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## Shearson Lehman Bros. v. Resolution Trust Corp.

Court of Appeals of Texas, Fifth District, Dallas  
February 23, 1994, Opinion Filed  
No. 05-93-00527-CV

**Reporter:** 1994 Tex. App. LEXIS 3812; 1994 WL 60907

SHEARSON LEHMAN BROTHERS, INC. F/K/A SHEARSON LEHMAN & HUTTON, INC., Appellant v. RESOLUTION TRUST CORPORATION, as Receiver for SANDIA FEDERAL SAVINGS ASSOCIATION, Appellee

**Notice:** [\*1] PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

**Prior History:** On Appeal from the 14th District Court. Dallas County, Texas. Trial Court Cause No. 91-13275-A.

**Disposition:** REVERSED, RENDERED in part and REMANDED in part.

### Core Terms

setoff, trial court, summary judgment, margin, waive, liquidation, matter of law, party's, garnishee, attorney's fees, funds, summary judgment motion, known right, unequivocally, conclusively, movant, amended answer, garnishor, requires, argues, writ of garnishment, no writ, relinquishment, securities, estoppel, manifest, waiting, issue of material fact, judgment rendered, interest charges

### Case Summary

#### Procedural Posture

Appellant garnishee sought review of a summary judgment from the 14th District Court, Dallas County (Texas), entered for appellee garnishor. Appellant contended that the undisputed facts showed that it asserted its contractual right of setoff against the debtor, and that the trial court erred by granting judgment for appellee and not granting judgment for appellant.

#### Overview

Appellee garnishor held the debtor's securities account. Appellant garnishee served a writ on appellee, and appellee answered by stating the net value of the debtor's account, or the total value of the securities minus margin debt. Appellant did not plead setoff until it filed a third

amended answer. In the meantime appellant continued to trade stocks, earn commissions, and accrue interest on the margin debt. The court held that these facts demonstrated as a matter of law that appellant did not waive its right of setoff, but rather that appellant asserted its right. Accordingly, appellee was not entitled to summary judgment, and appellant was. There was no express waiver of setoff, and appellant's actions were not inconsistent with the assertion of the right. Failing to plead the defense was not a waiver of the right. Statement of the net amount in the account was consistent with setoff. Delay in liquidation of the account was due to the fact that account was a qualified plan. Because appellee had not carried its summary judgment burden and appellant had, reversal and rendition were appropriate.

#### Outcome

The court reversed the judgment for appellee garnishor and rendered judgment for appellant garnishee. The court held that the facts did not establish a waiver as a matter of law. To the contrary, they established that appellant had not waived its right to setoff, and appellant was entitled to judgment. The court remanded for the trial court to update its award of attorney's fees.

### LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

**HNI** The standards applicable in reviewing summary judgment rulings areas follows. The movant has the burden to show no genuine issue of material fact and its entitlement to judgment as a matter of law. In deciding whether there is a disputed material fact issue preventing summary judgment, the court takes evidence favorable to the nonmovant as true. The court indulges every reasonable inference for the nonmovant and resolves any doubts in his favor.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

**HN2** The summary judgment rule does not provide for a trial by deposition or affidavit. The rule is a method of summarily ending a case that involves only a question of law and no genuine fact issues. The trial court's duty is to determine if there are any fact issues to try, not to weigh evidence or determine its credibility. A trial court cannot try the case on affidavits.

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

**HN3** The purpose of the summary judgment rule is to end claims patently without merit or untenable defenses. If the trial court must resolve factual issues to enter judgment, then the summary judgment is neither authorized nor proper. Application of the rule must not deprive litigants of their right to a full hearing on any real fact issue.

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

**HN4** A movant must show its entitlement to summary judgment on the issues expressly presented to the trial court. The movant must conclusively prove all essential elements of its cause of action or defense as a matter of law. A movant must expressly present his grounds for summary judgment in his motion. To win on summary judgment, the defendant has two options. The defendant must disprove an essential element of the plaintiff's cause of action as a matter of law. Or the defendant must prove all elements of its defense as a matter of law.

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Appealability

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Reversible Errors

**HN5** When both parties file summary judgment motions, and the trial court grants one and denies the other, the

judgment is final and appealable. On appeal the court determines all questions presented. If the court finds reversible error, it will render the judgment the trial court should have rendered.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

**HN6** With cross motions for summary judgment, each party must carry its own burden and neither can win because the other did not discharge its burden. The court considers all summary judgment evidence in deciding whether to grant either party's motion.

