

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Richard Mulvihill

Case Number: 20-03557

vs.

Respondent
Lee Kramer

Hearing Site: Washington, D.C.

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. Associated Person

This matter proceeded pursuant to Rule 12800 of the Code of Arbitration Procedure (“Code”).

REPRESENTATION OF PARTIES

Claimant Richard Mulvihill: Keith Mulvihill, Frederick, Maryland.

For Respondent Lee Reuel Kramer: Brian J. Riordan, Esq. and Kathleen M. Klein, Esq., Clausen Miller P.C., Chicago, Illinois.

CASE INFORMATION

Statement of Claim filed on or about: October 19, 2020.

Richard Mulvihill signed the Submission Agreement: December 3, 2020.

Statement of Answer filed on or about: January 27, 2021.

Lee Kramer signed the Submission Agreement: January 27, 2021.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: negligence, breach of fiduciary duty, unsuitable investments, and lack of diversification. The causes of action relate to investment in FSIC II, an alternative and non-publicly traded security.

Unless specifically admitted 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, Claimant requested compensatory damages in the amount of \$50,000.00.

In the Statement of Answer, Respondent requested that Claimant's claim be denied in its entirety.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges having read the pleadings and other materials filed by the parties.

On March 19, 2021, Respondent filed a Motion to Dismiss pursuant to Rule 12206 of the Code of Arbitration Procedure ("Code"). On March 24, 2021, Claimant filed a response opposing the Motion to Dismiss.

The Arbitrator 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 The explanation is for the information of the parties only and is not precedential in nature.

AWARD

After considering the pleadings, the Arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows:

1. Respondent's Motion to Dismiss pursuant to Rule 12206 of the Code is granted by the Arbitrator without prejudice to any right Claimant has to file in court; Claimant is not prohibited from pursuing his claims in court pursuant to Rule 12206(b) of the Code.
2. FINRA Dispute Resolution Services shall retain the \$600.00 filing fee that Claimant deposited previously.
3. Respondent is liable for and shall pay to Claimant \$300.00 to reimburse Claimant for one-half of the filing fee previously paid to FINRA Dispute Resolution Services.
4. Any and all relief not specifically addressed herein is denied.

ARBITRATOR'S FINDING

Authority to File a Claim - Claimant executed a Power of Attorney in 2009 granting broad powers to his wife to act on his behalf. It further states that if his wife "is unable, unavailable, or unwilling to be my agent," Claimant's son may act for his father. In a letter dated March 18, 2021, Claimant's wife states that she is unable to be her husband's attorney-in-fact "at this time." Respondent argues that this letter does not indicate whether Claimant's son had authority to act as POA when this claim was filed. If Claimant's son's authority to act on the date of filing was critical to the outcome of this matter, it would be appropriate to request a follow up letter from Claimant's wife indicating whether she was unable to act at that time. However, for the reasons stated below, this is a moot point. Respondent also contends that there has been no showing that Claimant either consented to a POA for this arbitration, or is incapacitated under the terms of the POA agreement. No such showing is required. Section 2 of the POA states: "This general

power of attorney shall become immediately effective upon signing as of the date hereof and shall continue in full force and effect for an indefinite period of time until my revocation of this general power of attorney or my death, whichever comes first." Whether authority had passed from Claimant's wife to Claimant's son as of the date of filing remains unclear, but it is clear that one of them had the authority to file without Claimant's consent, and without any showing that Claimant was incapacitated.

Eligibility to File a Claim - Respondent argues that Claimant was ineligible to file a claim regarding the purchase of shares in FSIC II because the claim was filed more than six years after the purchase. FINRA Rule 12206 states: "No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule." Respondent argues that the event giving rise to the claim was the purchase of shares in FSIC II on November 6, 2013. Even if the triggering event was when the transaction cleared on November 27, 2013, Claimant would have had to file by November 27, 2019. FINRA did not receive this claim until October 19, 2020, almost seven years post-purchase. Thus, the claim is ineligible for arbitration. Where fraud or deceit is alleged, the event giving rise to a claim might be discovery of the wrongdoing, but that is not the case here. Claimant was well aware of the investment and was kept apprised of its progress. Investments can fluctuate in value, so if the clock did not start to tick until a loss occurred, Rule 12206 would be meaningless. Investments do not suddenly become unsuitable when they lose money; a perfectly suitable investment may decrease in value and a completely inappropriate purchase may enjoy a gain.

Merits of the Case - Claimant and his wife began investing with Respondent in or about April of 2009. At the time, Claimant sold plumbing equipment and earned a substantial annual income. Claimant listed his risk tolerance as "moderately aggressive" and indicated that he "agreed" with the following statement: "I am comfortable with investments that may frequently experience large declines in value if there is a potential for higher returns." On November 6, 2013, Respondent opened an account for Claimant with FSC Securities Corporation. Claimant invested in FSIC II, a non-publicly traded Business Development Company ("BDC"). Assuming the Claimant's far more modest calculation of his portfolio as of 2013 is correct, the FSIC II investment constituted 33% of his liquid net worth and 20% of his total net worth. This is a sizeable amount, but the record indicates that other investments were much more conservative (publicly traded stocks and bonds). Thus, the record does not indicate that this investment rendered the Claimant's overall investment portfolio unsuitably risky or imbalanced. With regard to diversification, Respondent alleges that Claimant invested in FSIC II to diversify because BDCs have a low correlation with equity markets and interest rates. Nothing in the record refutes this assertion. Nothing in the record indicates that Respondent was negligent or breached his fiduciary duty to Claimant. The Claimant received a prospectus and had several weeks to consider it. Whether Claimant fully understood the product is unclear, but it was readily apparent that he was investing a significant sum in a single security, and Claimant's investment history indicates that he was sophisticated enough to understand that securities can suffer losses. Nothing in the record indicates that the FSIC II shares were a fundamentally unsound investment. In fact, it appears that they held their value until a global catastrophe, Covid-19, caused widespread economic distress. Finally, it should be noted that Respondent disputes the amount of the alleged loss, arguing the sale of the shares was unsolicited and that if Claimant had retained the shares his loss would have been much smaller. Respondent also contends that the damage calculation fails to take into account dividends received on the shares. If this claim

had been eligible for arbitration and the claimant had established wrongdoing, there would have been a need for further evidence regarding damages.

FEES

Pursuant to the Code:

1. Non-Party FSC Securities Corporation has paid to FINRA Dispute Resolution Services the \$750.00 Member Surcharge and \$1,750.00 Member Process Fee previously invoiced.

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

ARBITRATOR

Geoffrey A. Drucker

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Sole 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.

Arbitrator's Signature

Geoffrey A. Drucker

Geoffrey A. Drucker
Sole Public Arbitrator

05/18/2021

Signature Date

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May 19, 2021

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