16-3239
Charney v. Wilkov

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of May, two thousand eighteen.

PRESENT:

JOHN M. WALKER, JR.,
DENNIS JACOBS,
Circuit Judges,
KATHERINE B. FORREST,*
District Judge.

Scott Charney, Diva Goodfriend-Koven, Robert Reach, Ellen Reach, Toni Allen, Scott Edvabsky, Anthony Corsaro, Barbara Corsaro, Gary Zuccaro, Bruce Lichtenstein, Robert Anarumo, Karen Fusco, Bonnie Vartabedian, Wayne Vartabedian, George Yu, Connie Simons, Laura Flax, Jay Coon, Neil Blitz, Marni Blitz, Joseph Levine, Nina Chaifetz, Ed Haran, Anne Haran, Kathy Paschuk, Bruce Fuller, Tracey Peck, Jeff Peck, Elizabeth Tymczyszynt, GATA Realty, LLC, CWZ Holding, LLC,
Plaintiffs-Appellees,

v. **16-3239**

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* Judge Katherine B. Forrest, of the United States District Court for the Southern District of New York, sitting by designation.

Jennifer S. Wilkov,
Defendant-Appellant,

Carla Zimbalist, Pam Chanla,
Defendants.

FOR DEFENDANT-APPELLANT: Jennifer S. Wilkov, *pro se*, Brooklyn, NY.

FOR PLAINTIFFS-APPELLEES: Scott A. Brody, Brody, O'Connor & O'Connor, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Hellerstein, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Appellant Jennifer Wilkov, *pro se*, appeals from the district court's grant of summary judgment in a securities fraud action brought by nineteen individual plaintiffs against her. Plaintiffs asserted claims under § 10(b) of the Securities Exchange Act, S.E.C. Rule 10b-5, common law fraud, and additional causes of action, arguing that Wilkov induced them to invest in a fraudulent real estate scheme. Wilkov pleaded guilty in a related state criminal action, admitting that she had induced plaintiffs to invest in the fraudulent scheme by misrepresenting: her experience with the two individuals who operated the scheme from California, Carla Zimbalist and Pam Chanla; her undertaking to monitor the plaintiffs' investments; and her due diligence into the investment. Based on her plea allocution in the state action, the district court determined that Wilkov knowingly made these three misrepresentations.

The plaintiffs moved for summary judgment, arguing that the misrepresentations were material, that plaintiffs relied on them, and that the misrepresentations caused them to lose their investments. The magistrate judge's Report and Recommendation ("R&R") limited its review to plaintiffs' securities fraud and common law fraud claims because they were the only claims that required proof of these three elements. The R&R concluded that genuine disputes of material fact existed regarding plaintiffs' reliance and whether the criminal conduct of Zimbalist and Chanla was foreseeable. The district court disagreed and granted summary judgment, reasoning that circumstantial evidence established plaintiffs' reliance and that the criminal conduct was not an intervening event. The district court subsequently awarded damages, and directed the clerk to close the case. This appeal followed. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

Jurisdiction

We have appellate jurisdiction over "final decisions of the district courts." 28 U.S.C. § 1291; *In re Roman Catholic Diocese of Albany, N.Y., Inc.*, 745 F.3d 30, 35 (2d Cir. 2014). A final decision is one that "conclusively determines all pending claims of all the parties to the litigation, leaving nothing for the court to do but execute its decision." *Petrello v. White*, 533 F.3d 110, 113 (2d Cir. 2008). Here, the district court's grant of summary judgment explicitly addressed only plaintiffs' claims of securities fraud and common law fraud. Although the district court did not expressly decide plaintiffs' other claims, its judgment was final.

