

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Patricia Gennarelli

vs.

Case #
91-03843

Name of Respondents

Fahnestock & Co., Inc.
Marc Andor Menton

REPRESENTATION

For Claimant, Patricia Gennarelli: David Crystal, II from the law firm of Collier Cohen, Shields and Bock.

For Respondent, Fahnestock & Co., Inc. ("Fahnestock"): Charles E. Padgett, Esq., from the firm of Fahnestock & Co.

For Respondent, Marc Andor Menton ("Menton"): George Brunelle, Esq.

CASE INFORMATION

Statement of Claim filed: December 4, 1991.

Claimant's Submission Agreement signed on: December 12, 1991.

Joint Statement of Answer filed by Fahnestock and Menton on January 10, 1992

Fahnestock Submission Agreement signed on: September 23, 1992.

Menton Submission Agreement signed on: September 23, 1992.

HEARING INFORMATION

Pre-Hearing Conference: September 17, 1992 - One Session.

Hearing Date/Sessions: September 23, 1992 - Two Sessions
November 17, 1992 - Two Sessions
November 18, 1992 - Three Sessions

Hearing Location: NASD's offices located at 33 Whitehall Street, New York City, New York.

CASE SUMMARY

Claimant alleges that in 1990 she invested \$50,000.00 in Colonial Constitutional Limited Partnership ("Colonial") through Fahnestock and Menton. Claimant further alleges that she made the investment in complete reliance on Fahnestock's and Menton's ("Respondents") representation that they had thoroughly fulfilled their due diligence obligations, that the investment was certain to be highly profitable over a period of at least ten years, that it was not speculative, was guaranteed by General Electric Corporation, that Colonial was such a promising opportunity that Menton had personally invested in it, and that she was lucky to be allowed to invest in Colonial.

Claimant states that she soon discovered that all of the representations were false. The chief financial officer of Colonial's parent, Colonial Realty Company, was arrested and later indicted for massive fraud that involved forgery in connection with Colonial and other partnerships syndicated by Colonial Realty Company. Claimant also states that documents purportedly signed by her in order to consummate the Colonial investment were forgeries and the information Menton and/or his agents placed on the purchase questionnaire in order to qualify her as an investor was almost entirely false. Claimant further states that within six months after her investment in Colonial she learned that it was worthless. Claimant alleges that Respondents' actions amounted to a breach of their fiduciary duty, breach of suitability rules, failure to supervise and churning.

Respondents deny liability, deny the allegations of wrongdoing and deny any knowledge of fraud at the time the investment was made. Respondents state that Claimant's daughter, Lisa Gennarelli, is a registered representative and introduced Claimant's account to the Respondents. Respondents argue that they made full and complete disclosure and that Claimant's losses were caused by factors beyond their control. Respondents state that the investment was considered "a Crown Jewel of Hartford". Respondents deny that they forged or misrepresented information in the investor questionnaire.

Menton contends that he was a good friend of Lisa Gennarelli and that Claimant vigorously solicited him to open her account. Menton states that Claimant had invested in penny stocks and not Certificate of Deposits as she suggests and that it was he who changed her investment objective from speculative and income to conservative. Menton also contends that the embezzlement by the chief financial officer occurred long after the investment and could not have been anticipated.

RELIEF REQUESTED

Claimant requests that the panel render a decision in her favor in the amount of \$50,000.00 plus lost interest and profits in an amount currently unknown, but believed to exceed \$10,000.00 as

well as costs of this proceeding and reasonable attorney's fees.

Respondents request that all claims be dismissed.

OTHER ISSUES CONSIDERED & DECIDED

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.

FINDINGS OF FACTS, CONCLUSIONS AND AWARD

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

See attached statement.

FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fees are assessed.

1. \$150.00 - Non-refundable filing fee.
 \$300.00 - Pre-hearing conference.
 \$2500.00 - 5 hearing session at \$500.00 per session.

 \$2,900.00 - Total Forum Fees.

2. The costs of this arbitration shall be shared equally by all parties. Therefore each party is assessed \$783.00.

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

FINDINGS OF FACT, CONCLUSIONS AND AWARD

On or about June 5, 1992, Claimant purchased one unit of Colonial for \$50,000.00 cash. There is no dispute that Claimant purchased Colonial on the advice of Menton, who at all relevant times was employed by Fahnestock and was Claimant's account executive.

