

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

John W. Winn, by his legal guardian
Donna Anderson,

Claimant,

v.

No. 95-05667

A.S. Goldmen & Company, Inc.,

Respondent.

A.S. Goldmen & Company, Inc.,

Third-Party Claimant and
Third-Party Counter-Respondent,

v.

Robert DiMinico, and Clifford Masticola,

Third-Party Respondents and
Third-Party Counter-Claimants.

REPRESENTATION OF PARTIES

Claimant John W. Winn, by his legal guardian Donna Anderson, ("Claimant") was represented by Daniel W. Hildebrand, Esq. and Robert E. Shumaker, Esq. of DeWitt Ross & Stevens S.C. located in Madison, Wisconsin.

Respondent, Third-Party Claimant, and Third-Party Counter-Respondent A.S. Goldmen & Company, Inc. ("A.S. Goldmen") was represented by Robert J. Hausen, Esq. of Chadbourne & Parke, LLP located in New York, New York.

Third-Party Respondents and Third-Party Counter-Claimants Robert DiMinico ("DiMinico") and

Clifford Masticola ("Masticola") were represented by Rebecca S. Walker, Esq. of Arkin Schaffer & Kaplan LLP located in New York, New York.

CASE INFORMATION

The Statement of Claim was filed on or about December 4, 1995.

The Amended Statement of Claim was filed on or about July 17, 1996.

Claimant's Submission Agreement was signed on November 17, 1995.

The Statement of Answer and Third-Party Claim of A.S. Goldmen was filed on or about October 25, 1996.

The Submission Agreement of A.S. Goldmen was signed on February 20, 1996.

The Joint Statement of Answer to the Third-Party Claim and Counterclaim of DiMinico and Masticola was filed on or about December 9, 1996.

The Submission Agreement of Respondent DiMinico was signed on December 5, 1996.

The Submission Agreement of Respondent Masticola was signed on December 5, 1996.

A.S. Goldmen's Statement of Answer to the Counterclaim of DiMinico and Masticola was filed on or about February 10, 1997.

Claimant's Post-Hearing Brief was filed on or about May 11, 1998.

A.S. Goldmen's Post-Hearing Brief was filed on or about May 11, 1998.

DiMinico and Masticola's Post Hearing Brief was filed on or about May 11, 1998.

HEARING INFORMATION

The hearing was held on February 10, 1998 for two (2) sessions, February 11, 1998 for two (2) sessions, February 12, 1998 for two (2) sessions, and March 23, 1998 for two (2) sessions. The hearing location was Milwaukee, Wisconsin.

CASE SUMMARY

Claimant's claims arose out of a securities account maintained at A.S. Goldmen. DiMinico and Mastriola were account executives at A.S. Goldmen assigned to Claimant's account.

Claimant contended that A.S. Goldmen improperly and unlawfully recommended and sold speculative and risky investments which were unsuitable based on his investment objectives, lack of sophistication and diminished mental capacity. Claimant alleged that A.S. Goldmen churned his securities account and made unauthorized transactions in order to generate commissions of over \$50,000. Claimant contended that account statements and confirmations were sent to the wrong address in an attempt to fraudulently conceal wrongdoing. Claimant maintained that A.S. Goldmen knew that he was not mentally competent to engage in the transactions at issue. Claimant maintained that A.S. Goldmen engaged in a continuum of negligent and/or intentional acts which violated the various federal and state securities laws, statutes, and the rules and regulations of the NASD and NYSE.

A.S. Goldmen denied all liability to Claimant in its Statement of Answer and Third-Party Claim. A.S. Goldmen maintained that the securities in Claimant's account were suitable in light of his financial resources and stated investment objectives. A.S. Goldmen alleged that Claimant's investment objectives were growth and speculation according to his New Account Form. A.S. Goldmen contended the Claimant had a substantial net worth, which consists of inherited wealth and a significant portfolio of speculative stocks. A.S. Goldmen asserted that Claimant approved and authorized each trade executed in his accounts, and the frequency and extent of trading reflected the Claimant's interests and decisions. In its Third-Party Claim, A.S. Goldmen alleged that DiMinico and Mastriola were the primary individuals who dealt directly with Claimant and conducted transactions in his accounts. A.S. Goldmen contended that DiMinico and Mastriola are liable pursuant to the principles of indemnity and contribution, in the event A.S. Goldmen is determined liable for any part of the damages claimed.

