SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1539-21

PAUL KUEHL,

Plaintiff-Appellant,

v.

ELECTROCORE, INC., FRANCIS R. AMATO, JOSEPH P. ERRICO, PETER S. STAATS, GLENN S. VRANIAK, MICHAEL G. ATIEH, NICHOLAS COLUCCI, CARRIE S. COX, TREVOR J. MOODY, STEPHEN L. ONDRA, MICHAEL W. ROSS, DAVID M. RUBIN, JAMES L.L. TULLIS, THOMAS J. ERRICO, EVERCORE GROUP, LLC, CANTOR FITZGERALD & CO., JMP SECURITIES LLC, BTIG, LLC, CORE VENTURES II, LLC, and CORE VENTURES IV, LLC,

Defendants-Respondents.

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SHIRLEY STONE, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

ELECTROCORE, INC., FRANCIS R. AMATO, GLENN S. VRANIAK, JOSEPH P. ERRICO, NICHOLAS COLUCCI, THOMAS J. ERRICO, TREVOR J. MOODY, MICHAEL W. ROSS, DAVID M. RUBIN, JAMES L.L. TULLIS, MICHAEL G. ATIEH, CARRIE S. COX, STEPHEN L. ONDRA, EVERCORE GROUP L.L.C., CANTOR FITZGERALD & CO., JMP SECURITIES LLC, and BTIG, LLC,

Defendants-Respondents.

Argued April 19, 2023 – Decided May 15, 2023

Before Judges Currier, Mayer, and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket Nos. L-0876-19 and L-1007-19.

Noam Mandel (Robbins Geller Rudman & Dowd, LLP) of the New York bar, admitted pro hac vice, argued the cause for appellants (Cohn Lifland Pearlman Herrmann & Knopf, LLP, Noam Mandel, Daniel A. Griffith (Whiteford, Taylor & Preston LLC) of the Delaware bar, admitted pro hac vice, Yury A. Kolesnikov (Bottini & Bottini, Inc.) of the California bar, admitted pro hac vice, attorneys; Peter S. Pearlman, Audra DePaolo, Matthew F. Gately, Daniel A. Griffith, Noam Mandel, and Yury A. Kolesnikov, on the briefs).

Kenneth J. Pfaehler (Dentons US, LLP) of the New York and District of Columbia bars, admitted pro hac vice, argued the cause for respondents electroCore, Inc., Francis R. Amato, Joseph P. Errico, Peter S. Staats, Glenn S. Vraniak, Michael G. Atieh, Nicholas Colucci, Carrie S. Cox, Trevor J. Moody, Stephen L. Ondra, Michael W. Ross, David M. Rubin, James L.L. Tullis, Thomas J. Errico, Core Ventures II, LLC, and Core Ventures IV (Dentons US, LLP, attorneys; Jonathan S. Jemison, Jonathan D. Henry, Kenneth J. Pfaehler, and Drew Marrocco (Dentons US, LLP) of the New York and District of Columbia bars, admitted pro hac vice, on the joint brief).

Zeichner Ellman & Krause LLP, Adam S. Hakki (Shearman & Sterling, LLP) of the New York bar, admitted pro hac vice, and Jeffrey D. Hoschander (Shearman & Sterling, LLP) of the New York bar, admitted pro hac vice, attorneys for respondents Evercore Group LLC, Cantor Fitzgerald & Co., JMP Securities LLC, and BTIG, LLC (Philip S. Rosen, Adam S. Hakki, and Jeffrey D. Hoschander, on the joint brief).

PER CURIAM

Plaintiffs Paul Kuehl and Shirley Stone appeal from a December 14, 2021 order granting motions to dismiss filed on behalf of defendants electroCore, Inc. (electroCore), Francis R. Amato, Joseph P. Errico, Peter S. Staats, Glenn S. Vraniak, Michael G. Atieh, Nicholas Colucci, Carrie S. Cox, Trevor J. Moody, Stephen L. Ondra, Michael W. Ross, David M. Rubin, James L.L. Tullis, Thomas J. Errico, Core Ventures II, LLC, Core Ventures IV (Core Ventures

defendants), Evercore Group, LLC, Cantor Fitzgerald & Co., JMP Securities LLC, and BTIG, LLC after the motion judge found the federal forum selection provision in electoCore's Initial Public Offer (IPO) valid and enforceable. Plaintiffs, who purchased electroCore stock, filed a lawsuit against defendants in state court alleging misrepresentations and omissions in the IPO in violation of the Securities Act of 1933 (Securities Act). We affirm.

