

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Claimant

Eleanor J. Mishel,

and

95-05699

Respondents

Bear Stearns & Company, Inc.;
and William D. Hirsh.

REPRESENTATION OF PARTIES

For Claimant: Eleanor J. Mishel ("Mishel") was represented by Barry S. Rosen, Esq. of Sachnoff & Weaver, Ltd., located in Chicago, Illinois.

For Respondents: Bear Stearns & Company, Inc. ("Bear Stearns") and William D. Hirsh ("Hirsh") were represented by Nicholas P. Iavarone, Esq. of Bellows & Bellows, located in Chicago, Illinois.

CASE INFORMATION

Claimant's Statement of Claim filed on: December 8, 1995.

Claimant's Submission Agreement signed on: December 8, 1995.

Respondents' Statement of Answer filed on: January 29, 1996.

Respondent Bear Stearns' Submission Agreement was signed on: January 29, 1996 by Mark E. Lehman, Senior Managing Director of Bear, Stearns & Company.

Respondents' Motion to Dismiss filed: September 3, 1996.

Claimant's Response to the Motion to Dismiss filed: September 26, 1996.

Respondents' Reply to Claimant's Response to Motion to Dismiss filed: October 24, 1996.

Claimant's Surreply to Respondents' Motion to Dismiss filed: October 30, 1996.

HEARING INFORMATION

Pre-hearing conference: None Held.

Hearing Dates/Sessions: November 18, 1996 for two (2) sessions;
November 19, 1996 for two (2) sessions;
November 20, 1996 for one (1) session.

Hearing Location: Chicago, Illinois.

CASE SUMMARY

Mishel alleged that Hirsh, while employed by or acting as an agent for Respondent Bear Stearns churned Mishel's account, engaged in reckless investment strategies, commingled moneys between two of Mishel's accounts and exercised undue influence over Mishel. Mishel specifically alleged that:

1. On December 15, 1989, Mishel opened an investment account at the Chicago office of Bear, Stearns & Co. Prior to opening this account, Mishel had very little investment experience.
2. Throughout the eleven month period in which Hirsh handled the account, Hirsh excessively traded Mishel's account resulting in large commissions for Hirsh and substantial losses for Mishel's account.
3. In spite of Mishel's request to avoid margin expenses, Hirsh traded in risky investments which resulted in several margin expenses. Further, Hirsh transferred funds from Mishel's "Special Account" into her "Initial Account" to reduce the margin balances without authorization.
4. Hirsh purchased "buy-writes," options and warrants for Mishel in spite of Mishel's lack of sophistication with regard to such investments.
5. Hirsh failed to take into account the best interests of his client by refusing to sell several investments in spite of their obvious failure.
6. Finally, Hirsh unduly influenced Mishel by means of their close personal relationship in attempting to cover up his wrongful conduct.

Respondents denied the allegations set forth in the Statement of Claim. Respondents specifically stated that:

1. Mishel was a woman of independent means who opened her account with her "play money" to be traded at Hirsh's discretion.
2. Mishel met with Bear Stearns Chicago office Compliance Manager Earle Shultz to discuss her account activity. At this meeting, Mishel explained that because of her significant assets away from Bear Stearns, she was unconcerned about the profits or losses in her account.
3. Although Hirsh traded in Mishel's "Special Account," this trading was conservative and limited in accordance with Mishel's request.
4. Even though Hirsh and Mishel had a close personal relationship, Mishel was a wealthy, intelligent and sophisticated woman who clearly understood the trading in her account. Moreover, Mishel never protested regarding Hirsh's trading activity during the entire life of the account.

In addition, the Respondents asserted several affirmative defenses, including waiver, ratification and laches.

RELIEF REQUESTED

Claimant requested an award in the amount of \$121,275.00 in compensatory damages; \$200,000.00 in punitive damages; costs and attorney's fees.

Respondents requested that the claims asserted against them be denied in its entirety and that they be awarded their costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

On September 3, 1996, Respondents filed a Motion to Dismiss. On September 26, 1996 Mishel filed her Response to the Motion to Dismiss. On October 24, 1996 Respondents' filed a Reply to Claimant's Response to Respondent's Motion to Dismiss. On October 30, 1996 Mishel filed a Surreply to Respondent's Motion to Dismiss. The panel denied without prejudice Respondents' Motion to Dismiss on October 29, 1996. At hearing, the Respondents' reargued the Motion at the conclusion of their case. The panel denied the Motion.

Respondent William D. Hirsh did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to §10301 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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 NASD Regulation, Inc. Office of Dispute Resolution.

AWARD

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

1. Respondents Bear Stearns & Company, Inc. and William D. Hirsh are jointly and severally liable for and shall pay to the Claimant, Eleanor J. Mishel, the sum of \$117,000.00 as actual damages;
2. The claim for punitive damages is hereby dismissed and denied;
3. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein;
4. *Any relief not specifically awarded is hereby denied..*

FORUM FEES

Forum fees are calculated at the rate of \$ 750.00 per hearing session and \$300 for each prehearing conference, if any. There were 5 sessions x \$ 750.00 = \$ 3,750.00 in forum fees. Pursuant to §10332(b) a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

Pursuant to §10332(c) of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable filing fee in the amount of \$ 200.00 and shall refund the hearing session deposit in the amount of \$ 750.00 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant. Respondent Bear Stearns &

Company, Inc. is liable for and shall pay to the NASD Regulation, Inc., Office of Dispute Resolution the sum of \$3,750.00 as forum fees.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, Respondent Bear Stearns & Company, Inc. is liable for and shall pay to the NASD Regulation, Inc. Office of Dispute Resolution the non-refundable member surcharge in the amount of \$350.00.

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

Dated:

/s/ Bradford S. Allen, Esq.
Bradford S. Allen, Esq.
Public Arbitrator, Presiding Chair

February 12, 1997

/s/ John T. Kelly, Esq.
John T. Kelly, Esq.
Public Arbitrator

February 15, 1997

/s/ Brian E. Slotky
Brian E. Slotky
Industry Arbitrator

February 13, 1997