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Order on Motions to Dismiss (ING USA ANNUITY AND LIFE INSURANCE COMPANY)

Alice D. Bonner
Superior Court of Fulton County

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Recommended Citation
Bonner, Alice D., "Order on Motions to Dismiss (ING USA ANNUITY AND LIFE INSURANCE COMPANY)" (2008). *Georgia Business Court Opinions.* Paper 65.
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ING USA ANNUITY AND LIFE INSURANCE COMPANY and ING INVESTMENT MANAGEMENT, LLC,	)	
Plaintiffs,	)	**Civil Action No. 2007CV134590**
v.	)	
J.P. MORGAN SECURITIES INC. and DAMIAN BERRY,	)	
Defendants.	)	

ORDER ON MOTIONS TO DISMISS

Counsel appeared before the Court on March 10, 2008, to present oral argument on the following motions to dismiss: (1) Defendant Damian Berry's Motion to Dismiss for Lack of Personal Jurisdiction, filed January 9, 2008; and (2) the Motion to Dismiss all Claims Brought by Plaintiff ING Investment Management, LLC, of Defendant J.P. Morgan Securities Inc. After reviewing the record of the case, the briefs submitted on the issues, and the arguments of counsel, the Court finds as follows:

I. Facts

Plaintiffs' Complaint arises from the purchase of notes in 2002 (the "2002 Notes") by ING USA Annuity and Life Insurance Company ("ING USA") through its agent ING Investment Management LLC ("ING IM", or, together with ING USA, "ING") from an Australian company, Sons of Gwalia Limited ("Gwalia"). Defendant JP Morgan Securities Inc. ("JP Morgan") acted as the private placement agent on the Gwalia 2002 Notes through, in part, individual

Defendant Damian Berry. In 2004, Gwalia entered into Voluntary Administration, which is the Australian equivalent to a US bankruptcy filing.

Plaintiffs allege that Defendants knew that Gwalia misrepresented its hedging strategy and overstated its estimated gold reserves and resources—key factors in Plaintiffs' decision to purchase the 2002 Notes. Plaintiffs allege counts of common law fraud and negligent misrepresentation in addition to violations of Georgia's Securities Act and RICO statutes.

II. Personal Jurisdiction – Defendant Damian Berry

The first issue before the Court is whether Mr. Berry's contacts with Georgia, such as his 2000 in-person pitch to ING and his contributions to the 2002 offering, are sufficient for this Court to exercise personal jurisdiction over him.

A. Standard

A court may exercise personal jurisdiction over a nonresident defendant if there is sufficient basis under the forum's long arm jurisdiction statute and the nonresident defendant's actions demonstrate minimum contacts sufficient to meet the due process considerations found in the U.S. Constitution. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). Georgia's long arm jurisdiction statute establishes personal jurisdiction over a nonresident who commits a tortious act or omission, causes an injury, or "transacts any business" in this state. O.C.G.A. § 9-10-91.[1]

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[1] O.C.G.A. § 9-10-91

A court of this state may exercise personal jurisdiction over any nonresident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:

(1) Transacts any business within this state;

(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;

(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

The scope of Georgia's long arm statute with respect to the "transacts any business" prong is coterminous with the limits of due process. Innovative Clinical & Consulting Serv., LLC, v. First Nat'l Bank of Ames, Iowa, 279 Ga. 672 (2005). "The constitutional touchstone is whether the defendant purposefully established minimum contacts in the forum State, that is, whether the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." Home Depot Supply, Inc., v. Hunter Management, LLC., 289 Ga. App. 286, 289 (2008).

In evaluating the Constitutional considerations of personal jurisdiction based upon whether a party transacts any business in this State, the Court applies a three-part test: (1) whether or not the defendant purposefully consummated a transaction or did an act within this state; (2) whether the cause of action arises from such act or transactions; and (3) whether the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. Aero Toy Store, LLC v. Grieves, 279 Ga. App. 515, 517 (2006). The first two prongs of the Aero Toy test establish "minimum contacts" and the third factor evaluates the reasonableness of asserting jurisdiction. Id. Such reasonableness factors include "the burden on defendant, the forum state's interest in adjudicating the dispute, plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution to controversies, and the shared interest of the states in furthering substantive social policies." Id. at 518.

