IN THE SUPREME COURT OF FLORIDA

NO.: 76,520
11TH CIRCUIT NO.: 89-5701

SAM SKURNICK,

RESPONDENT/APPELLANT

vs.

AL AINSWORTH,

PETITIONER/APPELLEE

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA

COMMENTS ON ANSWER BRIEF OF APPELLEE

Submitted By:

Sam Skurnick
143 Hoyt Street - 5J
Stamford, Ct. 06905

Tel:(203)357-9797

9/14/90

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE

Case No. 76,520
Eleventh Circuit 89-5701

SAM SKURNICK,

Respondent-Appellant

vs.

AL AINSWORTH,

Petitioner-Appellee

MOTION TO CONSIDER COMMENTS BY
APPELLANT ON THE ANSWER BRIEF OF APPELLEE

Appellant, SKURNICK, moves this Court to consider his comment below on the Answer Brief of the Appellee, AINSWORTH.

1. AINSWORTH's statement in the first paragraph of page 2 in his brief, namely, "The Eleventh Circuits Certification indicates that it agrees with AINSWROTH," is invalid. The Eleventh Circuit has requested this Court to rule on whether SKURNICK sold stocks to AINSWORTH in Florida, and not whether the agreements between AINSWORTH and SKURNICK were valid. Therefore, there was no need for them to include this item in their certification. Therefore, the omission of this item in the certification, as well as many other items, is no indication that the Eleventh Circuit agrees with AINSWORTH.

2. On the bottom of page 2, AINSWORTH quotes SKURNICK as saying, "I once received a telephone call--once or twice from his nephew and..." This quote from the record submitted by AINSWORTH clarifies the statement in item 6 of Appendix 2 of the certification which states: "It is unclear from the record, however, whether SKURNICK placed any of the telephone calls." The calls actually came from New Jersey. SKURNICK believes that the place of origin of the calls is not material in this case as long as SKURNICK did not originate the calls. AINSWORTH's statement from the record clearly indicates that the calls were initiated on AINSWORTH's behalf by his nephew.

3. On page 7 and page 22 AINSWORTH cites the decision of The Supreme Court of Florida in the case of DINSMORE v. MARTIN BLUMENTHAL ASSOCIATES which discusses what it means to engage in a business venture in Florida: "The activities of the person sought...must be considered collectively and show a general course of business activity in the State for pecuniary benefit." This is exactly what the Eleventh Circuit wishes this Court to decide. Did SKURNICK's activities as shown by the record show a general course of business activity in the State of Florida for pecuniary benefit? The Memorandum of Law submitted by AINSWORTH at the Arbitration hearing quoted DINSMORE,supra and continued with the following statement after "pecuniary benefit: "DeVANEY v. RAUSCH, 228 So.2d 904 (Fla. 1969). A non-resident defendent, which engages the services of brokers, jobbers, wholesalers, or distributors, can be doing business

in this State pursuant to Fla.Stat.Section 48.181.(1) if the non-resident Defendant, through brokers, jobbers, wholesalers or distributors was engaged in a course of conduct in Florida for the purpose of realizing a pecuniary benefit."

SKURNICK at no time employed agents in Florida, or outside of Florida, to solicit business in Florida for pecuniary benefit.

4. On pages 8, 9, and 10 AINSWORTH attempts to prove that SKURNICK was a dealer under Florida law. The issue before this Court is not whether SKURNICK is, or is not, a dealer under Florida law. The issue is whether SKURNICK was conducting a business in Florida. However, since AINSWORTH brings up the question SKURNICK wishes to call this Court's attention to the fact that Florida Stat.Section 517.021(9)(b) as of the time AINSWORTH was SKURNICK's client said: "The term 'dealer' does not include the following:- Any person buying and selling exclusively through a registered dealer or stock exchange." Because all stocks purchased and sold for AINSWORTH were listed on The New York Stock Exchange and were executed by a dealer registered in the State of Florida, by definition, SKURNICK was not a dealer according to Florida statutes of 1985. This will be found on page 3 of SKURNICK's brief.

