UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

DANIEL L. ZESSINGER,

Defendant.

Case No. 4:01CV1222 RWS

MEMORANDUM AND ORDER

Plaintiff Securities and Exchange Commission ("the SEC") filed this lawsuit alleging that Defendant Daniel Zessinger ("Zessinger") failed to comply with the terms of the Initial Decision of an Administrative Law Judge ("ALJ") of the SEC and the Order finalizing the Initial Decision issued by the SEC.

This matter is before the Court on the SEC's Motion for Summary Judgment. Because no genuine issue of material fact exist, the Court will grant the SEC's motion.

I. Facts

On September 28, 1995, the SEC issued an Order Instituting Public Proceedings ("OIP") pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b), 19(h) and 21C of the Securities Exchange Act of 1934. The OIP alleged that between November, 1990 and May, 1992, Zessinger, as a registered representative of Prudential Securities, Inc. ("Prudential"), churned customer accounts and engaged in other fraudulent misconduct. An evidentiary hearing was held on March 13 and 14, 1996 before an ALJ.

Zessinger is a college graduate and was employed by Prudential as a broker-dealer in the St. Louis area from November, 1990 to May, 1992. This particular investigation uncovered Zessinger's misconduct in connection with his client, Mrs. Mildred Weir. Mrs. Weir, now deceased, was a ninety year old widow with modest assets suffering from Alzheimer's disease. Mrs. Weir's son and his wife were handling her investments. None of these individuals were sophisticated with regard to investment matters. Accordingly, an account was opened with Zessinger for Mrs. Weir in 1990. Mrs. Weir's son's primary goal was to have the financial ability to place Mrs. Weir in a nursing home in the near future. Consequently, the Weirs' were interested in conservative management of their funds.

Rather than follow the Weirs' wishes, Zessinger invested the money into low-priced speculative stock and new issues and engaged in margin trading.[1] Not only did Zessinger not follow the Weirs' wishes, he misrepresented the status of the account. When Mrs. Weir's son asked why the account was losing money, Zessinger convinced him that the statements were incorrect and they would be changed.

The Weirs finally had the account liquidated by another broker who told them the account was unprofitable and had been churned. The account lost over $65,000 during the time it was handled by Zessinger. The ALJ explained that churning occurs "when a securities broker enters into transactions and manages a customer's account for the purpose of generating commissions and in disregard of his customer's interest."

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[1]Zessinger apparently asked Mrs. Weir's son to sign an agreement form that had not yet been filled out. Zessinger was a trusted broker, so Mrs. Weir's son signed the form. The form was an agreement to allow Zessinger to engage in margin trading.

The ALJ issued her Initial Decision on August 2, 1996.[2] The ALJ found that Zessinger had violated antifraud provisions[3] and was required to disgorge his ill-gotten gains of $19,340. In addition, the ALJ ordered Zessinger to pay pre-judgment interest in the amount of $7,652[4] and a civil penalty of $100,000. This Initial Decision became final on October 8, 1996. Zessinger has not paid any of these damages.

II. Discussion

A. Legal Standard

When considering a motion for summary judgment, the Court must determine whether the record, when viewed in the light most favorable to the non-moving party, shows any genuine issue of material fact. Fed. R. Civ. P. 56(c). See generally, Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record, which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. There is, however, no express or implied requirement in Rule 56 that the moving party must support its motion with affidavits or other materials *negating* the opponent's claim. Id. The burden is not on the moving party to produce evidence

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[2]In her decision, the ALJ noted that Zessinger had already been convicted of two other securities-related felonies committed during the time he was employed by Prudential. Zessinger's convictions included mail fraud and securities fraud.

[3]Specifically, the ALJ found that Zessinger violated § 17(a) of the Securities Act of 1933, § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

[4]The ALJ explained that this amount was pre-judgment interest computed from June 1, 1992, one month following the end of Zessinger's activities in which he received the ill-gotten gains, through July 31, 1996.

showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Id. at 325. Instead, "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. As long as the record before the court demonstrates that there is no genuine issue of material fact, summary judgment should be granted. Id. at 323.

When faced with a motion for summary judgment meeting the standard set forth above, the non-moving party may not rest upon the mere allegations or denials of its pleadings alone, but must introduce affidavits, depositions, answers to interrogatories, or admissions on file designating *specific facts* showing that there is a genuine issue of material fact for trial. Celotex, 477 U.S. at 324; Jetton v. McDonnell Douglas, Corp., 121 F.3d 423, 427 (8th Cir. 1997); Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987). Further, a plaintiff facing a motion for summary judgment must designate *specific facts* showing a genuine issue of material fact on each essential element of his claim. Id.

B. Anaylsis

The facts are not disputed in this case. Zessinger does not argue that he should not be fined. He agrees that he should be held responsible for the $19,340 as disgorgement. Zessinger, however, asks for leniency with regard to the interest payments and the civil penalty. He explains that he does not have the money to pay these damages.

The SEC is authorized to order payment of disgorgement and civil penalties in any administrative proceeding brought pursuant to § 15(b)(6) of the Securities Exchange Act, against any person associated with a broker or dealer if it finds, on the record after notice

and opportunity for hearing, that such person has willfully violated provisions of the various federal securities laws. See 15 U.S.C. § 78u-2(1). Section 21(e) of the Securities Exchange Act provides:

> Upon application of the Commission the district courts of the United States . . . shall have jurisdiction to issue writs of mandamus, injunctions and orders commanding (1) any person to comply with the provisions of this chapter, the rules, regulations and orders thereunder . . . .
>
> 15 U.S.C. § 78u(e).

The record shows that Zessinger was given the opportunity to be heard, he was heard before an ALJ of the SEC and was found to have violated federal securities laws. As a result, the Court will exercise its jurisdiction to order Zessinger to comply with the terms of the decision issued by the SEC.

In addition, to the amount of damages explained above, the SEC argues that it is entitled to pre-judgment interest in the amount of $13,609.41. This amount represents interest on $26,992, the amount of the ill-gotten gains plus the pre-judgment interest accrued prior to the ALJ's decision. The interest on the $26,992 was computed from October 8, 1996, the date the Initial Decision became final, and is consistent with the Internal Revenue Service rate for underpayment of taxes. See 26 C.F.R. § 301.6621-1.

Courts have the discretion to order those who violate § 10(b) of the Securities Exchange Act to pay pre-judgment interest. Grogan v. Garner, 806 F.2d 829, 838 (8th Cir. 1987). The ALJ found that Zessinger violated § 10(b) and Rule 10b-5 thereunder. This Court finds that Zessinger is liable for pre-judgment interest in the amount of

$13,609.41, as calculated under 26 C.F.R. § 301.6621-1, from the date the ALJ's decision became final.

III. Conclusion

No genuine issues of material fact exist in this case. As a result, summary judgment will be granted in favor of the SEC. After thoroughly reviewing the decision and orders of the SEC, the Court finds that Zessinger shall disgorge $19,340 in ill-gotten gains, $7,652 in interest, $13,609.41 in pre-judgment interest and $100,000 as a civil penalty.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff Securities and Exchange Commission's Motion for Summary Judgment [#17] is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Daniel Zessinger shall remit to Defendant Securities and Exchange Commission $140,601.41.

RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 14th day of March, 2002.

UNITED STATES DISTRICT COURT - EASTERN MISSOURI
INTERNAL RECORD KEEPING

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