

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Prudential Securities, Inc.

94-02313

Name of Respondent

David Fleischer

REPRESENTATION

For Claimant Prudential Securities, Inc. appeared Jill A. Byrne, Esq. with the law firm of Kutak Rock, Washington, D.C.

For Respondent David N. Fleisher appeared Norris D. Wolff, Esq. of the law firm of Kleinberg, Kaplan, Wolff & Cohen, P.C., New York, New York.

CASE INFORMATION

The Statement of Claim was filed on June 16, 1994. Claimant's Submission Agreement was signed on June 6, 1994.

A Statement of Answer was filed by Respondent on April 28, 1995. Respondent Fleisher did not file a Submission Agreement.

On May 19, 1995, Claimant filed a reply Respondent's Answer and Counterclaim.

HEARING INFORMATION

Hearing Date/Sessions: July 7, 1995 - 2 Sessions

The hearing was held at the National Association of Securities Dealers, Inc. offices located in New York City, New York.

CASE SUMMARY

Claimant Prudential Securities Inc. alleged that respondent Fleischer was an employee of claimant corporation. Claimant alleged that it made three loans to respondent on or about November 8, 1990, February 28, 1991, and February 28, 1991, respectively. Claimant further alleged that such loans were each evidenced separately by a promissory note signed by respondent. Claimant alleged that under each note, respondent was obligated to repay the principals plus interests in three equal annual installments or, upon the termination, for any reason whatsoever, of respondent's employment with claimant. Claimant alleged that the terms of the notes were incorporated by reference on the reverse of each of the three loan checks cashed by respondent.

Claimant alleged that on or about March 5, 1993, respondent voluntarily resigned from claimant corporation to become employed with a competitor of claimant corporation.

It was also alleged by Claimant that respondent made the first two repayments on each of the three notes. Claimant also alleged that respondent had failed and refused to pay the outstanding principal balance on the three notes plus accrued interests that became due upon respondent's voluntary resignation.

Claimant alleged that letters were sent to respondent on April 8, 1993, and March 21, 1994 in which a demand was made on respondent for amounts due and owing to claimant under each of the three notes.

Respondent denied all allegations of wrongdoing asserted by the claimant. Respondent maintained that the promissory notes on which claimant based its claim were issued as part of respondent's bonuses and were all to be forgiven.

Respondent maintained that claimant's claims of respondent's debt as evidenced by the notes were contrary to claimant corporation's own internal memoranda and statements to respondent. Respondent further maintained that claimant repeatedly used notes as part of bonuses, a practice designed, in part, to reduce claimant's reported losses and/or increase in reported income.

Respondent also maintained that certain of the notes were issued under coercion and duress and over protest to employees in lieu of the promised phantom stock plan. Respondent maintained that the second note claimant seeks repayment of claimed was thus forced upon him in lieu of a phantom stock commitment which had been awarded to him unconditionally by claimant in writing four and one-half months earlier. Respondent further maintained that claimant thereafter reneged on the award and failed to remit that bonus.

Respondent maintained that claimant repeatedly breached various promises and undertakings which it had made to him regarding his compensation. Respondent maintained that bonuses for corporate finance transactions generated by respondent were either not paid or underpaid from agreed scale. Respondent further maintained that he was promised, but never received, a permanent salary increase in 1988 to make him whole for an underpayment of his October 1987 bonus which claimant admitted in writing.

Claimant maintained that respondent was an at will employee with claimant and that although he was guaranteed a specified minimum salary, the amount and form of other compensation was completely discretionary. Claimant maintained that respondent received deferred compensation of executive award which was to be paid over a three-year period. Claimant maintained that under the circumstances of respondent opting to receive the entire executive award in advance of the payment dates, claimant advanced funds to respondent as a loan secured by a promissory note signed by respondent. Claimant maintained that in each of the three years following receipt of the funds, respondent was required to write a check to repay one-third of the loan, plus interest, and claimant would write a check to respondent in the identical amount less withholding taxes.

In reply to the Counterclaim, Claimant maintained that the incentive compensation and/or bonuses were conditioned upon respondent's further performance or nonperformance. Claimant maintained that respondent clearly understood the loan arrangement as evidenced by his commencement of payments of principal and interest to claimant for the two-thirds of the executive awards vested in him during his employment with claimant. Claimant maintained that respondent ratified the loan transactions by his actions of endorsing the loan checks and repaying the principal and interest on the notes. Claimant also maintained that respondent did not receive a salary increase in January 1988 due to the firm-wide salary freeze on employees of respondent's category.

RELIEF REQUESTED

Claimant requested that the panel find in its favor and award the following: (1) The sum of \$25,833.33 which represents the total outstanding principal balance on the First, Second and Third Notes; (2) Interest on the First Note at the contract rate of 9% from November 8, 1990 until the date of the payment; (3) Interest on the Second Note at the contract rate of 8.5% from February 28, 1991 until the date of payment; (4) Interest on the Third Note at the contract rate of 8.5% from February 28, 1991 until the date of the payment; (5) The cost of collection, and of this proceeding, as respondent agreed to pay under the terms of the First, Second and Third note; and (6) Such other relief as the arbitration panel deemed just and proper.

Respondent requested an award dismissing all of claimant's claims and awarding respondent (1) an amount equal to the value of the stock award respondent was promised and claimant reneged upon (estimated at between \$100,000 and \$200,000); (2) the balance of his bonus owed of \$20,000 plus interest thereon from January 5, 1988, (3) any additional compensation that was promised but unpaid, and (4) the costs and disbursements of this action and punitive or exemplary damages.

Claimant in its Replay to Respondent's Answer with Counterclaims in response to Claimant's Statement of Claim requested that the panel (1) Deny respondent's counterclaims in their entirety; and (2) award claimant the damages requested in its Statement of Claim, including the principal sum of \$25,833.33 which represents the total outstanding principal balance on the notes, interest, costs, including attorneys' fees and such other relief as the panel deems just and proper.

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 Fleisher be and hereby is liable and shall pay to the Claimant the sum of \$25,833.33, with interest specifically included as follows:
 - interest on \$9,166.66 at 9% from November 8, 1990 until date of payment;
 - interest on \$11,666.67 at 8 1/2% from February 28, 1991 until date of payment; and
 - interest on \$5,000.00 at 8 1/2% from February 28, 1991 until date of payment.
2. Respondent be and hereby is liable and shall pay to the Claimant the sum of \$3,196.52 representing attorneys' fees and disbursements.
3. Claimant be and hereby is liable and shall pay to the Respondent/Counter Claimant the sum of \$28,573.00, interest specifically excluded.
4. All other claims be and hereby are denied.

Pursuant to Section 44c of the Code of Arbitration Procedure, the arbitrators have assessed the following forum fees:

2 sessions X \$600 = \$1,200.00

1. Claimant be and hereby is liable and shall pay to the NASD the sum of \$600.00 representing one-half of the forum fees assessed. However, claimant previously deposited \$600.00 with the NASD. Therefore, the amount due is zero.

2. Respondent be and hereby is liable and shall pay to the NASD the sum of \$600.00 representing one-half of the forum fees assessed.

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

Concurring Arbitrators' Signatures
Name

John J. Witkowski, Jr., Esq.
Chairman - Industry Arbitrator

Frank G. Piazza
Industry Arbitrator

Francis J. LaSalla
Industry Arbitrator

I, Francis J. LaSalla, do hereby affirm that this is my decision in the above-captioned matter.

Date of Decision: November 10, 1995

The following Arbitrator(s) concur(s) with the award:

none