871 F.Supp. 400
United States District Court,
D. Colorado.

AMERICAN SECURITIES TRANSFER, INCORPORATED, Plaintiff,
v.
PANTHEON INDUSTRIES, INC., a Colorado corporation; A.R.G.I., Incorp., an Arizona corporation; and Princeton American Corporation, an Arizona corporation, Defendants.

Civ. A. No. 93-B-1432. | Dec. 2, 1994.

Transfer agent brought interpleader action to determine ownership of stock certificate. The District Court, Babcock, J., held that: (1) fact issues precluded summary judgment for transfer agent that it had no duty to transfer shares; (2) fact issues regarding adequacy of consideration precluded summary judgment for issuer; and (3) issuer and transfer agent owed no duty to transferee of holder requesting transfer.

Motions for summary judgment denied in part; granted in part.

West Headnotes (10)

Attorneys and Law Firms

***401** Patrick J. Russell, Denver, CO, for plaintiff.

Richard S. Strauss, Hochstadt, Straw & Stauss, P.C., Denver, CO, for defendants A.R.G.I. and Princeton American.

Miles M. Gersh, James S. Helfrich, Gersh & Danielson, Denver, CO, for defendant Pantheon Industries.

Opinion

MEMORANDUM OPINION AND ORDER

BABCOCK, District Judge.

Plaintiff American Securities Transfer, Incorporated (AST) filed this interpleader action to determine the ownership to stock certificate no. 2770 (the certificate), issued to defendant A.R.G.I., Incorporated (A.R.G.I.) and representing 2,000,000 shares of Pantheon Industries, Inc. (Pantheon) common stock when issued. AST asserts no interest in the certificate. A.R.G.I. and Princeton American Corporation (Princeton) (collectively A & P) bring one counterclaim against AST alleging that AST violated § 4-8-401, 2 C.R.S. (1992) and, thus, they are entitled to damages. A & P also assert this claim against Pantheon. In addition, they assert cross-claims against Pantheon for breach of contract, state and federal securities fraud, and exemplary damages. Similarly, Pantheon asserts cross-claims against A.R.G.I. for federal securities fraud, common law fraud, and lack of standing. It also brings a claim against Princeton for violation of Rule 144 of the Securities and Exchange Commission.

AST and Pantheon move for summary judgment on A & P's claim that they violated § 4-8-401. A & P cross-move for partial summary judgment against AST and Pantheon on this same claim. Pantheon also moves for partial summary judgment seeking a declaration that it is the rightful claimant to the stock certificate at issue. These motions are briefed fully and oral argument is unnecessary. For all the reasons set forth below, AST's and Pantheon's motions will be granted to the extent of Princeton's § 4-8-401 claim. Because genuine issues of material fact otherwise exist, the remaining motions will be denied.

I.

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.

56(c). The non-moving party has the burden of showing that there are issues of material fact to be determined. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits if any, which it believes demonstrate the absence of genuine issues for trial. *Celotex,* 477 U.S. at 323, 106 S.Ct. at 2552-53; *Mares v. ConAgra Poultry Co., Inc.,* 971 F.2d 492, 494 (10th Cir.1992). Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. *Otteson v. U.S.,* 622 F.2d 516, 519 (10th Cir.1980); Fed.R.Civ.P. 56(e).

II.

The following facts are undisputed. AST and Pantheon are corporations organized and existing under the laws of the State of Colorado. Scheduling Order, "Undisputed Facts" (the Order), ¶ 1. AST is Pantheon's stock transfer agent. Order, ¶ 2. In February 1990, Pantheon and Minco American Corporation ***402** (Minco) discussed a potential merger of their companies. Order, ¶ 3. Dale Eyman (Eyman) and David Smith (Smith), as Minco's officers and directors, were primarily responsible for the merger negotiations. *Id.* At this time, Pantheon owed its auditors, Toback & Co. (Toback) approximately $55,000. *Id.* at ¶ 4.

