
Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant
Michael Muto

Case Number: 03-00813

Names of the Respondents
Chris Marzella
Morgan Stanley DW, Inc.

Hearing Site: Tampa, Florida

Nature of the Dispute: Customer vs. Member and Associated Person.

REPRESENTATION OF PARTIES

Michael Muto, hereinafter referred to as "Claimant", appeared pro se.

For Chris Marzella ("Marzella") and Morgan Stanley DW, Inc. ("MSDW"), hereinafter collectively referred to as "Respondents": Jon Jacobson, Esq., Greenberg Traurig, P.A., West Palm Beach, Florida.

CASE INFORMATION

Statement of Claim filed on or about: January 30, 2003.

Claimant signed the Uniform Submission Agreement: March 16, 2003.

Statement of Answer filed by Respondents on or about: April 14, 2003.

Respondents did not file executed Uniform Submission Agreements.

Motion to Dismiss or, in the Alternative, Emergency Motion for Adjournment filed by Respondents on or about: October 6, 2003.

Motion to Preclude Witnesses and Exhibits Not Timely Identified by Claimant filed by Respondents on or about: October 7, 2004.

Responses to Motion to Dismiss or, in the Alternative, Emergency Motion for Adjournment and Motion to Preclude Witnesses and Exhibits Not Timely Identified by Claimant filed by Claimant on or about: October 9, 2003.

Motion to Dismiss filed by Respondents on or about: January 12, 2004.

Response to Motion to Dismiss filed by Claimant on or about: January 13, 2004.

Motion to Reconsider the Arbitrator's Ruling on Respondents' Motion to Dismiss filed by Claimant on or about: January 26, 2004.

Response to Motion to Reconsider the Arbitrator's Ruling on Respondents' Motion to Dismiss filed by Respondents on or about: January 26, 2004.

Request for Expungement filed by Respondent Marzella on or about: January 26, 2004.

CASE SUMMARY

Claimant asserted the following causes of action: failure to inform Claimant of Respondent MSDW's interest in the securities recommended to Claimant by Respondent Marzella; and failure to mitigate Claimant's losses by swaying Claimant to keep securities even as they fell in price. The causes of action relate to the purchase in Claimant's account of the Van Kempen Select Growth B mutual fund and the common stock of Atmel and Applied Materials.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

Claimant requested compensatory damages in the amount of \$20,000.00.

Respondents requested that Claimant's claims be denied in their entirety.

OTHER ISSUES CONSIDERED AND DECIDED

Respondents Marzella and MSDW did not file with NASD Dispute Resolution properly executed submissions to arbitration but are required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure (the "Code") and, having answered the claim, are bound by the determinations of the undersigned arbitrator (the "Arbitrator") on all issues submitted.

On or about October 6, 2003, Respondents filed a Motion to Dismiss or, in the Alternative, Emergency Motion for Adjournment which asserted that Claimant failed to produce documents in direct violation of the Arbitrator's Orders dated July 22, 2003 and September 8, 2003. Respondents further asserted that Claimant's failure to produce documents prejudiced Respondents and hindered their ability to adequately prepare defenses to Claimant's claims. On or about October 9, 2003, Claimant filed a response which asserted that he had produced all of the documents he was ordered to by the Arbitrator. On October 9, 2003, the Arbitrator issued an Order which granted Respondents' Motion for Adjournment, and ordered Respondents to contact Claimant to determine the period of time necessary to complete document production.

Thereafter, in an effort to assist in the resolution of outstanding discovery issues, the Arbitrator scheduled a telephonic conference with the parties on December 4, 2003. Pursuant thereto, on December 4, 2003, the Arbitrator issued an Order which directed that all outstanding document production was to be completed by January 5, 2004, and that witness and exhibit lists were to be exchanged by January 12, 2004.