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(4) Owns, uses, or possesses any real property situated within this state; or
(5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

A defendant who moves a court to dismiss for lack of personal jurisdiction bears the burden of proving the court's lack of jurisdiction. Beasley v. Beasley, 260 Ga. 419, 420 (1990). In evaluating a motion to dismiss, a trial court construes the uncontroverted complaint allegations as true; where evidence is offered, it is viewed in the light most favorable to the plaintiff. Delong Equip. Co. v. Wash. Mills Abrasive Co., 840 F.2d 843, 845 (11th Cir. 1988).

B. Facts

Mr. Berry is a resident and citizen of Australia. Mr. Berry works for an Australian affiliate ("Chase Australia") of non-party J.P. Morgan Chase Bank, N.A. Mr. Berry is a relationship manager for the clients of Chase Australia, including Gwalia. In 2000, Chase Australia and its affiliates became involved in Gwalia's efforts to solicit U.S. investors to purchase senior debt securities (i.e., notes). Chase Australia assisted in preparing a 2000 private placement memorandum ("2000 PPM") and conducting "road show" presentations along with representatives of Gwalia. Mr. Berry participated in preparing the 2000 PPM and in conducting a road show presentation to ING in Georgia.

Later, Gwalia sought to market a second tranche of senior debt securities (i.e., the 2002 Notes) in the U.S. and again turned to Chase Australia and its affiliates, all of which are now J.P. Morgan entities as a result of a merger between the two financial corporations and referred to collectively herein as "J.P. Morgan." J.P. Morgan created an updated private placement memorandum for the 2002 Notes (the "2002 PPM"), with contributions from Mr. Berry[2] and identified Mr. Berry as a member of the J.P. Morgan team. Although the two PPM's contained different provisions, the 2002 PPM stated that it was offering the notes on "substantially the same terms and conditions" as the 2000 PPM. J.P. Morgan circulated the

[2] In connection with the 2002 Notes, Plaintiffs allege that Mr. Berry assisted in drafting, reviewing, and commenting on the 2002 PPM for the 2002 sale. Mr. Berry, in his response, acknowledges his involvement in the 2002 offering, but disputes that he directly contributed to the contents of the PPM.

2002 PPM to potential investors, including ING IM. Again, J.P. Morgan made a road show presentation to ING, although Mr. Berry did not participate in that sales pitch.

Plaintiffs allege that in purchasing the 2002 Notes, they relied upon the representations for both the 2000 and the 2002 offerings, including the statements made during the 2000 and 2002 road shows. After Gwalia's liquidation, Plaintiffs claim that the 2000 PPM, the 2002 PPM, and their corresponding sales pitches misstated material elements of the investment opportunity. As a result, Plaintiffs make allegations under the Georgia RICO Act against Mr. Berry and J.P. Morgan.

C. Analysis

The First National Bank of Ames, Iowa case and the subsequent Aero Toy case, in their interpretation of the "transacts any business" prong of Georgia's long arm statute, expanded a trial court's reach under O.C.G.A. § 9-10-91(1) to the maximum extent permitted under the Constitutional limits of due process. The Court, under this expanded theory of personal jurisdiction, evaluates whether the defendant has met the modest threshold of "minimum" contacts. For example, physical presence in the Georgia is not required; "postal, telephone, and other intangible Georgia contacts" may be a sufficient basis upon which to exercise personal jurisdiction. First Nat'l Bank of Ames, Iowa v. Innovative Clinical & Consulting Serv., LLC., 280 Ga. App. 337, 338 (2006), certiorari denied by 127 S.Ct. 1910 (2007).

In First National Bank of Ames, Iowa, the Georgia Court of Appeals upheld personal jurisdiction over a non-resident bank (the "Bank"), which had a security interest in a lease agreement involving a Georgia company, ICCS. The Bank had no physical presence in Georgia, and its only contacts with Georgia were through its postal, telephone, and other intangible contacts with ICCS to seek lease payments. The Court concluded that the Bank

"transacted some business in Georgia, even if only with this one customer..." which was sufficient for the court to exercise personal jurisdiction over it. 280 Ga. App. 337, 338.

The Gwalia 2000 and 2002 Notes offerings, directed in part by Mr. Berry, targeted ING as a potential investor. Mr. Berry contributed to the 2000 and 2002 PPMs which were distributed to ING as a part of the securities offerings. Additionally, Mr. Berry traveled to Georgia and participated in the 2000 sales pitch to ING, which Plaintiffs allege form the basis of its RICO allegations. Finally, Mr. Berry was identified as a J.P. Morgan team member and acted as Gwalia's relationship manager (on behalf of J.P. Morgan) with respect to ING. Thus, this Court finds that Mr. Berry transacted business sufficient to establish personal jurisdiction over him, pursuant to O.C.G.A. § 9-10-91(1). Defendant Berry's Motion to Dismiss for Lack of Personal Jurisdiction is, therefore, **DENIED**.

