

Securities Fraud

unpublished  
Jeff Singdahlsen  
IN THE UNITED STATES  
FOR THE EASTERN DISTRICT OF CALIFORNIA

Alc

ROBERT J. CAVINESS, et al.

Plaintiffs,

v.

) C.A. 91-1192-A

DeRAND RESOURCES CORP., et al.,

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Defendants.

ORDER

This matter is before the Court on the defendants' motions to dismiss. For the reasons stated below, the motions are GRANTED in part and DENIED in part.

1. The defendants' motions to dismiss based on the statutes of limitations are DENIED. While the Supreme Court has held that the statutory period can not be equitably tolled, Lambf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 115 L. Ed. 2d 321 (1991), this Court does not read the opinion to mandate the same result with regard to fraudulent concealment. It is simply not desirable to permit, and thereby create incentives for, a party to engage in additional wrongdoing. Allowing a party to prevail because it successfully forestalled discovery of the fraud through additional, affirmative acts aimed at concealing the existence and bases of a cause of action would have exactly that effect. As such, the extension of Lambf to cover fraudulent concealment should not be undertaken lightly or unnecessarily. The plaintiffs' complaint

alleges facts sufficient to maintain a theory of fraudulent concealment. To the degree the plaintiffs are able to set out the basis for their claim of fraudulent concealment more clearly, they are given leave to amend the complaint.

2. The motions to dismiss claims based on Sections 17(a) and 5 of the Securities Act of 1933 are GRANTED and claims alleging private causes of action under Sections 17(a) and 5 are DISMISSED WITH PREJUDICE. The language of the statute and the case law are clear that these section do not create private rights of action.

3. "Loss causation" must be alleged to maintain a cause of action under Section 10 of the Securities Act of 1934 and Rule 10b-5. Therefore, the defendants' motions to dismiss Count I of the complaint based on the plaintiffs' failure to allege "loss causation" are GRANTED and Count One is DISMISSED WITHOUT PREJUDICE. The plaintiffs may file a new complaint alleging loss causation. If, however, they are unable to develop specific facts tending to show loss causation, the defendants may renew their motions to dismiss.

4. The Marshall defendants' motion to dismiss Count Two on the ground that they are not "sellers" within the meaning of Section 12 is DENIED. The Marshall defendants read Pinter v. Dahl, 486 U.S. 622 (1988), too narrowly. The Supreme Court meant to eliminate only those tangentially involved in the sale. Further, the Court is explicit that one who solicits buyers falls within the scope of Section 12. Id. at 643. The plaintiffs have alleged sufficient involvement by the Marshall defendants, including specific allegations of solicitation, to maintain a cause of

action. See Plaintiffs' Complaint, Para. 5; see also, Caviness affidavit, para. 4.

5. The defendants' motions as to the RICO claims are DENIED. In particular:

a. The Marshall defendants' argument that the plaintiffs' failed to allege use or investment under Sections 1962(a) and (b) is without merit. Income from the "enterprise" was used and invested in the development of the oil wells. This is in of itself sufficient to satisfy the requirement of use or investment in the enterprise.

b. Similarly, the defendants' claim that the plaintiffs have failed to sufficiently plead a RICO injury is without merit. See Busby v. Crown Supply, 896 F.2d 833, 837 (4th Cir. 1990).

c. The same can be said for the argument that the plaintiffs have failed to plead a "person" who is distinct from the "enterprise." The defendants read the requirement too broadly. All that is required is that the enterprise not be a subpart of the person. See United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), overruled on other grounds, Busby v. Crown Supply, 896 F.2d 833 (4th Cir. 1990).

d. The plaintiffs have also sufficiently alleged a pattern of racketeering. A "threat of continuity can be established by: showing the predicate acts or offenses are part of an entity's regular way of doing business . . . ." H.J. Inc. v. Northwestern Bell Tel. Co., 109 S.Ct. 2893, 2902 (1989). The plaintiffs clearly allege that it was the defendants' routine course of business to

sell interests in the limited partnerships through the use of false and misleading statements.

6. The defendants also raise a number of other grounds for dismissal based on asserted failures in the pleadings. These include, but are not limited to, the requirements of pleading fraud under Rule 9(b) of the Federal' Rules of Civil Procedure, and various RICO pleading requirements. Motions based on these grounds are DENIED. The Court finds that these grounds are generally without merit. To the degree there is any merit to them, they present semantic difficulties that can be easily cured. The plaintiffs have not always chosen the appropriate words or organized the complaint in the best possible manner. The essential facts are, however, present, and to the extent the plaintiffs are able to clarify to issues presented, they are given leave to amend their complaint.

7. The motion to dismiss Crosstex Pipelines Inc. as a defendant is GRANTED. There are no allegations of specific misconduct by Crosstex, and the plaintiffs made no effort to refute Crosstex's strong assertions that it was not a party to the alleged fraudulent "enterprise."

8. As to the remaining grounds, the motions are DENIED. The law is clear on these issues and the grounds asserted for dismissal are without merit.

It is so ORDERED.

Let the Clerk send a copy of this order to all counsel of record.

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DATE

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UNITED STATES DISTRICT JUDGE