

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 13-10436

United States Court of Appeals
Fifth Circuit
FILED
June 24, 2014
Lyle W. Cayce
Clerk

TRANSFIRST HOLDINGS, INCORPORATED;
TRANSFIRST MERCHANT SERVICES, INCORPORATED;
PAYMENT RESOURCES INTERNATIONAL, L.L.C.,

Plaintiffs-Appellees

v.

DOMINIC J. MAGLIARDITI;
DII INVESTMENTS, INCORPORATED,

Defendants-Appellants

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:06-CV-2303

Before SMITH, WIENER and PRADO, Circuit Judges.

PER CURIAM:*

Following a bench trial, the district court held Defendants-Appellants Dominic J. Magliarditi (“Magliarditi”) and DII Investments, Inc. (“DII”) (together, “Appellants”)¹ liable for, *inter alia*, fraud by non-disclosure under Texas law and entered judgment for Plaintiffs-Appellees on that claim. On

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

¹ Other individual and corporate defendants were held liable for fraud, but those parties have not challenged the district court’s judgment in this appeal.

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appeal, Appellants challenge the district court's (1) holding of fraud, (2) determination that Magliarditi is personally liable for damages attributable to corporate defendant SSF Holdings, LLC ("SSF"), and (3) reliance on evidence adduced by Plaintiffs-Appellees' expert witness as to damages. Having reviewed the record on appeal, including the parties' briefs, the applicable law, and the district court's extensive January 19, 2010 findings of fact and conclusions of law and the March 8, 2011 order amending its findings of fact and conclusions of law, we AFFIRM for the following reasons:

1. The district court correctly determined that Plaintiffs-Appellees detrimentally relied on Appellants' fraudulent non-disclosures.² Rule 52(a) of the Federal Rules of Civil Procedure "exacts neither punctilious detail nor slavish tracing of the claims issue by issue and witness by witness."³ Consequently, "[i]f a trial judge fails to make a specific finding on a particular fact, the reviewing court may assume that the court impliedly made a finding consistent with its general holding so long as the implied finding is supported by the evidence."⁴ As the district court's factual findings of reliance are amply supported by

² *United Teacher Assocs. Ins. Co. v. Union Labor Life Ins. Co.*, 414 F.3d 558, 567-58 (5th Cir. 2005) ("Courts in Texas have consistently held that fraud by nondisclosure or concealment requires proof of all of the elements of fraud by affirmative misrepresentation, including fraudulent intent, with the exception that the misrepresentation element can be proven by the nondisclosure or concealment of a material fact in light of a duty to disclose."); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997) ("The [respondents] assert that the jury's verdict must be sustained because reliance is not an element of a claim for fraud by non-disclosure. We disagree. Reliance is an element of fraud. Fraud by non-disclosure is simply a subcategory of fraud because, where a party has a duty to disclose, the non-disclosure may be as misleading as a positive misrepresentation of facts." (internal citations omitted)).

³ *Century Marine Inc. v. United States*, 153 F.3d 225, 231 (5th Cir. 1998) (quoting *Burma Navigation Corp. v. Reliant Seahorse M/V*, 99 F.3d 652, 656 (5th Cir. 1996)).

⁴ *Id.*

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substantial evidence, they are not clearly erroneous.⁵ The district court thus did not err in holding Appellants liable for fraud.

2. The district court explicitly found that Magliarditi purposefully used SSF and DII to perpetuate his fraud. A court may pierce a corporate veil via the “sham to perpetrate a fraud” doctrine—which is not a separate cause of action—“if recognizing the separate corporate existence would bring about an inequitable result.”⁶ Following the Texas courts’ “flexible fact-specific approach focusing on equity,” the district court properly concluded that recognizing the corporate existence of SSF and DII separate from Magliarditi would produce an inequitable result.⁷ The district court thus did not err in holding Magliarditi personally liable for damages attributed to SSF.

3. The district court adopted a portion of Plaintiffs-Appellees’ expert witness’s testimony to determine lost-profit damages. As the witness provided a sound basis for his assumptions and explained how he relied on them to reach his estimate of Plaintiffs-Appellees’ lost profits, his testimony was not “the mere ipse dixit of a credentialed witness.”⁸ The district court’s factual findings regarding damages are

⁵ *Delahoussaye v. Performance Energy Servs., L.L.C.*, 734 F.3d 389, 392 (5th Cir. 2013) (“To reverse for clear error, this court must have ‘a definite and firm conviction that a mistake has been committed.’” (quoting *Canal Barge Co., Inc. v. Torco Oil Co.*, 220 F.3d 370, 375 (5th Cir. 2000))); *Arete Partners, L.P. v. Gunnerman*, 594 F.3d 390, 394 (5th Cir. 2010).

⁶ *Bollore S.A. v. Imp. Warehouse, Inc.*, 448 F.3d 317, 326 (5th Cir. 2006) (quoting *Castleberry v. Branscum*, 721 S.W.2d 270, 272-73 (Tex. 1986)).

⁷ *Permian Petroleum Co. v. Petroleos Mexicanos*, 934 F.2d 635, 644 (5th Cir. 1991) (citing *Castleberry*, 721 S.W.2d at 273).

