

**Shield Trading, LLC v Grossman**

2005 NY Slip Op 30235(U)

November 1, 2005

Supreme Court, New York County

Docket Number: 0600569/2005

Judge: Faviola Soto

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**FAVIOLA SOTO**  
J.S.C.

PRESENT: \_\_\_\_\_

PART 7

Index Number : 600569/2005

SHIELD TRADING, LLC

vs

GROSSMAN SAMUEL A.

Sequence Number : 002

STRIKE ANSWER

INDEX NO. \_\_\_\_\_

MOTION DATE 9/30/05

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

*Notice of Cross-Motion*  
Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1
2
3 4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *and cross-motion*

*are*  
**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**  
NOV 09 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: November 1 2005

**FAVIOLA SOTO** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

*Copies marked*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7

----- x  
SHIELD TRADING, LLC,

DECISION & ORDER

Plaintiff,

Index No. 600569/05

-against-

SAMUEL A. GROSSMAN,

Defendant.

-----  
**HONORABLE FAVIOLA A. SOTO, J.:**

**FILED**  
NOV 09 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Shield Trading, LLC, moves for summary judgment striking defendant's answer and awarding it \$34,640.53, plus attorneys' fees, or, alternatively directing an inquest to determine the amount of its damages. Defendant, pro se, Samuel A. Grossman, cross-moves to strike plaintiff's complaint for failure to state a cause of action and for summary judgment for the relief demanded in the answer, with fees and motion costs.

For the following reasons, the motion is granted to the extent of finding that defendant is liable to plaintiff for all net trading losses through April 30, 2004, and setting the matter down for an inquest on the amount of damages through April 30, 2004, and an evidentiary hearing limited to the timing and results of any trades executed after April 30, 2004, and reasonable attorneys' fees. The cross-motion is denied.

Plaintiff is a broker-dealer, organized as an LLC, that offers services primarily to day-traders. To trade on plaintiff's platform, a trader agrees to be a "Class B Member" of the LLC, and is provided a "sub-account" in which trades are executed in the name of the LLC. On March 12, 2004, plaintiff began trading pursuant to plaintiff's Operating Agreement and Trader Disclaimer (the Agreement). Defendant executed trades in this sub-account between March 12,

2004, and April 30, 2004.

The Agreement contemplates that Class B Members will receive 70% of their net profits, and that the remaining 30% will be paid to Class A Members. The Trader Disclaimer, at page 19 of the Agreement, provides: "[i]n the sole discretion of the Managing Member, traders may be held personally liable for trading losses." Section 9.01 of the Agreement provides that there are three Managing Members, Dan Pipitone (Pipitone), John Ferrara, and John Muscatella.

According to the admitted allegations of the complaint, defendant deposited \$10,000 with plaintiff in his sub-account, and then, on March 8, 2004, defendant withdrew \$9,678.22, and, on March 31, 2004, defendant withdrew an additional \$10,000. The complaint charges that the net of gains, losses, and withdrawals is a debit of \$34,640.53. Pipitone states in his affidavit that the total losses for defendant's account are \$44,640.53 and the total gains are \$19,678.22, leaving a net loss of \$24,692.31. Additionally, defendant admittedly withdrew \$9,678.22 from his account on March 8, 2004, bringing the total debit to \$34,640.53. Defendant's withdrawal on March 31, 2004, of \$10,000 is a return of principal that is not included in this calculation, though defendant contends in his affidavit that \$5,000 of his withdrawals was not capital but gains, and that \$5,000 in capital contribution was never withdrawn. Pipitone further states that defendant has refused to pay the \$34,640.53.

By submitting the Pipitone affidavit, and the affidavit of Martin S. Cole, counsel of record, containing documentary evidence detailing the trading results, deposits, and withdrawals made by defendant, and the duly executed Operating Agreement and Trading Disclaimer, plaintiff has met its initial burden of coming forward with evidence showing its entitlement to summary judgment, thus shifting the burden to defendant to produce evidence establishing the

existence of a factual issue (see Vermette v Kenworth Truck Co., Div. of Paccar, Inc., 68 NY2d 714, 717 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

Defendant's submissions in support of his cross-motion contain arguments in his own affidavit construing the terms of the Agreement, as well as factual contentions related to the management of his sub-account. The court treats defendant's arguments as having been submitted both in support of his cross-motion and in opposition to plaintiff's motion.

Defendant states in his affidavit that on April 29, 2004, when his capital account fell below \$1,500, defendant elected not to contribute additional capital and instructed Pipitone, apparently orally, to close out his account. Defendant argues that, had all positions been closed out either at the close of business on April 30<sup>th</sup>, or with a market order at the opening on the next business day, his damages would have been limited to \$1,643.34. Defendant thus argues that plaintiff failed to mitigate its damages.

