2022 IL App (1st) 211318-U

FIFTH DIVISION
NOVEMBER 23. 2022

Nos. 1-21-1318, 1-21-1340, 1-21-1376, 1-12-1375, 1-21-1374, 1-21-1395 cons.

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELLIOTT ASSOCIATES, L.P.; ELLIOTT INTERNATIONAL, L.P.; THE LIVERPOOL LIMITED PARTNERSHIP (NAMED AS "THE LIVERPOOL PARTNERSHIP"); TYRUS CAPITAL EVENT MASTER FUND LIMITED; TYRUS CAPITAL OPPORTUNITIES MASTER FUND LIMITED; PENTWATER MERGER ARBITRAGE MASTER FUND LTD.; PENTWATER EQUITY OPPORTUNITIES MASTER FUND LTD.; PWCM MASTER FUND LTD.; and OCEANA MASTER FUND LTD.,	)	Appeal from the Circuit Court of Cook County.
	)	No. 16 L 6279
Plaintiffs-Appellants,	)	
v.	)	
ABBVIE, INC.,	)	Honorable Margaret A. Brennan, Judge Presiding.
Defendant-Appellee.	)	

MASON CAPITAL L.P. and MASON CAPITAL MASTER FUND L.P.,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
	)	No. 17 L 10409
v.	)	

Nos. 1-21-1318)
1-21-1340)
1-21-1376)
1-12-1375)
1-21-1374)
1-21-1395) Cons.

ABBVIE, INC. and RICHARD GONZALEZ,	)	Honorable
	)	Margaret A. Brennan,
Defendants-Appellees.	)	Judge Presiding.

HUDSON BAY MASTER FUND LTD. and HUDSON BAY MERGER ARBITRAGE OPPORTUNITIES MASTER FUND LTD.,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	No. 17 L 10407
v.	)	
ABBVIE, INC. and RICHARD GONZALEZ,	)	Honorable
	)	Margaret A. Brennan,
Defendants-Appellees.	)	Judge Presiding.

WCM ALTERNATIVES: EVENT-DRIVEN FUND; WCM MASTER TRUST; THE MERGER FUND; and THE MERGER FUND VL,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	No. 17 L 10408
v.	)	
ABBVIE, INC. and RICHARD GONZALEZ,	)	Honorable
	)	Margaret A. Brennan,
Defendants-Appellees.	)	Judge Presiding.

ODS CAPITAL, LLC,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 17 CH 8448
ABBVIE, INC. and RICHARD GONZALEZ,	)	Honorable
	)	Margaret A. Brennan,
Defendants-Appellees.	)	Judge Presiding.

Nos. 1-21-1318)
1-21-1340)
1-21-1376)
1-12-1375)
1-21-1374)
1-21-1395) Cons.

FIRST NEW YORK SECURITIES LLC, FNY MANAGED ACCOUNTS LLC; and GOOSE HILL CAPITAL LLC,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	No. 17 L 9229
v.	)	
ABBVIE, INC. and RICHARD GONZALEZ,	)	Honorable Margaret A. Brennan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Connors and Justice Mitchell concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order granting summary judgment is affirmed.

¶ 2 The plaintiffs-appellants, Elliott Associates, L.P., Elliott International, L.P., and The Liverpool Partnership; Tyrus Capital Event Master Fund Limited and Tyrus Capital Opportunities Master Fund Limited; First New York Securities LLC and FNY Managed Accounts LLC; Goose Hill Capital LLC; Mason Capital L.P. and Mason Capital Master Fund L.P.; Hudson Bay Master Fund Ltd. and Hudson Bay Merger Arbitrage Opportunities Master Fund Ltd.; Pentwater Merger Arbitrage Master Fund Ltd., Pentwater Equity Opportunities Master fund Ltd., PWCM Master Fund Ltd., and Oceana MasterFund Ltd.; and WCM Alternatives: Event-Driven Fund, WCM Master Trust, The Merger Fund, and The Merger Fund VL; appeal from the circuit court of Cook County's judgment granting summary judgment in favor of the defendants-appellees, AbbVie, Inc. (AbbVie) and Richard Gonzalez on all their collective claims. For the following reasons, we affirm

the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The plaintiffs are all different hedge funds. AbbVie is a Delaware-incorporated pharmaceutical company with its principal place of business in North Chicago, Illinois. Mr. Gonzalez is AbbVie's chief executive officer and chairman of the board.

