

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Fidelity Brokerage Services, Inc. v. David Berger, Forestview Financial, Inc., Forestview Financial, Inc., General Partner of Forestview Limited Partnership, David Berger, General Partner of Forestview Limited Partnership, and Forestview Limited Partnership

Case Number: 00-354

Hearing Site: Detroit, Michigan

REPRESENTATION OF PARTIES

Claimant, Fidelity Brokerage Services, Inc., ("Fidelity"), hereinafter referred to as "Claimant": Laurence K. Richmond, Esq., Laurence K. Richmond & Associates, P.C., Quincy, Massachusetts.

Respondents, David Berger ("Berger"), individually and as President of Forestview Financial, Inc.: James Eccleston, Esq. and Ronald Amato, Esq., Eccleston & Associates, P.C., Chicago, Illinois.

Respondent Forestview Limited Partnership: Forestview Financial, Inc., General Partner, by David Berger, President

CASE INFORMATION

Statement of Claim filed on or about: January 21, 2000

Claimant, Fidelity Brokerage Services, Inc., signed the Uniform Submission Agreement: December 14, 1999, by Robert Marsiello

Amended Statement of Claim filed by Fidelity on or about: July 13, 2000

Second Amended Statement of Claim filed on or about March 1, 2001

Correspondence from David Berger filed on or about: October 10, 2000

Statement of Answer and Counterclaim filed by Respondent, Forestview Limited Partnership, on or about: October 16, 2000 by Forestview Financial, Inc., David Berger, President

Reply to Counterclaim filed by Fidelity Brokerage Services on or about: October 24, 2000

Respondent, Forestview Limited Partnership, signed the Uniform Submission Agreement: October 10, 2000, by Forestview Financial, Inc., General Partner, by David Berger, President

Motion to Summarily Dismiss Claim against David Berger individually and as General Partner of Forestview Limited Partnership filed by Respondents on or about March 20, 2001

Claimant's Opposition to Respondents' Motion to Summarily Dismiss Claim against David Berger individually and as General Partner of Forestview Limited Partnership and Cross Motion for Judgment as to David Berger's Individual Liability filed on or about: March 21, 2001

Respondent Berger's Reply to Claimant's Opposition to Respondents Motion to Summarily Dismiss Claim against David Berger individually and as General Partner of Forestview Limited Partnership and Cross Motion for Judgment as to David Berger's Individual Liability filed on or about: March 21, 2001

CASE SUMMARY

Claimant asserted the following causes of action: failure to repay a debit balance due to a margin sellout of several option and equity positions in the Forestview Limited Partnership account with Claimant. Claimant alleged that Respondents, David Berger and Forestview Financial, Inc., are liable to Claimant if the Arbitrator deems that FLP was never in existence.

Unless specifically admitted in its Answer, Respondent Forestview Limited Partnership (FLP) denied the allegations made in the Statement of Claim and asserted in its defense that Fidelity failed to notify FLP within a reasonable time to cover positions. FLP filed a counterclaim and alleged that Fidelity failed to execute good faith transactions and did not notify FLP of a margin shortfall situation.

Respondent, David Berger, denied, in written correspondence and at hearing, that he is a General Partner of Forestview Limited Partnership. Respondent Berger stated that the only General Partner of Forestview Limited Partnership is Forestview Financial, Inc.

RELIEF REQUESTED

Claimant requested damages of \$34,011.00, plus interest, costs and reasonable attorney's fees.

Respondent Forestview Limited Partnership requested damages of \$48,000.00, plus interest, costs, and attorney's fees.

OTHER ISSUES CONSIDERED AND DECIDED

During the Prehearing Conference on February 28, 2001, Claimant orally requested that it be allowed to amend and clarify its Statement of Claim. The Chairperson granted Claimant's request.

Respondent, David Berger, individually, did not file with the NASD Dispute Resolution, Inc., a properly executed submission to arbitration but appeared and testified at the hearing, and is bound by the determination of the Arbitrator on all issues submitted.

