UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

JAY JONAS RUBIN — Case No.: 3:11-bk-9348-JAF
Chapter 7

Debtor.
_____/

ROBERT TUKE, *et al*., — Adv. Pro. No. 3:12-ap-292-JAF

Plaintiffs,

v.

JAY JONAS RUBIN

Defendant.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This proceeding is before the Court upon Plaintiffs', Robert Tuke and Jill Tuke, Complaint filed against Defendant, Jay Rubin. (Doc. 1).[1] In the Complaint, Plaintiffs assert that Defendant sold them stock of Extreme Impact Shutter Supply, Inc., ("EISS"), they suffered losses, and now contend that any debt due to them by Defendant arising from this transaction is not dischargeable pursuant to 11 U.S.C. § 523(a)(2). (Doc. 1 at 1-10). Plaintiffs assert three claims: sale of unregistered securities, securities fraud, and common law fraud. (Doc. 1 at 4-10). On May 23, 2013, the Court held a trial. At the conclusion of the trial, in lieu of oral arguments, the Court directed the parties to submit memoranda in support of their respective positions. Upon the evidence presented at trial and the parties' memoranda (Docs. 81, 82), the Court makes the

[1] The Complaint was initially filed by Robert Tuke; however the Court allowed Plaintiff to add Jill Tuke as a necessary party to the action. (Doc. 57 at 3-4). The Court will refer to Robert Tuke as Plaintiff and to Jill Tuke as Plaintiff's wife.

following Findings of Facts and Conclusions of Law pursuant to Bankruptcy Rule 7052.

FINDINGS OF FACT

Defendant is a physician specializing in neurology, who does not have any training or education in business or financing. (T. at 71-72). Defendant practices medicine full-time and had done so from 2006 through 2012. (T. at 72). Defendant and William Schroeder met in the 1990s and they became close friends. (T. at 73). At one point, Schroeder became Defendant's financial advisor, and Defendant believed he made good investment recommendations. (T. at 11-13). Prior to September of 2006, approximately one year after the termination of their investment advisor-client relationship, Schroeder approached Defendant to discuss the idea of starting a new business that would focus on designing and building storm shutters. (T. at 11-12, 15). Schroeder and Defendant discussed this business opportunity numerous times in 2005 and 2006, and on September 6, 2006, EISS was formulated. (T. at 15-16, 30, 32). According to the articles of incorporation, Defendant was one of the original directors of EISS and he and his wife owned twenty percent of EISS, represented by twenty shares of stock. (T. at 16). The Annual Reports of EISS reflect that Defendant was a director of EISS in 2007 and 2008, but that he was not a director on April 14, 2009, the date EISS' Annual Report was filed. (Pls.' Exs. 3, 4, 5, Def.'s Ex. 1).[2] The Annual Report filed in 2009 disclosed that William Schroeder was the only director of EISS. (Def.'s Ex. 1). Although Defendant was a member of the board of directors from 2006 through 2008, no meetings of EISS' board of directors were held during this time. (T. at 34). Defendant also did not participate in the operation of the business and did not receive any financial statements. (T. at 78).

In February of 2007, Schroeder asked Defendant to invest $150,000 in EISS. (T. at 19-20). Defendant did not invest any money, but instead, he guaranteed two separate loans totaling

[2] Plaintiffs' exhibit numbers refer to the tab numbers preceding the exhibits.

$1.1 million. (T. at 20, 22). Defendant knew that if EISS did not generate sufficient revenue to pay off the loans he would be personally responsible for the repayment; however, he expected that EISS would generate sufficient revenue. (T. at 24-25). In March and April of 2008, Defendant guaranteed two additional loans for a combined amount of $240,000. (T. at 40). At that time, Defendant knew nothing about EISS's financial condition, but he relied on Schroeder's enthusiasm. (T. at 40). In 2008, Schroeder asked him twice to make contributions for EISS' operating expenses, and Defendant made various contributions totaling $44,650. (T. at 37, 43, 46). Defendant made these cash contributions following telephone conversations with Schroeder with the understanding that EISS was a start-up business in continuous need of capital. (T. at 43, 46, 48). Defendant spoke with Schroeder by phone frequently and he was always led to believe that "things were very good and . . . that things were also on the verge of exploding." (T. at 54). Defendant told other individuals, Robert Feldman, Joe London, Karen Hartsell, and Gary Simon, about this investment opportunity, and they all invested in EISS. (T. at 25-27). Defendant also told his brother, a "struggling writer," about this investment opportunity and his brother later invested $120,000. (T. at 74-75). Defendant testified that Schroeder told "grand stories" and was always able to convince investors to invest. (T. at 45).

