1994 WL 707000
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

The CHASE MANHATTAN BANK, N.A., Plaintiff,
v.
REMINGTON PRODUCTS, INC. and Victor K. Kiam II, Defendants.

No. 92 CIV. 7983 (MEL).
|
Dec. 19, 1994.

Attorneys and Law Firms

Hertzog, Calamari & Gleason, (Peter E. Calamari, **Mark H**. **Moore**, Gerald D. Silver, of counsel), New York City, for plaintiff.

Pollack & Greene, (Alan M. Pollack, Scott A. Sommer, Mitchell G. Mandell, of counsel), New York City, for defendants.

OPINION

LASKER, District Judge.

***1** Chase having prevailed on its motion for summary judgment, there remains the question of the extent of Remington and Kiam's liability.

I.

Both sides make valid arguments in their calculation of an appropriate Transaction Fee. As an initial matter, Chase's use of the July 25, 1992 "Remington Partnership Estimated Opening Balance Sheet" to value the Perlmutter Transaction was appropriate. The defendants object that Chase's recent reliance on the July 25 balance sheet is indicative of what they describe as Chase's persistent tendency to change its method of applying section 3 of the Engagement Agreement when doing so enhances the Transaction Value. While this may be true, Chase's current calculation is persuasive. The balance sheet specifies the particulars of Remington's refinancing—including the amount of cash contributions, new debt and the assumption of liabilities—and the defendants have presented no evidence to demonstrate that the balance sheet has not been prepared in accordance with generally accepted accounting principles. Because the right side of a balance sheet represents the source of a corporation's funds, Chase's method of basing its fee calculation on the right side of the July 25 balance sheet is consistent with the definition of Transaction Value contained in section 3 of the Engagement Agreement.

The defendants also object that the balance sheet was not introduced in a timely manner. While it is true that it did not appear as part of Chase's initial submission regarding damages, the defendants' laxity in matters of discovery and disclosure has been a persistent feature of this litigation and Chase's representation that it would have relied on the balance sheet sooner had the defendants been more forthcoming is acceptable. In any event, the critical question is whether the balance sheet's figures are accurate and dependable—and they appear to be—not when they were presented to the court.

Chase concludes from the July 25 balance sheet that the Transaction Value is $104,184,000.[1] Remington and Kiam contend that this figure is subject to four adjustments downward. The first—in the amount of $21,145,000—is the value of Kiam's equity in RPI, all of which Kiam contributed to RPC. The defendants' argue that Chase is not entitled under the Engagement Agreement to the inclusion of the assets which Kiam contributed to the refinancing of Remington. Chase responds that, because Kiam actually transferred his equity in RPI to RPC as part of the Perlmutter Transaction, the affected assets are includible within the definition of Transaction Value contained in section 3 of the Engagement Agreement and therefore should be included in Transaction Value.

Even if the language of section 3 of the Engagement Agreement is arguably susceptible to Chase's reading—a proposition far from clear—the inclusion of Kiam's own assets in the calculation of a fee for Chase's services would be so contrary to the intuitive expectation that a banker does not become entitled to a fee by reason of a client retaining assets that the client already owns, that such a reading would not be tenable unless it was the only reasonable interpretation of section 3. Clearly, it is not. As described in section 3, Transaction Value includes "the total proceeds and other consideration paid or contributed ... in connection with a Transaction...." The most reasonable interpretation of this language in the context of this case is that Transaction Value is made up of the value of assets received from third parties, not the value of retained assets. Chase's argument that Kiam's equity was in fact "contributed" to RPC in connection with RPC's formation is an unnatural formalism. It follows that Chase's calculation of the Transaction Value should be reduced by the $21,145,000 which Kiam contributed.[2] Chase's contention at oral argument that this reduction should in turn exclude the $5,280,000 which Perlmutter loaned to Kiam, and Kiam then contributed to RPI, is unpersuasive. If Kiam and Perlmutter had agreed that Kiam need not repay the $5,280,000, the argument that the corresponding equity should be attributed to Perlmutter, not Kiam, for purposes of calculating Chase's fee would have some merit. In such a case, the "loan" would have no economic impact on Kiam's investment in Remington. However, the record contains no evidence of such an agreement. Assuming that the defendants' representation that Kiam has incurred a bona fide obligation to Perlmutter is valid, Kiam has in fact increased his investment in Remington and Chase's argument fails.

