

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between)

Name of Claimant(s))

Michael McNamee)

Name of Respondent(s))

Shearson Lehman Hutton, Inc.)

Thomas Vietzke)

Michael J. McNamee, Jr.)

Case No. 90-01593

REPRESENTATION

For Claimant, Michael McNamee ("McNamee Sr."): Joel Goodman, Esq. of Goodman and Nekvasil, P.A.

For Respondents, Shearson Lehman Hutton, Inc. ("Shearson") and Thomas Vietzke ("Vietzke"): Debra Jenks, Esq. of Boose, Casey, Ciklin, et al.

For Third Party Respondent, Michael J. McNamee, Jr. ("McNamee Jr."): Burton Wland, Esq. of Fowler, White, et al.

CASE INFORMATION

Statement of Claim filed: June 5, 1990. Claimant's Submission Agreement signed: May 26, 1990.

Respondents, Shearson and Vietzke's, Statement of Answer filed: January 30, 1991. Respondents' Submission Agreements signed by Vietzke on January 9, 1991, and by William Hobauser on behalf of Shearson on January 14, 1991.

Third Party Respondent, McNamee Jr. failed to file a Submission Agreement as required by Sections 12 and 25 of the Code (see Other Issues). Third Party Respondent, McNamee Jr.'s, Statement of Answer filed: April 26, 1991.

HEARING INFORMATION

On April 11 and September 24, 1991, in Tampa, Florida, Pre-Hearing Conferences lasting two (2) sessions were conducted via telephone conference call. The Pre-Hearing Conference on April 11, 1991 was conducted without an arbitrator and the one on September 24, 1991 was conducted with an arbitrator.

On October 23, 24 and 25, 1991, January 31, February 1 and May 26, 1992, in Tampa, Florida, hearings lasting 15 sessions were conducted.

CASE SUMMARY

Claimant alleged that Respondents were liable for violation of the Florida Security and Investor Act, common law fraud, intentional breach of fiduciary duty, negligence, gross negligence and civil theft. Claimant alleged that Claimant's broker began trading options in Claimant's account without authorization from Claimant and Respondents failed to supervise the broker. Claimant alleged that the trading in options on margin was excessive and unsuitable for Claimant in light of his income and investment objectives.

Respondents, Shearson and Vietzke, denied all allegations of wrongdoing and alleged that the claim is the result of collusion between Claimant and his broker/son McNamee Jr., the account was opened as a joint account giving McNamee Sr. and McNamee Jr. equal rights to conduct trades in the account, Claimant was a sophisticated investor, Claimant's investment objectives were appreciation with risk and Claimant received monthly statements.

Respondents, Shearson and Vietzke, alleged the affirmative defenses of failure to state a claim, assumption of risk, ratification, account stated, waiver, estoppel, laches, unclean hands, in pari delicto, failure to mitigate damages, Claimant's voluntary assumption of the risks was the sole proximate cause of any damages, failure to exercise due care, failure to timely notify Respondents of problems in the account, no private right of action for violation of exchange rules, lack of reliance, lack of scienter, lack of criminal intent, the damages were not caused by Respondents, statutes of limitations, and the request for punitive damages violates the U.S. and Florida Constitutions.

Respondents, Shearson and Vietzke, asserted a Third Party Claim against McNamee Jr. for indemnification and contribution.

Third Party Respondent, McNamee Jr. alleged that Shearson was aware of and participated in the conduct alleged and, therefore, can have no claim against McNamee Jr. due to Shearson's own independent negligence and wrongful conduct, Shearson is estopped from claiming against McNamee Jr. since it was aware of the trading and accepted the commissions and benefits and failed to guide McNamee Jr.'s activities or bring the alleged improprieties to McNamee Jr. or McNamee Sr.'s attention and otherwise ratified McNamee Jr.'s actions.

RELIEF REQUESTED

Claimant requested damages in the amount of \$277,738.00, plus treble damages of \$833,214.00, plus costs, attorney's fees and interest.

Respondents, Shearson and Vietzke, requested dismissal of the claims and filed a Third Party Claim for indemnification or contribution.

Third Party Respondent, McNamee, requested dismissal of the Third Party Claim plus costs and attorney's fees.

OTHER ISSUES CONSIDERED & DECIDED

1. Third Party Respondent, McNamee Jr. filed for bankruptcy and, pursuant to the automatic stay provisions of the Bankruptcy Code, the Third Party Claim against him was dismissed without prejudice.
2. This Panel finds that McNamee Sr.'s claims are not barred by any applicable statutes of limitations.
3. This Panel finds that Third Party Respondent McNamee Jr. was required to sign a Submission Agreement pursuant to Sections 12 and 25 of the NASD Code of Arbitration Procedure, McNamee Jr. being a person associated with an NASD member firm, Shearson, at the time this controversy arose.
4. 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.

AWARD

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

1. Respondent, Vietzke, is found not liable and, therefore, all claims against him are hereby dismissed.
2. Respondent, Shearson, is found liable and shall pay to the Claimant the amount of \$120,000.00, plus interest at the average one-year treasury bill rate, compounded annually from July 9, 1985 to July 9, 1992 in the amount of \$68,281.00 for a total due to the Claimant of \$188,281.00.
3. Respondent, Shearson, is also found liable and shall pay to the Claimant the further amount of \$75,312.00 for attorney's fees pursuant to Section 517.211, Florida Statutes.
4. Claimant's request for treble damages is denied.

OTHER COSTS

1. Respondent, Shearson, is also found liable and shall pay to Claimant the further amount of \$10,750.00 for costs and expert witness fees, copying costs, costs of transcripts, and other miscellaneous costs.

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

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$15,300.00 (one Pre-Hearing Conference with an arbitrator x \$300.00 plus 15 sessions x \$1000.00 per session). Respondent, Shearson, is hereby assessed \$15,300.00, \$1,000.00 of which shall be paid directly to the Claimant and \$14,300.00 of which shall be paid to the National Association of Securities Dealers, Inc. The NASD shall retain the \$1,250.00 previously deposited by Shearson in partial satisfaction of such fees leaving a balance due the NASD of \$13,050.00. Additionally, Respondent, Shearson, is hereby assessed and shall pay to Claimant the \$250.00 non-refundable filing fee previously deposited by Claimant.

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

Concurring Arbitrators' Signatures

/s/
Paul Sidney Elliott, Esq.

Public

/s/
Bruce A. Beery

Public

/s/
Joseph I. Amnette

Industry

Date of Decision: July 15, 1992