UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

THE BANK OF ALTON, EDWARD J. and DOROTHY C. SOPTIC, CLIFFORD A. and HELEN M. STRICK, CHARLES S. BATSCH, HARVEY A. and MARY P. TILLEY, ELTON R. GREER, OLIVER V. and JANICE A. GOMER, and DONALD G. BURWELL,

Plaintiffs-Appellants,

v.

THE MISSION BANK, CAL CAUFIELD AND COMPANY, INC., NORMAN E. GAAR, P.A., JUDSON L. PALMER, JR., P.C., WEBB R. GILMORE, P.C., JAMES S. ALLEN, JR., P.C., KIM B. WELLS, P.C., CHRISTOPHER D. AHREANS, P.C., ROBERT P. BALLSRUD, P.C., JOHN E. CATON, P.A., JOE L. NORTON, P.A., and JUDSON L. PALMER, JR.,

Defendants-Appellees,

No. 88-2577
(D. Kansas)
(No. 85-2487-S)

LOUIS L. FRYDMAN and JANE FRYDMAN,

Plaintiffs-Appellants,

v.

THE MISSION BANK, CAL CAUFIELD AND COMPANY, INC., PAINE WEBBER JACKSON & CURTIS, INC., NORMAN E. GAAR, P.A., JUDSON L. PALMER, JR., P.C., WEBB R. GILMORE, P.C., JAMES S. ALLEN, JR., P.C., KIM B. WELLS, P.C., CHRISTOPHER D. AHREANS, P.C., ROBERT S. BALLSRUD, P.C., JOHN E. CATON, P.A., JOE L. NORTON, P.A., and JUDSON L. PALMER, JR.,

Defendants-Appellees.

No. 88-2579
(D. Kansas)
(No. 85-2491-S)

ORDER AND JUDGMENT*

Before **LOGAN, McWILLIAMS, and BRORBY**, Circuit Judges.

---

* 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.

The Bank of Alton, et al. (Appellants) appeal the trial court's grant of summary judgment in favor of various defendants below, contending: (1) the trial court erred in granting summary judgment to the Mission Bank because Appellants had inadequate time for discovery and also the trial court erred by concluding, as a matter of law, that the Mission Bank owed no duties to the plaintiffs and had not known of fraudulent activities; (2) the trial court erred in granting summary judgment to the Gaar & Bell defendants because there were factual issues regarding whether reasonable inquiry would have established potential causes of action against the defendants at the time the release was signed; (3) the trial court erred in granting Gaar & Bell's motion for summary judgment based upon a release because there were material issues of fact remaining with regard to the claim of economic duress; and (4) the trial court erred in granting summary judgment to the Gaar & Bell defendants based upon the releases because the releases were void. Appellant's Brief at i, ii. We review the trial court's grant of summary judgment under the same standard employed by the trial court, Osgood v. State Farm Mut. Auto. Ins. Co., 848 F.2d 141, 143 (10th Cir. 1988), and we affirm.

In 1982, Kansas City, Kansas (the City) issued 1.65 million dollars of industrial revenue bonds to allow an entity named Six Hundred One Investors, Inc. (601) to purchase the assets of an existing business, Midwest Boneless Meat of Kansas, Inc. (Midwest). The Mission Bank agreed to purchase the bonds and to subsequently resell them to an underwriter named Cal Caulfield &

Co., Inc. (Caulfield). In August of 1982, the Mission Bank bought the bonds at a discount and during September through November, 1982, resold them to Caulfield who located investors for the bonds. April 14, 1986 Memorandum and Order.

An offering circular for the investors was prepared which contained certain financial information respecting the transaction, the results of an appraisal of the building and equipment, and the plan for the construction of an addition to the building and purchase of new plant equipment. The trial court found the Mission Bank was not involved in the preparation of the offering circular, the accounting statement or the appraisal. April 14, 1986 Memorandum and Order at 4.

The Mission Bank initially dispersed over one million dollars to old owners of Midwest and paid certified invoices. Two of the documents submitted to the Mission Bank for payment were fraudulent in that the money paid thereon did not go for the stated purpose of purchase of plant equipment. The trial court found the Mission Bank had no knowledge that the submitted documents were fraudulent. April 14, 1986 Memorandum and Order at 5. The amount paid through the fraudulent documents totaled $95,000 and those funds were diverted to an individual named Harold Audsley. The trial court found that Harold Audsley was an undisclosed principal of 601. April 14, 1986 Memorandum and Order at 5.

