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Order on Plaintiffs' Motion for Partial Summary Judgment (ING USA ANNUITY AND LIFE INSURANCE COMPANY)

Alice D. Bonner
Superior Court of Fulton County

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FULTON COUNTY, GA

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ING USA ANNUITY AND LIFE INSURANCE COMPANY and ING INVESTMENT MANAGEMENT, LLC,	)(	
Plaintiffs,	)(	Civil Action No. 2007-CV-134590
v.	)(	
J.P. MORGAN SECURITIES INC. and DAMIAN BERRY,	)(	
Defendants.	)(	

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

On June 24, 2010, Counsel appeared before the Court to present argument on Plaintiffs' Motion for Partial Summary Judgment. After hearing the arguments made by counsel, and reviewing the briefs submitted on the motion and the record in the case, the Court finds as follows:

Defendant J.P. Morgan Securities Inc. ("JPMSI") provided investment banking services to an Australian mining company named Sons of Gwalia Limited ("Gwalia"). Defendant Damian Berry ("Berry") was an employee of JPMSI between 1998 and 2002 and was JPMSI's relationship manager for Gwalia during that time. Starting in 2000, Gwalia decided to raise capital through the private placement of debt securities. This private placement strategy occurred over the course of two offerings—the first in the fall of 2000 ("2000 Private Placement") and the second in early 2002 ("2002 Private Placement").

Plaintiffs ING-USA Annuity and Life Insurance ("ING-USA") and ING Investment Management LLC ("ING-IM") participated in the 2002 Private Placement. ING-USA, a life insurance company, ultimately purchased $32 million of the notes offered by Gwalia in the 2002 Private Placement. JPMSI acted as Gwalia's broker for both the 2000 Private Placement and the 2002 Private Placement and, among other things, assisted Gwalia in preparing a private placement memorandum for each offering. In 2004, Gwalia entered into voluntary administration which is the Australian equivalent of bankruptcy.

Plaintiffs allege that during the 2002 Private Placement, Defendants misrepresented and concealed Gwalia's true financial picture. In particular, Plaintiffs allege that Defendants misrepresented and concealed: (1) Gwalia's investments in derivatives called Indexed Gold Put Options ("IGPOs"), (2) Gwalia's liquidity crisis following an unauthorized trading spree by Gwalia's director of finance, and (3) problems with Gwalia's acquisition of another gold mining company, Pacific Mining Corporation Limited ("Pac Min"). Based on these allegations, Plaintiffs assert claims for violations of the Georgia Securities Act of 1973 ("GSA"), common law fraud, negligent misrepresentation, and violations of the Georgia RICO Act.

Plaintiffs have moved for (1) summary judgment on their claims under the GSA (2) partial summary judgment against JPMSI on all elements of their common law fraud and negligent misrepresentation claims except the amount of recoverable damages, and (3) partial summary judgment against JPMSI and

Berry on all elements of their claim under the Georgia RICO Act except the amount of recoverable damages.

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

In support of their motion for summary judgment on their claim under the GSA, Plaintiffs argue that they seek the rescission remedy provided by the GSA. The GSA provides that

> It shall be unlawful for any person ... in connection with the offer to sell, sale, offer to purchase, or purchase of any security, directly or indirectly: (A) to employ a devise, scheme, or artifice to defraud; (B) to make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they are made, not misleading; or (C) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon a person.

Former O.C.G.A. 10-5-12(a)

The GSA further provides that any person who violates O.C.G.A. 10-5-12(a)

> shall be liable to the person buying such security; and such buyer may sue in any court of competent jurisdiction to recover the consideration paid in cash (or the fair value thereof at the time the consideration was paid if such consideration was not paid in cash) for the security with interest thereon from the date of payment down to the date of repayment as computed in paragraph (1) of subsection (d) of this Code section (less the amount of any income received thereon), together with all taxable court costs and reasonable attorney's fees, upon the tender, where practicable, of

> the security at any time before the entry of judgment, or for damages if he no longer owns the security.

Former O.C.G.A. § 10-5-14(a).

Plaintiffs argue that they are pursuing the rescission remedy provided by O.C.G.A. § 10-5-14 because ING-USA still owns the securities in dispute. Based on that premise, Plaintiffs argue that they should not be required to show causation because causation is only an essential element of claims seeking damages, not claims seeking rescission. The Court finds that Plaintiffs' argument is untenable because they seek a remedy they have no legal right to pursue. Under Georgia law, rescission is only available in a suit between the parties to a contract. Sofet v. Roberts, 185 Ga. App. 451, 452 (1988) (because no privity of contract existed between the parties to the law suit, it was proper for the trial court to dismiss that portion of appellant's complaint which sought rescission). Here, Plaintiffs entered into an agreement with Gwalia to buy securities and JPMSI was the broker for that agreement, not a party to it. Accordingly, the Court finds that Plaintiffs may not elect the rescission remedy provided by the GSA, and must pursue only the damages remedy.

The Georgia Court of Appeals has made clear that the essential elements of a claim brought under O.C.G.A. § 10-5-12 are the same as those of its federal counterpart, section 10(b) of the Securities Act of 1934, namely: "(1) a misstatement or omission, (2) of a material fact, (3) made with scienter, (4) on which plaintiff relied, (5) that proximately caused his injury." GCA Strategic Investment Fund, Ltd. v. Joseph Charles & Associates, Inc., 245 Ga. App. 460, 464 (2000). The Court finds that questions of fact, including whether Defendants'

alleged misrepresentations and omissions proximately caused Plaintiffs' injury, preclude the grant of summary judgment on Plaintiffs' GSA claim.

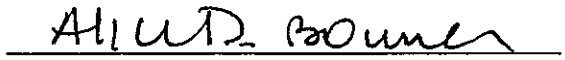
Next Plaintiffs argue that they are entitled to summary judgment as to liability on their claims for common law fraud and negligent misrepresentation. Under Georgia law, "fraud has five elements: (1) false representation by a defendant; (2) scienter; (3) intention to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff." Bogle v. Bragg, 248 Ga. App. 632, 634 (2001). Negligent misrepresentation has three elements: "(1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, 267 Ga. 424, 426 (1997). The Court again finds that questions of fact, especially as to scienter on Plaintiffs' fraud claim and reasonable reliance and causation on both claims, preclude summary judgment on Plaintiffs' claims for fraud and negligent misrepresentation.

Finally, Plaintiffs argue that they are entitled to summary judgment as to liability on their claims under the Georgia RICO Act. In pertinent part, the Georgia RICO Act makes it unlawful to "acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money" through a "pattern of racketeering activity." O.C.G.A. § 16-14-4. A pattern of racketeering activity is defined by the Act in pertinent part as "[e]ngaging in at least two acts of racketeering activity."

O.C.G.A. 16-14-3(8). While Defendants argue that the two Private Placements were merely a single transaction completed over the course of two closings, the Court disagrees. JPMSI, or its predecessor, was hired on two separate occasions, as evidenced by two different engagement letters, to conduct the two separate private placements. The two private placements each had separate private placement memoranda and different investors. Despite Defendants arguments, the Court finds that the 2001 Private Placement and the 2002 Private Placement were not a single transaction. The Court finds that there is evidence upon which a jury could find that Defendants violated the Georgia RICO Act based on two predicate acts—misrepresentations and omissions in the private placement memoranda for both the 2000 Private Placement and the 2002 Private Placement. However, questions of fact as to Defendants' liability preclude summary judgment on Plaintiffs' Georgia RICO claim.

Plaintiffs' Motion for Partial Summary Judgment is **DENIED.**

SO ORDERED this 11th day of August, 2010.



Alice D. Bonner, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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