FILED
United States Court of Appeals
Tenth Circuit

OCT 26 1990

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

LEONARD FREIS; FRED NEUMAN; DOROTHY NEUMAN; RICHARD JOHNSTON; SHARON FREED; SAUL ROSENFIELD; MARCELLA ROSENFIELD; NORTON BOSLOW; and MARILYN BOSLOW,

Plaintiffs-Appellants,

v.

PHOENIX PETROLEUM CORPORATION; MORTON KAATZ; HARRY KAATZ; and DALE CALHOUN,

Defendants-Appellees.

No. 88-2030
(D.C. No. 85-Z-2135)
(District of Colorado)

ORDER AND JUDGMENT[1]

Before McKAY and EBEL, Circuit Judges, and WEST,[2] District Judge.

This case concerns the district court's denial of two post-trial motions pursuant to Rule 59 of the Federal Rules of Civil Procedure.

---

[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

[2] Honorable Lee R. West, United States District Judge for the Western District of Oklahoma, sitting by designation.

I. Facts

Plaintiffs sued defendants[3] for securities law violations in connection with the purchase of working interests in two oil well leases. The parties stipulated that the working interests were purchased on January 30, 1984, April 11, 1984, and April 25, 1984. Plaintiffs claimed that defendants violated section 12(1) of the Securities Act of 1933, 15 U.S.C. § 77l(1), because the securities were not registered. Plaintiffs also claimed that defendants made material misrepresentations and omissions that violated section 12(2) of the Securities Exchange Act of 1934, 15 U.S.C. § 77l(2); section 10b of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.

The case was tried to a jury; and at the conclusion of the plaintiffs' case, defendants moved for directed verdict on the section 12(1) claim arguing that it was barred by the one year statute of limitations set forth in section 13 of the 1933 Act, 15 U.S.C. § 77m. After hearing arguments on the motion for directed verdict, the court found that the section 12(1) cause of action accrued when the contracts were signed in January of 1984 and in April of 1984. Because this suit was not filed until September 20, 1985, more than one year after the contract dates,

---

3 Defendants were Phoenix Petroleum corporation, Harry Kaatz, Morton F. Kaatz, and Dale Calhoun. Plaintiffs received notices of default against Phoenix Petroleum corporation and Dale Calhoun. The case against Harry Kaatz was dismissed by the district court after he sought bankruptcy protection. At trial, the plaintiffs proceeded against Morton F. Kaatz.

the court granted defendants' motion for directed verdict. Record, vol. 5, at 451.

The claims under section 12(2) of the 1933 Act, 15 U.S.C. § 77l(2), section 10b of the 1934 Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5 were submitted to the jury. The jury returned a verdict in favor of plaintiffs and awarded damages in the amount of zero. The district court polled the jury on their verdict and submitted an interrogatory asking whether they found plaintiffs' section 12(2) claim timely. The jury answered in the affirmative. The court then entered judgment for plaintiffs in the amount of zero pursuant to the jury verdict.

Plaintiffs filed two post-trial motions under Rule 59: (1) a motion for new trial on the issue of damages only, and (2) an alternative motion for new trial on all issues. Plaintiffs argued that there were two conflicting instructions on damages submitted to the jury.[4] Plaintiffs claimed that Instruction No. 31 "was extremely confusing and must have been the instruction used by the

---

[4] Instruction No. 21 stated: "If you find that plaintiffs are entitled to recover from the defendant under 15 U.S.C. § 77l(2), you must award a sum of money equal to the consideration paid for such securities less the amount of income received thereon."

Instruction No. 31 stated: "Finally, for plaintiffs to recover for misrepresentations or omissions by defendant, plaintiffs must show that they have suffered damages as a result of their reliance on defendant's fraud. The correct measure of damages is the difference between the fair market value of all that plaintiffs received and the fair market value of what they would have received had there been no fraudulent conduct." At Plaintiff's request, the court added the notation "(10b-5)" at the end of the instruction in order to avoid jury confusion.

jury in arriving at its damages verdict." Record, vol. 1, doc. 5, at 1. The court denied plaintiffs' motion for new trial stating that it was untimely because "plaintiffs failed to move the court immediately to reconvene the jury for further deliberations on the offending damages instructions." Order, June 2, 1988, at 2. The district court held that the jury instructions complained of were not confusing and that "[t]hey provided the jury with an adequate legal guidepost to reach a decision." Id. The district court also held that it would be second-guessing the jury's finding of zero damages and usurping the jury's function as a trier of fact if the plaintiffs' motion was granted. Id. at 3.

Under Rule 59(e), plaintiffs requested that the court alter or amend findings and the directed verdict on the section 12(1) claim. Plaintiffs asserted below that the court erred in finding that the limitations period on the section 12(1) claim began to run when the separate agreements were entered into in January and April, 1984. Plaintiffs argued that the statutory period began to run in December 1984 when the defendant executed and delivered the assignments of working interests. Because the district court found that plaintiffs committed a fatal error in not pleading sufficient facts to demonstrate that the complaint was within the statute of limitations, the motion to alter or amend was denied.