The Mission Bank first learned of the fraud in November, 1983, and thereafter disclosed this information to the bondholders. April 14, 1986 Memorandum and Order at 5. The bonds were declared in default, Appellees' Brief at 2, Midwest stopped doing business, and vacated the premises. A bondholders' meeting was called for December 7, 1983 to discuss the default and the options available to the bondholders. December 3, 1987 Memorandum and Order at 2. The bondholders chose Paul Utterback, Chairman of the Bank of Alton to take over and operate the facility. Brief of Appellee The Mission Bank at 8. In January, 1984, the bondholders committee met and accepted the Mission Bank's resignation as fiscal agent. April 14, 1986 Memorandum and Order at 5.

In the Spring of 1985, a produce company called the Tanaka Brothers made an offer to lease the premises on the condition that new bonds be issued and that all bondholders consent to the reissuance. Brief of Appellee The Mission Bank at 8. The proposal was presented to the bondholders at a meeting on May 23, 1985. The bondholders accepted the proposal and exchanged their bonds for new bonds issued by the City. Brief of Appellee The Mission Bank at 8. Gaar & Bell agreed to prepare the necessary documents free of charge, if the bondholders agreed to release them from all liability arising out of the original bond issuance. The release language was included in the bondholders' consent which was mailed to all bondholders on June 4, 1985. All bondholders executed the consent, including the release, and the new bonds were issued. December 3, 1987 Memorandum and Order at

3. The Bank of Alton was designated as trustee pursuant to a Trust Indenture dated June 1, 1985. Brief of Appellee The Mission Bank at 8.

A number of the bondholders filed suit against the Mission Bank and the bond underwriter, Caulfield, asserting claims under § 10(b) of the Securities Exchange Act of 1934, § 17(a) and § 12(2) of the Securities Act of 1933, the Racketeer Influenced and Corrupt Organizations Act (RICO), and pendent state claims under Kansas securities laws, common law fraud, and negligence. Bondholders Louis and Jane Frydman filed a separate complaint in the same forum against the Mission Bank, Caulfield, and Paine Webber Jackson & Curtis (Paine Webber). Except for the Frydmans' additional claims against Paine Weber, the Complaints were identical. Brief of Appellee The Mission Bank at 8-9. The cases were consolidated at the trial level. The court granted summary judgment to the Mission Bank in a Memorandum and Order dated April 14, 1986. On December 3, 1987, the court also granted summary judgment to the Gaar and Bell law firm, which had been added as a defendant in Plaintiff's second amended complaint of September 10, 1986.

<u>Summary Judgment in Favor of the Mission Bank</u>

Appellants argue the trial court erred in granting the Mission Bank's motion for summary judgment for two reasons: (a) Appellants were given inadequate discovery time; and (b) the trial court erred in determining the Mission Bank owed no duty of disclosure to Appellants. The Mission Bank argues that Appellants failed to preserve for appeal the issue of inadequate time for discovery, Brief of Appellee The Mission Bank at 16, and the trial court correctly ruled the Mission Bank was not a trustee with broad fiduciary obligations but had only those limited duties as paying agent and fiscal agent as expressly specified in the ordinance and lease. We agree with the Mission Bank.

First we address the discovery issue. Appellants do not assert error in the trial court's treatment of the Mission Bank's motion to dismiss as one for summary judgment. Rather, they assert error in the trial court's ruling on the motion before Appellants gained the information they desired but did not request. Citing Cronin v. Midwestern Oklahoma Dev. Auth., 619 F.2d 856 (10th Cir. 1980), Appellants state "the haste at which summary judgment was granted requires reversal." Appellant's Brief at 17. The record bears no indication that the Appellants sought additional time for discovery under Fed. R. Civ. P. 56(f) or made any timely objection to the trial court ruling on the motion when it ruled.[1]

