

NASD Regulation, Inc. AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant(s)

Fahnestock & Co., Inc.

95-05101

Name of Respondent(s)

Brian Patrick Smith

REPRESENTATION

Claimant Fahnestock & Co., Inc. ("Fahnestock") was represented by James S. Telepman, Esq. of Levine, Frank & Edgar, P.A., Palm Beach Gardens, Florida.

Respondent Brian Patrick Smith was represented by Martin Gofberg of Securities Arbitration Centers, Ft. Lauderdale, Florida.

CASE INFORMATION

Statement of Claim filed on: October 26, 1995. Claimant's Submission Agreement signed on: October 16, 1995 by Eric Shames, Esq. on behalf of Fahnestock.

Statement of Answer filed by Respondent on: January 18, 1996. Respondent failed to sign a Submission Agreement as required by Rules 10301 and 10314 of the NASD Code of Arbitration Procedure ("the Code") (see "Other Issues"). Respondent's counterclaim filed on March 24, 1997.

Claimant did not file a response to the counterclaim.

HEARING INFORMATION

On April 8, 1997 a hearing lasting two sessions was conducted in Ft. Lauderdale, Florida.

CASE SUMMARY

Claimant alleged that, in 1992, Karl-Heinz Kowa and Kristel Kowa ("the Kowas") submitted a claim to the NASD for arbitration. The Respondents in that case were, among others, Fahnestock and Smith (Claimant and Respondent in this case respectively). Fahnestock

maintained that the arbitration panel in the Kowas' case rendered a decision which held, *inter alia*, that Fahnestock and Smith were jointly and severally liable to the Kowas for \$112,000.00 in damages. Fahnestock next maintained that the arbitration panel in the Kowa arbitration did not specify the basis upon which liability was found nor did it assign percentages of liability to the parties.

Fahnestock next maintained that it paid the award in full and thereafter commenced an action against Smith in Palm Beach County Circuit Court which was subsequently referred to arbitration. Fahnestock alleged that Smith was liable to it for indemnity or contribution based upon the allegations, evidence and conclusions from the prior arbitration.

Respondent denied liability and alleged that he should not be held solely liable for the amount awarded to the Kowas and that Fahnestock, as a co-fiduciary, owed the Kowas a duty to protect their proprietary securities account as well as a duty to prevent harm to them. Respondent maintained that Fahnestock's Registered Options Principal and Senior Registered Options Principal were responsible for insuring that these duties were carried out. Respondent maintained that the Options Principals signed every options trade ticket and, therefore, were clearly aware of every trade made by Smith, since Smith had no authority to sign any option trade tickets.

Respondent next maintained that Fahnestock, as co-fiduciary, violated its fiduciary duty as a matter of law and that Smith should not be held liable under Section 768.31 of the Florida Statutes (Uniform Contribution Among Tortfeasors Act) since that statute states that it does not apply to breaches of trust or other fiduciary obligations and the statute expressly precludes the right to contribution between co-fiduciaries if they are found liable for damages resulting from a breach of fiduciary duties. Smith further alleged that, since Claimant was found liable for negligence, it is not entitled to indemnification since case law provides that a person who is directly liable for his own negligence is not entitled to indemnity from a joint tortfeasor.

Respondent asserted a counterclaim alleging that Fahnestock should be found liable to Smith for failure to properly supervise the Kowa account, negligence, indemnity, bad faith, breach of fiduciary obligation to a public customer, violations of NASD Rules of Fair Practice, and estoppel.

Claimant did not file a response to the counterclaim.

RELIEF REQUESTED

Claimant requested damages in the amount of \$112,000.00. During the course of the hearing, Claimant requested a dismissal of the counterclaim.

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Respondent requested a dismissal of the claim and requested damages on the counterclaim in excess of \$20,000.00 plus attorney's fees and punitive damages in the amount of \$50,000.00.

OTHER ISSUES CONSIDERED AND DECIDED

Pursuant to rule 10101 of the Code, the arbitration panel found subject matter jurisdiction over this controversy.

The arbitration panel further found that the Respondent was a person associated with a member of the NASD at the time the controversy arose. Consequently, the arbitration panel found personal jurisdiction over the Respondent pursuant to Rule 10301 of the Code.

In view of the above, the arbitration panel found that the Respondent was required to file with the NASD a properly executed Submission Agreement pursuant to Rule 10314(b) of the Code. In this regard the arbitration panel found that the Statement of Claim was properly served upon the Respondent pursuant to Rule 10314(a) of the Code.

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 the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions (if any), the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Smith is found liable and shall pay to Claimant the amount of \$1,000.00.
2. Claimant Fahnestock is found not liable to Smith on the counterclaim and, therefore, all claims against Fahnestock are hereby dismissed.
3. Respondent's requests for attorney's fees and punitive damages are hereby denied.

FORUM FEES

Pursuant to Rule 10205(c) of the Code of Arbitration Procedure, the panel has assessed forum fees in the amount of \$1,500.00 (2 sessions x \$750.00 per session).

1. Claimant Fahnestock is hereby assessed \$1,500.00 for which NASD Regulation, Inc. shall retain the \$750.00 previously deposited in partial satisfaction thereof, leaving a balance due

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to NASD Regulation, Inc. of \$750.00.

2. Respondent Smith is hereby assessed the \$500.00 non-refundable filing fee for the counterclaim.
3. NASD Regulation, Inc. shall retain the \$500.00 non-refundable filing fee previously paid by Claimant.
4. NASD Regulation, Inc. shall retain the \$350.00 member surcharge previously paid by Claimant pursuant to Rule 10333 of the Code.
5. Claimant Fahnestock is hereby assessed the sum of \$750.00 representing the adjournment fee for the hearings scheduled to convene on June 3 and 4, 1996.

Fees are payable to the NASD Regulation, Inc.

Concurring Arbitrators' Signatures
Name

Public/Industry

_____/s/_____
Patricia Cowart, Esq.

Industry/Chairperson

_____/s/_____
Gary F. Lang

Industry

_____/s/_____
Robert H. Rushowy

Industry

Date of Decision: April 29, 1997