***2** The three other downward adjustments that the defendants have proposed for the calculation of Transaction Value are without merit. They seek to reduce the Transaction Value by the amount of cash shown on the July 25 balance sheet because, they argue, this cash could have been used to reduce current liabilities. If the defendants' argument is taken to its logical extreme, the Transaction Value should be reduced by the value of *any* asset that could be sold and the proceeds used to reduce current liabilities.

The defendants also seek to deduct from Chase's proposed Transaction Value liabilities in the amount of $2,731,000 on the ground that they represent, in the defendants words, "liabilities of foreign corporate subsidiaries that were independent from and not assumed by the Kiam/Perlmutter joint venture." If by this description the defendants suggest that the liabilities are obligations for financial reporting purposes only, not bona fide obligations, the record is insufficient to determine whether this is true. RPC is presumed to be responsible for the liabilities reflected on the July 25 balance sheet in the absence of evidence that such treatment is inappropriate.

Finally, the defendants argue that the present value of the employment contract which Kiam received in connection with the Perlmutter Transaction is not includible in the computation of the Transaction Value. There are strong indications in the record that Isaac Perlmutter never had any intention of allowing—and in fact did not allow—Kiam to exercise appreciable authority over RPC's operations. For example, Perlmutter testified on deposition that he had little regard for Remington's top management and had made replacing them a priority. According to the same testimony, Kiam himself was removed from day-to-day control of Remington by June of this year at the latest. In such circumstances, it is reasonable to conclude that Kiam's employment contract constitutes additional consideration paid in exchange for Kiam's equity in the company (with the added attraction from Remington's standpoint of being tax deductible).

In sum, after subtracting from Chase's proposed Transaction Value of $104,184,000 Kiam's retained equity of $21,145,000, the Transaction Value of the Perlmutter Transaction is determined to be $83,039,000. Applying the staggered percentages specified in section 3(c) of the Engagement Agreement,[3] this results in a Transaction Fee of $1,188,475. Crediting the $350,000 that Remington has already paid in accordance with the Engagement Agreement, the defendants remain liable to Chase for a Transaction Fee of $838,475.

Under section 4(a) of the Engagement Agreement, Remington agreed to pay Chase's reasonable expenses in connection with its role as Remington's financial advisor. Chase has adequately described and documented its disbursements and therefore is entitled to the $65,570 it has requested. Under section 4(b) of the Engagement Agreement, Remington was obligated to pay a $20,000 advance on expenses at the time the Agreement was executed. If this advance was paid, it may be subtracted from the amount now due.

II.

***3** The defendants do not dispute that, under section 5 of the Engagement Agreement, they are liable to Chase for reasonable attorney's fees and the parties have made numerous submissions on the issue of what amount is reasonable. Chase has submitted affidavits by Peter Calamari as well as Hertzog, Calamari and Gleason's bills. Chase admits that attorney's fees in this case are unusually high but contends that the defendant's practice of mounting as lengthy and extensive a defense as possible is the cause of the excessive expense. The defendants have submitted affidavits by Alan Pollack and Milton Yusim, who specializes in the valuation of legal services. They argue that various methods employed by Hertzog, Calamari and Gleason—including "block" billing, use of .25 hour rather than .10 hour increments and "team staffing"—unreasonably inflated the firm's bills.

Upon careful review of the material submitted, and consideration of the several factors relevant to an inquiry as to the reasonableness of attorney's fees—including the difficulty of the issues presented and the skill required to resolve them; the lawyers' experience, apparent ability and reputation; the time and labor expended; the amount involved and the benefit accruing to the client as a result of the services; and the customary fees charged for similar services—I find that the defendants have failed to introduce any significant evidence that Hertzog, Calamari & Gleason's bills and billing methods are out of line with standard practices in this district in cases of this type. Regardless of whether billing in smaller time increments, leaner staffing and more precise diary entries do or do not reduce legal fees, there is no basis for penalizing Chase for hiring counsel whose billing practices are common in its sector of the profession. The defendants have litigated this case to an extent disproportionate to the amount at issue. That this course of action has proven costly is not Chase's fault. Moreover, Chase's representation that it has promptly paid its counsel's fees throughout the course of this litigation further indicates that those fees were not excessive. As an experienced consumer of legal services, Chase is presumably capable of recognizing overbilling when it sees it. Chase is awarded attorney's fees of $451,767.

III.

Pre-judgment interest at a rate allowed by law is awarded, with respect to both the Transaction Fee and expenses, from August 18, 1992, the date of the Perlmutter Transaction closing memorandum. Post-judgment interest at a rate allowed by law is awarded from the date hereof as to all amounts due.

