

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

OFFICE OF THE ATTORNEY
GENERAL, DEPARTMENT OF LEGAL
AFFAIRS, STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 51-2010-CA-2912-WS/G

BOTFLY L.L.C., DAVID R. LEWALSKI,
JON J. HAMMILL, and JON J.
HAMMILL, P.A.,

Defendants.

_____/

**PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST
DEFENDANTS JON J. HAMMILL AND JON J. HAMMILL, P.A.**

Plaintiff, Office of the Attorney General, Department of Legal Affairs, State of Florida, by and through its undersigned attorneys, pursuant to this Court's request during the June 15, 2011 hearing on Plaintiff's Motion for Partial Summary Judgment Against Defendants Jon J. Hammill and Jon J. Hammill, P.A., hereby files this Supplemental Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment Against Defendants Jon J. Hammill and Jon J. Hammill, P.A., and states as follows:

Introduction

On June 15, 2011, this Court held a hearing on Plaintiff's Motion for Partial Summary Judgment Against Defendants Jon J. Hammill and Jon J. Hammill, P.A. At the conclusion of the hearing, the Court requested counsel for Plaintiff and counsel for Jon J. Hammill ("Hammill")

and Jon J. Hammill, P.A. (“Hammill, P.A.”) to submit additional legal memoranda addressing certain issues relevant to the Court’s consideration of the Motion. The two issues are whether scienter is required to prove a violation of section 517.301, Florida Statutes, and whether the Court should consider the affidavit submitted by Defendant Hammill in opposition to the Motion for Partial Summary Judgment. The statute itself as well as state case law suggest that section 517.301(1)(a), Florida Statutes, is a strict liability statute. If the Court agrees, then Partial Summary Judgment can be entered against Hammill and Hammill, P.A. If the Court disagrees, then Plaintiff requests that ruling on the Motion for Partial Summary Judgment be deferred to allow Plaintiff to depose Hammill on the issues raised in the affidavit.

Argument

I. Scienter is not an element of a violation of Fla. Stat. § 517.301(1)(a).

A. The text of Fla. Stat. § 517.301(1)(a) omits any scienter requirement.

Section 517.301(1)(a), Florida Statutes, contains three separate offenses for which liability can be established. The statute provides,

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.

Each of these subsections omits any requirement that a defendant must have specific knowledge

of a fraudulent scheme in order for liability to be imposed. Plaintiff has sued Hammill and Hammill, P.A. for violating section 517.301(1)(a), Florida Statutes.

By contrast, section 517.301(1)(c), Florida Statutes, which is also an alternative basis of liability for Hammill, contains an express scienter requirement to demonstrate liability. That provision of the statute provides:

It is unlawful and a violation of the provisions of this chapter for a person:
(c) In any matter within the jurisdiction of the office, to *knowingly* and *willfully* falsify, conceal, or cover up, by any trick, scheme, or device, a material fact, make any false, fictitious, or fraudulent statement or representation, or make or use any false writing or document, *knowing* the same to contain any false, fictitious, or fraudulent statement or entry. (emphasis added).

In this subsection, the legislature intentionally used the words “knowingly,” “willfully,” and “knowing” as elements of the offense. However, in Fla. Stat. § 517.301(1)(a), the legislature intentionally omitted any such requirement of specific knowledge on the part of a defendant.

As the Supreme Court of Florida noted regarding another statute, “When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded.” *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) (citations omitted). “The legislature’s use of different terms in different sections of the same statute is strong evidence that different meanings were intended.” *Beshore v. Dept. of Financial Svcs.*, 928 So. 2d 411, 413 (Fla. 1st DCA 2006) (citations omitted). The legislature apparently determined to make securities violations contained in Fla. Stat. § 517.301(1)(a) strict liability offenses and securities violations contained in Fla. Stat. § 517.301(1)(c) specific intent offenses.

B. Case law indicates that scienter is not a required element of a violation of Fla. Stat. § 517.301(1)(a).

It appears from state court authority that violations of Fla. Stat. § 517.301(1)(a) are strict liability offenses. In *Merrill Lynch, Pierce, Fenner & Smith v. Byrne*, the appellant challenged the judgment entered against him arguing that scienter was required to demonstrate a violation of Fla. Stat. § 517.301. 320 So. 2d 436, 440 (Fla. 3d DCA 1975). The portion of Fla. Stat. § 517.301 at issue in the case provided, “It is unlawful * * * (b) 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; . . .” *Id.* n.2. The Third District Court of Appeal rejected the appellant’s argument stating that it disagreed with federal decisions indicating that scienter is required in a securities violation. *Id.* The Court stated, “We think the better Federal decisions and the clear weight of authority is that *scienter is not necessary to recovery.*” *Id.* at 440 (emphasis added).

