STATE OF MICHIGAN

COURT OF APPEALS

SUBRATA GHOSH and MRISM CORPORATION,

Plaintiffs-Appellants,

v

CORPORATION AND SECURITIES BUREAU,

Defendant-Appellee.

UNPUBLISHED
April 19, 1996

No. 171738
LC No. 93-094180-AA

Before: Sawyer, P.J., and Young and S.B. Neilson,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court order affirming the decision of the Michigan Corporation and Securities Bureau (the Bureau), which found that plaintiff Subrata Ghosh violated the Michigan Uniform Securities Act (the Act), MCL 451.501 *et seq.*; MSA 19.776 (101) *et seq*. We affirm.

I

The Bureau charged plaintiff Subrata Ghosh with five violations of the Act:

A. Offering and selling unregistered and non-exempt securities, contrary to MCL 451.701; MSA 19.776(301);

B. failure to disclose material facts in connection with the sale, contrary to MCL 451.501(2); MSA 19.776(101)(2)

C. Conducting business without being registered as a securities agent, contrary to MCL 451.601(a); MSA 19.776(201)(a)

---

* Circuit Judge, sitting on the Court of Appeals by assignment.

D. Being convicted of a felony, contrary to MCL 451.604(a)(1)(C); MSA 19.776(204)(a)(1)(C); and

E. Violating MCL 451.604(a)(1)(B); MSA 19.776(204)(a)(1)(B), which allows revocation for failure to comply with any provision of the Act.

Plaintiffs contended that the Act did not apply because Ghosh was acting as a "finder," and not an "agent," in offering and selling the preorganization subscriptions; the subscriptions were not "securities" as defined under the Act; and even if they were, the subscriptions were exempt from registration. Plaintiffs contend that defendant failed to prove any of the charges and challenge the decision below on several ethical and constitutional grounds.

During 1987, Ghosh sold interests in MRISM Corporation, which was organized to purchase and set up magnetic imaging machines for hospitals. Eight investors, including two relatives of Ghosh, contributed a total of $144,000 for preorganization subscriptions.[1] Fred Rogers, a self-employed businessman, was approached by Ghosh and eventually made an investment. Rogers was the only investor who testified at the administrative hearing. He testified that, for his investment of $6,250 (made payable to MRISM), he thought he was purchasing stock in MRISM, a company to be formed.[2] Ghosh gave Rogers a receipt indicating that Rogers had purchased an equitable interest and stock in MRISM.

Evidence showed that Ghosh intended to pay himself and his former wife a total of $108,000 in salaries from the subscription money. That payment comprised two-thirds of the subscription capital. Rogers testified that he was unaware of that intent. Rogers also testified that he was not to have an active role in MRISM's management.

Following the administrative hearing, the hearing referee issued a proposed decision finding that Ghosh had violated the Act and recommending that his license be revoked. The administrator rejected plaintiffs' objections and adopted the proposed decision. On appeal, the circuit court affirmed.

II

Plaintiffs challenge the determination that Ghosh violated the Act. Our review on appeal is limited. The administrator's factual findings, if supported by competent, material and substantial evidence, are conclusive. MCL 451.811(a); MSA 19.776(411)(a).

A. Selling Unregistered Securities

Plaintiffs contend that Ghosh's preorganization sales activities involved the sale of "units" in a "joint venture" in an "Initial Capital Fund" and are outside the purview of the Act. The referee found that Ghosh sold securities within the meaning of the Act.

