UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Bush v. Rewald

619 F. Supp. 585 (D. Haw. 1986) · No. Civ. No. 84-0881 · Decided January 14, 1986

SUMMARY

The United States District Court for the District of Hawaii addressed defendants' motions for summary judgment in a proposed securities-fraud class action arising from the collapse of Bishop, Baldwin, Rewald, Dillingham & Wong, a Ponzi scheme. The court analyzed potential primary, controlling-person, and aiding-and-abetting liability under federal securities laws, as well as common-law fraud, negligence, negligent misrepresentation, and professional negligence claims. Summary judgment was granted to several attorney and real-estate-agent defendants based on the absence of evidence establishing a duty, scienter, participation, or causation.

CASE DETAILS

COURT	United States District Court for the District of Hawaii
WRITING FOR THE COURT	Martin Pence
JURISDICTION	Hawaii
DECIDED	January 14, 1986
DOCKET	Civ. No. 84-0881
DISPOSITION	other
PROCEDURAL POSTURE	Investors brought a proposed securities-fraud class action and related statutory and common-law claims against persons associated with Bishop, Baldwin, Rewald, Dillingham & Wong. After an earlier Rule 12(b)(6) ruling, the court decided the summary-judgment aspects of motions by ten defendants, together with renewed dismissal motions concerning the RICO claim and other claims.
STANDARD OF REVIEW	Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmovant, the record reveals no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The opposing party must present significant probative evidence and may not rely solely on the pleadings. Rule 9(b) requires fraud allegations to identify the circumstances of the fraud with particularity.
PRECEDENTIAL VALUE	Published federal district court opinion; persuasive rather than binding outside the issuing court and not binding on the Ninth Circuit.

TOPICS

securities fraud · class actions · summary judgment · motions to dismiss · civil procedure

PRACTICE AREAS

securities litigation · class actions · civil procedure · professional negligence · RICO

QUESTIONS PRESENTED

1. Whether summary judgment was appropriate on the securities-fraud, common-law fraud, negligent misrepresentation, negligence, professional-negligence, malpractice, real-estate recovery-fund, and unfair-trade-practices claims against the moving defendants.
2. Whether an alleged securities-law duty to disclose could arise merely from being an outside attorney, director, employee, or consultant listed in the firm's promotional brochure.
3. Whether defendants could be liable as controlling persons or aiders and abettors of securities fraud absent evidence of control, actual knowledge, or substantial assistance.
4. Whether the section 12(2) claim was barred by the applicable one-year limitations period.
5. Whether the RICO claim failed under Rule 9(b), was time-barred, or could proceed against defendants for whom no predicate acts were shown.
6. Whether summary judgment could be decided before class certification and before further substantive discovery.

HOLDINGS

1. A person associated with an investment firm does not owe investors a duty to disclose material facts merely because the person performed corporate legal work, served as a director, worked for the firm, or was listed as a consultant in promotional materials. The duty must be evaluated under the relevant relationship, access, benefit, reliance, and transaction-initiation factors, together with the required scienter.
2. A director is not automatically liable as a controlling person; control over the corporation's regular affairs must be shown.
3. Assuming aider-and-abettor liability exists, it requires actual knowledge of the fraud and substantial assistance in furthering it.
4. A section 12(2) seller need not be in privity with the buyer, but the defendant's conduct must have proximately caused the plaintiff's injury; the record showed no significant evidence that the moving defendants' acts were substantial factors in any investor's purchase.
5. An attorney generally owes professional duties to the client, or potentially to an intended third-party beneficiary for whose benefit services were undertaken; foreseeability alone does not establish a duty to investors.
6. The section 12(2) claim was time-barred because the fraud was publicly disseminated in late July and early August 1983, more than one year before suit was filed.

7. A district court may decide summary-judgment motions before ruling on class certification when fairness and efficiency support that sequence and the defendants consent or assume the associated risk.
8. The RICO claim was dismissed with prejudice because the complaint failed to plead predicate fraudulent acts with Rule 9(b) particularity and the claim was time-barred under the applicable Hawaii limitations provision.