Banking Law > Bank Activities > Liens & Setoffs > Banker's Liens

**HN7** To setoff a debt by assets of the debtor, a party must fulfill three steps. The party must decide to exercise its right to setoff, take an action to accomplish the setoff, and make a record of the setoff. Additionally, Texas law requires the party to apply the funds to the debt.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

**HN8** Waiver is the intentional relinquishment of a known right by actual renunciation or intentional conduct inconsistent with claiming that known right. The elements of waiver are: (1) an existing right, benefit, or advantage; (2) knowledge, actual or constructive, of its existence; and (3) actual intent to relinquish the right. Since waiver is a voluntary relinquishment of a known right, its existence depends largely on the intention of the party having the right.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

**HN9** Waiver law distinguishes between showing intent by actual renunciation and showing intent based on inference. If a party's conduct is consistent with claiming the right, it cannot be the basis for a waiver. When intent is by inference, a party must conclusively show the other party unequivocally manifested its intent to no longer assert its claim. A party shows waiver by implication when the other party's clear, unequivocal, and decisive acts result in an estoppel on his part.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Contracts Law > Formation of Contracts > Consideration > Detrimental Reliance

Contracts Law > Formation of Contracts > Consideration > Promissory Estoppel

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

**HN10** The doctrines of waiver and estoppel are two distinct doctrines. Waiver requires voluntary surrender of known rights. Estoppel requires showing the other party's conduct prejudiced the party. Waiver is a unilateral act performed solely by a party in whom a legally enforceable right exists.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > Remedies > Provisional Remedies > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Discipline, Layoffs & Terminations

**HN11** When the trial court discharges a garnishee on its answer, the garnishee can recover reasonable attorneys fees. [Tex. R. Civ. P. 677](#). When a garnishor contests a garnishee's answer costs shall abide the issue of such contest. [Tex. R. Civ. P. 677](#).

**Judges:** Before Justices Baker, Burnett, and Barber.  
Opinion By Justice Baker

**Opinion by:** JAMES A. BAKER

### Opinion

#### OPINION

Opinion By Justice Baker

Shearson Lehman Brothers, Inc. (Shearson) appeals the trial court's summary judgment for the Resolution Trust Corporation (RTC). The summary judgment awarded RTC the assets in Dr. James Key's Shearson account to satisfy an outstanding judgment RTC held against Key. RTC garnished Shearson to satisfy the judgment against Key. The trial court found Shearson waived its right to setoff the debts Key owed to Shearson. Shearson claims the trial court erred in granting RTC's summary judgment motion and denying its summary judgment motion. Alternatively, Shearson contends there is a genuine issue of material fact preventing summary judgment. We agree with Shearson that the trial court erred in granting RTC summary judgment and in denying Shearson summary [\*2] judgment. We reverse the trial court's judgment. We

render judgment that Shearson had the right to setoff Key's margin debt. We remand the cause for the trial court to determine Shearson's attorney's fees.

### THE GARNISHMENT ACTION

RTC received a judgment against Key for \$ 672,686.33. To collect the judgment, RTC served Shearson with a Writ of Garnishment in November, 1991. Shearson answered the writ by identifying Key's account.<sup>1</sup> Shearson amended its answer in December to specify the amount of assets in the account.

With its amended answer, Shearson filed an interpleader petition. Shearson stated there were competing claims to the funds in the account. Shearson identified Key's claim that assets in the account were exempt funds belonging to the Key Clinic's Defined Benefit Plan. Shearson also identified RTC's claim to the account under the writ. [\*3] Shearson requested an order of liquidation for the account and directions on disposition of the assets. In its amended answer, Shearson stated the account had assets worth \$ 116,885.61. Key held \$ 164,770.80 of stocks and \$ 53,030.30 of mutual funds. Key also had a margin debt of \$ 109,915.49 in the account. Shearson deducted assets to cover the margin debt. Shearson stated the remaining assets as the amount it owed Key.

In April 1992, RTC asked the trial court to order liquidation of the account. Shearson obeyed the court's order to liquidate the account. While the garnishment action was pending, Shearson sold matured securities, collected commissions, and charged interest on the margin debt in the account. In May 1992, the trial court dismissed all claims against Shearson, discharged it as garnishee, and awarded it attorney's fees.

In July 1992, RTC amended its controverting affidavit to dispute Shearson's account valuation. RTC claimed the account assets were \$ 217,801.10 and not the amount Shearson stated in its amended answer. RTC moved to reinstate Shearson to determine whether it properly exercised its right of setoff in Shearson's client agreement with Key. The trial court [\*4] reinstated Shearson as the garnishee.