Among other things, Colonial promised its investors a minimum preferred return of 14%, including a 10% guaranteed tax-sheltered cash return. (Respondents Exhibit "A"). Colonial was unique in that it offered investors a "put feature" i.e.: at any time after January 1, 1993 [April 1, 1993], an investor could elect to terminate his or her investment and receive back all capital contributions and interest expenses paid to date while retaining all cash distributions. (Respondents' Exhibits "B" and "C"). Apparently, the principals of Colonial had substantial net worth and a proven track record of successful real estate projects similar to the one offered to Claimant. In June of 1990, an investment in Colonial appeared on its face to be conservative and high quality.

Unfortunately, in October of 1990, certain principals of Colonial were arrested for "fraud and a variety of other charges.... After careful consideration, Colonial chose the Chapter 11 option since it provides for reorganization..." (Respondents' Exhibit "D"). Claimant's investment in Colonial is apparently worthless; this arbitration was instituted to recover her loss.

The panel agrees with Respondents' contention that any subsequent intervening criminal activity by the principals of Colonial was not reasonably foreseeable. Moreover, there is no evidence that this conduct is directly attributed to the Respondents. Indeed, Fahnestock impressed the Panel that it went to great lengths in discharging its obligation of due diligence before recommending Colonial as an investment to its customers.

However, Colonial was a privately placed offering, within the meaning of Section 4(2) of the Securities Act of 1933, as amended. Consequently, the law required that certain representations and undertakings be made by potential Colonial investors, including the Claimant, in order to participate in the offering.

Specifically, the offering required that the Claimant execute: (1) an Indemnification and Security Agreement, (2) an Amended and Restated Colonial Constitution Limited Partnership Agreement, (3) a Security Agreement, (4) a Personal Financial Statement, (5) a Non-Negotiable Investor Note, (6) a Negotiable Note, (7) Investor Representations, (8) Colonial Bank Reference Authorization Letter, (9) Request for Verification of Deposit, (10) Purchaser Questionnaire, (11) Letter of Non-Distributive Intent and (12) Subscription Agreement (collectively the "Subscription Documents").

Claimant testified at the hearing that with the exception of the Personal Financial Statement¹, all of the Subscription Documents were forged. Claimant also offered an expert opinion from the Hart Questioned Document Laboratory Incorporated that corroborated her testimony on this point. (Claimant's Exhibit "8"). This testimony was unrebutted by Respondents. No evidence was presented that the Claimant ratified the forgery of the Subscription Document.

The issue of Claimant's suitability and sophistication becomes secondary as there was fraud in connection with the sale of this security. Therefore, the Claimant is entitled to rescind her Colonial purchase on the basis that the Subscription Documents (with one possible exception) were forged.

It is important to note that Fahnestock not only condoned, but encouraged its registered representatives, particularly Menton, to instruct their clients, specifically the Claimant, to communicate with and transmit Subscription Documents directly to Colonial. (Claimant's Exhibit "2"). Therefore, even though the Respondents may not have forged the Subscription Documents, they must bear the responsibility of the wholesale forgeries, particularly when Fahnestock was in a position, vis-a-vis Colonial, to implement and maintain procedures to insure that Subscription Documents transmitted by its customers were properly completed and executed. The Panel also notes that the Respondents collectively received a substantial commission on this transaction and had an obligation beyond that of a mere "finder".

This written decision is prompted by the concern expressed by Respondents' counsel during closing argument that an award in favor of the Claimant would effectively brand the Respondent as "thieves". The Panel is sensitive to this concern. By articulating the basis of its decision in favor of the Claimant, the Panel intends to dispel any conclusion that the Respondents were "thieves" in connection with the Claimant's investment in Colonial. Nevertheless, the Respondents are liable for the Claimant's loss.

Accordingly, the Panel rules as follows:

1. The Respondents shall pay the Claimant the sum of **FIFTY THOUSAND DOLLARS AND NO CENTS(\$50,000.000)**. Liability is assessed eighty percent(80%) against Respondent Fahnestock and twenty percent(20%) against Respondent Menton. This liability is joint and several.

¹ Claimant testified that she was uncertain as to the genuineness of her signature on the Personal Financial Statement; Respondents proffered a handwriting expert who was certain that the signature was that of the Claimant. This issue, however, is of little moment. The Panel is convinced that if the Claimant signed the Personal Financial Statement at all, she signed it in blank as her name was prominently misspelled on the first page and would have certainly been corrected by her if the document was complete at the time she allegedly signed it.