II. Motion for New Trial

A. Standard of Review

The district court's decision on a motion for new trial pursuant to Rule 59(a) is reviewed under an abuse of discretion standard. Bonin v. Tour West, Inc., 896 F.2d 1260, 1261 (10th Cir. 1990); see Brown v. McGraw-Edison Co., 736 F.2d 609, 616 (10th Cir. 1984). A decision on a motion for new trial will not be reversed absent a gross, manifest, or clear abuse of discretion. See Harvey By Harvey v. General Motors Corp., 873 F.2d 1343, 1346 (10th Cir. 1989); Karns v. Emerson Elec. Co., 817 F.2d 1452, 1456 (10th Cir. 1987); Trujillo v. Goodman, 825 F.2d 1453, 1461 (10th Cir. 1987); Holmes v. Wack, 464 F.2d 86, 89 (10th Cir. 1972).

B. Discussion

The district court's denial of plaintiffs' motion for new trial is partially premised on plaintiffs' failure to complain of the confusing jury instruction. On appeal plaintiffs claim that their "motion for a new trial was not based on instruction no. 31, but rather the jury's complete and utter disregard of the court's instruction no. 21 and the undisputed evidence in this case." Brief of Appellants, at 33. A closer examination of plaintiffs' motion for a new trial reveals that they were complaining of an inconsistent verdict.

Appeals from inconsistent verdicts are governed by Federal Rule of Civil Procedure 49. Rule 49(b) concerns the submission to a jury of a general verdict with written interrogatories on one or more issues of fact. "When the answers [to the interrogatories] are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial." Fed. R. Civ. P. 49(b). Plaintiffs submitted a post-verdict interrogatory to the jury on whether the section 12(2) claim was timely. After the jury answered in the affirmative, plaintiffs did not submit any additional interrogatories to the court for the jury's consideration. Although plaintiffs did briefly allude to the alleged inconsistency in the verdict, this was done only after the jury was discharged.

We have held that a party must object to any inconsistency in the verdict before the jury is discharged, otherwise "he waives any future challenge to the inconsistency because his failure to make a timely objection deprives the court of the option of sending the jury back for further deliberations." Bonin v. Tour West, Inc., 896 F.2d 1260, 1263 (10th Cir. 1990); see also Jarvis v. Commercial Union Assur. Cos., 823 F.2d 392, 396 (10th Cir. 1987); Kirkendoll v. Neustrom, 379 F.2d 694, 698 (10th Cir. 1967). We are convinced that the plaintiffs' allusion to an inconsistent verdict after the jury was discharged did not preserve the issue for review.

Plaintiffs state that "although the jury did not deliver a verdict designating liability under either section 12(2) or Rule 10b-5 in particular, it must necessarily have found liability under Section 12(2)." Brief of Appellants, at 18. The verdict form presented to the jury is reproduced as follows:

> We, the jury, find for the plaintiff, [plaintiff's name], and award damages of $ 0.00 against the defendant, Morton F. Kaatz.

Record, vol. 1, doc. 8. In the cases we have found involving inconsistent verdicts, the verdict forms have provided information that could be reviewed on its face. See, e.g., Bonin v. Tour West, Inc., 896 F.2d 1260, 1262 (10th Cir. 1990); Jarvis v. Commercial Union Assur. Cos., 823 F.2d 392, 393-94 (10th Cir. 1987). Here the verdict form submitted to the jury at the request of plaintiffs[5] did not distinguish a finding of liability under any of the alleged statutory sections. In that sense it was a general verdict. The jury answered that the defendants were liable but that plaintiffs suffered zero damages. Plaintiffs now claim the that the jury found for plaintiffs on the section 12(2) claim and that the finding of zero damages is inconsistent with the judgment.

"When submitting a general verdict and interrogatories under Rule 49(b), both the trial and appellate court have a duty to

---

[5] The defendants state in their brief that these forms were prepared by plaintiffs, and we have found nothing in the record to dispute that contention. Even assuming the court prepared the verdict form, plaintiffs should have objected to the form because it did not distinguish the various statutory sections under which defendants could have been found liable.

reconcile the two if any seeming conflict arises." Harvey By Harvey v. General Motors Corp., 873 F.2d 1343, 1347 (10th Cir. 1989). The district court attempted to reconcile the verdict when it stated:

> On the [section 12(2)] claims, the jury may have decided that some benefit received from plaintiffs' securities rendered nugatory the consideration paid for such securities. On the Rule 10b-5 claims, the jury may have decided that the fair market value of all that plaintiffs received, and the fair market value of what they would have received had there been no fraudulent conduct, was equally balanced. At any rate, the Court is not free to set aside the jury's verdict merely because the court might have awarded damages.