Plaintiff is a sophisticated party; he has B.A. and B.S. degrees in business, and he was employed by a multinational, publicly traded company attaining a position of vice president. (T. at 109, 111). Plaintiff has held a real estate license and owns rental properties as investments. (T. at 111, 121). Moreover, Plaintiff and his wife owned a privately-held travel agency, which they acquired through a stock purchase from Plaintiff's wife's parents. (T. at 112). Subsequently Plaintiffs sold the agency through a stock sale to the American Automobile Association. (T. at 112-14). Plaintiff served as treasurer of the Boys and Girls Club of Marion County (the "Club"),

an organization with a $3 million annual budget. (T. at 116). As treasurer, Plaintiff "present[ed] financial information to the board of directors, such as profit and loss statements, expense reports, outstanding receivables and the balance sheets" and he understood these financial documents. (T. at 116-17). Plaintiff has several investment accounts, in which he owns mutual funds, equities, and fixed income investments. (T. at 120).

Defendant and Plaintiff met at the Club when Plaintiff became a member of the Club's board of directors. (T. at 50-51, 89). Plaintiff knew that Defendant was a prominent physician and that he was respected in the community. (T. at 89). Following the Club's meeting of the board of directors on April 16, 2009[3], Defendant told Plaintiff about the investment opportunity in EISS because he knew that Schroeder was looking for an investor. (T. at 50-51, 124-25). Plaintiff testified that Defendant told him the investment was going to change Plaintiff's future and that he would be able to retire early. (T. at 91). At the time of this initial conversation, Plaintiff had known Defendant for only four months and did not know anything about his financial condition or net worth. (T. at 127-28).

Thereafter, Defendant called Plaintiff to give him Schroeder's contact information so that he could get information about the investment and encouraged Plaintiff to visit the facilities of EISS. (T. at 51-53, 93). Plaintiff contacted Schroeder on May 3, 2009, and visited the facilities on May 5, 2009. (T. at 93, 132-33). During the visit, Plaintiff spent an hour and a half touring the facilities, Schroeder told Plaintiff about the business, and Plaintiff asked some questions, but he never asked to see any documentation. (T. at 133, 136). Plaintiff was accompanied on this

[3] The evidence established that the meetings of the Club's board of directors took place on the third Thursday of each month. (T. at 51). Plaintiff testified that Defendant approached him to discuss this investment opportunity after the Club's board of directors' meeting in March; however, Defendant testified that they discussed the investment for the first time after the Club's board of directors' meeting in April. (T. at 50-51, 90). Plaintiff testified that after their meeting in March, Defendant called Plaintiff on the phone to discuss his investment on March 24, April 2, and April 10, 2009; however, these phone calls are not reflected on Plaintiff's phone records. (T. at 122-25). Thus, the Court finds Plaintiff's testimony regarding this issue of fact not credible.

visit by his brother-in-law who provided his input regarding the investment. (T. at 133-35). After the visit, Plaintiff concluded that EISS was established and "running a viable business." (T. at 93).

Following his visit, Plaintiff received an undated letter from Schroeder called Investment Specs. (T. at 96-98, Pls.' Ex. 14). The letter indicated that Plaintiff would be investing in three companies: EISS, High Street LLC, and Schroeder LLC. (T. at 139, 141, Pls.' Ex. 14). The letter explained that EISS had three divisions: 1) a shutter division, 2) a powder coat division, and 3) a CNC division, which was expected to generate $1 million revenue in the following twelve months. (Pls.' Ex. 14). Schroeder also indicated in the letter that he had personally invested $1.6 million in EISS, that EISS employed seventeen people, and that it was one of the finest companies in the industry. (Pls.' Ex. 14)

