UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Securities & Exchange Commission v. Capital Growth Co., S.A.

391 F. Supp. 593 (S.D.N.Y. 1974) · No. No. 74 Civ. 3779 · Decided December 31, 1974

SUMMARY

The court addresses the Securities and Exchange Commission's action alleging violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5 arising from the alleged misappropriation of assets of foreign investment companies. It upholds subject matter and personal jurisdiction, the preliminary injunction, and the appointment of a receiver, and rejects the EHG defendants' due-process and notice challenges.

CASE DETAILS

COURT	United States District Court for the Southern District of New York
WRITING FOR THE COURT	Stewart, District Judge
JURISDICTION	New York
DECIDED	December 31, 1974
DOCKET	No. 74 Civ. 3779
DISPOSITION	other
PROCEDURAL POSTURE	The SEC sought preliminary and permanent injunctive relief and appointment of a receiver in an enforcement action alleging violations of Securities Exchange Act § 10(b) and Rule 10b-5. The EHG defendants moved by special appearance to quash service, vacate the preliminary injunction and receiver appointment, set aside their default, and obtain additional time to answer.
STANDARD OF REVIEW	For preliminary injunctive relief, the court applied the Second Circuit standard requiring either probable success on the merits and possible irreparable injury, or sufficiently serious questions going to the merits combined with a balance of hardships tipping decidedly toward the movant. The court also evaluated notice under Federal Rule of Civil Procedure 65(a)(1) and the constitutional due-process standard of notice reasonably calculated to apprise interested parties of the action and afford an opportunity to object.

PRECEDENTIAL VALUE	Published federal district court memorandum opinion; persuasive authority within the Second Circuit and elsewhere, but not binding appellate precedent.

TOPICS

subject matter jurisdiction · injunctions · equitable relief · service of process · civil procedure

PRACTICE AREAS

civil procedure · securities regulation · equitable remedies · international litigation

QUESTIONS PRESENTED

1. Whether the federal district court had subject matter jurisdiction over alleged securities fraud involving foreign corporations and transactions with significant United States contacts.
2. Whether venue was proper in the Southern District of New York.
3. Whether the SEC satisfied the standard for preliminary injunctive relief and whether the court could appoint a receiver and seek disgorgement and an accounting.
4. Whether the EHG defendants received adequate notice of the preliminary-injunction proceedings under Rule 65(a)(1) and due process.
5. Whether the court had personal jurisdiction over the EHG defendants when the preliminary injunction was entered.

HOLDINGS

1. The court had subject matter jurisdiction over the alleged fraudulent scheme because the allegations showed significant conduct within the United States and an impact on United States investors.
2. Venue was proper in the Southern District of New York based on the SEC's uncontested allegations of relevant acts occurring in the district.
3. The preliminary injunction was properly entered because the SEC's uncontested allegations demonstrated probable success on the merits and a likelihood of irreparable harm, and also satisfied the alternative Second Circuit formulation for preliminary relief.
4. Because the federal securities laws applied and the SEC made a strong showing of fraudulent misappropriation by fiduciaries, the court could exercise its equitable powers to appoint a receiver and seek disgorgement and an accounting of misappropriated funds.
5. The EHG defendants received adequate notice and an adequate opportunity to be heard, satisfying Rule 65(a)(1) and due process.
6. A preliminary injunction would be void as to defendants over whom the court lacked personal jurisdiction, but the court had personal jurisdiction over the EHG defendants when the injunction was entered.

KEY QUOTATIONS

> *"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections."* (at 600)

> *"The notice must be of such a nature as reasonably to convey the required information"* (at 600)

> *"Thus the court found that the order to show cause gave defendants sufficient notice of the preliminary injunction hearing."* (at 601)

FACTUAL BACKGROUND

The SEC alleged that the defendants engaged from 1968 onward in a scheme to divert assets of the Capital Growth companies for their own benefit, harming shareholders. The companies were foreign entities whose securities were marketed to public investors, including United States investors, through United States mailings and representations emphasizing their connections to the United States and its securities markets. The alleged conduct included illiquid investments, non-arm's-length transactions, misappropriation of corporate assets, and elimination of shareholders' redemption rights. The EHG defendants were based in Puerto Rico and received notice of the TRO and preliminary-injunction proceedings through counsel, telephone communications, mail, and service of process.

PROCEDURAL HISTORY

The court entered a temporary restraining order on September 3, 1974. A preliminary injunction and receiver appointment were entered against the Capital Growth and EHG groups on September 24, 1974; a permanent injunction was entered against the Sheffield defendants on October 30, 1974. The EHG defendants later appeared, answered the complaint, and moved to challenge jurisdiction, service, notice, the injunction, the receiver appointment, and their alleged default. After reconsideration, the court adhered to its prior rulings and held the injunction binding.

DISPOSITION

other

CASES CITED

- Carpenters' District Council v. Cicci, 261 F.2d 5 (6th Cir. 1958)
- SEC v. Koenig, 469 F.2d 198 (2d Cir. 1972)
- SEC v. Frank, 388 F.2d 486 (2d Cir. 1968)
- Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972)
- Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968), rev'd in part on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied sub nom. Manley v. Schoenbaum, 395 U.S. 906 (1969)
- Travis v. Anthes Imperial Limited, 473 F.2d 515 (8th Cir. 1973)
- SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943)

- SEC v. United Financial Group, Inc., 474 F.2d 354 (9th Cir. 1973)
- Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973)
- Sampson v. Murray, 415 U.S. 61 (1974)
- SEC v. Keller Corp., 323 F.2d 397 (7th Cir. 1963)
- SEC v. Culpepper, 270 F.2d 241 (2d Cir. 1959)
- Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288 (1960)
- Porter v. Warner Co., 328 U.S. 395 (1946)
- SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972)
- SEC v. Bowler, 427 F.2d 190 (4th Cir. 1970)
- SEC v. Dumont, 49 F.R.D. 342 (S.D.N.Y. 1969)
- Plaquemines Parish School Board v. United States, 415 F.2d 817 (5th Cir. 1969)
- Banke v. Novadel-Agene Corp., 130 F.2d 99 (2d Cir. 1942), cert. denied, 317 U.S. 692 (1942)
- American Surety Co. v. Baldwin, 287 U.S. 156 (1932)