AST issued the certificate to A.R.G.I. on March 12, 1990 pursuant to instructions received from Pantheon. Affidavit of Kellie D. Watson, AST's senior vice president (Watson affid.), ¶¶ 3 and 4. This certificate contains a restrictive legend which reads:

The shares represented by this Certificate have not been registered under the Securities Act of 1933 (the Act) and are "restricted securities" as that term is defined in Rule 144 under the Act. The shares may not be offered for sale, sold or otherwise transferred except pursuant to an effective registration statement under the Act or pursuant to an exemption from registration under the Act, the availability of which is to be established to the satisfaction of the Company.

A.R.G.I.'s and Princeton's Cross-Motion (A & P motion), exh. A. The certificate also states on its face that the shares of common stock are "fully paid and nonassessable". *Id.* Several days earlier, Eyman, on behalf of A.R.G.I., executed an investment letter acknowledging the restrictive legend. AST's exh. A. Eyman is and was A.R.G.I.'s sole officer and director. Deposition of Dale Edward Eyman, Jr. (Dep. Eyman), p. 108. On February 28, 1990, A.R.G.I. issued a $40,000 promissory note (the A.R.G.I. note) to the order of Pantheon's wholly-owned subsidiary, Pantheon Studios, Inc. (Pantheon Studios). The A.R.G.I. note is also signed by Dale Eyman, on behalf of A.R.G.I. Pantheon's exh. E. A.R.G.I. has made no payments on its note. Pantheon's exh. O-A.R.G.I.'s answer to interrogatory No. 4.

Notwithstanding the certificate's restrictive legend, A.R.G.I. purportedly assigned and transferred the certificate to Minco on February 28, 1991. Pantheon's exh. T. Approximately two months later, Minco sold its assets to Princeton. Pantheon's exh. U. Smith and Eyman are also officers and directors of Princeton. Dep. Eyman, pp. 109-10.

In a letter dated August 18, 1992, Pantheon advised AST that the certificate was issued in error and instructed AST to cancel it. Order, ¶ 8; Pantheon's exh. X. In response, AST advised Pantheon that it was unable to cancel the certificate but would place a stop transfer order against it. Pantheon's exh. Y and Watson affid., ¶ 6. Enclosed in a May 11, 1993 letter, A.R.G.I. submitted the certificate to AST and requested that a new stock certificate be issued to A.R.G.I. without the restrictive legend (the reissuance request). Pantheon's exh. Z. In a May 19, 1993 letter, AST notified Pantheon of A.R.G.I.'s request and informed it that the transfer would be completed unless AST received, within thirty days, a court order precluding the transfer or an indemnity bond protecting AST against any loss. Order, ¶ 14; Watson affid., ¶ 9 and attached exh. F. On May 21, 1993, Pantheon responded by phone and in writing instructing AST not to transfer the shares. Order, ¶ 15; Watson affid., ¶¶ 9 and 10. AST then advised A.R.G.I. of Pantheon's position and transmitted via facsimile the pertinent documents. Watson affid., ¶ 13. Watson told A.R.G.I. to obtain a legal opinion which addresses all points raised in Pantheon's letter. *Id.* and attached exh. H. On June 15, 1993, Watson received a letter via facsimile from T. Michael Daggett (Daggett), A.R.G.I.'s attorney. *Id.* at ¶ 14 and attached exh. I. This letter along with Pantheon's instructions were forwarded to AST's legal counsel. *Id.* at ¶ 15. AST received neither a court order precluding A.R.G.I.'s reissuance request nor a surety bond. *Id.* at ¶ 16. Nevertheless, AST did not proceed with the reissuance request. *Id.* Instead, AST brought this interpleader action.

III.

A.

The first question raised is whether AST breached its duties under Article 8 of the Uniform Commercial Code. Because the issuer, Pantheon, is a Colorado corporation, Colorado law governs. § 4-8-106, 2 C.R.S. (1992). Under C.R.S. § 4-8-401(1), an issuer ***403** has a duty to register the transfer of securities as requested if certain preconditions are met. *Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp.,* 293 F.Supp. 1383, 1385 (D.Colo.1968). Section 4-8-401 provides in relevant part:

Duty of issuer to register transfer ...

