STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-09-018

Mark L. Randall, and
Randall Law Office, P.A.,

Plaintiffs,

v.

DECISION AND ORDER
(Motions to Reconsider)

J. Michael Conley,
Wenonah Wirick, and
Conley & Wirick, P.A.,

Defendants

This matter is before the Court on the parties' motions to reconsider.[1] Through their motions, the parties seek reconsideration of various portions of the Court's December 31, 2009, Order on Defendants' Motion to Dismiss.

Plaintiffs' Motion

In its December 31, 2009, Order, the Court concluded that because the arbitrator considered and decided Plaintiffs' fraud claim against the Defendants, Plaintiffs' claim under the Maine Uniform Securities Act (32 M.R.S. § 16100, et seq.) is precluded by the doctrine of collateral estoppel. Plaintiffs specifically argue that when he found in the Defendants' favor on the fraud claim, the arbitrator did so because Plaintiffs had failed to establish that they reasonably relied on Defendants' alleged statements or omissions. In support of this argument, Plaintiffs cite the arbitrator's conclusion that "[t]he evidence does not support a finding of fraud against Conley. Randall had ample opportunity to request information regarding the financial condition of the Conley firm and to then investigate the financial

[1] Defendants actually filed a Motion for Relief and a request to revise the order. The Court considers the motion to be a request that the Court reconsider its Order as to Defendant Wirick.

condition of the firm before signing the Transition Agreement." Of significance, Plaintiff's maintain, is the absence of a finding by the arbitrator as to whether the Defendants made the alleged misstatements or omissions. According to Plaintiffs, the only rational inference that one can make from a reading of the Arbitration Award is that the arbitrator, in rejecting Plaintiffs' fraud claim, concluded that Plaintiffs failed to prove the necessary element of reliance.

Plaintiffs contend that the basis of the arbitrator's ruling is critical because Plaintiffs are not required to prove that they relied upon Defendants' alleged misstatements or omissions in order to sustain their claim under Maine's Securities Act. 32 M.R.S. § 16509 reads in relevant part:

> A person is liable to the purchaser if the person sells a security . . . by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing of the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission.

As Plaintiffs note, the plain language of section 16509 does not include a reliance element. Without a reliance element, Plaintiffs argue, the arbitrator's decision cannot be construed to preclude recovery on collateral estoppel grounds.

Maine's Securities Act is based upon the Uniform Securities Act (the Act), which has been adopted in many other states. Courts in the majority of the states in which the issue has been considered have determined that a claimant is not required to prove reliance in order to prevail on a securities act claim. *See Gohler v. Wood*, 919 P.2d 561, 566 (Utah 1995) (collecting cases); and David O. Blood, Comment, *There Should Be No Reliance in the "Blue Sky"*, 1998 BYU L. Rev. 177. Many, if not all, of the courts have focused on the plain language of the Act, and the purpose of securities regulation generally. That is, because most courts do not believe that such an important term (i.e., reliance) was inadvertently omitted from the Act, courts have generally determined that imposition of a reliance requirement would be contrary to the particular legislature's intent. Indeed, the argument that state legislatures intentionally declined to include a reliance requirement, thereby removing an obstacle to a

purchaser's potential recovery, is more compelling given that the principal objective of the Act is to protect investors. *See, e.g., Green v. Green*, 293 S.W.3d 493 (Tenn. 2009).

The Court's analysis in this case must begin with the plain language of the statute. If the statute is ambiguous, the Court would look beyond the plain language in an attempt to discern the legislature's intent. *Great Northern Paper, Inc., et al. v. Penobscot Nation, et al.*, 2001 ME 68, ¶ 15, 770 A.2d 574, 580. The plain language of section 16509 is unambiguous, and does not require a claimant to prove reliance in order to sustain a claim under the Maine Uniform Securities Act. In fact, by requiring an investor to establish that the misstatement or omission was "material", the legislature has opted for an objective causation test, rather than the subjective test that reliance would impose. As the court in *Natheson v. Zonagen, Inc.*, 267 F.3d 400, 413 (5th Cir. 2001) explained, "[t]he element of reliance is the subjective counterpart to the objective element of materiality. Whereas materiality requires the plaintiff to demonstrate how a 'reasonable' investor would have viewed the defendants' statements and omissions, reliance requires a plaintiff to prove that it *actually* based its decisions upon the defendants' misstatements or omissions." (emphasis in original).

The issue presented by Defendants' Motion to Dismiss and Plaintiffs' request for reconsideration is whether based on the pleadings at this stage of the proceedings, the Court can conclude that the arbitrator applied the objective standard required by the element of materiality and/or whether the arbitrator determined that the alleged statements or omissions were not made. Upon further review of the pleadings that are appropriate for the Court's consideration on a motion to dismiss,[2] and upon further consideration of the reasoning of courts and commentators which have considered similar, if not identical, provisions as 32 M.R.S. § 16509, particularly in light of the motion to dismiss standard, the Court is not convinced that the arbitrator's finding in favor of Defendants' on the fraud claim precludes

[2] "A Rule 12(b)(6) motion is appropriate to raise the affirmative defense of res judicata only if the facts establishing the defense appear on the face of the complaint." *Sargent v. Sargent*, 622 A.2d 721, 723 (Me. 1993). In *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 8, 843 A.2d 43, 47, the Law Court concluded that "a court [may] consider official public documents, documents that are central to the plaintiff's claim, and documents referred to in the complaint, without converting a motion to dismiss into a motion for a summary judgment when the authenticity of such documents is not challenged."

as a matter of law Plaintiffs' recovery on their claim under Maine's Securities Act. At best, the language of the Award is uncertain on that point. Because one can rationally construe the arbitrator's rejection of the fraud claim to be based upon Plaintiffs' failure to prove reliance, and because reliance is not a necessary element of Plaintiffs' Securities Act claim, the Court will grant Plaintiffs' motion for reconsideration, and reinstate Count I of Plaintiffs' Complaint.[3]

Defendants' Motion

In their motion, Defendants' maintain that the Court incorrectly determined that the Arbitration Award did not address the fraud claim against Defendant Wirick. A further review of the record reveals that the award was subsequently amended to include Defendant Wirick within the scope of the arbitrator's ruling on the fraud issue. However, insofar as the Court will grant Plaintiffs' motion to reconsider, Defendants' motion is moot.

Conclusion

Based on the foregoing analysis, the Court grants Plaintiffs' motion for reconsideration, and vacates its December 31, 2009, Order dismissing Count I of Plaintiffs' Complaint. Defendants' motion is dismissed as moot.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 5/27/10

Justice, Maine Business & Consumer Docket

[3] The Court's conclusion should not be construed as a determination that the arbitrator found that certain representations were or were not made, or that principles of *res judicata* do not otherwise preclude Plaintiffs' Securities Act claim. Instead, the Court grants Plaintiffs' motion because, for the reasons discussed herein, the Defendants have not established that it is "beyond a doubt that [Plaintiffs are] entitled to no relief under any set of facts that [they] might prove in support of [their] claim." *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *Hall v. Bd. of Envtl. Prot.*, 498 A.2d 260, 266 (Me. 1985)), which is the standard that Plaintiffs must satisfy in order to prevail on their motion to dismiss.