Further, the Supreme Court of Florida has held that scienter is not required to be alleged or proven in a prosecution for selling unregistered securities under Fla. Stat. § 517.07. *State v. Houghtaling*, 181 So. 2d 636 (Fla. 1966). In addition, in *Huff v. State*, the defendant was charged with selling unregistered securities and tried to rely on the advice of counsel defense but was precluded from offering such evidence by the trial court. 646 So. 2d 742, 743 (Fla. 2d DCA 1994). The Second District Court of Appeal affirmed the decision of the trial court on that issue stating that the advice of counsel defense is irrelevant to a strict liability crime. *Id.* With respect to the trial court’s exclusion of evidence on the advice of counsel defense, the Court stated, “This ruling was correct because scienter is not an element of security law violations.” *Id.* (citing *State*

v. *Houghtaling*, 181 So. 2d 636 (Fla. 1965)).

Likewise, some federal courts interpreting Fla. Stat. § 517.301 have found no scienter requirement in the statute. For example, in *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690-691 (11th Cir. 1983), the U.S. Court of Appeals for the Eleventh Circuit affirmed the lower court's use of jury instructions that did not include a scienter requirement for a violation of Fla. Stat. § 517.301. The Court stated, "There is no persuasive indication that the Florida Supreme Court would not choose to enforce § 517.301 without the requirement of a showing of scienter." *Id.* The Court noted that *Byrne* "concluded that the state law would be best enforced without a scienter requirement." *Id.* at 690-1 (citing *Merrill Lynch, Pierce, Fenner & Smith v. Byrne*, 320 So. 2d 436, 440 (Fla. 3d DCA 1975)). Recently, several federal court decisions have stated that a negligence standard is applied to section 517.301. *See, e.g., In re. Checkers Sec. Litigation*, 858 F. Supp. 1168, 1180 (M.D. Fla. 1994). However, the text of the statute itself omits any reference to negligence, and these decisions are generally not based on Florida state court authority.¹

Further, at least one court from outside of Florida has held that Fla. Stat. § 517.301 contains no scienter requirement. In *Andrews v. Fitzgerald*, the U.S. District Court for the Middle District of North Carolina contrasted Fla. Stat. § 517.301 with Federal section 10(b) of the Securities Exchange Act. 1992 WL 159766, at *4 (M.D.N.C. February 7, 1992). The Court held that "[u]nlike § 10(b), however, no showing of scienter is necessary under § 517.301." *Id.*

¹ These decisions appear to have originated from an opinion of the U.S. Court of Appeals for the Eleventh Circuit that cited the *Byrne* decision with a parenthetical stating that Florida's statute is satisfied by a showing of negligence. *Gochmauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1046 (11th Cir. 1987). However, the *Byrne* decision nowhere includes a requirement of negligence for a violation of section 517.301. *Merrill Lynch, Pierce, Fenner & Smith v. Byrne*, 320 So. 2d 436, 440 (Fla. 3d DCA 1975).

C. Other authority indicates that scienter is not a required element of a violation of Fla. Stat. § 517.301(1)(a).

In an article written for the *Florida Bar Journal*, Hillsborough County Circuit Judge Tom Barber quoted Fla. Stat. § 517.301 and wrote, “The weight of existing authority suggests that securities fraud is a strict liability offense...” Judge Tom Barber, *Criminal Enforcement of Florida’s Securities Laws*, 79 Fla. B. J. 8, 13 (February, 2005). Judge Barber noted that no Florida court had specifically addressed the issue squarely in a published decision, but he discussed the legislature’s prerogative to omit a scienter requirement in the statute. *Id.* Judge Barber concluded that “securities fraud is arguably a strict liability offense in Florida” while recognizing the difficulties such a result may produce. *Id.*

Accordingly, Plaintiff requests that this Court enter an Order granting its Motion for Partial Summary Judgment against Hammill and Hammill, P.A. and enter a Partial Summary Judgment against Hammill and Hammill, P.A. because Hammill’s affidavit fails to dispute the evidence provided by Plaintiff indicating substantial participation by Hammill and Hammill, P.A. in the Botfly ponzi scheme.²

II. The Court should permit additional discovery against Defendant Jon J. Hammill before ruling on Plaintiff’s Motion for Partial Summary Judgment.

