

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

Jay Jablonski,

Claimant/Counterrespondent,

v.

No. 93-02386

Shearson Lehman Brothers, Inc.

n/k/a Smith Barney Shearson,

Respondent/Counterclaimant

REPRESENTATION OF PARTIES

For Claimant Jay Jablonski ("Claimant"): Armand Salese, Esq., of Salese & McCarthy, P.C., Tucson, Arizona.

For Respondent Shearson Lehman Brothers, Inc. ("Respondent"): Stephen Young, Esq., and Elizabeth A. Kendrick, Esq., of Keesal, Young & Logan, Long Beach, California.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about June 16, 1993.

Claimant's Submission Agreement was signed on June 9, 1993.

Respondent's Statement of Answer and Counterclaim was filed on or about September 1, 1993.

Respondent's Submission Agreement was signed on August 5, 1993.

Claimant's Reply to Counterclaim was filed on or about October 4, 1993.

HEARING INFORMATION

Pre-hearing Conference date: April 8, 1994. One (1) session.

Hearing dates: April 11, 1994. Two (2) sessions.
April 12, 1994. Two (2) sessions.
April 13, 1994. Three (3) sessions.

Hearing Location: Phoenix, Arizona

CASE SUMMARY

Claimant alleged: Wrongful termination; breach of contract; violation of covenant of good faith and fair dealing; violation of A.R.S. Section 13-2301 et seq.; and fraud by the Respondent. The allegations arose out of the recruitment, the negotiations and subsequent employment and termination of Claimant by Respondent for complaints arising out of limited partnership products sold while Claimant was employed at Prudential Securities. Claimant further alleges that Respondent was fully aware of his "product problems" at Prudential Securities, and that they would follow the Claimant to Respondent should he transfer employment.

In its Answer, Respondent denied generally and specifically each and every allegation in the Statement of Claim. In addition, Respondent asserted the following affirmative defenses:

1. The Statement of Claim is barred by the applicable statutes of limitation.
2. The Statement of Claim fails to state facts sufficient to constitute a cause of action against Respondent.
3. Respondent at all times acted in good faith.
4. The damages suffered by Claimant, if any, are the proximate result of his own actions or omissions.
5. Claimant is estopped from bringing the claims set forth under the Statement of Claim.
6. Claimant has waived any right to recovery under the Statement of Claim.
7. Claimant was an "at-will" employee whose employment could be terminated at any time, with or without cause.
8. In the event that Claimant is determined not to be an "at-will" employee, "good cause" existed for his termination.
9. In the event that Claimant is determined not to be an "at-will" employee, the exercise of managerial discretion regarding his termination was justified and proper.
10. As to each and every alleged oral, written, or implied contractual relationship, Claimant committed a prior breach thereof, excusing any duty of further performance by Respondent.
11. As to each and every alleged implied contractual relationship, there was a failure of consideration.
12. Claimant's claims are barred by the statute of fraud.
13. Claimant's action for wrongful termination is preempted by federal law.
14. Claimant failed to mitigate his damages, if any.
15. Claimant's claim for punitive damages is barred because he failed to properly allege that Respondent acted with malice, oppression, or fraud.
16. Claimant's demand for punitive damages, if granted, would violate both the Arizona Constitution and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.
17. Claimant's own acts which caused or contributed to his termination of employment were wrongful and inequitable and, on that basis, he should be barred from recovery under the doctrines of unclean hands and/or in pari delicto.
18. Claimant's claims for physical and/or emotional distress are barred by the

exclusivity provisions of the Arizona workers compensation laws.

19. Claimant's termination, as well as any problems he faced in securing future employment upon his termination, if any, are based solely upon his own improper conduct and inaction.

Respondent also asserted a Counterclaim based on a letter agreement entered into by the parties, pursuant to which Claimant received an "up-front" loan in the form of a forgivable promissory note (the "Note"). The Note was to have been forgiven in three equal annual installments. In addition, the terms of the Note made the balance of the remaining principal and interest due and payable upon resignation or termination of Claimant's employment. Respondent stated that Claimant's employment was terminated on February 2, 1993, and that there is due and owing to Respondent the sum of \$130,865.01, plus interest.