RTC claimed Shearson waived its right to setoff. Shearson asserted it properly setoff the margin debt in the account under the client agreement and did not waive its setoff right. Both parties moved for summary judgment. RTC alleged waiver and Shearson alleged no waiver. RTC argued Shearson waived because it did not plead setoff,

<sup>1</sup> Shearson identified three accounts held in Key's name. However, this appeal concerns only one of those accounts.

We refer only to the one account.

did not mention the margin debt, and did not declare its intent to setoff. The trial court granted RTC's motion and denied Shearson's motion. In the judgment the trial court said:

The court further finds that while Debtor Key had a margin debt in his account no. 612-11866 with Shearson of \$ 100,915.49, Shearson waived its right to offset the margin debt against effects of Debtor by failing to liquidate the Account immediately upon receipt of the Writ of Garnishment issued by the RTC and to apply liquidation proceeds against the margin debt.

## STANDARD OF REVIEW

**HN1** The standards we apply in reviewing summary judgment rulings are:

1. The movant has the burden to show no genuine issue of material fact and its entitlement to judgment as a matter of law.
2. In deciding whether there is a disputed material [\*5] fact issue preventing summary judgment, we take evidence favorable to the nonmovant as true.
3. We indulge every reasonable inference for the nonmovant and resolve any doubts in his favor.

*Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). **HN2** The summary judgment rule does not provide for a trial by deposition or affidavit. The rule is a method of summarily ending a case that involves only a question of law and no genuine fact issues. *Gaines v. Hamman* 163 Tex. 618, 358 S.W.2d 557, 563 (1962). The trial court's duty is to determine if there are any fact issues to try, not to weigh evidence or determine its credibility. A trial court cannot try the case on affidavits. *Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929, 931 (1952).

**HN3** The purpose of the summary judgment rule is to end claims patently without merit or untenable defenses. If the trial court must resolve factual issues to enter judgment, then the summary judgment is neither authorized nor proper. *Starnes v. Holloway*, 779 S.W.2d 86, 90 (Tex. App.--Dallas 1989, writ denied). Application of the rule must not deprive litigants of their right to a full hearing on any real fact issue. [\*6] *Gulbenkian*, 252 S.W.2d at 931.

**HN4** A movant must show its entitlement to summary judgment on the issues expressly presented to the trial court. The movant must conclusively prove all essential elements of its cause of action or defense as a matter of law. *Swilley v. Hughes*, 488 S.W.2d 644, 67 (Tex. 1972). A movant must expressly present his grounds for summary judgment in his motion. *McConnell v. Southside Inde. Sch.*

*Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). To win on summary judgment, the defendant has two options. The defendant must disprove an essential element of the plaintiff's cause of action as a matter of law. Or the defendant must prove all elements of its defense as a matter of law. *See Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970).

**HN5** When both parties file summary judgment motions, and the trial court grants one and denies the other, the judgment is final and appealable. On appeal we determine all questions presented. *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988); *Tobin v. Garcia*, 159 Tex. 58, 316 S.W.2d 396, 400 (Tex. 1958). If we find reversible error, we render the judgment the trial court should have rendered. *Tobin*, [\*7] 316 S.W.2d at 400.

**HN6** With cross motions for summary judgment, each party must carry its own burden and neither can win because the other did not discharge its burden. *Shade v. City of Dallas*, 819 S.W.2d 578, 584 (Tex. App.--Dallas 1991, no writ). We consider all summary judgment evidence in deciding whether to grant either party's motion. *Dallas County Appraisal Dist. v. Institute for Aerobics Research*, 766 S.W.2d 318, 319 (Tex. App.--Dallas 1989, writ denied).

## APPLICABLE LAW

### A. The Right of Setoff

**HN7** To setoff a debt by assets of the debtor, a party must fulfill three steps. The party must decide to exercise its right to setoff, take an action to accomplish the setoff, and make a record of the setoff. *See Baker v. National City Bank*, 511 F.2d 1016, 1017-18 (6th Cir. 1975); *In re Archer*, 34 B.R. 28, 30 (N.D. Tex. 1983). Additionally, Texas law requires the party to apply the funds to the debt. *Texas Commerce Bank v. U.S.*, 703 F. Supp. 592, 594 (N.D. Tex. 1988), *aff'd*, 896 F.2d 152 (5th Cir. 1990).

