

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

ROSE ST. JULIEN,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	97-2236
	:	
MICHAEL ANTHONY ANDREWS,	:	
SEI INVESTMENTS, and	:	
UNITED BANK OF PHILADELPHIA,	:	
Defendants.	:	

MEMORANDUM

R.F. KELLY, J.

MARCH, 24, 1998

Rose St. Julien ("Plaintiff") has brought this action against Michael Anthony Andrews ("Andrews"), United Bank of Philadelphia ("United Bank"), and SEI Investments ("SEI") to recoup losses sustained in connection with a fraudulent investment scheme allegedly perpetrated by Andrews. Plaintiff has obtained judgment by default against Andrews for the full amount of her claim. Presently before this Court are Motions for Summary Judgment filed by Defendants United Bank and SEI Investments. For the reasons that follow, United Bank's Motion is granted in part and denied in part, and SEI's Motion is granted.

I. FACTS.

In January of 1995, Plaintiff sought advice on how to invest her assets. Plaintiff approached Michelle Greene, Esquire ("Greene"), her attorney, who referred Plaintiff to Andrews. Greene is also a financial planner but chose not to represent Plaintiff in both capacities. Greene's recommendation was based on the fact that Greene and Andrews had previously worked

together as financial advisors and currently Greene sublet office space to Andrews from which he operated his own firm, Andrews Financial Associates. Additionally, prior to recommending Andrews to Plaintiff, Greene had accompanied Andrews on a tour of SEI and Greene was present when Andrews gave a presentation to employees of "Rehab Options" regarding investments available with SEI.

Upon meeting Plaintiff, Andrews represented himself as having an affiliation with SEI. SEI sells mutual funds to the public indirectly through "registered investment advisors."¹ Andrews is a "registered investment advisor." SEI requires its "registered investment advisors" to execute a "Master Account Agreement" and did so with Andrews through its predecessor, the Eagle Trust Company, on September 29, 1995. Also, SEI requires that investors complete an "Investor Application" which must be approved prior to purchasing SEI products. Attached to the "Investor Application" is the "Investor Agreement" which defines the relationship between SEI, the "registered investment advisor" and the investor.

At Andrews direction, Plaintiff partially filled out paper work with the SEI Investments logo. Particularly, Plaintiff received both an "Investor Application" and an "Investor Agreement" by which SEI specifically disclaimed having any

¹ All "registered investment advisors" must register with the Securities Exchange Commission. In 1997, regulatory responsibility for "registered investment advisors" managing less than \$25 million in assets pass to the states. 15 U.S.C. § 80b-3a.

responsibility for, control over, or affiliation with Andrews. Andrews never submitted these documents to SEI.

Andrews recommended that Plaintiff liquidate her existing brokerage accounts and turn over the proceeds as well as additional savings to him for investment with SEI. Plaintiff wrote several checks payable to "SEI." Plaintiff believed Andrews would open an account for her with SEI and invest her assets in their products.

Unbeknownst to Plaintiff, Andrews proceeded to open an account with United Bank in the name of "SEI Company." Plaintiff's checks were deposited into that account. Andrews also opened an account in the name of Andrews Financial Services and transferred the contents of Plaintiff's brokerage accounts there.

During 1996, Andrews told Plaintiff that he would be attending school in London. In reality, Andrews was serving time in a federal minimum security correctional facility in New Jersey. Andrews escaped from that facility and has disappeared. The contents of the United Bank accounts have also disappeared.

Eventually, Plaintiff discovered that she had been defrauded by Andrews. This suit was instituted by Plaintiff against Andrews, United Bank and SEI to recover \$101,048.23. Andrews failed to defend himself and Plaintiff obtained judgment by default on all Counts.

II. STANDARD.

Summary Judgment is proper "if there is no genuine

issue of material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986). Defendant, as the moving party has the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Then, the non-moving party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(c). If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION.

