

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

*DAVID ANDREWS, et al.,* )  
 )  
 *Plaintiffs* )  
 )  
 *v.* )  
 )  
 *EMERALD GREEN PENSION FUND,* )  
 *et al.,* )  
 )  
 *Defendants* )

*Docket No. 98-436-P-H*

**RECOMMENDED DECISION ON PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT AGAINST DEFENDANT CASSIDY**

The plaintiffs, David Andrews, Raymond St. Laurent and Richard Dingwell, move for summary judgment against defendant Michael Cassidy on Counts VII, XV, and XVII of the third amended complaint. Motion for Partial Summary Judgment with Respect to Michael Cassidy (“Motion”) (Docket No. 76).<sup>1</sup> I recommend that the court deny the motion.

**I. Summary Judgment Standard**

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

---

<sup>1</sup> Since the Motion was filed, a fourth amended complaint has been allowed (Docket No. 88) and a motion seeking leave to file a fifth amended complaint has been filed (Docket No. 103). The counts addressed in the Motion remain the same in both subsequent versions of the complaint.

of law.” Fed. R. Civ. P. 56(c). “A fact becomes material when it has the potential to affect the outcome of the suit.” *Steinke v. Sungard Fin. Sys., Inc.*, 121 F.3d 763, 768 (1st Cir. 1997). “By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

## **II. Factual Background**

The following appropriately supported material facts are taken from the Plaintiffs’ Statement of Material Facts (“Plaintiffs’ SMF”) (Docket No. 77) submitted with their motion. Cassidy has failed to controvert any of the statements included in that document in the manner prescribed by this court’s Local Rule 56(c), providing instead an unsworn factual narrative within his memorandum

in opposition to the motion. Response and Objection to Plaintiffs' Motion for Partial Summary Judgment with Respect to Michael Cassidy ("Cassidy's Objection") (Docket No. 90) at 1-7. To the extent that the statements of material facts included in the plaintiffs' statement of material facts are properly supported by citations to the record, therefore, they are taken as admitted. Local Rule 56(e).<sup>2</sup> The fact that Cassidy appears in this action *pro se* makes no difference; a *pro se* litigant is not thereby excused from compliance with the rules applicable to summary judgment proceedings. *See Posadas de Puerto Rico, Inc. v. Radin*, 856 F.2d 399, 401 (1st Cir. 1988).

Cassidy first met plaintiff St. Laurent in the Bahamas in May 1997. Deposition of Michael Cassidy (Volume I) ("First Cassidy Dep."), filed with Plaintiffs' SMF, at 104-05.<sup>3</sup> Cassidy met with St. Laurent, plaintiff Andrews and Al Sargent, who arranged the meeting, at Friendly's in Haverhill, Massachusetts in the summer of 1997. *Id.* at 104. Beginning in November 1997 Cassidy discussed

---

<sup>2</sup> The plaintiffs submitted with their reply memorandum in connection with the instant motion a "Further Statement of Material Facts in Response to Cassidy Reply." Docket No. 102. This document does not comply with Local Rule 56(d), which limits a reply statement of material facts to admitting, denying or qualifying additional facts properly submitted by a party opposing a motion for summary judgment. The plaintiffs' "further statement" makes no attempt to respond in any identifiable way to the improperly presented factual assertions in Cassidy's objection and purports to bring additional facts to the attention of the court. Since the party opposing a motion for summary judgment may not file a response to the moving party's reply, such an attempt to add facts for the court's consideration is unfair and inappropriate. The court will not consider any of the facts set forth in the plaintiffs' "further statement."

<sup>3</sup> Cassidy contends that he was not allowed to read and therefore has not signed the transcripts of his August 17, 1999 deposition, taken in two parts by two different court reporters, and that as a result the plaintiffs may not rely on the testimony he gave under oath on that day. Cassidy's Objection at 3-4. The record before the court reflects that Cassidy has had a copy of the second volume of the transcript of his deposition at least since November 23, 1999. Letter dated December 6, 1999 from Michael J. Cassidy to David J. Perkins, Esq., apparent original attached to Cassidy's Objection. Cassidy's Objection is dated December 8, 1999 and notes no corrections or changes to be made to that transcript. Even if Cassidy had not had ample time to review at least one of the two transcripts before filing his objection, he has waived any objection to the use of those transcripts by failing to move to suppress them. Fed. R. Civ. P. 32(d)(4).

