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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

U.S. BANK NATIONAL ASSOCIATION,

Plaintiff-Appellant,

v.

STERNE, AGEE & LEACH, INC.,

Defendant-Appellee.

No. 06-35523

D.C. No. C04-5623 RBL

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted December 6, 2007
Seattle, Washington

BEFORE: McKEOWN and CLIFTON, Circuit Judges, and SCHWARZER,
District Judge**

U.S. Bank National Association (“USB”) appeals the district court’s

*This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

**The Honorable William W Schwarzer, Senior United States District Judge
for the Northern District of California, sitting by designation.

judgment pursuant to Fed. R. Civ. P. 52(c) dismissing its action against Sterne, Agee & Leach, Inc. (“SAL”) for violation of the Washington State Securities Act (“WSSA”). Our review of the district court’s legal conclusions is de novo. *Price v. United States Navy*, 39 F.3d 1011, 1021 (9th Cir. 1994). Because the district court applied the wrong legal standards of materiality and reliance, we vacate the judgment and remand for appropriate proceedings.

USB, standing in the shoes of the original investors by reason of the assignment of their claims, alleged that SAL sold securities issued by the Eel River Investment Company (“ERIC”) using material misrepresentations or omissions. Specifically, USB alleged that SAL failed to disclose: (1) the litigation, debt, and criminal history of ERIC’s president and chairman, Veril Olsen; (2) the dual role of attorney Michael Ross as both counsel to and director of ERIC, in connection with his issuance of an opinion letter respecting ERIC’s securities; and (3) the fact that the shares were not lawfully issued under Washington law. After a five-day bench trial, the district court determined that USB failed to establish the requisite elements of its cause of action, namely materiality of any representation or omission, or reliance on the part of the investors. The court dismissed the case with prejudice.

I.

The district court acknowledged that the test of materiality is whether a “reasonable investor” would consider an omitted fact important when making an investment decision. But it then determined that in this case, the reasonable investor is “an institution that is an ‘accredited investor’ as defined in Rule 501 under the Securities Act of 1933.”¹ In this respect, the court erred.

Under the WSSA, “A material fact is one to which a reasonable [person] would attach importance in determining his or her choice of action in the transaction in question.” *Guarino v. Interactive Objects, Inc.*, 86 P.3d 1175, 1185 (Wash. Ct. App. 2004) (citation and internal quotation marks omitted). The WSSA is “patterned after and restates in substantial part the language of the federal Securities Exchange Act of 1934.” *Guarino*, 86 P.3d at 1183 (citations omitted). The statute is to be “construed as to . . . coordinate the interpretation and administration of [the statute] with the related federal regulation.” Wash. Rev. Code. § 21.20.900. Under the federal and Washington securities laws, materiality requires “a substantial likelihood that the disclosures of the omitted fact would have been viewed by the reasonable investor as having significantly altered the

¹ The court observed that because “[the investors] placed [their] sole reliance on the creditworthiness of [the] banks . . . [i]nformation unrelated to those institutions or to the structure of their obligations to the investors was, in the end, immaterial.”

‘total mix’ of information made available.” *Guarino*, 86 P.3d at 1185 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976))). The standard for materiality does not vary according to the type of investor involved. *Basic*, 485 U.S. at 240, n. 18 (1988) (“We find no authority . . . for varying the standard of materiality depending on who brings the action”); *see also TSC*, 426 U.S. at 445 (“The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.”).

In assessing materiality by reference to an institutional investor, the district court departed from the controlling standard. On remand the district court shall apply the standard of the reasonable investor to the evidence in the record, and to such additional relevant evidence offered by the parties.²

II.

The district court concluded that the investors received exactly what they bargained for and had placed their “sole reliance” on the creditworthiness of the banks backing the securities. The court erred in failing to apply a rebuttable presumption of reliance in favor of USB. Although the court referenced a

² Our disposition makes it unnecessary to consider whether the district court entered judgment prematurely before USB had completed presentation of its case, as USB argues on appeal. *See generally Summers v. Delta Air Lines, Inc.*, 508 F.3d 923 (9th Cir. 2007).

rebuttable presumption, it did not provide any details or reasoning as to what evidence supported its conclusion that SAL had rebutted the presumption of reliance. As this was a bench trial, without those findings, we cannot review the propriety of this conclusion. Further, from the record, we cannot determine whether this conclusory observation concerning reliance was affected by the court's mistaken view of determining materiality with reference to the original investors' status as "accredited investors."

In a case involving an alleged omission, upon a finding of materiality there is a rebuttable presumption that the plaintiff relied on the omission. *Guarino*, 86 P.2d at 1187 (quoting *Morris v. International Yogurt Co.*, 729 P.2d 33, 41 (Wash. 1986) (in an action alleging the omission of a material fact, proof of nondisclosure of a material fact establishes a presumption of reliance that the defendant may rebut by proving that the plaintiff would have made the same decision if the fact had been disclosed)).³ Accordingly, if on remand the district court finds that SAL made material omissions of fact, it will have to determine, through specification of relevant evidence, whether SAL rebutted the presumption of reliance. This determination might also require the court to consider additional relevant evidence

³ While *Morris* arose under the Washington Franchise Investment Protection Act, the court's decision was based on decisions under Rule 10b-5 of the Securities and Exchange Act of 1934.

from the parties.

VACATED AND REMANDED.