8-11-2010

Order on Defendants' Motion for Summary Judgment (ING USA ANNUITY AND LIFE INSURANCE COMPANY)

Alice D. Bonner
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ING USA ANNUITY AND LIFE INSURANCE COMPANY and ING INVESTMENT MANAGEMENT, LLC,	)(	
Plaintiffs,	)(	**Civil Action No. 2007-CV-134590**
v.	)(	
J.P. MORGAN SECURITIES INC. and DAMIAN BERRY,	)(	
Defendants.	)(	

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On June 24, 2010, Counsel appeared before the Court to present argument on Defendants' Motion for Summary Judgment. After hearing the arguments made by counsel, and reviewing the briefs submitted on the motion and the record in the case, the Court finds as follows:

Defendant J.P. Morgan Securities Inc. ("JPMSI") provided investment banking services to an Australian mining company named Sons of Gwalia Limited ("Gwalia"). Defendant Damian Berry ("Berry") was an employee of JPMSI between 1998 and 2002 and was JPMSI's relationship manager for Gwalia during that time. Starting in 2000, Gwalia decided to raise capital through the private placement of debt securities. This private placement strategy occurred over the course of two offerings—the first in the fall of 2000 ("2000 Private Placement") and the second in early 2002 ("2002 Private Placement").

Plaintiffs ING-USA Annuity and Life Insurance ("ING-USA") and ING Investment Management LLC ("ING-IM") participated in the 2002 Private Placement. ING-USA, a life insurance company, ultimately purchased $32 million of the notes offered by Gwalia in the 2002 Private Placement. JPMSI acted as Gwalia's broker for both the 2000 Private Placement and the 2002 Private Placement and, among other things, assisted Gwalia in preparing a private placement memorandum for each offering. In 2004, Gwalia entered into voluntary administration which is the Australian equivalent of bankruptcy.

Plaintiffs allege that during the 2002 Private Placement, Defendants misrepresented and concealed Gwalia's true financial picture. In particular, Plaintiffs allege that Defendants misrepresented and concealed: (1) Gwalia's investments in derivatives called Indexed Gold Put Options ("IGPOs"), (2) Gwalia's liquidity crisis following an unauthorized trading spree by Gwalia's director of finance, and (3) problems with Gwalia's acquisition of another gold mining company, Pacific Mining Corporation Limited ("Pac Min"). Based on these allegations, Plaintiffs assert claims for violations of the Georgia Securities Act of 1973 ("GSA"), common law fraud, negligent misrepresentation, and violations of the Georgia RICO Act. Defendants have moved for summary judgment on all claims against them.

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most

favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

In support of their motion for summary judgment, Defendants first argue that Plaintiff ING-IM has not suffered any damages whatsoever. In response, Plaintiffs simply argue that Defendants have recycled an argument left over from their motion to dismiss in which they questioned whether ING-IM was a proper party to this lawsuit. In its Order on Defendants' motion to dismiss, the Court held that at that early stage of litigation, ING-IM should not be "foreclosed from being able to prove recoverable damages" but also warned that "issues of specific damages suffered by ING-IM ...may be raised again in any motions for summary judgment filed by Defendants." Defendants again question ING-IM's involvement in this lawsuit and argue that Plaintiffs have failed to produce any evidence to show that ING-IM has suffered any damage as a result of Defendants' alleged misconduct. Damage to the plaintiff is an essential element of each of Plaintiffs' claims against Defendants. Yet, in their response to Defendants' motion for summary judgment, Plaintiffs have failed to produce any evidence that ING-IM has suffered damage in this case. Accordingly, summary judgment in favor of Defendants is **GRANTED** all on claims asserted by ING-IM.

