

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant/Counter-Respondent

Merrill Lynch, Pierce Fenner & Smith, Inc.

94-00400

Name of Respondent/Counter-Claimant

Louis Centore

REPRESENTATION

For Claimant/Counter-Respondent: Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") was represented by Maria D. Dickson, Esq. and Jack D. Ballard, Esq. of Andrews & Kurth, L.L.P., located in Houston, Texas.

For Respondent/Counter-Claimant: Louis Centore ("Centore") was represented by Richard F. Bergner, Esq. of Richard F. Bergner & Associates, located in Houston, Texas.

CASE INFORMATION

Statement of Claim filed: February 2, 1994.

Merrill Lynch's Submission Agreement signed on: January 26, 1994 by Frederick T. Cater, Administrative Manager, Merrill Lynch, Pierce, Fenner & Smith, Inc.

Merrill Lynch's Motion to Bar Defense filed on: April 13, 1994.

Statement of Answer and Counterclaim filed by Centore on: August 17, 1994..

Centore's Submission Agreement signed on: September 9, 1994.

Merrill Lynch's Answer to Counterclaim filed: August 25, 1994.

Merrill Lynch's Motion to Dismiss Counterclaims filed on: October 17, 1994.

HEARING INFORMATION

Pre-Hearing Conference: August 13, 1994 for One (1) session before Three (3) arbitrators.

Hearing Date/Sessions: October 20, 1994 for Two (2) sessions.

Hearing Location: Houston, Texas.

CASE SUMMARY

Merrill Lynch alleged that Centore failed to pay the balance due on a Promissory Note executed by Centore as part of his employment. The claim specifically alleged that:

1. Centore was employed by Merrill Lynch as a financial consultant in Houston, Texas;
2. On or about September 24, 1990, Centore signed a Promissory Note payable to Merrill Lynch in the amount of \$60,000.00. The Note provided that the principal would be due in five pro rata monthly payroll deductions of \$12,000.00, plus interest;
3. Upon the termination of Centore's employment, the unpaid principal and interest would be due and payable in full as of the date of termination of his employment; and
4. On or about October 16, 1992, Centore left his employment with Merrill Lynch with the principal balance of \$36,000.00 remaining due and owing under the Note. All conditions precedent to the enforcement of the Note occurred or were waived.

Centore denied the material allegations of the Statement of Claim, alleging that:

1. Merrill Lynch made a material representation to Centore that he would be paid a non-refundable salary of \$10,000.00 per month if he left Smith Barney and went to work for Merrill Lynch. This representation was false because on Centore's two year anniversary date as an employee of Merrill Lynch, he was advised that the \$240,000.00 in salary he had received over the past two years had been offset by a production payout of approximately \$48,000.00, leaving a balance owed by Centore to Merrill Lynch of \$192,000.00. Centore was further advised that "salary" meant a draw against future production and that if his commission-production did not equal the salary paid, Centore would be responsible to repay Merrill Lynch the difference;
2. Upon Centore being told that the above sum would require repayment and his replying that to do so would require him to go without compensation for the next three to five years, Centore's employment was terminated and due

to Merrill Lynch's actions, was unable to transfer a number of his clients, resulting in the loss of these clients; and

3. At the end of one year's employment at Merrill Lynch, one-third of the \$60,000.00 "up-front" money was forgiven by Merrill Lynch as a service bonus to Centore.

Based upon the above allegations, Centore asserted a counterclaim based upon the following causes of action: fraudulent inducement; breach of duty of good faith and fair dealing; wrongful termination; mental anguish; conversion; negligent misrepresentation; and breach of contract.

Merrill Lynch denied the material allegations of the Counterclaim, asserting that:

1. Centore was an "at will" employee and could be terminated at any time for any reason not violative of law; therefore, Centore has no claim for wrongful termination;
2. Regardless of the cause of Centore's termination, he is still obligated to pay the balance due on the Promissory Note;
3. Centore ratified and affirmed his obligation to pay the note in conversation with Merrill Lynch, and his actions constitute ratification of the debt; and
4. Centore is estopped from asserting any claims or defenses due to his own actions.