We recite the facts from the motion record. electroCore, a Delaware corporation based in New Jersey, manufactured and sold a non-invasive nerve stimulation device used to treat multiple neurologic and rheumatologic conditions, including acute cluster headaches. electroCore's device went by the name "gammaCore."

In April 2017, the United States Food and Drug Administration (FDA) approved the commercial sale of the gammaCore for the treatment of pain associated with acute cluster headaches. However, because the market for treating cluster headaches was relatively small, electroCore sought to expand the use of its device for the treatment of migraine headaches and applied to the FDA for such approval. The FDA cleared gammaCore for the treatment of migraines in January 2018.

On May 21, 2018, electroCore filed a Form S-1 registration statement with the United States Securities and Exchange Commission (SEC) for an IPO of common stock. The registration statement attached electroCore's certificate of incorporation. electroCore's certificate of incorporation contained a federal forum selection provision, stating:

> Unless [electroCore] consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of [electroCore] shall be deemed to have notice of and consented to the provisions of this Certificate of Incorporation.

Additionally, the prospectus accompanying electroCore's IPO advised all prospective stock purchasers of the federal forum selection provision. The prospectus stated, "[o]ur certificate of incorporation further provides that the federal district courts of the United States will be the exclusive forum for resolving any complaint asserting a cause of action under the Securities Act."

In June 2018, the SEC declared electroCore's registration statement effective for an IPO. The IPO sold more than five million shares of electroCore's common stock to public investors at a price of $15 per share.

Around the same time, defendants faced a rapidly changing marketplace with new competitors, products, and drugs for the prevention and treatment of migraine headaches. By the middle of June 2019, electroCore announced the resignation of its chief executive officer and chief financial officer, and the transition of its chief medical officer to senior executive advisor. On July 29, 2019, electroCore's common stock dropped to $1.40 per share, representing more than a ninety percent decrease from the per-share value in June 2018.

Plaintiffs filed separate complaints against defendants, asserting claims under the Securities Act on behalf of all purchasers of electroCore common stock as part of the June 2018 IPO. The trial court consolidated the complaints in August 2019.

On September 16, 2019, plaintiffs amended the complaint alleging defendants violated 15 U.S.C. § 77k (Section 11) and U.S.C. § 77l(a)(2) (Section 12(a)(2)) of the Securities Act. Plaintiffs also claimed the individually named defendants and the Core Ventures defendants violated 15 U.S.C. § 77o (Section 15). Plaintiffs asserted that misleading statements and omissions in electroCore's registration statement induced them to purchase shares.

In September 2019, another shareholder filed a class action lawsuit in the United States District Court for the District of New Jersey, entitled Turnofsky

v. electroCore, Inc., No. 3:19-cv-18400 (D.N.J.) (federal court action). The federal court action asserted claims under the Securities Act similar to plaintiffs' claims in the state court action.

On October 31, 2019, defendants moved to dismiss the complaint in the state court action under Rule 4:6-2(e) and Rule 4:5-8(a). Defendants did not raise the federal forum selection provision in their motion to dismiss because such clauses were invalid under controlling Delaware law at that time. See Sciabacucchi v. Salzberg, C.A. No. 2017-0931- JTL (Del. Ch. Dec. 19, 2018).[1]

On February 14, 2020, the motion judge granted defendants' motion and dismissed plaintiffs' complaint with prejudice. The motion judge did not allow argument on the motion despite plaintiffs' submission of opposition to defendants' dispositive motion. Nor did the motion judge issue an oral or written decision stating findings of fact and conclusions of law.

Plaintiffs appealed. In their responding appellate brief, defendants included the following footnote regarding the federal forum selection provision:

> electroCore is a Delaware corporation. Its certificate of incorporation provides that the federal district courts

[1] The Salzberg case issued by the Delaware Chancery court was unreported. However, unreported decisions issued by Delaware courts are considered precedential. See Crystallex Int'l Corp. v. Petróleos de Venez, S.A., 879 F.3d 79, 85 n.8 (3d Cir. 2018) ("Delaware courts give [unreported] opinions substantial precedential weight.").

