

Bond Case Briefs

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BONDS - ARIZONA

Greenwich Investment Management Incorporated v. Aegis Capital Corporation

United States District Court, D. Arizona - March 18, 2024 - Slip Copy - 2024 WL 1156568

In 2019, Greenwich Investment Management Inc. (Plaintiff) purchased from Aegis Capital Corp. (Defendant or Underwriter) two series of municipal bonds issued by the Arizona Industrial Authority for \$22,040,000. Plaintiff initially did not purchase the bonds for itself, but rather on behalf of its clients as their investment adviser.

The bonds were meant to fund the operations of Harvest Gold Silica, Inc. (HGS), which is in the business of remediating mine solid waste into silica-based products.

Defendant underwrote the bonds and published several documents meant to induce Plaintiff's purchase.

In 2020, UMB Bank, N.A., the trustee for the bonds, found HGS to be insolvent.

In June 2021 – after HGS was declared insolvent and a few months before Plaintiff filed the first complaint related to this suit – Plaintiff purchased a \$5,000 Series 2019B bond and a \$5,000 Series 2019A bond on the secondary market for its own account.

Plaintiff brought this suit against Underwriter, alleging violations of the Arizona Securities Act, the Connecticut Securities Act, and the Texas Securities Act, as well as raising claims of fraud and negligent misrepresentation.

Defendants moved to dismiss Plaintiff's claims, arguing that the Court lacked subject matter jurisdiction. Specifically, Defendants argued that Plaintiff did not have standing to pursue its claims because Plaintiff lacked the minimum requirement for an injury-in-fact – that a plaintiff have legal title to, or a proprietary interest in, the claim.

As an initial matter the District Court held that to have an injury-in-fact, a plaintiff must have legal title to, or a proprietary interest in, the claims asserted. It is not enough that plaintiff is the attorney-in-fact for its clients and has discretionary authority to make investments on their behalf.

In its Complaint, Plaintiff alleged that it “purchased all of the bonds, some for its own account and some for its clients” and thus alleged it suffered an injury-in-fact. But Defendants, making a factual attack, point to evidence refuting Plaintiff's allegation that it purchased any of the bonds for itself at the initial issuance. However, Plaintiff later conceded that it had purchased the full bond amount “on its clients' behalf.”

Plaintiff argued that its allegation in the Complaint that it purchased some bonds for its own account and some bonds for its clients was technically not incorrect because Plaintiff purchased two \$5,000 bonds (of the \$22 million sold) for its own account. But Plaintiff purchased those two bonds on the secondary market, two years after the initial issuance and after UMB Bank had declared HGS to be

insolvent. Plaintiff conceded that its claims against Defendants based on purchases Plaintiff made for its clients relying on alleged misrepresentations leading up to the initial issuance could not also be premised on the two bonds Plaintiff purchased for its own account on the secondary market two years later.

“The Complaint otherwise fails to allege injury to Plaintiff, only to Plaintiff’s clients. The Complaint also does not include any allegation that Plaintiff’s clients have assigned their claims to Plaintiff. In its Response, Plaintiff informed the Court that it has since obtained 181 assignments from its bond-buying clients and, as such, Plaintiff requests leave to amend the Complaint. But these recent assignments do not affect the Court’s analysis of whether Plaintiff’s Complaint establishes constitutional standing. Because Plaintiff has not pled facts sufficient to demonstrate legal title to, or a proprietary interest in, the claims brought, Plaintiff has not pled an injury-in-fact and does not have standing to pursue its claims.”

The Court noted that a supplemental pleading (even if characterized as a motion to amend) can be used to cure a jurisdictional defect, in this case Plaintiff’s assignments from its bond-buying clients.

However, “While the Court recognizes there is a presumption to allow a plaintiff to supplement the complaint in ordinary circumstances under *Eminence Capital, LLC*, 316 F.3d at 1052, the Court finds the dilatory tactics on the part of Plaintiff and resulting undue prejudice to Defendants rise to such a level in this case that the Court must exercise its discretion to deny Plaintiff’s request to supplement the Complaint.”