Who pays for the Ponzi scheme? The Bullet Point: Volume 1, Issue 17

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Krlich v. Clemente, et. al., 11th Dist. Trumbull No. 2015-T-0089, 2017-Ohio-7945.

This was an appeal of a trial court's decision to grant summary judgment to various defendants on claims for slander, defamation, libel, and intentional infliction of emotional distress. The plaintiffs claimed that the defendants made harassing phone calls to them, threatened them with violence both in person and via electronic messaging, honked car horns at their house at all hours of the night, trashed their lawn, and paint-balled their house. The various defendants ultimately moved for summary judgment and the trial court granted the motions, and plaintiffs appealed.

The Eleventh Appellate District affirmed the trial court's decision finding that the plaintiffs failed to establish that the actions of defendants were extreme and outrageous and that each of the defendants committed the alleged acts as required to prevail on their claims.

The Bullet Point: 'To establish a claim for intentional infliction of emotional distress, a plaintiff must show (1) that the actor either intended to cause emotional distress or knew or should have known that the actions taken would result in serious emotional distress to the plaintiff; (2) that the actor's conduct was so extreme and outrageous as to go "beyond all possible bounds of decency" and was such that it could be considered as "utterly intolerable in a civilized community"; (3) that the actor's actions were the proximate cause of plaintiff's psychological injury; and (4) that the mental anguish suffered by the plaintiff was serious and of a nature that "no reasonable man could be expected to endure it."' This requires evidence of extreme and outrageous conduct. "Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities are insufficient to sustain a claim for relief."

Shakoor v. VXI Global Solutions, 7th Dist. Mahoning No. 16 MA 0038, 2017-Ohio-8018.

This was an appeal of a trial court's decision finding that an arbitration agreement between the parties did not specifically permit class arbitration and therefore dismissed the lawsuit. Appellants filed a lawsuit against VXI, an

operator of call centers throughout Ohio, for violating Ohio's Minimum Fair Wage Standards Act. Specifically, appellants claimed that employees of VXI were required to do work before clocking in to their shifts, which violated the Minimum Fair Wage Standards Act. VXI filed an answer denying the allegations and asserted as an affirmative defense that the employment contract contained an arbitration clause that prohibited participation in a class action. In response, appellants filed a motion to stay the case, pending arbitration, and submitted their claims to arbitration. VXI opposed the motion to stay, arguing that while it agreed to arbitration, it did not agree to class arbitration. Ultimately, the trial court agreed.

The appellants appealed, arguing that the trial court erred in finding that class participation was barred, and that the trial court erred in dismissing the lawsuit instead of staying it. On appeal, the Seventh Appellate District agreed in part with the trial court's decision. Specifically, the Seventh Appellate District held that the arbitration agreement precluded class arbitration because it was silent on the issue. The court reversed the trial court's decision to dismiss the case, however, finding that under applicable law, only a stay, not outright dismissal, was warranted.

The Bullet Point: Both federal and Ohio courts have held that an arbitration clause does not authorize class arbitration without an affirmative statement of authority—silence is not enough. As the Sixth Circuit explained: "The [U.S. Supreme] Court has stated that 'it cannot be presumed the parties consented to [classwide arbitration] by simply agreeing to submit their disputes to an arbitrator.'") Likewise, arbitration clauses that use the words "I" or "me" are a good indication that class arbitration is not permitted.

Similarly, Ohio's arbitration statute indicates that upon referral to arbitration, the litigation "shall" be stayed. The statute is silent on dismissal of a lawsuit pending arbitration, and, while there is a split in authority, many courts take the word "shall" literally and determine that it requires a stay, not dismissal, of a lawsuit. Moreover, there are public policy reasons for staying a case pending arbitration, including that certain disputes that arise during arbitration (e.x. discovery or subpoena issues) can be referred back to the court for a decision.

Schlabach v. Kondik, 7th Dist. Harrison No. 16 HA 0017, 2017-Ohio-8016.

This was an appeal of a trial court's decision to grant summary judgment in an equitable action for deed reformation on the basis of the claim being barred by the statute of limitations.

