

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Gary Hart

95-01191

Name of Respondent

Fidelity Brokerage Services, Inc.

REPRESENTATION

For Claimant: Gary Hart ("Hart") was represented by James J. Moylan, Esq. of Arnstein & Lehr, located in Chicago, Illinois.

For Respondent: Fidelity Brokerage Services, Inc. ("Fidelity") was represented by Susan J. Magar, Esq. of Altheimer & Gray, located in Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed: March 8, 1995.

Claimant's Submission Agreement signed on: February 15, 1995.

Statement of Answer filed by Respondent on: May 10, 1995.

Respondent's Submission Agreement signed on: May 10, 1995 by Anne Marie Dever, Product Manager, Fidelity Brokerage Services, Inc.

Claimant's Motion to Bar Evidence filed on: May 2, 1995.

HEARING INFORMATION

Pre-Hearing Conference: None Held

Hearing Date/Sessions: January 10, 1996 for Two (2) sessions.

Hearing Location: Chicago, Illinois

CASE SUMMARY

Hart alleged that Fidelity failed to open his third party managed custodial account as Respondent had originally promised, resulting in Hart's purchase orders not being executed and causing the securities to be purchased subsequently at a higher price. Hart specifically alleged that:

1. On December 10, 1991, Hart contacted The Chicago Corporation to manage his investment portfolio and was told that the account could be maintained at another brokerage firm. Chicago Corporation prepared a list of 25 securities to be purchased on or before December 16, 1991;
2. About December 12, Hart met with a Fidelity employee and was told that Fidelity could act as custodian of his account under third party management. He deposited \$25,000.00 in the account;
3. On December 13, 1991, Hart executed the Chicago Corporation management agreement for non-custodial accounts, designating Fidelity as custodian. He walked the agreement to Fidelity and then deposited checks with Fidelity totaling \$235,000.00. In addition, Fidelity's authorization forms executed by Chicago Corporation employees were provided to Fidelity on December 13, 1991;
4. On December 20, 1991, Hart was informed that contrary to the earlier representations, Fidelity would be unable to carry his account. The securities which were to be purchased on or before December 16, 1991 were not acquired; and
5. As a consequence, Hart had to open a new custodial account at The Chicago Corporation and cause his deposits with Fidelity to be wire transferred to the Chicago Corporation. The Chicago Corporation could not purchase any of the 25 securities until December 23, 1991.

Based upon the allegations, Hart asserted claims for Failure to use due diligence to open the account and execute the orders; breach of contract; detrimental reliance; violation of Section 12 of the Illinois Securities Law of 1953, as amended [815 ILCS 12]; control person liability as established by Section 20 of the Securities Exchange Act of 1934 [15 U.S.C. 78s]; and liability pursuant to the doctrine of respondeat superior.

Respondent denied the material allegations of the Statement of Claim, alleging:

1. After Fidelity reviewed the agreement between The Chicago Corporation and

Hart, it realized that the agreement called for a different type of third party trading account than Hart had set up with Fidelity and that Fidelity did not offer retail customers the type of account the agreement required. This information was relayed to Hart on or before December 20, 1991;

2. Fidelity was not told of the list of 25 securities to be purchased nor did Fidelity receive an order to purchase securities before December 16, 1991. Fidelity was not contacted by Hart or The Chicago Corporation from December 13, 1991 when the account was opened until December 20, 1991 when the account was transferred; and

3. Hart's damage calculation is based on the difference in price of the securities on December 16, 1991, the day the securities were to be purchased, and the date the securities were actually purchased, though no order was placed on December 16, 1991, the funds were transferred out of Fidelity on December 20, 1991, and The Chicago Corporation was able to purchase securities for Hart on December 23.

RELIEF REQUESTED

Claimant requested entry of an award against Respondent for actual damages in the sum of \$21,565.63, plus interest, costs and attorneys' fees.

Respondent requested that the claim be dismissed.

OTHER ISSUES CONSIDERED & DECIDED

At hearing on January 10, 1996, the Claimant withdrew his Motion to Bar Evidence.

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 documentary evidence presented at the hearing and the argument and summations of respective counsel, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant Gary Hart's claim against Respondent Fidelity Brokerage Services, Inc. is granted and Respondent Fidelity Brokerage Services, Inc. is liable for and shall pay to Claimant Gary Hart damages in the amount of \$12,597.00;

2. Claimant Gary Hart's claim for interest is dismissed and denied;
3. Claimant Gary Hart's claim for attorneys' fees is dismissed and denied. Each party shall bear their own attorneys' fees;
4. Claimant Gary Hart's claim for costs against Fidelity Brokerage Services, Inc. is granted and Respondent Fidelity Brokerage Services, Inc. is liable for and shall pay to Claimant Gary Hart the sum of \$337.98 as costs; and
5. Any relief not specifically granted is hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Two (2) sessions x \$400.00 per session = \$800.00.

The National Association of Securities Dealers, Inc. shall retain the \$100.00 non-refundable claim filing and refund the \$400.00 hearing session deposit previously deposited by the Claimant, Gary Hart. Respondent Fidelity Brokerage Services, Inc. is liable for and shall pay to the NASD the sum of \$800.00 as forum fees.

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

Concurring Arbitrators' Signatures

Name

Date

/s/ Robert S. Sugarman, Esq.

January 17, 1996

Robert S. Sugarman, Esq.

Public Arbitrator

Chairperson

/s/ Theodore L. Leeb, Esq.

January 18, 1996

Theodore L. Leeb, Esq.

Public Arbitrator

/s/ Robert L. Sanders

January 18, 1996

Robert L. Sanders

Industry Arbitrator

For NASD Use Only

Date of Decision: January 26, 1996