

AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimants

Vladimir J. Kalas and Eva Kalas

96-04426

Name of Respondents

Sterling Foster & Company, Inc.
Charles J. DiStefano
Adam R. Lieberman

REPRESENTATION

Claimants Vladimir J. Kalas and Eva Kalas ("Claimants") were represented by Timothy J. O'Connor Esq. of the law firm of Ainsworth, Sullivan, Tracy, Knauf, Warner & Ruslander, P.C., Albany, New York.

Respondents Sterling Foster & Co. ("Sterling Foster") and Adam R. Lieberman ("Lieberman") were represented by Joseph D'Elia Esq. of the Law Offices of Joseph D'Elia, Huntington, New York.

Respondent Charles J. DiStefano ("DiStefano") was not represented.

CASE INFORMATION

Claimants filed their Statement of Claim on October 3, 1996.

Claimants signed a Submission Agreement naming Respondents Sterling Foster and DiStefano on July 1, 1996.

Claimants signed a Uniform Submission Agreement naming Sterling Foster, DiStefano and Lieberman on July 14, 1999.

Respondents DiStefano, Lieberman and Sterling Foster (collectively "Respondents") filed a Joint Statement of Answer and Response to the Statement of Claim on January 7, 1997.

Sterling Foster submission agreement was executed by Adam Lieberman, President/CEO of Sterling Foster & Co., Inc. on January 8, 1997.

DiStefano signed his Submission Agreement on January 7, 1997.

Lieberman did not sign a Uniform Submission Agreement.

HEARING INFORMATION

Hearing Date/Sessions: May 27, 1999/two sessions

Hearing Location: Albany Marriott, Albany, New York

CASE SUMMARY

Claimants alleged, among other things, that Respondents breached their fiduciary duty to Claimants; made material misrepresentations; and, engaged in excessive trading in Claimants' account to generate excessive commissions.

Claimants alleged that they first made contact with DiStefano in August 1992 by way of a cold call. Claimants alleged that when they first spoke with DiStefano he expressly advised DiStefano of his desire to invest monies to assure the availability of ample funds for Claimants' childrens' education and for Claimants' long term goal of assuring a financially secure retirement. Claimants alleged that from the time they opened their account with Respondents, Respondents systematically used Claimants' account to make concentrated purchases of speculative securities.

Claimants alleged that their account sustained out-of-pocket losses of \$70,470. Claimants alleged that in addition to these out of pocket losses their account sustained further damages as measured by any one of the standard market indices, including the S&P 500 Index, U.S. Treasury Bond Index, and straight 9% interest damages which through March 1996, totaled \$96,820, \$91,662 and \$81,701 respectively. Claimants also asserted that the account had a high commission cost ratio of 9.7%.

Claimants alleged that Respondents intentionally and inappropriately utilized their securities savings portfolio as a repository for excessive trading activity in concentrated speculative issues, namely, Lazer Gate Systems, Inc., Franklin Ophthalmic Warrants, American Bingo and Gaming and Advanced Voice Technology. Claimants alleged that Respondents used the Claimants' account to generate excessive commissions.

Claimants alleged that Respondents, as a result of the above listed actions committed, negligence, misrepresentation, securities malpractice, common law fraud and breach of fiduciary duty.

Respondents categorically denied all allegations of wrongdoing as asserted by Claimants in their Statement of Claim. Respondents maintained that Claimants assertions of common law fraud were without particularity and demanded a more particularized statement of allegations. Respondents further asserted that Claimants' request for punitive damages is beyond the power afforded to the arbitrators under New York Law.

Respondents maintained that Claimants sought speculative investments through their purchase of each of the above listed securities. Respondents also maintained that Claimants received exactly what they desired from Sterling Foster: investment products with the potential of substantial appreciation.

Respondents stated that Claimants' investment losses were solely due to unfavorable market factors and that Respondents cannot be accountable for the same.

Respondents maintained that Claimants were aware of the speculative nature of the securities that they purchased through Sterling Foster. Respondents maintained that both Claimants had strong educational backgrounds and clearly had the capacity to understand the import and consequences of their investment decisions. Respondents maintained that Claimants were experienced investors who often received investment advice from sources outside of Respondents. Respondents also maintained that Claimants' increased awareness of the fluctuations associated with their securities was further demonstrated through their pattern of trade. Respondents maintained further that Claimants had the capacity to bear the risks of the investments at issue.

Respondents raised the following affirmative defenses: that Claimants understood the risks inherent in their investments; that the Claimant assumed the risks associated with their investments; Respondent acted in good faith without intent to deceive or act recklessly with respect to the Claimants; Respondent mailed both confirmation and monthly account statements which were received by Claimants in a timely fashion, and Claimants failed to complain; and that all transactions were properly effectuated by Respondents.

