5-5-2010

Order on Defendant Odom's Motion for Summary Judgment (SCS FUND, LP)

Elizabeth E. Long
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

D.

SCS FUND, LP and WINSLOW ASSET GROUP, LLC,

Plaintiffs,

v.

STEVEN ODOM,

Defendant.

Civil Action File No. 2008-CV-152062

ORDER ON DEFENDANT ODOM'S MOTION FOR SUMMARY JUDGMENT

On April 21, 2010, counsel appeared before this Court to present oral argument on Defendant Steven Odom's ("Odom") Motion for Summary Judgment. After hearing the arguments made by counsel and reviewing the briefs submitted on the motions and the record in the case, the Court finds as follows:

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). The moving party need only eliminate one essential element of a party's claim to prevail on summary judgment. Real Estate Int'l Inc. v. Buggah, 220 Ga. App. 449, 451 (1996).

Plaintiff SCS Fund, LP ("SCS") is an investment fund. In June 2006, SCS obtained the right to purchase the assets of Verilink out of bankruptcy. SCS assigned its right to purchase the Verilink assets to Winslow Asset Holdings, LLC ("WAH"), a wholly-owned subsidiary of Plaintiff Winslow Asset Group, LLC ("WAG"). WAH bought the Verilink assets using funds provided by its limited

partner, SCS. WAG then entered into a securities purchase agreement (the "Agreement") with Verso Technologies, Inc. ("Verso") that resulted in a transfer of the Verilink assets to Verso in exchange for $5.8 million in Verso common stock ("the Purchase"). Pursuant to the Agreement, WAG assigned all of the Verso stock to SCS almost immediately after the Purchase. Verso is currently in bankruptcy. Odom was Chairman of Verso at the time of the Purchase.

At oral argument, WAG's counsel admitted that WAG has suffered no damages in this case. Accordingly, summary judgment is GRANTED in favor of Defendant Odom on all counts asserted by WAG.

SCS asserts claims against Odom for (1) securities fraud under Georgia law, (2) common law fraud, and (3) negligent misrepresentation. Specifically, SCS alleges that Odom made material misrepresentations of fact and failed to disclose material information in connection with the Purchase. SCS also alleges that in the two years following the Purchase, Odom made material misrepresentations of fact in order to convince SCS to hold its Verso stock when, otherwise, SCS would have sold its stock. SCS finally sold its Verso stock in April 2008 for $403,165. Because SCS acquired that stock in June 2006 for $5.8 million worth of assets, SCS claims a loss of $5,396,835 that it attributes to Odom's allegedly fraudulent statements and omissions.

A claim for securities fraud under Georgia law has five elements: "1) a misstatement or omission, 2) of a material fact, 3) made with scienter, 4) on which plaintiff relied, 5) that proximately caused his injury." Koegler v. Kransnoff, 268 Ga. App. 250, 254 (2005). Under Georgia law, "fraud has five elements: (1) false representation by a defendant; (2) scienter; (3) intention to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff." Bogle v. Bragg, 248 Ga. App. 632, 634 (2001). Negligent misrepresentation has three elements: "(1) the defendant's negligent supply of false information to foreseeable persons, known or

unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, 267 Ga. 424, 426 (1997). Thus, a misrepresentation is a required element common to all three of SCS's claims.

Donald Slowinski ("Slowinski") is the sole principal of SCS and since 1984 has been an experienced securities professional. He initiated the Purchase and testified in his deposition that he conducted considerable due diligence prior to the Purchase. SCS now contends that Odom made certain misrepresentations or omissions prior to the Purchase and that Verso's 2005 10-K was also misleading.

First, SCS alleges that the description of Verso as a provider of "next-generation" technology is a material misrepresentation. Neither Odom nor the 2005 10-K assert that Verso is only a "next-generation" provider; rather it is clear that Verso had next-generation products as well as "legacy" products. Thus, the Court cannot find a misrepresentation here.

Second, SCS alleges that prior to the Purchase, Odom represented that Verso intended to discontinue some of Verilink's product lines. However, the Agreement gives Verso the discretion to sell such product lines, but it does not require it to do so. Moreover, any statement about Verso's future plans are not actionable because "a 'misrepresentation' presupposes knowledge of the falsity of the representation and does not include representations as to future acts or events." Gross v. Ideal Pool Corp.,181 Ga. App. 483, 485 (1987).

Third, SCS alleges that prior to the Purchase, Odom represented that Verso had large pending deals to supply equipment to Alcatel and Motorola. There is evidence in Slowinski's and Odom's depositions showing that such pending deals existed thus making any representations to that effect true.

