IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

MAY 18 2007

MICHAEL S. RICHIE
CLERK

OKLAHOMA DEPARTMENT OF SECURITIES *ex rel.* IRVING L. FAUGHT, Administrator, and DOUGLAS L. JACKSON, in his capacity as the court appointed receiver for the investors and creditors of Schubert & Assoc. and for the assets of Marsha Schubert, individually, and doing business as Schubert & Associates, and for Schubert & Associates,	)	
Plaintiffs/Appellees,	)	Case No. CJ-2005-3796 Consolidated with Case No. CJ-2005-3299
v.	)	
ROBERT W. MATHEWS, *et al.*,	)	Supreme Court No. 104,262 Consolidated with Supreme Court No. 104,304
Defendants,	)	
KENNETH LARUE, ARTHUR PLATT, YVONNE PLATT, MARVIN WILCOX, and PAMELA WILCOX,	)	
Defendants/Appellants.	)	

ANSWER OF THE OKLAHOMA DEPARTMENT OF SECURITIES TO PETITION FOR CERTIORARI OF DEFENDANTS/APPELLANTS

Plaintiff/Appellee, the Oklahoma Department of Securities ("Department"), hereby submits its answer opposing the Defendants/Appellants' Petition for Certiorari ("Petition for Certiorari"). On April 13, 2007, the Court of Civil Appeals ("COCA") affirmed the summary judgments of the Oklahoma County District Court ("District Court") against the Defendants/Appellants who were unjustly enriched by the receipt of funds from Marsha Schubert. Ms. Schubert obtained such funds through a "Ponzi" scheme she orchestrated from Crescent, Oklahoma. Defendants/Appellants now seek this Court's review of the

decision of the COCA.[1] The COCA's decision affirming the summary judgments was in accord with applicable decisions of this Court; therefore, the petition for writ of certiorari should be denied.

I. Background

On October 14, 2004, the Administrator of the Department sought and received injunctive relief in the Logan County District Court against Marsha Schubert, individually and doing business as Schubert and Associates, and Schubert and Associates (collectively, "Enforcement Action Defendants") for violations of the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003), and the Oklahoma Securities Act (Predecessor Act), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (1991 & Supp. 2003).

As stated by the majority in footnote 3 of the COCA Opinion, the civil action in Logan County is authorized under Section 406.1 of the Predecessor Act and its subject matter counterpart in Section 1-603 of the Act. The civil action against the Enforcement Action Defendants invoked the full authority of Section 406.1 of the Predecessor Act and Section 1-603 of the Act.

The Logan County Court also appointed Douglas L. Jackson (Jackson) to act as Receiver (Receiver) for the benefit of claimants and creditors of the Enforcement Action Defendants. The Logan County Court specifically authorized the Receiver to institute actions to recover assets directly traceable to the Enforcement Action Defendants' fraudulent scheme and to promote equity among the investors.

[1] In its published opinion in Appeal No. 104,004, the COCA decided the same issues raised by the Defendants/Appellants herein (COCA Opinion). Recognizing the facts in the two appeals differ only slightly and not in a material way, the Court of Civil Appeals adopted the holding in Appeal No. 104,004 in affirming the District Court's judgments against Defendants/Appellants.

The Enforcement Action Defendants operated a "Ponzi" investment scheme wherein participants received payments from monies obtained from later investors rather than from the profits of investment activities. As a result of the "Ponzi" scheme, 87 people lost approximately $9,000,000. Marsha Schubert was found criminally liable for operating the "Ponzi" scheme and was sentenced to federal prison for her conduct. Marsha Schubert was also ordered to disgorge the $9,000,000 she took from the 87 victims.

Of the $9,000,000 taken from her victims, Marsha Schubert distributed over $6,000,000 of that money to, or on behalf of, other people. These individuals received value in excess of any funds they transferred to the Enforcement Action Defendants. They were unjustly enriched at the expense of the 87 victims.

The Department and the Receiver brought the District Court suit against 162 people who unjustly received funds from the Enforcement Action Defendants (Relief Defendants)[2]. The District Court issued summary judgments and ordered disgorgement of the amounts received by each Relief Defendant in excess of the principal amounts of their contributions to the Schubert scheme. On April 13, 2007, the COCA affirmed the trial court's summary judgments finding that the Department and the Receiver have standing to bring the suit, that no material facts remain in controversy, and that the Department and Receiver are entitled to judgment as a matter of law.

II. The petition for writ of certiorari should be denied.

Defendants/Appellants ask this Court to review the Court of Appeal's decision on the grounds that the COCA has determined a question of substance not heretofore determined by this Court and/or in a way not in accord with applicable decisions of this Court. The petition

[2] The Relief Defendants who filed this appeal collectively received over $600,000 from the Enforcement Action Defendants without giving any consideration or without giving adequate consideration.

should be denied because the opinion is properly based on precedent established by this Court. Although the specific questions at issue in this appeal have not been *expressly* answered by Oklahoma appellate courts, this Court has issued opinions underlying and clearly supporting the result reached by the District Court and the Court of Civil Appeals.

Defendants/Appellants specifically question whether the Administrator of the Department may bring an action against persons who have not violated the Act and whether the Administrator has a legal or equitable right to third party assets. In consideration of these issues, the COCA relied extensively on the ruling in a case previously before this Court.

In *State ex rel. Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334, this Court was required to interpret provisions of the Predecessor Act, which did not specifically authorize the Administrator of the Department to seek general equitable remedies in district court actions.[3] The Predecessor Act specifically authorized the Administrator to seek an injunction or writ of mandamus against wrongdoers, but the statute was silent as to other equitable remedies such as disgorgement. This Court determined that the Administrator of the Department had the authority to seek disgorgement against violators of the Predecessor Act.

