UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Phillip Emrich and Eric Gillberg v. Touche Ross & Company et al.

11 Fed. R. Serv. 3d 226 (9th Cir. 1988) · No. No. 86-6347 · Decided May 16, 1988

SUMMARY

The Ninth Circuit reviewed the dismissal of claims arising from the sale of securities in Sambo's Restaurant joint ventures. The court held that the RICO claim and related state-law claims were properly within federal jurisdiction after removal, but that the Securities Act of 1933 claims were not removable and the Securities Exchange Act of 1934 claims were subject to derivative-jurisdiction principles. The court affirmed dismissal of the 1934 Act claims, reversed dismissal of the remaining claims, ordered remand of the 1933 Act claims to state court, and remanded for consideration of equitable tolling.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
WRITING FOR THE COURT	Tang, Circuit Judge; Wiggins, Circuit Judge; Kozinski, Circuit Judge
JURISDICTION	Federal
DECIDED	May 16, 1988
DOCKET	No. 86-6347
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiffs appealed from the district court's dismissal with prejudice of their removed state-court action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).
STANDARD OF REVIEW	Removal jurisdiction, dismissal under Rule 12(b)(6), and interpretation of state law were reviewed de novo. A Rule 12(b)(6) dismissal was improper unless it appeared beyond doubt that plaintiffs could prove no set of facts entitling them to relief.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Phillip Emrich, Eric Gillberg v. Touche Ross & Company, Sam Battistone Sr., Sam D. Battistone Jr., F. Newell Bohnett, Robert Hild, Owen Johnston, William L. Wagner Sr., George McKaig, Dan V. Angeloff, George A. Cavelletto, Bruce N. Anticouni

TOPICS

subject matter jurisdiction · appellate procedure · motions to dismiss · statute of limitations · civil procedure

PRACTICE AREAS

civil procedure · federal courts · securities litigation · RICO · appellate procedure

QUESTIONS PRESENTED

1. Whether the district court acquired subject matter jurisdiction over the removed action and over the federal and state claims.
2. Whether the RICO claim was removable under 28 U.S.C. § 1441(a) and whether it supplied pendent jurisdiction over related state-law claims.
3. Whether the RICO claim was separate and independent from the nonremovable Securities Act of 1933 claim under 28 U.S.C. § 1441(c).
4. Whether the district court properly dismissed the Securities Exchange Act of 1934 claims under the derivative-jurisdiction doctrine.
5. Whether the Securities Act of 1933 claims had to be remanded because of the statutory prohibition on removal.
6. Whether the state-law and RICO claims could be dismissed as time-barred on the face of the complaint despite allegations invoking equitable tolling and the pendency of earlier actions.
7. Whether the Rule 12(b)(6) motion should have been treated as a motion for summary judgment because defendants submitted a declaration.

HOLDINGS

1. A civil RICO claim arises under federal law and is removable under 28 U.S.C. § 1441(a); the district court therefore had original jurisdiction over the RICO claim and pendent jurisdiction over sufficiently related California statutory and common-law claims.
2. The district court properly dismissed the Securities Exchange Act of 1934 claims because the state court lacked subject matter jurisdiction over claims subject to exclusive federal jurisdiction, and the federal court could derive no jurisdiction through removal.
3. The Securities Act of 1933 claims were not removable under § 1441(a), and the RICO claim was not a separate and independent claim supporting removal under § 1441(c); the district court therefore lacked jurisdiction over those claims and was required to remand them to state court.
4. The district court improperly dismissed the state-law and RICO claims as time-barred on the pleadings because the complaint alleged facts invoking state and federal equitable-tolling doctrines and the public record showed that earlier related actions might have remained pending.
5. The motion to dismiss was not automatically converted into a summary-judgment motion merely because defendants submitted a declaration requesting judicial notice of public records.

KEY QUOTATIONS

> *“Because the RICO claim is one "arising under the laws of the United States" it falls within the district court's original jurisdiction and is thus removable pursuant to section 1441(a).”* (¶ 23)

> *“"[W]here there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under Sec. 1441(c)."”* (¶ 32)

> *“Treated as a Rule 12(b)(6) motion, the complaint should not have been dismissed unless it appeared "beyond doubt" that plaintiffs could prove no set of facts in support of their claim which would entitle them to relief.”* (¶ 38)

FACTUAL BACKGROUND

The action arose from the 1977 and 1978 sale of securities in two Sambo's Restaurant, Inc. joint ventures formed to finance restaurant expansion. Plaintiffs alleged that Sambo's officers, directors, and auditor violated federal and state securities laws, committed fraud, and violated RICO in connection with those sales. Plaintiffs filed the present action in 1986 and alleged that they learned of the defendants' misconduct within one year before filing two earlier related actions in 1981.

