

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Michael R. Barz

CASE #88-01940

Name of Respondent(s)

Raymond, James & Associates, Inc.
Joseph P. Tuorto
Harvey Hertz

Heard before the members of the Arbitration Panel:

George Felos, Esq.

Public Arbitrator

Louis Saxton

Public Arbitrator

Randall T. Stack

Industry Arbitrator

CASE SUMMARY

This matter was initiated by a Statement of Claim filed with the National Association of Securities Dealers, Inc. ("NASD") on June 16, 1988. Claimant, Michael Barz ("Barz"), alleged that Respondents, Raymond James & Associates, Inc. ("Raymond James"), Joseph Tuorto ("Tuorto") and Harvey Hertz ("Hertz"), were liable for: violations of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934; violations of Chapter 517 of the Florida Statutes; fraud; breach of fiduciary duty; negligence; and civil theft. Claimant alleged that Hertz: misrepresented, among other things, the safety and potential investment return of certain equity securities; recommended and purchased for Claimant unsuitable investments; and excessively traded Claimant's account while maintaining complete discretionary control over the account. Claimant alleged that Raymond James and Tuorto were also liable for failure to properly supervise Hertz.

In a Statement of Answer filed with the NASD on June 23, 1989, Respondents, Raymond James, Tuorto and Hertz, denied all allegations of wrongdoing and alleged that Claimant wanted to be aggressive in the market; was aware of the risks involved; Hertz did not assure Claimant that he would realize a specific rate of return; and the investments made subsequent to the October 1987 market crash were authorized by Claimant. Respondents asserted the affirmative defenses of: assumption of risk; unclean hands; ratification; estoppel; waiver; Claimant's lack of due diligence; comparative negligence; lack of intent; good faith; superceding or intervening causes; failure to mitigate damages; and that Claimant cannot recover under Florida's Civil Theft Statute since he consented to the investments and Respondents lacked the intent to defraud.

RELIEF REQUESTED

Claimant requested damages in the amount of \$18,000 plus treble damages pursuant to Section 772.11 of the Florida Statutes plus attorney's fees, punitive damages, costs, and interest.

Respondents requested dismissal of the claim plus attorney's fees and costs.

AWARD

On March 5, 1990 (pre-hearing conference) and April 18th and 19th, 1991, in Tampa, Florida, during a hearing lasting six (6) sessions, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimant on June 8, 1988, by Dennis W. Zank on behalf of Respondent, Raymond James on August 23, 1988, by Respondents Hertz and Tuorto on August 23, 1988.

After considering the pleadings, the testimony, and the evidence presented at the hearing, the arbitrator(s) have decided 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 be entered. In either case, the parties have agreed to receive conformed copies of the Award while the original(s) remain on file with the NASD.
2. Respondent, Tuorto, is found not liable and, therefore, all claims against him are hereby dismissed.
3. Respondents, Raymond James and Hertz, are found liable, jointly and severally, and shall pay to the Claimant the amount of \$9,978.66, plus interest at the legal rate of 12% per annum from June 17, 1987 to April 18, 1991 in the amount of \$4,590.18 for a total due to the Claimant of \$14,568.84.

4. Respondents, Raymond James and Hertz, are also found liable, jointly and severally, and shall pay to the Claimant the further amount of \$11,827.54 for attorney's fees pursuant to Section 517.211, Florida Statutes.

5. Respondents, Raymond James and Hertz, are also found liable, jointly and severally, and shall pay to the Claimant the further amount of \$2,500 for costs.

6. Respondents, Raymond James and Hertz, are also found liable, jointly and severally, and shall pay to Claimant the further amount of \$15,000 for punitive damages. The Panel finds that Respondent, Hertz, acting within the scope and course of his employment with Respondent, Raymond James & Associates, Inc., solicited Claimant on December 30, 1987 to resume a trading program which Hertz, by his own admission, previously determined was unsuitable to Claimant's temperament and financial situation. The panel finds such action to be outrageous, willful, and in wanton disregard of the duties owed Claimant by Respondents and therefore, awards Claimant punitive damages. The arbitrators base their authority to award punitive damages on the application of the Federal Arbitration Act and the case law interpreting that Act.

FORUM FEES

7. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$3,000 (6 sessions x \$500 per session). Respondents, Hertz and Raymond James, are hereby assessed \$3,000, jointly and severally, of which \$500 shall be paid directly to the Claimant as a return of his filing fee, and \$2,500 of which shall be paid to the National Association of Securities Dealers, Inc. The NASD, Inc. shall retain the \$500 previously deposited in partial satisfaction of such forum fees.

8. The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

/s/
George Felos, Esq.

/s/
Louis Saxton

/s/
Randall T. Stack

Date of Decision: 5/22/91