On or about January 12, 2004, Respondents filed a Motion to Dismiss which asserted the Arbitrator had the authority to dismiss Claimant's claims because Claimant failed to comply with three Orders issued by the Arbitrator regarding document production, and failed to comply with NASD Dispute Resolution's rules governing discovery. On or about January 13, 2004, Claimant filed a response which asserted he had produced all of the documents he was ordered to by the Arbitrator on December 29, 2003. On January 20, 2004, the Arbitrator issued an Order which granted Respondents' Motion to Dismiss Claimant's claims with prejudice.

based upon Claimant's failure to produce key documents that the Arbitrator ordered him to produce.

On or about January 26, 2004, Claimant filed a Motion to Reconsider the Arbitrator's Ruling on Respondents' Motion to Dismiss which asserted that all documents ordered by the Arbitrator to be produced by January 5, 2004 were produced to Respondents on December 29, 2003. On or about January 26, 2004, Respondents filed a response which asserted that Claimant had not produced all documents. On or about January 26, 2004, Respondent Marzella filed a Request for Expungement which requested the expungement of this matter from his public and non-public NASD Central Registration Depository records. On January 28, 2004, the Arbitrator issued an Order which reaffirmed his prior Order to dismiss Claimant's claims with prejudice. In addition, the Arbitrator stated that he would not expunge this arbitration claim from Respondent Marzella's records because an evidentiary hearing was not held and exhibits were not reviewed. On or about January 29, 2004, Respondent Marzella withdrew his Request for Expungement.

AWARD

After considering the pleadings and the record in this matter, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

Claimant's claims are dismissed with prejudice.

Any and all claims for relief not specifically addressed herein are denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$125.00
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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. Accordingly, Respondent MSDW is a member firm and a party.

Member surcharge	= \$425.00
Total Member Fees	= \$425.00

Adjournment Fees

No adjournment fees were assessed in this matter.

Injunctive Relief Fees

Injunctive relief fees are assessed to each member or associated person who files for a temporary injunction in court. Parties in these cases are also assessed arbitrator travel expenses and costs when an arbitrator is required to travel outside his or her hearing location and additional arbitrator honoraria for the hearing for permanent

injunction. These fees, except the injunctive relief surcharge, are assessed equally against each party unless otherwise directed by the panel.

Injunctive relief fees were not assessed in this matter.

Forum Fees and Assessments

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

Three (3) Pre-hearing sessions @ \$450.00/session		= \$1,350.00
Pre-hearing conferences:		
	July 22, 2003	1 session
	September 8, 2003	1 session
	December 4, 2003	1 session

Total Forum Fees	= \$1,350.00
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The Arbitrator has assessed forum fees of \$675.00 to Claimant, and \$675.00 to Respondents, jointly and severally.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services beyond the normal administrative services. These include, but not limited to, additional copies of arbitrator awards, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

There were no administrative costs incurred in this matter.

Fee Summary

Claimant is solely liable for:

Initial Filing Fee	= \$125.00
<u>Forum Fees</u>	= \$675.00
Total Fees	= \$800.00
<u>Less Payments</u>	= \$625.00
Balance Due NASD Dispute Resolution	= \$175.00

Respondent MSDW is solely liable for:

<u>Member Fees</u>	= \$425.00
Total Fees	= \$425.00
<u>Less Payments</u>	= \$425.00
Balance Due NASD Dispute Resolution	= \$ 0.00

Respondents are jointly and severally liable for:

<u>Forum Fees</u>	= \$675.00
Total Fees	= \$675.00

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<u>Less Payments</u>	<u>= \$ 0.00</u>
Balance Due NASD Dispute Resolution	= \$675.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATOR

Richard Lee Ashton

Public Arbitrator

Arbitrator's Signature

/s/
Richard Lee Ashton
Public Arbitrator

February 3, 2004
Signature Date

February 3, 2004
Date of Service (For NASD Dispute Resolution office use only)

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<u>Less Payments</u>	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$675.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATOR

Richard Lee Ashton

Public Arbitrator

Arbitrator's Signature

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Feb. 3, 2004

Signature Date

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