4-23-2010

Order (MICHAEL J. HAWK)

Elizabeth E. Long
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MICHAEL J. HAWK, DONALD M. HILL, and JAYE M. JACKSON	)(	
Plaintiffs,	)(	
v.	)(	**Civil Action File No. 2009-CV-162588**
STEVEN ODOM	)(	
Defendant.	)(	

ORDER

On April 21, 2010, Counsel appeared before this Court to present oral argument on Defendant Odom's Motion for Summary Judgment filed on March 12, 2010. 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:

This case arises out of a private placement offering ("the Purchase") through which Plaintiffs purchased stock in Verso Technologies, Inc. ("Verso"), a Minnesota corporation that is currently in bankruptcy. Defendant Steven A. Odom ("Odom") was the CEO of Verso at the time of the Purchase.

The record shows that Odom has met Plaintiff Jackson at least once, but Plaintiffs Hawk and Hill have never spoken with or met Odom. Plaintiffs' representative for the Purchase was Mr. Donald J. Slowinski ("Slowinksi"). Prior to Plaintiffs' purchase of Verso stock, Slowinski met with Odom and was the sole conduit of information between Odom and Plaintiffs regarding the Purchase. During their meeting, in addition to discussing Verso, Odom gave Slowinski a copy of a PowerPoint

presentation about Verso. On February 21, 2008, each Plaintiff executed a subscription agreement memorializing their purchase of Verso stock.

Plaintiffs assert claims for common law fraud, negligent misrepresentation, and securities fraud under Georgia law. Specifically, Plaintiffs allege that: (1) the PowerPoint presentation contained misrepresentations, (2) Odom made oral misrepresentations to Slowinski who passed this misinformation on to Plaintiffs, and (3) Odom failed to disclose material information to Plaintiffs.

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).

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). 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). Thus, reliance is an element common to all three of Plaintiffs' claims.

The only document that Plaintiffs allege contain any misrepresentations is the PowerPoint presentation. However, the record shows that Plaintiffs did not rely on the PowerPoint presentation when deciding to invest in Verso. Specifically, the record shows that Plaintiff Hawk never received the PowerPoint presentation and, thus, did not rely on it when deciding to invest in Verso. Plaintiff Hill testified during his deposition that he "relied" on the PowerPoint presentation, but he failed to identify any misrepresentation contained in the PowerPoint presentation. Plaintiff Jackson testified in his deposition that he entered into this Purchase with Verso because of previous investments he had made in Verso. Moreover, when specifically asked what in the PowerPoint presentation influenced him to invest in Verso, Plaintiff Jackson failed to identify anything and, instead, stated that he "wanted to protect what investment I had with the company."

The subscription agreements executed by the Plaintiffs contained a merger clause. That merger clause provides that "[t]his Subscription Agreement contains the entire agreement of the parties with respect to the matter set forth herein and there are no representations, covenants or other agreements except as stated or referred to herein or as are embodied in the Offering Documents." As to any alleged oral misrepresentations by Odom to Slowinski, the Court finds that they cannot form the basis of Plaintiffs' claims because of this merger clause. Even if claims based on Odom's alleged oral misrepresentations to Slowinksi were not precluded by the merger clause, Plaintiffs cannot show that they justifiably relied on those statements. The record shows that Slowinski and Plaintiff Jackson were distrustful of Odom. Therefore, their reliance on any statements he made was unjustified. As their agent, Slowinski's distrust of Odom is imparted to Plaintiffs Hawk and Hill.

This leaves Plaintiffs with only claims for fraud by omission. 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. "The obligation to communicate may arise from the confidential relations of the parties or

from the particular circumstances of the case." Id. There is nothing in the record to show that Plaintiffs shared a confidential relationship with Odom as two of them never met or spoke with Odom and the third knew him only slightly. "Absent a confidential relationship, no duty to disclose exists between parties in arms-length business Purchases." Lilliston v. Regions Bank, 288 Ga. App. 241, 244 (2007); see also, Bogle v. Bragg, 248 Ga. App. 632, 636 (2001). The record reveals that this case arises from an arms-length business Purchase. The record also shows that Plaintiffs did not seek any additional information from Odom after their conversations with Slowinski. Liability for fraud by omission cannot be found where Plaintiffs failed to exercise ordinary care in considering an arms-length Purchase. First Union Nat. Bank of Georgia v. Gurley, 208 Ga. App. 647, 649 (1993). As Odom had no duty to disclose and Plaintiffs did not seek any due diligence from Odom, Plaintiffs fraud by omission claims fail as a matter of law.

Defendant Odom's motion for summary judgment is hereby **GRANTED**.

SO ORDERED this 23rd day of April, 2010.

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

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