

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID H. MARION, as Receiver : CIVIL ACTION
for Bentley Financial Services, :
Inc. :
v. :
TDI, INC. (f/k/a Traders and :
Dealers, Inc., f/k/a The Trading :
Desk, Inc. and f/k/a U.S. Central :
Securities, Inc.), SOUTHEASTERN :
SECURITIES, INC., SFG FINANCIAL :
SERVICES, INC., PENINSULA BANK, :
THEODORE BENGHIAT, CASTO EDWIN :
RIVERA, JERRY MANNING, JOHN STRINE, :
JEFFREY WILSON and JOSEPH :
MARZOUCA : NO. 02-7032

MEMORANDUM AND ORDER

Fullam, Sr. J.

May , 2004

The Securities and Exchange Commission brought suit against Robert L. Bentley, Bentley Financial Services, Inc. and Entrust Group, alleging serious violations of the securities laws, and obtained the appointment of a receiver for those entities (C.A. No. 01-5366). David H. Marion, Esquire, was appointed Receiver, and given "complete jurisdiction over, and control of all property, real, personal or mixed, including any assets or funds, wherever located, of all defendants" (Order dated November 7, 2001).

Briefly summarized, Robert L. Bentley and his corporations, Bentley Financial Services, Inc. and Entrust Group, conducted an elaborate financial swindle which eventuated into a

Ponzi-scheme. Investors were led to believe that they were purchasing from BFS federally-insured certificates of deposit (CD's), whereas actually they were purchasing unregistered IOU's of BFS. Some \$4 billion dollars worth of these unregistered securities were sold, far in excess of BFS's ability to repay. Funds received from current investors were used to keep the scheme afloat as long as possible, but, like all Ponzi schemes, the arrangement collapsed.

In his capacity as Receiver of Bentley Financial Services, Inc., Mr. Marion has brought this action against various entities and individuals whose wrongful conduct allegedly helped to perpetuate the scheme, and thus damaged BFS by increasing its liabilities to defrauded investors. The defendants are:

1. Southeastern Securities, Inc., SFG Financial Services, Inc., Theodore Benghiat, and Casto Edwin Rivera (the "Benghiat Defendants"). Southeastern Securities is a registered broker-dealer which acted as co-broker in many of the sales of unregistered securities; Benghiat was President of Southeastern Securities and its related company "SFG," and Rivera was compliance officer.

2. Peninsula Bank and Joseph Marzouca, its executive vice president. Peninsula Bank purported to be acting as escrow agent holding the legitimate CD's which the securities sold by BFS were

supposed to represent (i.e., in which the investors supposedly obtained an interest).

3. TDI, Inc. ("TDI" and various related entities (hereinafter collectively referred as "TDI") was a broker-dealer registered with NASD, which employed Mr. Bentley for a time, and was allegedly involved in many of the fraudulent sales. Defendant Jerry Manning was CEO and compliance officer for TDI. Defendants John Strine and Jeffrey Wilson were, respectively, vice president and president of TDI, and also compliance officers.

Plaintiff's claims are set forth in a first amended complaint, 64 pages in length, containing 271 paragraphs. Plaintiff is proceeding on several theories, set forth in 20 separate counts. The Benghiat Defendants and Peninsula Bank and its vice president Joseph Marzouca have filed motions to dismiss under Fed. R. Civ. P. 12(b)(6). Peninsula Bank and Mr. Marzouca also seek dismissal for lack of jurisdiction.

The amended complaint includes the following claims: Count I, violation of the Securities Exchange Act, § 20(a), 15 U.S.C. § 78t(a); Count II, respondeat superior liability under § 20(a) of the Securities Exchange Act; Count III, respondeat superior liability for failure to supervise registered representatives of a securities broker; Counts IV and V, negligence; Count VI, negligent supervision; Count VII, deepening

insolvency; Counts VIII and IX, breach of fiduciary duty; Count X, fraud; Count XI, breach of contract; Count XII, conversion; Count XIII, violation of Pennsylvania securities law (70 P.S. §§ 1-501, 1-503); Count XIV, aiding and abetting fraud; Count XV, aiding and abetting constructive fraud; Count XVI, aiding and abetting breach of fiduciary duty; Count XVII, aiding and abetting conversion; Count XVIII, aiding and abetting deepening insolvency; Count XIX, negligent misrepresentation; and, Count XX, unjust enrichment.

Since I am required, at this stage, to accept as true all factual averments of the amended complaint, and since dismissal is improper unless it is clear that plaintiff cannot possibly prove the claim asserted; and since the amended complaint has obviously been prepared with great care and skill, I am satisfied that, except for the issues discussed below, the motions to dismiss lack arguable merit. Plaintiff may well be unable to prove the claims being asserted, but he is entitled to proceed with the attempt.

The potentially dispositive issues do require discussion. They are: (1) whether this court has jurisdiction over the claims being asserted against Peninsula Bank and Joseph Marzouca, in view of a forum-selection clause in the document setting forth Peninsula Bank's role as escrow agent; (2) whether plaintiff has standing to assert claims for conduct which

allegedly increased BFS's liability to defrauded investors; and (3) whether plaintiff's claims are barred by the doctrine of in pari delicto.

