2010 WL 1285408 (Ga.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Georgia.
Cobb County

State of Georgia,

v.

Frank CONSTANTINO, Defendant.

No. 09-9-5301-42.
January 14, 2010.

Motion to Dismiss Specific Counts of the Indictment

Frank J. Marquez, Attorney for Defendant, Ga. Bar Number 143103, Belli, Weil, Grozbean & Davis, LLP, 8010 Roswell Road, Suite 200, Atlanta, Georgia 30350, Telephone No.: (770) 993-3300.

Judge Grubbs.

COMES NOW, Defendant, in the above styled matter and files this, his Motion to Dismiss specific Counts of the Indictment as the evidence does not conform to the law which the State cites. In support of said motion Defendant shows this Honorable Court the following:

I.

VIOLATIONS OF THE GEORGIA SECURITIES ACT

1.

DISMISS COUNT TWO

a.

In the instant matter, Defendant was charged in Count Two of the above styled indictment, filed on December 18, 2009, with "Violation of the Georgia Securities Act". The grand jury charged that the Defendant, on or about the 26th of February, 2003, did "willfully omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, to wit: said accused failed to disclose that said [Caye Bank] 'Stock' was not transferable, in violation of O.C.G.A. §§ 10-5-12 and 10-5-24..."

b.

The evidence introduced by the State fails to show that the Caye Bank stock in question was non-transferable. The State has not produced a subscription agreement proving otherwise. Further, the stock certificate (attached hereto as Exhibit "A") specifically states that the Caye Bank stock is transferable. Moreover, the State has failed to prove that Mr. Constantino "willfully" sold non-transferable securities. As such, Count Two must be dismissed for lack of evidence showing a violation of the Georgia Securities laws.

2.

DISMISS COUNT 7

a.

In the instant matter, Defendant was charged in Count Seven of the above styled indictment, filed on December 18, 2009, with "Violation of the Georgia Securities Act". The grand jury charged that the Defendant, on or about the 20th of May, 2002, did "willfully offer for sale and did willfully sell a security to Judy Cox within this state, to wit: 'Units' in the Belize Development Trust II, said "Units" being a security that required registration with the Georgia Secretary of State pursuant to O.C.G.A. § 10-5-2(a)(26) and said 'Units' were not registered with the Georgia Secretary of State, in violation of O.C.G.A. § 10-5-24 and in willful violation of O.C.G.A §§ 10-5-5 and 10-5-12..."

b.

The test established in *Cox v. Edelson*, 243 Ga. App. 5, 530 S.E.2d 250 (2000), controls as to whether an investment is a security under Georgia Securities Law for the time period in which the allegations found in the indictment took place. Under the test, characteristics usually associated with a security are: (i) the right to receive dividends contingent upon an apportionment of profits; (ii) negotiability; (iii) the ability to be pledged or hypothecated; (iv) the conferring of voting rights in proportion to the number of shares owned; and (v) the capacity to appreciate in value.

The "Units" in the Belize Trust do not meet this test. Ms. Cox entered into a partnership with Mr. Constantino to develop certain property in Belize through the Belize Trust Both parties contributed to the Trust for this purpose. No dividends were ever paid out. In fact, no return was to be received until the constructed properties were sold. This is typical of purchasing property, building on it, and then selling the property and edifices for a profit. No sale of securities was involved. Additionally, Ms. Cox's interest was non-negotiable. She could not go out on the secondary market and sell her interest. Just as in any other partnership situation, all other partners would have to agree to the assignment or transfer of a co-partner's interest. Pursuant to Section 5 of the Belize Development Trust II Subscription Agreement (attached hereto as Exhibit "B") which Ms. Cox signed and understood, "the Units being acquired hereby have not been registered under the Georgia Securities Act or the Securities Act of 1933 or any other applicable state securities law and therefore, [s]he must bear the economic risk of the investment for an indefinite period of time since the Units cannot be sold or offered for sale unless they are so subsequently registered or an exemption from such registration is available." Ms. Cox also was prohibited from pledging or hypothecating her interest pursuant to Section 7 of the Agreement which states that she "is acquiring the Units solely for investment for [her] own account. She has no present agreement, understanding, intent or arrangement to subdivide, sell, assign or transfer any part of all of [her] Units, or any interest therein, to any other person." Meanwhile, there were no voting rights with respect to the Trust. Any contribution to the Trust was placed in the hands of the Trust Manager who had the right to invest in the ventures as set forth in the Addendum to Belize Land Development Trust II (attached hereto as Exhibit "C"). Finally, the only appreciation in value was that of the local real estate market in Belize. Ms. Cox was due 8% on promissory notes over a five year period. She also held an equity interest in the Trust ventures, which returned interest in the form of sales proceeds from the constructed real estate ventures. It is evident that these Trust "Units" were not securities and the Belize Trust II Subscription Agreement portrayed them as such.

