
Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Name of the Claimant
CGF Securities, LLC

Case Number: 04-00948

Name of the Respondent
Maria Fiore

Hearing Site: Boca Raton, Florida

Nature of the Dispute: Member vs. Associated Person.

REPRESENTATION OF PARTIES

For CGF Securities, LLC, hereinafter referred to as "Claimant" or "CGF": Gary E. Susser, Esq., Law Offices of Gary E. Susser, P.A., Boynton Beach, Florida.

Maria Fiore, hereinafter referred to as "Respondent" or "Fiore", appeared *pro se*.

CASE INFORMATION

Statement of Claim filed on or about: February 10, 2004.

Claimant signed the Uniform Submission Agreement on: February 10, 2004.

Statement of Answer, Affirmative Defenses and Counterclaim filed on or about: April 5, 2004.

Respondent did not file an executed Uniform Submission Agreement.

Response to Counterclaim filed by Claimant on or about: July 16, 2004.

CASE SUMMARY

Claimant alleged that Respondent defaulted in payment on a loan owed pursuant to a certain Promissory Note.

Unless specifically admitted in her Answer, Respondent denied the allegations made in the Statement of Claim and asserted various defenses.

Respondent alleged the following causes of action in her Counterclaim: 1) breach of contract / breach of implied duty of good faith and fair dealing; 2) breach of fiduciary duty; 3) fraudulent misrepresentation / fraud in the inducement; 4) duress / coercion; 5) defamation / slander; 6) non-statutory sexual harassment / hostile work environment; and 7) assault and battery. The causes of action relate to Respondent's former employment with Claimant.

Unless specifically admitted in its Answer, Claimant denied the allegations made in the Counterclaim and asserted various defenses.

RELIEF REQUESTED

Claimant requested: 1) dismissal of the Counterclaim; 2) compensatory damages in the amount of \$23,334.00; 3) interest; 4) costs; 5) attorneys' fees; and 6) such other relief the undersigned arbitrators (the "Panel") deemed just and proper.

Respondent requested: 1) dismissal of the Statement of Claim in its entirety; 2) compensatory damages; 3) punitive damages; 4) interest; 5) costs; and 6) attorneys' fees.

OTHER ISSUES CONSIDERED AND DECIDED

Respondent did not file with NASD Dispute Resolution a properly executed Uniform Submission Agreement but is required to submit to arbitration pursuant to the NASD Code of Arbitration Procedure (the "Code") and, having answered the claim, appeared and testified at the hearing, is bound by the determination of the Panel on all issues submitted.

On or about January 4, 2005, Claimant filed its Motion to Dismiss Counterclaim of Respondent Maria Fiore and to Strike Answer and Affirmative Defenses. Claimant requested the Panel to: 1) strike Respondent's Answer and Affirmative Defenses; 2) dismiss, with prejudice, Respondent's Counterclaim; or 3) bar Respondent from presenting any evidence in any form in defense of Claimant's Statement of Claim or in support of Respondent's Counterclaim, and that the arbitration proceed forward, as scheduled, only on Claimant's Statement of Claim. On or about January 20, 2005, Respondent filed her written response to the motion. On or about February 10, 2005, the Panel conducted a telephone pre-hearing conference with the parties. The Panel ordered that: 1) the evidentiary hearing remains scheduled for March 1 - 2, 2005; 2) Respondent's Counterclaim is dismissed, without prejudice; 3) Respondent's Affirmative Defenses are stricken, except the First Affirmative Defense (failure to state a cause of action) and the Eighth Affirmative Defense (laches); 3) Paragraphs 3, 4, 5, 6 and 9 of Respondent's Answer are stricken insofar as they relate or refer to Respondent's Affirmative Defenses or Counterclaim; 4) subject to the Panel's discretion, Respondent will be barred from offering any documentary evidence at the hearing; and 5) costs for Claimant's Motion to Dismiss Counterclaim and to Strike Answer and Affirmative Defenses and the pre-hearing conference are assessed against Respondent.

On or about March 3, 2005, the Panel ordered that: 1) the evidentiary hearing is scheduled to continue on April 1 and 4, 2005; 2) the Panel's Order dated February 10, 2005 is vacated, except for paragraph no. 6 thereof; 3) Respondent shall respond in full to Claimant's Request for Documents and Information, originally served on Respondent on or about July 16, 2004 and re-served on Respondent at the pre-hearing conference of March 1, 2005; 4) Claimant is authorized to serve additional limited discovery requests on Respondent and Respondent must respond by March 11, 2005; 5) Claimant is authorized to serve appropriate follow-up discovery requests on Respondent by March 21, 2005; 6) Respondent must respond to follow-up discovery requests by March 28, 2005; and 7) all discovery requests and responses must be served by hand delivery or overnight mail.