the Emerald Green Pension Fund (“Fund”) with Andrews and St. Laurent. *Id.* at 112. Cassidy told St. Laurent and Andrews that Clyde Beverly was co-trustee of the Fund, that Beverly was also co-trustee of a pension fund run by a licensed banker, and that he was a “risk qualifying plan trustee who would be managing money for a profit.” *Id.* at 112-13. Cassidy told St. Laurent and Andrews that the type of trade activity in which the Fund would participate could yield a return in the range of 10 to 100 per cent over a year or so. *Id.* at 116-18. Cassidy also told them that the funds they invested in the Fund would be kept in an insured bank account and that “there was bonding available to protect any loss of funds.” Deposition of Michael J. Cassidy (Volume II) (“Second Cassidy Dep.”), filed with plaintiffs’ SMF, at 12-13. Cassidy told Andrews that his return on investment in the Fund would initially be 15 to 18 per cent per month. Affidavit of David Andrews (“Andrews Aff.”) (Docket No. 29) ¶ 6.

In response to questions from Andrews in December 1997 Cassidy stated that he had been doing business with Beverly for one and one-half years, long enough to have received a payout through the Fund, and that the Fund was an ongoing program. Second Cassidy Dep. at 162-64 & Exh. B to Plaintiffs’ SMF (Cassidy Dep. Exh. 24). Cassidy had met Beverly one and one-half years earlier, but had first introduced an investor to him in November 1997. First Cassidy Dep. at 55, 63. Beverly had represented to Cassidy that he had made successful trades and “received a payout on the fund” before Cassidy made these representations to Andrews. Second Cassidy Dep. at 166; First Cassidy Dep. at 58. At some point in 1998 Cassidy told Andrews that the fund would use a guarantee from the Bank of Bangkok to create profits. Second Cassidy Dep. at 75-76, 83-84; Affidavit of Raymond St. Laurent (“St. Laurent Aff.”), attached to the plaintiffs’ Memorandum in Support of Motion to Consolidate (Docket No. 27), ¶ 24 & Andrews Aff. ¶ 26 (“Cassidy and/or

Shawver” made this representation). As of the first week of May in 1998 Cassidy knew that this deal had not yet occurred and that the Fund had not engaged in any other trades since December 1997. Second Cassidy Dep. at 50.

Prior to January 30, 1998 the Fund maintained a bank account at the Centura Bank in North Carolina. Request for Admissions to Michael Cassidy (“Admissions”), included in Exh. A to Plaintiffs’ SMF, Request No. 19.<sup>4</sup> Cassidy provided St. Laurent with instructions with respect to making a \$70,000 transfer of funds on or about December 16, 1997 to the Fund’s Centura Bank account. *Id.* No. 17. Cassidy provided Andrews with instructions with respect to making a \$30,000 transfer of funds on or about December 10, 1997 to the Fund’s Centura Bank account, and on or about February 3, 1998 with respect to making a \$60,000 transfer to that account. *Id.* Nos. 22-23. Cassidy provided Dingwell with instructions with respect to making a \$20,000 transfer of funds on or about December 1, 1997 to the Fund’s Centura Bank account. *Id.* No. 25. During a conversation that took place on a date between February 15 and February 28, 1998, Galen Shawver, trustee of the Fund, told Cassidy that the Centura Bank account had been frozen by the state of North Carolina. Deposition of Galen C. Shawver (September 13, 1999) (“Shawver Dep.”), copy submitted with Plaintiffs’ SMF, at 76-77, 79 & Exh. 5 thereto (Affidavit of Galen C. Shawver [sic] — Section A),

---

<sup>4</sup> The plaintiffs maintain that Cassidy did not respond to these requests for admission, rendering all of the requests admitted under Fed. R. Civ. P. 36(a). Plaintiffs’ SMF at [1] n.1. Cassidy does not respond directly to this assertion, but has attached to his opposition to the motion for summary judgment a copy of a letter from him to the attorney for the plaintiffs dated December 6, 1999 claiming that he mailed a response to the request for admissions to the attorney on a date that would have been timely and enclosing a copy of the request marked with his responses. The copy of that response provided to the court bears a signature but no date and no notarization, so there is nothing in the record of evidentiary quality to suggest that Cassidy’s responses were timely or sworn. Accordingly, I must treat the requests as having been admitted, despite the fact that most are denied in the document attached to Cassidy’s December 6, 1999 letter.