Defendant submits the same documentary evidence as that presented by plaintiff, except that defendant's exhibits contain a version of the monthly performance summaries for March and April 2004 that has hand-written computations in the far-right column setting forth his contention that the total net loss of the account should be \$1,643.

Other than the handwritten notations on the monthly statements, defendant's submissions do not explain how this significantly lower figure is derived other than allegedly as a result of plaintiff not closing out the sub-account as allegedly instructed. Defendant argues that plaintiff held the positions longer in order to speculate, and that he should not be liable for losses incurred over and above the opening prices on April 1. This factual issue cannot be resolved on the documents before the court.

The second prong of defendant's argument involves construction of the Agreement with respect to the treatment of losses. Defendant relies on numerous provisions to support his contention that he cannot be held personally liable for trading losses.

In support of this argument, defendant relies first on Section 6.01 of the Agreement, captioned "Capital Contributions of the Members". This provides that "there shall be no additional 'capital calls' on Class B Members unless their initial contribution falls below \$1,500 at which time all open positions in their specific sub-account can be closed out by the Member-Managers. No further trading will be allowed ...". Defendant also relies on the language at page 21 of the Agreement: "[I] represent and warrant that I understand that I cannot trade options or take any positions overnight. All positions not closed by 4:00 P.M. Eastern can be closed by the Member-Managers at whatever the market price is at the time.". Defendant argues that these provisions placed a duty on plaintiff to close out all positions in his sub-account when the balance fell below \$1,500, and not allow further trading.

Where a contract is unambiguous and the intention of the parties can be determined from the language of the contract, the determination is for the court (see Matter of Estate of Stravinsky v Schott Musik Int'l GmbH & Co., 4 AD3d 75 [1<sup>st</sup> Dept 2003]). Here, the court holds that the use of the word "can" is not mandatory, and therefore plaintiff was under no duty to close out defendant's account when it fell below \$1,500, and that the payment required of a trader when plaintiff exercises its discretionary right to hold a trader personally liable, is in the nature of indemnification, and not an additional capital contribution as defendant argues.

Defendant argues extensively that pursuant to Section 7.02 of the Agreement, plaintiff may not allocate losses to him. This argument is immaterial, as plaintiff does not rely on this

section in its cause of action. Rather, plaintiff relies solely on the Trading Disclaimer, which allows a Managing Member sole discretion to hold a trader personally liable for trading losses. The court rejects defendant's assertion that Section 7.02 (b) (1) operates to insure that a Class B Member has no personal liability for losses that exceed the initial capital contribution. The allocation of losses under Section 7.02 is intended for determining net profits and distributing them among Class A and Class B Members. In no way does the language of Section 7.02 negate the clear language of the Trader Disclaimer that a Managing Member has sole discretion to hold a trader personally responsible for net trading losses.

Next defendant argues that he cannot be held liable for breach of contract because plaintiff has not cited any provision of the contract that he has violated. This argument has no merit. The Trading Disclaimer, which is part of the Agreement, allows a Managing Member, in the exercise of sole discretion, to hold defendant liable for his net trading losses. The complaint alleges that demand was made upon defendant for this sum and that he refused. This, if proved, would constitute a breach of contract.

Nor can defendant prevail on his tax argument that because he has not received a K-1 form as provided for in the Agreement, the loss was not allocated to him. Until he indemnifies plaintiff for his net losses, defendant has not realized the loss. It would be incongruous for defendant to be able to file a K-1 claiming a loss that he did not in fact incur. Similarly, it could not have been the intention of the parties that a trader could withdraw his capital and almost \$10,000 in gains, and then leave plaintiff with the losses.

The cross-motion is denied. Contrary to defendant's arguments, the complaint states a cause of action and defendant has failed to show he is entitled to summary judgment dismissing

the complaint or in his favor for the relief requested in his answer. Defendant's arguments that he cannot be held personally liable for losses incurred in his sub-account under the terms of the Agreement are without merit as a matter of law. Defendant's argument that venue is improperly placed because the Agreement is a consumer transaction similarly is without merit.

With respect to plaintiff's demand for "reasonable attorneys fees and other costs and expenses of the litigation," as provided for pursuant to Section 16.02 of the Agreement, the court declines the request within the motion to award one-third of the amount demanded, the amount plaintiff alleges it has agreed to pay its counsel. The reasonable amount of attorneys' fees ( which the court may find to be less than, greater than, or equal to the amount requested within the motion), will be determined after the hearing on the damages that plaintiff has incurred, and will include fees and expenses if plaintiff is the prevailing party.

Accordingly, it is

ORDERED that plaintiff's motion is granted as indicated, and otherwise denied; and it is

ORDERED that the cross-motion is denied; and it is further

ORDERED that a hearing shall be held on November 22, 2005, promptly at 9:30 a.m.,

111 Centre Street, Room 949.

DATED: New York, New York  
November 1, 2005

FAVIOLA S. SOTO J. S. C.

**FILED**  
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