

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Roney & Co.,

Claimant and Counter-Respondent,

v.

No. 95-04206

Robert N. Sheppard

Respondent and Counter-Claimant.

REPRESENTATION OF PARTIES

Claimant and Counter-Respondent Roney & Co. ("Claimant") was represented by Raymond W. Henney, Esquire of Honigman Miller Schwartz & Cohn located in Detroit, Michigan.

Respondent and Counter-Claimant Robert N. Sheppard ("Respondent") was represented by Thomas J. Fayfer, Esquire and William L. Hoey, Esquire of Fausone, Taylor & Bohn located in Northville, Michigan.

Respondent was previously represented by Laurence S. Schultz, Esquire of Driggers, Schultz, Herbst & Paterson located in Troy, Michigan.

CASE INFORMATION

The Statement of Claim was filed on or about September 1, 1995.

Claimant's Submission Agreement was signed on August 29, 1995 by Lewis Echlin, III of Roney & Co.

The Statement of Answer, Affirmative Defenses, and Counterclaim was filed on or about November 30, 1995.

Respondent's Submission Agreement was signed on October 12, 1995.

Claimant's Answer to Counterclaim was filed on or about January 22, 1996.

Respondent's Amended Counterclaim was filed on or about August 16, 1996.

Memorandum of Roney & Co. Concerning Respondent's Claims under the Michigan Handicappers' Civil Rights Act and ERISA was filed on or about October 7, 1996.

HEARING INFORMATION

The telephonic pre-hearing conferences were held on: August 21, 1996 for one (1) session; September 30, 1996 for one (1) session; and February 21, 1997 for one (1) session.

The hearing was held on: October 8, 1996 for two (2) sessions; November 18, 1996 for two (2) sessions; November 19, 1996 for two (2) sessions; November 20, 1996 for two (2) sessions; January 20, 1997 for two (2) sessions; February 24, 1997 for two (2) sessions; February 25, 1997 for three (3) sessions; and February 26, 1997 for two (2) sessions.

The hearing was held in Southfield, Michigan.

CASE SUMMARY

Claimant Roney & Co. brought this action to recover alleged sums owed, pursuant to a promissory note, by Respondent Robert N. Sheppard, a former registered representative of Roney & Co.

Claimant alleged that, in March 1994, Respondent joined Roney & Co. as an account representative. Claimant contended that Claimant and Respondent entered into a Letter Agreement (the "Agreement") dated March 10, 1994, with respect to Respondent's employment. Claimant asserted that the Agreement indicated that Claimant agreed to loan Respondent the sum of \$108,525.90 pursuant to Respondent's Promissory Note (the "Note"). Claimant maintained that it agreed to forgive one-third of the loan on each annual anniversary of Respondent's employment until the entire sum was forgiven. Claimant alleged that the Agreement provided that Respondent's employment could be terminated by either party for any reason. Claimant contended that, on June 12, 1995, it terminated Respondent's employment with Roney & Co. due to Respondent's abusive behavior. Claimant asserted that Respondent became liable for the remaining balance owed under the Note, plus costs of collection. Claimant maintained that it has made demand on Respondent for payment of the sums owed under the Note, but Respondent has refused to satisfy his obligation. Claimant asserted that, because Respondent was with Roney & Co. for a full year, he was entitled to a one-third credit pursuant to the Agreement. Claimant also represented that it was willing to waive an additional \$6,177.87. Claimant alleged that Respondent owed it the principal amount of \$66,172.73, interest on the principal owed, and its attorney fees.

Respondent denied the allegations set forth in the Statement of Claim. Respondent alleged that Claimant cannot pursue an action against him for non-payment of the Note because Claimant had previously engaged in material breaches of its contract with Claimant. Respondent contended that, due to these breaches, Respondent is relieved from his obligations to pay the Note.

Respondent contended that Claimant failed to provide him with general administrative assistance, secretarial support, a sales assistant, and employee benefits as they had agreed. Respondent asserted that all this prevented Respondent from bringing much of his business to Roney & Co., caused Respondent a substantial loss in his production, and resulted in Respondent being subjected to tremendous stress. Respondent alleged that he suffered a heart attack that caused him to be absent from work. Respondent contended that, during this time, Claimant did nothing to assist him in maintaining his clients, and that other Roney & Co. brokers solicited his clients and were making questionable trades. Respondent maintained, that after his termination, Respondent began an improper solicitation to steal away Respondent's remaining clients. Respondent alleged that Claimant's actions resulted in a breach of Respondent's Employment Agreement, a wrongful termination in violation of Michigan statutes, and a post-termination breach of the Employment Agreement by improper solicitation of his clients.