A. Claims against United Bank.

1. Count X - Conversion.

Plaintiff has brought an action for conversion against United Bank pursuant to section 3420 of the Pennsylvania Commercial Code. 13 Pa.C.S.A. § 3420. United Bank has moved for Summary Judgment on the ground that the instruments at issue were not forged and therefore, section 3420 does not apply. United Bank is entitled to Summary Judgment, but for a different reason.

Section 3420 provides: "An action for conversion of an instrument may not be brought by the issuer . . . of the instrument." 13 Pa.C.S.A. § 3420(a). The issuer is the "drawer of an instrument." 13 Pa.C.S.A. § 3105(c). Checks are

instruments. 13 Pa.C.S.A. § 3104(f). In this action, Plaintiff is the issuer of the checks that she alleges were converted by United Bank. By the terms of the statute, Plaintiff cannot maintain an action for conversion under section 3420, therefore, Summary Judgment as to Count X is granted.

2. Count XI - Imposter; Fictitious Payees.

Plaintiff also brings a claim against United Bank pursuant to section 3404 of the Pennsylvania Commercial Code which provides rules for cases involving Imposters and Fictitious Payees. 13 Pa.C.S.A. § 3404. This case involved an imposter, Andrews, who posed as an agent of SEI. 13 Pa.C.S.A. § 3404 cmt. 1.

The effect of section 3404 is to place the risk of loss on Plaintiff but allow her to offset this loss by bringing an action against United Bank for its failure to exercise ordinary care. 13 Pa.C.S.A. § 3404 cmt. 3. The allocation of loss is left to the trier of fact and thus precludes summary judgment at this time. Id.

B. Claims against SEI Investments.

1. Count IV - Sections 10(b) and 20 of the Security Exchange Act.

Plaintiff alleges SEI violated section 10(b) of the Security Exchange Act. Under section 10(b) Plaintiff must establish that SEI "(1) with scienter (2) made misleading statements or omissions (3) of material fact (4) in connection with the purchase or sale of securities (5) upon which the

plaintiff relied in entering the transaction and (6) that the plaintiff suffered economic loss as a result." Klien v. Boyd, ___ F.3d ___, 1998 WL 55245 at *6 (3d Cir. Feb. 12, 1998), vacated, reh'g en banc granted, (Mar. 9, 1998)(citing Scattergood v Perelman, 945 F.2d 618, 622 (3d Cir. 1991)). Plaintiff has failed to allege that SEI, as opposed to Andrews, made any misrepresentation of material fact or omitted a material fact when obligated to speak. Additionally, there is no private action for aiding and abetting a violation of 10-b by which Andrews' misrepresentations could be imputed to SEI. Central Bank v. First Interstate Bank, 511 U.S. 164, 184 (1994).

Plaintiff also attempts to hold SEI secondarily liable as a "controlling person" under section 20 of the Securities Exchange Act. 15 U.S.C.A. § 78t. Under section 20 Plaintiff must establish that SEI (1) had control of Andrews and (2) "was a culpable participant in the fraud." Rochez Bros. Inc. v. Rhoads, 527 F.2d 880, 890 (3d Cir. 1975). Plaintiff has failed to allege either element.

To "control" within the meaning of section 20, SEI must have had the "power to direct or cause the direction of the management and policies of a person, . . . by contract or otherwise." 17 C.F.R. § 240.12(b)-2(f). SEI specifically disclaimed having any "control" over Andrews in the Investor Agreement which provides in relevant part:

The Investor [Plaintiff] specifically acknowledges and agrees that with respect to . . . ("the Firm") [Andrews Financial] named in the Application:

- a. The Investor and not the Custodian [SEI] is responsible for investigating and selecting the Firm;
- b. The Firm is not affiliated with or controlled or employed by the Custodian and the Custodian has not approved, recommended or endorsed the Firm;
- c. The Custodian is not responsible for supervising or monitoring trading by the Firm in the Investor's Account;

Plaintiff has failed to provide any other means by which SEI controlled Andrews.