---

[1] As the Mission Bank correctly noted in its brief,

> The Bondholders' brief in opposition to the Bank's motion for summary judgment included an affidavit from their counsel in which he stated, *inter alia*, that certain discovery had recently been initiated and that "additional contemplated discovery will serve to substantially clarify the issues ...." (Document No. 34) The Bondholders have not attempted to argue on appeal that this affidavit satisfies Rule 56(f), nor could they persuasively do so. In the first place, the affidavit neither refers to Rule 56(f), nor does it assert that additional time is needed in order to

Rule 56(f) specifically addresses problems with premature motions. "Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery." Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986) (footnote omitted). When, as in this case, a party fails to make a proper Rule 56(f) request for additional discovery time and fails to object until he files the appellate brief, the issue is not preserved for appeal. Brown v. Chaffee, 612 F.2d 497, 505 (10th Cir. 1979).

Appellants next argue the trial court erred in determining the Mission Bank had no duty of disclosure. Appellants contend the Mission Bank had a duty of disclosure based upon their status as fiscal agent, paying agent, and trustee, and also based upon its action in connection with issuance and sale of the bonds. Appellants' Brief at 18, 22. In its Memorandum and Order dated

---

> properly respond to the Bank's motion. The affidavit filed by counsel as part of the Bondholders' motion for reconsideration in the Bank of Alton case likewise fails to satisfy Rule 56(f). (Document No. 48) This Court has held that mere references to discovery being incomplete, or statements regarding the status of discovery, are insufficient to invoke the shelter provided by Rule 56(f). Dreiling v. Peugeot Motors of America, Inc., 850 F.2d 1373, 1377 (10th Cir. 1988); Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d at 833; see also, Brae Transp. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986) (references in memoranda and declarations to a need for discovery do not qualify as motions under Rule 56(f)).

Brief of Appellee The Mission Bank at 18.

April 14, 1986, the trial court fully analyzed the issue, and concluded the Mission Bank was not in a position of a trustee and did not owe fiduciary duties to the appellants. We have studied the record and applicable law and affirm the trial court's decision for substantially the same reasons stated in the Memorandum and Order dated April 14, 1986.

Appellants also contend the trial court erred in granting summary judgment to the Mission Bank on the alleged liability as an aider and abettor. Appellants' Brief at 25. Their argument presumes that the Mission Bank had a duty of disclosure and therefore a lesser degree of scienter was required to establish liability. We agree with the trial court's determination that the Mission Bank had no such duty and therefore the degree of scienter which the Appellants must establish is increased to the level of "conscious intent." April 14, 1986 Memorandum and Order at 10. We also agree with the trial court that nothing in the record or the plaintiffs' allegations establish this level of scienter. On this issue we affirm for substantially the same reasons set forth in the trial court's Memorandum and Order of April 14, 1986.

Summary Judgment in Favor of the Gaar and Bell Defendants

Appellants contend the trial court erred in granting summary judgment to the Gaar and Bell defendants based upon the releases signed by the bondholders. The release signed by each bondholder is contained in a two-page document entitled "CONSENT, AGREEMENT TO EXCHANGE BONDS AND RELEASE" and contains the following language:

> "In consideration for the leasing of the Project to Tanaka by the City, the issuance of the Tanaka Bonds by the City, the granting by the City of a exemption for the Project from general ad valorem real estate taxes during the term of the Lease, and the preparation of the documents authorizing the issuance of the Tanaka Bonds and the rendering of an opinion on the validity and taxexempt status thereof, <u>the undersigned hereby releases the City, its special bond counsel, John F. Steineger, Jr., and its bond counsel, Gaar and Bell, from any claim for liability or damages to the undersigned in connection with or arising out of the issuance and sale of the Midwest Bonds</u>. This release shall not extend to any other party involved in the issuance and sale of the Midwest Bonds."

(Emphasis added) Appellants' Addendum, tab 20.

Appellants attack the release on several grounds: (a) the trial court erred in not subjecting the release to strict scrutiny, Appellants' Brief at 28; (b) the trial court erroneously applied an incorrect standard of knowledge, Appellants' Brief at 30; (c) the trial court erred in concluding that they should have discovered the potential causes of action as a matter of law, Appellants' Brief at 34; (d) at the time of summary judgment there were material issues of fact remaining with regard to the claim of economic duress, Appellants' Brief at 38; and (e) the releases were obtained in violation of securities law and disciplinary rules relating to attorneys, Appellants' Brief at 44, 47. In its Memorandum and Order dated December 3, 1987, the trial court analyzed at length the validity of the releases and the issues of economic duress and public policy. We adopt and affirm the reasoning of the trial court in that regard. Further, we find no merit in the additional arguments lodged by appellants.

