

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: 
Justice

PART 53

Index Number : 401720/2005
CUOMO, ANDREW M.
vs.
GREENBERG, MAURICE R.
SEQUENCE NUMBER : 049
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) _____
Answering Affidavits — Exhibits _____ | No(s) _____
Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is **FILED**


MAY 29 2014

NEW YORK
COUNTY CLERK'S OFFICE

is decided in accordance with
accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/28/14

, J.S.C.
HON. CHARLES E. RAMOS

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
THE PEOPLE OF THE STATE OF NEW YORK by
ERIC T. SCHNEIDERMAN, Attorney General
of the State of New York,

Plaintiffs,

- against -

In Ex N. 612/05
FILED

MAURICE R. GREENBERG and HOWARD I. SMITH,

MAY 29 2014

Defendants.
-----X

**NEW YORK
COUNTY CLERK'S OFFICE**

Hon. Charles E. Ramos, J.S.C.:

In motion sequence 049, defendants Maurice R. Greenberg and Howard I. Smith move for summary judgment seeking dismissal of the amended complaint.

The facts in this action have been recited numerous times and will not be repeated, except as necessary.

This action has been pending for eight years, meandering through a series of seemingly never-ending motions and appeals. On November 19, 2010, this Court denied defendants' motions for summary judgment, granted in part the Attorney's General's motion for summary judgment as to liability with respect to the "Capco" transaction, and denied summary judgment as to the "GenRe" transaction (*People v Greenberg*, 2010 NY Slip Op 33216[U] [Sup Ct, NY County 2010]). The Court ordered that the action be placed on the trial calendar after the filing of the note of issue, which was filed on January 21, 2011.

On May 8, 2012, the First Department affirmed in part this Court's order, finding that issues of fact existed as to whether defendants knew of, or participated in the fraudulent aspects of the two schemes arising out of both the Capco and GenRe transactions, and as to the materiality of the Capco transaction (95 AD3d 474 [1st Dept 2012]).

Defendants appealed to the Court of Appeals. While the appeal was pending, the Attorney General withdrew its claim for restitutionary damages against defendants, seeking the equitable remedies of disgorgement and a permanent injunction barring defendants from participation in the securities industry or from serving as an officer or director of a public company.

On June 25, 2013, the Court of Appeals affirmed, and remitted the action to this Court for trial (21 NY3d 439]). Defendants thereafter sought to recuse this Court, which was denied, and affirmed by the First Department (114 AD3d 434 [1st Dept 2014]).

Defendants now move, again, for summary judgment, arguing that the Attorney General lacks standing to continue prosecution of this action for permanent injunctive relief.

Defendants also argue that the Attorney General's theory of disgorgement fails as a matter of law, because the Martin Act and Executive Law § 63 (12) do not permit the State to seek

disgorgement of funds obtained from sources other than investors or the State.

Defendants' motion is denied in its entirety. The guidance from the Court of Appeals could not be more clear that the Attorney General may proceed to trial seeking equitable relief. Speaking for the Court, Judge Smith stated:

We are left with two questions to address: whether the evidence of Greenberg's and Smith's knowledge of the fraudulent nature of the AIG-GenRe transaction is sufficient to raise an issue of fact for trial; and whether, on the present record, the Attorney General is barred as a matter of law from obtaining any equitable relief. We answer yes to the first question and no to the second, and therefore affirm the Appellate Division's order denying Greenberg and Smith summary judgment.

In addition, Judge Smith went further to state:

We have no difficulty in concluding that, in this civil case, there is evidence sufficient for trial that both Greenberg and Smith participated in a fraud. The credibility of their denials is for a fact finder to decide...There is no doubt room for argument about whether the lifetime bans that the Attorney General proposes would be a justifiable exercise of a court's discretion; but that question, as well as the availability of any other equitable relief that the Attorney General may seek, must be decided by the lower courts in the first instance.

The Martin Act expressly confers the Attorney General with authority to seek a permanent injunction barring a defendant from "selling or offering for sale to the public within this state, as principal, broker or agent, or otherwise, any securities issued or to be issued" (General Business Law § 353 [1]; e.g. *People v*

Lexington Sixty-First Assoc., 38 NY2d 588 [1976]; *People v Photocolor Corp.*, 156 Misc 47 [Sup Ct, NY County 1935]).

Moreover, officer and director bars are an appropriate remedy in public enforcement actions against corporate executives who engage in fraudulent securities transactions, including under the Martin Act (see e.g. *People v McCann*, 3 NY2d 797 [1957], *app dismissed* 359 US 312 [1959]).

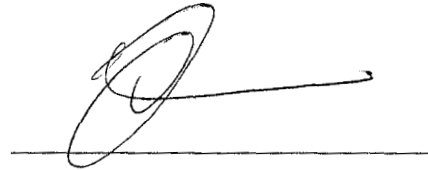
Defendants also question the scope and nature of the permanent injunction, and assert that defendants pose no threat to the New York public because they are not officers or directors of a public company and have no intention of selling securities to the public. These arguments pose issues of fact, including the credibility of defendants, which are not appropriate for summary resolution (see *SEC Solucorp Indus.*, 197 F Supp 2d 4, 12 [SD NY 2002]; *SEC v Washington County Utility Dist.*, 676 F 2d 218, 227 [6th Cir 1982] ["the decision regarding injunctive relief must await until the district court ascertains the number and magnitude of the violations attributable to (defendant)]; *SEC v Koracorp. Indus.*, 575 F2d 692 [9th Cir], *cert denied* 439 US 953 [1978]).

The Attorney General may also seek disgorgement under the Martin Act as an equitable remedy (*People v Ernst & Young*, 114 AD3d 969 [1st Dept 2014]).

Accordingly, the determination of the issues remaining in this action must be tried, as the Court of Appeals has held.

Counsel are directed to contact the Part Clerk to schedule a pre-trial conference in this matter, and to file pre-trial briefs and to submit copies of proposed exhibits pursuant to the Trial Rules for Non-Jury Trials in Part 53.

Dated: May 28, 2014

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a horizontal line extending to the right.

J.S.C.

HON. CHARLES E. RAMOS

FILED
MAY 29 2014
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