On or about March 16, 2005, Claimant filed its Motion to Terminate Case. Claimant alleged that Respondent failed to comply with repeated Orders of the Panel. Respondent did not file a written response. On or about

March 30, 2005, the Panel denied the motion and ordered the hearing to resume on April 1, 2005.

The parties agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions (if any), the majority of the Panel has decided in full and final resolution of the issues submitted for determination as follows:

Arbitrators Green and Saks submit the following majority opinion and disagree with the dissent submitted by Arbitrator Ansell.

This was a claim by Claimant CGF Securities, LLC on a promissory note for an unpaid balance of \$23,334.00. The funds were tendered to Respondent Maria Fiore pursuant to a contract entered into on December 6, 2001 between Claimant and Respondent. The payments were tendered to Respondent upon her fulfilling two of the three conditions of the contract. There is no dispute as to the fulfillment of the payment. The third condition of the contract was not fulfilled nor was payment tendered to the Respondent. Accordingly, it is not an issue in this arbitration.

The promissory note upon which the Claimant based its claim contained two pages. The second page of the promissory note allegedly contained the Respondent's signature. Two different copies of the two-page promissory note were submitted into evidence. Witnesses for the Claimant admitted that the first page of the promissory note upon which they based their claim was not the first page of the note signed by the Respondent. The first page was substituted at a date significantly later than December 6, 2001.

While Claimant could not fix the date when the substitution took place, their best testimony was that the substitution took place more than a year after the note was originally signed. Witnesses for the Claimant admitted that the Respondent was never advised of the substitution of a new first page of the note. In addition, they were not able to produce any evidence as to who substituted the new first page.

Arbitrators Green and Saks are of the opinion that the Promissory Note upon which the Claimant relies is fraudulent.

Therefore, the Claimant is denied recovery under the note.

Respondent has failed to present evidence to support her counterclaim or damages thereon. Therefore, Respondent's Counterclaim is denied.

Arbitrators Green and Saks further find based upon the testimony of the witnesses that the Respondent's employment was terminated at the request of the Claimant and was not voluntary.

Each party should bear their own costs and attorneys' fees.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

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

Initial claim filing fee	= \$ 750.00
Counterclaim filing fee	= \$ 250.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, Claimant is a member firm and a party.

Member surcharge	= \$ 425.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,200.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed:

There were no adjournments requested during these proceedings for which fees were assessed.

Three-Day Cancellation Fees

Fees apply when a hearing on the merits is postponed or settled within three business days before the start of a scheduled hearing session:

There were no three-day cancellation fees assessed during these proceedings.

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.

There were no injunctive relief fees assessed during these proceedings.

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A 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:

One (1) Pre-hearing session with a single arbitrator @ \$450.00 per session	= \$ 450.00
Pre-hearing conference: December 1, 2004	1 session

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Two (2) Pre-hearing sessions with Panel @ \$1,000.00 per session	= \$2,000.00
Pre-hearing conferences: July 20, 2004 1 session	
February 10, 2005 1 session	

Six (6) Hearing sessions @ \$1,000.00 per session	= \$6,000.00
Hearing Dates: March 1, 2005 2 sessions	
April 1, 2005 2 sessions	
April 4, 2005 2 sessions	

Total Forum Fees	= \$8,450.00
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The majority of the Panel has assessed forum fees in the amount of \$7,450.00 to Claimant.

The majority of the Panel has assessed forum fees for the pre-hearing conference of February 10, 2005 in the amount of \$1,000.00 to Respondent.

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 during these proceedings.

Fee Summary

Claimant is solely liable for:

Initial Filing Fee	= \$ 750.00
Member Fees	= \$ 3,375.00
Forum Fees	= \$ 7,450.00
Total Fees	= \$11,575.00
Less payments	= \$ 4,425.00
Balance Due NASD Dispute Resolution	= \$ 7,150.00

Respondent is solely liable for:

Counterclaim filing fee	= \$ 250.00
Forum Fees	= \$1,000.00
Total Fees	= \$1,250.00
Less payments	= \$ 0.00
Balance Due NASD Dispute Resolution	= \$1,250.00

