

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

KEMPER SECURITIES, INC.

and

NASD Case No. 94-01611

GREGORY M. KUSS and GREGORY KNAFELC

REPRESENTATION OF PARTIES

Claimant, Kemper Securities, Inc. was represented by Diane Fischer of Gomberg Kane & Fischer, Ltd., Chicago, Illinois.

Respondent, Gregory M. Kuss was represented by J. Jerome Olitt of Arbitration and Mediation Specialists, Inc., Stamford, Connecticut.

Respondent, Gregory Knafelc appeared Pro Se.

CASE INFORMATION

The Statement of Claim was filed on or about April 29, 1994.

The Submission Agreement of Claimant, Kemper Securities, Inc. was signed on April 28, 1994 by A. Brad Busscher, Vice-President and Senior Counsel.

The Statement of Answer, Counterclaim and Motion to Sever was filed by Respondent, Gregory Kuss on or about September 8, 1994.

The Submission Agreement of Respondent, Gregory Kuss, was signed on September 6, 1994.

The Statement of Answer, Counterclaim and Motion to Sever was filed by Respondent, Gregory Knafelc, on or about September 13, 1994.

The Submission Agreement of Respondent, Gregory Knafelc, was signed on September 13, 1994.

A Response to the Counterclaims and the Motions to Sever was filed by Claimant, Kemper Securities, Inc. on or about October 11, 1994.

HEARING INFORMATION

The hearing was held in Milwaukee, Wisconsin on the following dates for a total of nine (9) hearing sessions:

June 13, 1995 - two (2) sessions;
June 14, 1995 - two (2) sessions;
August 16, 1995 - three (3) sessions; and

August 17, 1995 - two (2) sessions,

CASE SUMMARY

Claimant, Kemper Securities, Inc. ("Kemper") alleged that when Respondent, Gregory Kuss ("Kuss") began his employment with Kemper, he voluntarily executed a promissory note (the "Note") on March 16, 1992 with Kemper whereby Kuss was loaned the sum of \$124,800.00. According to the Claimant, the Note provided that Kuss agreed to repay Kemper the \$124,800.00 in one lump sum payment on March 16, 1996 plus interest at 5% per annum although Kemper would forgive one quarter of the balance due plus interest on each yearly anniversary date of Kuss' employment with Kemper, assuming Kuss remained in the full-time employment of Kemper. Claimant contended further that the Note provided that if Kuss did not remain employed by Kemper for the entire four year period then the balance due on the Note as of the date of his termination of employment (for any reason) would be due and payable immediately, with all accrued interest. Kuss terminated his association with Kemper on November 15, 1993. On November 23, 1993, Kemper tendered a demand to Kuss for \$78,000.00, being the balance due under the Note plus interest, and sent another letter dated December 8, 1993 demanding \$83,304.00, which it said was the correct balance. Kemper alleges that to date, Kuss has failed and refused to honor his obligation to Kemper under this Note.

Claimant further alleged that when Respondent, Gregory Knafelc ("Knafelc") began his employment with Kemper, he voluntarily executed a Note on March 16, 1992 with Kemper whereby Knafelc was loaned the sum of \$40,000.00. According to the Claimant, the Note provided that Knafelc agreed to repay Kemper the \$40,000.00 in one lump sum payment on March 16, 1996 plus interest at 5% per annum although Kemper would forgive one quarter of the balance due plus interest on each yearly anniversary date of Knafelc's employment with Kemper, assuming Knafelc remained in the full-time employment of Kemper. Claimant contended further that the Note provided that if Knafelc did not remain employed by Kemper for the entire four year period then the balance due on the Note as of the date of his termination of employment (for any reason) would be due and payable immediately, with all accrued interest. Knafelc terminated his association with Kemper on November 15, 1993. On November 22, 1993, Kemper tendered a demand to Knafelc for the balance due under the Note of \$24,496.00 plus interest, for a total of \$28,496.00. Kemper alleges that to date, Knafelc has failed and refused to honor his obligation to Kemper under this Note.