III. Motion to Dismiss All Claims brought by Plaintiff ING Investment Management LLC

The second issue before this Court is whether or not Plaintiff ING IM is a proper party to this suit. Defendant J.P. Morgan moves this Court to dismiss all claims brought by ING IM, who acted as the agent/purchaser on behalf of ING USA, the 2002 Notes holder. Defendants allege that ING IM can neither prove that it is a purchaser under the Georgia Securities Act nor that it has suffered damages as a result of the alleged fraud, negligent misrepresentation, or RICO violations.

A. SECURITIES CLAIMS

Georgia securities regulations allow the buyer of a improper security to sue to recover the consideration paid for that security. O.C.G.A. § 10-5-14(a) (2008).[3] The plaintiff, however,

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[3] **O.C.G.A. § 10-5-14**
(a) Any person who violates subsection (a) of Code Section 10-5-12 shall be liable to the person buying such security; and such buyer may sue in any court of competent jurisdiction to recover the consideration paid in cash (or the fair value thereof at the time the consideration was paid if such consideration was not paid in cash) for the

must be a purchaser of the security. A purchaser "refers to the one to whom the sale or disposition is made....The word purchaser may be used in a broad sense to include those who acquire title for a monetary consideration...[and]...to include one to whom the disposition is made within the class of persons on whom the right of voiding illegal sales or dispositions is conferred." Bell v. Sasser, 238 Ga. App. 843, 847 (1999).

Defendants allege that ING IM was merely an advisor agent and thus cannot qualify as a purchaser of the security, nor can it prove direct damages. Federal cases support the conclusion that an investment advisor or agent can be a "purchaser" under the analogous federal securities statues. See, e.g., EZRA Charitable Trust v. Rent-Way, Inc., 136 F.Supp.2d 435, 442 (WD Pa. 2001) (finding that an investment advisor had standing to bring federal security claims even though the securities at issue were purchased by the advisor on behalf of its clients).

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security with interest thereon from the date of payment down to the date of repayment as computed in paragraph (1) of subsection (d) of this Code section (less the amount of any income received thereon), together with all taxable court costs and reasonable attorney's fees, upon the tender, where practicable, of the security at any time before the entry of judgment, or for damages if he no longer owns the security. Damages are the amount which equals the difference between the fair value of the consideration the buyer gave for the security and the fair value of the security at the time the buyer disposed of it, plus interest thereon from the date of payment down to the date of repayment as computed in paragraph (2) of subsection (d) of this Code section. A person who offers or sells a security in violation of paragraph (2) of subsection (a) of Code Section 10-5-12 is not liable under this subsection if:

(1) The purchaser knew of the untrue statement of a material fact or omission of a statement of a material fact; or

(2) The seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.

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(c) Every person who directly or indirectly controls a person liable under subsection (a), (b), or (h) of this Code section, every general partner, executive officer, or director of such person liable under subsection (a), (b), or (h) of this Code section, every person occupying a similar status or performing similar functions, and every dealer, limited dealer, salesman, or limited salesman who participates in any material way in the sale is liable jointly and severally with and to the same extent as the person whose liability arises under subsection (a), (b), or (h) of this Code section unless the person whose liability arises under this subsection sustains the burden of proof that he 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. There is contribution as in the case of contract among several persons so liable.