(1) If a certified security in registered form is presented to the issuer with a request to register transfer or an instruction is presented to the issuer with a request to register transfer ... the issuer shall register the transfer ... as requested if:

(a) The security is indorsed or the instruction was originated by the appropriate person ...; and

(b) Reasonable assurance is given that those indorsements or instructions are genuine and effective ...; and

(c) The issuer has no duty as to adverse claims or has discharged the duty (section 4-8-403); and

(d) Any applicable law relating to the collection of taxes has been complied with; and

(e) The transfer ... is in fact rightful or is to a bona fide purchaser.

(2) If an issuer is under a duty to register a transfer ... of a security, the issuer is also liable to the person presenting a certificated security or an instruction for registration or his principal for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer ...

Official comment 3 states that "[i]f any of the preconditions do not exist, there is no duty to register the transfer." Pursuant to § 4-8-406, a coextensive duty is imposed upon a transfer agent to register a transfer request. The provisions of §§ 401 and 406 apply to the request to reissue the certificate here as this is a predicate for transfer of the certificate. *Bender v. Memory Metals, Inc.,* 514 A.2d 1109, 1115 (Del.Ch.1986); *Kenler v. Canal Nat. Bank,* 489 F.2d 482, 485 (1st Cir.1973).

The parties address two of the above conditions in their motions-§§ 401(1)(c) and (e). A & P argues that Pantheon's August 18, 1992 letter did not give rise to an "adverse claim" upon which AST had a duty to inquire under § 401(1)(c). However, they concede, and I agree, that AST's May 19th letter to Pantheon discharged its duty of inquiry.

The issuer [transfer agent] may discharge any duty of inquiry by any reasonable means, including notifying an adverse claimant by ... mail ... that the transfer will be registered unless within thirty days from the date of mailing the notification, either: a) [a]n appropriate restraining order, injunction, or other process issues from a court of competent jurisdiction; or (b) [a]n indemnity bond ... to protect ... any transfer agent ... is filed ...

§ 4-8-403(2). Having satisfied § 4-8-401(1)(c), AST's and A & P's motions turn on § 8-401(1)(e) which requires that the requested transfer be "in fact rightful or ... to a bona fide purchaser".

[1] AST argues that on the undisputed facts, as a matter of law, it is immune from liability because it never received an adequate opinion of counsel from A.R.G.I. concerning the rightfulness of the transfer in view of Pantheon's representation that under Rule 144, the restrictive legend could not be removed. I disagree.

It is undisputed that the certificate contains a restrictive legend which states that the shares may not be transferred "except pursuant to an effective registration statement under the Act or pursuant to an exemption from registration under the Act, the availability of which is to be established to the satisfaction of the Company". Rule 144 of the Securities and Exchange Commission (Rule 144), 17 C.F.R. § 230.144, requires that restricted securities be held a minimum of 2 years before being sold and this 2-year holding period does not begin "until the full purchase price or other consideration is paid ..." 17 C.F.R. § 230.144(d). When a promissory note is given as consideration, Rule 144 provides in relevant part:

... Giving the issuer or affiliate of the issuer from whom the securities were purchased a promissory note ... to pay the purchase price ... shall not be deemed full payment of the purchase price unless the promissory note ...:

***404** (i) provides for full recourse against the purchaser of the securities;

(ii) is secured by collateral ...; and

(iii) shall have been discharged by payment in full prior to the sale of the securities.

While certain Rule 144 requirements are eliminated if the restricted securities have been held for three years, the provisions of Rule 144(d) are also used to compute the three-year period. 17 C.F.R. § 230.144(k). Based on these regulations, Pantheon advised AST in its May 21, 1993 letter that A.R.G.I. was not entitled to the removal of the restrictive legend because a promissory note (the A.R.G.I. note), delivered as payment for the shares, had not been paid and, thus, the shares were "not eligible to have the restricted legend removed under any condition."

Pantheon's claim of nonpayment was later implied by A.R.G.I.'s attorney, T. Michael Daggett (Daggett), in his June 15, 1993 letter (the Daggett letter) to AST. Notwithstanding the certificate's statement on its face that the shares were fully paid and non-assessable, he stated, in part, that the consideration paid for the certificate was a $40,000 promissory note made payable to Pantheon Studios, a subsidiary of Pantheon, and other consideration. He further stated:

The promissory note was made payable to Pantheon Studios, Inc., so Pantheon could fairly represent that the 2,000,000 shares had been paid for. Accordingly, the shares were fully paid for and nothing was due Pantheon from A.R.G.I., Inc. as a result of its purchase of the shares.

