

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Dorothy R. Kealy

92-01043

Name of Respondents

John Moylan
FirstTier Securities Services Inc.
Invest Financial Corporation

REPRESENTATION

For Claimant at the hearing: Patrick M. Flood, Esq. of Omaha, Nebraska.

For Respondent FirstTier Securities Service, Inc. at the hearing: Henry E. Pfeiffer, Esq. of Omaha, Nebraska.

For Respondents John Moylan and Invest Financial Corporation at the hearing: Eugene B. Harper, Esq. of Tampa, Florida.

CASE INFORMATION

Statement of Claim filed: March 19, 1992. Amended Statement of Claim filed: April 22, 1992. Second Amended Statement of Claim filed: June 8, 1992. Response to the Respondents Answer/Section 15 of the Code of Arbitration Procedure, entitled Brief Regarding Rule of Discovery filed : June 8, 1992.

Claimant's Submission Agreement signed on: April 1, 1992.

Joint Statement of Answer filed by Respondents Invest Financial Corporation and John Moylan on: September 15, 1992. Statement of Answer To Claimant's Second Amended Statement of Claim filed by Respondents Invest Financial and Jim Moylan: June 15, 1992. Motion To Dismiss Claimant's Second Amended Statement of Claim filed by Respondents Invest and Moylan on: June 15, 1992.

Statement of Answer filed by Respondent FirstTier Securities on: June 18, 1992. Statement of Answer to Claimant's Second Amended Statement of Claim filed by Respondent FirstTier Securities: June 23, 1992. Motion To Dismiss Claimant's Statement of Claim, As Amended, as to FirstTier Securities, filed: June 23, 1992.

Respondent Invest Financial Corporation's Submission Agreement signed on: May 4, 1992 by Eugene B. Harper. Respondent John Moylan's Submission Agreement Signed on: May 11, 1992. Respondent FirstTier Securities Services Inc.'s Submission Agreement signed on: May 11, 1992 by John Moylan.

HEARING INFORMATION

Pre-hearing Conference: September 28, 1992 for one (1) session with the full panel.

Hearing Date/Sessions: September 30, 1992; two (2) sessions.

Hearing Location: Omaha, Nebraska.

CASE SUMMARY

Claimant, Dorothy R. Kealy, ("Kealy") alleged that Respondent John Moylan, ("Moylan") as an employee of Respondent FirstTier Securities Services, Inc. ("FirstTier") or Respondent Commercial Federal Investment Services, Inc. ("Commercial"), violated Securities Dealers Rules and Exchange Rules, committed fraud, breached an oral contract, breached fiduciary duties, and engaged in misrepresentations. Kealy alleged that her allegations arise out of certain mutual fund accounts, namely American Capital Government Securities, ("American"), MPS Government Income Plus Interest, ("MPS"), and Putnam High Yield Interest, ("Putnam"). Kealy further alleged that her accounts were handled by Moylan, and maintained with Invest and Commercial, and that all are liable.

Kealy alleged that prior to establishing mutual fund accounts with Moylan, she requested, and Moylan and Commercial agreed, that she only wanted to buy low-risk securities and/or mutual funds in order to maintain the principal of her investments, obtain a fair rate of return on her principal and supplement her income with dividends. Kealy alleged that from the period of October 31, 1985 through January 30, 1992, she requested that Moylan change the ownership of her investments with Moylan to include Kealy's daughter, as co-owner. Kealy alleged that Moylan resisted this, claiming that in the event something happened to Kealy, Moylan "would take care of it." Kealy further alleged that Moylan ignored her request to summarize her investments with Moylan and FirstTier and that Moylan and Commercial invested her funds in unsuitable, high-risk mutual funds in violation of Kealy's instructions. Kealy also alleged that Moylan, FirstTier, and Commercial allowed these mutual funds to be misrepresented to Kealy and failed to keep her totally informed about the nature of her mutual fund accounts and

the substantial loss she was suffering in principal of those accounts. Kealy additionally alleged that she did not know, nor did she have reason to know, that Moylan, FirstTier, and Commercial committed the above stated allegations.