¶ 5 On June 20, 2014, AbbVie announced that it had approached another pharmaceutical company, Shire PLC (Shire), with an acquisition proposal.[1] Shire is organized under the laws of the island of Jersey, a self-governing dependency of the United Kingdom, and headquartered in Ireland. AbbVie disclosed that, as part of its acquisition proposal with Shire, AbbVie would reincorporate as a foreign company outside of the United States and create a tax inversion, which would significantly reduce the amount it paid in taxes in the United States.

¶ 6 On June 25, 2014, AbbVie issued a press release regarding the merger with Shire. The press release stated, in relevant part:

> "The proposed combination is strategically compelling to AbbVie and Shire and would create a larger and more diversified biopharmaceutical company with multiple leading franchises and significant financial capacity for future acquisitions, investment and enhanced shareholder distributions and value creation[.]
>
> ***

[1]Shire is not a party to this appeal.

AbbVie believes this transaction is highly executable[.]"

The press release further stated that with the merger, AbbVie would be able to avail itself of a "[g]lobally competitive tax rate" which would provide AbbVie "with flexible access to [] global cash flows."

¶ 7 On July 18, 2014, AbbVie and Shire announced they had reached agreed terms and signed a merger agreement. The merger agreement provided that AbbVie would merge with Shire, and after the merger, AbbVie would be the surviving entity. The new entity would then reincorporate in Jersey. The merger agreement projected a new, lower tax rate for the newly merged entity as a consequence of reincorporation under the laws of Jersey. The plaintiffs all purchased stock in Shire based upon the merger agreement.

¶ 8 Also on July 18, 2014, Mr. Gonzalez held an investor conference call to discuss the merger agreement. During the conference call, investment analysts asked Mr. Gonzalez about the emerging political debate in the United States regarding tax inversions and the risk of United States government action to eliminate or restrict tax inversion benefits. Mr. Gonzalez answered that AbbVie had "studied this transaction very, very carefully" and believed it was "highly executable." He stated that the tax inversion was an additional benefit but "not the primary rationale" for the proposed merger agreement.

¶ 9 On September 22, 2014, while the merger agreement was pending, the United States Treasury Department announced new federal tax regulations that would limit certain benefits of tax inversions and diminish the ability of inverted companies to pay a lower tax rate to the United States (the treasury notice).

¶ 10 On September 29, 2014, Mr. Gonzalez issued a letter to all Shire employees, which AbbVie publicized to investors and filed with the United States Securities and Exchange Commission. That letter stated that AbbVie was still planning to move forward with the merger agreement and that Mr. Gonzalez was "more energized than ever" and "confident" about the proposed merge. That same day, AbbVie also published a letter to its own employees stating that it was aiming for a fourth-quarter close of the merger agreement.

¶ 11 On October 14, 2014, AbbVie announced that it was reconsidering the merger agreement, due, in part, to the September 22, 2014, treasury notice issued by the U.S. Government. On October 15, 2014, AbbVie confirmed that it was terminating the merger agreement. AbbVie's announcement stated:

> "Although the strategic rationale of combining our two companies remains strong, the agreed upon valuation is no longer supported as a result of the changes to the tax rules and we did not believe it was in the best interests of our stockholders to proceed."

