UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Morin v. Trupin

747 F. Supp. 1051 (S.D.N.Y. 1990) · No. 88 Civ. 5743 (RWS) · Decided September 29, 1990

SUMMARY

The United States District Court for the Southern District of New York considers numerous defendants' motions to dismiss claims arising from alleged fraud in the sale and management of tax-advantaged real estate limited partnerships. The court grants dismissal of the securities and other claims, primarily based on pleading deficiencies under Federal Rule of Civil Procedure 9(b), failure to satisfy statutory requirements, and other substantive defects, while granting leave to amend. The court grants certain motions for summary judgment and denies a motion for sanctions.

CASE DETAILS

COURT	United States District Court for the Southern District of New York
WRITING FOR THE COURT	Robert W. Sweet
JURISDICTION	New York
DECIDED	September 29, 1990
DOCKET	88 Civ. 5743 (RWS)
DISPOSITION	other
PROCEDURAL POSTURE	Numerous defendants moved to dismiss a consolidated complaint under Rules 9(b) and 12(b)(6), and certain defendants alternatively moved for summary judgment under Rule 56. Continental Realty Corp. and Emanuel Organek also moved for sanctions.
STANDARD OF REVIEW	On a motion to dismiss, factual allegations are accepted as true and construed liberally in plaintiffs' favor; dismissal is proper when plaintiffs can prove no set of facts entitling them to relief. Summary judgment is proper when no genuine dispute of material fact exists and the movant is entitled to judgment as a matter of law; the court does not resolve disputed facts and asks whether a reasonable trier of fact could find for the nonmovant.
PRECEDENTIAL VALUE	published district court opinion
PARTIES	Simeon Morin, Delano Morin, Anant Mauskar, Stewart Blaikie, James Brockenbrough, Celia Brockenbrough, William Brunner, Doris

Brunner, Richard J. Chaban, Roberta M. Chaban, Mable Creten, Madelyn Dennis, Trustee for Dennis Family Trust, Earl J. Field, Subhash Gajendragadkar, Morris A. Goldsmith, Lon A. Graves, Sandis P. Graves, Julius Groner, Hong-Zen Lin Hung, JFA Associates, Crl Kirk, Roger Kirk, Louis Linker, James C. Magidson, James Marshall, Charles R. McNamee, Coremco, Inc., Charles F. Pratt, John A. Romito, Cynthia L. Romito, Richard L. Rouhe, Gerard F. Ryan, Barbara Ryan, James Schlenker, Frank A. Schuler, III, Harry Simon, Maurice A. Van Lerberg, Paul C. Van Lerberg, Joyce B. Seal, Joyce B. Seal, personal representative for the Estate of H. Max Seal, Robert J. Nejdl, Mary M. Nejdl, James E. Wheeler, Arnold L. Petersen, II, Donald T. Hlubucek, Richard Ratner v. Barry H. Trupin, Bennett W. Trupin, Arthur Berlin, Salvatore A. Bucci, Gerald Schaffer, Marvin Schaffer, Frederick Gnesin, David Kaye, Herb Silverstein, Robert D. Abrams, George Cohen, Rothschild Registry International, Inc., Rothschild Reserve International, Inc., Tru Management Corp., Tru Properties Corp., Sarasota Management Corp., Mellon Management Corp., MHT Properties Corp., MHT Corporation, Prudential American Realty Corp., Prudential American Financial Corp., BWT Corporation, The Tara Jill Trupin 1985-B Trust, RRI Realty Corp., Continental Realty Corp., Emanuel Organek, American Realty Associates, North American Associates, Stuart Stern, Jerry Bills, Pass-Through Mortgage Corp., Jackson-Cross Company, George C. Hoez, Russell E. Snyder, Network Appraisal Company, Inc., Joseph J. Savilia, Stephen H. Schuster, Gary Rogers, H. Stewart Carrico, II, Charterhouse Capital Investment Corp., Charterhouse Financial Ltd., Westwind Leasing Corp., Alan Asher, Laventhol & Horwath, Elliot Lesser, Mintz, Fraade & Zeiger, P.C., Frederick M. Mintz, Alan Fraade, Eisenberg Honig & Fogler, Martin Honig, Stuart Becker & Company, P.C., Stuart Becker, Ferber Greilsheimer Chan & Essner, William Greilsheimer, Robert Chan

TOPICS

motions to dismiss · summary judgment · sanctions · civil procedure · commercial litigation

PRACTICE AREAS

civil procedure · securities litigation · RICO · commercial litigation · real estate investment

QUESTIONS PRESENTED

1. Whether the securities-fraud allegations satisfied Federal Rule of Civil Procedure 9(b).
2. Whether the Section 12(2) claims adequately pleaded tender, timeliness, and statutory-seller status.