RELIEF REQUESTED

Merrill Lynch requested entry of an award for the principal sum of \$36,000.00, plus interest from October 16, 1992 at the rate of 9.5% per annum as provided in the Note; attorneys' fees and costs of collection as provided in the Note; Centore to pay all costs of arbitration; and for such further relief to which Merrill Lynch may have been entitled.

Centore requested that Merrill Lynch be denied recovery on its claims, and that Centore recover an award against Merrill Lynch (i) declaring the word "salary" in Merrill Lynch's compensation agreement to not mean "a draw against commission earned" if Centore remained in Merrill Lynch's employ for a minimum two year period; (ii) rescinding the promissory note signed by Centore; (iii) actual damages (pecuniary and non-pecuniary) resulting by virtue of Merrill Lynch's conduct; (iv) punitive damages as allowed by law; (v) reasonable attorneys' fees; (vi) costs of arbitration; and (vii) such other relief, in law as in equity, to which Centore showed himself to be entitled.

OTHER ISSUES CONSIDERED & DECIDED

On September 13, 1994, after review of the pleadings filed and a hearing held before the full Panel, the Arbitrators denied Claimant's Motion to Bar the Answer pursuant to Section 25 of the NASD Code of Arbitration Procedure.

On October 20, 1994, the Arbitrators heard arguments regarding Claimants/Counter-Respondents Motion to Dismiss the Counterclaims filed by Centore. After review, the Panel determined that the Motion would be denied.

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 originals remain 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. Respondent/Counter-Claimant Louis Centore is liable for and shall pay to Claimant/Counter-Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. the sum of \$36,000.00 as actual damages plus simple interest at the rate of 9.5% per annum from October 16, 1992 until the sum is paid in full;
2. In addition, Respondent/Counter-Claimant Louis Centore is liable for and shall pay to Claimant/Counter-Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. the sum of \$18,136.72 as attorneys' fees. In deciding to award attorneys' fees, the Panel considered the arguments presented in the post-hearing submissions in regard to Chapter 38 of the Texas Civil Practice and Remedies Code, as well as the provision for payment of attorneys' fees in the Promissory Note executed by Louis Centore, and determined that authority existed for an award of attorneys' fees to the Claimant/Counter-Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.;
3. The counterclaims asserted by Respondent/Counter-Claimant Louis Centore are hereby dismissed with prejudice and denied in the entirety;
4. The parties shall bear all other costs of arbitration which they have individually incurred, except for those specifically enumerated herein; and

5. All relief not specifically award is hereby denied.

FORUM FEES

Pursuant to Section 44(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: One (1) pre-hearing session before the full panel x \$750.00 per session = \$750.00; Two (2) hearing sessions x \$750.00 per session = \$1,500.00; Total Forum Fees = \$2,250.00.

The National Association of Securities Dealers, Inc. shall retain the \$500.00 claim filing fee and the \$600.00 hearing session deposit previously deposited by the Claimant/Counter-Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. In addition, the National Association of Securities Dealers, Inc. shall retain the \$500.00 claim filing fee and the \$750.00 hearing session deposit previously deposited by the Respondent/ Counter-Claimant Louis Centore. Respondent/ Counter-Claimant Louis Centore is liable for and shall pay to Claimant/Counter-Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. the sum of \$600.00 as reimbursement of the hearing session deposit previously paid. Furthermore, Respondent/Counter-Claimant Louis Centore is liable for and shall pay to the NASD the sum of \$900.00 as additional forum fees.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ John C. Booth, Jr.

December 23, 1995

John C. Booth, Jr.

Industry Arbitrator

Chairperson

/s/ Robert M. Birenbaum

December 22, 1994

Robert M. Birenbaum

Industry Arbitrator

/s/ Bernard D. Hammer

December 27, 1994

Bernard D. Hammer

Industry Arbitrator

For NASD Use Only/Date of Decision: December 29, 1994