92

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

TRANSPETROL, LTD. CASE NO: CL 96-6566 AI

Plaintiff,

vs.

RODOLJUB RADULOVIC, RAMOIL HOLDING CO. LTD., RAMOIL MANAGEMENT CO., THOMAS O. KATZ, RUDEN, MCCLOSKY, SMITH, SCHUSTER & RUSSELL, P.A., and J.D. GILBERT & COMPANY,

Defendants.
_____/

NOTICE OF APPEAL

NOTICE IS GIVEN that TRANSPETROL, LTD., Plaintiff/Appellant, appeals to the Fourth District Court of Appeal, the order of this Court rendered July 22, 1999. The nature of the order is a final Order Dismissing All Counts of Third Amended Complaint Except that Portion of Count III: Common Law Fraud Pertaining to Mr. Radulovic, Ramoil Holding and Ramoil Management entered by Judge Edward Fine of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. A copy of the Order Dismissing All Counts of Third Amended Complaint Except that Portion of Count III: Common Law Fraud Pertaining to Mr. Radulovic, Ramoil Holding and Ramoil Management is attached hereto as Exhibit "A".

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to the following:

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127

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this 16th day of August, 1999.

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IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO. CL 96-6566 AI

TRANSPETROL, LTD.,
Plaintiff,

vs.

RODOLJUB RADULOVIC, RAMOIL HOLDING
CO. LTD., RAMOIL MANAGEMENT CO.,
THOMAS O. KATZ, RUDEN, MCCLOSKY,
SMITH, SCHUSTER & RUSSELL, P.A., and
J.D. GILBERT & COMPANY,
Defendants.
_____/

ORDER DISMISSING ALL COUNTS OF THIRD AMENDED COMPLAINT EXCEPT THAT PORTION OF COUNT III: COMMON LAW FRAUD PERTAINING TO MR. RADULOVIC, RAMOIL HOLDING AND RAMOIL MANAGEMENT

This action came before the Court on Defendants' motions to dismiss the Third Amended Complaint, the Court having already entered orders addressing the First and Second Amended Complaint. The Court having considered the complaint, the various memoranda, authorities and arguments of the respective parties orders as follows:

The first two transactions described namely those described in Paragraphs 23 through 25 and 30 through 33 have forum selection clauses which provide exclusive jurisdiction in the Courts of England. These forum selection clauses are valid on their face and no good cause has been shown why they should not be enforced. The contracts are international transactions between international parties. Their resort to the exclusive jurisdiction of the Courts of England is reasonable.

The earliest transaction is described as a contract with Yox Italiano for fuel oil to be shipped to Bosnia, secured by a letter of credit issued by Jugo Banka, where it is alleged that Transpetrol, the Plaintiff, agreed to cover the resale obligations of the Yox Italiano's contract by purchasing a like quantity of fuel oil and that Plaintiff was never properly paid. The second transaction described in Paragraphs 30 through 33 concerns a contract

surrounding a shipment of sugar in return for gas oil with certain Russian entities secured by an irrevocable bank guarantee where Ramoil Holding orally agreed with Transpetrol to provide a letter of credit from Credit Lyonnais Bank Nederland. It was alleged that a balance of approximately $137,500.00 is still due and owing to Plaintiff by Ramoil Holding.

Both of these transactions are governed by a forum selection clause granting exclusive jurisdiction in the courts of England. The first forum selection clause provides that the parties irrevocably agree, which the Court considers to be a mandatory agreement - that the Courts of England have jurisdiction to settle any disputes, which to this Court includes any disputes arising in the present law suit - which arise out of or in connection with this contract. The Court construes this to require that anything arising out of or in connection with the transaction described in Paragraphs 23 through 25 falls within the exclusive jurisdiction of the Courts of England. That would include all the counts of the present complaint except Count III, Common Law Fraud, since all counts except Count III, incorporate these paragraphs.

The transactions described in Paragraphs 30 through 33 of the complaint have a forum selection clause that provides that the parties irrevocably agree that the Courts of England have jurisdiction to settle any disputes which may arise out of or in connection with that contract and submit to the jurisdiction of England's courts. The Court construes this forum selection the same way that it has construed the previous forum selection clause. All of the counts of the complaint except Count III, Common Law Fraud, include allegations which arise out of or are in connection with this second contract and are governed by its forum selection clauses.

