

AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Evelyn J. Fetcho

98-00317

Name of Respondent

Liberty Securities Corporation

REPRESENTATION

For Claimant Evelyn J. Fetcho ("Claimant"): Kalju Nekvasil, Esq. and Stephen Krossschell, Esq. of Goodman & Nekvasil, P.A., Clearwater, Florida.

For Respondent Liberty Securities Corporation ("Respondent"): Lynnette E. McGuinness, Esq. of Buchanan Ingersoll, P.C., Miami, Florida. Prior to the final evidentiary hearing, Leslie Smith, Esq. of Buchanan Ingersoll, P.C. appeared as counsel for Respondent.

CASE INFORMATION

Statement of Claim filed on January 27, 1998.

Claimant's Submission Agreement signed on December 23, 1997.

Statement of Answer filed by Respondent on April 1, 1998.

Respondent's Submission Agreement signed on March 30, 1998.

HEARING INFORMATION

A telephonic pre-hearing conference which lasted one (1) session was conducted with the arbitration panel on October 13, 1998. In addition, a telephonic pre-hearing conference which lasted one (1) session was conducted with the chairperson on November 12, 1998.

The evidentiary hearing which lasted six (6) sessions was conducted in Boca Raton, Florida on February 22, 24, and 25, 1999.

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CASE SUMMARY

Claimant alleged that Respondent, acting through Thomas Piechowicz ("Piechowicz"), recommended that Claimant invest in unregistered debenture bonds and collateral trust bonds issued by C'est Lestial Waters, Inc. ("CWI"). Claimant alleged that Respondent, acting through Piechowicz, made false representations to Claimant in connection with these recommendations, including, *inter alia*, that these bonds were conservative, safe investments. Claimant further alleged that Respondent failed to conduct a proper due diligence review of these bonds and failed to make material disclosures to Claimant concerning their lack of due diligence. Specifically, Claimant alleged Respondent failed to disclose the following: the SEC had issued a cease and desist order against Piechowicz for his activities relating to his participation in the sale of unregistered collateral trust bonds called C'est Lestial Waters, Inc.; the Pennsylvania Securities Commission issued a cease and desist order against Piechowicz for his activities involving the offering of unregistered securities in the form of debenture bonds and collateral trust bonds called C'est Lestial Waters, Inc.; and, the Ohio Division of Securities issued a cease and desist order which involved a finding, *inter alia*, that Piechowicz sold unregistered, non-exempt securities to Ohio residents and acted as a salesman without a license in violation of the Ohio Revised Code.

Claimant next alleged that Respondent's actions violated the Florida Securities and Investor Protection Act and federal securities laws. Claimant also brought claims of breach of contract, common law fraud, breach of fiduciary duty, negligence and gross negligence, unjust enrichment, and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. Claimant alleged that Respondent was responsible for the actions of Piechowicz under the doctrines of respondeat superior, apparent authority, and inherent agency power. Claimant further alleged that Respondent was a controlling person under the Florida Securities and Investor Protection Act (and under the Securities Act of 1933 and the Securities Exchange Act of 1934 which are statutorily incorporated in the Florida Blue Sky Act) and, therefore, had supervisory responsibility over the activities of Piechowicz. Claimant alleged that Respondent violated the Florida Securities and Investor Protection Act and Florida Administrative Code and was liable pursuant to Claimant's common law claims because it failed to properly supervise Piechowicz. Finally, Claimant asserted claims for attorneys' fees and costs the entitlement to which, and amount thereof, Claimant alleged, are properly decided by a court of competent jurisdiction because the arbitration panel lacks jurisdiction under Florida law to decide the issue of attorneys' fees.

Respondent denied the allegations set forth in Claimant's Statement of Claim. Respondent further maintained the following: that it is not vicariously liable for the acts of its broker where the broker lacked actual or apparent authority for his actions. Respondent's broker, Piechowicz, was not authorized to sell CWI bonds and was, therefore, acting outside the scope of his actual authority. Respondent only authorized its brokers to sell pre-approved securities which consisted of specified mutual funds and annuities. Respondent's brokers were prohibited by federal and

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state law, as well as Respondent's own policies and contracts of employment, from selling non-approved and unregistered securities.

Respondent alleged that Piechowicz did not have apparent authority to sell CWI bonds and that Piechowicz was acting adversely to Respondent and for his own personal benefit. Respondent claimed it was unaware of and did not receive a commission on the sale of the CWI bond to Claimant and that Claimant never became a customer of Respondent.