The letter further indicated that the expected income of EISS in 2010 was $5 million, which would allow "$75,000 in distributions . . ." (Pls.' Ex. 14). The letter also disclosed that the business "was projected to grow significantly each year" and that EISS carries forward tax losses, which could be attributed to Plaintiff. (T. at 98, Pls.' Ex. 14). Plaintiff understood that if EISS suffered tax losses "it could come [his] way." (T. at 141). Plaintiff did not know whether EISS suffered any tax losses in the past and he did not inquire about this issue. (T. at 156). Plaintiff assumed that Schroeder was looking for another investor because EISS needed additional capital. (T. at 143). Finally, the letter disclosed that Plaintiff was to receive three percent of EISS, five percent of High Street LLC, and five percent of Schroeder LLC for an investment of $375,000.[4] (T. at 146-47, Pls.' Ex. 14). The letter also provided as follows:

> [Defendant] – 20% Ownership. Neurologist in Ocala, Florida. The oldest partner in [EISS]. Contributed $1.2 million. Please call [Defendant] at . . . –cell- anytime.

[4] It stands to reason that these numbers represented the amount of stock in each company Plaintiffs were to receive for an investment of $375,000.

> He will take your call and talk to you about the company and it's [sic] future. [Defendant] also has his brother's money in this company. This investment is for his retirement.

(Pls.' Ex. 14). The fact that the letter indicated Defendant was one of the oldest partners in EISS and that he owned "a significant part of the company" was an important factor for Plaintiff in making a decision regarding the investment. (T. at 98).

On May 19, 2009, Plaintiff received an e-mail from Schroeder that included wiring instructions and advised Plaintiff that Schroeder would "be seeing the attorney tomorrow to get [Plaintiff] the stock certificate [as] Tenants in Entirety with both [Plaintiff] and [Plaintiff's wife.]" (Def.'s Ex. 4). Notwithstanding this representation, Plaintiffs never received any stock certificate for their investment. (T. at 102). EISS never registered with the Florida Office of Financial Regulation, for the purpose of conducting business or issuing securities in Florida.[5] (T. at 21). Subsequently, Plaintiff spoke with Schroeder on the phone twice on May 20, 2009. (T. at 144-45). On the same date, Plaintiff received another letter from Schroeder in which he indicated that it outlined "the agreement and . . . terms we discussed." (Def.'s Ex. 5). Although the earlier undated letter mentioned an investment by Plaintiff of $375,000, this letter reflected that he had agreed to invest $225,000. (Def.'s Exs. 2, 5). On May 26, 2009, Plaintiff made a wire transfer of $225,000 to Schroeder, but he does not know what portions of this investment were allocated to the three companies. (T. at 102, 149).

Although Plaintiff and Defendant spoke six to eight times before Plaintiff invested in EISS, they disagree on the substance of those conversations, most notably on whether they discussed the contents of the letters sent to Plaintiff from Schroeder. (T. at 95, 165). Plaintiff testified that Defendant has seen the letters and has "confirmed the information contained in [the

[5] Under the provisions of Chapter 517, Florida Statutes, the Office of Financial Regulation issues all permits to do business in the State of Florida pursuant to the Securities and Investor Protection Act.

undated letter]." (T. at 97). Defendant denied this assertion. (T. at 165). Plaintiff testified that Defendant assured him that the investment was a sure thing; however, at the same time he admitted that he knew EISS needed additional capital. (T. at 97, 143). Defendant testified that he made clear to Plaintiff that EISS was "a start-up" business and that it was looking for investors because it needed capital. (T. at 83, 166-67). As Plaintiff's testimony is inconsistent, the Court finds Defendant's testimony credible.