Second, Defendants argue that they are entitled to summary judgment on Plaintiffs' GSA and common law fraud claims because Plaintiffs lack evidence to show scienter. Scienter is an essential element of both a claim under the GSA and for common law fraud. See Bogle v. Bragg, 248 Ga. App. 632, 634 (2001) and GCA Strategic Investment Fund, Ltd. v. Joseph Charles & Associates, Inc.,

245 Ga. App. 460, 464 (2000). Except in rare cases where the evidence is "plain and indisputable," determination of scienter is an issue of fact for the jury. Kilroy v. Alpharetta Fitness, Inc., 295 Ga. App. 274, 280 (2008). The Court finds that there is evidence upon which a jury could find that Defendants acted with scienter in making misrepresentations or omissions regarding (1) the risks involved in Gwalia's investments in IGPOs including Berry's knowledge of those risks and his authorization of the description used for the IGPOs, (2) Gwalia's liquidity crisis following an unauthorized trading spree by its director of finance including the help provided by Berry in shoring up that crisis and (3) Gwalia's acquisition of PacMin, including Berry's knowledge of problems with PacMin's operations.

Third, Defendants argue that they are entitled to summary judgment on Plaintiffs' GSA, common law fraud, and negligent misrepresentation claims because Plaintiffs cannot show that they reasonably relied on Defendants. To this end, Defendants argue that cautionary language in the 2002 Private Placement memorandum shields them from liability. Specifically, Defendants argue that the private placement memorandum states, among other things, that JPMSI "neither offer[s] an opinion as to nor assume[s] any responsibility for the adequacy, accuracy, or completeness of any information contained herein." The Court finds that this type of standard disclaimer does not shield Defendants from liability and does not preclude Plaintiffs from showing reasonable reliance. In re National Century Financial Enterprises, Inc., Investment Litigation, 541 F.Supp.2d 986, 1005 (S.D. Ohio 2007) ("Courts have long held that general

disclaimers of accuracy do not shield sellers who knowingly make false statements"); In re Prudential Securities Inc. Ltd. Partnerships Litigation, 930 F. Supp. 68, 72 (1996) ("cautionary language does not protect material misrepresentations or omissions when defendants knew they were false when made"); Clayton v. Heartland Resources, Inc., 2009 WL 790175, *5 (W.D. Ky. 2009) (denying a motion to dismiss a claim against an attorney who prepared offering documents in a securities transaction ruling that the attorney was a primary participant in the alleged wrongdoing and could not be shielded from liability by language in those documents disclaiming their accuracy and completeness when he knowingly made misrepresentations and omissions in those documents). The court in In re National Century found that plaintiffs' claims for fraud and negligent misrepresentation could proceed because cautionary language will not protect misrepresentations and omissions knowingly made and the document itself expressly invited plaintiffs' reliance. Similarly, here, there is evidence upon which a jury could find knowing omissions and misrepresentations by JPMSI and the cautionary language follows a paragraph which twice states that the private placement memorandum is to be used to evaluate Plaintiffs' potential investment. The Court also finds that misrepresentations and omissions were made in documents other than the private placement memorandum and, therefore, any cautionary language in the private placement memorandum cannot be used to shield Defendants from liability for alleged misrepresentations and omissions in other documents. Accordingly, the Court finds that the cautionary language in the private

placement memorandum does not preclude a showing of reasonable reliance by Plaintiffs on their GSA, common law fraud, and negligent misrepresentation claims.

Fourth Defendants argue that Plaintiffs' own due diligence proves that they did not reasonably rely on Defendants. The Court finds that as accredited investors, the private placement memorandum called on Plaintiffs to perform their own due diligence, which they did. Georgia courts routinely reject fraud claims when plaintiffs fail to do adequate due diligence to uncover the fraud. See, e.g., First Union National Bank of Georgia v. Gurley, 208 Ga. App. 647, 649 (1993). However, the opposite does not hold true. In other words, simply because a plaintiff conducts extensive due diligence, yet fails to detect the alleged fraud, does not mean that the plaintiff has not relied on misrepresentations or omissions by the defendant. The Court finds that the due diligence that Plaintiffs conducted does not negate their reliance.

