

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Marcus B. Overton

Claimant

vs.

A.G. Edwards and Sons, Inc.

Respondent

Case #91-00964  
AWARD

CASE SUMMARY

Claimant Marcus B. Overton, pro se, in a claim filed with the National Association of Securities Dealers, Inc. on March 26, 1991, alleged that Respondent A.G. Edwards and Sons, Inc., failed to deliver a Georgia Investors Quality Tax Exempt Trust Series #14 bond which he had entrusted to Respondent for the purpose of transferring ownership from Claimant's joint account with his late wife to the Claimant's sole account. The parties agreed that Claimant delivered the bond to Respondent's agent in January 1986 and that Claimant paid the applicable transfer fees at that time. The parties also agreed that since that time, Claimant has received the monthly payment on the bond. The parties further agree that in May 1989, Claimant wrote to Respondent inquiring about the missing certificate.

Respondent A.G. Edwards and Sons, Inc., represented by in-house counsel, William S. Port, Esq., maintained that their records reflect that the transfer of the bond to Claimant's sole account occurred in February 1986. Respondent maintained that its records indicate that the new certificate was mailed by First Class Mail on February 24, 1986 to Claimant, submitting as evidence a "delivery ticket" purporting to show the fact. In its defense Respondent raises the presumption that items placed in the United States Mail system are in fact delivered and asserts that the Claimant bears the burden of proving non-delivery. It also raises the defenses, inter alia, of laches, estoppel, lack of due diligence to mitigate Claimant's damages, contributory negligence, general demurrer, and statute of limitations. All of these defenses are premised upon Claimant's alleged failure from February 1986 until May 1989 to inform Respondents that he had not received his certificate from Respondent. Claimant replies that he did inform Respondent about the lost certificate promptly, by phone and letter. He recounts several phone conversations with Respondent's agent which he states occurred in 1986. Claimant submits three letters which appear to have been written in March, July and December 1986, wherein he complained that he had not received the certificate and requested Respondent's help in obtaining the replacement.

Respondent claims it never received Claimant's letters, other than the letter mailed in 1989.

RELIEF REQUESTED

Claimant requests damages of One Thousand Fifty Dollars and No Cents (\$1,050.00). Respondent requested that the claims of the Claimant be dismissed and that Respondent be awarded costs, including reasonable attorneys' fees.

AWARD

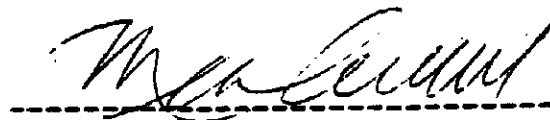
Pursuant to Section 13 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure, a single Public Arbitrator, Michael A. Caldwell, was selected to review and determine the matter in controversy between the parties set forth in submissions to Arbitration signed by the Claimant Marcus B. Overton on March 20, 1991 and by the Respondent A.G. Edwards and Sons, Inc. on August 19, 1991 respectively;

And, that the Arbitrator, having considered the proof of the Parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Respondent, A.G. Edwards and Sons, Inc. is liable and shall pay to the Claimant, Marcus B. Overton the sum of One Thousand Fifty Dollars and No Cents (\$1050.00).
2. The parties shall bear their respective costs including attorney's fees;
3. The Fifty Dollar and No Cents (\$50.00) filing fee previously deposited with the National Association of Securities Dealers, Inc. by the Claimant shall be retained by the NASD, Inc., and Respondent A.G. Edwards and Sons, Inc. shall reimburse the \$50.00 filing fee directly to the Claimant.

AFFIRMATION

I, MICHAEL A. CALDWELL, do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.



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Signature of Arbitrator

DATE OF DECISION: February 26, 1992

NASD ARBITRATION 91-00964

REPORT OF ARBITRATOR

This matter came before the undersigned arbitrator under the Simplified Arbitration Procedures of the NASD Code of Arbitration Procedure upon the mutual agreement of the parties.

The claim is for certain amounts representing certain costs associated with replacement of certain certificates which the parties acknowledge belong to Claimant.

Claimant complains that Respondent failed to deliver a bond which he had entrusted to Respondent for the purpose of transferring ownership from Claimant's joint account with his late wife to the Claimant's sole account. The parties agree that Claimant delivered the bond to Respondent's agent in January 1986, and that Claimant paid the applicable transfer fees at that time. The parties also agree that since that time Claimant has received the monthly payments on the bond. The parties further agree that in May 1989 Claimant wrote to Respondent inquiring about the missing certificate.

