

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Mark K. Lammers,
Claimant,

vs.

96-03252

Merrill, Lynch, Pierce, Fenner & Smith, Inc.,
Respondent.

REPRESENTATION OF PARTIES

Mark K. Lammers ("Claimant") was represented by Negatu Molla, Esq., of Kimble, Gothreau & Nelson, P.C., Tucson, Arizona.

Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Respondent") was represented by F. Pendleton Gaines, III, Esq., of Fennimore Craig, P.C., Phoenix, Arizona.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about July 19, 1996. Claimant's Submission Agreement was signed on July 19, 1996.

Respondent's Statement of Answer was filed on or about October 7, 1996. Respondent's Submission Agreement was signed on October 2, 1996.

HEARING INFORMATION

A hearing was held on the Motion to Dismiss on March 17, 1997 for one (1) session. The full panel and parties' counsel were in attendance. The hearing on the merits was held on May 5, 6, 7, and 8, 1997, for two (2) sessions each day, for a total of eight (8) sessions. The hearing was held in Scottsdale, Arizona.

CASE SUMMARY

Claimant alleged that Respondent: Wrongfully terminated him in contravention of the law and public policy and motivated by bad faith and malice because of his affidavit and testimony regarding the investigation of Alan Lang; breached their employment with him through their failure to adhere to the express and implied in-fact agreement evidenced by written provisions governing employment relations, written evaluations of Claimant, and oral representations made to Claimant; breached their covenant of good faith and fair dealing; defamed Claimant due to the fact that Respondent knew or should have known that the alleged grounds for dismissal would be communicated to prospective employers and would severely damage Claimant's ability to secure comparable employment; committed tortious interference with contractual relations through wrongfully withholding

Claimant's client list, contacted those clients, and wrongfully encouraged them to terminate their relationship with Claimant; and intentionally inflicted emotional distress on Claimant. The allegations arose out of the termination of Claimant's employment on February 25, 1994.

Respondent denied the allegations set forth in the Statement of Claim. Respondent specifically denied that: It wrongfully terminated Claimant; breached any contract or implied covenant; and denied that it defamed him, interfered with his contractual relations or intentionally inflicted emotional distress upon him. Respondent asserts that Claimant's U-5 terms were specifically negotiated between the parties, and that Claimant was an "at will" employee. Respondent also asserted the following defenses: Claims one, three, four five and six are time-barred by the applicable statutes of limitations of the State of Arizona; Claimant's employment was terminable at will by Respondent, and Respondent acted within its rights under Arizona law to terminate Claimant; even if Respondent was required to show cause for termination, which it is not, his conduct and activities described above are sufficient to establish such cause, and Respondent acted properly and within its rights under the circumstances; there was no written employment agreement, and since Claimant's termination violated no statute or law of the State of Arizona, his claims must be dismissed; because Claimant's own counsel negotiated the terms and conditions of his U-5, Claimant can have, and has, no claim arising out of the contents of that form; and under Arizona law, Claimant must prove by clear and convincing evidence that Respondent was motivated in its acts by an "evil mind" to establish a claim for punitive damages, and there is no such showing in this case.

RELIEF REQUESTED

In his Statement of Claim, Claimant requested an award of the following relief: Compensatory and punitive damages not less than \$6,500,000; and all attorneys' fees and costs incurred in bringing this action.

Respondent requested that the Statement of Claim be dismissed on the merits and that it have and recover its costs and attorneys' fees pursuant to A.R.S. § 12-341.01.

OTHER ISSUES CONSIDERED & DECIDED

On or about October 8, 1996, Respondent filed a Motion to Dismiss Claims one, four, five and six. Claimant requested oral argument on the motion. A hearing on the Motion to Dismiss was set for, and held on, March 17, 1997. After deliberation, the arbitrators denied the motion.

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:

Claimants claims against the Respondent are, and each of them, denied with prejudice.

FORUM FEES

Forum fees are calculated at the rate of \$1,500 per hearing session and \$300 for each pre-hearing conference, if any. There were nine (9) sessions x \$1,500 = \$13,500 in forum fees. Pursuant to §10332(b) of the 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 §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 \$500 and shall **retain** as forum fees the hearing session deposit in the amount of \$1,500 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

Pursuant to §10333 of the NASD Code of Arbitration Procedure, NASD Regulation, Inc. Office of Dispute Resolution shall **retain** the non-refundable member surcharge in the amount of \$500 previously paid by the Respondent.

Additional forum fees in the amount of \$5,250 are assessed by the arbitrators against the Claimant.

Additional forum fees in the amount of \$6,750 are assessed by the arbitrators against the Respondent.

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

Dated:

Matthew J. Zale
Matthew J. Zale
Public Arbitrator, Presiding Chair

/s/

May 29, 1997

John V. Marion
John V. Marion
Public Arbitrator

/s/

May 27, 1997

Dale B. Heath
Dale B. Heath
Industry Arbitrator

/s/

May 26, 1997