Defendant has never seen any financial statements from EISS and he never represented to Plaintiff that he has seen any. (T. at 166). Plaintiff has never asked for any tax returns or financial statements of EISS. (T. at 165-66). Plaintiff called one of the investors, who told him that there was nothing he knew that would cause him concern about the investment. (T. at 153). Plaintiff discussed this investment opportunity with his wife. (T. at 160-61). Plaintiff's wife did not discuss this investment opportunity with Defendant, but she knew that Defendant was somehow involved in EISS. (T. at 160-61). The fact that Defendant was involved in this business was very significant for Plaintiff's wife, and if he was not involved, she would not have agreed to invest. (T. at 161). Plaintiff's wife does not recall ever meeting Defendant before Plaintiffs decided to invest in EISS and she did not know anything about his "ability as an investor." (T. at 163). On August 24, 2009, approximately two months after making the investment, Schroeder asked Plaintiff for a $15,000 loan on behalf of EISS. (T. at 150). Schroeder explained that he needed this capital quickly in order to purchase aluminum at a good price and "the profits would rise up." (T. at 150). Plaintiff loaned the money to Schroeder who was supposed to repay it in thirty days, but he did not do so. (T. at 151). This was the first indication for Plaintiff that EISS might be struggling financially. (T. at 158).

In November 2009, Defendant learned that EISS made a late payment on the loans he had

guaranteed. (T. at 23-24). Subsequently, EISS defaulted on the loans, which triggered Defendant's bankruptcy action. (T. at 24-25). In 2011, it became apparent to the investors that EISS had serious financial problems. (T. at 35). For this reason, they hired Deborah Hilliard to conduct an audit of EISS' financial affairs. (T. at 35).

EISS struggled financially from the time it was formulated. (Pls.' Ex. 18 at 23-24). EISS owed "thousands of dollars" to the IRS for payroll taxes, EISS' property was subject to the IRS liens, and its vehicles had been repossessed. (Pls.' Ex. 17 at 17-18, T. at 78). When the IRS demanded payment of payroll taxes, Schroeder would take the money out of the account in order to pay the payroll taxes, but he never paid them. (Pls.' Ex. 17 at 18). At one point, EISS' employees' could not cash their checks. (Pls.' Ex. 17 at 22). EISS' 2008 income tax return indicated that it had an ordinary income loss of $1,372,672. (T. at 28-29). Hilliard's audit indicated that Schroeder used EISS' funds for, among other things, personal expenses such as purchasing a boat. (Pls.' Ex. 12, 13).

Defendant testified that he did not know about EISS' financial losses and he never inquired about the company's financial situation even though he and Schroeder spoke on the phone frequently. (T. at 30, 65-67). When they spoke on the phone, they discussed the business and many things including sports, politics, and the economy. (T. at 54, 74). Defendant did not know that Schroeder was sued multiple times for securities fraud until recent years, and he never received any legal advice about the issuance of the securities in Florida. (T. at 13). Defendant did not receive any proceeds from Plaintiffs' investment. (T. at 79). If Defendant knew the investment opportunity was not going to be successful, he would not have recommended it to anyone. (T. at 75).

CONCLUSIONS OF LAW

In an attempt to recoup some of their lost investment monies, Plaintiffs initiated this proceeding alleging in their Complaint that Defendant impermissibly sold them unregistered securities in violation of Florida Securities and Investor Protection Act and, in the sale of securities, committed common law fraud and securities fraud. (Doc. 1 at 1-10). Furthermore, Plaintiffs assert Defendant should not receive a discharge of the alleged debt arising from the sale of securities pursuant to § 523(a)(2). (Doc. 1 at 4-10). Before trial, Plaintiffs filed a Memorandum of Law with supporting Authorities to be Used at Trial asserting that they were not proceeding under § 523(a)(2), but instead under § 523(a)(19). (Doc. 69 at 6). Defendant filed an Objection to Plaintiffs' Trial Memorandum arguing Plaintiffs should not be allowed to change the basis of their claim for non-dischargeability at this point in the proceedings. (Doc. 71 at 2). Defendant renewed his objection at trial, and the Court reserved a ruling on this issue. (T. at 6-9). After trial, the parties filed their respective post-trial memoranda. (Docs. 81, 82). In Plaintiffs' post-trial memorandum, they assert that they established the alleged debt should be excepted from Defendant's discharge pursuant to § 523(a)(19) and that Defendant was incorrect in assuming Plaintiffs' case was governed by § 523(a)(2).[6] (Doc. 81 at 5). Defendant continues to object to Plaintiffs' entitlement to pursue their case at trial under § 523(a)(19) because they asserted this section was the basis of their Complaint for the first time in their pre-trial Memorandum of Law. (Doc. 82 at 1-2).