In *United States ex rel. Polansky v. Pfizer, Inc.*, 762 F.3d 160 (2d Cir. 2014), we held that a district court dismissal that addressed fewer than all claims in a complaint was not final because it was unclear "how much of the complaint the district court intended to dismiss." *Id.* at 161. The issue arose in *Polansky* because the district court had previously ruled on the merits of one of the open claims, and had permitted it to proceed to discovery. *Id.* at 163. However, absent the "irreconcilable inconsistency" present in *Polansky*, a district court order that provides reasoning for some of the plaintiff's claims is final if it is clear that the district court intended to dismiss the case in its entirety. *Cox v. United States*, 783 F.3d 145, 147-49 (2d Cir. 2015) (per curiam). In determining the district court's intent, we consider the totality of circumstances. *See Vona v. Cty. of Niagara*, 119 F.3d 201, 206 (2d Cir. 1997) (holding that dismissal was final even though state claims were not addressed in motion to dismiss, because the district court later marked case "closed" and could have plausibly declined to exercised supplemental jurisdiction); *Guggenheim Capital, LLC v. Birnbaum*, 722 F.3d 444, 449-50 (2d Cir. 2013).

The record confirms that the district court intended its judgment to end the litigation. In contrast to *Polansky*, where dismissal of the complaint was inconsistent with an earlier denial of a motion to dismiss one of the claims, the district court closed the case without intimating an intent to take any further action as to the undecided claims. *See Guggenheim Capital, LLC*, 722 F.3d at 449-50. Moreover, plaintiffs have not pursued these claims and thus have declined to prosecute them. *See id*. at 450 (holding that the parties' two-year delay pursuing open claims supported finding that judgment was final). Applying a "practical rather than a technical construction" to § 1291, the district court's judgment was final. *Id.* (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)); *see Vona*, 119 F.3d at 206.

Merits

We review orders granting summary judgment *de novo* and focus on whether the district court properly concluded that there was no genuine dispute as to any material fact and that the moving party was entitled to judgment as a matter of law. *See Sotomayor v. City of N.Y.*, 713 F.3d 163, 164 (2d Cir. 2013); *Sousa v. Marquez*, 702 F.3d 124, 127 (2d Cir. 2012).

In order to prevail on a claim of securities fraud under § 10(b) and Rule 10b-5, "a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a

connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 157 (2008). A claim of fraud under New York law requires "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 208 (2d Cir. 2000) (quoting *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996)). The district court concluded that three of Wilkov's misrepresentations were material and made knowingly. Wilkov challenges the district's holdings regarding reliance, causation, and scienter.

1. Reliance

Reliance is essential to a claim under § 10(b) and Rule 10b-5 because "[i]t ensures that, for liability to arise, the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability." *Stoneridge*, 552 U.S. at 159 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988)). In securities fraud cases, reliance is equated with "transaction causation," *In re Vivendi, S.A. Sec. Lit.*, 838 F.3d 223, 256 (2d Cir. 2016), which requires the defendant's conduct be the "but for" cause of the plaintiff's detrimental action, *Suez Equity Inv'rs L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 96 (2d Cir. 2001). Accordingly, a plaintiff may establish reliance by demonstrating that "*but for* the fraudulent statement or omission, the plaintiff would not have entered into the transaction." *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 186 (2d Cir. 2001) (quoting *Suez*, 250 F.3d at 95). Transaction causation is also a necessary element of a fraud claim under New York law. *Basis PAC-Rim Opportunity Fund (Master) v. TCW Asset Mgmt. Co.*, 149 A.D.3d 146, 149 (1st Dep't 2017).

As the district court determined, but for Wilkov's representations, the plaintiffs would not have invested in ths fraudulent scheme. While ninteen plaintiffs doubtless had different interactions at various points with Wilkov, the undisputed facts demonstrate that every plaintiff relied on Wilkov's knowing false representations that she herself had invested with Chanla and Zimbalist, that she had done due diligence on the two, and that she would monitor the properties herself. To the extent plaintffs relied on Wilkov as an investment adviser, this only adds weight to the inference that they relied on her false statements. To the extent plaintiffs relied on the rates of return, this was because Wilkov implied she had the same rate of return in her investments with Chanla and Zimbalist. And to the extent plaintiffs relied on referrals, the referrrals were recommendations to meet with Wilkov, not to make the investment, and because friends made the connection, this reinforced reliance on Wilkov's lie. Further, relying on these representations without an investigation was reasonable since Wilkov is a financial advisor. *See Crigger v. Fahnestock & Co.*, 443 F.3d 230, 234 (2d Cir. 2006) ("when matters are held to be peculiarly within defendant's knowledge [it is] said that plaintiff may rely without prosecuting an investigation" (internal citation, quotation marks, and alteration omitted)).