Even though Pantheon's May 21st letter and Daggett's response gave AST reason to question whether A.R.G.I.'s reissuance request would be "rightful" under § 4-8-401(1)(e), I cannot conclude, as a matter of law, that AST is immune from liability absent a legal opinion from A.R.G.I.'s attorney that the proposed action is permissible. No such basis for immunity exists under Rule 144 or § 4-8-401. Furthermore, none of the cases cited to support AST's contention, *Kenler v. Canal Nat. Bank,* 489 F.2d 482 (1st Cir.1973), *Melville v. Wantschek,* 403 F.Supp. 439, 444-45 (E.D.N.Y.1975), and *Charter Oak Bank & Trust Co. v. Registrar & Transfer Co., Inc.,* 141 N.J.Super. 425, 358 A.2d 505, 509-10 (1976), are controlling. In addition, *Kenler* and *Charter Oak* are distinguishable in that the restrictive legends in those cases expressly required, in part, an opinion of counsel, satisfactory to the company that registration was not required under the Act. *Kenler,* 489 F.2d at 483; *Charter Oak,* 358 A.2d. at 507. If the Colorado General Assembly or the SEC intended to provide immunity to a transfer agent absent an adequate legal opinion when a proposed transfer is questionable, they could have said so explicitly. It is not for me to supply this additional basis for immunity absent legislative intent that it be there. 73 Am.Jur.2d *Statutes,* § 314 (1974); *Andrus v. Glover Construction Co.,* 446 U.S. 608, 616-17, 100 S.Ct. 1905, 1910-11, 64 L.Ed.2d 548 (1980) (construing federal law).

[2] AST further contends that, as a transfer agent, it has no statutory duty to remove a restrictive legend. The enactment of § 4-8-406(1) rejected the common law principle precluding a transfer agent's liability to a stockholder in damages for mere "nonfeasance". Official comment 1 to § 4-8-406. This statute expressly holds transfer agents liable for the wrongful refusal to register a transfer and wrongful registration of a transfer in any case within the scope of a transfer agent's function where the issuer would itself be liable. *Id.* In this case, AST contends that as the transfer agent, it had no coextensive duty under § 4-8-406(1)(b) to remove the restrictive legend from the certificate since Pantheon, not AST, possessed the factual background or pertinent documents necessary to determine whether this action was "rightful". Thus, as the argument goes, common law principles apply here to immunize AST from liability to A.R.G.I. or Princeton. I disagree.

AST offers no legal authority for this unique interpretation of its co-extensive duty. Furthermore, A.R.G.I.'s reissuance request is the obvious first step in and a necessary incident to a contemplated transfer of the stock. *Kenler,* 489 F.2d at 485 (addressing this question in dictum). Accordingly, I conclude ***405** that A.R.G.I.'s reissuance request is considered a "request to transfer shares" within the meaning of § 4-8-401. Consequently, it falls within AST's coextensive duty under § 4-8-406.

C.

[10] Lastly, I consider Princeton's involvement in this case. AST contends that it owed Princeton no statutory duty because the undisputed evidence shows that A.R.G.I. was the only party requesting the certificate's reissuance. I agree. Neither Princeton nor A.R.G.I. offer any evidence from which I can conclude that AST or Pantheon owed Princeton any duty under § 4-8-401. A party opposing a motion for summary judgment may not simply allege that there are disputed issues of fact; rather the non-moving party "must set forth specific facts showing that there is a genuine issue for trial". Fed.R.Civ.P. 56(e). Accordingly, summary judgment is appropriate and Princeton's § 4-8-401 claim for relief against AST and Pantheon will be dismissed.

Accordingly, it is ORDERED that:

1) AST's motion for summary judgment is DENIED in part and GRANTED in part;

2) A & P's cross-motion for partial summary judgment is DENIED;

3) Pantheon's motion for partial summary judgment is DENIED in part and GRANTED in part;

4) Princeton's first claim for relief against AST and Pantheon is DISMISSED with prejudice.

