

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Name of Claimant

Cowen Construction, Inc.

No. 93-00688

Name of Respondents

Stratton Oakmont, Inc.
Howard Scott Gelfand

REPRESENTATION OF PARTIES

For Claimant: Barry K. Beasley, Esq. and J. Clark Kendall II, Esq., of Huffman Arrington Kihle Gaberino & Dunn, Tulsa, Oklahoma.

For Respondent: Norman B. Arnoff, Esq., of Capuder & Arnoff, New York, New York, and William B. Federman, Esq., of , Oklahoma City, Oklahoma.

For Respondent Howard Scott Gelfand: Jacob H. Zamansky, Esq., of Finkelstein, Bruckman, Wohl, Most & Rothman, New York, New York.

CASE INFORMATION

Statement of Claim filed on or about: February 28, 1993.

Claimant's Submission Agreement signed: February 19, 1993.

Joint Statement of Answer filed by Respondents on or about:

Respondent Stratton Oakmont, Inc.'s Submission Agreement signed on: March 19, 1993.

Respondent Howard S. Gelfand's Submission Agreement signed on: May 4, 1993.

HEARING INFORMATION

Hearing dates: January 5, 1993. Two (2) sessions.
January 6, 1993. Three (3) sessions.
January 7, 1993. Two (2) sessions.

Hearing Location: Oklahoma City, Oklahoma.

CASE SUMMARY

Claimant, Cowen Constructions, Inc. ("Claimant") alleged that Respondents, Stratton Oakmont, Inc. and Howard Scott Gelfand ("Respondents"): Violated Section 10(b) of the Securities and Exchange Act of 1934 and SEC Rule 10b-5 promulgated thereunder; violated Section 408 (a)(2) of the Oklahoma Securities Act, 71 O.S. Supp. 1992, Section 408(a)(2); breached their fiduciary duty; negligently misrepresented material facts or common law fraud violations; violated NASD Rules of Fair Practice, Article III, Section 2; and violated Section 15(b)(4)(E) of the Securities Exchange Act. Claimant also alleged that Respondent Stratton Oakmont, Inc. was liable to Claimant pursuant to Section 20(a) of the Securities and Exchange Act, and under the doctrine of respondeat superior. The allegations arose out of transactions in Ropak and Visual Equities stock.

In their joint Answer, Respondents denied the allegations contained in the Statement of Claim. In addition, Respondents set forth the following affirmative defenses:

1. The statement of Claim fails to state a claim upon which relief may be granted.
2. The damages for which Claimant seeks to hold Respondents liable resulted in whole or in part from Claimant's acts or omissions and Respondents are in no way liable to Claimant for its own wrongful or negligent acts or omissions.
3. The damages for which Claimant seeks to hold Respondents liable resulted in whole or in part from the negligent, deliberate, intentional, reckless or unlawful acts or omissions of third parties including agents of claimants, and Respondents are in no way liable to Claimant for any such acts or omissions on the part of third parties.
4. The damages for which Claimant seeks to hold Respondents liable were proximately caused by Claimant's own failure to use reasonable means to mitigate damages properly.
5. Claimant, through its conduct, approved, authorized and/or ratified Respondents' actions and are accordingly, estopped from recovery herein.
6. The alleged damages were caused by Claimant's own conduct or negligence or Claimant was guilty of contributory negligence and is, therefore, precluded from recovery herein.
7. Claimant, by its own conduct, has waived any and all rights that it may have against Respondents.
8. Respondents state that if they should be found liable in any manner for damages, if any, purportedly sustained by Claimant, then such damages were proximately caused or contributed to by persons not presently part of this action, and it is necessary that the proportionate degree of negligence or fault of each and every said person or entity, whether made parties to this action or not, be determined and pro-rated, and that any judgement that might be entered against Respondents be reduced by that degree of fault found to exist as to said other persons or entities.
9. All risks in investing in the securities market were fully explained to the Claimant and that it knowingly, willingly and voluntarily assumed those risks in investing in the market.

10. At all times mentioned in the Statement of Claim, Respondents maintained an adequate and reasonable system of control over its employers' and that Respondents at all times acted in good faith and did not at any time, directly or indirectly, induce any act or acts constituting a cause of action, either acting alone or in concert, as part of a common scheme plan or conspiracy.
11. Claimant failed to use the requisite due diligence in monitoring, trading, managing and handling of its Stratton Oakmont account.
12. Attorneys' fees are not recoverable by Claimant.
13. Punitive damages are not recoverable by Claimant.
14. Claimant's allegations are barred by the Statute of Limitations.
15. This forum lacks jurisdiction over the persons and subject matter of this proceeding.

RELIEF REQUESTED

Claimant requested an award against Respondents in the amounts of \$310,937.50 for compensatory damages, \$310,937.50 for punitive damages, and attorneys' fees.

Respondent requested that this claim be dismissed in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

In their Answer, Respondents made a Motion to Strike the pleadings as Prejudicial and Scandalous. The motion related to certain SEC documents that had been referred to in the Statement of Claim, and had also been attached to the Statement of Claim as exhibits. After hearing argument from the parties, and deliberation, the arbitrators granted the Motion and ordered that tab 14 of the exhibits attached to the Statement of Claim be removed from the record.

During the hearing of this matter, Respondents made Motions to Dismiss the Statement of Claim. After hearing argument from the parties, and deliberation, the panel denied those motions.

The parties have agreed that the Award in this matter may be executed by 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 original(s) remain on file with the NASD.

AWARD

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

1. Respondents, Stratton Oakmont, Inc. and Howard Scott Gelfand ("Respondents") are jointly and severally liable for, and shall pay to the Claimant, Cowen Construction, Inc. ("Claimant") the sum of \$162,500.00 upon the tender, by Claimant, of the 70,000 shares of Visual Equities stock. If Claimant does not tender the 70,000 shares of Visual Equities stock within 30 days of service of this Award, Respondents shall be jointly and severally liable to Claimant in the amount of \$127,500.00.
2. Claimant's claim for punitive damages is hereby denied and dismissed with prejudice.

OTHER COSTS

Each party shall bear its own costs and expenses associated with this arbitration, including attorneys' fees, except as set forth more fully below.

Respondents are jointly and severally liable for, and shall pay to Claimant the sum of \$1,250.00 as reimbursement of its filing fees and hearing session deposit incurred in the filing of this case.

Respondents are jointly and severally liable for, and shall pay to Claimant the sum of \$10,000.00 as an award of attorneys' fees. The authority for the award of attorneys' fees can be found in parties' arguments at the hearing as set forth in the transcripts of this matter.

FORUM FEES

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

$$7 \text{ hearing sessions} \times \$1,000.00 = \$7,000.00$$

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

Additional forum fees in the amount of \$6,000.00 are assessed jointly and severally against the Respondents.

Pursuant to Sections 30(b) and 43(c) of the Code, the NASD shall retain the \$334.00 paid by each party for the postponement of this case.

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

CONCURRING ARBITRATORS

Dated:

Name:

January 27, 1994

John R. Preston/s/
John R. Preston
Presiding Chair
Public Arbitrator

January 26, 1994

William Ragusin/s/
William Ragusin
Public Arbitrator

January 27, 1994

Stephen P. Mann/s/
Stephen P. Mann
Industry Arbitrator

Date of Service by the NASD: 1-31-94