2018 IL App (1st) 172862-U

SIXTH DIVISION
November 9, 2018

Nos. 1-17-2862 & 1-17-2863 (cons.)



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| HUIZENGA MANAGERS FUND,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>A.R. THANE RITCHIE, RITCHIE RISK-LINKED STRATEGIES, LLC, RITCHIE PARTNERS, LLC, and RITCHIE CAPITAL MANAGEMENT, LLC,<br><br>Defendants-Appellants. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the<br>Circuit Court of<br>Cook County.<br><br><br><br>No. 07 CH 9626<br><br><br>Honorable<br>Peter Flynn,<br>Judge Presiding. |

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

**ORDER**

¶ 1 *Held:* Trial court's entry of judgment following our corrected mandate was appropriate; affirmed.

¶ 2 This is the second time this case has appeared before this court. The first time was on appeal from the trial court's order entered against defendants Ritchie Risk-Linked Strategies, LLC, Ritchie Partners, LLC, A. R. Thane Ritchie, and Ritchie Capital Management, LLC for violating section 7323 of the Delaware Securities Act (Act). 6 Del. C. § 73-605 (West 2012). The trial court found defendants liable for material misrepresentations made to plaintiff Huizenga

Managers Fund, LLC (Huizenga), prior to Huizenga's second investment with them on October 1, 2005. The trial court denied Huizenga relief for its first investment with defendants on August 1, 2005, which Huizenga claimed on cross-appeal was in error. We affirmed the circuit court's judgment as it pertained to the second investment but reversed on the first investment. *Huizenga v. Ritchie*, 2016 IL App (1st) 152733-U. We also remanded the case for the trial court to calculate prejudgment interest. The underlying facts of this case are described in detail in that order, and therefore we will only discuss those facts that are necessary for the narrow issue before us on appeal.

¶ 3 Following our decision, defendants filed a petition for rehearing, which was denied. They then filed a petition for leave to appeal to the Illinois Supreme Court, which was denied. Thereafter, defendants filed a petition for writ of *certiorari* in the United States Supreme Court, which was also denied. On July 10, 2017, after the appeals process had concluded, the clerk of this court issued its mandate. The mandate simply stated, "Remanded for calculation of prejudgment interest."

¶ 4 On August 8, 2017, Huizenga filed a motion in this court to recall the first mandate and to issue a new mandate. Huizenga requested that this court direct the Clerk of the Appellate Court to issue a new mandate stating:

> "Remanded (1) for entry of judgment in favor of Plaintiff-Huizenga Managers Fund, LLC, and against Defendants Ritchie Risk-Linked Strategies, LLC, Ritchie Partners, LLC, Ritchie Capital Management, LLC, and A.R. Thane Ritchie, jointly and severally, in the amount of $6,000,000.00, and (2) for calculation of prejudgment interest."

¶ 5 A.R. Thane Ritchie responded in opposition, with Ritchie Partners and Ritchie Capital joining him, reasoning that Huizenga sought relief beyond that contemplated by this court's order.

¶ 6 On August 23, 2017, we granted Huizenga's motion to recall the first mandate and directed the clerk of this court to issue a new mandate that stated, "Affirmed in part. Reversed in part. Remanded for calculation of prejudgment interest." The new mandate was issued that same day.

¶ 7 On August 25, 2017, Huizenga filed a motion in the trial court to reinstate its motion for entry of judgment. At the hearing on Huizenga's motion, defense counsel argued that this court ordered judgment to be entered on the Huizenga's first investment, but did not "say against whom, and that is critical." The trial court stated that "the Appellate Court affirmed the application of the Delaware statute. They were pretty explicit about that." It then stated that it was going to apply the Delaware statute "now for a variety of reasons, one of which is that I know the Appellate Court is okay with that because they said so and another of which is that I cannot imagine anything more inequitable than driving this thing through yet another round of expense while Mr. Ritchie on the sidelines protests that he is already insolvent simply because the Court is endeavoring, in its own view, to do equity."

