

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11012

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 17, 2004

In the Matter of	:	
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	:	
JAMES F. GLAZA, d/b/a FALCON	:	ORDER FOLLOWING
FINANCIAL SERVICES, INC.	:	REMAND HEARING
	:	

On September 8, 2003, the undersigned issued an Initial Decision in this matter finding Respondent James F. Glaza, d/b/a Falcon Financial Services, Inc. (Glaza), in violation of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 (Securities Act) and Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (Exchange Act). James F. Glaza, d/b/a Falcon Fin. Servs., Inc., 81 SEC Docket 245. Glaza appealed that Initial Decision to the Securities and Exchange Commission (Commission) asserting that my findings were based on stipulations that his hearing attorney had fraudulently induced him to sign. After considering Glaza's arguments and proffer of evidence, the Commission remanded the proceeding for further inquiry by its Order Remanding Proceeding to Administrative Law Judge (Remand Order) on September 30, 2004. James F. Glaza, d/b/a Falcon Fin. Serv., Inc., Securities Act Release No. 8498.

Pursuant to that Remand Order, I offered the parties an opportunity to produce any relevant evidence, and I held a one-day hearing on November 8, 2004, in Denver, Colorado, relating to Glaza's representation by counsel and the July 2, 2003, submission of Stipulations of Facts and Conclusions of Law by the parties (Stipulations). Based on a review of the record in its entirety and on a "preponderance of the evidence" standard of proof, I make the following findings of fact. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981).¹

¹ References to the November 8, 2004, hearing transcript will be cited as "(Tr. ___)." Citations to Glaza's Brief in Support of Petition for Review dated November 25, 2003, appear as "(Appeal Brief at ___)." Citations to his affidavit submitted to the Commission on appeal appear as "(Glaza Aff. ___)," to Attorney Eric Liebman's affidavit appear as "(Liebman Aff. ___)," and to Attorney Norman Arnoff's affidavit appear as "(Arnoff Aff. ___)." The Division of Enforcement's hearing exhibits, filed November 5, 2004, are cited as "(Div. Ex. ___)."

FINDINGS

1. Original Institution of Proceedings

The Commission initiated this administrative proceeding by an Order Instituting Proceedings (OIP) on January 21, 2003, charging Respondent Glaza with certain violations of the antifraud and registration provisions of the securities laws. On January 23, 2003, the Chief Administrative Law Judge by order assigned the proceeding to my docket. I then held a telephonic prehearing conference on March 10, 2003, with counsel for the parties in attendance. Representing the Division of Enforcement (Division) was Polly A. Atkinson (Atkinson) and Thomas D. Carter (Carter). Representing Glaza was Walter L. Baumgardner Jr. (Baumgardner), as lead counsel, and Eric Liebman (Liebman), as his local counsel in Denver. Glaza himself was not in attendance. Thereafter, by agreement of the parties, a hearing date was scheduled for July 7, 2003. During the time between March 10, 2003, and the date of the scheduled hearing, the following events occurred resulting in the submission of Stipulations by the parties to resolve the proceeding.

By letter dated May 9, 2003, Liebman wrote to Glaza to confirm their recent telephone conversation and to advise that he would not review the twenty-five boxes of documents at the Division's offices until it was clear that Baumgardner (or someone else) would be the lead counsel and Liebman was instructed how to proceed. Liebman also cautioned in his May 9 letter that Glaza had to move promptly if Glaza intended to seek a continuance of the hearing date. (Tr. 14-16; Div. Ex. A1.)

On May 13, 2003, Glaza e-mailed Baumgardner to advise him of Liebman's concern about document review and, among other things, asked Baumgardner for his opinion as to Glaza's chances for "success" at an eventual hearing. (Tr. 15-16; Div. Ex. A2.) Glaza testified that Baumgardner did not respond to the e-mail, but they spoke about four or five days later and Baumgardner told Glaza not to be concerned because he was "on top of it." On May 20, 2003, Liebman again wrote to Glaza reminding him that Glaza had not responded to his May 9 letter, and that as local counsel, Liebman's representation was limited to document review and obtaining transcripts until Glaza resolved the issue of whether Baumgardner would continue as lead counsel, in light of certain scheduling conflicts. Liebman also again advised of the need to move expeditiously if a continuance of the hearing was to be sought; otherwise Liebman would be forced to withdraw altogether from representing Glaza. (Tr. 17-18; Div. Ex. A3.)