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

ARBITRATION PANEL

<i>Burton L. Ansell, Esq.</i>	-	<i>Public Arbitrator, Presiding Chairperson</i>
<i>Lawrence M. Green</i>	-	<i>Public Arbitrator</i>
<i>A. George Saks, Esq.</i>	-	<i>Non-Public Arbitrator</i>

Concurring Arbitrators' Signatures

_____/s/_____
Lawrence M. Green
Public Arbitrator

April 19, 2005
Signature Date

_____/s/_____
A. George Saks, Esq.
Non-Public Arbitrator

April 20, 2005
Signature Date

Dissenting Arbitrator's Signature

_____/s/_____
Burton L. Ansell, Esq.
Public Arbitrator, Presiding Chairperson

April 19, 2005
Signature Date

Dissenting Opinion:

This was a claim on a promissory note for the remaining unpaid balance of \$23,334.00. The amount was not in dispute.

When Fiore, a broker, came to work for CGF she was given a loan to be ratably forgiven over a period of several years, provided she remained in CGF's employ until the note was fully forgiven. The note also provided that any remaining unpaid portion of the note would immediately become due and payable upon "termination of [Fiore's] employment for any reason whatsoever ..."

Fiore left CGF's employ while a balance of \$23,334.00 still remained, and this claim resulted.

The reasons for Fiore's departure from CGF were sharply disputed by the parties, Fiore asserting that her remaining liability on the note was excused and/or subject to setoff because of various affirmative defenses and counterclaims. These included claims that her "voluntary resignation" was "coerced", sexual harassment, breach of contract, slander, fraud, hostile work environment, misrepresentation, breach of fiduciary duty, and assault and battery.

At the hearing, Fiore offered no evidence of damages, and the arbitrators therefore did not determine liability or

assess any damages on the setoff claims. However, a majority of the arbitrators decided that Fiore left CGF for reasons that excused further repayment of the note.

In my view, the reasons for the termination are irrelevant and there is no basis for excusing Fiore's full performance of the contract. Although there is an implied covenant of good faith and fair dealing that is sometimes invoked to, for example, excuse performance by a party to a contract if his or her performance is "prevented" by the other party, both settled law and simple logic dictate that such a covenant may not be implied where it would contradict an express covenant in the contract. Thus, Fiore expressly agreed that if her employment were terminated "for any reason whatsoever" she would remain liable on the note. Plainly, the particular reasons for the termination are irrelevant, Fiore's liability is not excused, and her counterclaim should be dismissed with prejudice.

The issue of "fraud" raised in the majority opinion is a non-issue. Fiore admits that she received the promised \$23,334.00 from CGF and has not repaid it. She suffered no detriment from the page substitution, which occurred after the contract was fully executed, consisted of the simple correction of a clerical error, and has no connection to any relevant provision of the note. By definition, if there was no detriment to Fiore there was no fraud.

The uncontroverted testimony of a CGF witness was that probably in 2003 – long after Fiore had received the loan of \$23,334.00 and had left CGF's employ – it was discovered that a date was misstated on the first page of the standard two page note, and the page was replaced by a page with the correct date but otherwise identical. Further, it was obvious that the corrected date reflected the actual intent of the parties.

The page substitution did not excuse Fiore from repaying the loan.

April 22, 2005


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

ARBITRATION PANEL

Burton L. Ansell, Esq.
Lawrence M. Green
A. George Saks, Esq.

Public Arbitrator, Presiding Chairperson
Public Arbitrator
Non-Public Arbitrator

Concurring Arbitrators' Signatures


Lawrence M. Green
Public Arbitrator

04-19-05
Signature Date

A. George Saks, Esq.
Non-Public Arbitrator

Signature Date

Dissenting Arbitrator's Signature

Burton L. Ansell, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

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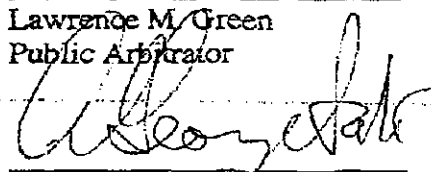
Burton L. Ansell, Esq.
Lawrence M. Green
A. George Saks, Esq.

- Public Arbitrator, Presiding Chairperson
- Public Arbitrator
- Non-Public Arbitrator

Concurring Arbitrators' Signatures

Lawrence M. Green
Public Arbitrator

Signature Date



4/20/05

A. George Saks, Esq.
Non-Public Arbitrator

Signature Date

Dissenting Arbitrator's Signature

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Public Arbitrator

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Public Arbitrator, Presiding Chairperson

04/19/05
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