

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

James & Phyllis Dunleavy,

Claimants,

v.

Case # 93-03696

David Lerner Associates
and William Robbins,

Respondents.

REPRESENTATION

For Claimants: John Kaley, Esq., from the law firm of Weinberg Kaley Gross & Pergament located in Garden City, NY

For Respondents: Ruthann G. Niosi, Esq., a sole practitioner located in New York ,NY

CASE INFORMATION

Statement of Claim filed: September 17, 1993

Claimant's Submission Agreement signed on: June 3, 1993

Joint Statement of Answer filed by Respondents David Lerner Associates and William Robbins on: January 25, 1994

Respondents David Lerner Associates' Submission Agreement signed on: October 26, 1993

Respondent William Robbins did not execute a Submission agreement as required pursuant to Section 25 of the NASD Code of Arbitration Procedure.

HEARING INFORMATION

Pre-Hearing Conference:	March 3, 1995	1 Session
Hearing Sessions:	May 30, 1995	2 Sessions
	May 31, 1995	2 Sessions

Hearing Location: NASD Inc.
33 Whitehall St.
New York City, New York.

CASE SUMMARY

Claimants, alleged that Respondent Robbins persuaded Claimants to invest in Birtcher "Real Estate Partnership III." Claimants alleged that Respondent Robbins represented this investment would yield nine percent (9%) annually, that the principal would double in five (5) to seven (7) years, and that this limited partnership was safe, conservative and suitable for the claimants. Claimants also alleged that Respondent David Lerner Associates continued to falsely report the value and suitability of Birtcher , causing the Dunleavy's to refrain from any corrective actions.

Claimants further alleged that they have never received the promised nine percent (9%) return on their investment in Birtcher and that their investment in Birtcher is virtually worthless. Claimants alleged that this investment was unsuitable for their needs and this was known or should have been known to the respondents. Claimants alleged that they relied on Respondents' investment advice and Respondents knew or should have known of the falsity of the representations made by them. Claimants alleged that failing to advise them of the speculative nature of the investment was grossly negligent, wanton and malicious and in total disregard of the needs and financial condition of the Claimants.

Respondents denied generally each and every allegation of misconduct in the statement of claim. Respondents maintained that Claimants spoke at length about investments and Birtcher suited the claimant's needs. Respondents also alleged that the claimants were well aware of the potential risks of the investment. Respondents alleged that Claimants were never assured that this investment was safe and conservative or that the partnership would double or that it was guaranteed to yield nine percent (9%) annually. Respondents alleged that the investment continues to produce a modest steady cash flow. Respondents further alleged that Claimants had knowledge of the risks associated with investing in the securities market and they assumed these risks. Respondents also alleged that Claimants failed to mitigate their damages by failing to make timely inquiries into their investment.

RELIEF REQUESTED

Claimants requested:

1. Damages in the amount of one hundred thousand dollars (\$100,000) plus interest from 1986 to the present;
2. Punitive damages in the amount of three hundred thousand dollars (\$300,000);
3. The costs and disbursements of this matter, including reasonable attorneys fees; and,
4. Such other and further relief as is just and proper.

Respondents requested:

1. That the claims as against them be dismissed in their entirety; and,
2. That the costs of the hearing not be held against them.

OTHER ISSUES CONSIDERED & DECIDED

Claimants submitted a memorandum of law which asserted the ability of the Arbitration Panel to award punitive damages pursuant to the decision in *Mastrobuono v. Shearson Lehman Hutton Inc.*. Claimants also asserted that their claim was not restricted by the eligibility period set forth in Section 15 of the Code of Arbitration Procedure.

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 David Lerner Associates and William Robbins be and hereby are jointly and severally liable and shall pay to the Claimants the sum of \$20,000.00.
2. Claimants request for punitive damages be and hereby is denied.
3. Each party shall bear their respective costs, including attorney's fees.
4. All other claims be and hereby are denied.

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FORUM FEES

Pursuant to Section 43c of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed:

Pre-Hearing Conference:	\$ 300.00	(1 session x \$300)
Hearing Sessions:	\$3000.00	(4 sessions x \$750)
Total Forum Fees:	\$3300.00	

1. Claimants be and hereby are liable for the sum of \$1650.00 which represents one-half of the forum fees assessed. Claimants previously deposited \$750.00 with the NASD, which will be applied toward forum fees assessed. Therefore, Claimants are liable and shall pay to the NASD the sum of \$900.00.
2. Respondents David Lerner Associates and William Robbins be and hereby are jointly and severally liable and shall pay to the NASD the sum of \$1650.00 representing one-half the forum fees assessed.

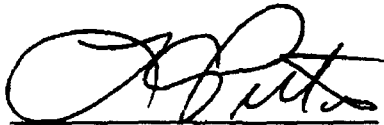
Fees are payable to the National Association of Securities Dealers, Inc.

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ARBITRATORS' SIGNATURES

Barry M. Koch, Esq.

Public Chairperson



Lawrence A. Pittore, Esq.

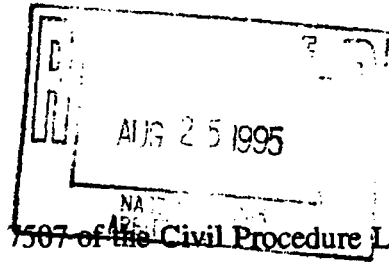
Public Arbitrator

Malcolm J. Irving

Industry Arbitrator

Date of Decision: September 8, 1995

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I, **Barry M. Koch, Esq.** do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that this is my decision in the above-captioned matter.

Barry M. Koch, Esq.

I, **Lawrence A. Pittore, Esq.** do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that this is my decision in the above-captioned matter.

Lawrence A. Pittore, Esq.

I, **Malcolm J. Irving** do hereby affirm pursuant to Article 7507 of the Civil Procedure Law & Rules, that this is my decision in the above-captioned matter.



Malcolm J. Irving