enforcement expects him to "put [his] family at risk to pay that scum bag [Claimant]." Based on this comment and these expenditures, the Hearing Officer believes the issue is not Respondent's inability to pay the Award, but rather his refusal to pay an Award that he finds unjust. (Tr. 36-38, 54-56, 65; CX-9, pp. 14, 295.)

For these reasons, including the lack of adequate and complete documentation regarding Respondent's financial situation, the Hearing Officer finds that Respondent has failed to establish a *bona fide* inability to pay the arbitration award. Furthermore, it appears that Respondent could make some meaningful payment toward the Award from available assets but has chosen not to do so.

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 Respondent has failed to establish any of the limited defenses permitted by NASD rules or case law and specifically failed to demonstrate the defense he asserted, a *bona fide* inability to pay. Accordingly, 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'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 that: (1) he has made full payment of the Award; or (2) the claimant has agreed to settle the Award; or (3) the Award has been discharged by a U.S. Bankruptcy Court. In addition, a total of \$1,384.40 in costs will be imposed on Respondent, which includes an administrative fee of \$750 and hearing transcript costs of \$634.40.¹⁶

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: August 10, 2005
Washington, DC

¹⁶ 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.