

2014 IL App (1st) 132422-U

No. 1-13-2422

December 30, 2014

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MARK DE SOUZA and BdS QUANT,)	Appeal from the Circuit Court
CAPITAL LLC,)	Of Cook County.
)	
Plaintiffs-Appellants,)	
)	No. 12 L 1874
v.)	
)	The Honorable
JOHN G. KELLY and JOHN G. KELLY,)	Raymond W. Mitchell,
P.C.,)	Judge Presiding.
)	
Defendants-Appellees.)	

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The Commodity Exchange Act (7 U.S.C. §§ 1-25 (2012)) does not permit a private litigant to sue a party for failure to register as required by the Act, unless the litigant can show actual damages from transactions made in violation of the Act.

¶ 2 BdS Quant Capital, LLC (BdS) sued John Kelly and John G. Kelly, P.C. (collectively, Kelly) for legal malpractice and breach of a fiduciary duty to register as an owner of BdS. The trial court dismissed with prejudice BdS's claim for breach of a fiduciary duty. In this appeal, we hold that BdS did not adequately plead grounds for a private action against Kelly for violation of the provision in Commodity Exchange Act (7 U.S.C. §§ 1-25 (2012)) that required Kelly to register with the National Futures Association (NFA) as an owner of BdS. Accordingly, we affirm the dismissal of BdS's claim for breach of a fiduciary duty.

¶ 3 BACKGROUND

¶ 4 Art Bushonville, Stuart Simonsen, and the Becca de Souza 2003 Irrevocable Trust (the Trust) together formed BdS to sell investment securities, and some of the securities involved commodities futures. The three members of BdS named Bushonville, Simonsen, and Mark de Souza as officers and managers of BdS.

¶ 5 Simonsen sued BdS in 2008. BdS, through its managers, Bushonville and de Souza, hired Kelly to represent BdS in the litigation. BdS agreed to the following terms for compensating Kelly:

"In the event of any recoverable dollar, compensatory/punitive award made in this case, [Kelly] will receive and claim a lien on 33% (thirty-three) percent of the recovery by way of settlement or verdict.

In the event there is not a recoverable dollar settlement or verdict, but rather an award, recovery, and utilization of the software and/or trading system contributed to the partnership by Simonsen (and the subject matter of [BdS's] counterclaim), *** [Kelly] will become a co-equal partner with [Bushonville

and de Souza or the Trust] in any business, partnership, LLC, or other venture that utilizes the software and/or trading system or any modification of it."

¶ 6 BdS filed a counterclaim against Simonsen for usurping a corporate opportunity. On April 23, 2009, Simonsen, BdS, Bushonville, de Souza, and the Trust entered into a settlement agreement that resolved Simonsen's claims and the counterclaims against Simonsen. Simonsen agreed to permit BdS to use the software he developed for five years, in exchange for a fee. Simonsen also agreed to relinquish his equity as a member of BdS, and he repaid a liquidated debt.

¶ 7 Kelly assumed ownership of Simonsen's equity, and he took a share of the liquidated debt. De Souza sued Kelly in 2011, alleging that Kelly committed legal malpractice when he took both the equity and a share of Simonsen's payment as compensation for legal services. The circuit court dismissed the complaint without prejudice. In 2012, de Souza and BdS sued Kelly, alleging the same grounds as the 2011 complaint for a charge of legal malpractice. In a separate count, BdS charged that Kelly breached his fiduciary duty to BdS when he failed to register with the NFA as an owner of BdS.

¶ 8 Kelly moved to dismiss the complaint for failure to state a claim for relief. See 735 ILCS 5/2-615 (West 2012). The trial court dismissed BdS's claim for legal malpractice based on the statute of limitations, finding that BdS's claim did not relate back to de Souza's 2011 complaint. In a separate order dated March 25, 2013, the circuit court dismissed BdS's claim for breach of a fiduciary duty. The circuit court held that BdS's pleadings showed that it did not suffer any damages from Kelly's failure to register with the NFA as an owner of BdS.

The court added a finding of no just cause to delay appeal from the dismissal of BdS from the lawsuit. BdS now appeals.

¶ 9

ANALYSIS

¶ 10

Because the circuit court's orders finally disposed of all of BdS's claims against Kelly, and the court expressly found no just cause to delay appeal, we have jurisdiction to consider this appeal from a final judgment disposing of the claims of one but not all of the parties. See Ill. Sup. Ct. R. 304(a) (eff. Feb. 26, 2010). BdS argues only that it adequately pled a cause of action against Kelly for breach of his fiduciary duty to register with the NFA as an owner of BdS. We review *de novo* the issue of whether BdS's complaint states a cause of action. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006).