The Act expressly defines a "security" to include a preorganization certificate or subscription, including any note or evidence of indebtedness. MCL 451.801(*l*); MSA 19.776(401)(*l*). Furthermore, an investment contract is included in the definition of a "security"; an investment contract is a "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *People v Cooper*, 166 Mich App 638, 646; 421 NW2d 177 (1987), quoting *Securities & Exchange Comm v WJ Howey Co*, 328 US 293, 298-299; 66 S Ct 1100; 90 L Ed 2d 1244 (1946). In addition, section MCL 451.801(j); MSA 19.776(401)(j) defines "sale" as including a disposition of an "interest in a security." We conclude that the hearing referee properly found on this record that Ghosh had successfully encouraged Rogers to invest in a security. In a veiled attempt to evade liability shortly before the hearing in this case, Ghosh acknowledged in a certificate sent to Rogers that he sold a preorganization subscription that was a security. Not only did Ghosh acknowledge that he sold a security, but there is substantial evidence that Rogers expected to receive profits from his investment in MRISM solely through Ghosh's efforts. Ghosh also gave Rogers a receipt declaring that Rogers' purchase constituted part of a "fifteen percent equity in MRISM" and that the investment created a beneficial ownership of "stock" in MRISM. There was competent, material and substantial evidence to support the finding that Ghosh sold a security as defined by the Act.

Next, we turn to the question whether the security was exempt from registration under the Act. Plaintiffs rely on the exemptions set forth in MCL 451.802(b)(9)(D)(1)(i); MSA 19.776(402)(b)(9)(D)(1)(i) and MCL 451.802(b)(10); MSA 19.776(402)(b)(10). Section (b)(9) provides a transactional exemption for investors who are reasonably expected to be actively engaged in the management of the issuer (here, MRISM). Rogers disclaimed any intention of becoming actively engaged in the management of MRISM or any discussion of the issue with Ghosh. Because the sale to Rogers did not fit within section (b)(9)(D)(1)(i), the issuer was required pursuant to MCL 451.802(b)(9)(A); MSA 19.776(402)(b)(9)(A) to exercise reasonable care to assure that purchasers do not resell the security except in compliance with state and federal security laws. The hearing referee found that Ghosh had not made reasonable efforts to restrict the sale of the security (until the self-serving notice was sent just prior to the hearing in this case).

Section (b)(10) requires that four elements be satisfied: (1) no commissions are paid for soliciting prospective investors; (2) there are not more than ten investors; (3) no advertising, other than as approved by the Bureau can be used; and (4) the seller reasonably believes the Michigan investors are purchasing the securities for investment only. The hearing referee found that Ghosh satisfied the first three elements, but failed to prove the fourth. The hearing referee noted in his opinion that plaintiffs relied upon two exhibits to establish Ghosh's reasonable belief that the investors were purchasing interests in MRISM only for investment purposes. The referee rejected the argument:

> Exhibit 7 [the receipt plaintiff gave to Rogers evidencing his investment in the stock of MRISM] merely indicates the amount invested and the general terms of the investment. Exhibit 7 contains no restrictive language on the transfer of the interests or statement that

purchasers were acquiring their interests for investments. Exhibit 9, the letter certificate sent to investors does contain transfer restrictions, but it was delivered only days before the hearing, several months after MRISM Corporation had ceased to exist and several years after the securities were sold.

Ghosh bore the burden of proving all of the elements of exemption. MCL 451.802(c); MSA 19.776(402)(c); *Ferar v Hall*, 330 Mich 214, 219; 47 NW2d 79 (1951). The record supports the hearing referee's finding that Ghosh failed to meet his burden.

B. Failure to Disclose Material Facts

Ghosh was also found to have violated the Act by failing to disclose the intended salaries -- a fact the hearing referee found to be material. As stated above, Rogers denied that he was aware that Ghosh intended to pay himself and his wife $108,000 from the proceeds of the investments. In fact, Rogers testified that he assumed Ghosh would take no compensation until MRISM was operational and making money.

This Court has held that MCL 451.501; MSA 19.776(101) imposes "a duty of full disclosure and fair dealing in the context of security transactions." *People v Cook*, 89 Mich App 72, 82; 279 NW2d 579 (1979). A material omission is one that a reasonable investor might have considered important to his investment decision. *Id*. at 83; *Prince v Heritage Oil Co*, 109 Mich App 189, 203; 311 NW2d 741 (1981). The hearing referee found that a reasonable investor might have considered the undisclosed fact that plaintiff intended to pay salaries equal to two-thirds of the entire capital to be raised material to his investment decision.[3] The record supports the hearing referee's conclusion.

