

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the matter of the Arbitration Between

Name of Claimants

The Nevenka Tanin Family Trust
Nevenka Tanin
Eleanore Tanin

NASD Arbitration
No. 93-03360

Name of Respondents

Shearson Lehman Hutton, Inc.

Third Party Claimant

Smith Barney Shearson, Inc.

Third Party Respondent

Cyril P. Tanin

Representation

For Claimants: Robert A. Uhl, Esq. - Aidikoff & Kesluk - Los Angeles, California

For Respondent, Shearson Lehman Hutton, Inc. - Susan E. Harkins, Esq. - Smith Barney
Shearson, Inc. - New York, New York

For Third Party Respondent, Cyril P. Tanin - In Pro Se

Case Information

Statement of Claim filed: August 26, 1993

Claimants' Submission Agreement signed: August 20, 1993

Statement of Answer, Motion to Dismiss and Third-Party Claim filed by Respondent: December
13, 1993

Respondent's Submission Agreement signed: December 13, 1993

Hearing Information

Hearing Dates / Sessions: April 22, 1993 - One Pre-Hearing Session
April 26, 1993 - Two Sessions
April 27, 1993 - Two Sessions
April 28, 1993 - Two Sessions

Hearing Location: Los Angeles, California

Case Summary

Cyril P. Tanin, then a trustee of the Nevenka Tanin Family Trust ("Trust"), opened an account with Respondent on or about August 18, 1986. The account was opened in the names of the three trustees for the benefit of the Trust. Beginning on or about August 18, 1986 and ending on or about June 1, 1989 the account was utilized to sell shares of stock which were assets of the trust. The first sale order was apparently executed at a point in time prior to receipt by Respondent's New Accounts Department of a copy of the Trust instrument. That action was in violation of Respondent's policies as set forth in its Compliance Manual.

In connection with the sale of that stock, Cyril Tanin forged the signatures of his mother (Nevenka Tanin), his sister (Eleanore Tanin) and his father (Peter Tanin). Peter Tanin died approximately five years before (i) the account was opened and (ii) his signatures were forged.

In connection with the sale of the stock, Respondent guaranteed each and every one of the signatures thereon, including the forged signatures of Nevenka, Eleanore and Peter Tanin. There was no evidence submitted that Respondent took any steps whatsoever to verify or confirm the validity of the signatures that it expressly guaranteed. In the absence of those guarantees, the stocks in question could not have been sold. The gross aggregate amount of the sales pursuant to the forged signatures was approximately \$148,432.00.

The proceeds of the sales, less commissions earned by Respondent, were remitted in checks given to Cyril Tanin and drawn in favor of all three of the trustees. Cyril forged the signatures on these checks, negotiated the checks and used the proceeds for his own benefit.

In 1993, Eleanore notified the police of Cyril's conduct. Cyril was contacted by the police and gave them a telephonic statement. No criminal prosecution ensued and claimants did not file a civil lawsuit against Cyril. In response to a request for repayment, Cyril has made payments to Eleanore in the approximate amount of \$4,600.00 to date.

Timeliness Issue

The panel took under submission Respondent's contention that some or all of the transactions in issue are barred as untimely due to the application of Section 15 of the Code of Arbitration Procedure and/or various statutes of limitations. The evidence established that in 1991 claimants were on notice as to the matters in question. However, Claimants' Statement of Claim was not filed with the NASD until August 23, 1993. Accordingly, it is the ruling of the Panel that all transactions which occurred more than six years prior to the filing date (i.e. prior to August 23, 1987) are barred by Section 15. Respondent's timeliness arguments are otherwise denied.

Discussion

The Claimants established by a preponderance of the evidence that Respondent guaranteed the signatures on the share certificates, including guaranteeing the signature of a person who had died five years prior to that time. The sole representative of respondent who testified (with the exception of an expert whose testimony was limited to the issue of calculation of damages) disclaimed any knowledge whatsoever about the procedures or safeguards utilized when guaranteeing a signature. It is an established principle of law that appropriate inferences may be drawn when a party has the power to produce evidence on a given subject and elects not to do so. In this case, it may permissibly be inferred that Respondent took no actions of any kind to verify that a reasonable basis existed upon which to issue a guarantee of signature(s) on the share certificates in question. If those guarantees had not been issued by Respondent, the sale of the stocks would not have been consummated. The failure to take any measures of any kind to determine that the issuance of a guarantee was warranted breached Respondent's duty to care to the Trust.

Discussion Re Third-Party Claim

The credible evidence established that Third-Party Respondent Cyril Tanin misappropriated trust assets and used the proceeds from the sale of those assets for his own benefit. The actions of Third-Party Respondent Cyril Tanin in forging signatures in order to effect the sale of trust assets, and to obtain the proceeds thereof for his personal benefit, constituted fraud or defalcation while acting in a fiduciary capacity as defined in 11 U.S.C. Section 523 of the U.S. Bankruptcy Code. Accordingly, his liability for this obligation falls within the definition of a debt which is nondischargeable in bankruptcy.

Relief Requested

Claimants seek to recover damages of not less than \$184,453.00, lost opportunity cost of not less than \$175,000.00, punitive damages, interest, costs and fees.

Respondent, Shearson, requests that the claim set forth in the Statement of Claim be dismissed with costs assessed against claimants or, in the event that an award is entered in favor of claimants, that an award be entered in favor of Shearson on its third-party claim against Cyril Tanin and that the Panel award Shearson such further relief as it deems appropriate.

Other Issues Considered and 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 original remains 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 Trust shall recover from Respondent the following items:
 - (a) \$73,839.00 in sales proceeds;
 - (b) \$22,000.00 representing lost dividends;
 - (c) \$1,250 in filing fees.
2. Smith Barney Shearson, Inc. shall recover from Third-Party Respondent Cyril Tanin the full amount which it is obligated to pay the Trust under Item 1.
3. The amount paid by Cyril Tanin to Eleanore Tanin (\$4,600) shall not be a credit against the award in favor of the Trust (Item 1) and shall not be a credit against the award in favor of Smith Barney Shearson, Inc. against Cyril Tanin (Item 2).
4. The award in Item 1 is exclusively in favor of the Nevenka Tanin Trust. The payment of the award shall be to the Trust and not to Eleanore or Nevenka Tanin as individuals.
5. Claimants' claim for punitive damages is denied.
6. The parties shall each bear their respective costs and fees (exclusive of forum fees) and attorneys' fee.
7. Claimants' claim for interest is denied.

Forum Fees

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

Total Fees:		
One Prehearing conference @ \$300 / session	=	\$300.00
<u>Six hearing sessions @ \$1,000.00</u>	=	<u>\$6,000.00</u>
Total	=	\$6,300.00

Respondent Smith Barney Shearson, Inc. is solely assessed the following forum fees:

Five Sessions + Prehearing Conference	=	\$5,300.00
<u>Hearing session deposit, previously paid</u>	=	<u>\$600.00</u>
Balance due	=	\$4,700.00

Claimants are assessed the following forum fees:

One session	=	\$1,000.00
<u>Hearing session deposit, previously paid</u>	=	<u>\$1,000.00</u>
Balance due	=	\$0.00

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

Arbitrators

<u>Name</u>	<u>Public / Industry</u>
Aaron Fenton	Public Chairperson
Andrew Sorensen	Industry Panelist
Harris Kershner	Public Panelist

Concurring Arbitrators' Signatures

H. E. Kershner

Date Served: 9/15/94