Further support can be found in the Northern District of Georgia case of *Binder v. Gordian Securities, Inc.*, 742 F.Supp. 663 (1990). In that case, the defendants were held exempted from registration pursuant to O.C.G.A. § 10-5-9(13) after satisfying a four-part inquiry. Subparagraph (A) of the Code section required fewer than fifteen persons in Georgia purchasing the investment units. Subparagraph (B) required that defendants not sell the units by any general or public solicitations or advertisements. Under Subparagraph (C), documents showing ownership interests in the entity in question had to contain language that the units were sold in reliance on the fact that they were exempted and that they could not be sold or transferred except in a similarly exempt transaction or pursuant to an effective registration statement. Finally, Subparagraph (D) required

that each purchaser of an interest execute a statement to the effect that the units would be purchased for his own investment purposes. Georgia's limited offering exemption may be paralleled to the Regulation D exemptions under the Federal securities laws.

Although the Defendant denies that the "Units" in the Belize Trust constituted a "security," in any event they would be exempt under the above inquiry. The "Units" were distributed to less than fifteen persons in Georgia; they were privately placed and privately advertised; the Belize Trust Subscription Agreement Section 5 provides that "the Units being acquired hereby have not been registered...and therefore, [the investor] must bear the economic risk of the investment for an indefinite period of time since the Units cannot be sold or offered for sale unless subsequently so registered or an exemption from such registration is available"; and the Subscription Agreement, signed by Ms. Cox, further provided in Section 7 that the investor "is the sole party in interest in [her] participation in this subscription and is acquiring the Units solely for investment for [her] own account. [She] has no present agreement, understanding, intent or arrangement to subdivide, sell, assign or transfer any part of all of [her] Units, or any interest therein, to any other person." Section 7 goes on to provide that Ms. Cox "understands that there is no market for the resale of the Units so that any realization of the value of [her] investment will in all probability be solely through distributions of cash realized from the operations of the Trust's business and liquidation of the Trust. [She] understands that any document evidencing the Units will bear a restrictive legend and that the records of the Trust will indicate the restrictions on transferability and sale noted."

As such, the law in effect during the time period alleged sides with the position that the "Units" in the Belize Trust were not "securities," and in any event would be exempt from registration. Accordingly, Count Seven must be dismissed.

3.

COUNT EIGHT

a.

In the instant matter, Defendant was charged in Count Eight of the above styled indictment, filed on December 18, 2009, with "Violation of the Georgia Securities Act". The grand jury charged that the Defendant, on or about the 22nd of May, 2002, did "willfully make an untrue statement of material fact, to wit: that the accused was investing over one million dollars ($1,000,000.00) in United States currency of his own money in Belize Development Trust II, that the principal of Judy Cox's investment was guaranteed, that there was a 42.4% per year return on Judy Cox's investment in four years, and that Judy Cox could not lose money, in violation of O.C.G.A. §§ 10-5-12 and 10-5-24..."

b.

It should initially be noted that, as explained in No. 2(b) above, the "Units" in the Belize Trust do not constitute a "security" under the Georgia Securities laws.

c.