Consequently all the counts except Count III are dismissed. Any repleading will have to omit any claims that arise out of or in connection with either of these transactions.

The indispensable party argument of Defendants is moot at this point since all the allegations in the Third Amended Complaint regarding Yox Italiana are removed by the forum selection clause ruling.

All other grounds of dismissal directed towards Count I are denied. These include failure to allege conditions precedent for failure to allege that a profit was made, and failure

to attach contracts. The Court finds that Exhibit D attached to the complaint is sufficient.

Regarding Count II, Fraudulent Misrepresentation: Due to the forum selection clause Count II is dismissed. Count II is based upon a 1995 transaction surrounding the lifting of an attachment on a Banco della Svizzera Italiana account. This second transaction appears to be similar to the transaction described in *HTP Ltd. v. Lineas Aereas Costaricenses, S.A.*, 685 So.2d 1238 (Fla. 1996), wherein a fraudulent inducement claim regarding the entry into a settlement agreement was determined not to be barred by the economic loss rule even though the damages sought as the economic losses were the same damages as under the contract. In an opinion that is presently not final, *Moransais v. Heathman*, 1999 WL 462629 Florida Supreme Court, July 1, 1999, the Supreme Court among other things makes it quite clear that actions for negligent misrepresentation and fraudulent inducement when the losses are purely economic, may still be brought as tort claims. The Court finds that the economic loss rule does not bar Paragraphs 108 though 112 of Count II.

Count III, Common Law Fraud as to Defendants Thomas O. Katz, Ruden, McClosky, Smith, Schuster & Russell, P.A., and J. D. Gilbert & Company: It is alleged that they were active and knowing participants in alleged unlawful and fraudulent conduct and that they owed a duty to creditors and business counterparts to disclose this conduct. It is additionally claimed that these Defendants fraudulently omitted to advise Transpetrol.

The case *In Re: U.S. Oil and Gas Litigation*, 1988 WL28544 S.D. Fla., concerns a failure to disclose material information to investors. The situation for lawyers and accountants dealing with investors is somewhat clearer than the allegations in this case which essentially boil down to diversion of assets out of the corporation beyond the reach of creditors and filing misleading income tax returns and financial information with a bank in Bermuda. There is nothing to indicate that either tax returns or this financial statement would be something that would be seen by Plaintiff. This differs from the Oil and Gas Litigation case where it is clear that the work product of the accountants and lawyers would

be seen by others and very likely by the plaintiffs. Unlike *Gutter v. Wunker*, 631 So.2d 1117 (Fla. 4th DCA 1994), *cause dismissed* 637 So.2d 235 (Fla. 1994); the present case was not a case where the attorneys undertook to disclose information or material facts or undertook to conceal or not disclose material facts to Plaintiff or to a class of which Plaintiff was allegedly a member. There is no indication from the allegations in the complaint that Defendant attorneys or accountants were aware of the existence of Plaintiff or of Plaintiff's business transactions with the Radulovic Defendants. The posture of the complaint is that Plaintiff did not see any of these documents but if they had seen them then they would have avoided entering into certain transactions and would have made immediate efforts to try to collect what they were owed.

The complaint lacks the element of reliance and Plaintiff, unlike potential investors who are likely to see the work product of the attorneys and the accountants, does not have the benefit of a presumption that Plaintiff is part of the class that would have relied upon either the tax returns, or the financial statements sent to the bank in Bermuda. The cause of action in this count is based upon the allegation that there was a duty to disclose information to Transpetrol. The basis of this count is failure to publicize the information since the count alleges that had Transpetrol been aware it would not have entered the various transactions. There is no allegation in this count that these Defendants' work product was used to mislead Plaintiff. There is no cause of action pled for breach of a duty to disclose allegedly fraudulently characterized transactions on tax returns and financial statements.

The allegations place Plaintiff as a creditor but there are no allegations against the accountant or attorney that indicate that they were preparing documents that would be circulated generally to creditors, (only to the bank in Bermuda and to anyone who gained information presumably through that bank which according to the pleadings does not include Plaintiff).

Consequently, Count III, Common Law Fraud, is dismissed as to Defendants Thomas O. Katz, Ruden, McClosky, Smith, Schuster & Russell, P.A., and J. D. Gilbert & Company.