¶ 12. In January 1998 Shawver told Cassidy that Beverly could not buy foreign bank guarantees through the Fund account. Shawver Dep. at 82. At this time he also told Cassidy that Beverly had told Shawver that all of the money in the Centura Bank account was Beverly's own funds. Second Cassidy Dep. at 122. Cassidy did not disclose this to the plaintiffs. *Id.* at 125. Shawver told Cassidy after the account was frozen that it had sufficient funds to cover all claims. *Id.* at 70-71. Cassidy took no steps to confirm this. *Id.* at 71. Investors with whom Cassidy worked after that time sent their investment money to other Fund bank accounts. *Id.* at 72-73.

Cassidy provided St. Laurent with instructions with respect to making a \$187,500 transfer of funds on or about May 29, 1998 involving the Fund. Admissions No. 18. Cassidy directed St. Laurent to transfer the funds to the First Tennessee Bank<sup>5</sup> because the Centura account had been frozen by government authorities. *Id.* No. 30. Cassidy provided Andrews with instructions with respect to making a \$50,000 transfer of funds on or about May 5, 1998 to an account in the First Tennessee Bank maintained in the names of Jerry Revalee and Galen Shawver. *Id.* No. 24. Cassidy informed St. Laurent that successful trades with respect to his Fund accounts resulted in his \$70,000 investment receiving a return of \$105,000. *Id.* No. 28.<sup>6</sup> Cassidy did not inform St. Laurent or Andrews that the Centura Bank account had been frozen at any time prior to the \$187,500, \$60,000,

---

<sup>5</sup> Plaintiffs' SMF includes the assertion that funds in this account were used by Jerry Revalee and others for personal expenditures. Plaintiffs' SMF ¶ 95. The citations to the record provided by the plaintiffs at the end of this paragraph, with the exception of an unauthenticated exhibit to the second Cassidy deposition, do not support the assertion. In addition, the citation to "Guerrini Affidavit" without any further reference to the paragraph or section of that affidavit where support for the assertion may be found is insufficient under Local Rule 56(e).

<sup>6</sup> The amount of the investment stated in the admission is \$75,000 but all other references to this investment are to \$70,000 as the amount. *E.g.*, Admission No. 17; Second Cassidy Dep. at 102.

or \$50,000 investments that they made. Second Cassidy Dep. at 71-72; 83-85.

Cassidy provided St. Laurent with a final investment accounting with respect to the Fund showing a final cash distribution of \$644,790.21 with respect to his total contribution of \$257,500 as of May 31, 1998. Admissions No. 31; Second Cassidy Dep. at 101-02 (Cassidy testifies that the statement is “simply an estimate of a value”). Cassidy provided Dingwell with a final investment accounting with respect to the Fund showing a final cash distribution of \$50,277.76 with respect to his total contribution of \$20,000 as of May 31, 1998. *Id.* No. 33. Cassidy also told Andrews, via e-mail dated March 24, 1998 that he had made a “windfall” profit on his investment in the Fund. Second Cassidy Dep. at 159-60 & Exh. C to Plaintiffs’ SMF. A written confirmation of trade from the Fund to Andrews after he made additional investments showed a total return of \$350,897.77. Andrews Aff. ¶ 14. St. Laurent received a written confirmation showing a total return on his account with the Fund of \$772,500. St. Laurent Aff. ¶ 12.

On or about June 30, 1998 Andrews asked Cassidy to have his investment in the Fund and related joint ventures returned to him. Admissions No. 40. Cassidy indicated that the money could be returned in the near future. *Id.* No. 43. At that time, Cassidy was aware that the funds in the Centura Bank account had been frozen. *Id.* No. 41.

### **III. Discussion**

#### **A. Fraud (Count VII)**

Under Maine law,

[i]n order to prevail on a claim of fraud, a plaintiff must show that a person:

- (1) makes a false representation
- (2) of a material fact
- (3) with

knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff.

*McCarthy v. U.S.I. Corp.*, 678 A.2d 48, 53 (Me. 1996) (quoting *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995)). Each of these elements must be proved by clear and convincing evidence.

*Wildes v. Ocean Nat'l Bank of Kennebunk*, 498 A.2d 601, 602 (Me. 1985). The plaintiffs correctly point out that both omissions and affirmative misrepresentations are actionable under Maine law.