> shall be the exclusive forum for resolving any complaint asserting a cause of action under the Securities Act. At the time [defendants] moved to dismiss, the controlling Delaware law (based on a December 2018 decision, i.e., well after the IPO) was that such forum selection clauses were unenforceable. Sciabacucchi [v. Salzberg], 2018 WL 6719718 (Del. Ch. Dec. 19, 2018). Therefore, [d]efendants could not move to dismiss on this basis. On March 18, 2020, the Supreme Court of Delaware reversed, and held that such forum selection clauses are valid and enforceable. Salzberg [v. Sciabacucchi], 227 A.3d 102 (Del. 2020). As the [c]omplaint was dismissed before the issue could be raised below, [d]efendants do not argue for affirmance on the basis of the forum selection clause on this appeal, but reserve their rights to dismissal on this additional basis should the case be remanded.

In resolving plaintiffs' appeal, we remanded the matter to the trial court. We instructed the motion judge to consider defendants' motion to dismiss anew, allow oral argument, and issue an oral or written decision setting forth factual findings and legal conclusions. Kuehl v. electroCore, Inc., No. A-2972-19 (App. Div. Oct. 8, 2021) (slip op. at 5-6).

Defendants filed a November 1, 2021 supplemental memorandum of law advising the trial court of the recent Delaware Supreme Court ruling, finding federal forum selection provisions that apply to Securities Act claims were valid and enforceable. This decision reversed the prior legal precedent in Delaware. Ten days later, defendants filed a new motion to dismiss plaintiffs' complaint,

relying on the change in Delaware law. Plaintiffs opposed the motion and a different judge heard argument on December 10, 2021.

The judge issued a December 14, 2021 order and accompanying ninety-page written decision granting defendants' motion to dismiss. The judge found electroCore's federal forum selection provision was valid and enforceable based on the Delaware Supreme Court's decision in Salzberg.

The motion judge rejected plaintiffs' argument that defendants waived assertion of the forum selection provision as a defense. The judge determined "defenses are not and should [not] be considered to be waived when they are not raised at a time when contrary to controlling precedent, but subsequently restored by intervening controlling precedent."

In holding defendants did not waive the federal forum selection provision, the judge concluded "[d]efenses raised when they become relevant and viable are not waived." Because Delaware law changed, the judge found defendants did not waive their defense based on the forum selection clause.

The judge also found enforcement of the federal forum selection provision would not be unreasonable because "a more complete putative class action" was pending in the federal court action. He further concluded such forum selection clauses were not contrary to public policy or the Securities Act.

On appeal, plaintiffs limit their argument to the dismissal of their complaint based on the federal forum selection provision. They contend defendants waived the federal forum selection provision by failing to raise the issue in prior pleadings. They also assert the clause is unenforceable as unreasonable and against public policy.

"We review a court's ruling on the legal enforceability of a forum-selection clause de novo." Largoza v. FKM Real Estate Holdings, Inc., 474 N.J. Super. 61, 72 (App. Div. 2022). We also apply de novo review to a trial court's determination on a Rule 4:6-2(e) motion to dismiss for failure to state a claim. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021).

Notwithstanding the enforceability of the federal forum selection provision under current Delaware law, plaintiffs contend that defendants waived the clause because it was not asserted in any prior pleadings and defendants withheld assertion of the provision as a defense until the remand proceeding. According to plaintiffs, a favorable change in law did not negate defendants' waiver of the federal forum selection provision. We disagree.

We are satisfied the judge correctly found electroCore's federal forum selection provision was valid and enforceable under Delaware law. electroCore is a Delaware corporation. Its certificate of incorporation included a federal

forum selection provision. As of March 2020, Delaware law held federal forum selection clauses were valid and enforceable in the context of Securities Act claims. Salzberg, 227 A.3d at 116.[2]

We reject plaintiffs' argument that defendants waived the federal forum selection provision by failing to raise the defense in any prior pleadings. Under the New Jersey Court Rules, "[e]very defense . . . to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses . . . may at the option of the pleader be made by motion," including "(e) failure to state a claim upon which relief can be granted." R. 4:6-2 (emphasis added). Under Rule 4:6-7, only the defenses asserting lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process are waived if not made by motion. On the other hand, a defense based on failure to state a claim "may be made in any pleading permitted or ordered, or by motion for summary judgment or at the trial on the merits." Ibid. Nothing in our Court Rules expressly requires

[2] Even if we agreed that New Jersey law rather than Delaware law applied, which we do not, the federal forum selection provision is valid and enforceable. See Largoza, 474 N.J. Super. at 72 (holding forum selection clauses in New Jersey are valid and enforceable unless unreasonable).

forum selection clauses to be pleaded as an affirmative defense or risk absolute waiver of the defense.

