

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Sandra B. Nickens

94-01522

Name of Respondents

Thomas James Associates, Inc.
Michael John Graham

REPRESENTATION

Claimant Sandra B. Nickens ("Nickens") was represented at the hearing by Walter G. Birkel, Esq. of Tighe Patton Tabackman & Babbitt of Washington, D.C.

Respondents Thomas James Associates, Inc. ("Thomas James") and Michael John Graham ("Graham") were represented at the hearing by James C. Cosby, Esq. of Maloney, Yeatts & Barr of Richmond, Virginia.

CASE INFORMATION

The Statement of Claim was filed with the NASD by Claimant Nickens on April 21, 1994. The Uniform Submission Agreement was signed by Walter G. Birkel under power of attorney for Claimant Nickens on April 18, 1994.

A Motion to Dismiss and Answer was filed by Respondent Thomas James on September 15, 1994. The Uniform Submission Agreement was signed by Michael Smith, General Counsel, on behalf of Thomas James on December 2, 1994.

An Answer was filed by Respondent Graham on September 15, 1994. The Uniform Submission Agreement was signed by Graham on September 15, 1994.

A Supplemental Answer was filed by Respondent Graham on October 3, 1994.

HEARING INFORMATION

The hearing was held on April 5, 1995 and April 6, 1995, at the NASD District Office in Washington, D.C., and on April 21, 1995 at the ANA Hotel in Washington, D.C., for a total of six (6) hearing sessions.

CASE SUMMARY

Claimant Nickens stated in her Statement of Claim that in the fall of 1991, she was referred to Respondent Graham, a registered representative with J. W. Gant & Associates ("J. W. Gant"), by her divorce attorney. Nickens alleged that her divorce attorney advised Graham that she had a property settlement of approximately \$23,000 to invest which represented Nickens' entire savings, that she had no prior investment experience, that her primary investment objective was preservation of capital, that she would be retiring in the next several years from a secretarial position, and that the money represented the core of her retirement funds. Nickens further alleged that Graham assured her that he would invest in conservative investments consistent with her goal of preservation of capital. Nickens additionally alleged that she opened two accounts with Graham at his then firm J. W. Gant, one of which was an IRA account.

Claimant alleged that in January 1992, she deposited \$18,000 to the non-IRA account and \$2,845 to the IRA account, that Graham assumed total control over the accounts, and that all trades in the accounts were conducted completely at Graham's discretion and initiative. Nickens alleged that Graham, contrary to his representations and Claimant's instructions, engaged in trading in Claimant's accounts in highly volatile, speculative over-the-counter stocks that were either initial public offerings or secondary offerings in which J. W. Gant or Thomas James made a market. Claimant alleged that she was an unsophisticated investor, that these investments were unsuitable in light of her investment objectives, and that Graham churned the non-IRA account.

Claimant stated that in September 1992, J. W. Gant ceased operations and Graham transferred her two accounts to his new employer, Respondent Thomas James. Claimant alleged that Graham thereafter continued to churn the non-IRA account, and invest in wholly unsuitable, speculative issues in both accounts. Claimant additionally alleged that Respondent Thomas James negligently failed to properly supervise Graham.

Respondent Thomas James in its Motion to Dismiss and Answer stated that to the extent any answer is required from Thomas James, that it adopts the answer of Respondent Graham.