Respondent's Counterclaim asserted various claims against Claimant, including: (1) breach of contract; (2) fraudulent inducement; (3) fraudulent, negligent and innocent misrepresentation; (4) tortious interference of business relationships; (5) violations of the Michigan Handicappers Civil Rights Act; and (6) violations of ERISA.

Claimant denied the allegations set forth in the Counterclaim. Claimant alleged that Respondent's Counterclaim was an example of an attempt to avoid liability on a promissory note by claiming supposed wrongdoing by the brokerage firm. Claimant contended that, contrary to Respondent's allegations, Claimant did not breach any of its commitments to Respondent. Claimant maintained that Claimant provided more than adequate support to Respondent as it was in Claimant's interest that Respondent should succeed. Claimant asserted that Respondent's claim of breach of employment contract was without merit. Claimant alleged that it complied with all of the terms that were agreed to. Claimant contended that Respondent's allegations concerning his heart attack and dismissal were ridiculous. Claimant also argued that Respondent has no cause of action under the Michigan Handicappers Civil Rights Act because heart attacks are not recognized as a "handicap" within its meaning and that Respondent was deemed fit by his doctor to do his job. Claimant further argued that Respondent's ERISA claim is without merit because Roney & Co. lived up to its commitments concerning group life insurance, which are not covered under ERISA.

RELIEF REQUESTED

Claimant requested an award for compensatory damages in the amount of \$66,172.73, plus interest, costs, and its attorney fees incurred in bringing its claims and in defending against Respondent's Counterclaim.

Respondent requested that the claims asserted against him be dismissed with prejudice and that he be awarded his costs and attorneys fees. Additionally, Respondent requested an award for compensatory damages in an amount in excess of \$1,000,000.00.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Robert N. Sheppard voluntarily withdrew his claims involving alleged violations of the Michigan Handicappers Civil Rights Act and ERISA.

Pursuant to the parties agreement, the panel of arbitrators granted leave to Respondent Robert N. Sheppard to file the Amended Counterclaim.

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 original(s) remain on file with NASD Regulation, Inc. Office of Dispute Resolution.

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) That Respondent and Counter-Claimant Robert N. Sheppard is liable for and shall pay to Claimant and Counter-Respondent Roney & Co. compensatory damages in the amount of Fifty Seven Thousand Dollars and No Cents (\$57,000.00), plus 5% simple interest, which shall begin to accrue on July 14, 1995 and shall continue to accrue until the date this award is paid in full;
- (2) That the Counterclaim is hereby dismissed in its entirety with prejudice; and
- (3) That other than forum fees, which are addressed below, all other claims and requests for relief not specifically awarded here are, and each of them, hereby denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,000 per hearing session and \$300 for each pre-hearing conference, if any. There were three (3) pre-hearing conferences x \$300 = \$900, and there were seventeen (17) hearing sessions x \$1,000 = \$17,000 in forum fees. Total forum fees are \$900 + \$17,000 = \$17,900. Pursuant to §10205(b) of the NASD Code of Arbitration Procedure (the "Code"), a hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10205(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$500 and shall **refund** the hearing session deposit in the amount of \$600 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant.

Pursuant to §10205(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$500 and shall **retain** as forum fees the hearing session deposit in the amount of \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Respondent.

Pursuant to §10333 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$300 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Claimant.

Pursuant to §10319 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** postponement fees in the amount of \$600 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Respondent in connection with Respondent's Request for Postponement. Pursuant to §10319 of the Code, the panel of arbitrators hereby waives the assessment of postponement fees in connection with the Joint Request for Postponement.

Accordingly, NASD Regulation, Inc. Office of Dispute Resolution shall **refund** the postponement deposit in the amount of \$250 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by Respondent in connection with the Joint Request for Postponement.

Pursuant to §10205(c) of the Code, Respondent Robert N. Sheppard is liable for and shall pay forum fees in the amount of \$17,150, which is the difference between \$17,900 (total forum fees) - \$750 (Respondent's hearing session deposit).

Fees are payable to NASD Regulation, Inc. Office of Dispute Resolution.

Concurring Arbitrators' Signatures

\s\ Harold I. Gach

Harold I. Gach, Esquire
Chairperson
Industry Arbitrator

March 17, 1997

Dated:

\s\ Keith J. Koerber

Keith J. Koerber
Panelist
Industry Arbitrator

March 14, 1997

Dated:

\s\ Stephen D. Arkwright

Stephen D. Arkwright
Panelist
Industry Arbitrator

March 15, 1997

Dated:

For NASD use only:

Date award served on the parties: March 21, 1997