Further, there is no indication that SEI was a "culpable participant" in the fraud perpetrated by Andrews. There is no indication that SEI had knowledge of Andrews' scheme, and Plaintiff does not allege otherwise. A jury could not reasonably conclude that SEI Industries was a "culpable participant" in Plaintiff's loss. Because Plaintiff has not alleged sufficient facts to support either a section 10-b or a section 20 action against SEI, Summary Judgment as to Count IV is granted.

2. Count VI - Sections 1-501 and 1-503 of the Pennsylvania Securities Act of 1972.

Plaintiff alleges that SEI is liable for "materially aiding" Andrews' violations of the Pennsylvania Securities Act of 1972. SEI argues that it cannot be liable under section 1-501 without having made a misrepresentation directly to Plaintiff. Further, SEI argues that no private right of action exists under section 1-503.

Section 1-401 makes it unlawful for any person,

directly or indirectly, in connection with the offer, sale or purchase of any security:

(a) To employ any device, scheme or artifice to defraud;

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person

70 Pa.C.S.A. § 1-401. No private cause of action exists for violations of section 1-401. In re Catanella & E.F. Hutton & Co. Sec. Litig., 583 F. Supp. 1388, 1439 (E.D. Pa. 1984). Instead, Section 1-501 provides a purchaser of a security with a private right of action against any person who "offers or sells a security" in violation of section 1-401. Id.

Liability under section 1-501 is predicated on the act of offering or selling a security. SEI correctly argues that it cannot be held liable under section 1-501 because it did not offer or sell a security directly to Plaintiff. That, however, does not end the inquiry.

Until recently, the prevailing view was that 1-501 was the "sole source of liability for any acts in violation of sections 401, 403, and 404 of the Pennsylvania Securities Act." Klien, 1998 WL 55245 at *21 (citing Biggians v. Bache Halsey Stuart Shields, Inc., 638 F.2d 605, 609 (3d Cir. 1980)). Section 1-503 was thought to allow a party held liable under section 1-501, to bring a cause of action against other individuals

involved in the sale of securities. In re Phar-Mor Sec. Litig., 892 F. Supp. 676, 688 (W.D. Pa 1995).

In a case not cited by either party, the Third Circuit Court of Appeals renounced this view in light of an intervening decision of a Pennsylvania intermediate appellate court and held that "an investor may bring an action directly against an agent pursuant to section 503." Klein, 1998 WL 55245 at *21.² It follows that an investor, such as Plaintiff, may bring a private action pursuant to section 503 against SEI.

Plaintiff correctly argues that SEI may be held liable for "materially aiding" Andrews under section 503. Section 503 provides in relevant part:

(a) Every affiliate of a person liable under section 501 or 502 . . . and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as such person . . .

70 Pa.C.S.A. § 1-503. Plaintiff argues that SEI Industries is liable for "'aiding and abetting'" the conduct of its agent, Defendant Andrews."

Presumably, Plaintiff contends that SEI is liable as an "affiliate" of Andrews. An "affiliate" is "a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the

² Although the Third Circuit Court of Appeals has vacated its decision in Klien, review of the motions filed in that case lead to the conclusion that section 1-503 is not at issue on rehearing. Further, should the Third Circuit find that there is no private cause of action pursuant to section 1-503, then Summary Judgment in favor of SEI is still proper.

person specified." 17 Pa.C.S.A. § 1-102(b). "Control" is defined as "possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, . . . by contract, or otherwise." 17 Pa.C.S.A. § 1-102(g). As discussed above, there is no evidence that SEI controlled Andrews. See supra Part III.B.1. Summary Judgment as to Count VI is therefore granted.

