

AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Marvin Gauger

98-00133

Names of Respondents

Josephthal Lyon & Ross, Incorporated
Steve Oates

REPRESENTATION

For Claimant: Curtis Carlson, Esq. of Carlson & Bales, P.A., Miami, FL.

For Respondent Josephthal Lyon & Ross, Incorporated ("Josephthal"): John E. Bersin, Esq., Associate General Counsel, Josephthal & Company, Incorporated, New York, NY.

For Respondent Steve Oates ("Oates"): Jack Stein, Esq. and Gary M. Miller, Esq. of Stein, Rosenberg & Winikoff, P.A., Ft. Lauderdale, FL.

CASE INFORMATION

Statement of Claim filed on January 12, 1998.

Claimant's Submission Agreement signed on October 7, 1998.

Statement of Answer filed by Respondents on March 26, 1998.

Respondent Josephthal's Submission Agreement signed on April 27, 1999.

Respondent Oates did not file a properly executed Submission Agreement (see "Other Issues").

HEARING INFORMATION

A telephonic pre-hearing conference which lasted one (1) session was conducted with the Arbitration Panel on July 24, 1998.

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The evidentiary hearing which lasted five (5) sessions was conducted in Boca Raton, Florida on April 27, 28, and 29, 1999.

CASE SUMMARY

Claimant's Statement of Claim alleged unsuitability, unauthorized trading, and churning which caused losses of over \$200,000.00 in approximately eight months. Claimant alleged that without his authority, Oates exercised complete control over his account and engaged in transactions that were unsuitable for the account, excessive in view of the investment aims and objectives of Claimant, and executed without conferring with, or obtaining Claimant's approval.

Claimant further alleged the following: that at all material times, Oates was a registered representative employed by Josephthal in the West Palm Beach office; that all of Oates' acts were in the scope of his employment with Josephthal; and, that Josephthal is vicariously liable for Oates' acts under the appropriate control person statutes, the doctrine of respondeat superior, and because Josephthal failed to properly supervise Oates' activities allowing Oates to commit the fraud and other improper acts.

Respondent Josephthal alleged the following: that each and every trade was authorized in advance by the Claimant; that Claimant on three separate occasions deposited money into the Josephthal account to pay for transactions, thus ratifying these trades; that Claimant previously had an account at Everen Securities, Inc. which was fully margined in aggressive-growth and speculative securities; that Claimant's account contained a margin debit of almost \$100,000.00 when it was transferred to Josephthal; that Claimant also invested in high interest mortgages, and subsequent to Josephthal, had opened accounts at Waterhouse Securities, Inc. and Everen Securities, Inc. in which he again traded speculative securities on margin; that, far from being unsophisticated, Claimant had an admitted net worth of \$2.5 million, and his Josephthal account represented less than 10% of his total net worth; that Oates compiled a significant due diligence file on each of the securities he recommended and that any decline in the value of these securities was the result of unforeseeable market forces; that the Claimant or someone acting on his behalf "doctored" certain documents in support of his unauthorized trading claims, including a letter which allegedly shows a forged signature of Oates; and, that Claimant failed to meet his burden of proof with respect to the churning claim, inasmuch as the Claimant failed to allege a portfolio turnover ratio.

Respondent Oates maintained that Claimant directed, authorized and approved all transactions executed in his account. Oates further maintained that the transactions were at all times suitable and consistent with the Claimant's plainly stated investment goals. In addition, Oates denied any and all allegations of liability and asserted numerous affirmative defenses against Claimant.

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RELIEF REQUESTED

Claimant requested an award of \$450,000.00 comprised of compensatory damages, punitive damages, out-of-pocket losses, interest, costs, and reimbursement of commissions paid.

Respondent Josephthal requested an award which dismissed all claims, assessed the costs and expenses of this proceeding against Claimant, and all such other and further relief as the Arbitration Panel deemed just and necessary.

Respondent Oates requested an award against Claimant plus costs and expenses.

OTHER ISSUES CONSIDERED & DECIDED

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 remains on file with NASD Regulation, Inc.

Respondent Oates did not file with the NASD Regulation, Inc., Office of Dispute Resolution a properly executed submission to arbitration but is required to submit to arbitration pursuant to Rule 10301 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.

AWARD

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

Respondents Josephthal and Oates are liable, jointly and severally, and shall pay to the Claimant compensatory damages of \$180,000.00.

Claimant's claims for punitive damages, out-of-pocket losses, pre-judgment interest, costs, and reimbursement of commissions paid are denied.

OTHER FEES

Pursuant to Rule 10332 of the Code, Claimant has paid to NASD Regulation, Inc. the claim filing fee of \$200.00.

Pursuant to Rule 10333 of the Code, Respondent Josephthal has paid to NASD Regulation, Inc.

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the member surcharge of \$1,500.00.

Pursuant to Rule 10333 of the Code, Respondent Josephthal has paid to NASD Regulation, Inc. the pre-hearing process fee of \$600.00.

Pursuant to Rule 10333 of the Code, Respondent Josephthal has paid to NASD Regulation, Inc. the hearing process fee of \$2,500.00.

FORUM FEES

Pursuant to Rule 10332 of the Code, forum fees in the amount of \$4,500.00 (one (1) pre-hearing conference-Panel x \$750.00 plus five (5) hearing sessions x \$750.00) are assessed as follows:

Claimant is assessed forum fees in the amount of \$2,250.00 for which NASD Regulation, Inc. shall retain the \$750.00 previously deposited by the Claimant leaving a balance due in the sum of \$1,500.00.

Respondent Josephthal is assessed forum fees in the amount of \$1,125.00.

Respondent Oates is assessed forum fees in the amount of \$1,125.00.

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

Concurring Arbitrators' Signatures

Name

Public/Industry

/s/

Public

Gloria O. North, Esq.

/s/

Public

James M. Dunne

/s/

Industry

Edward S. Burstein

Date of Decision: June 11, 1999

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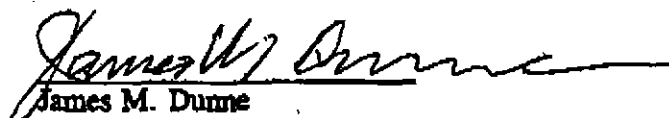
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JUN 10 1999

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