The Court concludes Defendant's argument that Plaintiffs should not be allowed to establish at trial they were entitled to relief pursuant to § 523(a)(19) is unavailing. Pursuant to Federal Rule of Civil Procedure 8(a), which is made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7008, in asserting a claim, the pleader need only set forth

[6] It should be noted that, in the same pleading, Plaintiffs claim they established the alleged debt should be excepted from discharge pursuant to § 523(a)(2)(A). (Doc. 81 at 16-18).

a short and plain statement of the claim showing that the pleader is entitled to relief. The purpose of the statement is to provide "fair notice" of the claim and "the grounds upon which it rests." Dimuccio v. D'Ambra, 779 F.Supp. 1318, 1322 (M.D. Fla. 1991). "The simplicity required by the rule recognizes the ample opportunity afforded for discovery and other pre-trial procedures which permit the parties to obtain more detail as to the basis of the claim and as to the disputed facts and issues." In re Enron Corp., 325 B.R. 671, 683 (Bankr. S.D.N.Y. 2005). "Based upon the liberal pleading standard established by [Rule] 8(a), even the failure to cite a statute, or to cite the correct statute, will not affect the merits of the claim." Id. "Section 523(a)(19)[7] excepts from discharge any debt arising from the violation of federal or state securities laws, or for common law fraud, deceit, or manipulation in connection with the purchase or sale of any security." In re Lichtman, 388 B.R. 396, 409 (Bankr. M.D. Fla. 2008). In their Complaint, Plaintiffs alleged Defendant, in connection with the sale of securities, committed common law fraud, securities fraud, and impermissibly sold them unregistered securities in violation of the Florida Securities and Investor Protection Act. (Doc. 1 at 1-10). Accordingly, Plaintiffs argue Defendant should not be discharged from the amounts he owes them pursuant to § 523(a)(2).[8] It appears Plaintiffs

[7] Section 523(a)(19)(A) provides, in pertinent part, as follows:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
> . . .
> (19) that--
>
> (A) is for--
>
> (i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or
>
> (ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; . . . .

[8] Plaintiffs' Complaint recites that this proceeding is brought "pursuant to FRBP 7001 and [11 U.S.C.] § 523(a)(2)." (Doc. 1 at 1).

failed to cite a correct statutory provision as a basis for the non-dischargeability; nevertheless, Plaintiffs' complaint constituted "fair notice" of the claim and "the grounds upon which it rests" and consequently Plaintiffs were entitled to prove at trial that Defendant's alleged debt is non-dischargeable pursuant to § 523(a)(19). See Dimuccio, 779 F.Supp. at 1322. Consequently, the Court will address Plaintiffs' claims in turn.

Sale of Unregistered Securities

In Count I, Plaintiffs claim Defendant violated § 517.07(1), Florida Statutes, by selling them unregistered securities because the EISS did not register its shares to be sold in Florida nor were the shares exempt from registration and for this reason his alleged debt should not be discharged pursuant to § 523(a)(19). (Doc. 1 at 4-5, Doc. 81 at 7-12). Exceptions to discharge are construed strictly against creditors and liberally in favor of honest debtors. In re St. Laurent, 991 F.2d 672, 680 (11th Cir. 1993). As mentioned above, "[s]ection 523(a)(19) excepts from discharge any debt arising from the violation of federal or state securities laws, or for common law fraud, deceit, or manipulation in connection with the purchase or sale of any security." In re Lichtman, 388 B.R. at 409. Section 523(a)(19) discharge exceptions are often defined by law external to the Bankruptcy Code. Id. (citing In re Chan, 355 B.R. 494, 503 (Bankr. E.D. Pa. 2006)) ("[T]he § 523(a)(19) discharge exception is defined, at least in part, in terms of claims established under specified non-bankruptcy statutes."). Pursuant to § 517.07(1) "[i]t is unlawful and a violation of this chapter for any person to sell or offer to sell a security within this state unless the security is exempt . . . or is registered pursuant to this chapter." "The trigger for the 'violation' of the Florida securities act occurs when the purchaser contracts to buy the security." Barnebey v. E.F. Hutton & Co., 715 F.Supp. 1512, 1526 (M.D. Fla. 1989). Here, however, Defendant never offered Plaintiffs any securities for sale nor had he contracted with them to sell