Count III as to the other Defendants, Radulovic and the Ramoil Holding and Ramoil Management: It is alleged Radulovic falsely represented that the Jugo Banka letter of credit had not been paid. Parts of this count rely on the non-disclosure allegations, and also that assets were being transferred out of the companies making them less able to pay their creditors, while at the same time it was represented that Ramoil Holding would pay the entire indebtedness by November, 1995. The allegations are that Plaintiff was lulled into inaction by reliance on these misrepresentations while funds were removed from the reach of creditors. The motion to dismiss Count III against these Defendants is denied.

Count IV, Uniform Fraudulent Transfer Act: The allegations are sufficient to indicate that these transfers were not made in the ordinary course of business and that it was not impossible that these actually were transfers even though Defendants are claimed to be alter-egos and the equivalent of a single entity.

As previously held this count is not barred by the one year statute of limitations set forth in Florida Statute 276.110(3).

Count IV fails to state a cause of action against Ramoil Management because there are no allegations in the count itself or in first 100 paragraphs incorporated in it that allow one to discern that Ramoil Management was either a transferor or a transferee with respect to any of the assets which were allegedly fraudulently transferred. Therefore Count IV is dismissed as to Ramoil Management.

As previously stated the forum selection clause requires the dismissal of this count.

Count V, RICO allegations:

Standing: The complaint sufficiently alleges standing by alleging that the injury was directly caused by the RICO violation, in other words, that the improper divesture of the assets of these corporations had a direct effect on Plaintiff's ability to recover against the corporations. *Bivens Gardens Office Building, Inc. v. Barnett Banks*, 140 F. 3rd 898 (11th Cir. 1998).

The allegations of deliberate transfer of assets by wire for no equivalent value is sufficient to allege activities affecting interstate or foreign commerce.

Mail fraud occurs when one intentionally participates in a scheme to defraud another of money or property and uses the mails or wires in the furtherance of scheme. *Pelletier v. Zweifel*, 921 F. 2d 1465 (11th Cir. 1991); *cert. denied* 502 US 855 (1991). The allegations are sufficient to show that the alleged predicate acts were calculated to deceive persons and were implemented by mail or wire with the requisite intent to defraud.

The allegations adequately show a proximate cause relationship between the alleged mail or wire fraud and injury to Plaintiff, namely that funds normally reachable by a creditor particularly by Plaintiff, were by illegal means put beyond the reach of the creditor.

The predicate acts in this case include acts of mail and wire fraud. The pleadings establish at least two distinct related predicate acts.

The allegations as pled are sufficient against all of the defendants including the attorneys and the accountant defendants.

The allegations are sufficient to allege that Plaintiff was the target of the improper conduct and that Plaintiff suffered a direct injury as a result of the conduct.

The Economic Loss Rule: The Economic Loss Rule bars this RICO action since the claims as pled arise out of Defendants' breach of its performance obligations under a contract or a series of contracts and the claims by Plaintiff are contractual claims by nature. *Comtech Intern. v. Millam Commerce Park*, 711 So.2d 1255 (Fla. 3rd DCA 1998); *Sarkis v. Pafford Oil Co., Inc.*, 697 So.2d 524 (Fla. 1st DCA 1997).

Also the forum selection clause ruling results in dismissal of this count. Therefore Count V is dismissed.

Count VI, Florida Statute 607.0831: Besides the forum selection clause dismissal, this count is dismissed against Ramoil Holding since Ramoil Holding is a foreign corporation and therefore this count is inadequately pled as to Ramoil Holding. Therefore this count is dismissed.

In summary:

Counts I, II, IV, V and VI are dismissed due to the forum selection clause and are not capable of being repled if they contain the allegations in Paragraphs 23 - 25 and 30 - 33.

Count III is dismissed as to Defendants Thomas O. Katz, Ruden, McClosky, Smith, Schuster & Russell, P.A., and J. D. Gilbert & Company but not as to Mr. Radulovic, Ramoil Holding and Ramoil Management.

Count IV already dismissed, is dismissed on additional grounds as to Ramoil Management.

Count V already dismissed, is dismissed on additional grounds as violative of the Economic Loss Rule.

Count VI already dismissed, is dismissed against Ramoil Holding on additional grounds.

ORDERED at West Palm Beach, Florida, this 22 day of July, 1999.

EDWARD FINE
Circuit Judge

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