

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Shearson Lehman Hutton, Inc.

89-03121

Name of Respondent(s)

Ann F. Johnson
Kenneth Pagago
B.R. Davidson

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. ("NASD") on or about November 8, 1989, Claimant Shearson Lehman Hutton, Inc. ("Shearson") alleged that Respondent Ann F. Johnson, ("Johnson") opened an option trading account with Shearson on or about March 24, 1985. Shearson alleged that Johnson bought and sold options pursuant to the account agreements she executed between the period of September 1, 1987 and October 31, 1987. Shearson alleged that on a number of occasions up to and including October 16, 1987, Shearson notified Johnson and B.R. Davidson, who held a power of attorney on behalf of Johnson, that there were a maintenance calls in Johnson's account. Shearson alleged that Johnson failed or refused to deposit additional funds or securities. Shearson alleged that on October 19, 1987 Johnson and Davidson were notified that additional funds would have to be deposited or that uncovered option positions would have to be covered. Shearson alleged that Johnson again failed or refused to deposit monies or securities and that the uncovered positions were therefore covered by Shearson on or about October 19, 1987. Shearson alleged that on or about October 20, 1987 the securities positions in Johnson's account were sold with the net effect being a deficit in Johnson's account of \$22,418.56. Shearson alleged that this sum and interest has not been paid to Shearson by Johnson.

In a statement of answer, counterclaim and third party claim filed with the NASD on or about January 26, 1990, Johnson denied the allegations of the claim and asserted affirmative defenses including, but not limited to, laches, estoppel, waiver, ratification and failure to mitigate damages. Johnson asserted a counterclaim against Shearson and alleged that she was unsuitable for the types of trading undertaken in her account. Johnson also alleged that third party respondents Kenneth Pagago ("Pagago") and B.R. Davidson ("Davidson") breached a fiduciary duty to Johnson causing her damages.

Pagago denied the allegations of the third party claim in a reply to that pleading filed with the NASD on or about February 20, 1990.

Davidson did not answer the third party claim asserted against him by Johnson.

RELIEF REQUESTED

Shearson requested damages of \$22,418.56 as of October 31, 1987 together with interest thereon from and inclusive of October 31, 1987 as provided in the customer agreement. Johnson requested dismissal of the claim plus an award on her counterclaim and third party claim in the amount of \$7500.00 plus interest, attorney's fees and costs of the proceeding.

Shearson requested dismissal of the counterclaim and Pagago requested dismissal of the third party claim.

PROCEDURAL MATTERS

Johnson named Davidson as a third party respondent in the answer to Shearson's statement of claim, served Davidson with a third party claim and provided the NASD with proof of service as of February 8, 1990. Davidson was and is not an associated person of a member firm, had no contract to arbitrate and failed to answer the claim or sign a uniform submission agreement. Counsel for Davidson notified the NASD by letter dated January 14, 1991 that Davidson would not voluntarily submit to arbitration. Davidson's counsel appeared at the hearing on January 23, 1991 to advise the panel of Davidson's position. The panel determined it had no jurisdiction over Davidson and would not make him a third party respondent to this matter. Johnson's third party claim against Davidson was, therefore, not considered by the panel.

AWARD

On Wednesday, January 23, 1991 in St. Louis, Missouri during a hearing lasting two sessions (2) sessions, the undersigned arbitrator(s) heard the controversy between the parties as set forth in submissions to arbitration signed on November 6, 1989 by J. Patrick Kearson on behalf of Claimant Shearson Lehman Hutton, Inc., and on March 21, 1990 by Respondent Ann F. Johnson. Third Party Respondent Kenneth Pagago did not execute a submission to arbitration, but is obligated to arbitrate this matter pursuant to Section 12 of the NASD Code of Arbitration Procedure. Pagago also appeared, testified and answered the claim. Therefore, Pagago is bound by the panel's determination on all issues submitted.

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 remains on file with the NASD.

After considering the pleadings, the testimony, and the evidence presented at the hearing, the arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Johnson is liable for and shall pay to Shearson the sum of Thirty Thousand, One Hundred, Sixty Three Dollars and Thirty Four Cents (\$30,163.34). This sum includes interest from and inclusive of October 31, 1987 to and inclusive of the date of the hearing;

2. Johnson's counterclaim asserted against Shearson shall be and is hereby denied in its entirety;

3. Johnson's third party claim against Pagago shall be and is hereby denied in its entirety;

4. The parties shall each bear their respective costs, expenses and attorney's fees incurred in this matter; and

5. Pursuant to Section 43(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. shall retain the \$500.00 claim filing fee and the hearing session deposit in the amount of \$400.00 previously deposited with the NASD by the Claimant. Shearson is assessed additional forum fees of \$400.00.

Dated: 20 FEBRUARY 1991

Panel Members Concurring

William B. Gillespie
Presiding Chair

Dated: _____

C.J. McEnerty, Jr.

Dated: _____

Charlotte S. Cohen
Industry Arbitrator

Date Served: _____

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William B. Gillespie
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Panel Members Concurring

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William B. Gillespie
Presiding Chair

Dated: _____

C.J. McEnarty, Jr.

Dated: 2-15-91

Charlotte S. Cohen
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Industry Arbitrator

Date Served: Jan 23, 1991