the securities. The record evidence established Defendant introduced Plaintiff to Schroeder, and Plaintiff's dealings regarding the sale of EISS' stock were exclusively with Schroeder. Plaintiffs presented no evidence, except Plaintiff's self-serving, incredible testimony regarding Defendant "confirm[ing] the information contained" in the undated letter[9] sent by Schroeder, that Defendant even knew Plaintiffs were to receive any stock for their investment. Schroeder promised Plaintiff he would receive a stock certificate, but Defendant testified Plaintiff had never showed him the letters sent by Schroeder before he wired the money to Schroeder, and the Court finds this testimony credible. Accordingly, the only parties involved in the transaction of selling the EISS' stock were Schroeder and Plaintiff. Thus, Plaintiffs failed to establish that Defendant sold them unregistered securities in violation of § 517.07 and the Court need not determine whether the action was barred by the operation of the statute of limitations pursuant to § 95.11(4)(e), Florida Statutes.

Securities Fraud

In Count II, Plaintiffs claim that Defendant is liable for securities fraud in violation of § 517.301(1). Specifically, Plaintiffs claim that Defendant personally participated in the sale of securities to Plaintiff, or, at a minimum, aided Schroeder in making the sale to Plaintiff, and, in doing so, Defendant made material misrepresentations regarding the financial situation of EISS. (Doc. 1 at 5-8, Doc. 81 at 12-16). Alternatively, Plaintiffs claim that Defendant omitted to disclose that 1) EISS had an ordinary income loss of $1,372,672 in 2008 tax year, 2) none of the purported customers of EISS had done any appreciable business with EISS, 3) Defendant was a mortgagee of certain real property leased to EISS, 4) EISS had defaulted under the terms of its lease with Defendant and other lessees and had not paid lease payments "for most of the three (3)

[9] The undated letter specified Plaintiff would receive three percent stock of EISS, five percent stock of High Street LLC, and five percent stock of Schroeder LLC for an investment of $375,000.

years preceding Plaintiff's investment," 5) EISS was "under severe financial distress," 6) Defendant was attempting to extricate himself from liability by secretly requesting to be "removed as an [o]fficer and [d]irector of [EISS]" thirty days prior to Plaintiff's investment, and 7) Schroeder had not been employed as a registered stock broker since he was fired in 2004 from Legg-Mason following lawsuits brought by various investors for securities fraud and other regulatory violations. (Doc. 1 at 6-7). Plaintiffs claim that the misrepresentations or omissions of facts were material in that had Plaintiffs known of the existence of the material facts they would not have invested in EISS. (Doc. 1 at 7). Moreover, Plaintiffs claim that Defendant knew or should have known of the existence of the material facts and that he either intentionally or negligently failed to disclose the same to Plaintiffs in violation of § 517.301(1). (Doc. 1 at 8).

Section 517.301 indicates, in pertinent part, that:

> (1) It is unlawful and a violation of the provisions of this chapter for a person:
>
> (a) In connection with the rendering of any investment advice or in connection with the offer, sale, or purchase of any investment or security, including any security exempted under the provisions of s. 517.051 and including any security sold in a transaction exempted under the provisions of s. 517.061, directly or indirectly:
>
> 1. To employ any device, scheme, or artifice to defraud;
>
> 2. To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
>
> 3. To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a person.

"This section makes it unlawful to employ certain false representations, schemes, or fraudulent artifices in rendering investment advice or in offering, selling, or purchasing investment securities or products." Wachovia Securities, LLC v. Vogel, 918 So. 2d 1004, 1006 (Fla. 2d