2. Loss Causation

The district court also properly determined that plaintiffs were entitled to summary judgment on the issue of loss causation. "Loss causation 'is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff.'" *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 172 (2d Cir. 2005) (quoting *Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc.*, 343 F.3d 189, 197 (2d Cir. 2003)). It is generally described in terms of the tort law principle of proximate cause which requires that damages be the foreseeable consequence of the defendant's conduct. *Id.* A plaintiff establishes loss causation by showing that "the loss was foreseeable and caused by the materialization of the risk concealed by the fraudulent statement." *ATSI Commc'ns, Inc. v. Shaar Fund Ltd.*, 493 F.3d 87, 107 (2d Cir. 2007). It requires a sufficiently direct relationship between the investment loss and the misrepresented information. *In re Vivendi*, 838 F.3d at 261.

Wilkov's argument that the criminal conduct of Zimbalist and Chanla was an unforeseeable intervening act is meritless. A plaintiff may fail to establish loss causation when an intervening event (such as a market crash) caused the loss or when the loss was caused by something unrelated to the fraud. *Castellano*, 257 F.3d at 189-90. But even when an "external and unforeseeable factor" intervenes, *id.* at 190, loss causation is established if the plaintiff's "loss was within the zone of risk *concealed* by the misrepresentations." *Lentell*, 396 F.3d at 173. Here the risk concealed by Wilkov that she had not conducted any due diligence and knew little about Zimbalist and Chanla materialized when Zimbalist and Chanla absconded with plaintiffs' investments. *See In re Vivendi*, 838 F.3d at 261.

As to plaintiffs' state law claim, New York law provides that intervening acts do not break the chain of causation if they are the "normal or foreseeable consequence of the situation created by the defendant's negligence," *Stagl v. Delta Airlines*, 52 F.3d 463, 473 (2d Cir. 1995) (quoting *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315 (1980)), even if that conduct is criminal, *Woodling v. Garrett Corp.*, 813 F.2d 543, 556 (2d Cir. 1987). "Neither the precise hazard nor the exact consequences [of the third party's conduct] need be foreseen." *Stanford v. Kuwait Airways Corp.*, 89 F.3d 117, 127 (2d Cir. 1996) (quoting *Mull v. Ford Motor Co.*, 368 F.2d 713, 717 (2d Cir. 1966)). Additionally, an intervening act cannot relieve a defendant of liability where "the risk of the intervening act occurring is the very same risk which renders the actor negligent." *Derdiarian*, 51 N.Y.2d at 316. Accordingly, it does not matter is, as Wilkov argues, that she did not know Zimbalist and Chanla would commit criminal acts. The loss of the investments was a foreseeable outcome from her failure to do any due diligence or to monitor the properties. *See Bell v. Bd. of Educ. of the City of N.Y.*, 90 N.Y.2d 944, 946-47 (1997). Accordingly, the district court properly determined that plaintiffs were entitled to summary judgment as to loss causation.

3. Scienter

Wilkov's challenge to scienter is also meritless. Wilkov asserts that the magistrate judge and district court improperly relied on her knowing misrepresentation of facts other than her previous experience with Zimbalist and Chanla, her intention to monitor the properties, and her due diligence. The magistrate judge and district court, however, only considered whether plaintiffs were entitled to summary judgment based on these three misrepresentations. Accordingly, the district court's determination regarding scienter was proper.

We have considered the parties' remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court