In any event, none of the allegations made by the State in this Count evidence a misrepresentation on the part of Mr. Constantino. Ms. Cox was well aware of the risks of her investment. She willingly signed a very explicit Subscription Agreement (see Exhibit "B") which provided that: "[She] is aware of and understands that the Trust has no **financial** or operating history and that the Units are speculative investments which could result in the loss of [her] entire investment. [She] understands the Trust's future operations are subject to many significant risks, including the risk that the **financial** consequences of investment in the Units may vary from those expected" (Section 8). Ms. Cox also represented that she was an accredited investor with over thirty (30) years of experience investing in real estate (see J. Cox deposition, pgs. 20-23). She admitted that she never undertook a riskless

investment in her previous thirty (30) years of experience, yet was somehow swindled by Mr. Constantino's investments. The investment in the Trust is currently sitting in unfinished construction because Ms. Cox decided to bring a lawsuit against Mr. Constantino before the plans could be finished. She was apprised of the possibility that she may not receive any return until the sale of the property. Section 7 of the Subscription Agreement further states that "[she] further represents that she has sufficient and adequate means to provide for [her] current needs and personal contingencies and has no need for liquidity with respect to [her] investment in the Units." For some reason, Ms. Cox over-leveraged herself, and when she requested her return from Mr. Constantino he rightfully informed her that it was tied up in constructing the projects in Belize (see Exhibit "D" for letters from Jim Parker describing progress of projects and pictures for support). An unintelligent investment on Ms. Cox's part does not make Mr. Constantino a criminal. Ms. Cox even acquiesced in Section 11 of the Subscription Agreement that "[she] has relied only on the information contained in [documents received] and no other statements or representations have been made to [her] by any person in connection with the Units." As a result of Ms. Cox's clear knowledge of the risks and her representations as an accredited investor, her reliance on any oral representations would be unjustified, and thus Count Eight must be dismissed.

4.

COUNT FIFTEEN

a.

In the instant matter, Defendant was charged in Count Fifteen of the above styled indictment, filed on December 18, 2009, with "Violation of the Georgia Securities Act". The grand jury charged that the Defendant, on or about the 23rd of May, 2003, did "willfully offer for sale and did willfully sell a security to Judy Cox, within this state, to wit: 'Stock' in Plantation Marina and Yacht Club of Belize, said 'Stock' being a security that required registration with the Georgia Secretary of State pursuant to O.C.G.A. § 10-5-2(a)(26) and said 'Stock' was not registered with the Georgia Secretary of State, in violation of O.C.G.A. § 10-5-24 and in willful violation of O.C.G.A. § 10-5-5 and 10-5-12..."

b.

The Plantation Marina and Yacht Club was a project entered into as part of the partnership between Ms. Cox and Mr. Constantino, under the Belize Trust. As Ms. Cox's interest in the Belize Trust were not "securities," neither can a project undertaken by the Trust be deemed a "security" under the Georgia Securities laws. The State has attempted to sway the Court to believing such a joint venture is a security by calling it "stock." However, it has failed to show that the elements of stock are present As previously explained, no profits were to be made until sale of their interests. There were no dividends paid out. Moreover, there was no segregated voting power amongst interest holders. As such, the State has failed to prove that the Plantation Marina and Yacht Club project was a "security," and Count Fifteen must be dismissed accordingly.

5.

COUNT SIXTEEN

a.

In the instant matter, Defendant was charged in Count Sixteen of the above styled indictment, filed on December 18, 2009, with "Violation of the Georgia Securities Act". The grand jury charged that the Defendant, on or about the 23rd of May, 2003, did "willfully offer for sale and did willfully sell a security to Judy Cox, within this state, to wit: 'Stock' in Plantation Marina and Yacht Club of Belize, said 'Stock' being a security pursuant to O.C.G.A. § 10-5-2(a)(26), and at the time of the sale, said accused was not registered with the Georgia Secretary of State as a securities dealer, limited dealer, salesman, or limited salesman of securities, in violation of O.C.G.A. § 10-5-24 and in willful violation of O.C.G.A. §§ 10-5-3 and 10-5-12..."

b.

