

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

R. A. HOLMAN & CO., INC.,

Plaintiff,

v.

SECURITIES AND EXCHANGE COMMISSION
et al.,

Defendants.

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:

Civil Action
No. 1888-62

STATEMENT OF THE DEFENDANTS IN OPPOSITION
TO PLAINTIFF'S ATTEMPT TO RENEW ITS MOTION
FOR A PRELIMINARY INJUNCTION, AND SUPPLEMENTAL
STATEMENT OF POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION

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The defendants submit this statement to point out that the motion for preliminary injunction which plaintiff is now attempting to "renew" has already been heard and has been determined adversely to the plaintiff.

FACTS

This is an action to enjoin the defendants, the Securities and Exchange Commission, its individual members, and one of its hearing examiners ^{1/} from continuing an administrative proceeding in which the plaintiff, a securities broker and dealer registered with the Commission, is a respondent. The administrative proceeding has been pending for over three years before William W. Swift, the hearing examiner, and the record contains over 8,000 pages of transcript. This is the plaintiff's fifth attempt to invoke a judicial order staying the proceeding and plaintiff's third attempt to disrupt the proceeding by seeking a preliminary injunction in this Court.

^{1/} The hearing examiner is not a party, having never been served with process in this action; also it should be noted that J. Allen Frear, Jr., who was made a party defendant, is no longer a member of the Commission.

On June 13, 1961, plaintiff filed an action in this Court to enjoin the proceeding on the basis of charges that improper ex parte communications occurred between the Commission's staff and members of the Commission, that a quorum of the Commission was not present when the order initiating the proceeding was entered and that a certain rule of the Commission was invalidly depriving plaintiff of a portion of its securities business during the pendency of the proceeding. This Court, Judge Tamm sitting, dismissed the complaint on the motion of the Commission. The Court of Appeals, after denying a request for a stay, affirmed the judgment of this Court. R. A. Holman & Co., Inc. v. Securities and Exchange Commission, 299 F.2d 127 (1962). A petition for a writ of certiorari was denied on June 4, 1962. 370 U.S. 911.

On June 13, 1962, a few days after the Supreme Court's refusal to review the Court of Appeals' decision in that case, and one year to the day after the complaint in that case had been filed, plaintiff commenced the present suit by filing a second complaint again seeking to enjoin the administrative proceeding. The bases upon which preliminary and permanent relief are prayed for by the plaintiff in this action are (1) that under the opinion of the Court of Appeals for the District of Columbia Circuit in Amos Treat & Co., Inc. v. Securities and Exchange Commission, 306 F.2d 260 (1962), two of the individual members of the Commission who were allegedly participating in the proceeding were disqualified from so participating because of prior service on the staff of the Commission (Count I), and (2) that the Commission's hearing examiner, who had been presiding over the hearing in the proceeding, was disqualified from so presiding because he had passed the age of mandatory retirement and therefore allegedly served at the will of the Commission, without what was claimed to be the requisite independence

from the Commission (Count II). Plaintiff contends that these alleged infirmities violate both the Administrative Procedure Act and the Fifth Amendment to the Constitution.

The motion for preliminary injunction which plaintiff is now attempting to renew was filed with the complaint on June 13, 1962. That motion sought "an Order granting preliminary injunction against the defendants . . . upon the grounds and in accordance with the prayers as set forth in the verified complaint . . ." The motion came on for hearing before this Court, Judge Hart sitting, on June 29, 1962. Although the preliminary injunction was sought on the basis of both counts of the complaint, counsel for plaintiff during the oral argument devoted his discussion to Count I and failed to discuss Count II. Upon conclusion of his argument and before the Court made its ruling counsel for plaintiff was asked by the Court whether he no longer sought a preliminary injunction on the basis of the second count (Transcript, p. 14):

"The Court: Now what about this Hearing Examiner, are you very serious about that?"