2. Simultaneously with the payment of the Award, or within thirty(30) days after delivery of this decision, whichever is earlier, Claimant shall execute and deliver all documents reasonably necessary to assign the Claimant's interest in Colonial to Fahnestock. Claimant shall prepare these documents in the first instance. The Panel will retain continuing jurisdiction in connection with the facilitation and delivery of documents necessary to transfer Claimant's Colonial unit to Fahnestock. To the extent Menton contributes to the payment of the Award, he is entitled to pro rata share of any Colonial income distribution from the date hereof as well as any proceeds received from the subsequent sale of this colonial unit.

3. The claim for interest is denied.
4. The costs of this arbitration shall be shared equally by all three parties.
5. All parties shall bear their own attorney's fees and disbursements.

ARBITRATION PANEL

| | | |
|------------------------|---|------------------------|
| Howard S. Eilen, Esq. | - | Chairperson and Public |
| Pamela H. Roderick | - | Public Panelist |
| Daniel M. Curzio, Esq. | - | Industry Panelist |

Concurring Arbitrator's Signature

Name


Pamela H. Roderick

Executed on
~~Date of Decision:~~

December 17, 1992

Date of Decision: December 22, 1992

STATE OF NEW YORK
COUNTY OF ~~NEW YORK~~ *Kings*

S.S.:

On this 7 day of December 1992, before me personally appeared **PAMELA H. RODERICK** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

RAYMOND MARDINEY
Notary Public, State of New York
No. 24-25800 Qual. in Kings Co.
Commission Expires March 30, ~~1993~~
1995

Raymond Mardiney

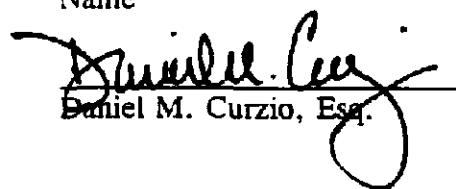
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| Howard S. Eilen, Esq. | - | Chairperson and Public |
| Pamela H. Roderick | - | Public Panelist |
| Daniel M. Curzio, Esq. | - | Industry Panelist |

Concurring Arbitrator's Signature
Name


Daniel M. Curzio, Esq.

Executed on
~~Date of Decision:~~ 12/18/92

Date of Decision: December 22, 1992

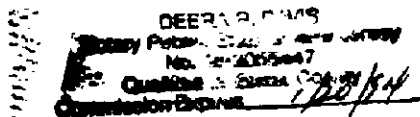
STATE OF NEW JERSEY

COUNTY OF *Hudson*

S.S.:

On this day of December 1992, before me personally appeared **DANIEL M. CURZIO, ESQ.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Debra R. Xlavis



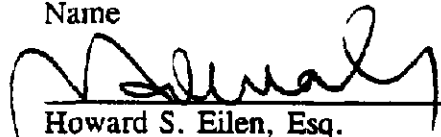
2. Simultaneously with the payment of the Award, or within thirty(30) days after delivery of this decision, whichever is earlier, Claimant shall execute and deliver all documents reasonably necessary to assign the Claimant's interest in Colonial to Fahnestock. Claimant shall prepare these documents in the first instance. The Panel will retain continuing jurisdiction in connection with the facilitation and delivery of documents necessary to transfer Claimant's Colonial unit to Fahnestock. To the extent Menton contributes to the payment of the Award, he is entitled to pro rata share of any Colonial income distribution from the date hereof as well as any proceeds received from the subsequent sale of this colonial unit.

3. The claim for interest is denied.
4. The costs of this arbitration shall be shared equally by all three parties.
5. All parties shall bear their own attorney's fees and disbursements.

ARBITRATION PANEL

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|------------------------|---|------------------------|
| Howard S. Eilen, Esq. | - | Chairperson and Public |
| Pamela H. Roderick | - | Public Panelist |
| Daniel M. Curzio, Esq. | - | Industry Panelist |

Concurring Arbitrator's Signature
Name


Howard S. Eilen, Esq.

~~Date of Decision:~~ 12-18-92

Date of Decision: December 22, 1992

STATE OF NEW YORK
COUNTY OF NEW YORK

S.S.:

On this ¹⁴ day of December 1992, before me personally appeared **HOWARD S. EILEN, ESQ.** known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

Lee D. Levy

LEE D. LEVY
Notary Public, State of New York
No. 41-4671804
Qualified in Queens County
Commission Expires March 30, 1993
Jan 3, 1993