

AWARD

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Fred E. White, Jr.

98-00753

Names of Respondents

Duke & Co., Inc.
Philip Teseo
Robert A. Bartlett

REPRESENTATION

For Claimant: Philip E. Downer, III, Esq. of the law firm of Downer, Kyle & Wilhite, L.L.C., Shreveport, Louisiana.

Respondent Duke & Co., Inc. ("Duke") did not appear.

For Respondent Philip Teseo ("Teseo"): Adam Silverstein, P.C., New York, New York.

Respondent Robert A. Bartlett ("Bartlett") did not appear at the evidentiary hearing.

CASE INFORMATION

Statement of Claim filed: February 25, 1998.

Claimant's Submission Agreement signed on: February 23, 1998.

Respondents did not file Statements of Answer.

Respondent Teseo's Submission Agreement signed on: September 22, 1998.

Respondents Duke and Bartlett did not file executed Submission Agreements.

HEARING INFORMATION

A telephonic pre-hearing conference was conducted with the Chairperson on February 8, 1999. The evidentiary hearing was conducted in New Orleans, Louisiana on February 9, 1999 lasting two sessions.

CASE SUMMARY

Fred E. White, Jr. ("Claimant") alleged the following: that Philip Tesco, Robert Bartlett and Duke & Co., Inc. (sometimes jointly referred to as "Respondents") used means and instrumentalities of interstate commerce and of the mails to make untrue statements of material facts and omitted to state material facts necessary to make the statements made in light of the circumstances under which they were made not misleading, specifically including but not limited to, that Respondents had superior knowledge with regard to the entity, Paravant Computer Systems, Inc. ("Paravant"), including contracts of Paravant, the trading of Paravant stocks and warrants by other brokerage firms and that Respondents were acting on Claimant's behalf and watching Claimant's "backside." Respondents utilized high pressure sales tactics and made specific representations and assurances that Paravant stocks and warrants would increase, ultimately convincing Claimant that the transactions proposed by Respondents were riskless and were required for the proper handling of his account. Claimant alleged that Respondents engaged in acts, practices and courses of conduct which operated as a fraud and deceit upon Claimant and upon which Claimant reasonably relied in connection with the purchases of Paravant common stock and Paravant warrants. Claimant further alleged that Respondents directly and indirectly employed devices, schemes, and artifices to defraud and engaged in transactions, acts and practices and courses of business which operated as a fraud or deceit upon Claimant. Claimant alleged that Respondents engaged in acts, practices and courses of business unsuitable for Claimant by causing Claimant to place essentially all investments in the single entity Paravant. Claimant further alleged that Respondents violated their duty of good faith and fair dealing owed to Claimant. Respondent Tesco made specific representations that he was a principal or owner of Duke and Company, Inc. and that he was the supervisor of the broker Mr. Robert Bartlett to convince Claimant to maintain his account at Duke and Company, Inc. for Tesco's administration which ultimately caused Claimant to lose all sums invested.

Respondent Tesco maintained the following: that the Claimant failed to prove the necessary elements of a claim for securities fraud based upon misrepresentation. The Claimant did not prove, or even allege falsity with regard to most of the statements attributed to Mr. Tesco. There is no colorable claim of reliance by the Claimant, who was investing hundreds of thousands of dollars simultaneously in high-risk securities at other brokerage firms. Furthermore, the direct cause of Claimant's damage was his own failure to settle a trade he ordered, and not any action or omission by Mr. Tesco.

Respondent Tesco further maintained there was no allegation of a specific misrepresentation by Mr. Tesco as to risk. As for allegations of a general failure to disclose risk, "the law does not require disclosure of the starkly obvious...that there are risks inherent in stock market investments is, in our view, information so basic that it need not be disclosed by the broker." Bischoff v. G.K. Scott & Co., 687 F. Supp. 746, 751 (EDNY 1986).