*Reed Paper Co. v. Procter & Gamble Distrib. Co.*, 807 F.Supp. 840, 844 (D. Me. 1992).

Here, the plaintiffs have failed to include in their statement of material facts any evidence that they acted, or refrained from acting, upon any false representation made to them by Cassidy to their damage. They state that Andrews requested a return of his invested funds from Cassidy, to whom they were not paid, but fail to state that the funds were not returned. They make no statement concerning any attempts by St. Laurent or Dingwell<sup>7</sup> to retrieve their money from Cassidy. The only

---

<sup>7</sup> The statement of material facts would not support judgment in Dingwell's favor on this claim even if this deficiency of proof as to the fifth element of fraud did not exist. The assertions in the plaintiffs' SMF concerning Dingwell that are relevant to a claim of fraud and actually supported by the portions of the record that are cited in support of those assertions are limited to the following: Cassidy provided Dingwell with written and/or oral instructions with respect to making a \$20,000 transfer of funds on or about December 1, 1997 to the Centura Bank account of the Fund. SMF ¶ 21; Admissions No. 25. Cassidy spoke with Dingwell once or twice on the telephone before he made this investment. SMF ¶ 21; Second Cassidy Dep. at 140. Cassidy provided Dingwell with a final investment accounting with respect to the Fund showing that Dingwell had a final cash distribution of \$50,277.76, with respect to his total contribution of \$20,000, as of May 31, 1998. SMF ¶ 30; Admissions No. 33. Prior to his investment, Cassidy told Dingwell that he could expect returns between 200 and 300% with respect to the Fund. Affidavit of Richard Dingwell ¶ 7. (The court's file currently contains only a copy of Dingwell's affidavit, dated March 31, 1999. The clerk's office has been advised that counsel for the plaintiff intends to provide the court with an identical signed original affidavit. This analysis therefore assumes that an affidavit of evidentiary quality is before the court.) Cassidy did not disclose to Dingwell that he had learned in January 1998 that  
(continued...)

evidence offered in the statement of material facts that might reasonably be construed to support a claim that any of the plaintiffs acted upon any false representations made by Cassidy to their detriment is the final entry: “97. The debt owed by the Fund to St. Laurent and Andrews is evidenced by Guarantee Pay Orders, attached hereto as Exhibit I.” Plaintiffs’ SMF ¶ 97. Even if a debt owed by the Fund could be construed as damage caused by Cassidy, an issue that I need not resolve, the two documents making up Exhibit I to Plaintiffs’ SMF, each of which bears the heading “EMERALD GREEN PENSION FUND” and subheading “Guarantee Payorder,” are guarantees of payment “for the benefit of: ShuKu International, located at c/o Michael Cassidy, as its Treasurer.” There is nothing on the face of the documents, and nothing in the plaintiffs’ statement of material facts, tying these two documents to any of the plaintiffs.

This lack of evidence on the final element of a claim of fraud under Maine law makes it unnecessary to consider the evidence with respect to the other elements. The motion for summary judgment against Cassidy on Count VII should be denied.

### **B. Negligent Misrepresentation (Count XV)**

Maine has adopted section 552 of the Restatement (Second) of Torts as the appropriate standard for claims of negligent misrepresentation.

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them

---

<sup>7</sup>(...continued)

Clyde Beverly was claiming that the money in the Fund’s Centura Bank account was Beverly’s. Second Cassidy Dep. at 125. This set of facts fails to establish that false representations were made to Dingwell by Cassidy before he made his sole investment or that any false representations were made to Dingwell after his investment for the purpose of inducing him to refrain from any particular action.

by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977). For a party to be liable for its negligent misrepresentation, another party must have, *inter alia*, relied upon the false representation to its pecuniary detriment.

*Perry v. H. O. Perry & Son Co.*, 711 A.2d 1303, 1305 (Me. 1998). Here again, the failure of the plaintiffs to submit evidence of pecuniary detriment means that they are not entitled to summary judgment on this claim.<sup>8</sup>

### **C. Violation of the Revised Maine Securities Act (Count XVII)**

The Revised Maine Securities Act, 32 M.R.S.A. § 10101 *et seq.*, provides, in relevant part:

In connection with the offer, sale or purchase of any security, a person shall not, directly or indirectly:

**1. Fraud.** Employ any device, scheme or artifice to defraud;

**2. Untrue statements, material omissions.** Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

**3. Deceptive practices.** Engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

32 M.R.S.A. § 10201. While I have concluded above that the plaintiffs have not established fraud based on the evidence submitted with their summary judgment motion, it is possible, viewing the