¶ 11

BdS claims that Kelly had a fiduciary duty to BdS to register with the NFA because federal law requires all persons with ownership interests in companies that trade commodities to register with the NFA. The Commodity Exchange Act (CEA) (7 U.S.C. §§ 1-25 (2012)) "regulates the conduct of participants in transactions involving commodity futures. Persons who actively participate in the industry, such as futures commission merchants, introducing brokers, and persons associated therewith, are obligated to register under the Act. 7 U.S.C. §§ 6f(a) and 6k(1). *** The NFA, a private corporation registered as a futures association under the Act, has been delegated the registration function." *R.J. O'Brien & Assoc. v. Pipkin*, 64 F. 3d 257, 259 (7th Cir. 1995).

¶ 12

Section 6k(1) of the CEA provides:

"It shall be unlawful for any person to be associated with a futures commission merchant as a partner, officer, or employee ***, in any capacity that involves

*** the solicitation or acceptance of customers' orders *** unless such person is registered with the Commission, under this chapter." 7 U.S.C. § 6k (2012).

¶ 13 However, in the CEA, Congress carefully circumscribed the bases upon which a private litigant can recover for violations of the CEA. Section 22(a)(1) of the CEA provides:

"Any person *** who violates this chapter *** shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such violation to any other person—

(A) who received trading advice from such person for a fee;

(B) who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity) or any swap; or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract or any swap;

(C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of—

(i) an option subject to section 6c of this title (other than an option purchased or sold on a registered entity or other board of trade);

(ii) a contract subject to section 23 of this title; or

(iii) an interest or participation in a commodity pool; or

(iv) a swap; or

(D) who purchased or sold a contract referred to in subparagraph (B) hereof or swap if the violation constitutes –

(i) the use or employment of *** any manipulative device or contrivance or swap *** in contravention of such rules and regulations as the Commission shall promulgate ***; or

(ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap." 7 U.S.C. § 25(a)(1) (2012).

¶ 14 Because BdS has not pled that it suffered any actual damages from a transaction made in violation of the CEA, it does not qualify under the CEA for a private right of action for a violation of the CEA. See *Klein & Co. Futures, Inc. v. Board of Trade*, 464 F.3d 255, 259 (2d Cir. 2006).

¶ 15 BdS argues that it has stated a common law cause of action for Kelly's breach of his fiduciary duty to register with the NFA. In *Indemnified Capital Investments, SA. v. R.J. O'Brien & Associates*, 12 F.3d 1406 (7th Cir. 1993), Indemnified claimed that it stated a cause of action against O'Brien for breach of its fiduciary duty to comply with NFA rules. The *Indemnified* court held that NFA rules "fail[] to create an independent private right of action." *Indemnified*, 12 F.3d at 1412. The *Indemnified* court affirmed the dismissal of the claim for breach of a fiduciary duty. *Indemnified*, 12 F.3d at 1412. Similarly, in *In the Matter of Lake States Commodities, Inc.*, 936 F. Supp. 1461, 1469-70 (N.D. Ill. 1996), *abrogated on other grounds, Damato v. Hermanson*, 153 F.3d 464, 470-71 (7th Cir. 1998), the plaintiffs charged the defendant with violating its obligations as a member of the NFA.

The *Lake States* court found no private right of action for violations of NFA rules, even when the plaintiff cast the rule violation as a common law action for breach of contract. *Lake States*, 936 F. Supp. at 1469-70.

¶ 16 The CEA required Kelly to register with the NFA as an owner of BdS, but the CEA also specifically limits private rights of action for violation of its provisions. We hold that phrasing the violation of the CEA as a breach of fiduciary duty cannot create a private right of action where the CEA disallows such a right of action. See *Klein & Co.*, 464 F.3d at 259; *Lake States*, 936 F. Supp. at 1469-70. We find that BdS has failed to state a cause of action against Kelly for violation of the CEA and NFA rules. Accordingly, we affirm the dismissal of BdS's claim against Kelly for breach of his fiduciary duty to register with the NFA.

¶ 17 CONCLUSION

¶ 18 The CEA permits a private right of action for violations of the CEA only if the plaintiff can show damages from transactions made in violation of the CEA. Because BdS has not pled any such damages from transactions, it has not pled a private cause of action for violation of the CEA. Rephrasing the alleged violation as a breach of a fiduciary duty cannot avoid the limitation of the CEA on private rights of action. Accordingly, we affirm the dismissal of BdS's claim against Kelly for breach of his duty, under the CEA, to register with the NFA as an owner of BdS.

¶ 19 Affirmed.