The decision of the district court is **AFFIRMED.**

Entered for the Court:

WADE BRORBY
United States Circuit Judge

FILED

APR 14 1988

ARTHUR G. JOHNSON, CLERK
By Molly Riggs DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

THE BANK OF ALTON, et al., Plaintiffs, v. THE MISSION BANK, et al., Defendants.	CIVIL ACTION NO. 85-2487-S

MEMORANDUM AND ORDER

This matter is before the court on the motion of defendant Mission Bank for summary judgment. Defendant filed this motion in lieu of an answer to plaintiffs' complaint. Affidavits were submitted in support of defendant's motion for the purpose of converting a Rule 12 motion into a Rule 56 motion. See Rule 12(b), Federal Rules of Civil Procedure. Plaintiff has had a reasonable opportunity to present material in opposition to defendant's motion.

To rule favorably on a motion for summary judgment, the court must first determine that the matters considered in connection with the motion disclose "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal

Rules of Civil Procedure. The principal inquiry is therefore whether a genuine issue of material fact exists. Dalke v. The Upjohn Co., 555 F.2d 245 (9th Cir. 1977); Hanke v. Global Van Lines, Inc., 533 F.2d 396 (8th Cir. 1976). A motion under Rule 56 will be denied unless the movant demonstrates beyond doubt that he is entitled to a favorable ruling. Madison v. Deseret Livestock Co., 574 F.2d 1027 (10th Cir. 1978); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 516 F.2d 33 (10th Cir. 1975). Pleadings and documentary evidence are to be construed liberally in favor of a party opposing a Rule 56 motion. Harman v. Diversified Medical Investments Corp., 488 F.2d 111 (10th Cir. 1973), cert. denied 425 U.S. 951 (1976). However, once a summary judgment motion has been properly supported, the opposing party may not rest on the allegations of the complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. Coleman v. Darden, 595 F.2d 533, 536 (10th Cir.), cert. denied 444 U.S. 927 (1979). A party with evidence tending to create a factual issue must present that evidence to the trial judge or summary judgment is proper. Otteson v. United States, 622 F.2d 516, 520 (10th Cir. 1980).

Additionally, in a case such as this where plaintiffs have had curtailed discovery, summary judgment is particularly disfavored. Cronin v. Midwestern Oklahoma Development Authority, 619 F.2d 856 (10th Cir. 1980).

The uncontroverted facts for the purposes of this motion are as follows. In the fall of 1982, Kansas City, Kansas [hereinafter the City] issued 1.65 million dollars of industrial revenue bonds to allow Six Hundred One Investors, Inc., [hereinafter 601], a new entity incorporated by James Schuler, Gerald Harvey and Robert Hart, to purchase the assets of an existing business, Midwest Boneless Meat of Kansas, Inc. [hereinafter Midwest]. Defendant Bank first learned of the proposed offering when its representative met with defendant Caulfield, who served as underwriter for this issue, in the early summer of 1982, to discuss the use of industrial revenue bonds to finance 601's contemplated purchase of Midwest. The Bank agreed to purchase the bonds and to subsequently resell to defendant Caulfield, conditioned on the defendant Bank being named trustee and paying agent. In August of 1982, the defendant Bank bought the bonds at a discount and during September through November, 1982, resold them to defendant Caulfield who located investors for the bonds.

An offering circular for the investors was prepared which contained certain financial information respecting the transaction, the results of an appraisal of the building and equipment, and the plan for the construction of an addition to the building and purchase of new boning equipment. Defendant Bank has submitted an affidavit indicating it did not participate in preparing the offering circular, the accounting statement or the appraisal. Plaintiffs respond only that they have no information to affirm or deny this affidavit although they believe that defendant Bank was in someway involved in approval of this offering circular based on the representations made by the defendant Bank that it would not transfer the securities unless "an official statement acceptable in form and substance to the City is prepared and made available to each subsequent transferee of the Bonds." (Plaintiff's Exhibit 2, attached to Plaintiff's Suggestions in Opposition to Motion for Summary Judgment of Defendant, Mission Bank.) The court has reviewed this Exhibit and can find nothing which would indicate any potential involvement of defendant Bank in the offering circular and as plaintiff has not come forward with specific facts, the court must deem defendant's affidavit to be uncontroverted. Additionally, plaintiff's belief that the defendant Bank was involved in some fashion in the approval of the offering circular does not controvert defendant Bank's statement that it did not participate in the preparation of the circular, the accounting statements or the appraisal.