3

Submit judgment on notice.

All Citations

Not Reported in F.Supp., 1994 WL 707000

Footnotes

1 That is, the aggregate of the liabilities and equity of the newly-formed Remington Products Company ("RPC", as opposed to "RPI", the company Kiam formed in 1979) less $330,000 of RPC intra-company debt.

2 The record is somewhat unclear as to whether $21,145,000 is the correct amount of Kiam's retained equity. Several documents describing the Perlmutter transaction—including the closing memorandum of August 18, 1992—value Kiam's retained equity at $19,720,000. Because the July 25, 1992 balance sheet now relied on by Chase values Kiam's retained equity at the higher figure, however, valuing that equity at $21,145,000 is consistent with adoption of $104,184,000 (the figure Chase sought) as the starting point in determining Transaction Value.

3 That is:

1.25%	x	65,000,000	=	812,500
2.00%	x	15,000,000	=	300,000
2.50%	x	3,039,000	=	75,975
		$1,188,475		

(The record does not contain information sufficient to derive a Threshold Amount for the Perlmutter Transaction but the parties agree that the correct figure is $65,000,000.)

293 A.D.2d 273
Supreme Court, Appellate Division, First Department, New York.

GENERALE BANK, Plaintiff–Appellant,
v.
BELL SECURITY, INC., Defendant–Respondent.
[And a Third–Party Action].

April 4, 2002.

Synopsis
Creditor which hired security service to guard warehouse where debtor's collateral was stored brought breach of contract action against the service after much of the collateral was removed. The Supreme Court, New York County, Donna Mills and Sheila Abdus-Salaam, JJ., entered summary judgment in favor of security service, and creditor appealed. The Supreme Court, Appellate Division, held that: (1) removal of collateral from warehouse established security service's prima facie liability, and (2) extent of the services that creditor engaged security service to provide and whether such services encompassed the removal of items from warehouse by means of access other than the front door were questions of fact that precluded summary judgment.

Reversed.

West Headnotes (4)

[1] **Detectives and Security Guards**
Authority, duty, and liability of private detectives and security providers

Removal of collateral from warehouse that creditor hired security service to guard after obtaining temporary restraining order preventing debtor from removing its inventory from warehouse established security service's prima facie liability to creditor for breach of contract, even if actions of third parties caused the collateral's removal.

1 Cases that cite this headnote

[2] **Judgment**
Contract cases in general

Extent of the services that creditor engaged security service to provide and whether such services encompassed the removal of items from warehouse by means of access other than the front door were questions of fact that precluded summary judgment in creditor's action against service for breach of contract to guard warehouse and prevent removal of debtor's collateral.

1 Cases that cite this headnote

[3] **Damages**
Reparation by wrongdoer

Amount of creditor's settlement with debtor in action on debt represented set off against creditor's loss in its breach of contract action against security service, which allegedly allowed removal of collateral from warehouse that creditor had hired service to guard.

Cases that cite this headnote

[4] **Guaranty**
Release or loss of other securities
Secured Transactions
Disposition of collateral

Impairment of collateral subjects a creditor or guarantor to greater liability.

Cases that cite this headnote

Attorneys and Law Firms

**199 Mark H. Moore, for Plaintiff-Appellant.

Deborah DelSordo, for Defendant-Respondent.

MAZZARELLI, J.P., ANDRIAS, WALLACH, RUBIN and MARLOW, JJ.

Opinion

***273** Order, Supreme Court, New York County (Donna Mills, J.), entered on or about January 19, 2001, which granted defendant's motion to renew a prior order of the same court (Sheila Abdus Salaam, J.), denying defendant's motion for summary ***274** judgment and, upon renewal, granted defendant's motion and dismissed the complaint, unanimously reversed, on the law, with costs, the motion denied and the complaint reinstated.

Plaintiff Generale Bank is the creditor of third-party defendant Easy Trading, N.V., which owes some $6.6 million secured by a lien on its inventory stored at a Brooklyn warehouse. On July 19, 1994, plaintiff obtained a temporary restraining order preventing Easy Trading or its agents from removing, transferring or otherwise disposing of any inventory subject to the lien.