Following AbbVie's announcement that it was not moving forward with the merger agreement, Shire's American depository receipts fell 30% in value in one day.[2]

¶ 12 Beginning on June 24, 2016, the plaintiffs all filed complaints against AbbVie and Mr. Gonzalez[3], alleging fraudulent misrepresentation and fraudulent concealment. Specifically, the

[2]American depository receipts (ADRs) are negotiable certificates representing ownership in publicly traded foreign corporations. *Cohan v. Citicorp*, 266 Ill. App. 3d 626, 627 (1993).

[3]Not all of the complaints named Mr. Gonzalez as a defendant.

plaintiffs alleged that the statements made by AbbVie and Mr. Gonzalez in June, July, and September 2014 regarding the merger agreement with Shire misrepresented and concealed the significance of the tax savings on the merger closing. The trial court subsequently consolidated all the cases since the complaints were substantially similar.

¶ 13 On April 5, 2021, AbbVie and Mr. Gonzalez moved for summary judgment. The motion argued that summary judgment was appropriate on all of the plaintiffs' claims because: (1) the statements at issue were non-actionable statements of opinion and/or of future intent; (2) there was no evidence to demonstrate that the statements were false; and (3) the bespeaks caution doctrine barred the claims.[4] Additionally, the motion argued that summary judgment was proper "on Certain Securities Subject to the dormant Foreign Commerce Clause" since the securities purchased in Shire were foreign.

¶ 14 On September 15, 2021, following a hearing on AbbVie's and Mr. Gonzalez's motion for summary judgment, the trial court granted the motion and dismissed the plaintiffs' actions with prejudice, "for reasons stated on the record." During the hearing, the trial court first addressed the June and July statements at issue, stating, "those statements include terms such as 'beliefs' and as such are opinion statements." The court further held:

> "Additionally, the Court recognizes that the bespeaks caution doctrine applies. There was ample evidence for -- you know, the plaintiffs are in a position

[4]The bespeaks caution doctrine provides that cautionary language in a securities offering document can negate the materiality of any alleged misrepresentation or omission. *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 18.

> here, they're evaluating, they're, you know, kind of rolling the dice hoping to make some money on this, and the bespeaks caution, they had to do their own analysis, they had to look, they had to be aware that there were possibilities that this may not come through, so for those reasons, the June and July statements are out."

Regarding the September statements, the trial court similarly found that those statements were not an actionable statement of fact. The trial court explained:

> "Mr. Gonzalez makes a statement saying -- you know, quite frankly, I think, you know, most people reading that is the kind of fluffy statement to feel good if you're with Shire, fluffy statement to feel good if you're with AbbVie, 'I still like all of you good people, I think you're good people, and we'll all move forward together on this.' It doesn't rise to the level of being actionable, again, it is opinion, ***."

The trial court therefore granted summary judgment in favor of AbbVie and Mr. Gonzalez on the plaintiffs' fraudulent misrepresentation claims.

¶ 15 Turning to the plaintiffs' fraudulent concealment claims, the trial court held that those claims failed because AbbVie owed no legal duty to the plaintiffs since there was no fiduciary relationship between the parties, as the plaintiffs had purchased stock in Shire and not AbbVie. The trial court consequently granted summary judgment in favor of AbbVie and Mr. Gonzalez on the plaintiffs' fraudulent concealment claims.

¶ 16 Finally, the trial court also held that summary judgment was appropriate pursuant to the dormant Foreign Commerce Clause, stating, "If it's traded outside of the United States, it doesn't

-- and they're a foreign corporation stock, [the states] have nothing to say about that, ***." This appeal followed.

¶ 17 ANALYSIS

¶ 18 We note that we have jurisdiction to consider this matter, as all of the plaintiffs filed a timely notice of appeal. See Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. July 1, 2017). This court subsequently consolidated all the appeals into one matter.