Fourth, SCS alleges that prior to the Purchase, Odom represented that "if Verso's revenues were combined with revenues generated by the Verilink business, Verso had a 'good shot' at being EBITDA positive in the third quarter of 2006 and that it was a 'lay up' that Verso would be EBITDA positive by the fourth quarter of 2006." The Court finds these alleged misrepresentations cannot provide a basis for SCS's claims because they are both opinions and representations as to future events. ReMax North Atlanta v. Clark, 244 Ga. App. 890, 893 (2000); Gross, 181 Ga. App. at 485.

In addition to the alleged misrepresentations discussed above, SCS alleges that Odom failed to disclose two pieces of material information prior to the Purchase. First, SCS alleges that Verso's 2005 10-K failed to disclose Verso's "history of massive technology-related write-offs." However, the record shows that such write-offs were, in fact, disclosed in public filings. Accordingly, the Court cannot find any omission of material information based on SCS's allegations regarding nondisclosure of "massive technology related write-offs" when the record shows that such disclosures were made.

Second, SCS alleges that in Verso's 2005 10-K, Odom failed to disclose that Verso engaged in "channel stuffing." In support of this allegation, SCS points to a single occurrence when it claims Verso recognized a sale to one of its distributors in December 2005 when such sale should have been accounted for in February 2006. The amount of that sale was $514,615.08. Odom denies any "channel stuffing" ever occurred. Actionable fraud may be based on "[s]uppression of a material fact which a party is under an obligation to communicate." O.C.G.A. § 23-2-53 (emphasis added). The Court finds that SCS cannot show that an omission about "channel stuffing" was material. When determining materiality, "the question is not whether the information relied upon was 'important' in some abstract sense; the question must be determined within the context of a specific decision." McKesson Corp. v. Green, 299 Ga. App. 91, 94 (2009). The Purchase at issue in this case was valued at $5.8 million. The record also shows that SCS raised the idea for the Purchase with Odom. Viewed

in the context of this case, the Court finds that a single incident of "channel stuffing" involving approximately $500,000, even if true, is immaterial as a matter of law. The Court also finds that Odom was not under an obligation to communicate. "The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." O.C.G.A. § 23-2-53. "Absent a confidential relationship, no duty to disclose exists between parties in arms-length business transactions." Lilliston v. Regions Bank, 288 Ga. App. 241, 244 (2007); see also, Bogle v. Bragg, 248 Ga. App. 632, 636 (2001). There is nothing in the record to show that SCS shared a confidential relationship with Odom. Rather, the record shows that the Purchase was an arms-length business transaction.

Turning to SCS's holding claims, Slowinski, in his affidavit, specifically points to three occasions on which he was planning to sell shares of Verso on behalf of SCS. However, in each instance, Slowinski alleges that he did not sell because Odom made misrepresentations about Verso which caused him to continue to hold the stock. In January 2007, Slowinski alleges that Odom said "you are crazy to sell just above $1.00, Verso is positioned to where we've already turned the corner...We could be close to $1.00 per share in earnings in the next few years. This is going to be a $20.00 stock." In March 2007, when Slowinski again told Odom he was planning to start selling, Odom stated "we're going to have a record year. We're going to sell that crap we don't need and split it with SCS like we agreed." And, finally in August 2007, Odom said "we've got record orders in hand and I think it is a bad idea to have the largest shareholder selling into this raise. Just hang in there."

In Holmes v. Grubman, 286 Ga. App. 636 (2010), the Georgia Supreme Court answered several certified questions from the United States Court of Appeals for the Second Circuit. First, it stated that Georgia does recognize fraud claims based on forbearance in the sale of publicly traded

securities. Second, it concluded that a plaintiff at trial has the burden of proving that the truth, concealed by the defendant, entered the marketplace thereby precipitating a drop in the price of the security. It cited favorably a Tenth Circuit case (In re Williams Securities Litigation – WCG Subclass, 558 F.3d 1130 (10th Cir. 2009) requiring a plaintiff to show that it was this revelation that caused the loss and not one of the "tangle of factors" that affect price.

The January and March 2007 alleged misrepresentations are statements of opinion and hope. And certainly, the August 2007 statement is not an actionable misrepresentation. Finally, SCS has not met the requirement of Holmes to show that any of these statements caused the loss rather than a "tangle of factors".

Odom's Motion for Summary Judgment is hereby GRANTED against both WAG and SCS.

SO ORDERED this 5th day of May, 2010.

Cynthia D. Wright

For ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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