Nor does Cole v. Jersey City Med. Ctr., 215 N.J. 265 (2013) support plaintiffs' waiver argument. In that case, our Supreme Court held the defendants waived enforceability of a contractual arbitration provision because the defendants filed an answer, the parties served extensive discovery, and at least twelve people were deposed prior to the defendants invoking the arbitration provision. Id. at 281-83. The Cole Court "concentrate[d] on the part[ie]s' litigation conduct to determine" whether the parties waived the right to arbitrate. Id. at 280. Because the defendants in Cole "engaged in litigation that was inconsistent with [their] right to arbitrate the dispute," namely litigating for twenty-one months without invoking the arbitration provision and raising the issue "three days before the scheduled trial date," the Court held the "totality of the circumstances of this case leads to the inexorable conclusion that [the defendants] waived [their] right to arbitrate during the course of the litigation." Id. at 281-83.

Here, electroCore's defense based on the federal forum selection provision turned on whether such provisions were enforceable under Delaware law. Defendants could not assert a defense that was legally not viable or available at

that time. At the time of the original motion to dismiss, federal forum selection provisions were invalid based on existing Delaware law. By filing a motion to dismiss for failure to state a claim, defendants were under no obligation to assert the federal forum selection provision when such a provision was unenforceable under Delaware law. See Chassen v. Fid. Nat'l Fin., Inc., 836 F.3d 291, 293 (3d Cir. 2016) ("Every circuit to have answered this question has held that 'a litigant [need not] engage in futile gestures merely to avoid a claim of waiver.'") (alteration in original) (quoting Miller v. Drexel Burnham Lambert, Inc., 791 F.2d 850, 854 (11th Cir. 1986)).

Unlike the circumstances in Cole, defendants have not engaged in any discovery. Nor have defendants filed answers. There is no evidence defendants withheld assertion of the federal forum selection provision as part of a deliberate litigation strategy. To the contrary, defendants did not raise the defense in their original motion to dismiss because Delaware law at the time held such clauses were unenforceable. Thus, under these facts, we are satisfied defendants did not waive their right to invoke the federal forum selection provision as a defense to plaintiffs' state court action.

Alternatively, plaintiffs argue that even if the federal forum selection provision is enforceable and defendants did not waive the defense, the provision

is unreasonable and contrary to public policy. Plaintiffs claim: 1) there is no longer an alternative forum available; 2) they will lose the benefits of a separate state court action; and 3) the provision contravenes the Securities Act. We disagree.

Forum selection provisions are generally enforceable as long as the provision is not "unreasonable and unjust." YA Global Investments, L.P. v. Cliff, 419 N.J. Super. 1, 10 (App. Div. 2011) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985)). "Courts will enforce such a forum-selection clause unless it is the product of 'fraud, undue influence, or overwhelming bargaining power,' is unreasonable, or offends a 'strong public policy.'" Ibid. (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)).

Plaintiffs claim enforcement of the federal forum selection provision is unreasonable because there is no longer an alternative forum available as the statute of limitations has expired on their Securities Act claims. However, statute of limitations considerations are generally not appropriate when assessing reasonableness. See, e.g., Union Steel Am. Co. v. M/V Sanko Spruce, 14 F.Supp.2d 682, 696 (D.N.J. 1998) (holding that a time-bar does not preclude enforcement of a forum-selection clause because "the analysis does not hinge

on whether a clause is unreasonable in light of present circumstances created by plaintiff's failure to file in the correct forum"); see also New Moon Shipping Co. v. MAN B&W Diesel AG, 121 F.3d 24, 32-33 (2d Cir. 1997) (noting that "consideration of a statute of limitations would create a . . . loophole for the party seeking to avoid enforcement" as they could deliberately postpone filing their cause of action until the statute has run so that they might file in a more convenient forum). Based on well-settled case law, enforcement of the federal forum selection provision in this case would not be unreasonable because plaintiffs can and are pursuing their claims in federal court.