Defendant Bank initially dispersed a little over one million dollars to old owners of Midwest and paid certified invoices. Two of the documents submitted to the defendant Bank for payment were fraudulent in that the money paid thereon did not go to the stated purpose of purchase of plant equipment. Defendant Bank has submitted an affidavit stating that it had no knowledge that the submitted documents were fraudulent.

Plaintiffs counter that knowledge must be imputed because of self-contradictory statements contained in the involved payment certificates. The court has examined Exhibits 7 and 8 attached to Plaintiff's Suggestions in Opposition to Motion for Summary Judgment of Defendant Mission Bank and finds no inconsistencies which would impute knowledge of fraud to the defendant Bank. The amount paid through the fraudulent documents totaled Ninety-Five Thousand Dollars ($95,000), which funds were diverted to an individual named Harold Audsley. The defendant Bank asserts that Harold Audsley was an undisclosed principal of 601. Plaintiffs contest this assertion because the defendant Bank had previously represented that it was fully aware of the condition, financial and otherwise, of 601. This representation does not controvert the defendant Bank's assertion that it was unaware of 601's undisclosed principal. The fact that defendant Bank in a purchaser's receipt and representation letter (Plaintiff's Exhibit 2) indicated it was aware of the condition of 601 does not lead to the conclusion that it was also aware of 601's undisclosed principal. Plaintiffs have failed to controvert this assertion by the defendant Bank.

The defendant Bank first learned of the fraud in November, 1983, and thereafter disclosed this information to the bondholders. In January, 1984, the bondholders committee met and accepted defendant Bank's resignation as fiscal agent. Plaintiffs brought suit against the defendant Bank, alleging violation of § 10(b) of the 1934 Securities Exchange Act, the 1933 Securities Act, the Racketeer Influenced & Corrupt Organizations Act [hereinafter RICO], and pendant state claims for violation of K.S.A. 17-1268(a), the Kansas Blue Sky Law, and common law fraud.

The court will first consider plaintiffs' claims under § 10(b). Plaintiffs allege that defendant Bank as trustee, fiscal agent and seller, was primarily liable for violations of § 10(b) of the Securities Exchange Act. Plaintiffs alternatively allege that defendant Bank is secondarily liable for knowingly or with reckless disregard, conspiring with or aiding and abetting 601 in its fraudulent scheme to defraud bondholders.

As to the question of its primary liability, defendant Bank asserts that it is entitled to summary judgment on the basis that it was not a trustee for plaintiffs, did not owe plaintiffs a fiduciary duty, and therefore had no duty to disclose under § 10(b). The ordinance passed by the Kansas City, Kansas, City Council in issuing the bonds states in Section 3:

> [T]he Bonds and the interest thereon shall be payable . . . as they respectively become due at The Mission Bank, in the City of Mission, Kansas, such Bank being hereby designated as the City's paying agent for the payment of the principal of said interest on the Bonds herein authorized and sometimes referred to herein as the 'Paying Agent'.

Defendant Bank's duties were further specified in Sections 6, 11, 12 and 13 of the Ordinance pertaining to accounts to be maintained and situations involving unclaimed principal and interest held by the Bank. Section 10 of the Ordinance designates the defendant Bank as the fiscal agent. Section 25(b) states: "[T]he Fiscal Agent's duties and responsibilities shall be limited to those expressly set forth in this Ordinance and the Lease." The lease generally refers back to the Bond Ordinance in specifying defendant Bank's duties as a fiscal agent.

If defendant Bank was acting as a mere transfer agent for the bonds and their proceeds, no § 10(b) liability attaches. See Woods v. Homes & Structures of Pittsburg, Kansas, 489 F.Supp 1270, 1277 (D. Kan., 1980). However, the Bank may be found primarily liable if it owed a direct duty to the public. Id. at 1278. A bank with a duty to disclose material misrepresentations to the public may be found liable under § 10(b) because of its silence or inaction. Id.