In 1982, the Berrys entered into an oil and gas lease with Floyd Kimble regarding 957 acres of their property. The lease contained a 10-year term, which continues into perpetuity as long as there are royalty payments being made. Kimble ultimately cancelled most of the lease in 1985 save for three tracts of land. In 1999, those three tracts were transferred to appellants, who then subdivided the land and sold them to a number of individuals, including appellees. Those deeds including the following language: "all mineral rights shall pass to buyer. Seller reserves the rights to any existing leases."

In 2010 or 2011, appellant realized he might be able to collect royalties under the Berry lease and that some of his purchase agreements omitted the reservation-of-rights language. He asked various parties, including

appellees, to reform the deeds and some agreed. Appellees did not, however, and so appellant brought the action for equitable reformation.

The trial court ultimately found that the claim was barred by the 10-year statute of limitations found at R.C. 2305.14 because the claim was to recover personal property only. Appellant then appealed. On appeal the Seventh Appellate District affirmed the trial court's decision, finding that a review of the claims and arguments establish it was covered by the statute of limitations for personal property found at R.C. 2305.14.

The Bullet Point: In determining which statute of limitation applies, "courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors[;] the form is immaterial." R.C. 2305.14 applies to claims in equity, which includes claims for deed reformation.

Cleve Corp. v. Franklin Cty. Bd. of Revision, 10th Dist. Franklin No. 17AP-37, 2017-Ohio-8090.

This was an appeal of the Board of Tax Appeals (BTA) determining the value of property for tax year 2014. The subject property is a UPS distribution facility which consists of more than 300,000 square feet. It was built for UPS as a truck terminal and continues to be used for that purpose. The property is considered a "special purpose" property for tax purposes because of the number of dock doors and because it was built to fit the unique needs of UPS. The property was initially assessed at $13,500,000. Appellant filed a complaint challenging that amount, claiming the property should be valued at $6,500,000. The BTA agreed with the initial assessment, and appellant appealed.

The Tenth Appellate District affirmed the BTA's decision on appeal noting that it is to give deference to the BTA's decisions as long as it is supported by reliable and probative evidence.

The Bullet Point: As a general rule, land in Ohio should be taxed based on market exchange valuation—the amount for which that property would sell on an open market by a willing seller to a willing buyer—rather than the current use value or the property. An exception to this general rule exists under the "special purpose" property doctrine. "Under this doctrine, a property's use may form the basis of the property's value if it is '"special purpose" in nature,' meaning that it was built for a unique purpose, is in good condition, and is being used for that purpose—both presently and for the foreseeable future."

Cruz v. PNC Bank, N.A., 6th Cir. No. 17-3091 (Oct. 4, 2017).

This was an appeal of a trial court's decision to dismiss a class action against PNC Bank for purported violations of Ohio's Securities Act, R.C. 1707.01 (OSA). The plaintiffs were victims of a Ponzi scheme perpetrated by William Apostelos and his associates, who sold them unregistered securities (both promissory notes and corporate membership unit certificates) in violation of the OSA. The proceeds from those sales were deposited into a PNC account and monthly interest payments were made to the investors from that account. Because of this, the plaintiffs alleged that PNC "participate in or aided" Apostelos in his violation of the OSA and were liable for the

damages suffered by the plaintiffs.

PNC moved to dismiss the complaint alleging that it could not be liable under the OSA because its actions "did not go beyond normal banking activities" and it did not directly assist Apostelos in the sale of the unregistered securities. The District Court dismissed the complaint and plaintiffs appealed. On appeal, the Sixth Circuit Court of Appeals affirmed. In so ruling, the Court found that plaintiffs had failed to allege any facts whatsoever to establish that PNC participated or coordinated with Apostelos beyond conducting normal banking activities, which was insufficient to establish a violation of the OSA.

The Bullet Point: Ohio Revised Code § 1707.43(A) provides remedies for the purchaser in an unlawful sale of securities. In addition to allowing the purchaser to void a sale or contract for sale made in violation of the OSA, section 1707.43(A) states that "[t]he person making such sale or contract for sale, and every person that has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to the purchaser . . . for the full amount paid by the purchaser." Liability under section 1707.43(A) "targets the sales transaction" and "requires an act of participation or assistance in the sale and some form of remuneration, either direct or indirect." This requires some participation and coordination beyond normal banking activities: "[t]he willingness of a bank to become the depository of funds does not amount to a personal participation or aid in the making of a sale" under section 1707.43(A).