No. 24200 -- Pocahontas Mining Company Limited Partnership v. Oxy USA, Inc., Cardinal Resources, Inc., R & B Petroleum, Inc., and James J. Boyle

Workman, J., concurring:

I write separately because the dissent gives such a mistaken view of what the law is with regard to the concept of detrimental reliance in the context of fraud; and because I cannot leave unchallenged a reasoning that would reward fraudulent actors for their skill in deception. The dissent sets forth the proposition that under the law of fraud, anytime one is intentionally lied to and stolen from,[1] there can be no fraud if the one defrauded doesn't find out about it and thus takes no affirmative action in reliance thereon.

First, a general examination of the law on fraud.

I. West Virginia Precedent

Rule 9(b) of the West Virginia Rules of Civil Procedure provides, in pertinent part, that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The degree of particularity has been delineated, somewhat obscurely, by our West Virginia case law. In Hager v. Exxon

[1]This opinion in no way concludes that the defendant in the instant case lied or stole; that is an issue which will require determination below.

Corporation, 161 W.Va. 278, 241 S.E.2d 920 (1978), this Court addressed Rule 9(b) and explained:

> Not only must fraud or mistake be pleaded, the circumstances creating the fraud or mistake must be set out in the pleadings with particularity. The charge of fraud is of such gravity that the strict requirements of Rule 9(b), R.C.P., have been included in the procedural rules as an exception to the principles of brevity and simplicity in pleading called for in Rule 8(e)(1). The rationale for these requirements is to permit the party charged with fraud the opportunity to prepare a defense.

161 W. Va. at 283, 241 S.E.2d at 923.

In Hager, "the plaintiffs not only failed to plead the circumstances constituting fraud or mistake, they did not even allege fraud or mistake in their complaint." Id. In syllabus point one of Hager, we specified that failure to allege fraud with particularity as required by Rule 9(b) precludes the offer of proof thereof during the trial. Id. at 278, 241 S.E.2d at 921.

Resolving a dispute regarding the sufficiency of the averment of fraud in Chamberlaine & Flowers, Inc. v. McBee, 177 W.Va. 755, 356 S.E.2d 626 (1987), we grounded our analysis upon the stated purpose of Rule 9(b), as expressed in Hager: "to permit the party charged with fraud the opportunity to prepare a defense." Chamberlaine, 177 W. Va. at 758, 356 S.E.2d at 629. In Chamberlaine, the averment declared that the appellees "knew or should have known that the roof of said structure

was in a defective condition but failed to inform Counterclaimant as to said condition." Id. The Court determined in Chamberlaine that "[t]his averment clearly informed both C & F and Frances Stout of the appellants' allegations against them" and consequently concluded that the averment of fraud conformed to the requirements of Rule 9(b). Id.

In Croston v. Emax Oil Co., 195 W.Va. 86, 464 S.E.2d 728 (1995), the appellants asserted an allegation of fraud as follows: "The Defendant [Emax Oil Company] has made willful, and intentionally fraudulent, and false misrepresentations. . . ." Croston, 195 W. Va. at 90 n.2, 464 S.E.2d at 732 n.2. This Court reiterated the Rule 9(b) requirements of particularity and specified that the plaintiffs did "not, with particularity, point to the specific misrepresentations upon which they predicate their claim of fraud, and this Court's assessment of what the misrepresentations were is gleaned from the appellants' brief and other documents in the case, as well as from the complaint." Id. This Court further noted "that the allegations of fraud in the complaint are general and fail to meet the requirements of Rule 9(b). . . ." Id. at 91, 464 S.E.2d at 733. Syllabus point four of Croston explains:

> The failure to plead particularly the circumstances constituting fraud not only inhibits full review of the substance of the claim of fraud by this Court on appeal from the grant of summary judgment; such failure also precludes the introduction of evidence supportive of any general allegation of fraud contained in the complaint had the case gone to trial, unless permitted by Rule 15(b), R.Civ.P. Rule 9(b), West Virginia Rules of Civil Procedure.

