

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

James L. May, Claimant v. Morgan Stanley Dean Witter, Inc., and Matthew Maloney,
Respondents.

Case Number: 00-04678

Hearing Site: Cincinnati, Ohio

REPRESENTATION OF PARTIES

Claimant James L. May ("May") represented himself.

Respondents Morgan Stanley Dean Witter, Inc. ("MSDW"), and Matthew Maloney ("Maloney"), hereinafter collectively referred to as "Respondents," were represented by Alan S. Brodherson, Esquire, of Morgan Stanley Dean Witter, Inc., New York, New York.

CASE INFORMATION

The Statement of Claim was filed on or about October 23, 2000.

Claimant signed the Uniform Submission Agreement on October 12, 2000.

Respondents filed their joint Statement of Answer and Motion Dismiss on or about December 18, 2000.

Respondent Maloney signed the Uniform Submission Agreement on February 20, 2001. Alan S. Brodherson, Esquire, Vice President and Associate General Counsel for Respondent MSDW, signed the Uniform Submission Agreement on its behalf on February 16, 2001.

Claimant filed his Response to Respondents' Motion to Dismiss on or about January 11, 2001.

CASE SUMMARY

Claimant asserted the following causes of action: fraud and defamation.

Unless stated otherwise in their joint Statement of Answer and Motion to Dismiss, Respondents denied the allegations set forth in the Statement of Claim and asserted the following defenses: failure to state a cause of action upon which relief may be granted and lack of standing.

RELIEF REQUESTED

Claimant requested:

Punitive Damages

\$1,000.00

Other Costs

unspecified

Respondents requested that the claims against them be dismissed in their entirety.

OTHER ISSUES CONSIDERED AND DECIDED

Respondents filed a Motion to Dismiss on December 18, 2000, and Claimant filed a response on January 11, 2001. By agreement oral argument was held telephonically on March 27, 2001, and recorded. The first two claims were based on a claim of defamation. In the course of the argument, Claimant James L. May stated that the defamatory statement which was the basis of his complaint was the April 26, 2000, letter of Kevin Deloatch of MSDW and specifically that portion of the letter which stated "... that you have attempted to discuss the account of a Morgan Stanley Dean Witter client ... " (Emphasis added.)

May stated the position that he believed the statement to be defamatory because a discussion was held. He admitted that the discussion failed to reach a resolution. Whether a discussion was attempted or conducted without reaching a resolution may be a matter of semantics, and it is probably a difference without a distinction. Nonetheless, for purposes of this decision, it will be assumed that the characterization as an "attempt" was false. The statement was contained in a writing and, therefore, would be in the subcategory of defamation defined as libel.

The Ohio Supreme Court in *Cleveland Leader Printing Co. v. Nethersole*, 84 Ohio St. 118, 95 N.E. 735, defined the elements of libel as (1) publication, (2) in writing, (3) false matter, (4) maliciously, (5) which reflects on the plaintiff in a defamatory matter, and (6) causes damages to the plaintiff.

Since the action of libel is based on damages to character or reputation, it is essential that there be publication to a third party. The letter of April 26, 2000, was correspondence from Mr. Deloatch to May. There was no third party involved. The element of publication is missing.

In *Cleveland Leader Printing Co. v. Nethersole*, *supra*, the court found that a statement that reflects upon a person in a defamatory manner is one that brings him into ridicule, hatred or contempt, or affects him injuriously in his trade or profession. To characterize a discussion as an attempt to discuss could not bring May into ridicule, hatred or contempt. Again, a claim of defamation has not been stated.

May's third claim is that MSDW compliance failed to provide "an explanation from MSDW compliance of Mr. Maloney's statement regarding our branch meeting". The fact that MSDW compliance failed to provide May with the requested explanation may have amounted to poor customer relations and/or discourtesies. It does not amount to a claim upon which relief can be granted. There is no duty on the part of any compliance department to fully respond to every customer request for explanation. There could be any number of situations where it would be imprudent for the compliance department to attempt to discuss specifics of an internal review.

Based on the foregoing, it is the determination of this arbitrator that Claimant has failed to state a claim upon which relief can be granted on the third claim and that the use of the word "attempted" to describe the discussion does not as a matter of law amount to defamation in the form of libel. The Motion to Dismiss is, therefore, granted.

AWARD

Accordingly, the undersigned Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. All claims against Respondents Morgan Stanley Dean Witter, Inc., and Matthew Maloney be and hereby are dismissed with prejudice.
2. Except as otherwise specified herein, each party shall bear its own costs and attorneys' fees.
3. Any and all relief not specifically addressed herein (including punitive [treble] damages) is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution, Inc. will retain the following non-refundable filing fee:

Initial claim filing fee	= \$ 25.00
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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 MSDW:

Member surcharge	= \$150.00
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Forum Fees and Assessments

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

Two (2) Pre-hearing sessions with a single arbitrator x \$25	= \$ 50.00
Pre-hearing conferences: April 4, 2001 1 session	
April 27, 2001 1 session	
Total Forum Fees	= \$ 50.00

The Panel has assessed the entire \$50 in forum fees incurred in this arbitration to Claimant James L. May.

Fee Summary

1. Claimant James L. May is solely liable for:

Forum Fees	= \$ 50.00
<u>Initial Filing Fee</u>	= \$ 25.00
Total Fees	= \$ 75.00
<u>Less payments</u>	= \$ 50.00
Balance Due NASD Dispute Resolution, Inc.	= \$ 25.00

2. Respondent Morgan Stanley Dean Witter, Inc., be and hereby is solely liable for:


<u>Member Fees</u>	= \$ 150.00
Total Fees	= \$ 150.00
<u>Less payments</u>	= \$ 1,400.00
Balance Due from NASD Dispute Resolution, Inc.	= \$(1,250.00)

All balances are due to NASD Dispute Resolution, Inc.

ARBITRATION PANEL

W. Sean Kelleher, Esq.

Public Arbitrator, Presiding Chair


 W. Sean Kelleher, Esq.
 Public Arbitrator, Presiding Chair

8/21/01
 Signature Date

Date of Service (For NASD-Dispute Resolution office use only)