

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Burton Glazer

Claimant

Case #88-00036

VS

Award

First Affiliated Securities, Inc.
and Elly Fischbach

Respondents

Heard Before the Arbitration Panel:

David G. Skeen, Esq.
Prudence W. Baldwin
Donald C. Douglas

SUMMARY OF ISSUES

This arbitration was filed on January 8, 1988.

Claimant alleges the following: Respondent Fischbach started doing business with Claimant in 1984 when Fischbach was with another brokerage. Respondent Fischbach came to Respondent First Affiliated Securities in April, 1984 and brought Mr. Glazer's accounts with him. Respondent Fischbach commenced a trading program in Mr. Glazer's account in accordance with an economic theory he had developed. His investment objectives were conservative because the funds were for his retirement. Fischbach placed him in speculative stocks and misrepresented the nature of the investments.

Claimant called Fischbach on or about Wednesday, October 14, 1987 and instructed him to sell the securities in his IRA account and Fischbach dissuaded him from so doing. He called Fischbach's office on Monday, October 19, 1987 and was told that Mr. Fischbach was in Europe. Claimant transferred his stock from Respondent First Affiliated in December, 1987 and sold the stocks in January, 1988.

Claimant's causes of action are: 1) The trades made by Fischbach were unsuitable; 2) Respondents are liable under the Racketeer Influenced and Corrupt Organization Act (RICO); 3) Breach of warranty; and 4) Breach of Fiduciary Duty. At the hearing Claimant withdrew his claim of churning.

Respondent, First Affiliated Securities (FAS) alleged the following: Claimant has failed to specify any facts to support his fraud and negligence claims, specifically the allegations of fraud and suitability. Respondent FAS argues that it cannot be found liable under a theory of respondeat superior or as a controlling person. Claimant also fails to plead RICO violations with adequate particularity and that Claimant's negligence claims are factually insufficient under a breach of warranty theory. Claimant is also barred from recovery based upon ratification of the account activity, Claimant's waiver of any right to recovery, and failure to establish the necessary due diligence to support his fraud claims.

Respondent Elly Fischbach stated that Claimant was an informed investor and speculator. Glazer chose to participate in the trading program. Fischbach states that he made no warranties or guarantees to Claimant. The stock trades were suitable for Mr. Glazer.

DAMAGES AND RELIEF REQUESTED

Claimant requested his out of pocket losses which totalled \$114,328.53 as of October 30, 1987, any losses attributable to Mr. Fischbach's warranties and any losses due to the unsuitability of the trade. Claimant also requested attorneys' fees in accordance with state and federal laws.

Respondent First Affiliated requested costs and sanctions in responding to Claimant's frivolous claims. Respondent First Affiliated also requested that Claimant's claims be dismissed.

Respondent Elly Fischbach requested that Claimant's claims be dismissed.

DAMAGES AND RELIEF AWARDED

On April 27 and 28, 1989 the arbitrators heard the controversy between the parties, in five sessions, as set forth in submissions to arbitration signed by Claimant on March 18, 1988 and by Respondents First Affiliated Securities, Inc., on June 6, 1988 and Elly Fischbach on June 6, 1988. At the commencement of the hearing, Jeffrey Kob, counsel for Respondent First Affiliated Securities presented a Motion to Dismiss based upon Insufficient Facts pled by Claimant to constitute a Claim.

The arbitration panel, having considered the pleadings, the testimony, and the evidence presented at the hearing, has determined in full and final resolution of the issues submitted for determination as follows:

1. Respondent's motion to dismiss is denied.
2. Each and every claim of Claimant against Respondent FAS is dismissed.
3. A majority of the arbitration panel dismissed each and every claim of Claimant against Respondent Elly Fischbach. Arbitrator David Skeen respectfully dissents and would find Respondent Elly Fischbach liable to Claimant for unsuitability and award damages accordingly. Each and every claim of Claimant against Respondent Elly Fischbach is therefore dismissed.
4. The parties shall each bear their respective costs, including attorney's fees.

OTHER ISSUES

Pursuant to Section 43 of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall retain the \$750.00 filing fee previously deposited by the Claimant.

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Date Served: 07/21/89