Counsel for plaintiff replied that he was now seeking a preliminary injunction only on the basis of the first count:

"Mr. Freeman: Yes, we are, Your Honor, but as far as this is concerned, if we get this preliminary injunction, that will resolve the question. This is a basic question and the other is secondary. It is novel. We don't have an all-fours case in the Court of Appeals and we prefer to rest for the present on the motion. [emphasis added]

The Court: The first point; all right."

During the argument presented by counsel for the Commission the Court stated that it would not decide whether a preliminary injunction should issue on the basis of Count II because the Court now understood that counsel for plaintiff no longer desired a preliminary injunction on that basis (Transcript, p. 30):

"Mr. Ferber [counsel for defendants]:

* * * *

Now, I don't know whether Mr. Freeman has conceded arguendo, at least, that on the Hearing Examiner point —

The Court: Well, he at least hasn't prosecuted it and unless he does, I won't consider it.

Mr. Ferber: Then I will not go into that"

Counsel for plaintiff did not thereafter prosecute the hearing examiner point. The Court granted plaintiff's motion and entered a preliminary injunction on July 6, 1962, which order states that it was issued ". . . on the basis of Count I of the complaint only"

On appeal by the Commission, the issuance of that preliminary injunction was reversed by the Court of Appeals on June 13, 1963, the opinion concluding that the plaintiff was not relieved from the requirement that he exhaust administrative remedies. After the Court of Appeals denied plaintiff's petition for a rehearing en banc on August 1, 1963, plaintiff's motion to stay the transmission of the judgment pending application for a writ of certiorari was denied on October 14, 1963. 2/ In accordance with the judgment of the Court of Appeals this Court on October 25, 1963, entered an order vacating and setting aside the preliminary injunction.

On November 19, 1963, plaintiff by having the motion set down for a second hearing is making its third attempt to secure a preliminary injunction of the Commission's administrative proceeding. Plaintiff is not now asserting any ground for a preliminary injunction that was not asserted in plaintiff's motion of June 13, 1962, the granting of which was reversed by the Court of Appeals.

ARGUMENT

Having previously elected not to prosecute its motion for preliminary relief on the ground of the purported disqualification of the hearing examiner, plaintiff has abandoned that ground as a basis for preliminary relief.

It clearly appears from the record in this case that plaintiff

2/ Plaintiff's petition for a writ of certiorari is pending.

is not entitled to another hearing on the questions whether a preliminary injunction should issue on the basis of either Count I or Count II of the complaint. In its motion filed over 17 months ago plaintiff prayed for a preliminary injunction on the basis of both counts. During the hearing on that motion, over 16 months ago, this Court was led to believe that plaintiff had elected to seek a preliminary injunction only on the basis of the first count. Counsel for plaintiff said: ". . . [I]f we get this preliminary injunction, that will resolve the question [of the hearing examiner's disqualification] . . ." (Transcript, p. 14). Judge Hart clearly indicated that the reason he made no determination as to the issue of the qualification of the Commission's hearing examiner was not because he found it unnecessary, but rather because plaintiff "hasn't prosecuted it" (Transcript, p. 30). This Court in effect cautioned counsel for plaintiff that he would waive his opportunity for a preliminary injunction as to Count II if he failed to press it. Counsel for plaintiff chose not to act in the face of this warning.

The plaintiff compounded its failure to prosecute the hearing examiner issue when the defendants appealed from the order of this Court granting the preliminary injunction. Plaintiff made no effort whatever to urge alternatively to the Court of Appeals that if the Court should find that the injunction was erroneously issued on the basis of the first count of the complaint that court should nevertheless affirm on the basis of the disqualification of the hearing examiner alleged in the second count. 3/

3/ Plaintiff stated in its brief to the Court of Appeals that, while the second count of the complaint had not been dismissed, the preliminary injunction was based only on the first count. The following appears on page 7 of the brief filed by plaintiff with the Court of Appeals and is the only reference in that brief to Count II:

"The Complaint contains a second count concerning the disqualification of the hearing officer on the ground that his appointment was expressly made at the will of the Commission and therefore he was not independent of the Commission as required by the Administrative Procedure Act. (JA 16-26). The present injunction was not granted on the ground of this count of the Complaint which is still pending"

