

Award
NASD Regulation, Inc.

In the Matter of the Arbitration Between:

Eva R. Abers vs. Everen Securities, Inc., Carol Lee and David Walby.

Case Number: 99-963

Hearing Site: Albuquerque, New Mexico

REPRESENTATION OF PARTIES

Claimant, Eva R. Abers ("Abers"), hereinafter referred to as "Claimant": Leonard J. Meyer, Esq., Zimmerman, Axelrad, Meyer, Stern & Wise, P.C., Houston, Texas.

Respondents, Everen Securities, Inc., ("Everen"), Carol Lee ("Lee") and David Walby ("Walby"), hereinafter collectively referred to as "Respondents": Bruce Lewitas, Esq. Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed on or about: March 2, 1999

Claimant signed the Uniform Submission Agreement: March 31, 1999

Statement of Answer and Motion to Dismiss filed by Respondents on or about: June 21, 1999

Respondent, Walby, signed the Uniform Submission Agreement: June 9, 1999

Claimant's Response to Respondents' Motion to Dismiss filed on or about: July 13, 1999

Claimant's Motion to Change Venue filed on or about: November 11, 1999

Respondents' Response to Motion and Cross-Motion to Change Venue filed on or about: November 24, 1999

Claimant's Response to Response and Cross-Motion to Change Venue filed on or about: December 13, 1999

CASE SUMMARY

Claimant asserted the following causes of action: breach of fiduciary obligation, making unsuitable recommendations, failure to properly monitor Claimant's account, common law negligence, breach of contract, failure to supervise, and liability under respondeat superior. The causes of action relate to the Respondents' handling of Claimant's investment account.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and contended that the five mutual funds purchased by Claimant were entirely suitable for her needs and objectives. Respondents argued that they spent much time researching the mutual funds and discussing the objectives of the planned portfolio with Claimant. Respondents further contended that all deferred sales charges

were fully disclosed and, in light of Claimant's past experience with such funds, she was already aware of the charges associated with "back-end loaded funds." Respondents averred that to the extent Claimant was damaged in any manner, it was caused directly by her selling on August 31, 1998, which was done in direct contravention of Respondents' advice. Respondents asserted the following affirmative defenses: Claimant has filed to state a claim upon which relief may be granted; Claimant authorized and approved the trades in questions; Claimant ratified the trades in questions; Claimant's claims are barred by her own negligence; Claimant assumed the risk associated with the trades in questions; Claimant failed to complain in a timely matter of the trades in questions; the claim is barred by Laches; Claimant failed to mitigate her losses; the market acted as an intervening/superseding cause in this matter.

RELIEF REQUESTED

Claimant requested: \$62,656.47 in capital losses, plus reimbursement of her loss of return on her investments calculated at an annualized 5.12% of her losses, attorney's fees, consultant fees and related expenses, interest, filing fees and costs of this proceeding.

Respondents requested a finding of no liability and a dismissal of all allegations.

OTHER ISSUES CONSIDERED AND DECIDED

Respondents Everen Securities, Inc. and Carol Lee did not file with the NASD Regulation, Inc. Office of Dispute Resolution a properly executed submission to arbitration but are required to submit to arbitration pursuant to the Code and, having answered the claim, appeared and testified at the hearing, are bound by the determination of the Panel on all issues submitted.

The panel denied Claimant's Motion to Change Venue and Respondents' Cross-Motion to Change Venue.

The Panel Denied Respondents' Motion to Dismiss.

Respondents' made an oral Motion for Directed Verdict at hearing, which Motion was denied by the Panel.

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.

AWARD

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

- 1.) Claimant's Statement of Claim is dismissed with prejudice;
- 2.) That other than Forum Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter;
- 3.) That any relief not specifically enumerated is hereby denied with prejudice.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee = \$ 150.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated persons at the time of the events giving rise to the dispute. In this matter, the member firm is a party.

Member surcharge = \$1,000.00

Pre-hearing process fee = \$ 600.00

Hearing process fee = \$1,500.00

Adjournment Fees

Adjournments requested during these proceedings:

February 8-10, 2000, requested by Everen Securities, Inc. = \$500.00 (waived by Panel)

Forum Fees and Assessments

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing sessions with Panel x \$500.00 = \$1,000.00

Pre-hearing conferences: November 16, 1999 1 session

December 15, 1999 1 session

Four (4) Hearing sessions x \$500.00 = \$2,000.00

Hearing Dates: April 26, 2000 2 sessions

April 27, 2000 2 sessions

Total Forum Fees 6 sessions = \$3,000.00

The Panel has assessed \$3,000.00 of the forum fees to Everen Securities, Inc.

NASD Regulation, Inc. Office of Dispute Resolution
Arbitration # 99-963
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Fee Summary

NATIONAL ASSOCIATION
OF SECURITIES DEALERS
RECEIVED
MAY 05 2000

Claimant, Eva R. Abers, be and hereby is solely liable for:

<u>Initial Filing Fee</u>	= \$ 150.00
<u>Total Fees</u>	= \$ 150.00
<u>Less payments</u>	= \$ 650.00
<u>Balance Due NASD Regulation, Inc.</u>	= \$ (500.00)

Respondent, Everen Securities, Inc., be and hereby is solely liable for:

<u>Member Fees</u>	= \$ 3,100.00
<u>Forum Fees</u>	= \$ 3,000.00
<u>Total Fees</u>	= \$ 6,100.00
<u>Less payments</u>	= \$ 3,100.00
<u>Balance Due NASD Regulation, Inc.</u>	= \$ 3,000.00

All balances are due to NASD Regulation, Inc.

Concurring Arbitrators' Signatures

George N. Roy, CPA
Public Arbitrator, Presiding Chair

Signature Date

Patrick Halter
Patrick Halter
Public Arbitrator

5.2.2000
Signature Date

Rodney O. McWhinney, Esq.
Industry Arbitrator

Signature Date

Date of Service (For NASD office use only)

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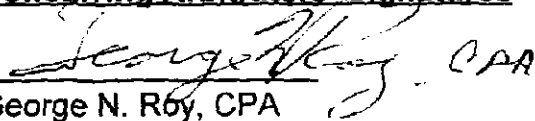
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