Nor have plaintiffs offered any reason why the pending federal court action fails to provide an adequate forum for their claims. The federal court action asserts claims against the same defendants as the state court action and includes plaintiffs as members of the putative class. The federal court action also asserts violations of the Securities Act and seeks the same relief sought in the state court action. In fact, one of the named plaintiffs here applied to be co-lead plaintiff in the federal court action "to obtain the largest recovery for the [c]lass" as possible. Based on representations in the federal court action, we are satisfied that action adequately addresses the claims of the putative class,

including the plaintiffs in this case, and therefore plaintiffs have a valid forum to litigate their claims.

Plaintiffs further contend that litigating their claims in the federal court action would result in surrendering benefits available to them in state court. Plaintiffs claim the federal court action contains fraud claims under the Securities Exchange Act of 1934 (Exchange Act) as well as the Securities Act. Plaintiffs assert inclusion of claims under the Securities Act and Exchange Act potentially hinders their Securities Act claims. For example, plaintiffs argue that claims under the Exchange Act are subject to a heightened pleading standard. They also contend that commingling of claims under both acts would result in complaints replete with references to intentional and reckless misrepresentation while overlooking negligence claims.

Contrary to plaintiffs' argument, federal courts routinely consider both Securities Act and Exchange Act claims in the same action. See, e.g., In re Facebook, Inc., 288 F.R.D. 26, 36 (S.D.N.Y. 2012). Moreover, plaintiffs' reliance on Shapiro v. UJB Fin. Corp., 964 F.2d 272, 288 n.18 (3d Cir. 1992), and Rombach v. Chang, 355 F.3d 164, 171 (2d Cir. 2004), is misplaced. Those cases do not stand for the proposition that claims under both acts cannot coexist in the same litigation. Rather, the cases emphasize that a party must carefully

plead the requisite elements when attempting to assert a Securities Act claim grounded in negligence rather than fraud. See Shapiro, 964 F.2d at 288.

We also reject plaintiffs' contention that enforcement of the federal forum selection provision is void under the Securities Act. Plaintiffs claim the Securities Act creates "an express right for investors to pursue Securities Act claims in state court," citing 15 U.S.C. §77v, and renders void "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission." 15 U.S.C. §77n. Plaintiffs argue that the judge erred in relying on Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481-83 (1989), to find the federal forum selection provision was not void under the Securities Act.

In Rodriguez, the United States Supreme Court held the "right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that [15 U.S.C. § 77n] is properly construed to bar any waiver of these provisions." 490 U.S. at 481. The Court noted that arbitration agreements are merely "a specialized kind of forum-selection clause." 490 U.S. at 482-83. See also Salzberg, 227 A.3d at 132 ("The holding in Rodriguez provides forceful support for the notion that [federal forum selection provisions]

do not violate federal policy by narrowing the forum alternatives available under the Securities Act.").

We also reject plaintiffs' argument that the forum selection provision is void as a matter of New Jersey public policy. See M/S Breman, 407 U.S. at 10, 15 (noting forum selection clauses will not be enforced when they "contravene a strong public policy of the forum in which suit is brought"). Plaintiffs rely on a January 29, 2019 letter from New Jersey's Attorney General to the SEC regarding a mandatory arbitration clause in a corporation's by-laws. The letter stated:

> Longstanding principles of New Jersey law limit the subject matter of corporate bylaws to matters of internal concern to the corporation. Under New Jersey law . . . forum-selection provisions relating to claims under the federal securities laws do not address matters of internal concern, and bylaw provisions purporting to dictate the forum for such claims—including but not limited to mandatory arbitration provisions—are void.

However, this letter from the Attorney General does not override New Jersey's public policy regarding forum selection clauses. Forum selection provisions are valid as a matter of New Jersey law. Largoza, 474 N.J. Super. at 72. Additionally, our courts look to Delaware courts for guidance on matters of corporate law. Casey v. Brennan, 344 N.J. Super. 83, 106 (App. Div. 2001) ("When considering issues of first impression . . . regarding corporate law, we

frequently look to Delaware for guidance of assistance."). In the January 2019 letter, the Attorney General relied on Delaware case law, specifically the now-overruled Salzberg case, in stating forum selection clauses applicable to Securities Act claims were invalid in New Jersey. We are satisfied that the Delaware Supreme Court's decision in Salzberg is dispositive and federal forum selection provisions regarding Securities Act claims are valid and enforceable.

Affirmed.