Whether or not an investment advisor or broker qualifies as a "buyer" under the Georgia Securities Act, O.C.G.A. §§ 10-5 *et seq.* is a question of first impression. In the absence of binding state precedent, this Court has reviewed decisions in other jurisdictions. Courts, however, "are not in agreement regarding whether an investment advisor purchasing securities on behalf of its clients qualifies as a purchaser..." under various securities laws. In re Sonus Networks, Inc. Securities Litigation 247 F.R.D. 244, 250 (D. Mass. 2007) (noting that standing considerations include whether the investment advisor acted as an attorney-in-fact of its clients, the payment of advisor fees, and the dual role of advisor/general partner); see also, In re Rent-Way Securities Litigation, 218 F.R.D. 101, 106 -107 (W.D. Pa. 2003) (finding that an investment advisor was a "purchaser" because it had a power-of-attorney); In re Turkcell Iletisim Hizmetler, A.S. Securities Litigation, 209 F.R.D. 353, 358 (S.D.N.Y. 2002) (focusing on "authority" to make investment decisions to determine the standing of an investment advisor); Cheney v. Cyberguard Corp., 211 F.R.D. 478, 489 (S.D. Fla. 2002) (holding that a president and sole shareholder of a separate entity, not employed as an investment advisor, did not have standing as a "purchaser"); EZRA Charitable Trust v. Rent-Way, Inc., 136 F.Supp.2d 435 (W.D. Pa. 2001) (finding that an investment advisor had standing as a "purchaser" because it independently determined which securities to purchase for its clients' accounts). While neither uniform in application nor approach, the analysis performed in other jurisdictions clearly demonstrates that this motion raises questions of fact, and thus is not appropriate for determination at this stage of the case.

B. FRAUD AND NEGLIGENT MISREPRESENTATION

Similarly, Defendants petition this Court to dismiss ING IM's fraud and negligent misrepresentation counts claiming that ING IM suffered no injury or damages from the alleged

acts. ING IM received the allegedly false statements by Defendants. ING USA, however, actually purchased the 2002 Notes and is the entity which, presumably, has suffered the primary economic losses.

After an exhaustive review of case law, both in and outside of Georgia, again the Court concludes that it is faced with a question of first impression. Florida Rock and Tank Lines, Inc., v. Moore, 258 Ga. 106 (1988), provides the most clearly applicable legal reasoning to the facts of this case. In Florida Rock, the Georgia Supreme Court found that in common law fraud, the "requirement of reliance is satisfied where ... A, having as his objective to defraud C, and knowing that C will rely upon B, fraudulently induced B to act in some manner on which C relies, and whereby A's purpose of defrauding C is accomplished." Id. at 107 Applied to the facts of this case, Florida Rock holds that ING USA, having relied upon ING IM could satisfy the reliance requirement to move forward on the fraud claim (and negligent misrepresentation) without the inclusion of ING IM in this suit. Florida Rock, however, does not require that ING IM be dismissed from this action.

C. RICO Claims

Finally, Defendants challenge ING IM's ability to prove proximate causation of damages available under Georgia's RICO statutes as a result of the complained of acts. To recover civil damages for a violation of Georgia's RICO statutes, the party seeking recovery must have suffered an injury. O.C.G.A. § 16-14-6(c). In Longino v. Bank of Ellijay, 228 Ga. App. 37 (1997), an agent of an ERISA plan and its trustees filed RICO claims against a bank in connection with a prior sale of notes to the plan and their later redemption. The Georgia Court of Appeals found that the attorney agent did not have standing to pursue RICO claims. In reaching its decision, the Court of Appeals reasoned that,

> "[a] plaintiff ...must show a causal connection between his injury and a predicate act. If no injury flowed from a particular predicate act, no recovery lies for the commission of that act....[t]his means that, when the alleged predicate act is [violative of OCGA § 10-5-12], the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme."

Id. at 41 (citations omitted). In Longino, the Court of Appeals concluded that the appellant was not directly harmed because he was not involved in the sale of the notes (the predicate act), and that he became involved in the scenario ***after the sale*** of the notes had concluded. Id. Here, unlike Longino however, ING IM acted as ING USA's agent ***during the sale*** of the notes. In addition, because ING IM was acting as ING USA's agent during the 2000 and 2002 offerings, the facts alleged in the Complaint may be sufficient to establish that ING IM was a target of the alleged scheme.

Plaintiffs have pled specific facts in their complaint, including that ING IM received the alleged misrepresentations, relied upon those statements in recommending the investment to ING USA, and now seeks to recover damages therefrom in an amount "to be determined by a jury." ING IM is not foreclosed from being able to prove recoverable damages at this stage of the proceeding. Issues of specific damages suffered by ING IM under this, and other, counts may be raised again in any motions for summary judgment filed by Defendants.

In light of the long-held principle that the plaintiff is the master of his own lawsuit, this Court finds it premature to remove ING IM from this action. North Carolina Nat'l Bank v. Peoples Bank of LaGrange, 127 Ga. App, 372 (1972). In accordance with the foregoing analysis, Defendants' Motion is hereby **DENIED.**

SO ORDERED this 16th day of April, 2008.

Alice D. Bonner
The Honorable Alice D. Bonner
Superior Court of Fulton County

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