DCA 2006). "Accordingly, in order to state a claim under [s]ection [517.]301, a plaintiff must allege the following: (1) that a defendant [in connection with the offer, sale, or purchase of any investment or security,] made a misstatement or omission (2) of a material fact (3) with scienter (4) upon which the plaintiff relied." Arnold v. McFall, 839 F.Supp.2d 1281, 1286 (S.D. Fla. 2011). "'[T]he scienter requirement under Florida law is satisfied by [a] showing of mere negligence.'" Id. (quoting Grippo v. Perazzo, 357 F.3d 1218, 1223 (11th Cir. 2004)). Plaintiffs claim that Defendant made misstatements or omissions of material facts in connection with selling them EISS' stock. (Doc. 1 at 6). However, the Court found that Defendant did not offer or sell any securities to Plaintiffs, Plaintiffs did not buy any securities from Defendant, and Defendant did not even know Plaintiffs were to receive stock for their investment. Consequently, any statements, or lack thereof, made by Defendant about the business were not "in connection with the offer, sale, or purchase of any investment or security."[10] See § 517.301(1)(a). Thus, Plaintiffs failed to establish Defendant violated § 517.301.

Further, Plaintiffs claim that they are entitled to "rescission of the investment" pursuant to § 517.211(4), because Defendant participated or, at a minimum, aided Schroeder "in the making of the sale . . . ." (Doc. 1 at 8, Doc. 81 at 14-15). Section 517. 211 provides as follows:

> (2) Any person purchasing or selling a security in violation of s. 517.301, and every director, officer, partner, or agent of or for the purchaser or seller, if the director, officer, partner, or agent has personally participated or aided in making the sale or purchase, is jointly and severally liable to the person selling the security to or purchasing the security from such person in an action for rescission, if the plaintiff still owns the security, or for damages, if the plaintiff has sold the security.
>
> . . .
>
> (4) In an action for damages brought by a purchaser of a security or investment, the plaintiff shall recover an amount equal to the difference between:

[10] Plaintiffs failed to plead Defendant made any misstatements or omissions of material facts in connection with the rendering of any investment advice.

> (a) The consideration paid for the security or investment, plus interest thereon at the legal rate from the date of purchase; and
>
> (b) The value of the security or investment at the time it was disposed of by the plaintiff, plus the amount of any income received on the security or investment by the plaintiff.

"The Florida Supreme Court has stated that for the remedies of [s]ection 517.211(2) to apply to a violation of [§] 517.301, buyer/seller privity is required." Rushing v. Wells Fargo Bank, N.A., 752 F.Supp.2d 1254, 1260 (M.D. Fla. 2010) (citing E.F. Hutton & Co., Inc. v. Rousseff, 537 So. 2d 978, 981 (Fla. 1989)). The Court has already found Defendant did not sell Plaintiffs EISS' stock and Plaintiffs did not buy EISS' stock from Defendant. Therefore, the buyer/seller privity required for § 517.211 is not present. Nevertheless, "there is authority for the premise that the seller's agent can be liable if the agent solicits the sale of securities." Id. However, as mentioned before, Plaintiff failed to establish that Defendant even knew whether Plaintiff would receive any stock for the investment. Thus, Defendant did not solicit any sale of securities and cannot be liable under § 517.211.

Common Law Fraud and violation of Rule 10b-5

Lastly, Plaintiffs claim that they established Defendant committed common law fraud and violated Rule 10b-5[11] when he intentionally or recklessly made misrepresentations of material fact or omitted to disclose material facts concerning EISS' financial condition in order to induce Plaintiff to invest. For this reason, Plaintiffs argue Defendant's dischargeability of an alleged debt arising out of the sale of securities should be excepted under § 523(a)(2). Although Plaintiffs maintained, in their pretrial memorandum of law and post-trial memorandum, that their case was not governed by § 523(a)(2), they still claim, in their post-trial memorandum, that Defendant's alleged debt arising out of the sale of EISS' stock should not be discharged under §

[11] 17 C.F.R. § 240.10b-5.