---

<sup>8</sup> While it is not necessary to consideration of this claim, I note that St. Laurent and Andrews could not have relied upon the allegedly false “final investment accountings” provided to them by Cassidy after all of their investments had been made in any manner that resulted in pecuniary damage in the absence of a showing, not attempted by these plaintiffs, that they could have withdrawn their money at that time but instead allowed it to remain in the Fund, from which they now cannot retrieve it.

properly supported facts asserted by the plaintiffs in the most favorable light, to draw a reasonable inference that Cassidy made one or more untrue statements or material omissions in connection with the plaintiffs' investments in the Fund. It is therefore necessary to address the plaintiffs' argument that Cassidy is liable to them under section 10201.

A private cause of action under the Revised Maine Securities Act is provided by 32 M.R.S.A.

§ 10605:

**1. Offer or sale of security.** Any person who offers or sells a security in violation of section 10201 . . . is liable to the person purchasing the security from that person. The person purchasing the security may sue to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, costs and reasonable attorneys' fees less the amount of any income received on the security, upon the tender of the security, or for damages plus costs and reasonable attorneys' fees if the person no longer owns the security.

\* \* \*

**3. Control persons.** Every person who directly or indirectly controls another person liable under subsection 1 or 2 . . . and every broker-dealer or sales representative who materially aids in the act or transaction constituting the violation is also liable jointly and severally with and to the same extent as that other person, unless the person otherwise secondarily liable under this Act proves that the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

The plaintiffs' statement of material facts does not establish that they purchased a security from Cassidy. According to the statement of material facts, the plaintiffs made no payments to Cassidy and invested directly in the Fund, which was managed and controlled by persons other than Cassidy. They must therefore seek to impose liability on Cassidy under subsection 3 of section 10605 as a broker-dealer or sales representative who materially aided in the investments at issue. The information included in the plaintiffs' statement of material facts fails to establish that Cassidy was a sales representative as that term is defined in the Revised Maine Securities Act ("the Act"),

which requires that a sales representative be an employee or a professional corporation authorized to act and acting for a broker-dealer or issuer, as those terms are defined in the Act. 32 M.R.S.A. § 10501(16). The evidence submitted by the plaintiffs might support a conclusion that Cassidy was a broker-dealer with respect to the transactions at issue (“any person engaged in the business of effecting transactions in securities for the account of others,” 32 M.R.S.A. § 10501(1)). However, the plaintiffs’ claim under the Act nevertheless founders on their conclusory assertion that “[t]he investment in the Fund was clearly a security.” Motion at 10.

The Act defines a security in great detail at 32 M.R.S.A. § 10501(18).

“Security” means any note; stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; any limited partnership interest; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; viatical settlement contract; voting-trust certificate; certificate of deposit for a security; documents of title to or certificates of interest or participation in an oil, gas or other mineral title or lease or in payments out of production under any title, lease, right or royalty; any put, call, straddle or option entered into a national securities exchange relating to foreign currency; any put, call, straddle or option on any security, certificate of deposit or group or index of securities, including any interest therein or based on the value thereof; or, in general, any interest or instrument commonly known as a “security,” or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The plaintiffs’ statement of material facts provides no evidence that they purchased any thing that comes within the statutory definition. There is a reference to a “Joint Venture Agreement dated December 10, 1997” involving St. Laurent that might or might not be an investment contract or certificate of participation in a profit-sharing agreement, no copy of which was provided to the court. Plaintiffs’ SMF ¶ 26. There is no reference to any evidence of indebtedness other than the “guarantee payorders,” Exhibit I to Plaintiffs’ SMF, which have already been discussed and do not

show that they were purchased by any of the plaintiffs. There is no reference to any of the other things included within the statutory definition. Clearly, there is no evidence in the summary judgment record that could possibly establish Cassidy's liability to Dingwell under the Act. I cannot draw the necessary inferences to support liability to St. Laurent and Andrews from the evidence provided. Such inferences would not be reasonable given the evidence included in the plaintiffs' summary judgment submission.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the plaintiffs' motion for partial summary judgment on Counts VII, XV, and XVII as to defendant Michael Cassidy be **DENIED**.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 29th day of December, 1999.*

---

*David M. Cohen  
United States Magistrate Judge*