

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Solomon and Harriet T. Klotz

96-00765

Name of Respondents

Duke & Company, Inc.
Lawrance A. Rosenberg
Eugene Klotsman

REPRESENTATION

For Claimants: Lawrence M. Philips, Esq., New York, NY.

For Respondent Duke & Company, Inc. ("Duke"): Steven R. Popofsky, Esq. of the law firm of Gersten, Savage, Kaplowitz & Curtin, LLP, New York, NY.

For Respondent Eugene Klotsman ("Klotsman"): Martin H. Kaplan, Esq. of the law firm of Gusrae, Kaplan & Bruno, New York, NY.

The Respondent Lawrance A. Rosenberg ("Rosenberg") did not appear.

CASE INFORMATION

Statement of Claim filed: February 21, 1996.

Claimants' Submission Agreement signed on: March 1, 1996.

The Respondent Lawrance Rosenberg did not execute a Submission Agreement or submit a Statement of Answer as required pursuant to Section 10314 of the Code of Arbitration Procedure.

Statement of Answer filed by Respondent Duke & Company, Inc. on: May 13, 1996.

Respondent Duke & Company, Inc.'s Submission Agreement signed on: May 9, 1996.

Statement of Answer filed by Respondent Eugene Klotsman on: June 2, 1996.

The Respondent Eugene Klotsman did not execute a Submission Agreement as required pursuant to Section 10314 of the Code of Arbitration Procedure.

HEARING INFORMATION

One telephonic pre-hearing conference and four hearing sessions were conducted in this matter on October 31, 1996, December 16 and 17, 1996, respectively, in Tampa, Florida.

CASE SUMMARY

Claimants alleged that the unauthorized and fraudulent sale to them commencing on February 23, 1993 through March 30, 1993 of Hillside Bedding Co. Inc. ("Hillside") stock resulted in the loss of most of their retirement money, amounting to \$350,000.00. Claimants alleged that these purchases were based on the unconscionable personal greed and deceit by Respondents of a vulnerable, trusting elderly couple. Claimants further alleged that the Respondents breached the fiduciary duty owed to the Claimants; violated the securities laws; violated the rules of the NASD; and, Respondents acted in a negligent manner in handling the Claimants' accounts. Claimants next alleged the Respondent Duke is liable under the doctrine of respondeat superior. Next, Claimants alleged that they were entitled to punitive damages because the fraudulent conduct engaged in by the Respondents deserved the severest condemnation.

Respondent Duke generally denied the allegations contained in the Statement of Claim and maintained that Claimants are business associates and personal friends of the former management of Duke and Claimants have come forward after three long years and now seek to hold Duke's new management, which has no connection to former management, and which acted vigorously and forthrightly to resolve those problems that were not disclosed to it in the acquisition, financially responsible for the actions of their own former associates. Respondent Duke next maintained that it would not be fair to impose the financial cost of Claimants' losses upon new management in view of the alleged active wrongdoing of the individual Respondents, and Claimants' own actions (their special relationship as partners with former management) and inactions (remaining silent to protect their investment) that take them well outside the realm of the typical customer. Respondent Duke next asserted cross-claims against the individual Respondents to the extent the new management of Duke may be found liable.

Respondent Klotsman maintained that the Statement of Claim demonstrates that Rosenberg, not Klotsman, was the party responsible for each of the recommendations and transactions involving Hillside Bedding and the Statement of Claim fails utterly to show any nexus between Klotsman and Dr. Klotz' transactions in Hillside Bedding. Respondent Klotsman further maintained that the Claimants' claim that the investment in Hillside was unauthorized or misrepresented to them is illogical and inconsistent as the investment could not have been misrepresented if it was unauthorized. Respondent Klotsman further maintained the following: that Rosenberg, not Klotsman, allegedly pressured Dr. Klotz into signing blank forms; Klotzman left the predecessor of Duke in February, 1993; the date of the first purchase of Hillside occurred on February 23, 1993 and the bulk of the investments occurred in March, 1993; and, at the time of the transactions in Hillside, Klotsman was no longer registered or associated with Duke's predecessor. Respondent Klotsman next maintained that the Claimants' losses occurred due to market risk, a risk that was known to Claimants at the time of the investments. Respondent