In her Amended Statement of Claim, Kealey dismissed Respondent Commercial, with prejudice, and added Invest Financial Corporation ("Invest") as a new Respondent. The allegations alleged in her Statement of Claim were re-alleged against Invest, and not Commercial.

In her Second Amended Statement of Claim, Kealey alleged that for each cause of action alleged, she did not know or have reason to know that the Respondents committed wrongful conduct.

Invest and Moylan, in their Statement of Answer, stated that Moylan was employed by Invest from October 1, 1982 to March 19, 1990 and Invest had no knowledge or information concerning Moylan's actions after March 19, 1990 to enable it to respond to Kealy's allegations of wrongdoing subsequent to that date. Invest and Moylan denied each and every allegation as set forth by Kealy, and specifically alleged that Kealy's investment objectives, and risk factors she was willing to assume to obtain those objectives were discussed with Moylan and his investment recommendations met Kealy's investment objectives. Moylan alleged that he recommended American and MFS to meet Kealy's investment objective of income with average risk to principal. Moylan further alleged that when Kealy advised Moylan she was in need of more income from her investments, he explained to her that she would have to assume a higher degree of risk, which she agreed to, and therefore, he recommended Putnam as a suitable investment to meet Kealy's changed investment objective of income with above-average risk. Invest and Moylan also alleged that they deny that Moylan ever refused or neglected to change the ownership of Kealy's mutual funds. Invest and Moylan alleged that the prospectuses given to Kealy clearly set forth the nature of the securities held in her portfolio, the risks associated with securities and the non-guarantee as to the rate of return or the value of the underlying shares. Invest and Moylan denied that at any time did Kealy express concern over her investments.

Invest and Moylan set forth the following affirmative defenses: statutes of limitations, no private cause of action for the damages sought by Kealy, any claimed losses in her accounts were not proximately caused by any unlawful act or conduct of Respondents, handling of Kealey's brokerage account was in accordance with all applicable brokerage industry standards and guidelines and all regulatory requirements, Kealy received prospectuses, confirmations, and monthly statements which reflected and fully disclosed all relevant information

concerning the activity in her accounts, approval, authorization and ratification, no scienter or reckless manner, and any injury or damage suffered by Kealey was caused by the actions or negligence of parties or persons other than Invest and Moylan, or some combination of the actions or negligence of Kealy and persons other than Invest and Moylan.

FirstTier, in its Statement of Answer, denied the allegations as set forth by Kealy. FirstTier alleged that on or about March 19, 1990, Moylan began employment with FirstTier and denied having any knowledge or information concerning Moylan's actions that occurred prior to March 19, 1990 to enable it to respond to Kealy's allegations of wrongdoing preceding that date. FirstTier also denied that it or Moylan ever refused to comply with a request made by Kealy to change the ownership of her investments to include her daughter, as a co-owner. FirstTier alleged that after March 19, 1990, Kealey never requested such a change. Additionally, FirstTier denied that it or Moylan refused to comply with Kealy's request for a summary of her investments and in October, 1991, Kealey received a complete update of her investments. FirstTier alleged that any allegations asserting a basis for relief occurred prior to March 19, 1990, when Moylan began employment with FirstTier.

In support of its allegations, FirstTier raised the following affirmative defenses: damage or injury suffered was caused by the actions or negligence of parties or persons other than FirstTier, or some combination of the actions or negligence of Kealy, any claimed losses in Kealey's account were not proximately caused by any unlawful act or conduct of FirstTier, no private cause of action for damages sought by Kealy in this action, handling of Kealey's brokerage account was in accordance with all applicable brokerage industry standards and guidelines and all regulatory requirements, statutes of limitations, claims arising from the initial purchase of American Capital Government Securities Fund on October 31, 1985, are barred by Section 15 of the Code of Arbitration Procedure, Moylan did not owe a fiduciary duty to Kealy and Kealey has failed to allege facts to establish the existence of a confidential relationship, she received prospectuses, confirmations, monthly, quarterly, and/or yearly statements which reflected and fully disclosed all relevant information concerning the activity in her account, and her conduct shows and establishes that she approved, authorized, ratified and is estopped from recovering damages based upon the transactions of which she now complains, FirstTier did not intend to deceive or defraud Kealey and did not act with scienter or in any reckless manner.

