

Wey v New York Stock Exch., Inc.

2007 NY Slip Op 33651(U)

November 7, 2007

Supreme Court, New York County

Docket Number: 0602510/2005

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS
Justice

PART 53

ALLISON L. WEY

INDEX NO.

602510/05

MOTION DATE

- v -

New York Stock Exchange and
John A. Thain

MOTION SEQ. NO.

006

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

NOV 13 2007

COUNTY CLERK'S OFFICE
NEW YORK

Motion is decided in accordance with:
accompanying Memorandum Decision.

Dated: 11/7/07

HON. CHARLES E. RAMOS

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION
 -----X

ALLISON L. WEY,

Plaintiff,

Index No. 602510/05

-against-

THE NEW YORK STOCK EXCHANGE, INC. and
 JOHN A. THAIN,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

On April 10, 2007, this Court decided defendant's summary judgment motion to dismiss the complaint, in part. The issue of *in pari delicto* required further briefing. This decision addresses that defense.

The factual background has been set forth in this Court's decision of April 10, 2007, and will not be repeated here.

The defense of *in pari delicto* is grounded on two premises: (1) courts should not lend their good offices to mediating disputes among wrongdoers; and (2) denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality. *Bateman Eichler, Hill Richards, Inc. v Berner*, 472 US 299 (1985). *In pari delicto* requires immoral or unconscionable conduct that makes the wrongdoing of the party against which it is asserted at least equal to that of the party asserting it. *Chemical Bank v Stahl*, 237 AD2d 231 (1st Dept 1997).

The *in pari delicto* defense is used sparingly, and is narrowly applied in litigation under federal regulatory statutes. *Alami v Volkswagen of America, Inc.*, 97 NY2d 281, 287-8 (2002), *affd* 10 AD3d 344 (2004); *see e.g. Perma Life Mufflers, Inc. v International Parts Corp.*, 392 US 134 (1968) (not recognizing in

pari delicto defense in Clayton Antitrust action).

The defense has been recognized in securities cases. See e.g. *Ross v Bolton*, 904 F2d 819 (2d Cir 1990). To ensure that the defense is narrowly applied in such cases, the Supreme Court in *Bateman Eichler*, 472 US 299 (1985), set forth a two-part test for the application of the defense in private causes of action under securities laws. *Bateman Eichler*, 472 US at 310-11. The Court held that the doctrine may bar an action "where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Id.*

The first prong of the test sets forth the essential elements of the doctrine. See *Pinter v Dahl*, 486 US 622 (1988). Courts apply the defense where the plaintiff has participated in some of "the same sort of wrongdoing" as the defendant. *Bateman Eichler*, 472 US at 307.

"A defendant cannot escape liability unless, as a direct result of the plaintiff's own actions, the plaintiff bears at least substantially equal responsibility for the underlying illegality. The plaintiff must be an active, voluntary participant in the unlawful activity that is the subject of the suit..." *Pinter*, 486 US at 636.

The process of weighing these faults is the function of the jury. See *Banks v Central Hudson Gas & Electric Corp.*, 224 F2d

631 (2d Cir 1955), *cert denied* 350 US 904 (1955). An exception is made where "upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party." *Holt v Welding Servs.*, 264 AD2d 562, 563 (1st Dept 1999), *lv dismissed*, 94 NY2d 899 (2000).

The second prong, which considers public policy implications of applying the defense, is consequential to the first. The public policy concerns are: a refusal of relief to those less blameworthy would frustrate the purpose of the securities laws; it would not serve to discourage the actions of those most responsible for organizing forbidden schemes; and it would sacrifice protection of the general investing public in pursuit of individual punishment. *Pinter*, 486 US at 636.

In an attempt to preclude the application of the defense, plaintiff argues that a seat on the NYSE is not a security, and thus insider trading laws are not applicable to this case. Plaintiff concludes that because the Weys violated no law or policy regarding the sale of the seat, no wrongdoing can be attached to their conduct, thereby disarming the defense. This Court disagrees.

Congress' purpose in enacting the securities laws was to regulate investments, in whatever form they are made and by whatever name they are called. *Banco Espanol de Credito v Security Pac. Nat'l Bank*, 973 F2d 51 (2d Cir 1992), *writ denied*, 509 US 903 (1993), *quoting Reves v Ernst & Young*, 494 US 56, 61 (1990). To that end, it enacted a broad definition of

"security,"¹ sufficient to encompass virtually any instrument that might be sold as an investment. *SEC v Edwards*, 540 US 389 (2004).

The touchstone in defining a security is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. *United Housing Found., Inc. v Forman*, 421 US 837 (1975), *rehearing denied*, 423 US 884 (1975).

A seat on the NYSE is the ultimate security; it clearly meets this test. The New York Stock Exchange traces its origins to 1792, when 24 New York City stockbrokers and merchants signed the Buttonwood Agreement. *History of the NYSE*, <http://www.nyse.com/about/history/1089312755484.html>, accessed 11/1/07. This agreement set in motion the NYSE's unwavering commitment to investors and issuers by creating a market for the fair and

¹"The term 'security' means any note, stock, treasury stock, security future, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance, which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." Securities and Exchange Act of 1934.

orderly exchange of securities. *Id*; see Rule 104, NYSE Constitution and Rules, January 2005. Thus, the creation of the NYSE itself satisfies the "common venture premised on a reasonable expectation of profits" requirement. Further, the value of the seat is derived from the "efforts" of brokers and traders driving the stock market, by trading a volume of securities, adding new companies to the exchange, and making a profit from each trade.