¶ 8 The trial court concluded that the simplest way for it to proceed would be to enter judgment against all of the defendants and leave it to this court to determine, in a subsequent appeal, whether that judgment was correct. The trial court noted that it would certify the judgment under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), because "all that will remain, in the Court's view, is the determination of attorneys' fees and it is quite common to enter a 304(a) certiorari where a judgment is partial final judgment only because an issue of

attorneys' fees remains." When asked by counsel if the trial court was denying the request to consider secondary liability for Ritchie Capital Management and Thane Ritchie and entering the judgment jointly and severally against all of the Ritchie parties, the trial court responded, "Yes."

¶ 9 The trial court entered an order on October 13, 2017, that stated it "hereby enters judgment in favor of Plaintiff Huizenga Managers Fund, LLC and against Defendants Ritchie Risk-Linked Strategies, LLC, Ritchie Partners, LLC, Ritchie Capital Management, LLC, and A.R. Thane Ritchie, jointly and severally, in the total amount of $12,771,529.70 (the 'Second Judgment'), comprised of $6,000,000.00 and $6,772,529.70 in prejudgment interest ***." The judgment was certified with Rule 304(a) language. Defendants appealed, arguing that the trial court exceeded this court's mandate when it entered judgment against all defendants jointly and severally.

¶ 10 During the pendency of this appeal, several motions were filed by both parties, including defendants' motion to dismiss the appeal for want of jurisdiction. Defendants claimed that because the attorney fees issue was still pending in the trial court, the judgment was not final and appealable. We denied that motion. There are still two open motions, which we opted to take with the case. We hereby deny Huizenga's motion to take judicial notice of certain documents cited in its reply brief, as they were unnecessary to this appeal. We also deny Huizenga's motion for sanctions against defendants for misrepresenting the record. As a final matter, we recently granted Huizenga's motion to dismiss Ritchie Risk-Linked Strategies, LLC from this appeal.

¶ 11 ANALYSIS

¶ 12 On appeal, defendants Ritchie Partners, LLC, Ritchie Capital Management, LLC, and A.R. Thane Ritchie claim that because this court did not address liability under section 7323(b)

of the Act in connection with the first investment in its order, liability could not be entered against A.R. Thane Ritchie or Ritchie Capital Management on remand.

¶ 13 In the trial court's initial order, it concluded in pertinent part:

> "For the foregoing reasons, the Court enters judgment in Huizenga's favor and against Ritchie Risk-Linked Strategies, LLC and Ritchie Partners, LLC, jointly and severally, on *** Counts I and II, and also enters judgment in Huizenga's favor and against defendants Thane Ritchie and Ritchie Capital Management, LLC, on Count II, for rescission of Huizenga's October 1, 2005 investment. The Court enters judgment in defendants' favor on the remainder of the Counts I and II claims (relating to Huizenga's initial August 1, 2005 investment) ***."[1]

¶ 14 On direct appeal, we agreed with Huizenga's argument that the trial court should have found defendants liable for Huizenga's first investment as well as its second investment because the trial court's factual findings established that before Huizenga invested its first $6 million on August 1, 2005, defendants knew the same undisclosed facts that they did before Huizenga's second investment, and failed to disclose them. *Huizenga*, 2016 IL App (1st) 152733-U, ¶ 75. We noted that the trial court misstated the test for materiality when discussing the first investment, and that the "same facts that the trial court delineated in support of its conclusion that the misrepresentations were material, were also present before the initial investment." *Id.* ¶ 77. We found that the trial court's finding that there was a lack of materiality with the first investment was against the manifest weight of the evidence and that "judgment should be entered in Huizenga's favor on the initial investment in the amount of $6 million." *Id.*

[1] Count I of Huizenga's third amended complaint was against Ritchie Risk-Linked Strategies pursuant to section 7323(a)(2) of the Act. Count II was against Ritchie Partners, A.R.Thane Ritchie, Capital Management, and other defendants not parties to this appeal, pursuant to section 7323(b) of the Act. To the extent that the trial court seemed to find Ritchie Partners liable under section 7323(a)(2), we find that conclusion to be in error.