### B. Waiver

**HN8** Waiver is the intentional relinquishment of a known right by actual renunciation or intentional conduct inconsistent [\*8] with claiming that known right. *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). The elements of waiver are: (1) an existing right, benefit, or advantage; (2) knowledge, actual or constructive, of its existence; and (3) actual intent to relinquish the right. *Missouri-Kansas-Texas RR v. Heritage Cablevision of Dallas, Inc.*, 783 S.W.2d 273, 280 (Tex. App.--Dallas 1989, no writ). Since waiver is a voluntary relinquishment of a known right, its existence depends largely on the intention of the party having the right. *Lang v. Lee*, 777 S.W.2d 158, 164 (Tex. App.--Dallas 1989, no writ).

**HN9** Waiver law distinguishes between showing intent by actual renunciation and showing intent based on inference. *Federal Deposit Ins. Corp. v. Attayi*, 745 S.W.2d 939, 947 (Tex. App.--Houston [1st Dist.] 1988, no writ). If a party's conduct is consistent with claiming the right, it cannot be the basis for a waiver. *Sun Exploration & Prod.*, 728 S.W.2d at 37. When intent is by inference, a party must conclusively show the other party unequivocally manifested its intent to no longer assert its claim. *Attayi*, 745 S.W.2d at 947. A party shows waiver by implication [\*9] when the other party's clear, unequivocal, and decisive acts result in an estoppel on his part. *Lang*, 777 S.W.2d at 164.

**HN10** The doctrines of waiver and estoppel are two distinct doctrines. Waiver requires voluntary surrender of known rights. Estoppel requires showing the other party's conduct prejudiced the party. *State Farm Lloyds, Inc. v. Williams*, 791 S.W.2d 542, 552 (Tex. App.--Dallas 1990, writ denied). Waiver is a unilateral act performed solely by a party in whom a legally enforceable right exists. *Burton v. National Bank of Commerce*, 679 S.W.2d 115, 117 (Tex. App.--Dallas 1984, no writ).

## APPLICATION OF LAW TO FACTS

### A. RTC's Motion for Summary Judgment

Shearson first alleges the trial court erred in granting RTC's summary judgment motion because RTC did not conclusively prove waiver. Shearson argues RTC did not prove as a matter of law Shearson intended to waive its right to setoff. RTC claims it proved Shearson's intent as a matter of law based on Shearson's inconsistent conduct with its right to setoff. Specifically, RTC claims Shearson did not plead the setoff defense and misled the trial court about its intention to setoff. RTC claims Shearson [\*10] waived its right to setoff by waiting five months to exercise the right. Additionally, RTC claims Shearson waived the right by trading securities, collecting commissions, and charging interest on the margin debt after RTC served the writ.

We must determine whether RTC conclusively proved Shearson intended to waive its setoff right by its conduct. Shearson's conduct must be clear, unequivocal, decisive, and inconsistent with Shearson's right to setoff. It must unequivocally manifest Shearson's intent to waive its setoff right.

Shearson did not plead setoff as a defense before the court ordered liquidation. Shearson pleaded setoff before the trial setting and before the parties filed summary judgment

motions.<sup>2</sup> Shearson raised the setoff defense in its third amended answer. Shearson did not waive the setoff right by not pleading the right because it did plead setoff before trial.

Before liquidation, Shearson answered [\*11] the writ stating it was indebted to Key for the net assets in the account. Shearson deducted the amount of assets subject to its setoff right before determining its indebtedness to Key. This conduct, contrary to being inconsistent with its setoff right, shows Shearson's intent to claim its right of setoff.

RTC claims Shearson's conduct of misleading the trial court and RTC about its intent to setoff shows an intent to waive the setoff right. The record shows that under the client agreement Shearson did not have to give Key (or RTC as garnishor) notice of setoff. The client agreement states Shearson has the right to offset the margin debt. Key's account statements, produced by Shearson to RTC, show the margin debt on the account. Shearson never led RTC to believe it could garnish more than the net assets in the account. Failure to tell the trial court or the garnishor of its intent to setoff does not unequivocally manifest the garnishee's intent to waive the right.

RTC argues waiting for five months to liquidate the account and exercise its setoff right shows Shearson intended to waive its setoff right. In its amended answer, Shearson raised Key's defense that the funds were exempt.