However, the most telling evidence that the seat is a security is Ms. Wey's own testimony. Mrs. Wey purchased her seat from her father on May 18, 2000 for \$1.1 million. A. Wey Dep. at 218:9-12; 360:17-22. The seat was sold by her father and purchased by the Mrs. Wey as an "investment opportunity" in the New York Stock Exchange. *Id.* at 127:6-25 - 128:1-3. The scope of the securities laws are meant to encompass such an investment. *Reves*, 494 US 56, 61 (1990); *SEC v Edwards*, 540 US 389 (2004).

Consequently, Mrs. Wey's sale of her seat using insider information (albeit false information) was in violation of federal and state securities laws. *United States v Chestman*, 947 F2d 551, 564 (2d Cir 1991) ["one who misappropriates nonpublic information in breach of a fiduciary duty and trades on that information to his own advantage violates Section 10(b) and Rule 10b-5" (of the Securities Exchange Act of 1934)]; *United States v Libera*, 989 F2d 596 (2d Cir 1993), writ denied 510 US 976 (1993) (same); *People v Napolitano*, 282 AD2d 49 (1st Dept 2001) (same), appeal denied, 96 NY2d 866 (2001)], as well as a

violation of the rules and regulations governing the New York Stock Exchange. See NYSE Disciplinary Rule 476(a)(1), *NYSE Constitution and Rules*, January 2005.

It is important to note, attempted insider trading that fails to achieve its goal is no less a violation of federal insider trading laws than a successful transgression. See *Kuehnert v Texstar Corp.*, 412 F2d 700 (5th Cir 1969) (stating that there is no difference in substance between a successful fraud and an attempt)²; *S.E.C. v Heden*, 51 F. Supp. 2d 296, 299 (SDNY 1999) (motion for preliminary injunction granted where S.E.C. was likely to prevail on the merits because overwhelming evidence revealed an attempt to elicit information in an effort to trade on insider information).

The first prong of the *in pari delicto* defense requires a comparative assessment of the parties' faults. This process is usually left for a trier of fact. However, in this case, no rational fact finder could conclude that Thain's conduct is equal to or greater than that of the Weys.

The Weys were admittedly motivated solely by personal financial gain. A. Wey Dep. 194-195, 250; 367; R. Wey 106. Mrs. Wey admittedly conspired with her husband to attain inside information for the limited purpose of selling her seat for the highest possible price. *Id.* This conduct alone is immoral and

²In 10(b) of the Securities and Exchange Act, 15 U.S.C.S. § 78j(b), the statutory phrase "any manipulative or deceptive device" seems broad enough to encompass conduct irrespective of its outcome. See *Kuehnert v Texstar Corp.*, 412 F2d 700 (5th Cir 1969).

unconscionable.

The Weys have exposed themselves to possible criminal liability by an apparent violation of 10(b) and/or 10b-5 of the Security and Exchange Act of 1934. Under the "misappropriation theory" of insider trading, one who misappropriates nonpublic information in breach of a fiduciary duty and trades on that information is liable under the Act. See *Libera*, 989 F2d 596 (2d Cir 1993); *United States v Chestman*, 947 F2d 551, 564 (2d Cir 1991).

As evidenced by their own testimony, the Weys were well aware that the information they were soliciting from Thain was nonpublic and if he divulged this information, it would have been a breach of his duty to the exchange. R. Wey Dep 103-104, 134; A. Wey Dep 50-51. Under these circumstances, a tippee is liable. See *United States v Falcone*, 257 F3d 226 (2d Cir 2001); *Libera*, 989 F2d at 600.

Further, by engaging in such conduct as a lessee and specialist, Mr. Wey, whom was acting on behalf of and at the direction of his wife, breached his fiduciary duty to the NYSE by attending the February 15 meeting as a specialist, attempting to gain inside information, and knowingly misappropriating that information in violation of the NYSE Constitution and Rules, and the NYSE Official Floor Manual.

On the other end, if Thain acted as plaintiff alleges, he was dishonest in answering Mr. Wey's question regarding the future of the NYSE. However, Thain was not motivated by personal

gain, but by his fiduciary duty to the exchange in attempting to protect the confidentiality of non-public information. Moreover, his statement was reactive to the improper query posed by Mr. Wey. Therefore, there is no question as to how the scales weigh; the Weys are substantially more at fault than Thain.

With regard to the second prong of the doctrine of *in pari delicto*, that is whether preclusion of this action would significantly interfere with the effective enforcement of the securities laws and protection of the investing public, the outcome is clearly in the negative. In fact, preclusion of this action would support the enforcement of securities law and protection of the investing public by discouraging similar unlawful activity by an insider or person with access to inside information. Therefore, the complaint must be dismissed. Accordingly, it is

ORDERED that plaintiff's complaint is dismissed in its entirety.

Dated: November 7, 2007

FILED
NOV. 13 2007
HON. CHARLES E. RAMOS
CLERK OF COURT
NEW YORK

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.