Id. at 87, 464 S.E.2d at 729.

While this Court has enforced the principles of Rule 9(b) and has rendered opinions based upon inadequacy of pleadings pursuant to Rule 9(b), it has not delineated any precise definition of the specificity with which the allegation of fraud must be made. Our prior forays, as outlined above, have been rather limited and have resulted in conclusions based upon total absence of an allegation of fraud in Hager, a determination that the respondents were clearly informed of the allegations against them in Chamberlaine, and absence of any factual basis for the assertion of "fraudulent misrepresentations" in Croston. Our history of dealing with implementation of Rule 9(b) has simply not provided any close cases, such as the present one, requiring more exhaustive evaluation. In the case sub judice, the plaintiff filed three separate complaints, none of which alleged fault with the particularity required by Rule 9(b). In the bill of particulars,[2] set forth in its entirety in the majority opinion, the plaintiff did allege additional facts upon which to predicate the fraud claim.[3] Thus, this case is

[2]The utilization of a bill of particulars in a case of this nature is unusual, and by relying upon the recitation of factual allegations contained therein, we do not approve of this method of pleading one's allegations of fraud. However, as the majority points out, the lower court determined that the bill of particulars could be considered as part of plaintiff's pleading, and no assignment of error on appeal regarding such inclusion was made. Thus, we must base our determinations upon the allegations made in the three complaints, as well as the allegations forwarded in the bill of particulars.

[3]The cumulative allegations, forwarded through the three complaints and the bill of particulars, characterize the transactions as follows: the defendants, in applying for a

readily distinguishable from Croston where absolutely no facts were pled. The question for our determination is how much is enough. At what point in recitation of the particulars of the allegation of the fraud claim is Rule 9(b) satisfied? Since our law on this subject is sparse, it is helpful to examine other jurisdictions.

II. The Federal Approach

A. Specificity

Applying Rule 9(b) of the Federal Rules of Civil Procedure, identical to the West Virginia version, in Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384 (7th Cir.1984), aff'd per curiam, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985), the Seventh Circuit Court of Appeals emphasized that a fraud pleading need not be as specific as a criminal bill of particulars and concluded that Rule 9(b) was satisfied where "the complaint adequately specified the transactions, the content of the allegedly false representations, and the identities of those involved." 747 F.2d at 404-05.

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permit to drill, provided false information regarding the ownership of the land to the State of West Virginia; the defendants drilled a well on the plaintiff's land; the defendants knew at the time of the drilling or soon thereafter that the well was located on the plaintiff's land; the defendants were aware that the well permit did not name the plaintiff as owner of the property; the plaintiff did not have notice of the drilling of the well; the defendants fraudulently failed to disclose and concealed notification of the existence of the well; and that the defendants failed to pay landowner royalties for at least ten years.

The Seventh Circuit has repeatedly instructed that Rule 9(b) requires the plaintiff to plead in detail the "who, what, when, where, and how" of the circumstances constituting the alleged fraud. Cumis Ins. Soc'y, Inc. v. Peters, 983 F.Supp. 787, 792-93 (N.D. Ill. 1997); DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990). As the Seventh Circuit noted in DiLeo, "[a]lthough states of mind may be pleaded generally, the 'circumstances' must be pleaded in detail. This means the who, what, when, where, and how: the first paragraph of any newspaper story." Id.

