IN THE COURT OF APPEALS OF IOWA

No. 4-363 / 94-0049

FILED
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CLERK SUPREME COURT

STEPHAN W. HEIMANN,

Plaintiff-Appellant,

vs.

CONSOLIDATED CAPITAL EQUITIES CORPORATION and CONSOLIDATED CAPITAL INCOME TRUST,

Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Larry J. Conmey, Judge.

Heimann appeals from the district court order dismissing his RICO suit against a real estate investment trust and its managing corporation. **AFFIRMED.**

Wallace L. Taylor, Cedar Rapids, for appellant.

W. Don Britten, Jr. of Nyemaster, Goode, McLaughlin, Voigts, West, Hansell & O'Brien, P.C., Des Moines, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Stephan W. Heimann appeals from the district court ruling dismissing his action against Consolidated Capital Equities Corporation (CCEC) and Consolidated Capital Income Trust (CCIT) for lack of jurisdiction. We affirm on different grounds than those relied on by the district court.

In April 1985, Heimann moved from Iowa to Pennsylvania. He continued to conduct transactions with Berthel, Fisher and Company (Berthel), a securities broker in Cedar Rapids, Iowa. In January 1986, Heimann purchased 6000 shares of a CCIT, at $17.25 per share, for a total price of $103,500. CCIT was a California business trust administered by CCEC, a Colorado corporation with a principal place of business in Texas. The over-the-counter transaction was brokered by Berthel. Eventually, Heimann liquidated the 6000 shares of CCIT for a total return of $33,716.87, a loss of nearly $70,000.

In 1989, Heimann sued Berthel for, among other things, not adequately investigating CCIT and for not recommending more diversified investments to him. The suit was subsequently settled for $35,000.

In April 1992, after he settled with Berthel, Heimann filed this action against CCIT and CCEC alleging a claim based on violation of the federal Racketeering and Influenced Corrupt Organizations Act (RICO). Heimann's petition alleges that he was a resident in Iowa in January 1986 when the shares were purchased.

Defendants moved for summary judgment, alleging, among other things, that the Iowa district court did not have jurisdiction. After consideration of the record, the district court granted the motion. The court found Heimann was not a resident of Iowa on the date the sale of the stock took place. Therefore, he was not entitled to assert the jurisdiction of the state court through Iowa Code section 617.3.

Heimann filed a motion to enlarge and amend findings and to modify the judgment. After a hearing, the court sustained its findings. The court rejected Heimann's argument that jurisdiction was conferred pursuant to Iowa Rule of Civil Procedure 56.2. Heimann appeals.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c); see Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of material fact. Milne, 424 N.W.2d at 423. The evidence must be viewed in the light most favorable to the resisting party. Thorpe Credit, Inc. v. Gott, 367 N.W.2d 342, 343 (Iowa 1986).

The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the

resisting party. Sherwood v. Nissen, 179 N.W.2d 336, 339 (Iowa 1970). A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. Gott, 387 N.W.2d at 343; Milne, 424 N.W.2d at 423. If the motion is properly supported, however, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e).

The statute of limitations for a civil action RICO claim is four years. Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 107 S. Ct. 2759, 97 L.Ed.2d 121 (1987). However, the Supreme Court did not decide in Agency Holding Corp. when a RICO claim accrues and the statute of limitations begins to run. The federal circuits have not all agreed on this issue. Most circuits follow some form of the discovery rule. The Eighth Circuit follows the rule that a RICO cause of action accrues, and the statute begins to run, when the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury, and that the injury is part of a pattern of racketeering activity. Granite Falls Bank v. Henrikson, 924 F.2d 150, 154 (8th Cir. 1991) (citing Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Florida, Inc., 906 F.2d 1546, 1554 (11th Cir. 1990)). Under this rule, Heimann's claim is barred by the four-year statute of limitations.

Under the Granite Falls rule, Heimann's RICO cause of action is barred four years after he discovered, or reasonably should have discovered, both the existence and source of his injury, and that the injury is part of a pattern. Thus, in analyzing when the statute began to run in this case, it is important to look not only at when Heimann actually discovered the existence of his RICO cause of action, but also when he reasonably should have discovered it.

We find the statute of limitations had run by the time Heimann filed his petition on April 1, 1992. All of the acts constituting the pattern of securities law violations alleged in the petition occurred by the end of 1985, before Heimann purchased his shares on January 15, 1986. In fact, any conduct which influenced Heimann's decision to purchase his shares, and consequently caused his injury in the sale of a security, or any conduct by reason of which plaintiff was injured in the sale of a security, had to have occurred prior to the time he purchased his shares on January 15, 1986.

The series of securities law violations that allegedly constitute the pattern of racketeering activity which caused Heimann his loss should have reasonably been discovered by him before April 1, 1988. The same violations alleged in Heimann's petition were the subject of the California Class Action filed in October 1985, even before Heimann purchased his shares. Information about the

filing of that lawsuit was made public in a press release on October 3, 1985; in the 1985 CCIT Report to Shareholders dated April 2, 1986, and mailed to all shareholders, including Heimann, on or about June 18, 1986; and in the 1986 CCIT Report to Shareholders dated March 15, 1987 and mailed to all shareholders, including Heimann, on or about April 15, 1987. Such disclosures to shareholders put them on notice of violations of the federal securities law and commence the running of the statute of limitations. Heimann was on notice of the pattern of alleged racketeering activity he relies on in this case long before April 1988.

Heimann's injury was the purchase by him of CCIT shares which were allegedly worth less than the $17.50 he paid for them. In early 1987, Heimann was offered $13.50 or $14.00 per share for the shares he had purchased in January 1986 for $17.50. He considered selling his shares at that price, but decided not to do so. He admits he knew by at least January 1988 CCIT would no longer make distributions from income, and all further distributions would be from liquidations of assets. Heimann also admits he was suspicious in January 1988 about information he was getting from CCIT, and he asked Fred Fisher to check it out and report back to him. Thus, it is clear that by at least January 1988 Heimann knew, or should have known, of the injury he alleges resulted from the pattern of racketeering activity alleged in the petition.

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Since it is clear that by January 1988 Heimann knew both of the existence of the pattern of racketeering activity and of his injury; then, he also must have known or should have reasonably known his alleged injury was a result of the alleged pattern. Consequently, we find Heimann's claim, not filed until April 1, 1992, is barred by the four-year statute of limitations that applies to RICO claims.

Because our ruling on this issue is dispositive, we need not address the other issues presented in this case. We will affirm the district court if any reason for affirmance appears in the record. See Hewitt v. City of Des Moines, 300 N.W.2d 121, 126 (Iowa 1981); Kelly v. Brewer, 239 N.W.2d 109, 113 (Iowa 1976). We find summary judgment was proper in this case. While the grounds upon which we rely are different from those relied upon by the district court, both arguments were addressed by the parties in motions submitted to the district court. We affirm the district court's granting of the motion for summary judgment.

AFFIRMED.