Respondent Graham in his Answer asserted that Claimant clearly instructed Graham that she wanted higher than average returns, that Graham advised her of the higher risk associated with such an approach and recommended more conservative investments, and that Claimant

declined more conservative investments such as mutual funds. Respondent stated that Claimant indicated that she understood such fundamentals and confirmed her objective of receiving higher than average returns. Graham further asserted that on the J. W. Gant opening account documents Claimant identified her investment objectives as growth with risk for the IRA account, and speculation, high degree of risk and/or high activity for the non-IRA account. Graham also stated that Claimant's conduct thereafter demonstrated that her investment objective was anything but preservation of capital, that Claimant was continually informed as to the existence of risk in her accounts through monthly account statements and prospectuses, that she received a written confirmation of each trade, and that she did not complain. Graham stated that Claimant suffered losses in part due to her unsolicited sell orders, the proceeds of which were withdrawn by her to cover expenses. Graham denied that Claimant's funds were invested in highly speculative new issues, and stated that she purchased only two new issues, both of which were consistent with her investment objectives. Graham stated that Claimant indicated on the account forms that she had previous investment experience, that she listed her occupation as accounting manager, had a re-existing relationship with an attorney, and had more than sufficient intelligence to be aware of the risks involved. Graham stated that the confirmations and monthly statements sent to Claimant disclosed whether the firm was a market maker in a given security. Graham denied that he had assumed total control over the account, and stated that every trade was made with Claimant's informed consent. Graham denied trading stocks in Claimant's accounts solely for the purpose of generating commissions, and stated that Respondents dissuaded Claimant from making unsolicited purchases.

Respondent Graham set forth the following affirmative defenses in his Answer: Claimant accepted and ratified the transactions; Claimant cannot recover for breach of fiduciary duty since the Statement of Claim fails to establish that a fiduciary relationship existed; contributory negligence; Claimant is barred from recovering punitive damages as a matter of law; Claimant has failed to set forth an actionable misrepresentation or intentional omission of a material fact; Claimant has failed to establish or plead that any fact misrepresented or omitted was the cause of her securities losses; and that Claimant's claims are barred by the doctrine of ratification, and by the applicable statutes of limitations.

Respondent Graham in his Supplemental Answer asserted that the risk inherent in owning common stocks was disclosed in writing to Claimant through financial documents and account statements, that any reliance on any alleged oral misrepresentation is unreasonable as a matter of law, and that Claimant is therefor barred from recovery.

RELIEF REQUESTED

Claimant Nickens requested damages in the amount of \$32,000, interest in the amount of \$5,000, and punitive damages.

Respondents Thomas James and Graham requested that the Statement of Claim be dismissed in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Thomas James filed a Motion to Dismiss the Statement of Claim filed against it to the extent that it sought recovery for any transactions made with any other brokerage firm. After due deliberation, the panel decided to deny the motion.

The parties have agreed that the Award in this matter may be executed by counterpart copies. The parties have also 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, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent, Michael John Graham, shall be liable for, and shall pay to Claimant, Sandra B. Nickens, the sum of Fifteen Thousand Eight Hundred Fifty-Two Dollars and No Cents (\$15,852.00), exclusive of interest.
2. Respondents, Thomas James Associates, Inc. and Michael John Graham, shall be and hereby are jointly and severally liable for, and shall pay to Claimant, Sandra B. Nickens, the sum of Seven Hundred and Twenty-Seven Dollars and No Cents (\$727.00), exclusive of interest.
3. Claimant's request for punitive damages is hereby denied.
4. Each of the parties shall bear their own costs and expenses incurred, other than those specifically provided for herein.
5. Any relief not specifically provided for herein is denied.

FORUM FEES

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

6 hearing sessions x \$400 = \$2,400.

Pursuant to Section 43(c) of the Code, the NASD shall retain the non-refundable filing fee in the amount of \$120, and the hearing session deposit in the amount of \$400 previously paid to the NASD by Claimant.

The panel has ordered that the Claimant pay additional forum fees to the NASD in the amount of \$400, and Respondent Graham pay \$1,600 to the NASD.

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

By The Arbitration Panel:

Dated:

4/25/95

/s/

Marvin Elster, Esq., Presiding
Public Arbitrator

4/25/95

/s/

Patrick Sean Dolan
Public Arbitrator

4/25/95

/s/

George R. Hannaway
Industry Arbitrator

Date Award Served By the NASD: April 28, 1995