After careful review of the record, weighing the facts in plaintiffs' favor, the court cannot conclude that the Bank was in a position of a trustee. The required features for a trust are set out in Jennings v. Jennings, 211 Kan. 515, 507 P.2d 241 (1973). A trust requires an explicit declaration and intention to create a trust, the transfer of lawful and definite property made by a person capable of making a transfer thereof, and a requirement to hold as trustee for benefit of a cestui que trust with directions as to the manner in which the trust funds are to be applied. Id. 211 Kan. at 521, 507 P.2d at 247. The words "trust" or "trustee" need not be used to establish a trust. Id.

The documents examined by the court do not indicate any intention to create a trust. The Bank was merely a fiscal and paying agent hired to perform specific duties. Additionally, the duties of the Bank were specifically limited to those as specified. Further, at the time the trust would have been created, there were no existing and identifiable beneficiaries who would be able to enforce the terms of the trust.

The court likewise finds that the defendant Bank owed no fiduciary duties to the plaintiffs. A fiduciary relationship may be specifically created by contract or implied in law due to the factual situation surrounding the involved transaction and the relationship of the parties to each other and to the questioned transaction. Denison State Bank v. Madeira, 230 Kan. 684, 640 P.2d 1235 (1982). Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in charge of the fiduciary. Id. The fiduciary relationship implies a condition of superiority of one of the parties over the other. The defendant Bank had clearly limited duties as fiscal and paying agent for the City, which duties were spelled out in the Ordinance & Lease. A general fiduciary relationship of unlimited scope cannot be implied. The defendant Bank herein had only limited administrative duties.

Plaintiffs argue that the defendant Bank should be given the status of a seller in the questioned transactions. There is nothing in the record indicating the Bank aided in the issuance of the bonds. Liability may arise if the defendant Bank participated in the issuance of the bonds and thus had a duty to disclose. Cronin, 619 F.2d at 862. The only involvement the defendant Bank had in the bonds issuance was in the purchasing and financing of the underwriter.

Next before the court is the determination of secondary liability on the part of defendant Bank. Plaintiffs argue that defendant Bank is liable as an aider and abettor. The elements of aiding and abetting in a Rule 10(b) violation are: "(1) proof of securities law violations; (2) proof that the alleged aider-abettor knew of the violations and of its role in the scheme, and (3) proof that the alleged aider-abettor knowingly and substantially assisted in the violation." Woods, 489 F.Supp at 1278.

Viewing the facts in plaintiffs' favor, there is nothing in the record to establish that the defendant Bank had any knowledge of a fraudulent scheme on the part of 601 or that the defendant Bank assisted in this scheme. The court has previously determined that the defendant Bank had no duty of disclosure to the plaintiffs-bondholders. In Woodward v. Metro Bank of Dallas, 522 F.2d 84, 97 (5th Cir. 1975), the court therein stated:

> When it is impossible to find any duty of disclosure, an alleged aider-abettor should be found liable only if scienter of the high 'conscious intent' variety can be proved. Where some special duty of disclosure exists, then liability should be possible with a lesser degree of scienter . . . . In a case combining silence/inaction with affirmative assistance, the degree of knowledge required should depend on how ordinary the assisting activity is in the business involved. If the evidence shows no more than transactions constituting the daily grist of the mill, we would be loathe to find 10b-5 liability without clear proof of intent to violate the securities laws. Conversely, if the method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability. In any case, the assistance must be substantial before liability can be imposed under 10b-5. [Citations omitted.]

In this case, the defendant Bank engaged in ordinary business transactions providing customary banking functions. There was nothing atypical about the arrangements made with defendant Caulfield or the City, nor was there lack of business justification for the Bank's actions. Plaintiffs must establish that defendant Bank's degree of scienter was conscious intent. See Woods, 489 F.Supp at 1279. There is nothing in the record or in plaintiffs' allegations to establish this standard.