Initially, it must be noted that combining to undertake a construction project, as explained in 4(b) above, does not constitute a "security" under the Georgia Securities laws. As such, Mr. Constantino had no duty to register as a securities dealer, limited dealer, salesman, or limited salesman of securities.

Accordingly, Count Sixteen must be dismissed.

6.

COUNT SEVENTEEN

a.

In the instant matter, Defendant was charged in Count Seventeen of the above styled indictment, filed on December 18, 2009, with "Violation of the Georgia Securities Act". The grand jury charged that the Defendant, on or about the 23rd of May, 2003, did, "in connection with the offer and sale of a security, to wit: 'Stock' in Plantation Marina and Yacht Club of Belize, did willfully omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, to wit: said accused failed to disclose that the State of Missouri Office of the Secretary of State had issued a cease and desist order that found that he, along with others, made an untrue statement of material fact in connection with the sale of a security, in violation of O.C.G.A. §§ 10-5-12 and 10-5-24..."

b.

As explained in 5(b) above, the Plantation Marina and Yacht Club project involved no offer or sale of a "security." As such, there can be no securities law violation of omitting a material fact as to the offer or sale of a security. In addition, the Missouri cease and desist order had no connection to the Plantation Marina and Yacht Club. Therefore, there was no omission of a material fact "in connection with" the sale of an interest in that project.

II.

THEFT BY TAKING

On January 18, 2002, prior to engaging in any ventures with Mr. Constantino, Ms. Cox wrote a letter (see attached Exhibit "E") describing her intention to loan Mr. Constantino up to Three Million Dollars ($3,000,000.00) over the next three (3) years for various business and personal endeavors. Ms. Cox knew that the funds would go toward various ventures as she explains in said letter. The promissory notes provided for an eight percent (8%) interest rate, maturing in five (5) years. However, as a result of Ms. Cox over-extending herself she decided to sue Mr. Constantino prior to the maturity date. The funds are tied up in various ventures of which Ms. Cox had personal knowledge. As such, there can be no theft by taking for any of the Counts alleged by the State whereby Ms. Cox sued Mr. Constantino prior to the maturity of the corresponding promissory note. In fact, Ms. Cox breached the terms of the promissory notes and should be held responsible, not Mr. Constantino. The construction in Belize could not have been completed after Ms. Cox brought suit and Jim Parker ceased working on those projects (see Exhibit "F" for Jim Parker letter).

Accordingly, Counts Nine, Ten, Eleven, Eighteen, Twenty and Twenty-One must be dismissed because there can be no theft by taking when Ms. Cox breached the terms of the promissory notes prior to their maturity dates (see Exhibit "G" for promissory notes).

The Defendant is reserving his right to recommence this Motion to Dismiss in the event that the State produces promissory notes corresponding to the other counts of theft by taking.

III.

EXPLOITATION OF THE ELDERLY

Due to the fact that Counts Two, Seven, Eight, Nine, Ten, Eleven, Fifteen, Sixteen, Seventeen, Eighteen, Twenty, and Twenty-One must be dismissed, the piggy-back **Exploitation** of the **Elderly** claims found in Counts Twelve and Thirteen must also be dismissed. Without a finding of guilt as to the other Counts, there can be no **exploitation** of the **elderly**.

IV. CONCLUSION

Based upon the foregoing arguments, Defendant prays that this Court GRANT his motion and dismiss Counts Two, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fifteen, Sixteen, Seventeen, Eighteen, Twenty, and Twenty-One of the above-styled Indictment.

Respectfully submitted, this the 14 day of January, 2010.

<<signature>>

Frank J. Marquez

Attorney for Defendant

Ga. Bar Number 143103

BELLI, WEIL, GROZBEAN & DAVIS, LLP

8010 Roswell Road, Suite 200

Atlanta, Georgia 30350

Telephone No.: (770) 993-3300

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