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No. 69636-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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STATE OF WASHINGTON
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B. DAVID THOMAS, Respondent

v.

ZINAIDA BOSSERDT and VICTOR BOSSERDT,
Appellants

APPEAL FROM KING COUNTY SUPERIOR COURT
THE HONORABLE SHARON ARMSTRONG

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. The Respondents Did Not Discover Mr. Thomas's Material Omissions Regarding the Transaction until after His Deposition on May 4, 2011.

1. RCW 21.20.010

RCW 21.20.010 states as follows:

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

- (1) To employ any device, scheme, or artifice to defraud;
- (2) 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
- (3) **To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.**

During his deposition, B. David Thomas stated that material information had not been included in the September 20, 2006 agreement between Nonna Verd and Zinaida Bosserdt. Specifically he stated that two material items were not disclosed in the agreement; (1) the loan amounts owed to Yevgenia Vaysberg (Vaysberg) and (2) a security agreement filed by Kaustman Construction. See Clerk's Paper No. 91, Declaration of Harold Franklin. These items were expressly excluded from the Stock Purchase Agreement entered into by Ms. Verd and Ms. Bosserdt and drafted by Mr. Thomas. See Clerk's Paper No. 116. Mr.

Thomas also stated in his deposition that he generally searched for UCC filings when he represented the buyers in stock transactions but never when he represents sellers. See Clerk's Paper No. 91, Declaration of Harold Franklin. This clearly demonstrates that Mr. Thomas could have and should have known about the UCC filing if he had done a simple search. He also should have known or could have known about the Vaysberg transaction if Mr. Thomas would have made specific inquiries about the past financial transactions and obligations involving King Pastry and Deli, before he drafted the agreement. Ms. Verd was already on notice from a letter dated June 19, 2006 that Vaysberg was pursuing collection against her and King Pastry and Deli. See Clerk's Paper No. 134. However, without making such a search and inquiry, both Ms. Verd and Mr. Thomas made reckless and unsubstantiated representations that caused the Bosserdtts to rely on them and enter into an agreement that caused them to suffer great financial loss. Furthermore, by making such representations, Mr. Thomas and Ms. Verd imposed on themselves a duty to insure that the information they set forth in the agreement was true and accurate; and both of them breached this duty.

Not only have the Bosserdtts provided evidence from a deposition that there is a genuine issue as to a material fact, the evidence also shows that both Ms. Verd and Mr. Thomas violated RCW 21.20.010 because

they, in connection with the offer or sale of securities, directly or indirectly made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made not misleading. The statute begins to run when the evidence was discovered or could have been discovered. In this case, the evidence was discovered at the date of Mr. Thomas's deposition. Therefore, the Respondent's motion for summary judgment should have been denied.

2. Summary Judgment Would be Improper Because There is Evidence that Mr. Thomas Failed to Disclose the Proper Amount of Shares that were the Subject of the Stock Purchase and Sale Agreement.

As set forth above, RCW 21.20.010 states that it is unlawful "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". RCW 21.20.010(2).

Under the terms of the Stock Purchase and Sale Agreement of September 20, 2006, Ms. Verd was supposed to sell Ms. Bosserdt all the outstanding shares of King Pastry and Deli which amounted to 1,000 shares. See Clerk's Paper No. 115. However, on July 2004, Ms. Verd

was issued 2,000 shares of stock. See Clerk's Paper No. 91, Declaration of Harold Franklin. Mr. Thomas prepared the stock transfer agreement between Verd and TIRBA in March of 2005. Therefore Mr. Thomas knew of the existence of the share ownership at the time of the transaction between Verd and Bosserdt, however he did not draft that agreement so that all of the shares were accounted for and transferred to the Bosserdt. In addition, Mr. Thomas knew and failed to disclose that Verd's shares were being utilized as collateral for loans she made with TIRBA. In "The Bosserdt's First Request For Production to Nonna Verd", Request No. 6 the Bosserdt requested the following:

Please produce all the corporate minutes, notes, resolutions and share authorizations that King Pastry & Deli, Inc, made over the last ten years.