3. Counts VII and VIII - Breach of Fiduciary Duty, Fraud and Negligent Misrepresentation.

Plaintiff contends that SEI is vicariously liable according to the principle of respondeat superior for the acts Andrews committed within the scope of his "apparent authority." SEI argues that Counts VII and VIII should be dismissed because in the absence of a master-servant relationship, it cannot be held vicariously liable. SEI's argument must fail because the doctrine of respondeat superior provides for liability not just on the basis of a master-servant relationship, but also on the basis of an agency relationship. Gajkowski v. Int'l Bhd. of Teamsters, 548 A.2d 533, 538 (Pa. 1998), cert. denied, 490 U.S. 1022 (1989); Restifo v. City of Philadelphia, 617 A.2d 818, 820 (Pa. Commw. Ct. 1992)(citing Builders Supply Co. v. McCabe, 77 A.2d 368, 370 (Pa. 1951).

The parties do not dispute the facts at issue, but disagree only as to the nature of the relationship created by those facts. This is a question of law to be determined by the Court. Juarbe v. City of Philadelphia, 431 A.2d 1073, 1076 (Pa.

Super. 1981).

Plaintiff relies on Andrews' "apparent authority" to hold SEI liable. "Under Pennsylvania law, apparent authority flows from the conduct of the principal and not from that of the agent." D&G Equip. Co., v. First Nat. Bank of Greencastle, Penn., 764 F.2d 950, 954 (3d Cir. 1985). "Apparent authority" allows an agent who lacks "actual authority," to bind his principle, but only if the principle "leads persons with whom his agent deals to believe that the agent has authority." Universal Computer Sys. v. Med. Servs. Asso., 628 F.2d 820, 823 (3d Cir. 1980). Yet, "apparent authority" cannot bind the principle "if the third person had notice of the agent's lack of authority." Id.

It is undisputed that Plaintiff received a copy of the Investor Agreement quoted above. See supra, Part III.B.1. The Investor Agreement gave Plaintiff reason to know that Andrews lacked any authority to bind SEI. D&G Equip. Co., 764 F.2d 950, 954-55 (3d Cir. 1985). As a matter of law, Plaintiff had notice of Andrews' lack of authority and SEI cannot be held vicariously liable, therefore Summary Judgment as to Counts VII and VIII is granted.

4. Count IX - Breach of Contract and/or Promissory Estoppel.

Plaintiff seeks to hold SEI vicariously liable for breach of contract and/or promissory estoppel. As discussed above, as a matter of law, Plaintiff is foreclosed from asserting

the doctrine of "apparent authority." Alternatively, Plaintiff invokes the doctrine of "authority by estoppel."

"Authority by estoppel" consists of two elements: "(1) there must be negligence on the part of the principle in failing to correct the belief of the third party concerning the agent; and (2) there must be justifiable reliance by the third party." Juarbe, 431 A.2d at 1079(citing Reifsnyder v. Dougherty, 152 A. 98 (Pa. 1930). "Authority by estoppel" is considered comparable with "apparent authority," so much that the same rules of law apply. Turnway Corp., v. Soffer, 336 A.2d 871, 876 (Pa. 1975). Plaintiff's reliance could not have been justified in light of the language contained in the Investor Agreement. Summary Judgment as to Count IX is granted.

An appropriate Order follows.

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

ROSE ST. JULIEN, Plaintiff,	:	
	:	CIVIL ACTION
v.	:	97-2236
	:	
MICHAEL ANTHONY ANDREWS, SEI INVESTMENTS, and UNITED BANK OF PHILADELPHIA, Defendants.	:	

ORDER

AND NOW, this 24th day of March, 1998, upon consideration of the Motions for Summary Judgment filed by Defendants SEI Investments and United Bank of Philadelphia, and Plaintiffs responses thereto it is hereby ORDERED that United Bank's Motion is GRANTED as to Count X but DENIED as to Count XI and SEI Investment's Motion is GRANTED.

BY THE COURT:

Robert F. Kelly, J.