On June 17, 2003, Baumgardner moved to continue the hearing date and for a more definite statement of the charges against Glaza made by the Division. Both motions were denied. (Tr. 12.) Subsequently, on June 27, 2003, Liebman withdrew as counsel because, among other reasons, his services would not be needed for the hearing. (Liebman Aff.)

On June 30, 2003, I held a second telephonic prehearing conference with Baumgardner, Atkinson, and Carter in attendance. At this prehearing conference, counsel advised me for the first time that the parties desired to submit the matter on stipulations of fact. In this regard, Baumgardner represented that he had spoken to Glaza "that morning" and Glaza would consent to certain remedial sanctions within the Stipulations. (Tr. 12-13.) By submitting Stipulations,

the attorneys were aware that it effectively resolved all the factual issues and significantly narrowed other issues in the proceeding to those regarding civil monetary penalty, disgorgement, and the weighing of any mitigating factors. (Tr. 57.)

On July 3, 2003, the parties jointly submitted 112 stipulations to the Office of the Administrative Law Judges that were signed by Atkinson, Baumgardner, and Glaza. The parties thereafter filed briefs on or about July 31, 2003. I then issued an Initial Decision on September 8, 2003, which relied exclusively on the Stipulations for factual findings and granted the agreed to remedial relief—a cease-and-desist order and bars from associating with any broker-dealer and from participating in any offering of penny stock. I also imposed a third-tier civil penalty of \$110,000 and ordered disgorgement in the amount \$780,131, plus prejudgment interest.

2. Appeal of Initial Decision

On October 3, 2003, Baumgardner, on Glaza's behalf, filed a petition for review with the Commission. (Tr. 58.) Sometime thereafter, Glaza discharged Baumgardner and retained new counsel to prosecute his petition for review. In his brief before the Commission, submitted by his new counsel, Glaza raised for the first time the allegation that Baumgardner fraudulently induced him to enter into the Stipulations and failed to clearly advise him of the consequences of agreeing to this procedure. (Appeal Brief at 15.) Further, Glaza represented that he never knew about the June 30, 2003, prehearing conference, at which the parties discussed the possible joint submission of the Stipulations. He stated that he did not speak with Baumgardner early that morning, never authorized him to agree to submit the matter on Stipulations, and never agreed to certain remedial sanctions. (Glaza Aff.)

Further, Glaza represented that he knew nothing about the Stipulations until he received them by fax on July 1, 2003, after Baumgardner had called him to advise that the hearing would not be continued. (Appeal Brief at 15-16.) According to Glaza, Baumgardner told him that he could submit his case by filing a brief as fully as though there was an evidentiary hearing but only if he signed "a document" (i.e., the Stipulations), which Glaza understood at the time to be merely the Division's version of the case. (Glaza Aff.) Baumgardner also stated, according to Glaza, that he had a scheduled court appearance in another matter in Detroit, Michigan, the same day as Glaza's hearing, but, if necessary, another attorney from Baumgardner's firm could attend the Detroit hearing in his place. (Appeal Brief at 15-16.)

After reviewing the Stipulations, Glaza contended in his affidavit that he told Baumgardner that he did not want to sign them because it appeared from the document that he was agreeing to certain sanctions. Glaza's wife, Jeannette Glaza, also had concerns about proceeding on Stipulations in this manner. (Tr. 62-63.) Baumgardner, however, assured him, according to Glaza, that the Stipulations only represented the Division's case and he could fully defend the contents by filing a brief with other documents. According to Glaza, the next day, Baumgardner "pressured" him into signing the Stipulations. (Glaza Aff.; Appeal Brief at 15-18.)

Just after signing the Stipulations and returning them to Baumgardner by fax, Glaza spoke to Liebman about the consequences of signing the Stipulations. Liebman stated that he could not give Glaza legal advice as he had withdrawn as his counsel, but observed that it

appeared that Glaza had “given away the store” and would not be able to offer a defense to the OIP’s allegations. Liebman then strongly advised Glaza to contact Baumgardner promptly to find out whether the Stipulations could be withdrawn. (Tr. 34-36; Liebman Aff.) That same day, Glaza also spoke with Norman Arnoff, an attorney in New York, who made the same observation that Glaza’s ability to defend the allegations was severely hampered after signing the Stipulations. (Tr. 28; Arnoff Aff.)