In reaching these conclusions regarding the defendant Bank's liability under § 10(b), the court is aware of the heavy burden placed on the defendant Bank to sustain summary judgment. The court has read the record in the light most favorable to plaintiffs, but finds that the defendant Bank has established that there are no genuine factual issues which would preclude summary judgment. This case differs from Woods, 489 F.Supp 1270, in that the court therein found that inferences could be drawn against the defendant Bank because of its actions contrary to the written trust agreement, its allowance to the underwriters of sixty (60) additional days in which to pick up and pay for the bonds, and its allowance of the bonds being picked up on a piecemeal basis at a fifteen percent (15%) discount over the objections of the issuer's attorney. There is nothing in the instant case which establishes the defendant Bank's actions to be beyond ordinary business practices.

The court has also been cautious in granting summary judgment on these issues in light of plaintiffs' limited discovery. The court in Cronin, 619 F.2d 856, cautions against summary judgment in such instances involving complex legal issues along with curtailed discovery. However, Cronin does not stand for the proposition that summary judgment may never be granted in such instances.

Next, defendant Bank seeks summary judgment on plaintiffs' claims under the 1933 Securities Act, § 17(a) and § 12(2), 15 U.S.C. § 77-q(a) and § 77-1(2). First, defendant Bank argues that no private cause of action exists under § 17(a). Woods, 489 F.Supp 1270, has previously so held. The court therein noted that the courts are split on this issue but found the reasoning in those cases denying a private cause of action under § 17(a) to be most persuasive. Quoting Dyer v. Eastern Trust & Banking Company, 336 F.Supp 890 (D. Maine, 1971), the court noted that the 1933 Act was much narrower than the 1934 Act and deals only with disclosure and fraud in the sale of securities..

> In 1942, the Securities & Exchange Commission adopted the language of § 17(a) in drafting Rule 10b-5, 17 C.F.R. § 240.10b-5, which was promulgated under the authority of § 10(b) of the 1934 Act, and the courts have implied a private right of action under § 10(b) and Rule 10b-5. Given the almost identicial language of Rule 10b-5 and § 17(a) and the fact that Rule 10b-5 is a broader provision than § 17(a) and that it covers both purchases and sales of securities, some courts see no practical point in denying the existence of such a private right of action under § 17. However, the practical significance of denying a private right of action under § 17 is that plaintiffs will be unable to circumvent the express civil remedies of both the 1933 and 1934 Acts. Such a rationale is sufficient to satisfy the court that a private right of action should not be allowed under § 17(a).

Woods, 489 F.Supp at 1287.

The court further found that a plaintiff may seek injunctive relief under § 7(a) along with criminal prosecution in the case of willful violations:

> Furthermore, an aggrieved purchaser has a private action under §§ 11 and 12 of the 1933 Act and § 10(b) of the 1934 Act subject to certain congressional and judicial limitations. If these provisions do not supply such a purchaser with a cause of action, it is because Congress or the Supreme Court did not intend the purchaser to have a cause of action. Such a purchaser should not be allowed to do by implication under § 17 what he is expressly not permitted to do by the terms of the above-mentioned provisions which provide civil matters.
>
> The language of § 17 gives no indication that Congress intended to create a private cause of action for violation of § 17 . . . . Furthermore, an implied private cause of action under § 17(a) is unnecessary to ensure the fulfillment of Congress' purpose in adopting the federal securities laws and, therefore, is unnecessary . . . .

Id. at 1288. Quoting Dyer v. Eastern Trust and Banking Company, 336 F.Supp 890.

The plaintiffs argue that the court should find a private cause of action under § 17(a) based on Seiffer v. Topsy's International, Inc., 487 F.Supp 653 (D. Kan., 1980). That case was decided prior to Woods, 489 F.Supp 1270, and did not consider a private cause of action under § 17(a) absent a § 10(b) claim. Section 17(a) was combined with a § 10(b) action and whether there was a private cause of action under § 17(a) was found to be irrelevant because of its similarity to a § 10(b) action. Further, the court in Woods considered its Seiffer opinion when making its finding that no private cause of action exists under § 17(a). This court finds the reasoning in Woods to be applicable and holds that no private cause of action exists under § 17(a).

Next before the court is the consideration of plaintiffs' claims under § 12(2). Defendant Bank argues that plaintiffs' claim under this section is barred by the statute of limitations, that the bonds in issue do not qualify as tax-exempt industrial revenue bonds under the 1933 Act, and further, that it was not a seller or a direct participant in the sale of the bonds.