For his Reply, Claimant denied that he breached the terms of his employment agreement with Respondent. In addition, Claimant asserted the following affirmative defenses to the Counterclaim:

1. Respondent's Counterclaim fails to state facts sufficient to constitute a cause of action against Claimant.
2. Claimant at all times acted in good faith.
3. Respondent at all times acted in bad faith.
4. Respondent is estopped from asserting a Counterclaim for the reasons set forth in Claimant's Statement of Claim.
5. Claimant was fired for bad cause in contravention of public policy and in breach of his employment contract with Respondent, thereby waiving any and all right to assert its Counterclaim.
6. Respondent's acts constitute fraud, illegality, a failure of consideration all of which preclude Respondent from any recovery under the terms of the employment agreement between the parties.

RELIEF REQUESTED

Claimant requested: Compensatory damages in the sum of no less than \$10,000,000.00; the panel to determine Claimant's actual damages to his person, property and business and treble same pursuant to Arizona's Racketeering statute; an award of all attorney's fees and costs incurred in the bringing of this matter; and that Respondent's Counterclaim be dismissed in its entirety and that Respondent take nothing thereby.

Respondent requested: That the Statement of Claim be dismissed in its entirety and that Claimant take nothing thereby; for costs and attorneys' fees; for the principal sum due of \$130,865.01; for interest on the principal sum to the date of the final payment at the federal short-term rate; and for such other and further relief as the arbitration panel may deem just and proper;

OTHER ISSUES CONSIDERED & DECIDED

On April 7, 1994, Respondent filed a Motion for Summary Judgement with the NASD. Claimant's counsel requested a pre-hearing conference on the issue of whether the motion would be considered prior to the hearing in this matter. On April 8, 1994, a pre-hearing was held with parties' counsel, arbitrators Martin and Leibshon, and NASD staff counsel. After hearing oral argument, and without reviewing the motion prior to the pre-hearing, the presiding arbitrators determined that Respondent's motion would be taken under advisement.

At the hearing in this matter, Respondents again asserted their motion, and the panel amplified its prior ruling that it would be taken under advisement. At the conclusion of the hearing, Respondent requested that the Motion for Summary Judgement be converted to Respondent's arbitration memorandum or brief. The undersigned arbitrators granted each party until April 18, 1994 to file additional or supplemental memoranda or briefs. A supplemental brief was filed by each party.

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, 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. Respondent Shearson Lehman Brothers, Inc., n/k/a Smith Barney Shearson, is liable for, and shall pay to the Claimant, Jay Jablonski, the sum of \$200,000.00 as satisfaction of his claim herein.
2. Claimant's claims for punitive damages and RICO damages are hereby, and each of them, denied and dismissed with prejudice.
3. Respondent's claims made in its Counterclaim are, and each of them, denied and dismissed with prejudice.

OTHER COSTS

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

Respondent is liable for, and shall pay to the Claimant the sum of \$1,500.00 as satisfaction of Claimant's claim for costs.

FORUM FEES

Pursuant to Section 44(c) of the NASD Code of Arbitration Procedure (the "Code"), the following forum fees are assessed:

1 pre-hearing conference session @ \$300.00 per session = \$300.00
7 regular hearing sessions @ \$1,500.00 per session = \$10,500.00

Pursuant to Section 44(c) of the Code, the NASD shall retain the nonrefundable filing fee in the amount of \$500.00, and shall RETAIN the hearing session deposit in the amount of \$1,500.00 previously paid to the NASD by the Claimant.

Pursuant to Section 43(c) of the Code, the NASD shall retain the nonrefundable Counterclaim filing fee in the amount of \$500.00 and shall RETAIN the Counterclaim hearing session deposit in the amount of \$750.00 previously paid to the NASD by the Respondent.

Additional Forum Fees in the amount of \$8,550.00 are assessed against the Respondent.

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

CONCURRING ARBITRATORS

Dated:

Name:

May 18, 1994

Mark Leibshon/s/
Mark Leibshon
Presiding Chair
Industry Arbitrator

May 18, 1994

David W. Martin/s/
David W. Martin
Industry Arbitrator

May 24, 1994

Charles Taylor/s/
James M. Rapisarda
Industry Arbitrator

Date of Service by the NASD: _____