Fifth, Defendants argue that Plaintiffs' GSA claim against Berry is time barred. Plaintiffs deny that they are pursuing a GSA claim against Berry and, thus, the Court finds this point moot.

Sixth, Defendants argue that ING-USA's GSA claim against JPMSI is time barred because ING-USA was not a party to a tolling agreement entered into on July 18, 2006. ING-USA responds that it was, in fact, a party to that tolling agreement. Contract construction is a matter of law for the court. Livoti v. Aycock, 263 Ga. App. 897, 901(2003). The first step in contract construction is to "look to the four corners of the instrument to determine the intention of the parties

from the language employed." Id.; see also O.C.G.A. § 13-2-3. The tolling agreement provides that:

> THIS TOLLING AGREEMENT is made and entered into by and between J.P. Morgan Securities, Inc., including its parents, affiliates, owners, successors and assigns (collectively, "J.P. Morgan"), and ING Investment Management LLC, for itself and as agent for ING USA Annuity and Life Insurance Company, Security Life of Denver Insurance Company and ReliaStar Life Insurance Company, and each of their successor and assigns (collectively, "ING").

The Court finds that the express terms of the tolling agreement make clear that it covers ING-USA. The Court rejects Defendants' arguments that ING-USA's claim against JPMSI under the GSA is time barred.

Seventh, Defendants argue that Plaintiffs' RICO claim fails because Plaintiffs cannot prove racketeering activity. Specifically, Defendants argue that because Plaintiffs cannot prove their GSA claim due to a lack of scienter and justifiable reliance, their RICO claim, which is based on Defendants' two alleged violations of the GSA, must also fail. For the reasons stated above, the Court finds that there is evidence upon which a jury could find that Defendants acted with scienter and that Plaintiffs justifiably relied on Defendants. As ING-USA's GSA claims have survived summary judgment, so has its Georgia RICO claim.

Eighth, Defendants argue that Plaintiffs have failed to show that Defendants' actions constituted a pattern of racketeering activity. In pertinent part, a pattern of racketeering activity is defined by the Georgia RICO Act as "[e]ngaging in at least two acts of racketeering activity." O.C.G.A. 16-14-3(8). While Defendants argue that the two Private Placements were merely a single transaction completed over the course of two closings, the Court disagrees.

JPMSI, or is predecessor, was hired on two separate occasions, as evidenced by two different engagement letters, to conduct the two separate private placements. The two private placements each had separate private placement memoranda and different investors. Despite Defendants arguments, the Court finds that the 2001 Private Placement and the 2002 Private Placement were not a single transaction. The Court finds that there is evidence upon which a jury could find that Defendants violated the Georgia RICO Act based on two predicate acts—misrepresentations and omissions in the private placement memoranda for the 2000 Private Placement and the 2002 Private Placement.

Finally, Defendants argue that Plaintiffs cannot prove causation for any of their claims. In support of this argument, Defendants maintain that the only evidence Plaintiffs have of causation is a few paragraphs in their expert's report which is inadmissible under Georgia's standard for expert testimony. Proximate cause is generally a jury question. "Where the proof 'does not plainly, palpably and indisputably show a lack of proximate cause,' the issue is for the jury." Malak v. First Nat. Bank of Atlanta, 195 Ga. App. 105 (1990) (citing DeKalb County Hosp. Auth. v. Theofanidis, 157 Ga. App. 811, 812(2) (1981)). The Court finds that Plaintiffs, through their expert and by pointing to deposition testimony by other witnesses, have provided evidence sufficient for a jury to conclude that Defendants alleged misrepresentations and omissions were a proximate cause of their injury.

Defendants' Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. Summary judgment in favor of Defendants is **GRANTED** on

all claims asserted by ING-IM. Summary Judgment in favor of Defendants is **DENIED** on all claims asserted by ING-USA.

SO ORDERED this 11th day of August, 2010.

Alice D. Bonner, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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