In their Statement of Answer to the Third-Party Claim, DiMinico and Mastriola denied that they engaged in any wrongdoing or are any way accountable, responsible or liable for any losses Claimant claims to have incurred for which A.S. Goldmen may be found liable. DiMinico and Mastriola contended that they knew Claimant was an extraordinary wealthy man with a vast number of investments at numerous broker-dealers and believed Claimant was fully capable of trading in his own account. DiMinico and Mastriola asserted various affirmative defenses, including: that the Statement of Claim and Third-Party Statement of Claim fails to state a claim upon relief can be granted; that claims asserted in the Statement of Claim and Third-Party Statement of Claim are barred by the applicable statutes of limitation; and that the claims are barred by the doctrine of laches, unclean hands, waiver and estoppel. In their Counterclaim,

DiMinico and Mastricola alleged that A.S. Goldmen has a duty to indemnify and hold them harmless for all expenses, costs of suit, legal fees, damages, judgments or other claims because they acted on their employer's behalf and at their employer's direction and control.

RELIEF REQUESTED

Claimant requested a total award in the amount of \$356,644.77, post-judgment interest, reasonable attorney fees and costs, punitive damages, and such other relief as deemed just and equitable.

In its Statement of Answer, A.S. Goldmen requested that the Statement of Claim be dismissed in its entirety with prejudice, plus an award of attorney fees and costs. In its Third Party Claim, A.S. Goldmen requested that DiMinico and Mastricola be held liable pursuant to the principles of indemnity and contribution, in the event A.S. Goldmen is determined liable for any part of the damages claimed.

In their Statement of Answer to the Third-Party Claim, DiMinico and Mastricola requested that the Third-Party Claim be dismissed in its entirety with prejudice. In their Counterclaim, DiMinico and Mastricola requested that A.S. Goldmen be ordered to indemnify and hold them harmless for all expenses, costs, legal fees, damages, judgments or other claims arising from this action.

A.S. Goldmen requested that the Counterclaim be dismissed in its entirety with prejudice.

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 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, as well as the post-hearing submissions, the undersigned concurring arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

- (1) With respect to the claims of John W. Winn against A.S. Goldmen & Company, Inc., the panel has determined that A.S. Goldmen & Company, Inc. is liable for and shall pay to John W. Winn damages in the amount of Two Hundred Sixty Four Thousand Three Hundred Sixty Five Dollars and No Cents (\$264,365.00), which sum is inclusive of an award of attorney fees and costs;
- (2) With respect to the claims of A.S. Goldmen against Robert DiMinico and Clifford Mastricola, the panel has determined that Robert DiMinico and Clifford Mastricola are jointly and severally liable for and shall pay to A.S. Goldmen & Company, Inc. damages in the amount of One Hundred Five Thousand Seven Hundred Forty Six Dollars and No Cents (\$105,746.00), pursuant to the applicable principles of indemnity and contribution;
- (3) That the Counterclaim of Robert DiMinico and Clifford Mastricola is hereby dismissed in its entirety with prejudice; and
- (4) That to the extent not specifically awarded or otherwise provided for above, all other claims and requests for relief by any party hereto are denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There were eight (8) hearing sessions x \$750 = \$6,000 in forum fees. Pursuant to §10332(b) of 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 §10332(c) of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain the non-refundable filing fee in the amount of \$200 and shall refund the hearing session deposit in the amount of \$750 previously deposited by the Claimant. Pursuant to §10332(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 \$400 previously deposited by A.S. Goldmen. Pursuant to §10332(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 by DiMinico and Mastricola. Pursuant to Rule 10333 of the Code, Respondent A.S. Goldmen has paid to NASD Regulation, Inc. the \$350 member surcharge previously invoiced. Pursuant to §10319 of the Code, NASD Regulation, Inc. Office of Dispute Resolution shall retain Claimant's postponement deposit in the amount of \$750.

Pursuant to §10332(c) of the Code, A.S. Goldmen is liable for and shall pay forum fees in the amount of \$5,600 (total forum fees - hearing session deposit). Pursuant to §10332(c) of the Code, A.S. Goldmen is also liable for and shall pay postponement fees in the amount of \$750.

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

Concurring Arbitrators' Signatures:

\s\ Frederick P. Kessler
Hon. Frederick P. Kessler
Chairperson
Public Arbitrator

June 6, 1998
Dated:

\s\ Gerald A. Grossman
Gerald A. Grossman, Esq.
Panelist
Industry Arbitrator

June 10, 1998
Dated:

Dissenting Arbitrator's Signature:

I would have awarded the Claimant the sum of \$56,444.00 against A.S. Goldmen & Company, Inc. I also would have dismissed the Third-Party Claim of A.S. Goldmen & Company, Inc.

\s\ James F. Parsons
James F. Parsons
Panelist
Public Arbitrator

June 9, 1998
Dated:

For NASD Regulation use only:

Date award served on parties: June 15, 1998