JUDGMENT

PURSUANT TO and in accordance with the Memorandum Opinion and Order signed December 2, 1994, by the Honorable Lewis T. Babcock, United States District Judge, it is

ORDERED that judgment is entered in favor of plaintiff American Securities Transfer, Incorporated, and defendant Pantheon Industries, Inc., and against defendant Princeton American Corporation, as to Princeton's first claim for relief against AST and Pantheon, and the first claim for relief is dismissed with prejudice.

Parallel Citations

26 UCC Rep.Serv.2d 214

[1] **Corporations and Business Organizations**
Transfer agents

Transfer agent was not immune from liability, for refusal to comply with transfer order, on grounds that it had not received an adequate opinion of counsel from transferee concerning rightfulness of transfer; statute did not provide for immunity through counsel opinion. West's C.R.S.A. § 4-8-401(1).

Cases that cite this headnote

[2] **Corporations and Business Organizations**
Duty to make or allow
Corporations and Business Organizations
Making and sufficiency

Transfer agent had statutory duty to remove restrictive legend from stock certificate, at request of transferee, even though agent claimed that issuer possessed factual background and pertinent documents necessary to determine whether transfer was "rightful," as required before duty to register transfer would apply. West's C.R.S.A. § 4-8-401(1)(e).

5 Cases that cite this headnote

[3] **Federal Civil Procedure**
Securities cases in general

Material issues of fact, precluding summary judgment, existed as to whether transfer agent was required to return stock certificate to issuer or deliver certificate to putative shareholder; there were questions as to exactly what consideration had been furnished for issuance of shares, and in event that consideration was delivery of promissory note, whether that was sufficient. Colo. Const. Art. 15, § 9; West's C.R.S.A. § 7-4-105; 17 C.F.R. § 230.144(d).

Cases that cite this headnote

[4] **Corporations and Business Organizations**
Estoppel to allege invalidity

Issuer of security was not estopped from denying that it had been issued for sufficient consideration, even though certificate recited that it was fully paid; inadequacy of consideration was constitutional ground for invalidating transfer of shares, to which estoppel doctrine did not apply. Colo. Const. Art. 15, § 9; West's C.R.S.A. § 4-8-202(2)(a).

1 Cases that cite this headnote

Cases that cite this headnote

[5] **Corporations and Business Organizations**
Restriction stated on certificate
Corporations and Business Organizations
Bona fide purchasers

Holder of restricted stock certificate could not compel transfer of an unrestricted certificate, under statute compelling issuer to register transfer to a "bona fide purchaser"; while holder was arguably purchaser for value of original certificate, it gave nothing of value for reissued certificate. West's C.R.S.A. §§ 4-1-201(33, 44), 4-8-302(2), 4-8-401(1)(e).

Cases that cite this headnote

[6] **Estoppel**
Relying and acting on representations

Party asserting estoppel claim must demonstrate he reasonably relied to his detriment upon acts or representations of other party and that he had no knowledge or convenient means of knowing facts.

1 Cases that cite this headnote

[7] **Estoppel**
Reliance on adverse party
Estoppel
Relying and acting on representations

Reliance asserted by party claiming estoppel must be justifiable or reasonable under total circumstances.

Issuer and transfer agent did not owe any duty to register transfer of securities to transferee of holder requesting transfer. West's C.R.S.A. § 4-8-401.

2 Cases that cite this headnote

[8] **Estoppel**
Nature and elements in general
Estoppel
Reliance on adverse party

Requirement of reasonable reliance applies equally to both equitable estoppel and estoppel by deed.

Cases that cite this headnote

[9] **Corporations and Business Organizations**
Estoppel to allege invalidity

Issuer was not equitably estopped from denying that stock had been issued for insufficient consideration, by virtue of recitation on face of certificate that it was fully paid; officers of holder and transferee had knowledge that there may have been failure of consideration for the stock, precluding necessary reasonable reliance on representation that stock was fully paid.

Cases that cite this headnote

[10] **Corporations and Business Organizations**
Persons Entitled