

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between)
)
HOWARD MOTT,)
)
) Claimant,)
) Case #88-03078
vs.) Award
)
BLINDER ROBINSON & CO., INC.) Respondent,)
)
vs.)
)
JOHN SWIGER) Third Party
) Respondent.)
)

Heard before the members of the Arbitration Panel:

Walter W. Hanes, Esq.
Bruce A. Beery
J. Thomas Hartung

CASE SUMMARY

This claim was filed with the NASD, Inc. on October 3, 1988. The hearing was conducted in Tampa, Florida on January 17, 1990, and February 14, 1990, with a total of four (4) sessions.

Claimant, Howard Mott ("Mott"), alleged that Respondent, Blinder Robinson and Co., Inc. ("Blinder"), was liable for: common law fraud; violations of Florida Statutes, Section 517.301 and Chapter 772; negligence; breach of fiduciary duty; and churning. Specifically, Claimant alleged that the actions of Blinder's employee, John Swiger ("Swiger"), in engaging in discretionary trading of penny stocks without consulting with, or obtaining the written authorization of, Claimant and in not disclosing the risks involved in such trading, caused Claimant's damages.

Respondent, Blinder, denied liability and requested clarification of the Statement of Claim. Blinder asserted affirmative defenses alleging: Claimant failed to state a claim; the damages sought were speculative; Claimant is barred from recovery by the doctrine of in pari delicto; stoppel; waiver; ratification; Claimant was not justified in his reliance; Blinder is not liable for the actions of Swiger, since Swiger was an independent contractor; Blinder properly supervised Swiger; breach of contract by the Claimant; contributory negligence; failure to exercise due diligence; failure to mitigate damages; that Blinder complied with all laws; an award of punitive damages is not available to Claimant under these circumstances; and set off.

Respondent, Blinder, asserted a Third Party Claim, which was denominated as a cross claim, against Swiger for indemnification and contribution. Specifically, Blinder alleged that the acts complained of, should they be found to have been committed by Swiger, were beyond the scope of Swiger's employment. Blinder also asserted a counterclaim against Claimant for attorney's fees incurred by Blinder in defending this claim in both Circuit Court and Arbitration.

Third Party Respondent, Swiger, failed to file an Answer.

Claimant/Counter Respondent, Mott, answered the counterclaim and alleged that: he was unaware of the arbitration provision; and the counterclaim fails to state cause of action.

RELIEF REQUESTED

Claimant requested rescission of the transactions plus interest, treble damages, attorney's fees and other costs. Respondent, Blinder, requested dismissal of the Claim and counterclaimed for attorney's fees and asserted a Third Party Claim requesting indemnification or contribution. Third Party Respondent, Swiger, failed to file an Answer. Claimant/Counter Respondent, Mott, requested dismissal of the Counterclaim.

AWARD

On January 17, 1990 and February 14, 1990, the arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by Claimant on November 1, 1988, by Respondent, Blinder, on January 16, 1989, and not signed by Third Party Respondent, Swiger, as required pursuant to Section 12 (a) of the NASD Code of Arbitration Procedure ("Code"), Swiger being a person associated with an NASD member firm at the time this controversy arose. Having considered the pleadings, the testimony, and the evidence presented at the hearing and Swiger, neither appearing at the hearing nor seeking any adjournment thereof, notwithstanding his knowledge of this arbitration as evidenced more fully below, the arbitrators have 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. Jurisdiction exists pursuant to the Form U-4 executed by Respondent, Swiger, and pursuant to Sections 12 and 13 of the Code.
3. Although the reasons are set forth in the record of proceedings for finding of adequate notice to Third Party Respondent, Swiger, the reasons will again be set forth here. The NASD, Inc. has made every attempt to locate and serve Respondent, Swiger, with notice of this hearing as demonstrated by the following record evidence:
 - (a) February 14, 1989, Service of Statement of Answer containing the Third Party Claim on Swiger by certified mail at 10934 Reading Road, Jacksonville, Florida 32257 (while no return receipt was received by the NASD, neither was this mail ever returned as undelivered; evidenced by Arbitrator's Exhibit 2 (a)).
 - (b) May 11, 1989, Service of overdue Answer notice on Swiger by certified mail at Swiger's Reading Road address (while no return receipt was received by the NASD, neither was this mail ever returned as undelivered; evidenced by Arbitrator's Exhibit 2(b)).

(j) January 29, 1990, letter enclosing a new Hearing Advance Sheet and correcting the prior Hearing Advance Sheet which only indicated February 14 as the date for the next session sent to Swiger by regular mail at his Bartram Road address (this mail was not returned as undelivered; evidenced by Arbitrator's Exhibit 2(j)).

4. Respondent, Blinder, is hereby liable and shall pay to Claimant the amount of Thirty Seven Thousand Three Hundred Fourteen and 48/100 (\$37,314.48) Dollars inclusive of interest at the legal rate of 12% per annum.
5. Respondent, Blinder, is hereby liable and shall pay to Claimant the further amount of Four Thousand Five Hundred and 00/100 (\$4,500.00) Dollars for costs and expenses.
6. Third Party Respondent, Swiger, is not liable to Respondent, Blinder, and, therefore, the Third Party Claim against him is hereby dismissed.
7. Claimant/Counter Respondent, Mott, is not liable to the Respondent/Counter Claimant, Blinder, and, therefore, the counterclaim against him is hereby dismissed.
8. Pursuant to Section 43 of the Code of Arbitration Procedure, the arbitrators have assessed Respondent, Blinder, forum fees in the amount of Three Thousand and 00/100 (\$3,000.00) Dollars (\$750 x four sessions), payable directly to the National Association of Securities Dealers, Inc. The NASD, Inc. shall refund the Seven Hundred Fifty and 00/100 (\$750.00) Dollar filing fee previously deposited by the Claimant.
9. The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding.

OTHER ISSUES

Pursuant to the statements of Claimant's counsel that the issue of attorney's fees would be referred to the appropriate court for resolution, and noting Respondent's lack of objection thereto, the arbitrators have decided that Claimant's request for attorney's fees is hereby dismissed without prejudice.

ARBITRATORS CONCURRING

Walter W. Hanes Esq., Bruce A. Beery and J. Thomas Hartung.

Dated: April 16, 1990