In its opinion the Court of Appeals reversed the order of this Court that had granted the injunction. If the Court of Appeals had understood that a question remained whether a preliminary injunction could properly be issued on the basis of Count II it presumably would at least have remanded for a determination of that question. But the Court of Appeals, as well as this Court and the defendant-appellees, had been led by plaintiff's actions to believe that a preliminary injunction was not sought on that ground. Plaintiff now changes its position and apparently claims it has always intended to seek preliminary relief on the basis of the second count as well. But the orderly procedures of this Court and the Court of Appeals should not be subordinated to plaintiff's attempt to have more than one day in court on its claim for a preliminary injunction. This Court was entitled to know in June of 1962 what issues it would be asked to decide on the motion for preliminary relief. When Judge Hart asked that question of counsel for plaintiff, Judge Hart at least should have been advised that plaintiff contemplated reserving the second count of the complaint in the event plaintiff ultimately was unsuccessful on the basis of the first count. Then this Court would have had the opportunity at that time to deal appropriately with plaintiff's intention to split its grounds for relief.

We urge this Court not to permit plaintiff's strategy of delay through piecemeal litigation to be successful. This Court should reject plaintiff's attempt to have a second hearing upon its motion for preliminary injunction by holding plaintiff to its prior election.

* * * * *

In view of plaintiff's waiver of any right it might have had to a preliminary injunction on the basis of the second count of the complaint, we deem it unnecessary for this Court to consider

other matters relative to the motion plaintiff is attempting to renew. In the event this Court disagrees, however, we respectfully refer this Court to the discussion contained on pages 1 through 11 and 18 through 30 of the Statement of Opposing Points and Authorities In Opposition to Plaintiff's Motion for a Preliminary Injunction filed with this Court by the defendants on June 25, 1962. The reasons why plaintiff's motion should not have been granted that were presented in that Statement, and which are now reasserted, may be summarized as follows:

1. Plaintiff has not exhausted its administrative remedies, and the allegations of Count II of the complaint come squarely within the doctrine announced by the Court of Appeals for this Circuit in Riss and Company v. Interstate Commerce Commission, 179 F.2d 810 (1950), where a challenge to the qualification of a hearing examiner appointed allegedly in violation of Section 11 of the Administrative Procedure Act was rejected as premature. See also the opinion of the Court of Appeals in the present case.

2. There is no denial of due process or violation of Section 11 of the Administrative Procedure Act arising out of the fact that Hearing Examiner Swift is the presiding officer in the proceeding against plaintiff.

3. Plaintiff is seeking by an injunctive action to have this Court review the order of the Commission which held that Hearing Examiner Swift was properly appointed. Congress has by statute provided that jurisdiction to review Commission orders lies exclusively with the Courts of Appeals.

4. The doctrine of res judicata prevents the "piecemeal" litigation of plaintiff's cause of action which it is attempting here. At the time plaintiff made its first attempt to enjoin the proceeding against it, in June of 1961, there were available all of the facts relative to the situation of Hearing Examiner Swift. Yet

plaintiff's complaint in that first injunctive action contained no reference to or claim respecting such facts.

5. It would be inequitable to grant the relief sought where plaintiff has failed to make timely objections and has otherwise engaged in dilatory tactics.

CONCLUSION

For the foregoing reasons plaintiff's attempt to renew its motion for a preliminary injunction should be rejected; we respectfully submit that in no event should a preliminary injunction issue.

Philip A. Loomis, Jr.
General Counsel

David Ferber
Associate General Counsel

John A. Dudley
Special Counsel

Donald R. Jolliffe
Attorney

Michael Joseph
Attorney

Dated: December, 1963.

Securities and Exchange Commission
Washington, D. C. 20549

CERTIFICATE OF SERVICE

I, Michael Joseph, being a member of the bar of this Court, hereby certify that I have caused a copy of the foregoing Statement to be served upon plaintiff herein by this day delivering a copy thereof to counsel for plaintiff at 1229 19th Street, Washington, D. C.

Michael Joseph

Dated: December 2, 1963.