

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Margaret R. Lottinville as
Successor Trustee of the James
O'Brien Trust dated January 3, 1977,
as amended May 5, 1977, and
Individually, and Patricia J.
McAllister and Mary M. Fredricks,
Individually

No. 92-01427

Name of Respondents

Prudential Securities, Incorporated
Summit Investment Corporation.
Richard Harris

REPRESENTATION OF PARTIES

For Claimants: Paul E. Freehling, Esq., of Pope, Ballard, Shepard & Fowle, Ltd., Chicago, Illinois.

For Respondent Summit Investment Corporation: Ann Exline Starr, Esq., General Counsel, Vice President, Summit Investment Corporation, Minneapolis, Minnesota. Respondent Summit Investment Corporation was also represented by Michael T. Brody, Esq., of Jenner and Block, Chicago, Illinois. However, Michael T. Brody was not present at the hearing.

For Respondents Prudential Securities, Incorporated and Richard Harris: Ronald P. Kane, Esq. of Seigan, Barbakoff, Gombert & Kane, Chicago, Illinois.

Counsel for James O'Brien, Arne R. Rhode, Esq., Chicago, Illinois, appeared at the hearing. However, he did not participate in the proceeding.

CASE INFORMATION

Statement of Claim filed on or about: April 23, 1992.

Claimants' Submission Agreements signed on: April 7, 1992, and April 17, 1992.

Statement of Answer filed by Respondent, Summit Investment Corporation on or about: August 3, 1993.

Joint Statement of Answer filed by Respondents, Prudential Securities, Incorporated and Richard Harris on or about: August 17, 1992.

The NASD does not have a record of Respondents Summit Investment Corporation, Prudential Securities Corporation, and Richard Harris having filed submissions to arbitration.

HEARING INFORMATION

Hearing date: June 30, 1993. One (1) session.

Hearing Location: Chicago, Illinois.

CASE HISTORY

The current matter resulted from a lawsuit that had been filed in the Circuit Court of Cook County, Illinois, when the Claimants brought an action against James O'Brien. The initial complaint in the Circuit Court had named James O'Brien as the sole defendant. Subsequently, Claimants added Summit Investment Corporation, Prudential Securities, Incorporated, and Richard Harris as defendants. Claimants then filed an arbitration with the NASD alleging: Omissions, breach of contract, failure to furnish competent and appropriate investment advice and breach of fiduciary duty by James O'Brien, the trustee, Prudential Securities, Incorporated, and Summit Investment Corporation and Richard Harris; aiding and abetting the Trustee's breach of fiduciary duty by Richard Harris; breach of trustee's fiduciary duty; tortious interference with an expectancy by all of the aforementioned parties; violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. Chapter 121 1/2, Section 261 et seq. by Richard Harris.

On or about August 17, 1992, Respondents, Prudential Securities, Incorporated and Richard Harris ("Respondents") filed, along with their Answer and Motion to Dismiss pursuant to

Section 16 of the Code, a Motion to Dismiss pursuant to Sections 12(b) and 15 of the NASD Code of Arbitration Procedure (the "Code"). On or about August 20, 1992, the Claimants filed their response with the Director of Arbitration. By way of letter dated November 18, 1992, the Director notified the parties that Respondents Motion pursuant to Section 12(b) of the Code had been denied, and that the Motion to Dismiss pursuant to Section 15 of the Code had been sustained as to any allegations of wrongdoing occurring prior to April 7, 1986.

On or about January 12, 1993, Respondents filed a request that their Motion to Dismiss pursuant to Section 16 of the Code be brought before a panel of arbitrators for decision. Responses were received from the parties, and a panel of arbitrators was appointed in February of 1993. On February 2, 1993, Respondent Summit Investment Corporation ("SIC") had also filed a Motion to Dismiss pursuant to Section 16 of the Code. Responses were received from the parties, and this motion, along with Respondents' motion were forwarded to the panel for decision.

On or about January 22, 1993, counsel for James O'Brien, Arne R. Rhode, filed a request that the jurisdictional issue surrounding James O'Brien be submitted to the panel of arbitrators for determination. James O'Brien contested jurisdiction of the NASD based on the fact that Claimants had no contract to arbitrate this matter with James O'Brien. This matter, along with all relevant responses, had also been submitted to the panel of arbitrators for determination.

On or about March 5, 1993, Claimants' filed a Motion to Reschedule the hearing, to set a Pre-hearing conference on the date presently set for hearing, and to Compel production of documents and information from the Respondents and SIC. On or about March 11, 1993, Respondents filed their Response to Claimants' motion, and also requested that the arbitration be stayed pending the resolution of the Circuit Court matter. On or about March 12, 1993, SIC filed its Response to Claimants' motion. Claimants' motion and the Responses were forwarded to the panel for consideration.

On March 23, 1993, the parties were informed that the panel determined that the NASD did not have jurisdiction to compel James O'Brien to arbitration, granted Respondents' Motion to Stay, and held all other pending motions in abeyance until the either the Court Ordered the arbitration to continue, or a final decision had been reached by the Court.