Klotsman asserted a counterclaim alleging that the claim is frivolous and Klotsman should receive the attorneys' fees, costs and disbursements incurred in this matter. Respondent Klotsman made a Motion to Dismiss alleging that none of the violations which are claimed to have been committed by Respondent Klotsman are supported by the facts and the Statement of Claim is devoid of any allegations of fact which connect Respondent Klotsman to the purchase of the Hillside Bedding investment in any way. Respondent Klotsman next asserted that under the law of the State of New York, an arbitration panel does not have the right to award punitive damages and Claimants' choice of venue in Florida does not impair the applicability of New York law.

RELIEF REQUESTED

Claimants requested compensatory damages in the sum of \$320,000.00; interest in the sum of \$55,785.00 or, alternatively, lost opportunity income in the sum of \$68,080.00; disgorgement of all commissions, margin interest and profits realized by the Respondents in the sum of approximately \$70,000.00; punitive or exemplary damages in the sum of \$500,000.00; and, reasonable counsel fees.

Respondent Duke requested a dismissal of all claims against them and further requested that to the extent Duke may be found liable, they asserted cross-claims against the individual Respondents.

Respondent Klotsman requested that the claim be denied in its entirety and that the relief requested in the counterclaim be granted.

OTHER ISSUES CONSIDERED & DECIDED

Prior to the commencement of the first hearing session, the arbitration panel was informed that the Claimants had entered into a settlement agreement with Respondent Duke and the Respondent Duke was withdrawing with prejudice the cross-claims against the individual Respondents.

The Claimants made a Motion to Amend the Statement of Claim at the hearing which was denied by the arbitration panel.

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.

Pursuant to Section 10101 of the Code of Arbitration Procedure ("Code"), the arbitration panel found subject matter jurisdiction over this entire controversy.

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

In view of the above, the arbitration panel found that the Respondent Rosenberg was required to file with the NASD a Statement of Answer and a properly executed Submission Agreement

pursuant to Section 10314(b) of the Code. In this regard, the arbitration panel found that the Statement of Claim was properly served upon the Respondent Rosenberg pursuant to Section 10314(a) of the Code.

In addition, in accordance with Sections 10310, 10315 and 10318 of the Code, the arbitration panel found that the NASD provided Respondent Rosenberg with "due notice" of the hearing conducted in this matter by regular and certified mail. The arbitration panel, therefore, determined to proceed without Respondent Rosenberg whose absence was unexcused.

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. The Respondents Rosenberg and Klotsman be and hereby are liable, jointly and severally, and shall pay to the Claimants the sum of \$356,000.00, inclusive of pre-judgment interest.
2. The Claimants' request for punitive damages is denied.
3. Each party shall bear their respective costs including attorneys' fees.

FORUM FEES

Pursuant to Section 10332 of the Code of Arbitration Procedure, the panel has assessed forum fees in the sum of \$5,000.00 (four sessions x \$1,000.00) plus one pre-hearing conference with the panel (\$1,000.00).

1. Respondents Rosenberg and Klotsman are assessed, jointly and severally, the sum of \$5,000.00 for which the NASD shall retain the \$1,000.00 previously deposited by the Claimants and the \$1,000.00 previously deposited by Respondent Klotsman in partial satisfaction thereof leaving a balance due to the NASD of \$3,000.00.
2. The NASD shall retain the \$250.00 non-refundable claim filing fee previously paid by the Claimants to the NASD.

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

Concurring Arbitrators' Signatures
Name

Public/Industry

/S/
Beverly S. Gordon, Esq.

/S/
James A. Cormack

Public

/S/
Samuel M. Niden

Date of Decision: 01/07/97