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AUCTION RATE SECURITIES - MASSACHUSETTS

Tutor Perini Corp. v. Banc of America Securities LLC

United States District Court, D. Massachusetts - September 24, 2013 - Slip Copy - 2013 WL 5376023

This action, like many similar actions that have been filed throughout the country, was triggered by the collapse of the auction rate securities ("ARS") market in February 2008. In this case, the plaintiff, Tutor Perini Corp. ("Tutor Perini") brought claims against its broker and investment advisor, Banc of America Securities LLC, now known as Merrill Lynch, Pierce, Fenner & Smith, Incorporated ("BAS"), and BAS's affiliate, Bank of America, N.A. ("BANA").

Tutor Perini alleged that during the time period from September 2007 through February 2008, BAS, with the knowledge and acquiescence of BANA, invested hundreds of millions of dollars of Tutor Perini's money in toxic ARS, including ARS that BAS had been holding in its own inventory, without disclosing the increasingly severe risk of illiquidity associated with such investments or the fact that BAS was engaged in a strategy to reduce its own inventory of ARS by foisting them onto its clients.

Tutor Perini claimed that the very risks which the defendants concealed from it materialized in February 2008, when the ARS market collapsed and ARS investors such as the plaintiff were unable to liquidate their holdings. Tutor Perini contended that as a result of the defendants' conduct, it continues to hold nearly \$100 million worth of ARS, which remain frozen in its account at BAS and will not mature for decades.

Tutor Perini asserted that the defendants committed securities fraud, in violation of section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, by making material misrepresentations and omissions regarding the risks of investing in ARS, and by selling it securities that were unsuitable in light of Tutor Perini's investment objectives (Count I). In addition, Tutor Perini asserted nine separate state law claims against the defendants, which include claims for intentional misrepresentation (Count II), fraudulent concealment (Count III), negligent misrepresentation (Count IV), violation of Mass. Gen. Laws ch. 93A (Count V), civil conspiracy (Counts VI-VII), violation of Mass. Gen. Laws ch. 110A, § 410(a)(2) (Count VIII), breach of contract (Count IX), and conversion (Count X).

Defendants contended that Tutor Perini's Exchange Act claims must be dismissed because the plaintiff has failed to comply with the heightened pleading standards of Fed.R.Civ.P. 9(b) and the Private Securities Litigation Reform Act, 15 U.S.C. §§ 78u-4(b), and has otherwise failed to allege facts sufficient to plead the elements of its claims. Similarly, they contended that each of Tutor Perini's state law claims must be dismissed because the allegations supporting them are inadequate to comply with the pleading requirements of either Fed.R.Civ.P. 9(b) or Fed.R.Civ.P. 8, and because Counts V and IX fail as a matter of law.

The court found that Tutor Perini had failed to state claims for civil conspiracy, breach of contract and conversion, but that its remaining claims were sufficient to comply with the applicable pleading standards and to state a claim for relief. Specifically, the court recommended that Counts VI, VII, IX and X be dismissed, but that the motion otherwise be denied.