B. Purposes of Rule 9(b) as Guidance

In evaluating the sufficiency of the pleading under Rule 9(b), a tribunal must be guided by the purposes of Rule 9(b). Reshal Assocs., Inc. v. Long Grove Trading Co., 754 F.Supp. 1226, 1230 (N.D.Ill. 1990) ("Rule 9(b) must not be applied blindly, but rather must be applied in view of its purposes. . . ."); Shields on Behalf of Sundstrand Corp. v. Erickson, 710 F.Supp. 686, 689-90 (N.D.Ill. 1989). This Court has simply stated that the purpose is to permit the party charged with fraud the opportunity to prepare a defense. Hager, 161 W. Va. at 283, 241 S.E.2d at 923. Other jurisdictions have described the purpose as three-fold: "(1) protecting a defendant's reputation from harm; (2) minimizing 'strike suits' and 'fishing expeditions'; and (3) providing notice of the claim to the adverse party." Vicom, Inc. v. Harbridge Merchant Servs. Inc., 20 F.3d 771, 777 (7th Cir. 1994). Reshal Associates also defined the purposes as three-fold:

> (1) to inform the defendants of the nature of the claimed wrong and enable them to formulate an effective response and defense; (2) to eliminate the filing of a conclusory complaint as a pretext for using discovery to uncover wrongs; and (3) to protect defendants from unfounded charges of fraud which may injure their reputations.

754 F.Supp at 1230.

The Seventh Circuit has emphasized that Rule 9(b) does not require the plaintiff to plead facts which show that the representation was in fact false. Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 683 (7th Cir.1992). Similarly, in Caliber Partners, Ltd. v. Affeld, 583 F.Supp. 1308 (N.D.Ill. 1984), the Illinois court indicated that nothing in Rule 9(b) requires a plaintiff to plead evidentiary details that will later be used to prove the claim of fraud. 583 F.Supp at 1311. In Banowitz v. State Exchange Bank, 600 F.Supp 1466 (N.D.Ill. 1985), the Illinois court emphasized that "[i]t is not necessary for plaintiffs to allege evidentiary details that will be used to support the claim of fraud at a later date." 600 F.Supp at 1469. The Second Circuit Court of Appeals has also specified that Rule 9(b) does not require that the pleading contain "detailed evidentiary matter." Ross v. A.H. Robins Co., 607 F.2d 545, 557 n. 20 (2d Cir. 1979), cert. denied, 446 U.S. 946 (1980). The pleading of fraud must merely satisfy the goals of Rule 9(b), expressed by the Second Circuit as follows: (1) to provide a defendant with fair notice of a plaintiff's claim, to facilitate preparation of a defense; (2) to protect a defendant from harm to his or her reputation or goodwill; and (3) to protect a defendant from a groundless suit instituted in the hope of forcing settlement as a

means of avoiding discovery costs. See O'Brien v. National Property Analysts Partners, 936 F.2d 674, 676 (2d Cir. 1991); Bender v. Rocky Mountain Drilling Assocs., 648 F. Supp. 330, 336 (D. D.C. 1986).

Federal jurisdictions have also embraced the concept of harmonizing Rule 9(b) with Rule 8 of the Federal Rules of Civil Procedure mandating that a pleading need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Reading those rules in pari materia, Rule 9(b) identifies those claims, such as fraud, for which only "slightly more" detail is required. Tomera v. Galt, 511 F.2d 504, 508 (7th Cir. 1975).

III. Conclusions

Pleading the fraud claim must be distinguished from proving the fraud claim; the pleading must not be expected to include every element of the proof. The proof, according to established West Virginia law, must include the elements of the action for fraud, including (1) that the act claimed to be fraudulent was the act of the defendant or induced by him, (2) that it was material and false; that the plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it. Syl. Pt. 3, Cordial v. Ernst & Young, 199 W. Va. 119, 483 S.E.2d 248 (1996). The pleading, however, is only held to the standard of Rule 9(b)

and the accompanying case law. As indicated above, Rule 9(b) has been interpreted to require only the pleading with particularity, rather than an exhaustive narration of every facet of proof which will later be adduced in the action for fraud.

