

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between)
)
JOHN CUNNINGHAM,)
) Claimant,)
) Case #88-00979
vs.) Award
)
MORGAN-KEEGAN & CO., INC.,)
)
KENNETH J. ARENA AND ANDREW RODE,)
) Respondents.)
)

Heard before the members of the Arbitration Panel:

William A. Fleck, Esq.
Ms. Patricia A. Shub
Mr. Terrence W. Grant

CASE SUMMARY

This claim was filed with the NASD, Inc. on March 25, 1988. The hearing was conducted in Fort Lauderdale, Florida on January 3, 1990 with a total of three (3) sessions.

Claimant John Cunningham ("Cunningham") alleged that Respondents Morgan-Keegan and Company, Inc. ("Morgan-Keegan"), Kenneth Arena ("Arena") and Andrew Rode ("Rode") were liable for: excessive trading; unsuitability; misrepresentation; failure to disclose; fraud and breach of fiduciary duty. Specifically, Claimant alleged that Arena's purchase, on margin, of stock on behalf of Claimant, after a lawsuit had been instituted against the stocks issuer, was in contravention of Claimant's stated investment objectives and constituted violations of Sections 10(b), 15(c) and 17(a) and Rules 10b-5 and 15c of the 1933 and 1934 Securities and Exchange Acts as well as violations of Florida Statutes Section 812.035, NYSE Rules 435 and 405 and NASD Rules of Fair Practice Article III, Sections 2 and 27.

Respondents alleged that Claimant advised Rode that he was a sophisticated investor and wanted to speculate; Claimant was advised of the risks; the Trading Authorization was never exercised and all transactions which took place were at the direction of the Claimant. Additionally, Respondents asserted the affirmative defenses of: Statute of Limitations; failure to mitigate damages; lack of proximate cause; waiver; estoppel; laches; ratification; acquiescence; good faith; that Claimant is not entitled to recover the measure of damages he seeks; any representations constituted mere puffing; Claimant exercised full control over the account; the allegations neither support, nor does the Florida Arbitration Act provide for, a claim of punitive damages; and Florida Statute Section 812.035 and the NYSE and NASD Rules do not provide a private cause of action.

RELIEF REQUESTED

Claimant requested damages in the amount of \$55,175.00 inclusive of interest, treble damages and other costs. Respondents requested dismissal of the claim.

AWARD

On January 3, 1990, the arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimant on April 7, 1988, and by Respondents Morgan-Keegan on August 12, 1988 and Arena and Rode on July 25, 1988. 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. The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD, Inc.
2. Respondents are not liable to the Claimant and, therefore, all claims against them are hereby dismissed.
3. Pursuant to Section 43 of the Code of Arbitration Procedure, the arbitrators have assessed forum fees in the amount of Two Thousand Two Hundred Fifty and 00/100 (\$2,250.00) Dollars (\$750 X 3 sessions). Claimant is hereby assessed forum fees in the amount of One Thousand One Hundred Twenty Five and 00/100 (\$1,125.00) Dollars. The National Association of Securities Dealers, Inc. shall retain the Seven Hundred and Fifty and 00/100 (\$750.00) Dollar filing fee previously deposited by the Claimant with the NASD, Inc. as partial satisfaction of Claimant's share of such forum fees. Respondents Morgan-Keegan and Arena are hereby assessed forum fees in the amount of One Thousand One Hundred Twenty Five and 00/100 (\$1,125.00) Dollars for which they shall be jointly and severally liable.
4. The arbitrators have assessed the further amount of Sixty Six and 00/100 (\$66.00) Dollars for costs incurred by the NASD, Inc. Claimant is hereby assessed Thirty Three and 00/100 (\$33.00) Dollars payable to the NASD, Inc. Respondents Morgan-Keegan and Arena are hereby assessed Thirty Three and 00/100 (\$33.00) Dollars payable to the NASD, Inc. and for which they shall be jointly and severally liable.
5. The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including attorney's fees.

OTHER ISSUES

None.

ARBITRATORS CONCURRING

William A. Fleck, Esq.
Ms. Patricia A. Shub
Mr. Terrence W. Grant

Dated: January 17, 1990