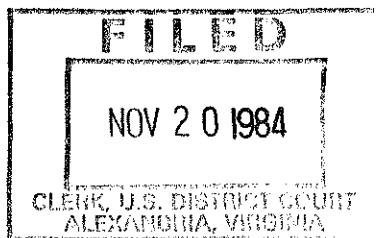


IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division



WALTER T. WALKER, III, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ACTION INDUSTRIES, INC., et al., )  
 )  
 Defendants. )

Civil Action No. 84-0720-A

MEMORANDUM OPINION

This matter came before the Court on defendants' motion to dismiss and for summary judgment of plaintiff's securities fraud case. Plaintiff, a past stockholder of defendant Action Industries, Inc., alleges that the corporation and members of its board of directors individually, jointly and in conspiracy with each other intentionally violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j (1976) and Rule 10b-5, 17 C.F.R. §240.10b-5, promulgated thereunder. Furthermore, plaintiff asserts that defendants breached their fiduciary duty of fair dealing and full and accurate disclosure owed to a corporate shareholder.

In support of his complaint, plaintiff lists 26 events that allegedly constitute an unlawful fraudulent scheme, engaged in by the defendants between December 1981 and November 1, 1982, to artificially depress the price of Action Industries stock.

According to plaintiff, the scheme involved misrepresentations and omissions of crucial data about Action Industries' improving financial health. These alleged misrepresentations and omissions form the gravamen of plaintiff's complaint.

Defendants, in response to plaintiff's allegations, deny the existence of a scheme and seek the dismissal of the complaint on grounds that it fails to allege either a violation of the Securities Exchange Act or a breach of a common law fiduciary duty.

#### DISCUSSION

As is well established in this and other circuits, a motion to dismiss asks the Court to test the legal sufficiency of a plaintiff's complaint. A complaint should not be dismissed unless it appears clear that the plaintiff cannot offer any proof of facts entitling him to relief. McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 246 (1980); Tahir Erk v. Glenn L. Martin Co., 116 F.2d 865, 870 (4th Cir. 1941). When a case involves factual issues, they are for the trier of fact to resolve after a presentation of evidence rather than for a Court to decide on a pretrial motion. Because issues of fact remain in this securities case, the Court denies defendants' motion to dismiss and for summary judgment.

a. The Securities Fraud Count

In essence, four issues lie behind an alleged violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. A plaintiff must prove that a defendant (1) made misrepresentations or omissions regarding securities, (2) those misstatements or omissions were material and in violation of a duty, (3) that the plaintiff justifiably relied on the defendants' disclosures, and (4) that the defendants intended to disseminate or to conceal the subject information. American General Insurance Co. v. Equitable General Corp., 493 F.Supp. 721 (E.D. Va. 1980).

In this case factual questions exist with regard to all four issues. Whether or not the defendants' tender offer statement and fiscal 1982 fourth quarter earnings report contained misstatements or omissions, which should have been corrected by defendants, is an issue for the trier of fact. Plaintiff has sufficiently alleged such a possibility based on the improved financial status of Action Industries during the relevant time period. A trier of fact may very well decide that the absence of the desired financial information was neither misleading nor unwarranted. However, only after the full presentation of evidence can these issues be resolved.

The same is true for the issue of materiality. Whether the subject information would have been material to an average investor is a triable issue in this case. Given earlier

pessimistic market earnings, evidence of possible financial improvement may have been important information for a present or potential investor in Action Industries stock. Of course, a trier of fact may determine otherwise; nonetheless, plaintiff has met the low standard of proof necessary to fend off a pretrial motion to dismiss.

Similarly, there are factual questions presented with regard to the issue of plaintiff's reliance. Defendants are correct in pointing out that the fourth circuit has yet to affirmatively adopt the integrity of the market theory embraced in Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975). However, a significant number of district courts in the fourth circuit have recognized this method of establishing a presumption of reliance. See Augenstein v. McCormick & Company, 581 F.Supp. 452 (D.Md. 1984); Frankel v. Wyllie & Thornhill, 537 F.Supp. 730 (W.D.Va. 1982); Lewis v. Capital Mortgage Investors, 78 F.R.D. 295 (D.Md. 1977); and Clark v. Cameron-Brown Company, 72 F.R.D. 48 (N.D.N.C. 1976). Moreover, the presumption of reliance recognized by the United States Supreme Court in Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S.Ct. 1456 (1972) may be applicable to this case. To establish a presumption of reliance under Blackie a plaintiff must prove a broad scheme on the market. In the alternative, the Affiliated Ute presumption arises upon the proof of acts primarily consisting of omissions of material facts. Whether this case involves a broad market scheme or material omissions is a determination for the trier of fact. Plaintiff

has sufficient alleged the possibility of meeting the Blackie or Affiliated Ute standards.

Finally, there is the scienter requirement in an action arising under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. To succeed at trial, plaintiff must prove defendants' intent to conceal the desired financial data and/or disseminate the alleged misrepresentations. Determining intent, however, is a decision best left to the trier of fact. Plaintiff's allegation of 26 events constituting a scheme on the market again sufficiently gives rise to an inference of intent.

In summary, the Court must deny defendants' motion to dismiss and for summary judgment on count one of plaintiff's complaint because sufficient facts are alleged to support a securities fraud cause of action. Discovery is not yet completed in this case. Plaintiff must be given the opportunity to fully flesh out the factual support for his claim and then present, at trial, remaining factual issues.

b. The Breach of Fiduciary Duty

In count two of his complaint, plaintiff asserts that defendants breached a fiduciary duty of fair dealing and full and accurate disclosure owed to the corporate shareholders. In addition, in count three, plaintiff seeks punitive damages for the alleged intentional breach. Like the securities fraud count, these causes of action survive defendants' motion to dismiss and for summary judgment.

Essentially defendants rest their motion as to counts two and three on the same arguments rejected above. They contend that no factual issues exist to support the allegation of a fraudulent scheme on the market, including the alleged material misrepresentations or omissions necessary to support a claim of a fiduciary breach. Yet, as discussed above, the Court thinks otherwise. Factual issues remain in the case regarding, for example, the existence of material misrepresentations and omissions and defendants intent to conceal or disseminate the subject information. Whether defendants breached a fiduciary duty owed to plaintiff also involves triable factual issues.

For the reasons stated herein, the Court denies defendants motion to dismiss and for summary judgment on all three counts of plaintiff's complaint.

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

DATE: 11/20/84

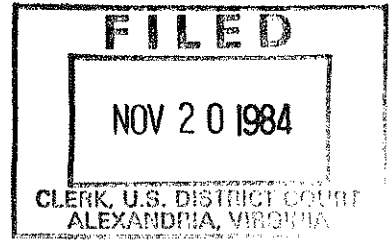
Richard L. Williams

UNITED STATES DISTRICT JUDGE

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Defendants. )



Civil Action No. 84-0720-A

ORDER

This matter came before the Court on defendants' motion to dismiss and for summary judgment. For the reasons stated in the accompanying memorandum opinion, the Court DENIES defendants' motion.

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

DATE 11/20/84

Richard L. Williams

UNITED STATES DISTRICT JUDGE