The allegations in the instant case clearly meet the requirements of the rule. The "act" claimed to be fraudulent in this case was the concealment of the fact that the well had been drilled upon the plaintiff's property. The plaintiff alleges that the defendants obtained a permit under false pretenses and thereafter fraudulently concealed and failed to inform the plaintiff of the existence of the well. Second, the plaintiffs alleged that the act was material and false; reliance to the plaintiff's detriment is indicated by the plaintiff's failure to act upon its right of collection for the ten-year period in which the concealment continued.

IV. Detrimental Reliance

The dissenter relies heavily on the contention that the element of detrimental reliance was not pled with particularity, and indeed that the fact that the plaintiff did not know of the alleged deception (and thus obviously could not take affirmative action) renders the element of detrimental reliance as necessarily absent. The law relating to fraud makes clear that the concept of detrimental reliance includes not only an action, but also an inaction. Where a claim is based upon fraudulent

concealment or fraudulent nondiscloure, it is the concealment of material facts inducing nonaction that constitutes fraud. "Fraudulent concealment involves concealment of facts by one with knowledge, or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." Silva v. Stevens, 589 A.2d 852, 857 (Vt. 1991), citing White v. Pepin, 561 A.2d 94, 96 (Vt. 1989). As expressed in the Restatement of the Law, Torts 2d 118, Section 550, a party to a transaction is liable to the other for fraudulent concealment if he "by concealment or other action intentionally prevents the other from acquiring material information." Obviously, one who is defrauded in this manner cannot possibly take any affirmative action to indicate reliance, since he knows nothing of the deception. Yet, it would be ludicrous to reward a fraudulent actor for his skill in perpetrating such a deception. That is not what the law on fraud, and specifically on the element of detrimental reliance, envisions.

In Reeves v. Keesler, 921 S.W.2d 16 (Mo.App. 1996), the Missouri Court of Appeals acknowledged that "silence or nondisclosure of a material fact can be an act of fraud if there exists duty to disclose." 921 S.W.2d at 20. In a circumstance in which a person has a duty to speak, his failure to disclose material information is equivalent to a fraudulent concealment. Salisbury v. Chapman Realty, 465 N.E.2d 127, 132 (Ill.App.3d 19). This concept was also concisely expressed in Jim Walter Homes, Inc. V. Waldrop, 448 So.2d 301 (Ala. 1983), as follows: "The law states that in order for silence to be an actionable fraud, facts must be averred which give rise to a duty to speak." 448

So.2d at 306, citing Hall Motor Co. v. Furman, 234 So.2d 37 (Ala. 1970); Williams v. Bedenbaugh, 110 So. 286 (Ala. 1926). The Alabama courts have explained that "[t]he legal duty to communicate depends upon the existence of a fiduciary relationship, or relation of trust and confidence between the parties, the value of a particular fact, the relative knowledge or inequality of condition of the parties, or other attendant circumstances." Id. at 306, citing Marshall v. Crocker, 387 So.2d 176 (Ala. 1980).

Confronting a challenge to a complaint on the ground that an allegation of concealment of fact did not constitute a misrepresentation, within its meaning as an element of fraud, the Court of Appeals of Oregon explained that "affirmative statements need not be made in order to be liable for fraud. Silence or concealment of facts can be the basis for a fraud action. . . . Non-disclosure of a known fact that is material to the transaction is actionable fraud." Whitlatch v. Bertagnolli, 609 P.2d 902, 905 (Or.App. 1980), citing Musgrave et ux. v. Lucas et ux., 238 P.2d 780 (Or.App. 1951), and Millikin v. Green, 583 P.2d 548 (Or.App. 1978).

Although the pleadings in the present case were ineptly crafted, I agree with the majority that the requirements of Rule 9(b) were satisfied by the allegation of the facts substantiating the claim of fraud with sufficient particularity. Because the appeal in this matter was based upon the procedural issue of compliance with Rule 9(b), the specific nature of the detrimental reliance in this case and the manner in which that

element was pled were not fully briefed. In the appropriate case, however, this Court should more precisely delineate the requirements regarding this concept, in accordance with the restatement and other law herein summarized.