Respondent's records reflect that the transfer of the bond to Claimant's sole account occurred in February 1986. Respondent claims its records indicate that the new certificate was mailed by First Class Mail on February 24, 1986 to Claimant, submitting as evidence a "delivery ticket" purporting to show the fact.

In its defense Respondent raises the presumption that items placed in the United States Mail system are in fact delivered, and asserts that the Claimant bears the burden of proving non-delivery. It also raises the defenses, inter alia, of laches, estoppel, lack of due diligence to mitigate Claimant's damages, contributory negligence, general demurrer, and statute of limitations. All of these defenses are premised upon Claimant's alleged failure from February 1986 until May 1989 to inform Respondents that he had not received his certificate from Respondent.

Claimant replies that he did inform Respondent about the lost certificate promptly, by phone and letter. He recounts several phone conversations with Respondent's agent which he states occurred in 1986. Claimant submits three letters which appear to have been written in March, July and December 1986, wherein he complained that he had not received the certificate and requested Respondent's help in obtaining the replacement.

Respondent claims it never received Claimants' letters, other than the letter mailed in 1989. However, it submitted no proof by way of affidavit nor other evidence rebutting Claimant's averment that he spoke to Respondent's agent, his broker by phone about the missing certificates on several occasions in 1986.

Respondent correctly assigned to Claimant the burden of persuasion of his claim for the replacement of the lost bond. However, while iterating practically every conceivable defense which might be raised to a securities claim, Respondent cites no statute nor rule for the arbitrator to apply in assigning responsibility for delivery of securities nor other guidance for determining liability for securities which are either misdirected or lost. Nevertheless Respondent admits it would have replaced the certificates if it had been notified of their loss within a year of the certificates' mailing.

Other than the UCC's one year limitation which it claims should apply to statement irregularities, Respondent specifies no other statute of limitations nor basis of this defense. However, the account statements in evidence merely show the payment of certain amounts to Claimant. Claimant doesn't dispute these amounts; nor does he claim he has not received the income due from the bond as stated in the statements. The account statements themselves do not purport to show the certificate's physical delivery to Claimant. Hence, this arbitrator fails to see how this statute of limitations defense can be dispositive of the claims in this case.

Moreover, like its statute of limitations defense, Respondent's contentions that the claim is barred by laches, estoppel, Claimant's contributory negligence,<sup>1</sup> and his lack of due diligence in mitigating his damages, rests upon the factual premise that Claimant waited until May 1989, more than three years after the certificates were allegedly mailed to Claimant, before notifying Respondent that he had not received the certificates. That assumption is not supported by the preponderance of the evidence before the arbitrator.

Assuming both that Respondent correctly posits a "legal presumption of delivery" arising from the "fact" of mailing, and that the party denying receipt of an item placed in the U.S. Mail should bear the burden of proving a non-occurrence (i.e. that he did

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<sup>1</sup> Assuming the facts could establish the basis for such a defense, Claimant's alleged contributory negligence would not necessarily bar his recovery altogether; Georgia courts apply a standard of comparative negligence to such defenses. This defenses is not dispositive of the claims herein.

not receive the certificate-even if this were possible), those same legal presumptions would apply with equal force and effect both to support Claimant's averment that he mailed three letters complaining of Respondent's non-delivery of the certificate in 1986 to his broker, and to counter Respondent's denial that it received Claimant's letters. If it is proper to assume Respondent mailed the certificate to Claimant, one must likewise assume Claimant mailed the letters complaining of the certificate's non-delivery to Respondent in 1986. Hence none of Respondent's affirmative defenses are determinative of the case.

In resolving the merits of the dispute, the arbitrator considered the following especially significant: Respondent does not deny Claimant's statement that, besides writing the letters to his brokers, he spoke by phone with his broker about the lost certificates in 1986. Respondent clearly could have produced evidence to the contrary if it existed, at least through an affidavit or other evidence from the broker who apparently remains in its employ. Hence, the arbitrator is inclined to credit Claimant's statement that he did so notify his broker in 1986.

Moreover, sound policy considerations appear to favor the assignment of greater responsibility for delivery and liability for the loss of the certificate to Respondent. The certificate involved herein wasn't mere correspondence or an account statement; it was a negotiable security. Claimant delivered it in person to Respondent. The United States Mail dubious reputation for reliability would seem to require, as a minimum standard of care, that Respondent return the certificate to Claimant by means other than mere first class mail, such as by utilizing a courier service, or even Registered or Certified Mail. In any event, had Respondent exercised a more appropriate degree of caution in ensuring proper delivery to Claimant, the determination of whether the certificates actually were delivered to Claimant would have been a far simpler and conclusive one.

Yet Respondent's letter to Claimant clearly indicated it used only first class mail.

John F. Allen