The Arbitrator denied Respondents Motion to Summarily Dismiss Claim against David Berger individually and as General Partner of Forestview Limited Partnership and Cross Motion for Judgment as to David Berger's Individual Liability.

OPINION

Fidelity Brokerage Services, Inc. ("Fidelity") filed this action to collect a deficit of \$34,011.00 in a margin account owned by Forestview Limited Partnership ("FLP"). Respondent FLP counterclaimed alleging failure to execute a trade resulting in damages to FLP in the amount of \$48,000.00 plus failure to properly liquidate the account resulting in damages of \$8,000.00.

On July 22, 1998, FLP opened an account with Fidelity by executing a new account application for an Fidelity Ultra Service Account signed by David Berger ("Berger") and accepted by a representative of Fidelity. (See Claimant's Exhibit D). On August 25, 1998, FLP executed a Spartan Active Trader Qualification Form with Fidelity, signed by Berger and accepted by a representative of Fidelity (Claimant's Exhibit E). On August 25, 1998, FLP opened a Fidelity Options Account with Fidelity signed by David Berger and accepted by a representative of Fidelity (See Claimant's Exhibit F). The Option Account Agreement in Claimant's Exhibit G was incorporated by reference in the other documents. On July 22, 1998, FLP executed a Partnership Account agreement with Fidelity authorizing Berger to transact business on behalf of FLP (Claimant's Exhibit H).

Respondent Berger is a well educated, knowledgeable and sophisticated in options trading and at least in part is earning his living by trading securities, including options. He also has considerable education and work experience with the use of computers. He had authority to act on behalf of the Respondent FLP and Forestview Financial, Inc.

The partners of FLP are Forestview Financial, Inc. and Tri-City Assembly of God, an unnamed party to these proceedings. The Respondent Forestview Financial, Inc was incorporated in the State of Nevada on December 1, 1997, but at this time is not in good standing. Berger attempted to form a Nevada Limited Partnership (FLP) with Forestview Financial, Inc. as general partner and Tri-City Assembly of God as a limited partner. Berger testified that he failed to forward the documents to the State of Nevada and under Nevada law, a limited partnership was not in existence at the time the accounts in question were opened and the transactions subject to this proceeding took place. Apparently at some point in 2001, the proper documents were filed and FLP is a Nevada Limited Partnership. In light of the fact that a limited partnership was not formed, FLP is a general partnership with Forestview Financial, Inc. and Tri-City Assembly of God as partners. The uncontroverted testimony is that Berger was not a partner, either general or limited, of FLP.

After opening the account in question, Berger engaged in trading. Berger traded both on line on Fidelity's website and by phone with Fidelity's representatives.

On September 30, 1998, Berger on behalf of FLP went to the on line site and sold the 10 Capital One October 105 puts in the account thereby incurring a margin call of

44,000. Berger testified that he also attempted to sell the other leg of the spread, i.e., the short 10 Capital One October 110 puts, but could not do so. The Fidelity on line site at the time in question did not allow simultaneous transactions. Berger apparently did nothing else that day but on the next day attempted several transactions to mitigate the problem. These transactions were not allowed. As previously stated, Berger was a knowledgeable, sophisticated and active trader in options including spreads and was well aware of the situation he created by legging out.

Fidelity issued a margin call by mailgram on September 30, 1998, and subsequently made several phone calls. FLP never made the margin call and Fidelity proceeded to liquidate the account on October 8, 1998. Testimony of Fidelity's representatives indicated that the FLP account was liquidated as "quickly as possible" and with "no conscience focus" on the account. It is apparent that in liquidating part a spread on one day and the other the next day 10 that Fidelity should have paid more attention to the consequences of their liquidation. FLP claims a loss on the liquidation of \$8,000.