3. Whether the RICO claims adequately pleaded predicate acts attributable to individual defendants, enterprise participation, causation, and conspiracy.
4. Whether the complaint adequately pleaded venue and service as to particular defendants.
5. Whether Continental Realty Corp. and Emanuel Organek were entitled to summary judgment on the federal securities and RICO claims.
6. Whether Eisenberg Honig & Fogler and Martin Honig were entitled to summary judgment on claims arising from the Airjet Trust private-placement memoranda.
7. Whether sanctions were warranted under Rules 11 and 56(g).

HOLDINGS

1. The securities-fraud allegations failed to satisfy Rule 9(b) because they did not adequately identify each defendant's status, connection to the alleged misrepresentations, basis for scienter, and the circumstances of alleged oral or extrinsic misrepresentations and plaintiffs' purchases.
2. A Section 12(2) claim must plead at least an offer to tender the securities purchased; the complaint's failure to do so required dismissal with leave to replead.
3. A Section 12(2) complaint must plead the time and circumstances of discovery, why discovery did not occur earlier, and the diligent efforts undertaken to discover the alleged fraud.
4. For Section 12(2) purposes, a statutory seller is a person who solicited the sale for financial gain; collateral participants who did not solicit the sale are not liable merely because they prepared offering documents or otherwise participated in the offering.
5. The RICO claims were inadequately pleaded because the complaint did not identify which defendants committed or aided which predicate acts or explain the factual basis connecting each defendant to those acts; the Section 1962(a), (b), and (d) claims also lacked required injury, acquisition, or conspiracy allegations.
6. Corporate officers are not insulated from liability for their own alleged fraudulent acts merely because they acted as corporate employees; corporate veil-piercing allegations were unnecessary where personal wrongdoing was alleged.
7. Continental Realty and Organek were entitled to summary judgment because plaintiffs offered no admissible evidence creating a genuine issue that Organek participated in the syndication, prepared or distributed the private-placement memoranda, promoted or sold the investments, or intentionally aided the alleged fraud.
8. Eisenberg Honig and Martin Honig were entitled to summary judgment because plaintiffs failed to produce evidence of material misrepresentations or omissions in the Airjet Trust memoranda, a statutory-seller relationship, or aiding-and-abetting conduct.
9. Sanctions were unwarranted because the record did not convincingly show that plaintiffs or their attorneys failed to make an objectively reasonable inquiry or pursued claims lacking a reasonable factual basis.

KEY QUOTATIONS

> *“The corporate veil protects shareholders from liability for corporate transgressions, but does not shield corporate employees from their own wrongdoing.”* (747 F. Supp. at 1070-71)

> *“The only exception to this rule, the court continued, is that "inaction can provide a basis for liability, in the absence of a duty to act, only when ‘designed intentionally to aid the primary fraud.’"”* (747 F. Supp. at 1071)

> *“The record does not convincingly indicate that plaintiffs failed to make an objectively reasonable inquiry into the basis of their claims.”* (747 F. Supp. at 1074)

FACTUAL BACKGROUND

Plaintiffs invested in tax-advantaged limited partnerships and investment trusts, principally involving real estate and helicopters. They alleged that defendants used affiliated entities to sell and resell properties at inflated prices, issued misleading private-placement memoranda and appraisals, concealed adverse information, and used fraudulent financing and sales practices. The complaint asserted federal securities fraud, Securities Act claims, RICO claims, common-law fraud, state securities claims, and related theories against more than fifty defendants.

PROCEDURAL HISTORY

The Morin, Blaikie, Petersen, and Seal actions were filed between August 1988 and September 1989 and consolidated, with the actions ultimately proceeding under No. 88 Civ. 5743. The court previously dismissed claims against the Greilsheimer law-firm defendants and denied an attachment application. On the present motions, the court dismissed the complaint with leave to replead, granted summary judgment to Continental and Organek and to Eisenberg Honig and Martin Honig, and denied sanctions.

DISPOSITION

other

REMAND INSTRUCTIONS

No remand was ordered. Plaintiffs were granted leave to replead in conformity with the opinion, including the requirements governing Rule 9(b), Section 12(2), and RICO allegations.