According to Glaza, he then phoned Baumgardner who assured him not to “worry, that signing the document was the correct thing to do in vigorously defending the case, and that in any case, his office had already faxed [the] signature page to the SEC and that the [Stipulations] could not be withdrawn.”² (Tr. 30; Appeal Brief at 19; Glaza Aff.)

3. The Remand Hearing

On September 30, 2004, the Commission issued its Remand Order wherein it restated the Commission’s “obligation to ensure that our administrative proceedings are conducted fairly in furtherance of the search for the truth and just determination of the outcome and the importance of the fairness and impartiality of the course of the proceeding.” Glaza, Securities Act Release No. 8498 at 7. Due to the gravity of Glaza’s allegation of fraud on the Stipulations, which was being alleged for the first time, the Commission remanded the proceeding to the undersigned to determine the impact and merits of Glaza’s allegations. A hearing was held on November 8, 2004, in Denver, at which time testimony was taken from Glaza, Liebman, Baumgardner, Atkinson, and Jeannette Glaza.

Glaza’s testimony at the hearing corresponded to what was represented in his affidavit to the Commission in support of his petition for review: He maintained that he never spoke to Baumgardner on or before June 30, 2003, about submitting the case on Stipulations; that he was pressured into signing them at the last minute; that he did not understand the legal impact of signing the Stipulations; and that he was told by Baumgardner that he could not withdraw the Stipulations after they were submitted to the Administrative Law Judge (Tr. 8-31.)

Glaza testified that he was concerned that the case was not being prepared properly. He sent “reams of information” to Baumgardner that included Glaza’s review and comments and summaries of depositions. (Tr. 16, 18-19.) Baumgardner assured him that everything was all right and that he was prepared to go forward to hearing. On July 1st or 2nd, Baumgardner, however, then took the position that the correct way to proceed was by submitting the matter on Stipulations and briefs. (Tr. 19, 29-30.)

After receiving the Stipulations, Glaza testified that he told Baumgardner that they were “one-sided” and did not accurately put forth Glaza’s case. Glaza made some suggestions and Baumgardner told Glaza that he would attempt to have them inserted. (Tr. 20-21.)

² Liebman and Arnoff also advised that the Stipulations could not be withdrawn. (Tr. 36-37; Arnoff Aff.; Liebman Aff.)

Liebman also testified in a manner consistent with his affidavit: He stated that he was never given authority to review the documents at the Division's office, because Glaza wanted to avoid possible duplication of legal services until the lead counsel issue was resolved. Glaza, in the meantime, was not sending Liebman any documents. Liebman also added that because he was withdrawing from representation and because his communications with Baumgardner were always limited, he never discussed why the case was being submitted on Stipulations with Baumgardner. (Tr. 32-33.) When asked by Glaza of his opinion of the Stipulations, Liebman told him that he was effectively consenting to imposition of the sanctions discussed therein. Liebman also explained to Glaza that, based on what he was telling him, there seemed to be a "disconnect" between what the documents said and what, according to Glaza, Baumgardner was telling him. (Tr. 34-36.) Liebman confirmed that Glaza was concerned about Baumgardner's representation during the March-June time frame, particularly Baumgardner's scheduling conflicts, but that Baumgardner continually reassured Glaza that everything was under control. (Tr. 37.)

Atkinson testified for the Division that about a week before the June 30 prehearing conference, Baumgardner advised her that Glaza would be amenable to settling the remedial part of the case because the State of Colorado had already put Glaza's Falcon Financial Services, Inc., out of business. The Division would not, however, agree to a settlement without financial sanctions due to Glaza's net worth. At that point, the prospect of submitting the case on Stipulations was discussed. (Tr. 40-41.) Atkinson was unaware that Glaza did not know the case would be submitted on Stipulations or that he had any concerns about doing it in that fashion. Atkinson believed that Glaza participated in suggesting some of the Stipulations that were eventually submitted. (Tr. 44-45.)