That same day, counsel for plaintiff sent a letter by facsimile transmission, confirming that "Bell Security will have two security guards watch the warehouse * * * If anyone attempts to remove any inventory from the warehouse, your guards should show them the order of the court" and inform counsel or plaintiff's vice president of the incident. Plaintiff's attorney included a copy of the temporary restraining order in the transmission. The address listed in the order transposed two digits in the Street number of the warehouse. However, both the letter and the cover sheet state the correct address. Moreover, it is clear that defendant actually did guard the warehouse located at 791 Kent Avenue (not 719) because plaintiff was billed some $60,000 for security services provided to that address over a period of five months.

On November 17, 1994, having obtained an order of seizure, plaintiff bank entered into a stipulation with the debtor permitting the bank to sell the collateral and apply the proceeds to the debt. However, ****200** when plaintiff's vice president gained access to the warehouse, he discovered that "more than three quarters of the inventory had been removed." Plaintiff thereafter settled its action against Easy Trading for $2.82 million, of which approximately $450,000 remains unpaid.

Plaintiff commenced this action in February 1996. In October 1999, defendant brought a motion for an order "[p]ursuant to CPLR 3212, granting summary judgment dismissing the summons and complaint." The moving papers contended that plaintiff could not prove that it sustained any damage as the result of defendant's malfeasance because plaintiff could offer only speculation regarding who stole the inventory and how the items—some 44,000 pieces of crystal and china—were removed from the warehouse. This motion was denied by the first order (Sheila Abdus Salaam, J.), entered on or about March 28, 2000. The court found issues of fact as to whether defendant was hired to prevent removal of items from the warehouse or merely to guard the front door, as defendant alleges.

***275** In September 2000, defendant submitted its second motion, denominated a motion to dismiss pursuant to CPLR 3211, which also sought renewal of the former CPLR 3212 motion. On September 18, 2000, the parties appeared before Justice Abdus–Salaam, who was engaged in the trial of another matter and who referred this and all other motions to the Trial Justice. It is apparent that trial began almost immediately because defendant states, "On September 21, 2000, following several days of testimony," the court undertook "to review the motions and determine whether there was a viable cause of action." The court's review culminated in the order appealed from, dismissing the complaint on the ground that "the lack of specificity in the 'letter agreement' and the misstatement of the location of the property in the Temporary Restraining Order annexed to this letter does not create a contract between the plaintiff Generale Bank and the defendant Bell Security." The court concluded, "Without a contractual relationship, or the meeting of the minds, the plaintiff's action fails."

[1] [2] It is abundantly clear that defendant provided security services to plaintiff, that property was removed from the premises secured by defendant and that plaintiff was damaged by the loss of its collateral. Under these facts, having actually undertaken performance, defendant would be prima facie liable to plaintiff for breach of contract even in the absence of a writing. The intervention of third parties is immaterial because such a breach of security is the immediate consequence of the lapse in security with which defendant is charged (*McKinnon v. Bell Security,* 268 A.D.2d 220, 700 N.Y.S.2d 469). The extent of the security services defendant was engaged to provide and whether such services encompassed the removal of items by means of access other than the front door merely present questions of fact for resolution at trial.

[3] [4] That plaintiff settled its action against the debtor is material only insofar as the amount of the settlement represents a set off against the total amount of plaintiff's loss. It is accepted that impairment of collateral subjects a

creditor or guarantor to greater liability (*see, Executive Bank v. Tighe,* 54 N.Y.2d 330, 337, 445 N.Y.S.2d 425, 429 N.E.2d 1054). In this case, plaintiff has been able to recover less than half of the amount owed by the debtor, and the unavailability of collateral securing the debt represents a significant monetary loss.

All Citations

293 A.D.2d 273, 741 N.Y.S.2d 198, 2002 N.Y. Slip Op. 02724

2002 WL 31546519
Only the Westlaw citation is currently available.
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)
United States Court of Appeals, Third Circuit.

TWIN COUNTY GROCERS, INC.; Twinco Services, Inc., Appellants,
v.
FOOD CIRCUS SUPERMARKETS, INC.; Joseph Azzolina, Sr.; Louis Scaduto; Grace Scaduto; Food King Inc; V & V Inc; Ronald Ginsberg; Mayfoods, Inc; Victor Laracca, L.J.V., Inc; William Michas; Francis Markets, Ltd; Neptune City Liquors, Inc; Donald P. Norkus; Gerard K. Norkus; Norkus Enterprises, Inc; Franelen Inc; Helen Paczkowski; Stanley Paczkowski; Harp Marketing Corp; Jack Pytluk; Martin Pytluk; Ruth Pytluk; Sidney Charles Markets, Inc.; Michael Zimmerman; Sidney Zimmerman; Charles H. Zimmerman; E. Dickerson & Son, Inc; C. Ronald Dickerson; Foodtown; Vincent Laracca, Digiorgio Corporation,

No. 02-1116.
|
ARGUED Oct. 29, 2002.
|
Decided Nov. 18, 2002.