Claimant Kealey responded to the Answers filed by the

Respondents which was entitled Brief Regarding Rule of Discovery. Kealey alleged that Section 15 of the Code should not apply, and that state statutes of limitations apply: Neb. Rev. Stat. Sec. 25-207 mandates a four year statute of limitation for fraud in Nebraska and Neb. Rev. Stat. Sec 25-206 mandates a four year statute of limitation for breach of oral contract.

In its Statement of Answer to Claimant's Second Amended Statement of Claim, FirstTier alleged that Kealey received annual and semi-annual reports accompanied by a prospectus, and that by receiving these reports, Kealey had access to a complete and full disclosure of her investments on an ongoing basis for a period of not less than six years from the commencement of this claim with respect to the American Capital Government Securities fund and for a period of not less than four years in the case of the MFS Government Income Plus Trust.

In its Motion To Dismiss Claimant's Statement of Claim, As Amended, FirstTier alleged that the amended claim be dismissed for the following reasons: (1.) Claimant's alleged losses, if any, were not proximately caused by any unlawful act or conduct of FirstTier, any such alleged injury or damage suffered by Claimant being caused by the actions or negligence of persons other than FirstTier, and (2.) any and all of the Claimant's alleged claims for damages against FirstTier are barred by the applicable statute of limitations of the State of Nebraska for said causes. FirstTier also alleged that any claims for damages arising from events occurring more than six years from the filing of the claimant's claim should be dismissed.

In their Statement of Answer To Claimant's Second Amended Statement of Claim, Invest and Moylan alleged that Moylan recommended the American Capital Government Securities Fund and MFS Government Income Plus Trust as a suitable investment to meet Claimant's investment objective of income with average risk to principal. Invest and Moylan also alleged that Moylan recommended the Putnam High Yield Trust as a suitable investment to meet Claimant's changed investment objective of income with average risk to income with above average risk.

In their Motion To Dismiss Claimant's Second Amended Statement of Claim, Invest and Moylan alleged that the claim should be dismissed for any and all claims for damages arising from events occurring more than six years from the filing of Claimant's claim and for any and all claims for damages arising from events occurring more than four years, being the applicable statutes of limitations in the state of Nebraska for the causes of action set forth therein.

RELIEF REQUESTED

In Kealey's Statement of Claim, Claimant requested an award of judgment against FirstTier, Commercial, and Moylan as follows: (1.) For total losses of \$10,696.96 in principal amounts from Kealey's mutual funds as of October 21, 1991, plus any additional amounts from October 21, 1991 until Kealey terminated her accounts with FirstTier on or about January 30, 1992; (2.) For losses in the amount of \$36,207.46 that Kealey sustained stemming from the failure of FirstTier and Moylan to invest Kealey's money according to her instructions in order to preserve her principal and obtain a fair rate of return of ten percent (10%) on her principal investments; (3.) For the costs of this action and reasonable attorney fees; (4.) For prejudgment interest from March 6, 1992 until the date of the judgment; (5.) and for postjudgment interest.

In Claimant Kealey's Amended Statement of Claim, the reliefs requested in her Statement of Claim were re-alleged, except that the relief was requested against Respondents Invest, FirstTier, and Moylan.

Respondents, Invest Financial Corporation and John Moylan, requested that the Statement of Claim and Second Amended Statement of Claim be dismissed and costs be assessed against the Claimant.