The COCA's decision is based on the rationale employed by this Court in its ruling in *Southwest Mineral*. This Court clearly stated that it is proper to consider the interpretive history of the federal securities laws to construe similar state securities law provisions. *Id* at

[3] The Legislature subsequently amended both the Act and the Predecessor Act to include very broad language authorizing the Administrator of the Department to seek equitable remedies in the district courts. *See* Sections 1-603 and 406 respectively.

1339. Consequently, this Court held that the Administrator had the right to seek disgorgement.[4]

The Court of Appeals cites to federal court decisions in support of the Administrator's authority to seek disgorgement from persons who have not violated the securities laws. The COCA cites *SEC v. Egan,* 856 F. Supp. 401 (N.D. Ill. 1993), in which the United States Securities and Exchange Commission (SEC) sought an order of disgorgement from third parties to whom funds were improperly disbursed. The *Egan* court found no meaningful difference between wrongdoers and "innocent" third parties for purposes of disgorgement:

> . . . the deterrence purpose is not dependent on that status—for it is just as important to discourage illegal conduct by taking the proceeds of that illegality from those who have given no current value for the ill-gotten gains that have been turned over to them (even though they themselves have not directly engaged in the illegal activity).

Egan at 401. The reason was to prevent unjust enrichment.

Egan is not a case in isolation. The court in *S.E.C. v. Collelo*, 139 F.3d 674, 676 (9th Cir. 1998), found that:

> [A]mple authority supports the proposition that the broad equitable powers of the federal courts can be employed to recover ill gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong. For example, the Supreme Court has held that a plaintiff who has a cause of action under the securities laws can enforce those rights "by such legal or equitable actions or procedures as would normally be available to him." *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287-288, 61 S.Ct. 229, 232-33, 85 L.Ed. 189 (1940).

The court in *SEC v. Cherif*, 933 F.2d 403, 414 n. 11 (7th Cir. 1991), found that "a Court can obtain equitable relief from a non-party against whom no wrongdoing is alleged if it is

[4] This Court also stated that a specific statutory provision authorizing the Administrator to seek disgorgement is not necessary as equity jurisdiction is conferred upon Oklahoma's district courts by the Oklahoma Constitution. *Southwest Mineral* at 1337.

established that the non-party possesses illegally obtained profits but has no legitimate claim to them." *See also SEC v. Better Life Club of America, Inc.*, 995 F. Supp. 167 (D.C.C. 1998); *SEC v. Antar,* 831 F.Supp. 380 (D.N.J. 1993); *S.E.C. v. Seibald,* 1997 WL 605114 (S.D.N.Y.).

Defendants/Appellants cite to *Marley v. Cannon,* 1980 OK 147, 618 P.2d 401, for the proposition that the Administrator of the Department is attempting to improperly expand his statutory authority. This is a red herring. The issue in *Marley* related to the authority of the Administrator to order a wrongdoer to cease and desist his unlawful activities when such an order was not a statutorily available sanction. Here, the Administrator is not acting in a quasi-judicial capacity. The Administrator has merely petitioned the court for an equitable remedy in order to effectively administer and enforce Oklahoma's securities laws. As cited by the COCA, the *Marley* Court recognized that the Administrator of the Department has "by implication and in addition to the powers expressly given by statute, such powers as are necessary for the due and efficient exercise of the powers expressly granted, or such as may be fairly implied from the statute granting the express powers." *Marley* at 405, citing *Oklahoma Tax Commission v. Fortinberry Co.,* 1949 OK 75, 201 Okla. 537, 207 P.2d 301.

Defendants/Appellants contend that Plaintiff/Appellee must demonstrate a legal or equitable right to the property sought through its unjust enrichment claim. Again relying on the rationale of the Court in *Southwest Mineral*, this argument fails based on the federal court decision in *Egan*. The court in *Egan* addressed the SEC's standing to obtain disgorgement from third parties deemed by the SEC to have been unjustly enriched with the fruits of the underlying securities fraud. The court reasoned:

> [The] SEC's standing to obtain the equitable remedies that are now at issue stems from its duty to advance the *public* interest, something that is really

> separate and apart from (although it may frequently concur with) the interest of injured investors.

Egan at 401-402. [Emphasis in original.]

In filing a petition, the Department is acting as a public agency enforcing public policy. For a governmental agency to bring suit under its statutes, that it has a duty to enforce, a regulatory agency need not be itself the victim. *State ex rel. Goettsch v. Diacide Distributors, Inc.*, 561 N.W.2d 369, 375 (1997) (a case brought by the Iowa Superintendent of Securities under the Iowa Uniform Securities Act). When the Iowa official sued on behalf and for the benefit of defrauded investors, the court ruled that the State must have the benefit of any theory of liability available to individual purchasers suing in their own names absent any contrary legislative intent. *Id.* As found by the COCA, Plaintiff/Appellee has an equitable right to recover the funds unjustly received by Defendants/Appellants.

CONCLUSION

Based on well-established precedent set forth by this Court, the Court of Civil Appeals found that Marsha Schubert committed violations of the Act and the Predecessor Act for which the Administrator properly invoked the equitable powers of the District Court pursuant to Section 1-603 of the Act and Section 406.1 of the Predecessor Act. Since there are no special or important reasons for this Court to review the opinion of the Court of Civil Appeals in this matter, the Plaintiff/Appellee respectfully requests that the Court deny the Defendants/Appellants' Petition for Certiorari.

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CERTIFICATE OF MAILING AND FILING

I certify that a true and correct copy of the *Answer of the Oklahoma Department of Securities to Petition for Certiorari of Defendants/Appellants* was mailed this 18th day of May, 2007, by depositing it in the U.S. Mails, postage prepaid, to:

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