¶ 19 The plaintiffs present the following issue: whether the trial court erred in granting summary judgment in favor of AbbVie and Mr. Gonzalez. The plaintiffs argue that AbbVie's and Mr. Gonzalez's June, July, and September 2014 statements were actionable assertions of fact, not opinions, and were not barred by the bespeaks caution doctrine, and so the trial court erred in granting summary judgment on their fraudulent misrepresentation claims. They also argue that the trial court erred in granting summary judgment on their fraudulent concealment claims because AbbVie had a duty to disclose that its primary rationale for the merger agreement was the tax savings. The plaintiffs additionally argue that the trial court erred in finding that summary judgment was appropriate pursuant to the dormant Foreign Commerce Clause because it does not apply.

¶ 20 As an initial matter, we note that the plaintiffs' opening brief and reply brief both exceed the page limits as provided by Supreme Court Rule 341(b)(1) (eff. Oct. 1, 2020) ("The brief of appellant and brief of appellee shall each be limited to 50 pages, and the reply brief to 20 pages."). Our supreme court rules are not suggestions but instead are meant to be strictly followed. "Where a party fails to comply with these procedural rules we may, in our discretion, strike the brief and

dismiss the appeal." *Gillard v. Northwestern Memorial Hospital*, 2019 IL App (1st) 182348, ¶ 45. The plaintiffs did not seek leave from this court to exceed the page limits as set by our Supreme Court Rules. Nonetheless, in the interest of justice, we decline to strike the plaintiffs' briefs and will resolve this matter on the merits.

¶ 21 Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2020); *Nine Group II, LLC v. Liberty International Underwriters, Inc.*, 2020 IL App (1st) 190320, ¶ 34. "A genuine issue of material fact exists where the facts are disputed or where reasonable minds could draw different inferences from the undisputed facts." *Nine Group II, LLC*, 2020 IL App (1st) 190320, ¶ 34. In appeals from summary judgment rulings, our review is *de novo*, which means we perform the same analysis that a trial court would perform. *Id.*

¶ 22 In order for a plaintiff to prevail on a claim of fraudulent misrepresentation, they must establish the following elements: (1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) an intent to induce the plaintiff to act; (4) action by the plaintiff in justifiable reliance on the truth of the statement; and (5) damage to the plaintiff resulting from such reliance. *Doe v. Dilling*, 228 Ill. 2d 324, 342–43 (2008). Here, the trial court granted summary judgment against the plaintiffs on their fraudulent misrepresentation claims on the basis that the statements made by AbbVie and Mr. Gonzalez in June, July, and September 2014 were not false statements of material fact, but rather were non-actionable opinions.

"An opinion is not a false statement of material fact and does not support an action for fraud." *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 30. Whether a statement is one of fact or of opinion depends on all the facts and circumstances of a particular case. *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 704 (2002).

¶ 23 Looking at the statements at issue, we agree with the trial court that those statements were AbbVie's non-actionable opinions regarding the likelihood of the merger with Shire successfully closing. Indeed, the June and July statements were that AbbVie found the merger with Shire to be "strategically compelling" and "highly executable" after studying the "transaction very, very carefully." These statements are clearly expressions of opinion regarding AbbVie's reasoning for moving forward with the merger, which is not the same as providing facts intended to be relied upon. In addition, it is well established that statements concerning future intent or conduct are not actionable as fraud. *Illinois Non-Profit Risk Management Association v. Human Service Center of Southern Metro-East*, 378 Ill. App. 3d 713, 723 (2008).

¶ 24 Even Mr. Gonzalez's statement in July that the tax inversion was an additional benefit but "not the primary rationale" for the merger agreement was not a statement of fact. Again, viewing this statement in the context of all the circumstances, more specifically against the backdrop of the possible issuance of a tax treasury notice, this statement was a mere expression of AbbVie's *thoughts and reasoning* regarding the merger agreement under the circumstances. Thus, contrary to the plaintiffs' assertion, this statement was *not a representation of fact* that the tax inversion was entirely insignificant to the merger agreement. Indeed, a representation is one of opinion rather than fact if it expresses the speaker's belief, without certainty, as to the existence

of a fact, and therefore cannot form the basis of an action for fraudulent misrepresentation. *Antonacci v. Seyfarth Shaw, LLP*, 2015 IL App (1st) 142372, ¶ 35. Even specific financial projections are considered to be statements of opinion, not fact. *Illinois Non-Profit Risk Management Association*, 378 Ill. App. 3d at 710. That is precisely the situation here.