RELIEF REQUESTED

Claimants requested, in their Statement of Claim, damages in the amount of \$91,662. This amount included an out-of-pocket loss calculation of \$70,470. Claimants also requested an award of NASD filing fees, NASD, forum fees, NASD arbitrator fees, expert witness fees, costs and disbursements and punitive damages of \$50,000.

Respondents requested that the Statement of Claim be dismissed in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

Claimants, at the hearing, 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, Claimants have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

Sterling Foster and Lieberman filed a hearing postponement request which the panel did not receive prior to the hearing and which was received by NASD Regulation on May 28, 1999 and by Claimants' counsels office the day of the hearing. Upon not receiving Sterling Foster and Lieberman's request, the panel delayed the start of the hearing for one hour and then decided to proceed. After the panel learned that NASD Regulation had received the postponement request on May 28, 1999, the Chairman permitted Claimants an opportunity to respond to the postponement request, which Claimants filed on July 13, 1999. Upon review of Respondents' postponement request, dated May 25, 1999, and Claimants' objection dated July 13, 1999, the undersigned arbitrators determined that no further hearings would be held and closed the record.

Lieberman failed to file with the NASD Regulation, Inc. Office of Dispute Resolution ("NASD Regulation") a properly executed submission to arbitration, but was required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure ("the Code") and having answered the claim, is bound by the determination of the arbitration panel on all issues submitted.

AWARD

After considering the pleadings, the testimony, 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. That Respondent Charles J. DiStefano was found guilty of security brokerage malpractice and breach of fiduciary duty and that Respondents Sterling Foster & Co., Inc. and Adam R. Lieberman were guilty of actual fraud and that Sterling Foster & Co., Inc., Adam R. Lieberman, and Charles J. DiStefano are jointly and severally liable and shall pay to Vladimir J. Kalas and Eva Kalas the amount of \$98,875 for illegal commissions charged and for failure to sell stock as directed. Interest on \$98,875 is awarded at 9% simple interest per annum from February 24, 1995 until the date the award is paid.
2. That Respondents Sterling Foster, Charles J. DiStefano, and Adam R. Lieberman are jointly and severally liable for, and shall pay to Vladimir J. Kalas and Eva Kalas punitive damages in the amount of \$50,000. The award of punitive damages is awarded as a result of Respondents outright and intentional fraud. The panel finds its authority for

punitive damages in Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995) and its progeny.

3. That each party shall bear its own costs and expenses, including attorney's fees, with the exception of Other Costs and Forum Fees specifically addressed below.
4. That any all relief requests not specifically addressed herein are denied in their entirety.

OTHER COSTS

Pursuant to Rule 10333 of the Code, Respondent Sterling Foster was assessed a member surcharge of \$350, which remains due and owing. Sterling Foster was assessed a postponement fee for the postponement of the April 30, 1997 hearing date which it paid.

FORUM FEES

~~Rule 10333 of the Code defines a hearing session as any meeting between the arbitrators and the parties including a prehearing conference, which lasts four (4) hours or less. Therefore, pursuant to Rule 10332(c) of the Code, the following Forum Fees are assessed.~~

(2 hearing sessions x \$750) = \$1,500

Forum fees are assessed against Respondents Sterling Foster, DiStefano, and Lieberman jointly and severally. NASD Regulation shall refund to Claimants their hearing session deposit of \$750.

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

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Date Award Signed

Concurring Arbitrators' Signatures

8/2/99

Donald G. Hatt
Donald G. Hatt, Esq., Chairman
Public Arbitrator

I, Donald Hatt, do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed the instrument which is my Award.

Neil J. Carey, Panelist
Public Arbitrator

I, Neil J. Carey, 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.

Arnold M. Kaplan, Panelist
Industry Arbitrator

I, Arnold M. Kaplan, 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.

Date Served by NASD Regulation: August 3, 1999


Date Award Signed

Concurring Arbitrators' Signatures

Donald G. Hatt, Esq., Chairman
Public Arbitrator

I, Donald Hatt, do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed the instrument which is my Award.

7/27/99


Neil J. Carey, Panelist
Public Arbitrator

I, Neil J. Carey, 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.

Arnold M. Kaplan, Panelist
Industry Arbitrator

I, Arnold M. Kaplan, 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.

Date Served by NASD Regulation: August 3, 1999

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Date Award Signed

Concurring Arbitrators' Signatures

Donald G. Hatt, Esq., Chairman
Public Arbitrator

I, Donald Hatt, do hereby affirm pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed the instrument which is my Award.

Neil J. Carey, Panelist
Public Arbitrator

I, Neil J. Carey, 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.

7/24/99



Arnold M. Kaplan, Panelist
Industry Arbitrator

I, Arnold M. Kaplan, 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.

Date Served by NASD Regulation: August 3, 1999