On Appeal from the United States District Court for the District of New Jersey. (D.C. Civil No. 99-cv-05135). District Judge: The Honorable Garrett E. Brown, Jr.

Attorneys and Law Firms

Guy V. Amoresano, (Argued), Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, NJ, for Appellants.

Mark H. Moore, (Argued), Gregory E. Galterio, Jaffe & Asher, New York, NY, for Appellee.

Before NYGAARD, GREENBERG, and MICHEL,[*] Circuit Judges.

OPINION OF THE COURT

NYGAARD, Circuit Judge.

Appellants Twin County Grocers, Inc. and Twinco Services, Inc. appeal from an order of the District Court which granted summary judgment in favor of Appellee DiGiorgio Corp., the sole remaining defendant. Appellants allege as error the issues listed in paragraph I, taken from its brief. Because we conclude that the District Court did not err, we will affirm.

I.

The allegations of error asserted by Appellants are as follows:

1. The District Court erred by holding that the restrictive covenants were unenforceable against DiGiorgio.

2. The District Court erred by not ordering DiGiorgio to disgorge profits.

3. The District Court erred by holding that Twin was not injured by DiGiorgio's actions.

4. The District Court erred by holding that DiGiorgio had no duty to negotiate with Twin in good faith, or, alternatively, that that duty had not been breached.

5. The District Court erred by holding that DiGiorgio was not unjustly enriched.

II.

The facts and procedural history of this case are well known to the parties and the court, and it is not necessary that we restate them here. The court has heard oral argument on the issues presented to us in this appeal. The reasons why we write an opinion of the court are threefold: to instruct the District Court, to educate and inform the attorneys and parties, and to explain our decision. None of these reasons are presented here. We use a not-precedential opinion in cases such as this, in which a precedential opinion is rendered unnecessary because the opinion has no institutional or precedential value. *See* United States Court of Appeals for the Third Circuit, Internal Operating Procedure (I.O.P.) 5.3. Under the usual circumstances when we affirm by not-precedential opinion and judgment, we briefly set forth the reasons supporting the court's decision. In this case, however, we have concluded that neither a full memorandum explanation nor a precedential opinion is indicated because of the very extensive and thorough opinion filed by Judge Garrett E. Brown, Jr. of the District Court. Judge Brown's opinion adequately explains and fully supports its order and refutes the Appellants' allegations of error. Hence, we believe it wholly unnecessary to further opine, or offer additional explanations and reasons to those given by the District Court, why we will affirm. It is a sufficient explanation to say that, essentially for the reasons given by the District Court in its opinion dated the 11th day of December, 2001, we will affirm.

III.

In sum, for the foregoing reasons, we will affirm the order of the District Court.

All Citations

Slip Copy, 2002 WL 31546519

Footnotes

* Honorable Paul R. Michel, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

67 N.Y.2d 709
Court of Appeals of New York.

ALLEN & COMPANY INCORPORATED, Respondent,
v.
SHEARSON LOEB RHOADES, INC., Appellant.

Feb. 11, 1986.

Synopsis

Client of securities broker-dealer obtained arbitration award for dealer's failure to inform client that foreign corporation in which customer owned stock had made "offering" of shares and options in subsidiary, preventing client from taking advantage of opportunity to purchase securities. The Supreme Court, New York County, McCooe, J., vacated the arbitration award, and client appealed. The Supreme Court, Appellate Division, 111 A.D.2d 122, 489 N.Y.S.2d 500, reversed and reinstated the arbitration award, and dealer appealed. The Court of Appeals held that the dealer's own admissions in arbitration contradicted its assertions, on appeal, that any communication or acceptance of offer would have been illegal under federal securities laws.

Judgment of Appellate Division affirmed.

West Headnotes (1)

[1] **Alternative Dispute Resolution**
Award

Arbitration award to client of securities broker-dealer for its failure to timely notify client of offering of shares and options in newly formed subsidiary of company whose shares broker was holding in client's account was proper in that broker's own admissions in arbitration contradicted its assertions, on appeal, that any communication or acceptance of offer would have been illegal under federal securities laws.

