

NASD REGULATION, INC. AWARD

OFFICE OF DISPUTE RESOLUTION

In the Matter of the Arbitration Between

Name of Claimant

Rickel & Associates, Inc.

96-03354

Name of Respondent

William Nesmith

REPRESENTATION

For Claimant Rickel & Associates, Inc. ("RAI") appeared Peter Seiden, Esq., of the law office Schneck, Weltman, Hashmall, & Mischel located in New York, New York.

Respondent William Nesmith ("Respondent") did enter an appearance in this matter.

CASE INFORMATION

The Statement of Claim was filed on September 03, 1996.

Claimant's Submission Agreement was signed on August 01, 1996.

Respondent Nesmith did not file a Statement of Answer or execute a Submission Agreement as required by Rule 10314(b) of the Code of Arbitration Procedure.

HEARING INFORMATION

Hearing Date(s)/Sessions:

July 28, 1997

Two Sessions

The hearings were conducted at the offices of NASD Regulation, Inc. located in New York.

CASE SUMMARY

Claimant stated that on June 6, 1995, Respondent entered into an agreement when he commenced employment with them. Claimant alleged that Respondent accepted a \$32,000.00 advances, minus a \$3,043.80 broker credit, that were to be repaid during the course of his employment with Claimant. Claimant alleged that when Respondent's employment ended he had not yet reimbursed them for the advances. Claimant alleged that to date Respondent has refused to pay them the outstanding amount of \$28,956.20.

Claimant further alleged that during his employment Respondent took advances, in the amount of

\$19,500.00, from President of the Equities Division Elliot Smith ("Smith"). Claimant alleged that Respondent repaid \$5,000.00 of those advances, but has refused to pay the \$14,500.00 balance. Claimant maintained that Smith assigned his right to the promissory note to Claimant, therefore, Claimant has the right to collect the balance due.

Claimant alleged that under the employment agreement that Respondent signed, if they prevail in this action they have the right to attorney fees and costs.

Respondent did not file a Statement of Answer.

RELIEF REQUESTED

Claimant requested:

- (a) On the First Claim of breach of contract, damages in an amount to be determined upon the presentation of proof at the arbitration hearing, believed to be in excess of \$28,956.20.
- (b) On the Second Claim of unjust enrichment, damages in an amount to be determined upon the presentation of proof at the arbitration hearing, believed to be in excess of an amount equal to \$28,956.20.
- (c) On the Third Claim of breach of contract and unjust enrichment, damages in an amount to determined upon the presentation of proof at the arbitration hearing, believed to be in excess of an amount equal to \$14,500.00.
- (d) On the Fourth Claim of attorney's fees, for all costs and expenses including, but not limited to, fees for preparation, trial and appeals and other legal proceedings in an amount to be determined at the arbitration hearing in this matter.

Respondent failed to file a Statement of Answer.

OTHER ISSUES CONSIDERED & DECIDED

The parties have agreed that a handwritten, signed Award may be entered. In this case, the parties have agreed to receive a conformed copy of the Award while the original remains on file with the NASD.

The arbitrator made the following determinations concerning Respondent Nesmith, who did not file a Statement of Answer and a Submission Agreement and did not appear at the hearing in this matter:

- 1. Pursuant to Rule 10101 of the Code of Arbitration Procedure (the "Code"), the arbitrator found subject matter jurisdiction over this entire controversy.
- 2. The arbitrator found that Respondent Nesmith was a person associated with a member of the NASD at the time this controversy arose. Accordingly, the panel found personal jurisdiction over Respondent Nesmith pursuant to Rule 10201/10301 of the Code.
- 3. The panel found that Respondent Nesmith was required to file a Statement of Answer and

a Submission Agreement with NASD Regulation pursuant to Rule 10314(b) of the Code.
In this regard, the arbitrator found that the Statement of Claim was properly served upon Respondent Nesmith pursuant to Rule 10314(a) of the Code.

4. In addition, in accordance with Rules 10310, 10315, and 10318 of the Code, the panel found that NASD Regulation provided Respondent Nesmith with "due notice" of the hearings conducted in this matter by regular and certified mail. The arbitrator further determined to proceed with the hearings without Respondent Nesmith whose absence was unexcused.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

- (1) Respondent be and is hereby liable and shall pay to Claimant the sum of \$28,956.20 on the first claim.
- (2) Respondent be and is hereby liable and shall pay to Claimant the sum of \$14,500.00 on the third claim.
- (3) Claimant's request for attorneys' fees is hereby denied.
- (4) *The parties shall bear their own costs.*
- (5) NASD Regulation, Inc. shall retain the filing fee and the costs of the hearing shall be borne equally between the parties.

FORUM FEES

Pursuant to Rule 10332 of the Code of Arbitration Procedure, the arbitrators have determined that NASD Regulation, Inc. shall retain the \$500.00 non-refundable filing fee and the \$200.00 member surcharge previously deposited by the Claimant and have assessed the following forum fees:

2 Sessions x \$300.00 = \$600.00

- (1) Claimant be and is hereby liable and shall pay NASD Regulation, Inc. the sum of \$300.00 as provided for in the "Award". Claimant previously deposited \$300.00 with NASD Regulation, Inc., therefore, no payment is required of Claimant.
- (2) Respondent be and is hereby liable and shall pay NASD Regulation, Inc. the sum of \$300.00 as provided for in the "Award".
- (3) Claimant was assessed and paid the \$200.00 NASD Member Surcharge.

Fees are payable to NASD Regulation, Inc..

ARBITRATOR'S SIGNATURE

Patricia N. Cirillo

Patricia N. Cirillo, Esq.

Date of Decision: 10/17/97

I, Patricia N. Cirillo, Esq., do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein, and who executed this instrument which is my award.

Patricia N. Cirillo

Patricia N. Cirillo, Esq.
Industry Chairperson