In response to that request, Ms. Verd provided Exhibits 38-48 and none of them set forth anything that addresses whether Ms. Verd's 2,000 shares were redeemed, canceled or relinquished and thus there is no evidence to show that she did not still own those 2,000 shares at the time the September 20, 2006 transaction was executed. See Clerk's Paper No. 91, Declaration of Harold Franklin. Yet in the Stock Purchase and Sale Agreement it is claimed that there were only 1,000 shares outstanding. See Clerk's Paper No. 138. Mr. Thomas could not account for the 1,000 shares and he made no inquiries about the other shares even though he had

knowledge that a total of 2,000 shares were issued to Ms. Verd in 2004. See Clerk's Paper No. 91, Declaration of Harold Franklin. However, without verifying the whereabouts of the other shares, Mr. Thomas and Ms. Verd made representations that there were only 1,000 shares outstanding that were for sale and caused Ms. Bosserdt to rely on their representations when in fact from all appearances, Ms. Verd still owned another 1,000 shares after the transaction was executed making Ms. Bosserdt only a 50% owner of the King Pastry and Deli and not a 100% owner as set forth in the September 20, 2006 agreement. Because of these material misrepresentations, the Bosserdts have suffered great financial loss and based on this evidence, Mr. Thomas' motion for summary judgment should not have been granted because it is clear that reasonable persons could reach more than one conclusion from all the evidence set forth herein. *Hansen at 485*. Further, this evidence could not have been discovered since the Respondent withheld the information from the Appellants up until the time of his deposition in May 4, 2011. Therefore the Respondent's motion for summary judgment should have been denied.

3. Summary Judgment Would be Improper Because There is Evidence that Mr. Thomas Failed to Disclose to the Bosserdts that the Stock Purchase and Sale Agreement was Conditioned on a TIRBA, Inc. Settlement.

Ms. Verd entered into an agreement with TIRBA, Inc. (TIRBA) on or about March 9, 2005 in which she borrowed money from TIRBA and secured that loan with a pledge of and other obligations involving 1,000 shares of King Pastry and Deli. See Clerk's Paper No. 91, Declaration of Harold Franklin. Ms. Verd breached this agreement and sought other investors to help pay off the debt owed to TIRBA. Ms. Verd, with the assistance of Mr. Thomas, entered into an agreement to sell shares to Ms. Bosserdt without getting TIRBA's permission and without fully informing Ms. Bosserdt of the transaction prior to entering into the Stock Purchase and Sale Agreement. See Clerk's Paper No. 138. During his deposition, Mr. Thomas acknowledged that the Stock Purchase and Sale Agreement with Ms. Bosserdt was conditioned upon negotiating a payoff with TIRBA but he did not personally tell this to Ms. Bosserdt. See Clerk's Paper No. 91, Declaration of Harold Franklin

This is further evidence that both Ms. Verd and Mr. Thomas withheld key information from Ms. Bosserdt that was material to the September 20, 2006 Stock Purchase and Sale Agreement and this information was not discovered until the deposition of Mr. Thomas. Therefore their motion for summary judgment should have been denied

4. Summary Judgment Was Improper Because
There is Evidence that Mr. Thomas Failed to Register
Securities Under RCW 21.20 et. seq.

According to RCW 21.20.320 certain transactions are exempt from registration. Specifically, a transaction receives an automatic exemption if the following are present:

- (1) Any isolated transaction, or sales not involving a public offering, whether effected through a broker-dealer or not; or any transaction effected in accordance with any rule by the director establishing a nonpublic offering exemption pursuant to this subsection where registration is not necessary or appropriate in the public interest or for the protection of investors.

RCW 21.20.320(1).