523(a)(2). It is unclear whether Plaintiffs intended to abandon their claim of non-dischargeabilty under § 523(a)(2). Accordingly, the Court addresses Plaintiffs' claim due to an abundance of caution. Section 523(a) provides, in pertinent part, as follows:

> A discharge under section 727, 1141, 228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–
>
> (A) false pretenses, a false representation, or actual fraud…

"For a debt to be excepted from discharge based on fraud, under 11 U.S.C. § 523(a)(2)(A), the creditor must show, by a preponderance of the evidence, that: '(1) the debtor made a false representation with the purpose and intention of deceiving the creditor; (2) the creditor relied on the representation; (3) the creditor's reliance was reasonably founded; and (4) the creditor sustained a loss as a result of the representation.'" In re Rudolph, 233 Fed. Appx. 885, 887-88 (11th Cir. 2007) (quoting In re Villa, 261 F.3d 1148, 1150 (11th Cir. 2001)). "Additionally, . . . the debt sought to be excepted from discharge must relate to the provision of money, property, or services 'to the extent obtained by' a debtor's fraudulent conduct." In re Bratcher, 289 B.R. 205, 213 (Bankr. M.D. Fla. 2003). "In other words, a debtor must have obtained money, property, or services as a result of his fraudulent conduct." Id. "To prove fraud under Florida law, a plaintiff must establish that the defendant made a 'deliberate and knowing misrepresentation designed to cause, and actually causing detrimental reliance by the plaintiff.'" In re St. Laurent, 991 F.2d 672, 676 (11th Cir. 1993) (quoting First Interstate Dev. Corp. v. Ablanedo, 511 So. 2d 536, 539 (Fla. 1987)). Moreover, "Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance." McDonald v. Alan Bush Brokerage Co., 863 F.2d 809, 813

(11th Cir. 1989) (quoting 15 U.S.C.A. § 78j(b)).[12] "Rule 10b-5, promulgated by the Securities Exchange Commission pursuant to Section 10(b) prohibits any 'artifice to defraud' or any act which 'operates or would operate as a fraud or deceit.'" Id. at 813-14 (quoting 17 C.F.R. § 240.10b-5).[13] Thus, a successful cause of action under Rule 10b-5 requires that the plaintiff prove: (1) a misstatement or omission (2) of a material fact (3) made with scienter (4) upon which the plaintiff relied (5) that proximately caused the plaintiff's loss. Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042, 1046 (11th Cir. 1987). Scienter contemplated by Rule 10b-5 is "a mental state embracing an intent to deceive, manipulate, or defraud." Broad v. Rockwell Intern. Corp., 642 F.2d 929, 961 (5th Cir. 1981). However "the rule of this Circuit is

---

[12] Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange-
> . . .
>
> b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j.

[13] Rule 10b-5 provides:

> Employment of manipulative and deceptive devices.
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

that a showing of 'severe recklessness' satisfies the scienter requirement." McDonald, 863 F.2d at 814. "'Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.'" Id. (quoting Broad v. Rockwell Intern. Corp., 642 F.2d 929, 961-62 (5th Cir. 1981)). Here, Plaintiffs failed to establish Defendant made any misrepresentations or omissions of material fact with the purpose and intent of deceiving Plaintiffs or that Defendant received any proceeds from their investment. Thus, they failed to establish Defendant committed common law fraud or that the alleged debt should be excepted pursuant to § 523(a)(2). Furthermore, the Court cannot conclude that Plaintiffs have adduced sufficient evidence to show recklessness on the part of Defendant for any action or inaction in connection with the purchase or sale of any security, an element of an action brought under Rule 10b-5. At most, Plaintiffs have established that Defendant was one of the investors who expressed an opinion about an investment, which turned out to be a poor investment. Defendant was not a director of EISS at the time he told Plaintiff about the investment. Proving merely a poor recommendation clearly falls short of demonstrating recklessness. Plaintiffs certainly have suffered substantial losses due to their purchase of EISS' stock; however, the losses are not attributable to any bad act, misrepresentation, or omission of Defendant.

Therefore, the Court will not except any of Defendant's alleged debt to Plaintiffs arising out of the sale of EISS' stock pursuant to § 523(a)(2) or § 523(a)(19). A separate Judgment in favor of Defendant and consistent with the Findings of Fact and Conclusions of Law shall be entered simultaneously herewith. Further, the Court reserves jurisdiction to rule upon the parties'

requests for an award of attorney's fees for thirty (30) days.

DATED this 9 day of August, 2013 in Jacksonville, Florida.

/s/

JERRY A. FUNK
United States Bankruptcy Judge

Attorney, George Franjola, is directed to serve a copy of this order on interested parties and file a proof of service within three (3) days of entry of the order.