Respondent, FirstTier Securities Services, Inc. requested that the Statement of Claim be dismissed as it relates to FirstTier Securities Services, Inc. and that the Second Amended Statement of Claim be dismissed, with all available and recoverable costs, charges and fees to be assessed against Claimant.

OTHER ISSUES CONSIDERED & DECIDED

The parties present at the hearing 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.

Respondent FirstTier, in its Answer, asserted a Motion To Dismiss based on Section 15 of the Code of Arbitration Procedure. The Claimant did not file a timely response. The Director denied the motion, but stated that the motion may be re-raised before the Panel.

Respondents Moylan and Invest, and Respondent FirstTier filed Motions To Dismiss Claimant's Statement of Claim, As Amended, on

the basis that the claimant did not execute an agreement to submit the matter to arbitration, and that some of the transactions in controversy were prior to six years from the date the complaint was filed with the NASD. A pre-hearing conference was held with the full panel. The panel determined that their ruling on the motions would be reserved until after the evidence was heard at the hearing. The motion was orally renewed at the opening of the hearing, at the conclusion of the claimant's case, and at the end of the hearings. Each time, the panel took the motion under advisement and reserved ruling until after hearing the evidence.

At the end of the claimants' case, each of the Respondents made a motion to dismiss the action based on the premise that the claimant failed to sustain its case. The panel took the motion under advisement.

A court reporter was present at the hearing. The panel ruled that the official record of the hearing would be the NASD cassette recording, supplemented by the court reporter's transcript if the tape recording is unclear, damaged, or lost.

AWARD

After considering the pleadings, the testimony, the evidence presented, and argument on the Motions To Dismiss which the panel took under advisement at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. The execution by all parties of a submission agreement waived the claim that the case should be dismissed because the claimant did not enter into an agreement to submit the matter to arbitration, the motion to dismiss by the respondents are sustained as to any claim for losses by claimant on transactions that occurred more than six years prior to the filing of the claim with the NASD (i.e. the purchases made for \$10,000.00 on October 31, 1985, and for \$5000.00 made on March 11, 1986). The panel ruled that it did have jurisdiction to hear all other claims against the Respondents contained in the Claimant's claim.

2. The Claimant's Statement of Claim and Second Amended Statement of Claim are dismissed and denied in their entirety;

3. Each of the parties shall bear their own costs and expenses incurred, including attorneys fees, other than those costs specifically enumerated below under Forum Fees.

FORUM FEES

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

2 sessions X \$400 = \$800 minus hearing session deposit of \$400 = net \$400, plus \$300 for the 1 session pre-hearing conference with the arbitrators = net \$700 due.

The NASD shall retain the non-refundable filing fee in the amount of \$120 and the hearing session deposit in the amount of \$400 previously deposited by the claimant with the NASD.

Additional forum fees are assessed against the claimant in the amount of \$150 and against the Respondents, jointly and severally, in the amount of \$550.

Additional forum fees are payable to the National Association of Securities Dealers, Inc.

By The Arbitration Panel:

Dated: _____

11/13/93



Robert Berkshire, Esq.
Chairperson
Public Arbitrator

Robert E. McCarthy, Ph.D.
Public Arbitrator

Bart A. Chavez, Esq.
Industry Arbitrator

Date Award Served By The NASD: _____

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By The Arbitration Panel:

Dated: _____

1/20/93

Robert Berkshire, Esq.
Chairperson
Public Arbitrator

Robert E. McCarthy
Robert E. McCarthy, Ph.D.
Public Arbitrator

Bart A. Chavez, Esq.
Industry Arbitrator

Date Award Served By The NASD: _____

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By The Arbitration Panel:

Dated: _____

Robert Berkshire, Esq.
Chairperson
Public Arbitrator

Robert E. McCarthy, Ph.D.
Public Arbitrator

Bart A. Chavez, Esq.
Industry Arbitrator

1/11/93

Date Award Served By The NASD: _____