When Baumgardner testified, he acknowledged receiving documents from Glaza and confirmed having numerous telephone conversations with him during the months prior to the hearing date. In his professional opinion, Baumgardner believed that Glaza had defenses to the OIP's unregistered-sales allegations but felt that Glaza would have had difficulty defending against the fraud charges. Particularly, he believed that Glaza would "get killed" by the Division's investor witnesses on the fraud allegations and did not want the investors' testimony memorialized on record in the event of any future arbitration claims brought against Glaza. (Tr. 49-51, 54.)

Baumgardner's testimony regarding his conversations with Glaza about the Stipulations, however, was unconvincing. He was unable to state without equivocation that he spoke to Glaza on the morning of June 30, 2003, as he represented at the prehearing conference that day. He testified: "I would not have gone into this discussion [regarding Stipulations] at all without having some feeling in my mind that Mr. Glaza and I had reached an agreement as to this approach to solve the problem. . . . The only way I can say it, Judge, is this way: I can't say that I have a specific recollection of exactly what time and what was said exactly. All I can tell you is that after we had the [prehearing conference] on the 30th. . . . That I talked to Mr. Glaza about this whole subject and the impact it would have and how we could best utilize this. . . . I would have had that conversation between [June] 30th and [July] 2nd when we started going back and forth. Absolutely." (Tr. 53-56.) Baumgardner stated that he was prepared to go to hearing if that was required. (Tr. 59.)

4. Conclusion

After reviewing the documents submitted to the Commission in support of the petition for review and weighing the evidence presented at the hearing, I find that the preparation of any defense to the OIP's allegations in this matter was inadequate. There was no effort to meet with the Division to review documents or otherwise prepare for the hearing and Baumgardner had certain scheduling conflicts around the date of the hearing. It is apparent that Glaza was lulled into a false sense of security that all was well during the time frame leading up to the hearing. This perspective quickly changed, however, on July 1, 2003, when Glaza learned that the case would be submitted on Stipulations, a legal construct that he never fully grasped.³

From the record, Glaza was obviously uneasy about this procedure before he signed the Stipulations but was assured by Baumgardner that it was the correct way to go. After talking to Liebman and Arnoff, his reservations were reinforced prompting him to seek immediate withdrawal of the Stipulations until he was advised by counsel that they could not be withdrawn. At no point before his appeal to the Commission were Glaza's concerns ever communicated to the Division or to the Administrative Law Judge.

ORDER

Although the evidence presented, as I stated at the conclusion of the hearing, does not establish that any sort of fraud was afoot regarding the submission of Stipulations, I believe that

³ Question: What was your understanding [of a stipulation in a legal sense]?

Glaza's Answer: He told me unequivocally that the stipulations were nothing more than a departure point for argument; that they—I did not know this terminology until later. That the fact that it was the SEC's case-in-chief was simply the fact that that was their contention that these were the facts, that we were free to argue against them. And my intention was to argue against them.

Question: Did he tell you in words or substance that, if you stipulated to a fact, in this case a fact propounded by the Division, that that removed the necessity for them to actually submit affirmative proof of the fact if the case went to hearing?

Glaza's Answer: I'm not quite sure I understood that.

Question: If you stipulate to something, it means the party asserting the fact doesn't have to come forward with affirmative proof of something; that both sides are agreeing that a fact is a fact?

Glaza's Answer: No, Your Honor, that was not the contention at all. It was simply—The contention was [that] it was one side's opinion. That's what the stipulation was.

(Tr. 21-22.)

it is clear that Glaza was not fully advised of nor did he fully understand the legal consequences of submitting the case on Stipulations. Accordingly, I ORDER, pursuant to the Remand Order, that the original proceeding be reopened.

As discussed at the conclusion of the hearing, Glaza and the Division shall meet prior to December 6, 2004, at which time each is to provide the other with full disclosure of the evidence to be offered in their cases-in-chief if a hearing is required. Glaza is urged to retain counsel to assist him in this review and presentation to the Division. After this meeting a telephonic pre-hearing conference shall be held on December 6, 2004, at 3:30 p.m. EST. In order to bring this matter to a prompt conclusion pursuant to the Remand Order, the parties will be expected to discuss additional scheduling and such matters set forth in Rule 221(c) of the Commission's Rules of Practice. The Division shall initiate the call.

SO ORDERED.

Robert G. Mahony
Administrative Law Judge