⁸ *Ellis v. United States*, 673 F.3d 367, 373 (5th Cir. 2012) (quoting *Jelinek v. Casas*, 328 S.W.3d 526, 536 (Tex. 2010)); see also *Guile v. United States*, 422 F.3d 221, 227 (5th Cir. 2005).

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supported by substantial evidence, and thus they are not clearly erroneous.⁹

The district court's third amended final judgment is, in all respects,
AFFIRMED.

⁹ *French v. Allstate Indem. Co.*, 637 F.3d 571, 577 (5th Cir. 2011); *see also Ellis*, 673 F.3d at 373; *Guile*, 422 F.3d at 227.

BILL OF COSTS

NOTE: The Bill of Costs is due in this office *within 14 days from the date of the opinion, See FED. R. APP. P. & 5TH CIR. R. 39.* Untimely bills of costs must be accompanied by a separate motion to file out of time, which the court may deny.

_____ v. _____ No. _____

The Clerk is requested to tax the following costs against: _____

COSTS TAXABLE UNDER Fed. R. App. P. & 5 th Cir. R. 39	REQUESTED				ALLOWED (If different from amount requested)			
	No. of Copies	Pages Per Copy	Cost per Page*	Total Cost	No. of Documents	Pages per Document	Cost per Page*	Total Cost
Docket Fee (\$450.00)								
Appendix or Record Excerpts								
Appellant's Brief								
Appellee's Brief								
Appellant's Reply Brief								
Other:								
Total \$ _____					Costs are taxed in the amount of \$ _____			

Costs are hereby taxed in the amount of \$ _____ this _____ day of _____, _____.

LYLE W. CAYCE, CLERK

State of _____
 County of _____

By _____
 Deputy Clerk

I _____, do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This _____ day of _____, _____.

 (Signature)

FIFTH CIRCUIT RULE 39

39.1 Taxable Rates. *The cost of reproducing necessary copies of the brief, appendices, or record excerpts shall be taxed at a rate not higher than \$0.15 per page, including cover, index, and internal pages, for any for of reproduction costs. The cost of the binding required by 5th CIR. R. 32.2.3 that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk shall, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.*

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. *Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.*

39.3 Time for Filing Bills of Costs. *The clerk must receive bills of costs and any objections within the times set forth in FED. R. APP. P. 39(D). See 5th CIR. R. 26.1.*

FED. R. APP. P. 39. COSTS

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise;

- (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
- (2) if a judgment is affirmed, costs are taxed against the appellant;
- (3) if a judgment is reversed, costs are taxed against the appellee;
- (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of costs: Objections; Insertion in Mandate.

- (1) A party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs.
- (2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.
- (3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must – upon the circuit clerk's request – add the statement of costs, or any amendment of it, to the mandate.

(e) Costs of Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

- (1) the preparation and transmission of the record;
- (2) the reporter's transcript, if needed to determine the appeal;
- (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
- (4) the fee for filing the notice of appeal.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 24, 2014

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 13-10436 TransFirst Holdings, Inc., et al v. Andrew
Phillips, et al
USDC No. 3:06-CV-2303

Enclosed is a copy of the court's decision. The court has entered judgment under FED R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Should a rehearing be pursued, we call your attention to the following guidelines for record citations.

Important notice regarding citations to the record on appeal to comply with the recent amendment to 5TH CIR. R. 28.2.2.

Parties are directed to use the new ROA citation format in 5TH CIR. R. 28.2.2 **only** for electronic records on appeal with pagination that includes the case number followed by a page number, in the format "YY-NNNNN.###". In single record cases, the party will use

the shorthand "ROA.###" to identify the page of the record referenced. For multi-record cases, the parties will have to identify which record is cited by using the entire format (for example, ROA.YY-NNNNN.###).

Parties may not use the new citation formats for USCA5 paginated records. For those records, parties must cite to the record using the USCA5 volume and or page number.

In cases with both pagination formats, parties must use the citation format corresponding to the type of record cited.

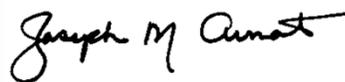
Explanation: In 2013, the court adopted the Electronic Record on Appeal (EROA) as the official record on appeal for all cases in which the district court created the record on appeal on or after 4 August 2013. Records on appeal created on or after that date are paginated using the format YY-NNNNN.###. The records on appeal in some cases contain both new and old pagination formats, requiring us to adopt the procedures above until fully transitioned to the EROA.

The recent amendment to 5TH CIR. R. 28.2.2 was adopted to permit a court developed computer program to automatically insert hyperlinks into briefs and other documents citing new EROA records using the new pagination format. This program provides judges a ready link to pages in the EROA cited by parties. The court intended the new citation format for use only with records using the new EROA pagination format, but the Clerk's Office failed to explain this limitation in earlier announcements.

The judgment entered provides that defendants-appellants pay to plaintiffs-appellees the costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Joseph M. Armato, Deputy Clerk

Enclosure(s)

Mr. Charles S. Cantu
Mr. Brian N. Hail
Ms. Anne McGowan Johnson
Mr. Peter Dermot Marketos
Mrs. Kendal Catherine Simpson