RELIEF REQUESTED

Claimant requested that an award be entered in his favor and against the Respondents in the amount of One Hundred Sixty-Three Thousand Five Hundred Twenty and No/100 Dollars (\$163,520.00) for damages, Thirteen Thousand Eight Hundred Thirty-Nine and No/100 Dollars (\$13,839.00) for attorney's fees, Two Thousand Fifty-One and 20/100 Dollars (\$2,051.20) for

costs and expenses, legal interest from the date of demand, and other damages specifically including, but not limited to, punitive damages as may be deemed fair and just by this panel.

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

OTHER ISSUES CONSIDERED & DECIDED

The parties present 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, the parties present at the hearing agreed to receive conformed copies of the Award while the original(s) remain on file with NASD Regulation, Inc.

Respondent Duke did not appear. Upon review of the file and the representations made by/on behalf of the Claimant, the undersigned arbitrators have determined that Respondent Duke has been properly served with the Statement of Claim pursuant to Rule 10314 of the NASD Code of Arbitration Procedure (the "Code"). The undersigned arbitrators have also determined that Respondent Duke has received due notice of the hearing as required under Rule 10315 of the Code and that arbitration of the matter would proceed pursuant to Rule 10318 of the Code.

Respondent Duke 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 Code and is bound by the determination of the arbitration panel on all issues submitted.

On September 23, 1998, the arbitration panel granted the Claimant's Motion to Exclude and Bar Presentation of Facts or Defenses on behalf of the Respondents Duke & Co., Inc., Philip Teseo and Robert A. Bartlett with the result that Respondents' participation in the hearing of the arbitration was limited to cross-examination of witnesses and/or documents and the Respondents were otherwise precluded and barred from presenting any matter, argument or defenses in accordance with the provisions of the Code.

On October 5, 1998, NASD Regulation, Inc. was informed that Respondent Bartlett had filed for protection under Chapter 7 of the United States Bankruptcy Code. Therefore, all proceedings regarding this individual were stayed and the arbitration panel did not make any determinations with respect to Mr. Bartlett.

Prior to the cross-examination of Claimant, Respondent Teseo asserted a motion to dismiss the claim of fiduciary duty and the claim of fraud. The arbitration panel granted Teseo's motion to dismiss the claim of fiduciary duty and deferred ruling on the motion to dismiss the claim of fraud until the conclusion of the evidentiary hearing.

Further, Respondent Teseo asserted a motion to dismiss for failure of Claimant to provide sufficient answers to discovery propounded on Claimant, or in the alternative, to preclude any testimony or evidence of Claimant's securities and/or financial experience. The arbitration panel denied the motions.

AWARD

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

There is no finding of fraud on the part of Respondent Teseo.

Respondents Duke and Teseo are responsible for placing Claimant in unsuitable securities and shall be jointly and severally liable to Claimant in the amount of \$113,610.00. Respondent Duke shall be individually liable for the additional amount of \$49,910.00.

Interest at the rate of eight (8%) percent per annum shall accrue on the above sums from February 25, 1998 until the date of payment of the Award.

Claimant's requests for costs and expenses, including attorneys' fees, and punitive damages are denied.

FORUM FEES

Pursuant to Rule 10332c of the Code of Arbitration Procedure, forum fees in the sum of \$1,800.00 (one pre-hearing conference-Chairperson \$300.00 plus two sessions x \$750.00) are assessed as follows:

Claimant is assessed the sum of \$900.00 for which NASD Regulation, Inc. shall retain the \$750.00 previously deposited in partial satisfaction thereof leaving a balance due in the amount of \$150.00.

Respondents Duke and Teseo are assessed the sum of \$900.00, jointly and severally.

OTHER FEES

Pursuant to Rule 10319 of the Code of Arbitration Procedure, Respondent Teseo has paid to NASD Regulation, Inc. the \$750.00 adjournment fee for the hearings scheduled for October 6 and 7, 1998.

Pursuant to Rule 10333 of the Code of Arbitration Procedure, Respondent Duke shall pay to NASD Regulation, Inc. the \$1,500.00 member surcharge, the \$600.00 pre-hearing process fee and the \$2,500.00 hearing process fee.

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

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

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Date of Decision: March 10, 1999