Order, June 2, 1988, at 3. The district court's attempt to reconcile this verdict was not an abuse of discretion. We are persuaded that the jury might have found for plaintiffs on the Rule 10b-5 claim and against plaintiffs on the section 12(2) claim for one or more of the reasons set out in the appellees' brief. We are also persuaded that the jury could have found the section 12(2) claim timely while finding no liability attached under that claim. It is not necessary for us to reconcile this verdict where the plaintiffs failed to bring to the court's attention the alleged inconsistency prior to the discharge of the jury. We believe plaintiffs waived the claim they may have had on the inconsistent verdict. Finding no abuse of discretion in the district court's order denying a new trial, the district court's entry of judgment on the jury's verdict is AFFIRMED.

III. Motion to Alter or Amend

A. Standard of Review

At the conclusion of plaintiffs' case, the district court granted defendants' motion for directed verdict on the section 12(1) claim. Plaintiffs moved the district court to alter or amend judgment on the section 12(1) claim and now appeal the denial of that motion.

Both parties argue that our standard of review on the Rule 59(e) motion is the same as that which would be applied by the trial court in making its initial ruling. That would be the correct standard of review if we were reviewing the court's decision to grant or deny a motion for directed verdict under Rule 50. Here, plaintiffs did not preserve for appeal the issue of whether the Rule 50 motion should have been granted. Plaintiffs could have done so by way of a motion to reconsider. The plaintiffs' request, however, was for the district court to alter or amend judgment pursuant to Rule 59(e); and the notice of appeal challenges the district court's order of June 2, 1988, in which their Rule 59(e) motion was denied.

We have held that the standard of review for a motion to amend judgment pursuant to Rule 59(e) is "whether the district court abused its discretion." Varley v. Tampax, Inc., 855 F.2d 696, 700 (10th Cir. 1988). Under the abuse of discretion standard, we will not disturb the district court's decision unless we find that the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." United States v. Ortiz, 804 F.2d 1161, 1164 n.2. (10th Cir. 1986).

B. Discussion

The district court did not abuse its discretion when it denied the motion to alter or amend in this case. We have examined the record and agree that plaintiffs did not plead affirmative facts to prove the action was brought within the statutory limitation period. In their brief on appeal, plaintiffs argue that their motion to amend the pleadings to conform to the evidence cured the initial error of failure to plead the date of delivery. We do not agree because the motion to conform was made at the end of the trial. When the district court granted defendants' motion for directed verdict at the close of plaintiffs' case, all issues and evidence pertaining to the section 12(1) claim were not before the court or the jury. Thus, the argued cure was not possible.

The district court's holding that the plaintiffs committed a fatal error in not pleading sufficient facts is in accord with Toombs v. Leone, 777 F.2d 465 (9th Cir. 1985). In Toombs, the court held that "the plaintiff must affirmatively plead sufficient facts in his complaint to demonstrate conformity with the statute of limitations." 777 F.2d at 468. There the plaintiff had alleged that he purchased his securities on a certain date but made "no allegation with respect to the date upon which his securities were delivered." Id. When faced with a decision on whether the claim was time-barred, the court held that the date pleaded must be taken as the time of the alleged violation. Id. We agree that affirmative facts must be pleaded to show conformity with the statute of limitations when invoking the court's jurisdiction under section 12(1) of the Securities Act of 1933, 15 U.S.C. § 77l(1).

The district court also relied on Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978). In Cook the court was faced with a statute of limitations question under another section of the Securities Act. The court found that the general rule in federal court practice was that "when the very statute which creates the cause of action also contains a limitation period, the statute of limitations not only bars the remedy but also destroys the liability, and therefore the plaintiff must plead and prove facts showing that he is within the statute." Cook v. Avien, Inc., 573 F.2d at 695.

In the case before us, the cause of action is set forth in section 12(1) of the Securities Act of 1933, 15 U.S.C. § 77l(1),[6] and the limitation period for a section 12(1) claim is set forth in section 13 of the Securities Act of 1933, 15 U.S.C. § 77m. Because an action "to enforce a liability created under section

[6] Section 77l(1) creates a civil liability for a person who "offers or sells a security in violation of section 77e of this title." 15 U.S.C. 77l(1) (1988). Section 77e(a) prohibits the sale or delivery after sale of unregistered securities. 15 U.S.C. 77e(a) (1988).

771(1) of this title [is barred], unless brought within one year after the violation upon which it is based," the plaintiff must affirmatively plead facts which would prove he is within the statute. 15 U.S.C. § 77m (1988). Here plaintiffs did not plead affirmative facts that proved they were within the statute of limitations period on their section 12(1) claim.

Finding no abuse of discretion in the district court's denial of the motion to alter or amend, we AFFIRM.

Entered for the Court

Monroe G. McKay
Circuit Judge