[\*12] Shearson asked the trial court to issue an order to liquidate and instructions on disbursement. Shearson could not setoff the margin debt with exempt funds. *Cf. National Indem. Co. v. Spring Branch State Bank*, 162 Tex. 521, 348 S.W.2d 528, 529 (1961). Under these circumstances, for Shearson to wait for the liquidation order was not conduct inconsistent with its right to setoff. It was not inconsistent to wait for the trial court to determine whether the funds were exempt. Shearson waited to protect itself from liability for wrongful setoff.

RTC argues Shearson's management of the account after it served the Writ of Garnishment shows an intent to waive the right of setoff. Key's account statements show Shearson sold and reinvested securities, collected commissions, and charged interest on the margin debt. The statements do not show Shearson paid any money to third parties or Key from the account.

RTC argues Shearson's management of the account is similar to banks honoring checks, accepting payments from the debtor, or making payments to debtors. RTC points out that banks waive the right to setoff in these instances. *E.g., Holt Sporting Goods Co. v. American Nat'l Bank*, [\*13] 400 S.W.2d 943 (Tex. Civ. App.--Amarillo

<sup>2</sup> The better practice would be to plead setoff in the first response to a Writ of Garnishment.

1966, writ dismissed w.o.j.); *First Bank of Whiting v. Samocki*, 509 N.E.2d 187 (Ind. Ct. App. 1987); *Wild v. Horst*, 250 So. 2d 179 (La. App. 1971). We disagree with RTC's argument.

Shearson's conduct in continuing to charge interest on the margin debt is consistent with its right to setoff. Additionally, investment accounts are different from a checking or savings account. Bank accounts will not decrease in value or waste if they are frozen. Investment accounts can decrease in value if not properly managed. Maintaining the account until the court ordered liquidation does not unequivocally manifest Shearson's intent to waive its setoff rights.

We sustain Shearson's first and second points of error because RTC did not conclusively prove Shearson intended to waive its right to setoff.

## 2. Shearson's Motion for Summary Judgment

RTC argues Shearson did not provide any competent summary judgment evidence to support its motion. RTC specifically argues Lena Stinson's<sup>3</sup> affidavit on which Shearson relies is not competent summary judgment evidence. Because we find Shearson conclusively proved that it did not intend to waive its setoff [\*14] rights without Lena Stinson's affidavit, we need not consider this contention.

Shearson's answer to the Writ of Garnishment identifies the account's net assets as the amount it owed Key. Shearson noted the amount of Key's margin debt on each account statement. Shearson continued to charge interest on the debt while waiting for the court to order liquidation. Shearson exercised its right to setoff when it liquidated the account. These actions show an intent to exercise the right to setoff.

Shearson's conduct was consistent with an intent to exercise the right. By offsetting the margin debt when it liquidated the account, Shearson showed a clear intent to exercise the right to setoff. Shearson also manifested its intent to exercise the right by responding it was indebted to Key only for the net assets in the account. Shearson's

failure to plead setoff in its first amended answer is not inconsistent with its right to setoff.

RTC also [\*15] argues Shearson did not exercise the right because it did not meet the three requirements of a setoff. However, the record shows Shearson's decision and act in furtherance of setoff by it applying funds to the margin debt. The March and April account statements show the liquidation and application of funds to the debt. RTC's argument is without merit.

Shearson proved as a matter of law it had the right to setoff, it exercised that right, and did not intend to waive that right. We sustain Shearson's third and fourth points of error.

## ATTORNEY'S FEES

The trial court awarded Shearson \$ 16,951.89 in attorney's fees. Shearson contends this award compensated them for attorney's fees up to August 3, 1992. The trial court first awarded the fees in an August 3, 1992 order. The trial court then included this amount as Shearson's reasonable attorney's fees in its final judgment on September 30, 1992.

*HN11* When the trial court discharges a garnishee on its answer, the garnishee can recover reasonable attorneys fees. *TEX. R. CIV. P. 677*; *Resido, Inc. v. Laredo Mopac Employees Credit Union*, 516 S.W.2d 197, 199 (Tex. Civ. App.--San Antonio 1974, no writ). When a garnishor contests [\*16] a garnishee's answer costs shall abide the issue of such contest. *TEX. R. CIV. P. 677*. Because the trial court should have resolved the waiver issue in Shearson's favor, we remand the cause for the trial court to determine Shearson's attorney's fees incurred after August 3, 1992, if any.

We reverse the trial court's judgment. We render judgment that Shearson had the right to setoff Key's margin debt.

We remand the cause for the trial court to determine Shearson's reasonable and necessary attorney's fees.

JAMES A. BAKER

JUSTICE

<sup>3</sup> Lena Stinson was a Vice President and Administrative Manager at Shearson.