

## N.A.S.D. AWARD

## NATIONAL ASSOCIATION OF SECURITIES DEALERS

Case Number 91-02212

Yosef Sheffi v. Shearson Lehman Hutton, Inc. and Eric Anderson

## CASE INFORMATION

This proceeding brought by Claimant, Yosef Sheffi, against Shearson Lehman Hutton, Inc. and Eric Anderson was commenced by a uniform submission agreement executed by Claimant on July 15, 1991, by Respondent Shearson on September 30, 1991 and by Respondent Anderson on December 3, 1991. Claimant filed a Statement of Claim dated July 16, 1991. Respondents filed an Answer dated October 23, 1991.

## REPRESENTATION

Claimant was represented by Melinda L. deLisle, Esquire of Kirkpatrick & Lockhart. Respondents were represented by Marcy J. Levine, Esquire of Bingham, Dana & Gould.

## HEARING INFORMATION

The matter was heard by a panel of three arbitrators: Charles H. Resnick, public arbitrator, Chairman; Tidal B. Henry, Jr. public arbitrator; and Benjamin H. Rutstein II, industry arbitrator.

Full day hearings were held on March 19, 1992 and on April 23, 1992, all at the offices of Gelb & Gelb, 20 Customs House Street Boston, Massachusetts. Witnesses for Claimant were Yosef Sheffi and Robert Gillen. Witnesses for Respondents were Eric Anderson and Lambros Kambolis. Each witness was duly sworn, examined by counsel and cross-examined by opposing counsel. Extensive exhibits which included confirmation statements, form 1099 and correspondence between the parties were submitted by joint stipulation. Additional exhibits were submitted during the course of the hearings.

## CASE SUMMARY

The controversy involves trades in stock or derivatives (e.g. puts, calls, scores) of Motel 6, Plum Creek Timber Co., Bank of Boston, Racal Telecom, Johnson and Johnson and Texas Instruments. Claimant seeks damages resulting from allegedly unauthorized trades in his account by respondent, Anderson. Anderson was at all relevant times a financial consultant or account executive employed by respondent Shearson. In his Statement of Claim, Claimant asserts eleven different but parallel theories of law to support his position.

Respondents answer that all trades were authorized; that the claim is barred by Claimant's failure to give 10 days written notice as required by printed language on the back (but not the front) of confirmation statements and that

Claimant suffered no damage since in the aggregate, trades in Claimants account resulted in a profit to him which he has received.

#### BACKGROUND

Most of the facts in this case are undisputed. Claimant had for a number of years maintained an account at the Chestnut Hill, Massachusetts branch of Respondent Shearson. In that account he had primarily invested in short term municipal bonds and about 15-20% conservative equities. He occasionally used margin in the Chestnut Hill account to buy additional bonds in anticipation of maturities of bonds already held, but not to speculate.

Claimant and Respondent Anderson became acquainted when Anderson was with the brokerage firm of Gant & Co. Claimant had an account with Gant and made some trades through Anderson with Gant. Anderson moved to Shearson's New York office in 1989 and solicited Sheffi's account. Sheffi agreed and commencing in January of 1990 initiated some trades. None of the parties however, could produce a copy of a client agreement or a margin trading agreement with respect to the New York account. Nevertheless, between April and July of 1990, a number of trades were made in Claimants account individually amounting to hundreds of thousands of dollars and in the aggregate more than \$800,000. When Claimant failed to pay for the trades, Respondent Shearson put the account on margin with attendant interest charges and in some cases sold out the position. In a series of letters and phone calls, Claimant at least as early as June of 1990 complained about the use of margin and the making of trades without his "specific authorization". At that point he insisted that the account be maintained at 100% equity. In July 1990, the New York account was closed with remaining securities and funds transferred to Claimants Chestnut Hill account. Claimant conceded on cross-examination that in the aggregate the New York account had earned a profit in excess of \$51,000 but contends that he decided to ratify a number of the unauthorized trades which worked out well and is entitled to damages for other unauthorized trades which he chooses not to ratify. There is no controversy or proceeding concerning the Chestnut Hill account.

#### ISSUES CONSIDERED AND DECIDED

We find that many of the trades in Claimant's account were unauthorized. We cannot believe that a cautious investor such as Claimant would have suddenly gone from trades never in excess of \$30,000 and dominantly in municipal bonds to trades amounting to several hundred thousand dollars each in puts, calls and speculative securities. While there was much testimony concerning whether Claimant was or was not a "sophisticated" or "experienced" investor, that is not the

issue. Surrounding circumstances and the exhibits entered into evidence make Claimant's position substantially more credible than Respondents'.

We find, moreover that Respondents were inexcusably negligent in handling the account. Respondent Anderson did nothing to assure that a client agreement and margin trading agreement were executed and filed. While he spoke frequently to Claimant, he failed in a number of cases to obtain authorization before making trades on behalf of the Claimant. Respondent Shearson failed to supervise and monitor obtaining the Client Agreement and margin agreement. On June 2, 1990, after almost \$1 million dollars in margin trades, Shearson for the first time sent a form letter requesting execution of a client agreement to cover margin transactions. On June 4, 1990 the resident manager of Shearson's office sent a form letter to claimant requesting confirmation of the trades in the account. After several heated written responses from Claimant and his refusal to execute the confirmation requested, on July 29, 1990, Shearson's Compliance Director sent another form ("Dear Valued Client") letter requesting confirmation of the transactions. We find that the ensuing investigation by Shearson's compliance department was superficial and little more than a whitewash of Respondents' conduct.

We find that Claimant is not barred by the requirement for written objection within ten days appearing on the reverse side of the confirmations. It is undisputed that Claimant did complain promptly both in writing and by phone after receiving his statements. Also, we find that Shearson waived the requirement by failing to raise it until it filed its answer in this proceeding more than a year after Claimant's initial protests.

#### DAMAGES

Claimant seeks damages of \$30,164 for allegedly unauthorized trades in Motel 6, Plum Creek, Bank of Boston, Racal, J&J Scores and Texas Instruments. He also seeks the return of \$4734 in margin interest charged to his account. We find that Claimant sustained no damages. By his own admission, he took a profit of \$51,000 when the account was closed out. He contends that he is entitled to ratify those unauthorized trades which were profitable and rescind those which were unprofitable. We reject this contention. If Claimant chooses to ratify some of the unauthorized trades, he must ratify all and take the losing trades along with the winning ones. Had Claimant sustained a net loss from the unauthorized trading, we would have awarded damages in an amount sufficient to make him whole. On the facts presented in this case, we find that this is an instance of "damnum absque hoc injuria".

AWARD

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.

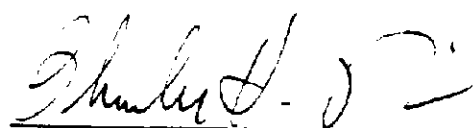
After considering the pleadings, the testimony and the evidence presented at the hearing and the briefs submitted by counsel, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination that Claimant recover nothing. Claimant has requested punitive damages and attorneys fees. We find both inappropriate in this case and award neither.

FORUM FEES

As stated above, we find the Respondents culpable and therefore in accordance with rule 43c of the Code of Arbitration Procedure assess forum fees of sixteen hundred dollars (\$1600.00) against them. Fees are payable to the National Association of Securities Dealers, Inc.

Respectfully submitted,

Executed on:  
May , 1992

  
Charles H. Resnick

  
Benjamin H. Rutstein, II

  
Tidal B. Henry, Jr.

Date of Decision: June 2, 1992