Florida Stat.Section 517.03(2) says "No provision of this chapter imposing liability shall apply to an act done,or omitted to be done, in conformity with a rule of the department in existence at the time of the act or omission, even though such rule may thereafter be amended or repealed or determined by

judicial or other authority to be invalid for any reason." See page 27 of SKURNICK's brief. Although the question before this Court is not whether SKURNICK was, or was not, a dealer under Florida Statutes, SKURNICK wishes to call to this Court's attention that not only is there a difference in "dealer" definitions between Federal law and Florida law, but that there were differences in the definition of "dealer" within Florida law of 1985.

5. AINSWORTH in the next to last paragraph of page 10 says: "A main argument of SKURNICK's has been that he did not need to be registered because he did not perform clearing functions and because his clearing brokers were registered." This is incorrect. My main arguments have been that I did not sell securities I owned directly or indirectly to AINSWORTH; I never acted in the capacity of a dealer with him or with anybody else as the term 'dealer' is defined in the United States Exchange Act of 1934 and is commonly used and understood in the securities industry; that I never sold securities in Florida, directly or indirectly; and that I made no solicitations in Florida, or elsewhere, by telephone calls, mailings, advertisements, agents or other means. For the record I thought it fitting to point out that I did not mail confirmations or statements to AINSWORTH, as was implied by AINSWORTH, but that these were mailed to him by brokers who were registered in Florida, and that these items carried the legend "Thru the courtesy of Sam Skurnick."

6. It should be noted that in the last paragraph on page 13 AINSWORTH in discussing the term "broker-dealer" correctly distinguishes the difference between a "broker" and a "dealer" as used under the Uniform Securities Act (USA).

7. In the last paragraph on page 14 AINSWORTH brings up a case, MERRILL LYNCH v. BYRNE when the third District Court of Appeals rejected a claim of ambiguity about statutory remedies in ch.517. The issue before this Court is not statutory remedies but whether SKURNICK sold securities in Florida.

8. On page 18 AINSWORTH discusses 'the securities definition of "sale" or "sell", namely, of a "disposition... of a security for value."' SKURNICK never disposed (sold) a security he owned to AINSWORTH or anybody else in Florida. All securities he bought or sold for himself or his clients were done through registered brokers on the floor of the New York Stock Exchange.

9. On page 19, last paragraph, ANALOGIES, AINSWORTH refers to the Stemmel, supra case and says, "...the Oregonians, subsequently bought and sold securities by means of telephone calls and correspondence from Oregon." This would appear to indicate that the California brokers solicited orders by telephone calls and mailing solicitations. This was not the case between AINSWORTH and SKURNICK. SKURNICK never spoke to AINSWORTH because AINSWORTH was deaf. He handled AINSWORTH'S

on a discretionary basis, and on this basis the arrangement between AINSWORTH and SKURNICK was an investment contract. Therefore, the transactions in AINSWORTH's account should not be treated as the purchase and sale of individual securities. See Argument X-A and citations on page 39 and 40 of SKURNICK's brief. On this basis no securities were sold to AINSWORTH inside Florida or outside Florida.

10. In Petrites on page 20, AINSWORTH says that a "significant contacts" approach was used to find that the sales had occurred in Florida. He says "Among these were:-," and lists contacts but does not include all the contacts. This is indicated by his use of the words "Among these." He probably omitted contacts that established a valid basis for the ruling that the sales were made in Florida. The omitted contacts could have been mail and/or telephone solicitations from Georgia to the Florida resident, advertisements, employment, or visitation of agents in Florida. This case on page 21 refers to "the negotiating for sale." There were never any negotiations between AINSWORTH and SKURNICK.

11. On page 21 AINSWORTH refers to the case of Martin v. Steuber "for applying Ohio law when defendants advertised in The Wall Street Journal with circulation in Ohio." AINSWORTH solicited my services long before I placed any advertisements in the north east edition of The Wall Street Journal which was not circulated in Florida. My advertisements in the north east edition of The Wall Street Journal consisted of public notices to my clients that I was rebating commissions to those whose

performance did not meet set standards, or who had losing trades. In the case of Martin v. Steuber the brokerage firm not only answered an inquiry but followed up with a solicitation of an order from the client.

