

NASD AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Mary S. Looney,

Claimant,

and

No. 93-02786

Timothy J. Riley,

Shearson Lehman Brothers, Inc., and

Kemper Securities, Inc.

Respondents.

REPRESENTATION OF PARTIES

Mary S. Looney ("**Claimant**") was represented by Ron Kent Hooper, Esq., , Arizona.

Shearson Lehman Brothers, Inc. ("**SLB**") and Timothy J. Riley ("**Riley**") were represented by Jeff Shumway, Esq., of Lewis & Roca, Phoenix, Arizona.

Kemper Securities, Inc. ("**KSI**") was represented by A. Brad Busscher, Esq., of Kemper Securities, Inc., Chicago, Illinois.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about July 15, 1993. Claimant's Submission Agreement was signed on July 15, 1993.

SLB's and Riley's joint Answer was filed on or about October 5, 1993. The NASD does not have a record of SLB and Riley having filed a Submission Agreement.

KSI's Answer was filed on or about September 23, 1993. KSI's Submission Agreement was signed on September 22, 1993.

HEARING INFORMATION

A telephonic hearing was held on October 17, 1995 for one (1) session concerning SLB's and KSI's Motions to Dismiss.

CASE SUMMARY

Claimant contended that Riley, SLB and KSI: Sold her unsuitable investments; breached their fiduciary duty; made material misstatements and omissions; violated A.R.S. §§44-1521 et seq.; committed negligence in the handling of Claimant's investments; and breached their contract. Claimant further alleged the SLB and KSI failed to supervise Riley's activities. The allegations arose out of transactions in Makenzie Group Funds and National Bond Funds on or about July, 1986 and October, 1986.

In their joint Answer, SLB and Riley denied the allegations contained in the Statement of Claim. SLB asserted that: The investments were suitable based upon Claimant's stated investment objective; the recommendations were thoroughly explained to Claimant and were agreed to by Claimant; Riley had acted in accordance with Claimant's instructions; SLB's and Riley's conduct was entirely proper; and any losses incurred by the Claimant were caused by the market crash of 1987.

For its Answer, KSI denied the allegations contained in the Statement of Claim. KSI asserted that the securities at issue were purchased more than six (6) years ago and KSI had no involvement with the purchases, and that the Claimant never opened an account with KSI. In addition, KSI asserted the following affirmative defenses: The Statement of Claim is barred by §15 of the NASD Code of Arbitration Procedure (the "Code"); the Statement of Claim is barred by the applicable statutes of limitations; the Statement of Claim as to KSI is barred based on a lack of privity of contract between KSI and Claimant; Claimant failed to mitigate her losses; Claimant has unclean hands since she had failed to disclose material information relating to, among other things, the income earned on the securities at issue; the Statement of Claim is barred by laches; the Claimant's losses, if any, were not proximately caused by any act or inaction of KSI; the Claimant failed to state a claim for exemplary damages; and the Statement of Claim failed to state any claim against KSI upon which relief can be granted.

RELIEF REQUESTED

Claimant requested a joint and several award against KSI and Riley for all damages Claimant had suffered, trebling of these damages as authorized by the Arizona Racketeering Statute, punitive damages in an amount adequate to punish and deter Respondents from future conduct, attorney's fees and costs pursuant to A.R.S. §12-341.01 and the Arizona Racketeering Statutes, and for such other and further relief as the arbitration panel deemed just and proper.

SLB and Riley requested that the Statement of Claim be dismissed and that they be awarded all costs and expenses, including forum fees and reasonable attorneys' fees, incurred in defending this arbitration.

KSI requested that the Statement of Claim be dismissed in its entirety and that it be awarded all costs and expenses, including reasonable attorneys' fees, incurred in defending this arbitration.

OTHER ISSUES CONSIDERED & DECIDED

Respondents SLB and Riley did not file with the NASD properly executed submissions to arbitration but are required to submit to arbitration pursuant to §12 of the Code and having answered the claim, appeared at the hearing and are bound by the determination of the arbitration panel on all issues submitted.

Respondents SLB, Riley and KSI ("Respondents") filed motions to dismiss under §15 of the Code as part of their Answers to the Statement of Claim. On March 11, 1994 and May 18, 1994 Respondents again asserted their respective Motions to Dismiss. Additionally, KSI asserted as another grounds for dismissal, that Claimant had never opened an account with KSI. On or about May 12, 1994, Claimant filed a response to the motions. On or about October 24, 1994, the Director of arbitration made a determination that claims arising on or before July 16, 1987 would be ineligible for arbitration. However, the director allowed allegations of wrongdoing arising after July 16, 1987 would be eligible for arbitration.

On or about July 26, 1995 KSI renewed its Motion to Dismiss. On or about August 11, 1995 SLB and Riley renewed their Motion to Dismiss. In addition, they asserted a Motion To Bar Claimant from presenting any witnesses and exhibits at the hearing due to the failure to comply with §32(c) of the Code. On August 14, 1995 Claimant submitted a Motion to Continue hearing and for additional time to respond to pending motions. On or about August 15, 1995 KSI filed its response to Claimant's request. On or about August 21, 1995, SLB and Riley submitted their response to Claimant's request. On or about August 21, 1995, after consideration of all relevant documents, and deliberation, the panel granted Claimant's request, allowed Claimant until September 5, 1995 to respond to Respondents' pending motions, and directed that a pre-hearing be set after September 5, 1995 for the purpose of hearing argument on Respondents' motions.

On October 17, 1995 a telephonic hearing was held for the purpose of hearing argument on Respondents' Motions to Dismiss. At the start of the hearing, Claimant's counsel, Mr. Hooper, stated that Claimant had been comatose for the last six (6) months. He had been unable to obtain an affidavit from her, and he could not find evidence supporting the Statement of Claim. Further, Mr. Hooper stated that he could not present anything other than the original response to Respondents' §15 motions which the Director had ruled on. Moreover, Mr. Hooper stated that due to her illness, Claimant would be unable to proceed with this arbitration. Lastly, Mr. Hooper conceded that Respondents' motions had to be granted, and that in good faith, he could not oppose a dismissal any longer. Based on the statements made on Claimant's behalf, by Mr. Hooper, the undersigned arbitrators dismissed the Statement of Claim.

AWARD

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

Claimant's claims, are and each of them, denied and dismissed with prejudice.

Each party shall bear its own costs and expenses, including attorneys' fees, associated with this arbitration.

FORUM FEES

Forum fees are calculated at the rate of \$750.00 per hearing session and \$300.00 for each prehearing conference, if any. There was one (1) regular sessions x \$750.00 = \$750.00 in forum fees. Pursuant to §43(b) a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §43(c) of the Code, the NASD shall **retain** the non-refundable filing fee in the amount of \$200.00 and shall **retain** the hearing session deposit in the amount of \$750.00 previously deposited with the NASD by the Claimant .

Pursuant to §43(c) Code, the undersigned arbitrators have waived the postponement fee assessed with the August 21, 1995 granting of Claimant's request for a continuance of this arbitration.

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

Dated:

Jeffrey B. Messing
Jeffrey B. Messing
Public Arbitrator, Presiding Chair

s/s

November 15, 1995

Peter Kay
Peter Kay
Industry Arbitrator

s/s

November 16, 1995

Melvin H. Borovay
Melvin H. Borovay
Public Arbitrator

s/s

November 17, 1995