

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS-

In the Matter of the Arbitration Between)

Name of Claimant(s))

Marie P. Batchelder)

Case No. 90-03608

Name of Respondent(s))

Richard Scott Asset Management, Inc.)

Eugene Herscher)

Barry Rorex)

Leslie Anne Moore)

REPRESENTATION

For Claimant, Marie P. Batchelder ("Batchelder"): Adam S. Doner, Esq. of McGee, Jordan, Shuey, Gordon.

For Respondents, Richard Scott Asset Management, Inc. ("RSAM"), Eugene Herscher ("Herscher") and Leslie Anne Moore ("Moore"): David L. Chiras, Esq.

For Respondent, Barry Rorex ("Rorex"): pro se.

CASE INFORMATION

Statement of Claim filed: December 26, 1990. Claimant's Submission Agreement signed: February 15, 1991.

Respondents' Statements of Answer filed: April 22, 1991 by RSAM; May 30, 1991 by Rorex; and, April 22, 1991 by Herscher and Moore. Respondents' Submission Agreements signed: by Richard Weissen on behalf of RSAM on April 19, 1991; by Moore on April 24, 1991; by Rorex on May 28, 1991; and, by Herscher on June 10, 1992.

HEARING INFORMATION

On June 10, 11 and 12; August 28 and 31; September 25; and, November 6, 1992 in Fort Lauderdale, Florida, hearings lasting 14 sessions were conducted. Previous hearings scheduled for February 18, 19 and 20, 1992 were postponed pursuant to a Motion by RSAM, Herscher and Moore.

CASE SUMMARY

Claimant alleged that she was totally inexperienced in securities investing; that her investment objectives of safety, income and moderate growth were conveyed to the Respondents, through Herscher; that Claimant does not have a good command of the English language and has little formal education; and,

that Claimant was insecure about managing the large sums of money she received and was dependent on Herscher for financial advice. Claimant further alleged that Respondents, through Herscher and excepting Rorex, made misrepresentations of and omitted to state material facts; recommended and effected trades in unsuitable securities including limited partnerships, whole life insurance and large front end load funds; introduced Claimant to Rorex, for the purpose of assisting in the transfer of several hundred thousand dollars from France. Claimant alleged that Rorex, with the assistance of Herscher, gained her confidence; that Rorex opened a commodities trading account for Claimant without her knowledge or consent; that Rorex made misrepresentations of and omitted to state material facts regarding both the securities recommended by Herscher and the commodities traded by Rorex in Claimant's account; and, that Respondents' activities constituted fraud, breach of fiduciary duties, negligence, violation of the Florida and Federal securities laws, and, by RSAM and Moore, negligent supervision.

Respondents denied all allegations of wrongdoing. RSAM, Herscher and Moore alleged that Claimant's main objective was investment income to meet her expenses; that RSAM did not have control of Claimant's finances; that no investment was made without Claimant's prior written consent; that all risks were disclosed; that any non-liquid components of her investments were never more than 10% of her total net worth; that RSAM's agent merely introduced her to Rorex; that the RSAM Respondents never recommended commodities; and, did not give advice outside their areas of expertise.

Respondent, Moore, further alleged that Claimant was an experienced, knowledgeable and sophisticated investor; that Moore, as Compliance Officer for RSAM, never supervised Herscher; and, that Moore was merely an office neighbor of Rorex and had no other business relationship with him.

Respondent, Herscher, further alleged that Claimant was an experienced, knowledgeable and sophisticated investor; that Herscher never held himself out as a financial advisor; that all transactions were unsolicited and not recommended by Herscher; and, that Herscher was merely an office neighbor of Rorex and had no other business relationship with him.

Respondent, Rorex, alleged that all risks were fully disclosed; that no forms were signed in blank; that Claimant knew and understood she was opening a commodities account; that Rorex's requests for additional funds were to cover margin calls to protect Claimant's positions; and, that Rorex always handled Claimant's account in a professional manner. Rorex further alleged the affirmative defenses of assumption of risk; estoppel; contribution; and, any others to which he may be entitled.