12. Reference is made to argument D on page 25. AINSWORTH says: "Plainly, the selling 'in this state' is understood in part by reference to the phrases:(1) 'from offices outside this state;' and, (2) 'by mail or otherwise.'" This statement is invalid for the following reasons: A broker with offices outside of Florida may -

a. solicit orders in Florida by telephone;
b. mail solicitations for ordes to Florida residents;
c. advertise to investors in Florida;
d. visit potential investors in Florida;
e. employ agents in Florida to solicit clients.

Any one of these activities could be interpreted as doing business in Florida from offices outside the State of Florida.

SKURNICK did not perform any of these activities. He did not solicit clients in Florida or elsewhere by any means.

13. On page 29 reference is made to "other 'activities' or 'contacts' of Skurnick were not detailed by the Eleventh Circuit in its Appendix 2:"

Item (6) says SKURNICK "changed clearing brokers and switched to Prudential-Bache Securities as his clearing broker." The facts are that Bruns, Nordeman, Rea & Co. was acquired by Bache & Co. which was later acquired by The Prudential Insurance Co. and the name was changed to Prudential-Bache Securities, Inc. For all practical purposes there was no change in clearing broker but only the name changed.

In connection with item 10, SKURNICK believes that "ratification," interpreted as approval, occurred when AINSWORTH assigned SKURNICK discretionary powers as long as SKURNICK acted in an ethical and legal manner. The confirmations and statements were mailed to AINSWORTH as required by S.E.C. regulations.

In connection with item 13, SKURNICK did not initiate any communications with AINSWORTH involving the solicitation of orders. Confirmations and statements were mailed to the new address by SKURNICK's clearing broker.

AINSWORTH has listed twenty (20) additional "activities" or contacts not listed by the Eleventh Circuit in Appendix 2. SKURNICK does not believe that any of these contacts have any bearing on the issue before this Court. AINSWORTH's introduction of these twenty "contacts" proves the fallacy of his argument on page 20 of his brief referred to by SKURNICK in the preceding item 10. For the sake of argument suppose there was a fact No.21 that SKURNICK visited AINSWORTH in Florida and discussed investments with him there. That in itself would be sufficient evidence that SKURNICK did business in Florida and the decision would go against him. Could one therefore say with validity that any of the contacts are a legal basis for a favorable ruling in a similar case? SKURNICK said that because AINSWORTH did not include <u>all</u> the "contacts" in the Petrites case, his conclusion was invalid.

It is SKURNICK's understanding that the United States Court of Appeals Eleventh Circuit wishes the Supreme Court of Florida to rule on the question whether SKURNICK sold stocks to AINSWORTH in Florida given the facts presented to them by the Eleventh Circuit. The entire record was sent to them so that they would not be limited in the scope of their examination of the facts.

AINSWORTH in his brief refers to the securities laws of Florida and other states being designed primarily to prevent fraudulent sales to investors. He is correct. For whatever merit it may have on the Supreme Court of Florida I wish to call their attention to the fact that AINSWORTH made a net investment with me of $1,100.00. My efforts on his behalf led to profits of about $65,000.00 and losses of about $55,000.00 (which are referred to as his "damages") so that he had a net profit of $10,000.00 on his original investment of $1,100.00. He now claims that under Florida law he is entitled to a refund from me of his $55,000.00 in trading losses. In his claims he swore I made false and fraudulent representations to him "in conversation," even though he was deaf. At the arbitration hearing he admitted under oath that he never saw me or spoke to me before in his life, and that I said nothing fraudulent, untruthful or deceitful to him in conversation or writing. These facts and my arguments are in my briefs and in the record submitted to this Court.

His account was highly profitable. He suffered no damages.

It was not the purpose of the Florida Statutes Chapter 517 to enrich unscrupulous investors and their unscrupulous attorneys at the expense of honest, ethical and conscientious stock brokers.

Respectfully submitted,

Sam Skurnick

SAM SKURNICK
143 Hoyt Street - 5J
Stamford, Ct. 06905
Tel: (203)357-9797

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to RUSSELL L. FORKEY, ESQ., Forkey & Falco, P.A., P.O.Box 959, Deerfield Beach, Fl. 33443, this 14th day of September, 1990.

Sam Skurnick

SAM SKURNICK