C. Unregistered Agent

Ghosh challenges the finding that he transacted business as an unregistered agent in violation of the Act. MCL 451.601(a); MSA 19.776(201)(a) prohibits a person from acting as a broker-dealer, commodity issuer or agent unless registered as an agent. An agent is defined to include a person who represents the issuer in effecting with the sale of securities. MCL 451.801(b); MSA 19.776(401)(b).

Ghosh contends that he functioned in the capacity of a finder, and not as an agent, and therefore did not violate the above provision. He contends that, at most, he should have been liable for any actions which violated the finder provisions of MCL 451.502(c); MSA 19.776(102)(c).[4] Ghosh contends that the hearing referee inappropriately created a rule which would require all finders to register as agents to avoid liability.

As we noted in part I(A) of this Opinion, plaintiff was selling securities. The evidence plainly shows that Ghosh was representing the issuer (MRISM) in these transactions. Therefore, he was required to register as an agent. He did not do so. The record supports the hearing referee's conclusion that Ghosh transacted business as an unregistered agent in contravention of the Act.

D. Convicted Felon

Plaintiffs argue that Ghosh did not violate MCL 451.604(a)(1)(C); MSA 19.776(204)(a)(1)(C). That section allows revocation if the agent "has been convicted of . . . any felony."

Plaintiffs do not contest that Ghosh had been convicted of a felony in 1990. Plaintiffs contend that Ghosh's agent registration could not be revoked because he was not registered as an agent at the time of his felony conviction. As the hearing referee noted, pursuant to Rule 601.2(2)[5] and MCL 451.601(b); MSA 19.776(201)(b), plaintiff's registration was merely inactive at the time of his conviction because he was not associated with a particular broker-dealer or issuer.[6] Plaintiff continued to be registered during that time.

In contrast to the Uniform Securities Act, which limits its scope to convictions within the past ten years, our statute contains no limitation on the timing of the conviction. See Uniform Securities Act, § 204, 7B ULA 542 (Master Edition 1985).

E. Derivative Violations

The last charge is a derivative one. Because we have found that Ghosh violated other sections of the Act, MCL 451.604(a)(1)(B); MSA 19.776(204)(a)(1)(B) was properly invoked. That section provides that the administrator may revoke any registration if it finds that the registrant has violated or failed to comply with any provision of the Act.

III

Finally, plaintiffs raise a laundry list of attacks on the constitutionality of the Act, the hearing process, the role of government attorneys in the process, and the specific evidence in this case. We have reviewed these allegations and find absolutely no merit in them. The plaintiffs' arguments employ circular and contradictory logic[7] and disjointed citations of "authority." The arguments are not premised on a fair reading of the law or the facts.

IV

In light of our affirmance of the defendant's decision, we need not address plaintiffs' claim that they are entitled to costs.

Affirmed. Defendant may tax costs.

/s/ David H. Sawyer
/s/ Robert P. Young, Jr.
/s/ Susan Bieke Neilson

---

[1] Of the $144,000 raised by Ghosh, he was able to account for only $25,000.

[2] Plaintiffs concede in their brief that a preorganization subscription for stock of a company to be formed "is generally a 'security,'" but deny that the investment here is properly characterized as such. However, as discussed *infra*, Exhibit 9 belies plaintiffs' argument.

[3] In reaching this conclusion, the hearing referee also noted that Ghosh revealed, in a questionnaire he prepared for his attorney five days *before* the sale to Rogers, that he was to receive $72,000 and his former wife $36,000 in salaries as officers of MRISM.

[4] It is not disputed that Ghosh was properly registered as a finder under MCL 451.801(u); MSA 19.776(401)(u).

[5] 1981 AACS, R 451.601.2.

[6] Under MCL 451.601(b); MSA 19.776(201)(b), the registration is "not effective" during that time.

[7] For example, plaintiffs concede that the rules of evidence do not apply in administrative hearings, and then argue that the Due Process Clause requires that the rules of evidence be followed. Plaintiffs also argue that the circuit court created new law by citing a treatise, yet plaintiffs also urge us to declare unconstitutional the entire hearings system on the basis of a treatise which declares that the chance of a fair hearing is "almost de minimis."