

AWARD

NASD Regulation, Inc. Office of Dispute Resolution

In the Matter of the Arbitration Between

Prudential Securities Incorporated.

Claimant

v.

96-04702

Kirk E. Dempsey,

Respondent

REPRESENTATION OF PARTIES

Prudential Securities Incorporated ("Claimant") was represented by Steven P. Gomberg, Esq., Gomberg Kane & Fischer, Ltd., 208 South LaSalle Street, Suite 1800, Chicago, Illinois 60604.

Kirk E. Dempsey ("Respondent") was represented by Lindsay Brew, Esq., Miller, Pitt & McAnally, P.C., One South Church Avenue, Suite 900, Tucson, Arizona 85701-1620.

CASE INFORMATION

Claimant's Statement of Claim was filed on or about October 21, 1996. Claimant's Submission Agreement was signed on October, 1996.

Respondent's Statement of Answer was filed: January 7, 1997. The NASD Office of Dispute Resolution does not have a record of Respondent filing a Submission Agreement.

HEARING INFORMATION

The Arbitration Panel held a hearing on September 3 and 4, 1997 in Phoenix, Arizona for a total of three (3) sessions

CASE SUMMARY

Claimant, Prudential Securities Incorporated ("Claimant"), alleged that the Respondent, Kirk E. Dempsey ("Respondent"), entered into a Promissory Note on May 10, 1994, (the "Note"), which by its terms, Respondent agreed to repay the sum of \$430,548.08 in forty-three equal monthly installment payments of \$10,012.75 beginning with October, 1994 and ending with April, 1998, plus interest at the rate of 6% per annum. Furthermore, pursuant to the terms

of the Note, should Respondent's net commission check after taxes not meet or exceed the monthly installment, Respondent would be required to make up the arrears. Claimant alleged that the Note provided for the payment of the entire amount due in the event of the termination, for any reason, of employment during the term of the Note. In addition, Claimant alleged that Respondent was not entitled to any unpaid transitional compensation if Respondent resigned or was terminated for cause. Respondent resigned from Prudential on May 31, 1996, and there was a remaining balance due on the Note in the amount of \$230,293.16, plus interest. On or about July 23, 1996, Claimant tendered a demand to Respondent for the balance due under the Note, including arrears plus interest. Claimant alleges that to date Respondent has failed and refused to honor his obligation to Prudential Securities Incorporated under the Note.

Respondent filed an Answer on or about January 7, 1997. Respondent alleged that Prudential would be opening an office on the northwest side of Tucson and that Respondent would be released from any obligation if Prudential failed to open such an office in eighteen months. Respondent also alleged that Prudential promised that he would be able to keep his own personal secretary and would be paid \$5,000.00 per year in expenses to help him meet her salary. Respondent further alleged that Prudential never took any steps to establish a branch on the northwest side of Tucson. Respondent also alleged that Prudential hired away his secretary to be an operations manager and ceased the \$5,000.00 supplemental expenses previously paid to Respondent.

Prudential filed a Reply to Respondent's Answer on January 20, 1997.

RELIEF REQUESTED

Claimant requested an award in the amount of:

- The principal balance due and owing under the Note in the amount of \$230,293.16;
- Interest on the balance due and owing under the Note from 06/04/1996 to 09/03/1997, at the contract rate of 6% per annum (\$37.86 per day) in the amount of \$17,302.02;
- Interest on the balance due and owing under the Note at the contract rate of 6% (\$37.86 per day) from 09/03/1997 to date of payment;
- Arrears on the Note in the amount of \$3,987.29; and
- Attorneys fees in the amount of \$17,006.00 and costs in the amount of \$2,865.40 as agreed to under the terms of the Note; and
- Any other relief as the Arbitrators deemed just.

Respondents denied the claims asserted against them and asked the panel to award them costs and attorneys' fees.

OTHER ISSUES CONSIDERED & DECIDED

Respondent did not file with NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to §10201 of the NASD Code of Arbitration Procedure (the "Code") and having answered the claim, appeared and testified at the hearing is bound by the determination of the arbitration panel on all issues submitted.

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 and the post-hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Kirk E. Dempsey is liable for, and shall pay to, Prudential securities Incorporated the sum of \$210,630.77 plus interest at the rate of 6% per annum from October 13, 1997 until paid. Respondent Kirk E. Dempsey is further liable for, and shall pay to Prudential Securities Incorporated the sum of \$11,000 as an award of attorneys' fees.

2. All other claims/requests for relief not specifically awarded herein are, and each of them, denied with prejudice.

3. Forum fees shall be divided evenly amongst the parties.

FORUM FEES

Forum fees are calculated at the rate of \$750 per hearing session and \$300 for each pre-hearing conference, if any. There were three (3) sessions x \$750 = \$2,250 in forum fees. Pursuant to Rule 10205(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 Rule 10205(c) of the Code, 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 \$750 previously deposited with NASD Regulation, Inc. Office of Dispute Resolution by the Claimant.

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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 \$ 350 previously paid by the Claimant.

Additional forum fees in the amount of \$375 (\$1,125 - \$750) are assessed by the arbitrators against the Claimant.

Additional forum fees in the amount of \$1,125 are assessed by the arbitrators against the Respondent.

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

Dated

Mark Leibsohn

/s/

November 14, 1997

Mark Leibsohn,

Dissenting

Industry Arbitrator, Presiding Chair

Concurring Arbitrators:

Maurice O. O'Neil

/s/

November 14, 1997

Maurice O. O'Neil

Industry Arbitrator

Roy R. Petsch

/s/

November 20, 1997

Roy R. Petsch

Industry Arbitrator