In addition, WAC 460-44A-050 elaborates on the condition of the isolated transaction exemption. It states that:

- 1) An "isolated transaction" within the meaning of RCW 21.20.320(1) includes:
 - (a) Subject to the limitation of (b) of this subsection, any sale of an outstanding security by or on behalf of a person not in control of the issuer or controlled by the issuer or under common control with the issuer and not involving a distribution;
 - (b) Any sale satisfying the requirements of (a) of this subsection that is effected through a broker-dealer, provided that it is one of not more than three such transactions effected by or through the broker-dealer in this state during the prior twelve months;
 - (c) Any sale of an outstanding security by or on behalf of a person in control of the issuer or controlled by the

issuer or under common control with the issuer if the sale is effected pursuant to:

(i) Brokers' transactions in accordance with section 4(4) of the Securities Act of 1933 and Rule 144 thereunder; or

(ii) Any other transaction not effected through a broker-dealer and not involving a distribution, if the sale, including any other sales of securities of the same class during the prior twelve months inside or outside this state by the person, does not exceed 1% of the outstanding shares or units of that class; or

(d) Any sale of a security by or on behalf of an issuer that is one of not more than three such transactions inside or outside this state during the prior twenty-four months.

An exemption provided by (a), (b), (c), or (d) of this subsection shall not be available for any offering made in a manner inconsistent with the limitations set forth in (a), (b), (c), or (d) of this subsection, respectively.

(2) "Sales not involving a public offering," within the meaning of RCW 21.20.320(1), is interpreted by the director in a manner consistent with section 4(2) of the federal Securities Act of 1933 and Securities and Exchange Commission Securities Act Release No. 4552.

WAC 450-44A-050. (emphasis added).

Based on the findings of the Department of Financial Institutions (DFI), King Pastry and Deli through Ms. Verd had executed a total of eight transactions within a two year period that were determined to be the sale of securities by DFI. See Clerk's Papers No. 139. As such, the securities no longer meet the requirements set forth in the automatic exemption definition and a registration statement should have been filed with the DFI. However, because Mr. Thomas did not make a proper inquiry of Ms. Verd, he did not find out about all the other transactions

that removed the Bosserdt transaction from being eligible for the automatic exemption. This information was not known until after the DFI order was issued in July of 2008 and it was not discovered by the Appellants until August of 2008. However, even though he failed to inquire about these transactions, the Respondent made representation in the September 20, 2006 agreement that had no basis in fact and he failed to properly inform the Bosserdt that the shares that were the subject of the agreement were required to be registered under RCW 21.20 et. seq. and that the shares no longer qualified for an automatic exemption. Mr. Thomas should have and would have known this had he made the proper inquiries. As a result of this, the Stock Purchase and Sale Agreement was misleading and the Bosserdt's were misled and misinformed regarding that agreement which constitutes a violation of RCW 21.20.010(2) and they did not know about the exemption question until after DFI issued their order in July 2008 and thus the motion for summary judgment should not have been granted.

B. DFI Investigation Uncovered a Great Deal of New Evidence Regarding Ms. Verd's and Her Agents Scheme to Defraud Investors Which Indirectly Applied to Mr. Thomas.

The DFI conducted an investigation and found that Ms. Verd and her agents violated RCW 21.20.040, the securities salesperson registration provision of the Securities Act, (a) based upon her offer and/or sale of securities while not registered as a securities salesperson or broker-dealer and violated RCW 21.20.010; (b) because in connection with the offer or sale of securities, she directly or indirectly made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

The DFI also found that Ms. Verd and her agents violated RCW 21.20.140, the securities registration provision because she offered and/or sold securities for which there was no registration on file with the Securities Administrator.

Further, DFI revealed the magnitude, extent and the affect of Ms. Verd's elaborate scheme to defraud investors and the DFI specifically identified that Ms. Verd's agents were also liable for violating WSSA. These were items the Bosserdt's discovered only after DFI issued their order in July of 2008. While it is clear that the Respondent's knew about Ms. Verd's actions because they filed a counter-claim against Ms. Verd, they did not know the possible involvement of Ms. Verd's agents, which Mr. Thomas was one. The Bosserdt's only learned this connection from

the DFI investigation in August of 2008. This is a significant date regarding the discovery of Mr. Thomas' involvement regarding the misrepresentations and omissions that he participated in. Therefore, the parties do not agree when the evidence should have been discovered and material issues exist regarding when the statute of limitations should have begun to run and the Motion for Summary Judgment should have been denied.