The court will first consider the questions surrounding the statute of limitations. Section 13 of the 1933 Act, 15 U.S.C. § 77m provides in pertinent part:

> No action shall be maintained to enforce any liability created under . . . Section 12(2) . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under Section 12(2) . . . more than three years after the sale.

The complaint in this case was filed on October 1, 1985. Defendant Bank's Exhibit C attached to its Suggestions in Support of its Motion for Summary Judgment indicates purchases of the bonds made prior to October 1, 1982. Additionally, Exhibit E, attached to defendant Bank's reply brief, contains the minutes of a December 7, 1983 meeting in which the bondholders were advised that a notice of default was sent because of 601's failure to file the proper financial statements for Midwest, that Midwest was not then operating, that the prospect of receiving the December 15, 1983, principal and interest payment was uncertain, that the $95,000 payment made by the defendant Bank had been diverted, and that the appraisal given to the City had overstated the business' value.

As of the date of this meeting, the bondholders, in the exercise of reasonable diligence, should have discovered the fraud. Plaintiffs assert that the date of delivery of the bonds is crucial and further discovery is required to establish this date. The court finds this argument unpersuasive. Plaintiffs are in a position to know when they received the bonds and to bring such evidence before the court. Additionally, the relevance of the delivery date is questionable in light of plaintiffs' knowledge of the condition of Midwest as of December, 1983. The court finds that plaintiffs' claims under § 12(2) are barred by the applicable statute of limitations.

Plaintiffs have also asserted a claim under the Racketeer Influenced & Corrupt Organizations Act [hereinafter RICO], 18 U.S.C. § 1961 et seq. To prove a violation of the substantive RICO statute, 18 U.S.C. § 1962, the plaintiff must prove:

> (1)the existence of an enterprise which affects interstate or foreign commerce; (2) that the defendant [was 'employed by' or] 'associated with' the enterprise; (3) that the defendant participated in the conduct of the enterprises' affairs; and (4) that the participation was through a pattern of racketeering activity, i.e., by committing at least two acts of racketeering activity designated in 18 U.S.C.A. § 1961(1).

Maxwell v. Southwest National Bank, Wichita, Kansas, 593 F.Supp 250, 256 (D. Kan., 1984) (quoting Alcorn County Mississippi v. United States Interstate Supplies, 731 F.2d 1160, 1167-68, quoting United States v. Phillips, 664 F.2d 971 (5th Cir. 1981)). The United States Supreme Court in Sedima v. Imrex Co., 105 S.Ct. 3275, (1985), emphasized that RICO's purpose is not aimed at the isolated offense. The court at note 14 indicated that two isolated acts of racketeering activity do not constitute a pattern, rather, it is the factor of continuity plus relationship which combines to produce a pattern.

Multiple acts implementing the same fraudulent scheme will not suffice to establish a pattern of racketeering activity. Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F.Supp 828, 833 (D. Ill., 1985). A pattern presumes repeated criminal activity, not merely repeated acts to carry out the same criminal activity. Professional Assets Management, Inc. v. Penn Square Bank, 616 F.Supp 1418, 1421 (D. Okl., 1985). See also Allington v. Carpenter, 619 F.Supp 474 (D. Cal., 1985).

In the instant case, all allegations raised by plaintiffs against the defendant Bank are the result of its involvement in one alleged criminal enterprise. Plaintiffs have failed to allege a pattern of racketeering activity as the allegations refer only to a single scheme. It follows that summary judgment must be granted in defendant's favor on this claim.

Plaintiffs remaining claims are based on Kansas law, in particular, K.S.A. 17-1268(a) and common law fraud. As no federal claims remain, it is within the court's discretion to determine whether to exercise pendant jurisdiction over the state claims. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). Where federal claims are dismissed prior to trial, it is also appropriate to dismiss the state claims. Id. at 726. The court declines to exercise pendant jurisdiction over plaintiffs' state claims and finds that they must likewise be dismissed.

IT IS BY THE COURT THEREFORE ORDERED that the motion of defendant Mission Bank for summary judgment is hereby granted.

DATED: This 14th day of April, 1986, at Kansas City, Kansas.

Dale E. Saffels

DALE E. SAFFELS
United States District Judge

DES:JAM:rs
AO 72A