RELIEF REQUESTED

Claimant requested rescission of \$180,000.00 plus accrued interest from RSAM; \$200,000.00 in damages from all Respondents for commodities losses; interest; costs; attorney's fees; and, \$1,000,000.00 in punitive damages.

The RSAM Respondents requested dismissal; denial of rescission request; severance from all claims against Rorex and his company Boca Research; and, striking of punitive damage request.

Respondent, Rorex, requested severance of claims from the RSAM Respondents; dismissal; striking of punitive damage and attorney's fees claims; reduction of damage claims by Claimant's contributory negligence; and, requested particularization of the Claim.

OTHER ISSUES CONSIDERED & DECIDED

1. Respondent, Rorex's, Motion to Dismiss, contained in his Answer to the Claim was argued at the beginning of the hearing. The Motion, based on lack of jurisdiction, was denied, as were later rearguments of the Motion.

2. Subsequent to the first three (3) days of the hearing, on June 15, 1992, this Panel ordered the parties to pay additional session deposits on or before July 15, 1992. At the hearing on August 28, 1992, all parties except for Respondent, Rorex, had complied with the Order. On August 28, 1992, Rorex argued for waiver of his assessments but did not present evidence. The Panel denied the request, ordered Rorex to pay, and advised him that failure to make the deposits would result in barring Rorex from presenting a defense or evidence, but that he would be permitted to cross-examine and make closing argument. Rorex had already made an opening statement.

On September 1, 1992, following two (2) more days of hearing, this Panel ordered the payment of further additional sessions deposits to be paid on or before September 25, 1992. Again, all parties except Rorex paid the required deposits. On September 16, 1992, Rorex filed a Motion to Waive the Deposits without supporting evidence. Claimant opposed the Motion which was argued at the hearing On September 25, 1992. The Motion was denied. By the conclusion of Claimant's case, Rorex had not paid the deposits and he was precluded from putting on a case in chief. Rorex was permitted to extensively cross-examine all witnesses, to make opening and closing remarks and to fully argue all of his Motions.

3. 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, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents, RSAM, Moore and Herscher, are found liable, jointly and severally, and shall pay to the Claimant the amount of \$156,472.49, inclusive of interest.
2. Respondents, Rorex, Herscher and RSAM, are found liable, jointly and severally, and shall pay to the Claimant the further amount of \$248,804.00, inclusive of interest.
3. Claimant's requests for attorney's fees and punitive damages are denied.

OTHER COSTS

The parties shall each bear all other costs and expenses incurred by them in connection with this proceeding, including attorney's fees.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the Panel has assessed forum fees in the amount of \$14,000.00 (14 sessions x \$1,000.00).

1. Claimant is hereby assessed \$4,666.66, for which the NASD shall retain \$4,666.66 of the \$5,333.00 in session deposits previously paid, in full satisfaction thereof, leaving an overpayment to be refunded to Claimant in the amount of \$666.34. The NASD shall also retain the non-refundable filing fee of \$250.00 paid by Claimant.

2. Respondents, RSAM, Herscher and Moore, are hereby assessed \$4,666.67, jointly and severally, for which the NASD shall retain \$4,666.67 of the \$5,333.00 in sessions deposits previously paid, in full satisfaction thereof, leaving an overpayment to be refunded to these Respondents in the amount of \$666.33.

3. Respondent, Rorex, is hereby assessed \$4,666.67. This amount is a final assessment of forum fees which supercedes the additional sessions deposits of \$5,333.00 which Rorex was previously ordered to pay.

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

Concurring Arbitrators' Signatures

/s/
Randy R. Freedman, Esq.

Public

/s/
Leon J. Steiner

Industry

/s/
Robert Wachterman

Public

Date of Decision: December 8, 1992