CASES CITED

- Morin v. Trupin, 711 F. Supp. 97, 103 (S.D.N.Y. 1989)
- Dwyer v. Regan, 777 F.2d 825, 828-29 (2d Cir. 1985)
- Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)
- Conley v. Gibson, 355 U.S. 41, 45-46 (1957)
- Stern v. Leucadia National Corp., 844 F.2d 997, 1004 (2d Cir. 1988)
- Luce v. Edelstein, 802 F.2d 49, 54-55 (2d Cir. 1986)
- Bruce v. Martin, 691 F. Supp. 716, 722 (S.D.N.Y. 1988)
- DiVittorio v. Equidyne Extractive Industries, Inc., 822 F.2d 1242, 1249 (2d Cir. 1987)
- Ouaknine v. MacFarlane, 897 F.2d 75, 80 (2d Cir. 1990)

- Tobias v. First City National Bank and Trust Co., 709 F. Supp. 1266, 1277 (S.D.N.Y. 1989)
- Thornock v. Kinderhill Corp., 712 F. Supp. 1123, 1128 (S.D.N.Y. 1989)
- Devaney v. Chester, 813 F.2d 566, 568-69 (2d Cir. 1987)
- Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 379 (2d Cir. 1974)
- Barr v. McGraw-Hill, Inc., 710 F. Supp. 95, 97 (S.D.N.Y. 1989)
- Gross v. Diversified Mortgage Investors, 431 F. Supp. 1080, 1088 (S.D.N.Y. 1977), aff'd, 636 F.2d 1201 (2d Cir. 1980)
- Wigand v. FloTek, Inc., 609 F.2d 1028, 1034 & n. 6 (2d Cir. 1979)
- Anisfeld v. Cantor Fitzgerald & Co., 631 F. Supp. 1461, 1464 (S.D.N.Y. 1986)
- Bresson v. Thomson McKinnon Securities, Inc., 641 F. Supp. 338, 342-43, 348 (S.D.N.Y. 1986)
- Quantum Overseas, N.V. v. Touche Ross & Co., 663 F. Supp. 658, 662 (S.D.N.Y. 1987)
- Pinter v. Dahl, 486 U.S. 622 (1988)
- Wilson v. Saintine Exploration and Drilling Corp., 872 F.2d 1124, 1126-27 (2d Cir. 1989)
- Beauford v. Helmsley, 865 F.2d 1386, 1391 (2d Cir.), vacated, Helmsley v. Beauford, 109 S. Ct. 3236 (1989), on remand, 893 F.2d 1433 (2d Cir. 1990)
- Plount v. American Home Assurance Co., 668 F. Supp. 204, 206 (S.D.N.Y. 1987)
- Rich-Taubman Associates v. Stamford Restaurant Operating Co., 587 F. Supp. 875, 878 (S.D.N.Y. 1984)
- United States v. Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411, 1427-29 (E.D.N.Y. 1988)
- United States v. Persico, 832 F.2d 705, 714 (2d Cir. 1987)
- H.J. Inc. v. Northwestern Bell Telephone Co., 109 S. Ct. 2893, 2900, 2902 (1989)
- Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495-96 (1985)
- Burdick v. American Express Co., 865 F.2d 527, 529 (2d Cir. 1989)
- Galerie Furstenberg v. Coffaro, 697 F. Supp. 1282, 1288-89 (S.D.N.Y. 1988)
- DeMuro v. E.F. Hutton, 643 F. Supp. 63, 66-67 (S.D.N.Y. 1986)
- Grunwald v. Bornfreund, 668 F. Supp. 128, 133 (E.D.N.Y. 1987)
- Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 792 n. 8 (3d Cir. 1984)
- United States v. Rastelli, 870 F.2d 822, 832 (2d Cir. 1989)
- United States v. Teitler, 802 F.2d 606, 613 (2d Cir. 1986)
- Mikropul Corp. v. DeSimone & Chaplin-Airtech, Inc., 599 F. Supp. 940, 943-44 (S.D.N.Y. 1984)
- Donahue v. Windsor Locks Board of Fire Commissioners, 834 F.2d 54, 57 (2d Cir. 1987)
- Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986)
- Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980)
- H.L. Hayden Co. of New York v. Siemens Medical Systems, Inc., 879 F.2d 1005, 1011 (2d Cir. 1989)
- Lund's, Inc. v. Chemical Bank, 870 F.2d 840, 844 (2d Cir. 1989)
- National Union Fire Insurance Co. v. Turtur, 892 F.2d 199, 206-07 (2d Cir. 1989)
- IIT v. Cornfeld, 619 F.2d 909, 922-27 (2d Cir. 1980)

- Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir. 1983)
- Detwiler v. Offenbecher, 728 F. Supp. 103, 135 (S.D.N.Y. 1989)
- Moon v. CIA, 514 F. Supp. 836, 839-40 (S.D.N.Y. 1981)
- LaBeach v. Beatrice Foods Co., 461 F. Supp. 152, 156 n. 5 (S.D.N.Y. 1978)
- Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1470 (2d Cir. 1988), rev'd in part sub nom. Pavelic & Leflore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989), on remand, 907 F.2d 145 (2d Cir. 1990)