

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimants

David M. Bush and Lesly S. Bush

Case Number: 19-02152

vs.

Respondent

Mid Atlantic Capital Corporation

Hearing Site: San Francisco, California

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

Nature of the Dispute: Customer vs. Member

This case was decided by an all-public panel.

The evidentiary hearing was conducted by videoconference.

REPRESENTATION OF PARTIES

For Claimant David M. Bush (“David Bush”) and Lesly S. Bush (“Lesly Bush”): Richard B. Foshier, Esq. and Bruce D. Oakes, Esq., Oakes & Foshier, LLC, St. Louis, Missouri.

Hereinafter, David Bush and Lesly Bush are collectively referred to as “Claimants”.

For Respondent Mid Atlantic Capital Corporation (“Respondent”): Derek C. Anderson, Esq., Winget Spadafora & Schwartzberg, LLP, Boulder, Colorado and Andrew Stanton, Esq., Jones Day, Pittsburgh, Pennsylvania.

CASE INFORMATION

Statement of Claim filed on or about: August 1, 2019.

Claimants signed the Submission Agreement: August 1, 2019.

Statement of Answer filed by Respondent on or about: October 11, 2019.

Respondent signed the Submission Agreement: October 9, 2019.

CASE SUMMARY

In the Statement of Claim, Claimants asserted the following causes of action: breach of fiduciary duty; common law fraud; negligence; negligent misrepresentation; omission; breach of contract;

restitution; and negligent supervision. The causes of action relate to Claimants' investment in JADDA Secured Senior Mortgage Fund, LLC.

In the Statement of Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimants requested:

1. Approximately \$1,000,000.00 in compensatory damages;
2. Punitive damages;
3. Pre-judgment interest;
4. Attorneys' fees;
5. Costs;
6. Filing and forum fees; and
7. Such other and further relief which this Panel deems just and proper under the circumstances.

In the Statement of Answer, Respondent requested:

1. Claimants take nothing by way of their Statement of Claim;
2. Attorneys' fees;
3. Costs;
4. This matter be expunged from Respondent's regulatory records;
5. All FINRA forum fees be assessed to Claimants; and
6. Other and further relief as the Panel deems just and appropriate.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

On March 11, 2020 Respondent filed a Motion to Dismiss pursuant to Rule 12206(a) of the Code of Arbitration Procedure ("Code"). On May 11, 2020, Claimants filed a response opposing the Motion to Dismiss. On May 18, 2020, Respondent filed its reply. On July 13, 2020, the Panel heard oral arguments on the Motion to Dismiss. By Order dated July 14, 2020, the Panel denied the Motion to Dismiss without prejudice.

During the evidentiary hearing, Respondent made a verbal motion to dismiss before Claimants' case-in-chief. The Panel denied the motion.

The Panel has provided an explanation of the decision in this award. The explanation is for the information of the parties only and is not precedential in nature

The Award in this matter may be executed in counterpart copies.

FINDINGS

The majority of the Panel decided that Claimants proved the suitability violation set forth as an allegation in their Statement of Claim, but did not prove the fraud or inadequate supervision causes of action.

AWARD

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

1. Respondent is liable for and shall pay to Claimants the sum of \$240,562.00 in compensatory damages.
2. Respondent is liable for and shall pay to Claimants interest on the above-stated sum at the rate of 7.00% per annum from April 26, 2007 through and including September 17, 2017.
3. The Panel did not make a determination with respect to Respondent's expungement request.
4. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages and attorneys' fees, are denied.

Dissent of Arbitrator Robert Favole

I would find for Respondent on its statute of limitations defense.

In April 2007, Claimants invested a sizable sum through Respondent's representative. Claimants' Statement of Claim was not submitted until August 2019. The statute of limitations is three years for claims sounding in tort, including breach of fiduciary duty. *Choi v. Sagemark* (2017) 18 Cal.App.5th 308, 322.

