

9 809018

AWARD
NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Name of Claimants

D. Vincent Cerrito and Theresa Fe McCarthy

vs.

#96-04542

Name of Respondents

Daniel M. Porush
Ira Boshnack

REPRESENTATION OF PARTIES

Claimants D. Vincent Cerrito and Theresa Fe McCarthy ("Claimants") were represented by Timothy J. O'Connor, Esq., Ainsworth Sullivan Tracy Knauf Warner & Ruslander, PC, Albany, NY.

Respondents Daniel M. Porush and Ira Boshnack (collectively "Respondents") did not appear.

CASE INFORMATION

The Statement of Claim was filed October 14, 1996.
Claimants' Uniform Submission Agreement was signed October 24, 1996.

Statement of Answer was filed by Respondent Boshnack was filed on May 28, 1997.
Statement of Answer was filed by Respondent Porush was filed on June 18, 1997.
Respondent Porush's Submission Agreement was signed on May 27, 1997.
Respondent Boshnack failed to submit an executed agreement to arbitrate.

The Statement of Claim was
Claimants' Uniform Subm

statement of Answer was
Statement of Answer was
Respondent Porush's Sub
Respondent Boshnack

HEARING INFORMATION

Pre-hearing conference dates/sessions: May 27, 1997/one session
February 13, 1998/one session
March 13, 1998/one session

Hearing date/sessions: July 20, 1997/one session

Hearing Location: 403 New Karner Road, Albany, NY

CASE SUMMARY

Claimants alleged that they are husband and wife and that they were contacted by Respondents about various investments and induced to authorize unsuitable transactions. Claimants further alleged that Respondents, through a scheme of misrepresentations and fraudulent sales practices, breached their fiduciary duty to Claimants and violated state and federal securities laws as well as the rules and regulations of the securities industry. Specifically Claimants alleged that Respondents persuaded them, through fraudulent misrepresentations and omissions of material facts, to invest in Octagon, Inc. ("Octagon") and Select Media Corporation ("SMC"). Claimants alleged that Respondents intended to defraud Claimants and solely for the benefit of Respondents.

9809018

In his filed Statement of Answer, Respondent Porush ("Porush") denied the allegations set forth in the Statement of Claim. Porush specifically raised the affirmative defenses of a failure to state a claim upon which relief can be granted; the application of New York law; claims barred by the applicable statute of limitations; Claimants authorized all transactions; Porush acted in good faith; Porush never had any direct dealings with Claimants; claim fails to plead fraud with particularity and with specific facts; damages had no proximate cause with any act by Porush; Claimants did not rely on anything Porush said; Porush had no fiduciary duty to Claimants; assumption of risk; failure to mitigate damages; and ratification.

In his filed Statement of Answer, Respondent Boshnack ("Boshnack") denied the allegations set forth in the Statement of Claim. Boshnack does not have sufficient information to form a belief as to whether he ever solicited or handled any transaction in Claimants' accounts. Boshnack maintained that Claimants only complained about transactions in which losses were sustained but not about the profitable transactions. Boshnack denied all liability to Claimants.

RELIEF REQUESTED

Claimant requested an award in the amount of \$575,000.00 as well as lost opportunity damages of \$200,000.00, as well as all fees and costs attributable to this arbitration.

Respondents Boshnack and Porush requested that the claims asserted against them be denied.

OTHER ISSUES CONSIDERED & DECIDED

Respondent Boshnack did not file with the NASD Regulation, Inc. Office of Dispute Resolution (the "NASD") a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 of the NASD Code of Arbitration Procedure ("Code") and Boshnack answered the claim. The NASD is bound by the determination of the arbitration panel on all issues submitted.

The parties in attendance at the hearing 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 originals remain on file with the NASD.

CONCLUSIONS OF ARBITRATORS

The only witness was Claimant Cerrito. He testified that his wife's name had been added to the stock merely for convenience, and she was not involved in any dealings with Respondents. He also testified that he knew nothing of Porush, and had very little to do with Boshnack, that practically all of his dealings had been with Eric Blumen ("Blumen"); that he had no complaints about the Select Media stock, had no complaints an initial purchase and sale of Octagon stock in August; in fact, made a handsome profit. Claimant Cerrito stated that his sole complaint related to Octagon stock purchased in October, November and December 1994 on which he took losses of over \$600,000.00; he stated there was no unauthorized trading; that he purchased Octagon relying on his faith in Blumen, who said "there is real money to be made here." This was the sole fact on which Claimant Cerrito relied on for which Claimants felt Respondents should be held liable in damages.

The arbitrators found that Blumen's statement was opinion only, and falls far short of fraud or misrepresentation, negligence, or malpractice. Hence, it is the unanimous decision of the panel that Claimant has failed to sustain the burden of proof to establish liability on the part of Respondents.

9809018

AWARD

After considering the pleadings, the testimony, and 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 the Statement of Claim is dismissed; and
2. That each party shall bear its own costs and expenses, with the exception of forum fees as specified below; and
3. That any and all relief not specifically stated herein is denied.

OTHER COSTS

Pursuant to Rule 10319 of the Code, Respondents Porush and Boshnack are assessed \$500.00, one-half of the adjournment fee of \$1,000.00, which has been invoiced.

FORUM FEES

Pursuant to Rule 10332(b) of the NASD Code, a hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less.

3 Prehearing sessions x \$1,000.00 = \$3,000.00

1 Hearing sessions x \$1,000.00 = \$1,000.00

Total Forum fees = \$4,000.00

Forum Fees are assessed to at \$1,333.33 to Claimants and \$1,333.33 to each Respondent. Claimant shall receive credit for the \$1,000.00 hearing session deposit previously submitted to the NASD, leaving a net forum fee assessment for Claimants of \$333.33. Each Respondent is assessed \$1,333.33 in forum fees.

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

4 04518

AFFIRMATION AND CONCURRING ARBITRATOR'S SIGNATURE

I, **DONALD G. HATT, ESQ.**, do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

9/14/98
DATE

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

Date Decision was Served by NASD:

Upheld DEC 26, 1998

AFFIRMATION AND CONCURRING ARBITRATOR'S SIGNATURE

I, **MAUREEN McCAULEY ,ESQ.**, do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

Sept. 21, 1998
DATE

Maureen^{MA} McCauley
Maureen McCauley, Public Arbitrator

Date Decision was Served by NASD:

October 28, 1998

AFFIRMATION AND CONCURRING ARBITRATOR'S SIGNATURE

I, **SHELDON DINOWITZ**, do hereby affirm, pursuant to Article 7507 of the Civil Procedure Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

9/13/98
DATE


Sheldon Dinowitz, Industry Arbitrator

Date Decision was Served by NASD: September 22, 1998