C. All Claims Against Mr. Thomas were not Discovered Until August 2008 after the Respondent Received the Notice from the DFI.

The DFI filed their Findings on July, 23, 2008. The Bosserdts did not receive the notice of their findings until some time in August 2008. From that point on, the Bosserdts discovered that Mr. Thomas was potentially liable for his actions centered around the Stock Purchase and Sale Agreements signed on or about September 25, 2006. See Docket No. 139.

On June 24, 2010, the Trial Court granted Appellants' motion to remove the stay, and to add the Respondent to the action as a Third-Party Defendant. See Clerk's Paper No. 116.

On July 30, 2010, within two years of receiving the DFI's Statement of Charges and Notice of intent to enter an Order to Cease and

Desist, To Charge Costs and to Impose Fines, when the Appellants discovered the Respondent's potential and/or likely culpability, the Appellants served the Respondent. See Clerk's Paper No. 116. By doing so, the Appellants tolled the statute of limitation and thus the Respondent's motion for summary judgment should not have been granted.

D. The Statute of Limitations for Federal Securities Begins After the Bosserdt's Discovered Mr. Thomas Involvement.

The applicable statute of limitations provides that a "private right of action" that, like the present action, "involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than the earlier of"(1) 2 years after the discovery of the facts constituting the violation; or "(2) 5 years after such violation." 28 U.S.C. §1658(b).

In *Merck v. Reynolds*, 559 U.S. ____, 130 S. Ct. 1784, 176 L. Ed. 2d 582 (2010) the Supreme Court held:

We conclude that the limitations period in §1658(b)(1) begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have "discover[ed] the facts constituting the violation"—whichever comes first. In determining the time at which "discovery" of those "facts" occurred, terms such as "inquiry notice" and "storm warnings" may be useful to the extent that they identify a time when the facts would have prompted a reasonably diligent

plaintiff to begin investigating. But the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered "the facts constituting the violation," including sci-enter—irrespective of whether the actual plaintiff undertook a reasonably diligent investigation.

Merck at 1796.

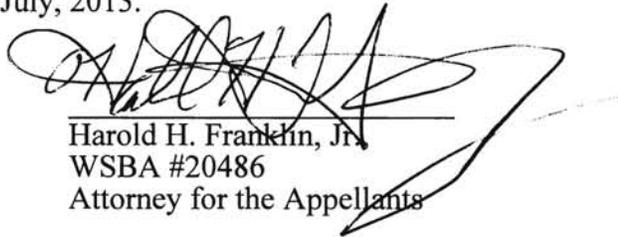
Under this ruling, the Bosserdtts did not discover Mr. Thomas' involvement until August 2008 and that gave them two years to file their claim under the Federal Securities laws. See 28 U.S.C. §1658(b). In addition, Appellant may rely on the five year statute of limitations 28 U.S.C. §1658(b) since Mr. Thomas committed a violation of Federal Securities regulations within 5 years of Appellants filing against him. Also, it will hold true that the three year statute under the Washington State Securities Act also did not begin to run until August 2008 and since the Bosserdtts served their action against Mr. Thomas on July 30, 2010, the statute was properly tolled and the Respondent's motion for summary judgment should have been denied.

CONCLUSION

In reviewing the findings of DFI and the deposition of B. David Thomas and the other evidence herein, it is clear that a genuine issue as to a material fact exists in this case and furthermore, the Appellants filed this

action before the statute of limitation period on their claims expired. Therefore, this Court should uphold the laws of the State of Washington and deny Mr. Thomas' motion for summary judgment and remand this case back to the trial court for further proceedings.

DATED this 15th day of July, 2013.



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