In a fiduciary case, "once a plaintiff becomes aware of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation." *Hobbs v. Bateman Eichler, Hill Richards* (1985) 164 Cal.App.3d 174 at 201-02.

The question whether Claimants had a "reason to at least suspect that a type of wrongdoing has injured them" is "not hypertechnical". *Choi*, 18 Cal.App.5th at 323. "So long as a suspicion exists, it is clear that the [Claimant] must go find the facts; she cannot wait for the facts to find her." *Id.* at 329.

Claimants testified they did not read the documents they signed in 2007, including the product placement memorandum, the Subscription Agreement, and documents relating to accredited status. The required "[r]easonable diligence does not consist of ignoring a private placement memorandum received prior to making an investment." *WA Southwest 2, LLC v. First American Title* (2015) 240 Cal.App.4th 148, 157.

Claimants' first priority was income with the expectation of a 9% annual return. Claimants received the expected return until 2010 and received no further periodic payments. They

received and reviewed the 2011 K-1 showing the value of their initial investment down 43%; the 2012 K-1, down 53%; and then 2013, down 93%.

Lesly Bush testified she thought their investment was a risk-free investment, she was “horrified” when the interest payments ceased in 2010 and “confused” as the value decreased. Yet, Claimants did nothing until 2019. Certainly in the face of all these disclosures and events, Claimants “discovered or should have discovered that [*Respondent’s*] advice had led them to trouble.” *Choi, id.* at 328 (emphasis added).

Once Claimants had a basis for suspicion, “it is not reasonable for them to rely on reassuring comments from a broker”, (*Volk v. D.A. Davidson* (9th Cir. 1987) 816 F.2d 1406, 1409), especially where Claimants presented “no facts indicating an affirmative effort on the part of [*Respondent*] to mislead them or conceal” the facts. *Id.* at 1416.

One might conclude the equities are with Claimants based on age, finances, nature of the investment and its percentage of their assets. But the equities do not vitiate their reasonable basis for suspicion, excuse their inaction or overcome the law of limitations.

I respectfully dissent.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

FINRA Dispute Resolution Services assessed a filing fee* for each claim:

Initial Claim Filing Fee	= \$ 1,725.00
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*The filing fee is made up of a non-refundable and a refundable portion.

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 person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge	= \$ 2,475.00
Member Process Fee	= \$ 5,075.00

Hearing Session Fees and Assessments

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

Three (3) pre-hearing sessions with the Panel @ \$1,300.00/session	= \$ 3,900.00
Pre-Hearing Conferences: July 13, 2020	1 session
September 21, 2020	1 session
January 12, 2021	1 session

Seven (7) hearing sessions @ \$1,300.00/session		= \$	9,100.00
Hearings:	September 14, 2021	2 sessions	
	September 15, 2021	2 sessions	
	September 16, 2021	2 sessions	
	September 17, 2021	1 session	

Total Hearing Session Fees	= \$	13,000.00
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The Panel has assessed \$5,850.00 of the hearing session fees jointly and severally to Claimants.

The Panel has assessed \$7,150.00 of the hearing session fees to Respondent.

All balances are payable to FINRA Dispute Resolution Services and are due upon receipt.

ARBITRATION PANEL

Alden Sharp Adkins	-	Public Arbitrator, Presiding Chairperson
Gary Kostow	-	Public Arbitrator
Robert James Favole	-	Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument, which is my award.

Concurring Arbitrators' Signatures

Alden Sharp Adkins

Alden Sharp Adkins
Public Arbitrator, Presiding Chairperson

09/29/2021

Signature Date

Gary Kostow

Gary Kostow
Public Arbitrator

09/29/2021

Signature Date

Dissenting Arbitrator's Signature

Robert James Favole

Robert James Favole
Public Arbitrator

09/29/2021

Signature Date

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September 30, 2021

Date of Service (For FINRA Dispute Resolution Services use only)