PROCEDURAL HISTORY

Plaintiffs filed suit in the Santa Barbara Superior Court alleging violations of the Securities Act of 1933, the Securities Exchange Act of 1934, California securities and fraud law, and RICO. Seven defendants removed the action to the Central District of California. The district court dismissed all counts as time-barred, held that it lacked subject matter jurisdiction over the Securities Exchange Act claim, and entered judgment dismissing the action with prejudice. The Ninth Circuit affirmed dismissal of the Securities Exchange Act claims, reversed the district court's exercise of jurisdiction over the Securities Act of 1933 claims and ordered remand of those claims to state court, and reversed dismissal of the state-law and RICO claims, remanding for further proceedings concerning equitable tolling and related factual issues.

DISPOSITION

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reversed_and_remanded
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REMAND INSTRUCTIONS

Remand the Securities Act of 1933 claims to state court. Remand the state-law claims and RICO claim to the district court for determinations concerning whether equitable tolling was properly raised, whether California equitable-tolling doctrines apply to the state claims, whether federal tolling doctrines apply to the RICO claim, and whether Emrich II remained pending. The district court was also directed to determine which defendants had been properly served and to permit amendment of the removal petition to identify all proper defendants.

CASES CITED

- Lou v. Belzberg, 834 F.2d 730, 734, 739 (9th Cir. 1987)
- Williams v. Caterpillar Tractor Co., 786 F.2d 928, 930 (9th Cir. 1986)
- Bright v. Bechtel Petroleum, Inc., 780 F.2d 766, 768 (9th Cir. 1986)

- Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423, 1426, 1429 (9th Cir. 1984)
- Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979)
- United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)
- Hurn v. Oursler, 289 U.S. 238, 243-47 (1933)
- Carnegie-Mellon University v. Cohill, 484 U.S. 343, 348-50 (1988)
- Contemporary Services Corp. v. Universal City Studios, Inc., 655 F. Supp. 885, 889, 893-95 (C.D. Cal. 1987)
- Thomas v. Shelton, 740 F.2d 478, 483 (7th Cir. 1984)
- Sheet Metal Workers International Ass'n v. Seay, 696 F.2d 780, 782 (10th Cir. 1983)
- Cianci v. Superior Court, 40 Cal. 3d 903, 916, 710 P.2d 375, 221 Cal. Rptr. 575, 581 (1985)
- McConnell v. Marine Engineers Beneficial Ass'n, 526 F. Supp. 770, 772 (N.D. Cal. 1981)
- American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14 (1951)
- Morris, Inc. v. Vitek, 412 F.2d 1174, 1176 (9th Cir. 1969)
- Kinsey v. Nestor Exploration Ltd., 604 F. Supp. 1365, 1371 (E.D. Wash. 1985)
- Beeman v. Olson, 28 F.2d 620, 621 (9th Cir. 1987)
- Dyer v. Greif Bros., Inc., 766 F.2d 398, 401 (9th Cir. 1985)
- Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921)
- Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co., 258 U.S. 377, 382 (1922)
- Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986)
- Fort Vancouver Plywood Co. v. United States, 747 F.2d 547, 552 (9th Cir. 1984)
- In re McLinn, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc)
- Phillips v. Bureau of Prisons, 591 F.2d 966, 969 (D.C. Cir. 1979)
- North Star International v. Arizona Corp. Commission, 720 F.2d 578, 580-82 (9th Cir. 1983)
- Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143, 156 (1987)
- Board of Regents v. Tomanio, 446 U.S. 478, 485-86 (1980)
- Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 466 (1975)
- Whittaker v. Whittaker Corp., 639 F.2d 516, 527 (9th Cir. 1981)
- Nichols v. Hughes, 721 F.2d 657, 660 (9th Cir. 1983)
- Mt. Hood Stages, Inc. v. Greyhound Corp., 616 F.2d 394, 396 (9th Cir. 1980)
- Addison v. State, 21 Cal. 3d 313, 319, 578 P.2d 941, 943-44, 146 Cal. Rptr. 224, 227 (1978)
- Electronic Equipment Express, Inc. v. Donald H. Seiler & Co., 122 Cal. App. 3d 834, 847 n.3, 176 Cal. Rptr. 239 (1981)
- Emrich and Gillberg v. Touche Ross & Co., Emrich v. Battistone, 714 F.2d 152 (9th Cir. 1983) (unpublished memorandum disposition)