I. The Forum-Selection Clause

Entrust, one of the Bentley receivership entities, entered into three "custodian agreements" with the defendant Peninsula Bank, setting forth the terms under which the Bank was to maintain a custody account for federally-insured CD's. Each of these agreements contained the following forum-selection clause:

"This agreement is governed by the laws of the state of Florida and by applicable federal law. This agreement binds you and your heirs, personal representatives, successors and assigns. You and [Peninsula State Bank] agree that any legal action related to this agreement shall be solely determined by the federal or state courts sitting in Date County, Florida. You and PSB agree to irrevocably waive the right to trial by jury in any action arising from this agreement."

It is clear that this lawsuit is not an "action arising from this agreement." A closer question is whether this lawsuit constitutes a "legal action related to this agreement." Peninsula contends that this action is "related to" the escrow agreement because, in its view, certain provisions of that agreement provide a complete defense against the claims now being asserted by the Receiver. According to Peninsula, the escrow agreements required Peninsula to carry out the instructions of

Entrust, without any obligation to inquire into the propriety of Entrust's requests.

I have concluded that the forum-selection clause should not be enforced, for several reasons. In the first place, the language "any legal action related to this agreement" is less precise than the language "any action arising from this agreement," and it is reasonable to suppose that the contracting parties intended the two phrases to have the same meaning. I am thus led to conclude that this lawsuit is not covered by the forum-selection clause. Ambiguities should be resolved against PSB, which drafted it.

I note also that, in Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190 (3d Cir. 1983), the Court stated "a forum-selection clause is presumptively valid and will be enforced by the forum unless the party objecting to its enforcement establishes (1) that it is the result of fraud or overreaching, (2) that enforcement would violate a strong public policy of the forum, or (3) that enforcement would in the particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable." If, as plaintiff alleges, the escrow arrangements between Entrust and the Peninsula Bank were an integral part of the fraudulent activities of the Bentley entities, and Peninsula Bank tortiously aided and abetted in the execution and prolongation of the

fraudulent scheme, it would be contrary to public policy (of this or any other forum) to permit the wrongdoers to select the forum in which their liability would be determined.

Finally, it is at least arguable that Peninsula Bank should be deemed to have submitted to the jurisdiction of this court by submitting a claim letter demanding attorneys' fees (pursuant to paragraph 8 of the custodian agreement) for defending this action. See Travellers Int'l AG v. Robinson, 982 F.2d 96, 99 & n.5 (3d Cir. 1992); Langenkamp v. Culp, 498 U.S. 42 (1990).

The motion of the Peninsula Bank defendants to dismiss for lack of jurisdiction will therefore be denied.

II. Standing

The defendants argue that plaintiff's claims for securities law violations, fraud, etc., are really the claims of the defrauded investors. It is undoubtedly true that persons who were directly victimized by the alleged sale of unregistered securities under false pretenses, the alleged fraud, etc. have claims against the parties directly involved, BFS, Entrust and Robert Bentley. And, presumably, they would have claims which they might assert against these defendants, for alleged participation in the fraudulent scheme and in its continuation. But this does not mean that the plaintiff, as Receiver for BFS, should be precluded from asserting that the defendants' wrongful

conduct has rendered BFS liable to the defrauded investors, thus increasing the liabilities of BFS. So long as double recoveries are avoided, I see no reason why the Receiver should be precluded from proceeding against wrongdoers who damaged BFS by increasing its liabilities, merely because, eventually, any recovery by the Receiver would enure to the benefit of the defrauded investors.

The Receiver has been authorized to take control of all of the assets of the receivership entities. As pleaded in the amended complaint, the assets of the receivership entities include their claims against these defendants. The Receiver has control of these assets, and may seek to realize upon them. Of course, any recovery which is ultimately distributed to the defrauded investors will be credited against their claims, just as any direct recoveries by the defrauded investors against these defendants would be credited against the claims asserted by plaintiff in this action.

III. In Pari Delicto

The defendants, understandably, contend that since Robert Bentley and his companies, BFS and Entrust Group conceived and carried out the fraudulent plan, they are precluded by the doctrine of in pari delicto from complaining against other alleged participants in the scheme. I conclude, however, that the plaintiff Receiver, as an innocent successor-in-interest, does not suffer from the same handicap. As the Third Circuit

Court of Appeals has stated, the defense of in pari delicto "loses its sting" when the bad actor is eliminated. See In re Personal & Bus. Ins. Agency, 334 F.3d 239, 246 (3d Cir. 2003); Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 358 (3d Cir. 2001); FDIC v. O'Melveny & Meyers, 61 F.3d 17, 19 (9th Cir. 1994); but see Knauer v. Jonathan Roberts Fin. Group, Inc., 348 F.3d 230 (7th Cir. 2003).

Conclusion

For all of the foregoing reasons, defendants' motions to dismiss the complaint will be denied, without prejudice to a properly supported motion for summary judgment, if justified by the facts.

