

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Sam L. Evans & Phyllis Evans

92-03192

Name of Respondent

Merrill Lynch, Pierce, Fenner & Smith, Inc.

REPRESENTATION

For Claimants: Sam L. Evans and Phyllis Evans were represented by Timothy M. McDaniel, Esq. of Houston, Texas.

For Respondent: Merrill Lynch, Pierce, Fenner & Smith, Inc. was represented by Jack D. Ballard, Esq. of Andrews & Kurth, L.L.P., located in Houston, Texas.

CASE INFORMATION

Statement of Claim filed: September 22, 1992.

Claimants' Submission Agreement signed on: September 9, 1992.

Statement of Answer filed by Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. on: November 25, 1992.

Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Submission Agreement signed on: December 18, 1992 by Nicholas F. McClanahan, First Vice President, Merrill Lynch, Pierce, Fenner & Smith, Inc..

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: June 23, 1993 for Two (2) sessions;
June 24, 1993 for Three (3) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Claimants Sam L. Evans and Phyllis Evans ("Evans") alleged that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") misrepresented its ability to timely complete a financial and estate plan for the Evans. The Evans specifically alleged that:

1. Prior to March 23, 1992, the Evans maintained a securities account with Merrill Lynch with their son as the account executive. On March 23, 1992, the Evans requested that Merrill Lynch sell the 133,300 shares of Grant Tensor common stock in the account at \$9.00 per share;
2. On March 24, 1992, Mr. Evans met with two Merrill Lynch executives to discuss a financial and estate plan involving the formation of charitable and insurance trusts using the Grant Tensor stock. The Merrill Lynch executives made specific representations that they were capable of providing these services;
3. At the meeting, Mr. Evans expressed concerns regarding the timing of plans because he anticipated an erosion of the value of the value of the Grant Tensor stock and he would be unavailable due to his travel schedule after April 3, 1992. Therefore, the arrangements would have to be completed before this date. The Merrill Lynch executives explained that it would only take two days to complete the trust documents, the main concern was the insurance physical, and that the timing concerns would be satisfied. Mr. Evans requested that the sell order be canceled;
4. The Evans' insurance physicals were completed on March 26, 1992, but they heard nothing from Merrill Lynch until a letter was received on April 1, 1992. This letter reiterated the information received at the first meeting and included three sheets of general calculations. Mr. Evans was advised that detailed computer runs were being prepared and a conference call was arranged to finalize arrangements;
5. The conference call occurred on April 2, 1992 with Merrill Lynch representatives. During the conference, the contents of the letter were simply reiterated and the computer runs had not been completed. Because of Merrill Lynch's inaction and failure to satisfy his time concerns, Mr. Evans aborted the trust plans and instructed his son to sell the Grant Tensor stock which had further deteriorated in value.

Based upon the above allegations, the Evans asserted claims for negligence; violation of the Texas Consumer Protection-Deceptive Trade Practices Act ("DTPA"); common law fraud and negligent misrepresentation; violation of Section 27.01 of the Texas Business & Commerce Code

concerning fraud in real estate and stock transactions; and breach of contract.

Respondent Merrill Lynch denied the material allegations of the Statement of Claim, alleging that:

1. At the March 24, 1992 meeting, Evans was interested in structuring an estate plan so as to avoid the capital gains taxes in connection with the contemplated sale of the Grant Tensor stock. The Merrill Lynch executives advise Evans that implementation of the plan required an evaluation of tax and financial data, selection of the type of trust, physical examinations, insurance approvals and rate quotations, and the drafting of the trust documents;
2. While Evans expressed concern about the timing because of the decline in the stock value, no specific deadline was agreed upon or stated by Evans. It was made clear to Mr. Evans that the insurance approvals and rate quotations would take time and that the trust documents would be ready within five business days after the specific type of trust was selected;
3. Following the meeting, Merrill Lynch began gathering the necessary documentation and forwarding it to the proper Merrill Lynch division. A letter regarding the available options relating to the charitable remainder and insurance trusts, with illustrations of the effect on the Evans, was sent to Mr. Evans by Federal Express and a conference call arranged. On April 2, 1992, nine days after the initial meeting, the conference call took place. During the call, Mr. Evans never complained of a delay in implementing the plan or advised the Merrill Lynch executives of his deadline. Immediately after the call, Evans told his son to sell the 133,300 shares of Grant Tensor stock. Evans cancelled the plan before the insurance and rate quotations were received, the trusts selected and before Merrill Lynch had an opportunity to implement the estate plan.

In addition, Merrill Lynch asserted the following affirmative defenses:

1. The Evans' damages, if any, were the result of their own negligence rather than any act or omission by Merrill Lynch;
2. The Evans are estopped by their own conduct of failing to complain about the time required to implement the plan and Merrill Lynch reasonably relied on their conduct;
3. The Evans ratified the time period required to implement the plan or, alternatively, waived their right to complain about it;

4. The Evans have failed to mitigate their damages and any losses sustained in connection with the sale of the Grant Tensor stock were the result of market forces and not Merrill Lynch's conduct; and
5. The Evans cannot recover punitive damages because New York law applies and New York law does not allow for the recovery of punitive damages in arbitration proceeding.

RELIEF REQUESTED

Claimants requested entry of an award against Merrill Lynch in the sum of \$429,279.00, plus exemplary and punitive damages not to exceed three times the amount of the actual damages awarded, plus reasonable attorneys' fees, costs, prejudgment and postjudgment interest.

Respondent requested that the relief sought in the Statement of Claim be denied in all respects, that Merrill Lynch recover the costs of arbitration and for such other relief which the Arbitration Panel deemed just.

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.

AWARD

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

1. The Statement of Claim is hereby dismissed and denied in its entirety;
2. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Five (5) hearing sessions x \$750.00 per session = \$3750.00.

The National Association of Securities Dealers, Inc. shall retain the \$200.00 claim filing fee and

the \$1,050.00 hearing session deposit previously deposited by the Claimants, Sam L. Evans and Phyllis Evans. Claimants Sam L. Evans and Phyllis Evans are liable for and shall pay to the NASD additional forum fees in the sum of \$825.00. Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is liable for and shall pay to the NASD forum fees in the sum of \$1,875.00.

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

Concurring Arbitrators' Signatures

Name

Date

Jeanine M. Lehman, Esq.
Jeanine M. Lehman, Esq.
Public Arbitrator
Chairperson

October 5, 1993

Woody W. Wilson
Woody W. Wilson
Public Arbitrator

October 8, 1993

Nick Sacaris
Nick Sacaris
Industry Arbitrator

October 5, 1993

For NASD Use Only

Date of Service of Award: 10-11-93