KEY QUOTATIONS

> *“The five factors for determining whether a duty exists are:”* (619 F. Supp. at 593)

> *“It cannot be said beyond a reasonable doubt that Newland did not solicit investments or that he committed no securities violations.”* (619 F. Supp. at 599)

> *“Neither Fed.R.Civ.P. 23 nor due process necessarily requires that the district court rule on class certification before granting or denying a motion for summary judgment.”* (619 F. Supp. at 600)

> *“Plaintiff cannot embark on a fishing expedition and expect defendants to supply him with a case by means of admissions in deposition and interrogatories.”* (619 F. Supp. at 601)

FACTUAL BACKGROUND

Bishop, Baldwin, Rewald, Dillingham & Wong collapsed in 1983 after being exposed as a large Ponzi-style investment fraud and entered bankruptcy. The plaintiff alleged that lawyers, accountants, and a real-estate agent associated with the firm aided securities fraud or owed investors duties to disclose material facts. The moving defendants generally submitted affidavits denying participation in solicitation, knowledge of the fraud, or direct dealings with investors, while evidence concerning attorney Gerald Lam's tax opinion, attorney D. Alden Newland's contacts with potential investors, and the roles of William Jolly and Daniel Clement created factual disputes.

PROCEDURAL HISTORY

The court previously dismissed or limited several claims for failure to plead fraud with particularity, statute-of-limitations defects, and failure to state a claim, while allowing amendment of some claims. On the present record, the court granted complete summary judgment to Smith, Jason Wong, Black, Ing, Fong, and Koshko; granted partial relief to Newland, Lam, Jolly, and Clement; dismissed the section 12(2) and RICO claims with prejudice as to all defendants; vacated the earlier without-prejudice dismissal orders to the extent superseded; and authorized Rule 54(b) final judgment for specified prevailing defendants.

DISPOSITION

other

CASES CITED

- Sovereign Life Ins. Co. v. Rewald, 601 F. Supp. 1489 (D. Haw. 1985)
- Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984)

- Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301 (9th Cir. 1982)
- Ruffin v. County of Los Angeles, 607 F.2d 1276 (9th Cir. 1979)
- SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980)
- Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972)
- White v. Abrams, 495 F.2d 724 (9th Cir. 1974)
- Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)
- Burgess v. Premier Corp., 727 F.2d 826 (9th Cir. 1984)
- Nelson v. Serwold, 576 F.2d 1332 (9th Cir. 1978)
- Aaron v. SEC, 446 U.S. 680 (1980)
- Herman & MacLean v. Huddleston, 459 U.S. 375 (1983)
- Stephenson v. Calpine Conifers II, 652 F.2d 808 (9th Cir. 1981)
- Ritzau v. Warm Springs West, 589 F.2d 1370 (9th Cir. 1979)
- Kidwell ex rel. Penfold v. Meikle, 597 F.2d 1273 (9th Cir. 1979)
- Harmsen v. Smith, 693 F.2d 932 (9th Cir. 1982)
- Admiralty Fund v. Tabor, 677 F.2d 1297 (9th Cir. 1982)
- Hickman v. Groesbeck, 389 F. Supp. 769 (D. Utah 1974)
- San Francisco-Oklahoma Petroleum Exploration Corp. v. Carstan Oil, 765 F.2d 962 (10th Cir. 1985)
- Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir. 1973) (en banc)
- Strong v. France, 474 F.2d 747 (9th Cir. 1973)
- Herm v. Stafford, 663 F.2d 669 (6th Cir. 1981)
- SEC v. Coffey, 493 F.2d 1304 (6th Cir. 1974)
- Goodman v. Kennedy, 18 Cal. 3d 335, 134 Cal. Rptr. 375, 556 P.2d 737 (1976)
- Stokes v. Lokken, 644 F.2d 779 (8th Cir. 1981)
- Sharp v. Coopers and Lybrand, 457 F. Supp. 879 (E.D. Pa. 1978)
- Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)
- Wright v. Schock, 742 F.2d 541 (9th Cir. 1984)
- First National Bank of Arizona v. Cities Service, 391 U.S. 253 (1968)
- Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)
- McCarthy v. Pacific Loan, 600 F. Supp. 137 (D. Haw. 1984)
- Bennett v. E.F. Hutton, 597 F. Supp. 1547 (N.D. Ohio 1984)
- Greenblatt v. Drexel Burnham Lambert, 763 F.2d 1352 (11th Cir. 1985)
- Lien Ho Hsing Steel Enterprise Co. v. Weihtag, 738 F.2d 1455 (9th Cir. 1984)
- Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979)
- Warth v. Seldin, 422 U.S. 490 (1975)
- Conley v. Gibson, 355 U.S. 41 (1957)