FINDINGS OF FACT

1. FLP is a general partnership with the partners being Forestview Financial, Inc. and Tri-City Assembly of God. The latter party is not a party to this case and no award can be made against that entity.
2. The uncontroverted testimony is that Berger was not a partner of FLP. Although there is considerable sloppiness concerning the execution of the account documents by FLP and Berger on its behalf, they are in the name of FLP. Berger never held himself out to be a partner to Fidelity and in fact signed an agency agreement for a partnership (Claimant's Exhibit H).
3. Fidelity properly issued its margin call on September 30, 1998, pursuant to the agreements between Fidelity and Forestview Limited Partnership. The deficit in the account after liquidation was \$34,011.00.
4. Fidelity improperly liquidated the account to Forestview Limited Partnership's damage in the amount of \$8,000.00

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

- 1.) Respondent, Forestview Limited Partnership, a general partnership, is solely liable for and shall pay to Claimant, Fidelity Brokerage Services, Inc., the sum of \$26,011.00 in compensatory damages;
- 2.) Respondent, David Berger, individually, is dismissed with prejudice;
- 3.) That other than Forum Fees, which are specified below, the parties shall each bear their own costs and expenses incurred in this matter;
- 4.) That any relief not specifically enumerated, is hereby denied with prejudice.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution, Inc., will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$1,000.00
Counterclaim filing fee	= \$ 175.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firm is a party.

Member surcharge	= \$ 800.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$1,000.00

Adjournment Fees

Adjournments requested during these proceedings:

January 17, 2001, adjournment by Claimant	= \$ 450.00
March 17, 2001, adjournment by Respondents	= \$ 450.00

Forum Fees and Assessments

The Arbitrator assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator, including a pre-hearing conference with the arbitrator, that lasts four (4) hours or less. Fees associated with these proceedings are:

Three (3) Pre-hearing sessions with a single arbitrator x \$450.00	= \$1,350.00
Pre-hearing conferences: August 16, 2000	1 session

October 17, 2000 1 session
February 28, 2001 1 session

Two (2) Hearing sessions x \$450.00 = \$ 900.00
Hearing Date: March 22, 2001 2 sessions
Total Forum Fees = \$2,250.00

The Arbitrator has assessed \$1,125.00 of the forum fees to Fidelity Brokerage Services, Inc.

The Arbitrator has assessed \$1,125.00 of the forum fees jointly and severally to Forestview Limited Partnership.

Fee Summary

Claimant, Fidelity Brokerage Services, Inc, be and hereby is solely liable for:

Initial Filing Fee	= \$ 1,000.00
Member Fees	= \$ 2,400.00
Adjournment Fee	= \$ 450.00
Forum Fees	= \$ 1,125.00
Total Fees	= \$ 4,975.00
Less payments	= \$ 4,300.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 675.00

Respondent, Forestview Limited Partnership, be and hereby is solely liable for:

Counterclaim Filing Fee	= \$ 175.00
Adjournment Fee	= \$ 450.00
Forum Fees	= \$ 1,125.00
Total Fees	= \$ 1,750.00
Less payments	= \$ 1,700.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 50.00

All balances are due to NASD Dispute Resolution, Inc.

Arbitrator's Signature

/s/ William P. Thorpe, Esq.
William P. Thorpe, Esq.
Public Arbitrator, Presiding Chair

03/30/01
Signature Date

03/30/01
Date of Service (For NASD office use only)

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October 17, 2000 1 session
February 28, 2001 1 session

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Hearing Date: March 22, 2001 2 sessions
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Fee Summary

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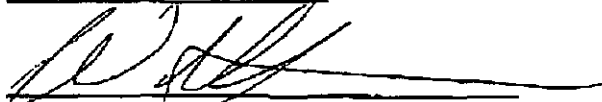
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Total Fees	= \$ 4,975.00
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Balance Due NASD Dispute Resolution, Inc.	= \$ 675.00

Respondent, Forestview Limited Partnership, be and hereby is solely liable for:

Counterclaim Filing Fee	= \$ 175.00
Adjournment Fee	= \$ 450.00
Forum Fees	= \$ 1,125.00
Total Fees	= \$ 1,750.00
Less payments	= \$ 1,700.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 50.00

All balances are due to NASD Dispute Resolution, Inc.

Arbitrator's Signature


William P. Thorpe, Esq.
Public Arbitrator, Presiding Chair

March 30, 2001
Signature Date

Date of Service (For NASD office use only)