On or about March 25, 1993, Claimants filed with the NASD a copy of the Circuit Court Order denying Respondents Motion to Stay this Arbitration, and requested that the arbitration continue, and that the NASD schedule a pre-hearing conference to resolve all open matters. On or about April 2, 1993, Respondents filed a Response to Claimants' March 25, 1993 correspondence. On or about April 12, 1993, SIC filed its Response to Claimants' request. The matter was then referred to the panel of arbitrators. The panel determined that the stay of the arbitration proceedings would remain in force.

On or about April 27, 1993, the NASD received the Order from Judge Foreman requesting a written explanation from the NASD as to the exact status of this arbitration. On May 4, 1993, a status memorandum had been sent to Judge Foreman setting forth the panel's position that the arbitration matter was stayed until such time that James O'Brien could be forced to appear before the panel. Copies of the memorandum were also sent to all parties.

On or about May 17, 1993, Respondents filed a request with the NASD for a pre-hearing conference concerning the May 4, 1993 status memorandum and their outstanding Motion to Dismiss. On or about May 24, 1993, SIC filed their concurrence with Respondents motion. On or about May 25, 1993, Claimants filed their Response to and Concurrence with Respondents' motion. The motion and responses were forwarded to the panel, and a pre-hearing was set for June 30, 1993.

On June 30, 1993, at 2:00 p.m. at the offices of the NASD, a hearing was held. The undersigned arbitrators, and William B. Kimme, Esq., NASD Staff Attorney, were present. Also present were Paul Freehling, Esq. for the Claimants, Ann Exline Starr, Esq. for SIC, and Ronald P. Kane, Esq. for Respondents. The topics brought before the panel were the following: Respondents' Motion to Dismiss pursuant to Section 16 of the Code; SIC's Motion to Dismiss pursuant to Section 16 of the Code; and the issue of compelling James O'Brien to arbitration. Counsel for James O'Brien, Arne R. Rhode, Esq. was present at the hearing. Mr. Rhode did not participate in the proceeding. The arbitrators informed the parties at the hearing that they would reserve ruling on the motions until after the hearing had been concluded, and the parties would be informed of the panel's decision prior to their status conference with Judge Foreman on July 6, 1993.

RELIEF REQUESTED

In their Statement of Claim, Claimants requested entry of an order providing that:

1. Respondents and SIC, jointly and severally, shall be directed to pay to the Trust (or alternatively, to the Claimants individually) all amounts by which the Trust had (or Claimants individually have) been damaged (at least \$1,000,000.00).
2. The Claimants shall be awarded punitive damages, prejudgment interest, costs, and fees in such an amount as may be determined to be fair and equitable; and
3. The Claimants be awarded such further and other relief as may be just and

equitable.

Respondents requested that the Statement of Claim be dismissed in its entirety and that Respondents be awarded their costs.

SIC requested that Claimants' Statement of Claim be dismissed with prejudice. SIC further requested that sanctions for bringing a frivolous claim against SIC be assessed against Claimants and their attorneys, and requested the panel award SIC its reasonable costs, disbursements and attorneys' fees plus sanctions.

OTHER ISSUES CONSIDERED & DECIDED

Respondents Prudential Securities, Incorporated, Richard Harris, and Summit Investment Corporation did not file with the NASD a properly executed submission to arbitration but are required to submit to arbitration pursuant to Section 8 of the Code and having answered the claim, appeared and presented arguments at the hearing, and therefore are bound by the determination of the arbitration panel on all issues submitted.

AWARD

After considering the pleadings, the testimony, and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents, Prudential Securities, Incorporated's, Richard Harris' and Summit Investment Corporation's Motions to Dismiss pursuant to Section 16 of the Code are hereby granted. The panel deems James O'Brien to be a necessary party to this proceeding, and because the NASD cannot compel Mr. O'Brien to be a defendant in these proceedings, this matter is best suited to be heard in the existing Circuit Court action no. 91CH2923 and captioned Lottinville, et al. v. James O'Brien, Prudential Securities, Incorporated, Richard Harris, and Summit Investment Corporation. Therefore, the parties are referred to the remedies provided by applicable law.

OTHER COSTS

Each party shall bear its own costs of this arbitration, except as set forth below.

FORUM FEES

Pursuant to Section 43(c) of the Code, the following forum fees are assessed:

1 hearing session X \$1,000.00 = \$1,000.00

Pursuant to Section 43(c) of the Code of Arbitration, the NASD shall retain the nonrefundable filing fee in the amount of \$250.00, and shall refund the hearing session deposit in the amount of \$1,000.00 previously paid to the NASD by the Claimants.

Additional forum fees in the amount of \$500.00 are assessed against Respondents Prudential Securities, Incorporated and Richard Harris.

Additional forum fees in the amount of \$500.00 are assessed against Summit Investment Corporation.

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

CONCURRING ARBITRATORS

Dated:

July 1, 1993

/s/Gregg Rzepczynski
Gregg Rzepczynski
Presiding Chair
Industry Arbitrator

July 1, 1993

/s/John L. Bodolay
John L. Bodolay
Industry Arbitrator

July 1, 1993

/s/Carmen P. Michelotti
Carmen P. Michelotti
Industry Arbitrator

Date of Service by the NASD:

July 2, 1993