¶ 25 Likewise, the September statements, which occurred after the treasury notice was issued and stated that Mr. Gonzalez was "more energized than ever" and "confident" in the merger agreement, and that AbbVie was still aiming to close the merger agreement, were mere expressions of opinion concerning *future intent or conduct*. See *Merrilees*, 2013 IL App (1st) 121897, ¶ 41 (assurances as to future events are generally not considered misrepresentations of fact); *Power v. Smith*, 337 Ill. App. 3d 827, 832–33 (2003) (statements regarding the future profitability of an endeavor are not statements of material fact). We also note that the plaintiffs are sophisticated hedge funds experienced in these types of financial transactions. They are in the business of analyzing mergers and similar transactions. The fact that they were raising questions about the looming treasury notice highlights that they were doing their own evaluation of the transaction and seeking AbbVie's *opinions* on the complex matter.

¶ 26 Accordingly, we find that no genuine issue of material fact exists as to whether the June, July, and September 2014 statements were non-actionable opinions and, therefore, not material statements of fact. Thus, the plaintiffs' fraudulent misrepresentation claims fail, and the trial court properly granted summary judgment in favor of the defendants on the plaintiffs' fraudulent misrepresentation claims on those grounds.

¶ 27 We now review the trial court's grant of summary judgment in favor of the defendants on

the plaintiffs' fraudulent concealment claims. To prove fraudulent concealment, a plaintiff must establish that: (1) the defendant concealed a material fact under circumstances where the defendant had a duty to speak; (2) the defendant intended to induce a false belief; (3) the plaintiff could not have discovered the truth through reasonable inquiry or inspection, or was prevented from making a reasonable inquiry or inspection, and justifiably relied upon the defendant's silence as a representation that the fact did not exist; (4) the concealed information was such that the plaintiff would have acted differently had he or she been aware of it; and (5) the plaintiff's reliance resulted in damages. *Phillips v. DePaul University*, 2014 IL App (1st) 122817, ¶ 82 (quoting *Bauer v. Giannis,* 359 Ill. App. 3d 897, 902–03 (2005)). The trial court granted summary judgment on the basis that AbbVie owed no required duty to speak to the plaintiffs.

¶ 28 Certainly, there is no duty to speak absent a fiduciary or other legal relationship between the parties. *Neptuno Treuhand-Und Verwaltungsgesellschaft Mbh v. Arbor*, 295 Ill. App. 3d 567, 573 (1998). And as the trial court correctly pointed out, the plaintiffs purchased *Shire* stock, *not AbbVie* stock. Under these facts and circumstances, a fiduciary relationship never arose between the plaintiffs and AbbVie. See *Guarantee Trust Life Insurance Co. v. Kribbs*, 2016 IL App (1st) 160672, ¶ 37 (a fiduciary relationship may arise as a matter of fact, where one party reposes special trust and confidence and thereby gains superiority and influence over the subservient party, or may arise as a matter of law, such as between a securities broker and his customer). There was no such relationship between the plaintiffs and AbbVie. AbbVie therefore owed no duty to speak or disclose to the plaintiffs any information related to its decision making

regarding the merger agreement. Thus, no genuine issue of material fact exists, and the trial court properly granted summary judgment on the plaintiffs' fraudulent concealment claims.

¶ 29 We therefore affirm the trial court's order granting summary judgment in favor of AbbVie and Mr. Gonzalez and dismissing the plaintiffs' actions with prejudice. Because we affirm the trial court's rulings on these grounds, we need not address the trial court's alternative grounds for granting summary judgment to the defendants, *i.e.,* the bespeaks caution doctrine and the dormant Foreign Commerce Clause.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.