In addition, Respondent alleged the following: that the Claimant did not justifiably rely on any apparent authority of Piechowicz to act on behalf of Respondent; that Claimant never opened an account with Respondent, never visited Respondent's office, never received or reviewed any literature, confirmations or account statements from Respondent, never spoke with any of Respondent's personnel other than Piechowicz and did not purchase her CWI bond through Respondent; that even after Claimant learned that her investment in CWI was in jeopardy, Claimant made no attempt to contact Respondent to inquire as to the status of her investment or seek a refund; and, that Claimant never identified Respondent in any of the three questionnaires she completed for the U.S. Securities and Exchange Commission, the Pennsylvania Securities Commission or the Pennsylvania Insurance Department regarding her investment in CWI.

Respondent next alleged the following: that Claimant's claims under Florida Statutes Chapter 517 are barred by Claimant's failure to file suit within two years after learning of facts giving rise to an alleged claim against Respondent; that Claimant received an inquiry letter concerning CWI from the U.S. Securities and Exchange Commission in February, 1995; that she never received the first interest payment on her CWI bond due in June, 1995; that by September, 1995 Claimant had filed a proof of claim in connection with the CWI bankruptcy proceedings; that nevertheless, Claimant did not file her Statement of Claim until December, 1997; and, that accordingly, Claimant's claims under Chapter 517 are barred by the applicable two year statute of limitations.

Additionally, Respondent asserted the following: Claimant's claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (the "UTCPL") is also without merit. At the time Claimant purchased the CWI bond in June, 1994, she was not a resident of Pennsylvania. Accordingly, this sale was not within the scope of governed transactions by the UTCPL. Furthermore, Claimant did not purchase the CWI bond from Respondent and, therefore, Respondent and Claimant did not possess the "buyer-seller" relationship required by the UTCPL.

Finally, Respondent alleged that Claimant's claim that her loss was caused by Respondent's failure to properly supervise and monitor its broker is unpersuasive. Respondent asserted that it owes its customers a duty to oversee its brokers' activities; however, under the facts of this case, Claimant's connection with Respondent was too attenuated to provide a basis to impose a duty on Respondent.

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RELIEF REQUESTED

Claimant requested actual damages in the amount of \$125,000.00, lost opportunity damages and rescission interest under the Florida Securities and Investor Protection Act, attorneys' fees and costs, punitive damages, and such other relief as is deemed proper and necessary by the arbitration panel.

Respondent requested a dismissal of all claims and that it be awarded its costs and expenses incurred in the defense of this action.

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.

On January 29, 1999, Respondent filed a motion to postpone the hearings scheduled to commence on February 22, 1999, which was opposed by the Claimant and denied by the panel.

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:

Respondent is liable and shall pay to the Claimant the sum of \$125,000.00 as compensatory damages. Respondent shall pay interest at the prevailing Florida statutory rate on this amount from the date of the Award until the date of payment of the Award if Respondent fails to pay Claimant its compensatory damages within 30 days of the date of this Award.

Claimant's request for punitive damages is denied.

Respondent is liable and shall pay to the Claimant the sum of \$8,533.00 as reasonable costs.

Respondent is liable and shall pay to the Claimant the sum of \$200.00 as reimbursement of Claimant's filing fee.

The Arbitration Panel finds that Respondent violated the Florida Securities and Investor Protection Act Section 517.211. The arbitration panel further determined that the issue of attorneys' fees in this matter is to be determined by a court of competent jurisdiction.

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Respondent's requests for costs and expenses are denied.

OTHER FEES

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

Pursuant to Rule 10333 of the Code, the Respondent has paid to NASD Regulation, Inc. the member surcharge of \$1,500.00.

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

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

FORUM FEES

Pursuant to Rule 10332 of the Code, the arbitration panel has assessed forum fees in the amount of \$5,550.00 (one (1) pre-hearing conference-panel x \$750.00 plus one (1) pre-hearing conference-chairperson x \$300.00 plus six (6) hearing sessions-panel x \$750.00) as follows:

Respondent is assessed the sum of \$5,550.00 for which NASD Regulation, Inc. shall retain the \$750.00 previously deposited by Respondent in partial satisfaction thereof leaving a balance due to NASD Regulation, Inc. of \$4,800.00.

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

Concurring Arbitrators' Signatures

Name

Public/Industry

/s/

Industry

Geraldine A. Genco

Arbitrator Genco respectfully abstains from executing this award.

/s/

Public

William T. England, Esq.

/s/

Public

John A. LaBarbera

Date of Decision: April 8, 1999

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Respondent's request for costs and expenses are denied.

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Industry

William T. England, Esq.

Public

John A. LaBarbera

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Date of Decision: _____

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Name

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Industry

William T. England, Esq.

Public


John A. LaBarbera

Public

Date of Decision: 4-6-1999