

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Douglas A. Kahn

96-03991

Name of Respondents

A.S. Goldmen & Company, Inc.
Frederick Birk

CASE SUMMARY

In a claim filed with the National Association of Securities Dealers, Inc. on September 6, 1996, claimant Douglas A. Kahn ("claimant"), who appeared Pro Se, alleged that respondent A.S. Goldmen & Company, Inc. ("A.S. Goldmen") and its agent, respondent Frederick Birk ("Birk") failed to execute his sell order. Claimant further alleged that on February 26, 1996 he gave Birk written instructions to sell 500 shares of Winfield Capital ("WCAP") at a limit price of \$10.00 per share. Claimant also alleged that he did not receive confirmation of the sale and wrote to Birk again on March 20, 1996 with instructions to sell if the stock price fell below \$7.00 per share. Claimant averred that he returned from vacation two months later in June 1996 and called A.S. Goldmen to inquire about his "trade orders". Claimant asserted that A.S. Goldmen informed him that no trades had been executed because Birk was no longer with the company, and that WCAP was valued at approximately \$2.00 per share.

Claimant further asserted that he indicated to A.S. Goldmen that the firm was responsible for Birk's actions and was referred to the Compliance Officer, Stewart Winkler ("Winkler"), who ignored his calls. Claimant also asserted that on June 4, 1996 and to date, Winkler failed to execute his written instructions to sell WCAP. Claimant contended that WCAP could have been sold between February and March, 1996 when it traded for over \$10.00 per share and between March and April, 1996, when it traded at over \$7.00 per share. Claimant also contended that A.S. Goldmen and Birk are liable for damages because of their willful disregard of his instructions.

Respondent A.S. Goldmen & Company, Inc., by its representative and counsel, Carole R. Bernstein, Esq., a sole practitioner located in Norwalk, Connecticut, denied every allegation contained in the Statement of Claim. A.S. Goldmen maintained that claimant placed an order to purchase 500 shares of WCAP at \$5.00 per share. A.S. Goldmen further maintained that claimant's alleged (a) January 26, 1996 order to sell at \$10.00 per share, (b) March 20, 1996 order to sell at \$7.00 per share and (c) June 4, 1996 order to sell at market price, were never received by Birk or A.S. Goldmen. A.S. Goldmen also maintained that claimant did not call to insure that he communicated to the correct address and/or fax number.

A.S. Goldmen contended that if claimant had addressed his letters properly, he would have immediately been informed of the firm's policy against accepting "stop loss" orders. A.S. Goldmen further contended that claimant was put on notice about his orders not being entered and confirmed, yet did nothing about it. A.S. Goldmen also maintained that WCAP was traded on NASDAQ and could be monitored from any reputable international paper. A.S. Goldmen asserted that claimant's presence in the country is irrelevant to the issue of his responsibility to monitor his account. A.S. Goldmen further asserted that claimant did not order his WCAP sold until October 4, 1996 and maintained that claimant is solely responsible for his alleged losses.

Respondent Frederick Birk, through his representative and counsel, Dan A. Druz, Esq. a sole practitioner located in Manasquan, New Jersey failed to file an Answer to the Statement of Claim.

RELIEF REQUESTED

Claimant Douglas A. Kahn requested \$5,000.00 in actual damages and assignment of WCAP to A.S. Goldmen, or in the alternative, actual damages of \$3,500.00 and assignment of WCAP to A.S. Goldmen; interest at the rate of 10% per Cal. Code Civ Pro 685.010 from February 27, 1996; punitive and other damages allowable.

Respondent A.S. Goldmen requested that claimant's claim be denied in its entirety, plus costs and attorneys fees.

OTHER ISSUES CONSIDERED AND DECIDED

The arbitrator reviewed and considered all submissions regarding respondent A.S. Goldmen & Company, Inc.'s Motion to Dismiss. The arbitrator denied the motion.

Pursuant to Section 10302 of the NASD Code of Arbitration Procedure, respondent Frederick Birk was sent the Statement of Claim via regular mail and was given the opportunity to respond, which he failed to do. In addition, an overdue answer notice and notice of the identity of the arbitrator were sent via certified mail and the signed return receipt card is on file with the NASD Regulation, Inc.

Pursuant to the by-laws of the NASD Regulation, Inc., the arbitrator determined that respondent Frederick Birk had notice of the claim, and was required to submit to this arbitration proceeding; and is therefore, bound by the arbitrator's ruling and determination.

AWARD

Pursuant to Section 10302 of the NASD Code of Arbitration Procedure, a single Public Arbitrator, John T. Collentine, was selected to review the matter in controversy between the parties set forth in submissions to Arbitration signed by the claimant on August 22, 1996 and by respondent A.S. Goldmen & Company, Inc. on November 20, 1996.

And, the Arbitrator, having considered the proof of the parties, has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Respondents A.S. Goldmen & Company Inc. and Frederick Birk are jointly and severally liable and shall pay to claimant Douglas A. Kahn \$2,630.00 in actual damages.
2. Respondents A.S. Goldmen & Company, Inc. and Frederick Birk are jointly and severally liable and shall pay to claimant Douglas A. Kahn, interest at the rate of 10% per annum from March 25, 1996 to the date of payment of the award.
3. The parties shall bear their respective costs.
4. The \$125.00 filing fee previously deposited with the National Association of Securities Dealers Regulation, Inc. by the claimant Douglas A. Kahn shall be retained by the NASD Regulation, Inc. Respondents A.S. Goldmen & Company, Inc. and Frederick Birk are jointly and severally liable and shall pay to the claimant Douglas A. Kahn \$125.00 as reimbursement of the filing fee.

AFFIRMATION

I, **JOHN T. COLLENTINE**, do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my oath and award.



Signature of Arbitrator

DATE OF DECISION: February 11, 1997