Even if this Court disagrees with Plaintiff’s argument in Section I regarding scienter, Plaintiff respectfully requests that this Court defer ruling on the Plaintiff’s Motion for Partial Summary Judgment until Plaintiff is given the opportunity to depose Mr. Hammill on the issues raised in his affidavit under the authority of *Jones v. Stoutenburgh*, 91 So. 2d 299, 303 (Fla.

² Hammill’s affidavit alleges that Hammill did not know of any wrongdoing committed by Botfly LLC or David Lewalski.

1957).³ In *Jones*, the Supreme Court of Florida held that when a party files an affidavit in response to a motion for summary judgment after previously invoking the Fifth Amendment, the moving party should be given an opportunity to take additional discovery to test the claims made in the affidavit. *Id.* If the defendant continues to assert the Fifth Amendment during the course of the additional discovery, then a summary judgment may be entered at that time. *Id.* Also, if it is shown that the defendant has no supporting evidence other than the affidavit, then a summary judgment may be entered. *Id.* Here, Defendant Jon J. Hammill filed an affidavit in opposition to the Motion for Partial Summary Judgment after repeatedly invoking his Fifth Amendment privilege against self incrimination in depositions and in responses to interrogatories, request for admissions, and request for production of documents relating to his role in the Botfly ponzi scheme. As a result of his waiver of the Fifth Amendment, Plaintiff has a right to conduct discovery of Mr. Hammill as to his role in Botfly.

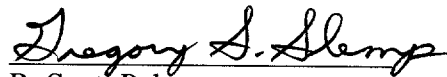
Conclusion

Plaintiff respectfully requests that this Court find that no scienter is required for a violation of Fla. Stat. § 517.301. As a result, Defendants Jon J. Hammill and Jon J. Hammill, P.A. should be found liable for violating the statute. Neither of the defendants disputes the substantial work performed for the Botfly ponzi scheme. The undisputed facts indicate that Hammill and Hammill, P.A. contributed substantially to the operation and growth of Botfly. In the alternative, Plaintiff requests that this Court defer ruling on Plaintiff's Motion for Partial Summary Judgment to permit Plaintiff to conduct discovery to test the claims made in Hammill's affidavit.

³ Of course, if the Court agrees with Plaintiff that scienter is not an element of a violation under Fla. Stat. § 517.301(a)(1), then a Partial Summary Judgment can be entered immediately.

WHEREFORE, Plaintiff, Office of the Attorney General, Department of Legal Affairs, State of Florida, prays this Court enter an Order granting its Motion for Partial Summary Judgment Against Defendants Jon J. Hammill and Jon J. Hammill, P.A., enter a Partial Summary Judgment against Defendants Jon J. Hammill and Jon J. Hammill, P.A. as to liability on Plaintiff's claims, and for such other and further relief that this Court deems just and proper.

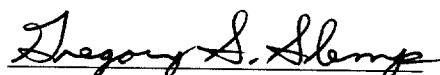
PAMELA JO BONDI
Attorney General



R. Scott Palmer
Special Counsel
Florida Bar No. 220353
Gregory S. Slemp
Assistant Attorney General
Florida Bar No. 478865
Office of the Attorney General
PL-01; The Capitol
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 488-9134
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Jeffrey W. Warren and Karen Cox, Bush Ross, P.A., P.O. Box 3913, Tampa, FL 33601-3913 and via email at kcox@bushross.com; David R. Lewalski, Pinellas County Jail, Cell Location/Status: CEN-6C1-UN01-08-003, 14400 49th St. N., Clearwater, FL 33762; Steve D. Tran, 2285 First Avenue North, Suite A, Saint Petersburg, FL 33713 and via email at uf3323@aol.com; Jon J. Hammill, 6232 Fifth Avenue North, Saint Petersburg, FL 33710; and Gabriel Mazzeo via email at gmaezeo11@gmail.com on this 28th day of July, 2011.



Gregory S. Slemp