In his Statement of Answer and Counter-Claim, Kuss denied owing Kemper any monies and alleged that Kemper caused him to depart from Kemper's employ by failing to fulfill its undertakings and breaching its implied covenants of good faith and fair dealing. As alleged by Kuss, Claimant made assurances to Kuss when recruiting

him regarding Kemper's financial stability, types of securities available for sale and actions against Kemper, among other things. Kuss further alleged that Kemper assured him that it was stable and would remain in existence. Yet, in 1993, Kuss alleged that Kemper announced that the firm was for sale, causing Kuss' clients to cease doing business with Kemper and Kuss. Kuss further alleged that new accounts as well as Kuss' business was down approximately 33% during this period when, as he describes it, Kemper appeared to be dismantling, and disorganization was rampant. Kuss contended that his Branch Office was for sale and that the Branch Manager was attempting to "shop his brokers" to other firms. Kuss further contended that the Regional Manager, Joseph DeMichaels, and the Branch Office Manager, Tom Burns, stated that they terminated Kuss because they knew he was leaving anyway. Kuss claimed that he determined he had no option except to leave Kemper. Kuss made other allegations against Kemper such as fraudulent and wrongful conduct by Kemper, misrepresentations, deceit, wrongful and fraudulent inducement to enter into agreements and failure to pay commissions. Kuss also asserted other affirmative defenses, including but not limited to: (1) any damages or financial losses incurred by Claimant were caused by the wrongful acts, actions and activities on the part of the Claimant, its agents, servants and/or employees; (2) a failure of consideration is extant with regard to contractual entitlement as alleged by the Claimant, and (3) the equitable principles of waiver and estoppel are applicable to bar recovery entitlement to the Claimant.

In his Answer and Counter-Claim, Knafelc denied the allegations contained in the Statement of Claim alleging that he was constructively discharged from Kemper and that since the parties did not have an oral agreement, a sum was improperly deducted from his compensation relating to a customer complaint.

RELIEF REQUESTED

Kemper requested an award against Kuss in the amount of \$93,600.00 (representing what Kemper now claimed to be the balance due on the Note) plus interest, costs and attorneys' fees and requested an award against Knafelc in the sum of \$30,000.00 (representing what Kemper now claimed to be the balance due on the Note) plus interest, costs and attorneys' fees.

Kuss requested an award in the amount of \$96,750.00 plus interest, costs and expenses. At hearing, Kuss amended his request to \$80,000.00, in the aggregate, for the allegations in Counts I and III of the Counter-Claim, the amount claimed in Count II of the Counter-Claim was unchanged, and \$1,836.67 for the amount claimed in Count IV of the Counter-Claim, plus costs and attorneys' fees.

Knafelc requested an award in the amount of \$62,502.87 plus costs.

OTHER ISSUES CONSIDERED & 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 originals remain on file with the National Association of Securities dealers, Inc.

The Panel and NASD staff were advised at the start of the hearing in August that Knafelc had reached a settlement with Kemper on August 15, 1995 so that Kemper withdrew its claims against Knafelc and Knafelc withdrew his Counter-Claims against Kemper. Accordingly, the Panel did not consider either the claims or counter-claims regarding Knafelc.

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. In favor of Kemper and against Kuss in the amount of \$128,193.78, in complete resolution of the allegations in the Statement of Claim, including the claim for interest and attorneys' fees;
2. In favor of Kuss and against Kemper in the amount of \$71,836.67 in complete resolution of the allegations in the Counter-Claim, and specifically ruling against Kuss for any claim for interest or attorneys' fees; and

3. The parties shall bear their own costs except for those costs specifically enumerated herein.

FORUM FEES

Forum fees are calculated at the rate of \$750.00 per hearing session. There were nine (9) hearing sessions x \$750.00 = \$6,750.00 in forum fees. Pursuant to Section 44(b) of the Code of Arbitration Procedure, a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with an arbitrator, which lasts four hours or less.

In accordance with Section 44(c) of the Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("NASD") shall retain as forum fees the non-refundable filing fee in the amount of \$500.00 and the hearing session deposit in the amount of \$750.00 previously submitted to the NASD by Kemper Securities, Inc. The NASD shall also retain the surcharge in the amount of \$200.00 pursuant to Section 45 of the Code previously submitted by the Claimant. In accordance with Section 44(c) of the Code of Arbitration Procedure, the NASD shall retain the non-refundable filing fee in the amount of \$500.00 and the hearing session deposit previously submitted by the Respondent, Gregory M. Kuss.

Claimant, Kemper Securities, Inc. is hereby liable for and shall pay to the NASD the sum of \$2,160.00 in additional forum fees. Respondent, Gregory Kuss is hereby liable for and shall pay to the NASD the amount of \$3,240.00 in additional forum fees. Respondent, Gregory Knafelc is hereby liable for and shall pay to the NASD the non-refundable claim filing fee for his counter-claim.

Arbitrators' Signatures:

Dated:

James L. Schwartz, Esq.
James L. Schwartz, Esq.
Industry Arbitrator, Presiding Chair

October 5, 1995

Richard P. Franz
Richard P. Franz
Industry Arbitrator

October 6, 1995

Robert F. O'Keef
Robert F. O'Keef
Industry Arbitrator

October 19, 1995

Date served by the NASD: October 19, 1995