¶ 15 Count II of Huizenga's complaint was a claim against several defendants including Ritchie Partners, Ritchie Capital Management, and A.R. Thane Ritchie, pursuant to section 7323(b) of the Act, which states in pertinent part:

> "every person who directly or indirectly controls a seller or buyer liable under subsection (a), every partner, officer, or director of such seller or buyer *** are also liable ***jointly and severally*** with and to the same extent as the seller or buyer, unless the nonseller or nonbuyer who is so liable sustains the burden of proof that the person did not know, and in the exercise of reasonable care, could not have known, of the existence of the facts by reason of which liability is alleged to exist." (Emphasis added).

¶ 16 The trial court found that three of the defendants were liable under section 7323(b) of the Act for their failure to show that they did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which liability was alleged to exist. Specifically, the trial court noted that A.R. Thane Ritchie was the "ultimate, and hands-on, authority, regarding the Coventry project," he "was ultimately responsible for Mulholland's communications with potential investors, and he was personally involved in selling the life settlements investment to Huizenga." The trial court concluded that "as the undisputed captain of the Ritchie ship, [A.R.] Thane Ritchie has the [section] 7323(b) responsibility to find out [that the information given to Huizenga was inadequate], and that he has not demonstrated reasonable care in doing so." The trial court found that Ritchie Partners, as the managing member of the fund, had a duty of reasonable care regarding what the fund communicated to Huizenga. The trial court stated that Ritchie Partners was tasked with overseeing those communications and it did not demonstrate that it could not have reasonably known the facts on which liability was

based. Finally, the trial court stated that it could not conclude that Ritchie Capital Management so thoroughly distanced itself from the Huizenga sales process as to be absolved of any duty to pay attention to what was and was not said. These conclusions related to the sale of both investments with Huizenga, which occurred within two months of each other. However, because the trial court had only found defendants liable as to the second investment, its imposition of section 7323(b) liability only applied to the second investment. On direct appeal, we found that the trial court's findings of liability under section 7323(b) of the Act were not against the manifest weight of the evidence. *Huizenga*, 2016 IL App (1st) 152733-U, ¶ 61. Because we found that the same facts existed prior to the first investment as existed prior to the second investment, when we reversed the judgment in defendants' favor on Huizenga's claims in Count I and II relating to Huizenga's initial August 1, 2005 investment, the imposition of section 7323(b) liability applied to both investments.

¶ 17 The mandate of a court of review is the transmittal of the judgment of that court to the circuit court, and revests the circuit court with jurisdiction. *PSL Realty Co. v. Granite Investment Co*., 86 Ill. 2d 291, 308 (1981). Accordingly, after receiving the mandate, the trial court should have entered judgment in Huizenga's favor and against Ritchie Risk-Linked Strategies on Count I, and also entered judgment in Huizenga's favor and against defendants Ritchie Partners, A.R. Thane Ritchie and Ritchie Capital Management on Count II, for rescission of both of Huizenga's investments–the August 1, 2005, investment, as well as the October 1, 2005, investment.

¶ 18 Because section 7323(b) of the Act states that defendants found liable under this section are jointly and severally liable with the seller found liable under section 7323(a)(2), we find that it was proper for the trial court, upon remand, to enter judgment in Huizenga's favor on the first investment for $6 million, and against defendants Ritchie Risk-Linked Strategies, Ritchie

Partners, Ritchie Capital Management, and A.R. Thane Ritchie, jointly and severally. This ruling should effectively end the litigation between these parties. To the extent that any other arguments are raised in this appeal, we note that our supreme court has held:

> "Where the Appellate Court *** on the first appeal to it, announces a particular view of the law governing the case and reverses and remands the case for further proceedings in accordance with the views announced, if the case is again brought before such court for review the former decision is binding on the court making it, and the questions decided and determined by it on the first appeal are not open for re-consideration on the second appeal." *Zerulla v. Supreme Lodge Order of Mutual Protection*, 223 Ill. 518, 520 (1906).

¶ 19 We affirm the judgment of the circuit court of Cook County. Defendants' motion to take judicial notice of certain documents and Huizenga's motion for sanctions are both denied.

¶ 20 Affirmed; motions denied.