2 Cases that cite this headnote

Attorneys and Law Firms

*****931 **850 *709** Gerald Kerner and Susan E. Amron, New York City, for appellant.

*****932 **851** David J. Freeman, David R. Foley and **Mark H. Moore**, New York City, for respondent.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division, 111 A.D.2d 122, 489 N.Y.S.2d 500, should be affirmed, with costs.

***710** As of August 15, 1980 plaintiff, Allen & Company, owned approximately 300,000 common shares of Pancontinental Mining Limited, an Australian company. The shares were held on Allen's behalf by defendant, Shearson Loeb Rhoades, Inc., in a foreign depository account in the name of ANZ Nominees, in Australia. By letter dated August 15, 1980, ANZ informed Shearson that Pancontinental was offering its shareholders as of that date shares and options in Pancontinental Petroleum Limited. The offering was not registered with the Securities and Exchange Commission. ANZ's letter bore the stamped legend, "*urgent. this is an important letter which requires your prompt attention,*" and concluded: "Instructions must be in our hands by 4th September, 1980, at the latest. In the absence of your specific instructions reaching this office by that date, we will lapse your entitlements."

Shearson did not, however, forward this letter to Allen. According to Allen, a Shearson broker first mentioned the offer offhandedly and without full particulars in a telephone conversation just before the offer expired, adding that Allen as an American citizen could not subscribe. By the time Allen received more information, consulted an attorney and informed Shearson that it wanted to subscribe, the offer had expired.

Allen sued for damages, but on Shearson's demand the matter was submitted to arbitration. Shearson's defense in the arbitration centered on two law issues. First, Shearson contended it could not legally have transmitted the letter or its contents to Allen because the offering was unregistered and that, had it done so, it would have violated section 5(c) of the Securities Act of 1933 (15 U.S.C. § 77e[c]), which makes it unlawful for any person directly or indirectly to offer to sell any unregistered security. In the alternative, Shearson claimed that even had Allen timely received the letter, it could not legally have exercised its right to buy unregistered securities in the United States, and thus suffered no harm. The arbitrators awarded Allen damages and Shearson moved, pursuant to CPLR 7511(b) and the Federal Arbitration Act (9 U.S.C. § 10), to set aside the award on the grounds that it was contrary to public policy as set forth in the Federal securities laws and irrational. Shearson's motion was granted by Special Term but the Appellate Division reversed and reinstated the award.

Shearson's position on the present motion, at bottom, rests on the very same two law issues it unsuccessfully tendered to ***711** the arbitrators—that it could not legally have transmitted the offer, and that Allen could not legally have accepted it; therefore, according to Shearson, an award of damages based on such illegal conduct cannot stand. But even assuming that an arbitration award were subject to vacatur on the ground that the arbitrators erroneously decided the questions of law submitted by the parties (*see, Matter of Maye [Bluestein],* 40 N.Y.2d 113, 118, 386 N.Y.S.2d 69, 351 N.E.2d 717), and even assuming that an arbitration award under the Federal Arbitration Act could be vacated on grounds other than those specified by statute (9 U.S.C. §§ 2, 10[a]–[d]), Shearson's own admissions in the arbitration contradict its assertions on this motion that any communication or acceptance of the offer would have been illegal.

Whether or not Shearson's transmittal of the August 15, 1980 letter to its customer would have constituted an offer to sell securities in violation of section 5(c) of the Securities Act of 1933, Shearson's own general counsel, testifying in the arbitration, acknowledged that a broker "can always legally speak to someone about an offering." He testified that Shearson did not *****933 **852** consider an oral communication regarding an offering a violation of section 5(c), and that Shearson had no policy barring its brokers from orally informing customers of such offerings. Indeed, Shearson offered testimony that its agent had in fact orally communicated the substance of Pancontinental's offer shortly after its receipt, which conflicted with Allen's proof that the communication was incomplete and untimely. Similarly, Shearson's own witness and correspondence indicated that Allen could have made arrangements to subscribe to the rights, thus contradicting the contention that Allen suffered no damage because it could not lawfully have accepted the offer.

WACHTLER, C.J., and MEYER, SIMONS, KAYE, ALEXANDER and TITONE, JJ., concur.

HANCOCK, J., taking no part.

Order affirmed, with costs, in a memorandum.

All Citations

67 N.Y.2d 709, 490 N.E.2d 850, 499 N.Y.S.2d 931