DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

EDWARD A. PURVIS and MAUREEN H. PURVIS, husband and wife, Plaintiffs/Appellants, v. ARIZONA CORPORATION COMMISSION, an Arizona agency, Defendant/Appellee.	1 CA-CV 10-0311 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. LC2009-000052-001DT

The Honorable Crane McClennen, Judge

AFFIRMED IN PART, REVERSED AND REMANDED IN PART

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O R O Z C O, Judge

¶1 Edward and Maureen Purvis (collectively, Purvis) appeal from the superior court's judgment, affirming the Arizona

Corporation Commission's (ACC) decision holding Purvis liable for violations of the Arizona Securities Act (Securities Act). For the reasons that follow, we affirm in part and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

¶2 In late 2006, the ACC initiated proceedings against Purvis and other defendants. Specifically regarding Purvis, the complaint alleged: (1) that he "offered or sold [unregistered] securities in the form of investment contracts and company stock, within or from Arizona" in violation of Arizona Revised Statutes (A.R.S.) section 44-1841 (2003); (2) that he "offered or sold securities within or from Arizona" without registering as a dealer or salesman in violation of A.R.S. § 44-1842 (2003); and (3) that he committed fraud in connection with the offer or sale of securities in violation of A.R.S. § 44-1991 (2003).

¶3 The ACC presented eleven witnesses throughout the hearings, which lasted several weeks. Purvis did not testify or call any witnesses on his behalf at the hearings. After the hearings, the Administrative Law Judge (ALJ) made a recommendation, and the ACC issued its decision. The ACC found that Purvis violated all three provisions of the Securities Act.

¶4 Specifically, the ACC found that Purvis violated the registration provisions of the Securities Act by selling unregistered securities in the form of investment contracts,

promissory notes, and stock; and that he did so without registering as a dealer or salesman. That is, Purvis was found to have: (1) sold investment contracts that involved pooling of investor funds and loaning capital to companies of Purvis's choosing; (2) solicited direct loans from investors to borrowers in exchange for promissory notes while charging a finder's fee; and, (3) enticed investors with stock purported to increase in value from $.80 to $3 or $4 a share on the promise that the company would go public.

¶5 The ACC also found that Purvis violated the anti-fraud provisions of the Securities Act with respect to each of the three types of securities through omissions and misrepresentations regarding the nature of the investments. The ACC also ordered Purvis to pay $250,000 in administrative penalties and $11,044,912 in restitution.

¶6 Purvis appealed to the superior court, which affirmed the ACC decision. The superior court held that the evidence supported findings that Purvis solicited investors to: (1) "purchase company stock in ACI Holdings and CSI Technologies, Inc."; (2) "invest in promissory notes with Homes for Southwest Living, Inc., Corporate Architects, Inc., and CSI Technologies"; and (3) "enter into investment contracts with Nakami Chi Group Ministries International" (NCGMI). The superior court affirmed the ACC's findings that Purvis violated A.R.S. §§ 44-1841, -1842,

and -1991 with respect to all three types of securities. The superior court also affirmed the administrative penalties and restitution amounts. Purvis timely appealed and we have jurisdiction in accordance with Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-913 (2003), -2101.B. (2003).

STANDARD OF REVIEW

¶7 On review, "[t]he [superior] court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12-910.E. (2003). "This court reviews the superior court's judgment to determine whether the record contains evidence to support the judgment and, in doing so, we reach the underlying issue of whether the administrative action was illegal, arbitrary, capricious or involved an abuse of discretion." *Havasu Heights Ranch and Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 386, 807 P.2d 1119, 1122 (App. 1990).

¶8 "We view the facts in the light most favorable to upholding the [agency's] decision." *Eaton v. Ariz. Health Care Cost Containment Sys.*, 206 Ariz. 430, 431, ¶ 2, 79 P.3d 1044, 1045 (App. 2003). "In the resolution of factual issues, this

standard requires a determination of whether there was substantial evidence to support the agency's decision." *Webster v. State Bd. of Regents*, 123 Ariz. 363, 365, 599 P.2d 816, 818 (App. 1979). "If two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion." *Id.* at 365-66, 599 P.2d at 818-19.

DISCUSSION

1. The promissory notes issued in connection with the bridge loans were securities.

¶9 The ACC found that Purvis solicited direct loans from investors to borrowers in exchange for promissory notes (bridge loans) while charging a finder's fee. For example, Purvis directed one investor to place her entire retirement account balance into a separate IRA account and name Purvis as the "authorized agent." Acting as her agent, Purvis authorized use of the entire account to fund a loan between the investor and Corporate Architects, Inc. Similar transactions were also arranged by Purvis between another investor and CSI Technologies, as well as Homes for Southwest Living, Inc. All of these deals were purported by Purvis to generate a return of two percent per month, and for at least one transaction, NCGMI received a five percent finder's fee.[1]

[1] Purvis was an agent of NCGMI.

¶10 Purvis argues on appeal that the promissory notes issued in connection with the bridge loan transactions were not securities requiring registration under the Securities Act according to the test articulated by *Reves v. Ernst & Young*, 494 U.S. 56, 65 (1990); and as such, he was not required to register as a dealer or salesman. We disagree.

¶11 Specifically, Purvis argues that "[a]ll [notes] had a term of less than nine months, all were secured by collateral, and all were used to correct the borrowing companies' short-term cash flow problems," and therefore, the notes were not securities. However, Purvis incorrectly applies the *Reves* test to reach this conclusion. *See State v. Tober*, 173 Ariz. 211, 212-13, 841 P.2d 206, 207-08 (1992) (holding that the *Reves* test is not applicable under the registration provisions of the Securities Act, which leaves "no room for judicial gloss").

¶12 A "security" is defined, in relevant part, as "any note." A.R.S. § 44-1801.26. (2003). A person intending to sell securities must be registered with the ACC. A.R.S. § 44-1842. Securities for sale must also be registered with the ACC, unless an exemption applies. A.R.S. §§ 44-1841, -1843, -1843.01, -1844 (2003). The burden of establishing an exemption is on the party claiming it. A.R.S. § 44-2033 (2003).

¶13 In this case, Purvis failed to establish, let alone posit, that the bridge loan notes fall within any particular

statutory exemption under Arizona law. "Issues not clearly raised and argued in a party's appellate brief are waived." *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996). Purvis alludes to a "nine-month" exemption from the United States Supreme Court's decision in *Reves*. *See Reves*, 494 U.S. at 63 (referring to the Second Circuit's use of a "presumption that *any* note with a term of more than nine months is a 'security'"). However, the Court in *Reves* did not endorse such an exemption; and furthermore, our own supreme court has held that the *Reves* test does not apply to charges brought under the Arizona registration statutes. *Tober*, 173 Ariz. at 212-13, 841 P.2d at 207-08. Moreover, the "nine-month term" inquiry typically relates to an exemption for commercial papers,[2] and Purvis has presented no evidence that the bridge loan notes qualify as commercial papers. *See, e.g.,* 15 United States Code (U.S.C.) section 77r(b)(4)(C); *see also* A.R.S. § 44-1843.A.8.

¶14 Finally, Purvis did not argue for an exemption below. He declined to put on any witnesses or otherwise present a case beyond cross-examination of ACC's witnesses at the administrative hearings. As such, at the administrative hearings and on appeal,

[2] *See S.E.C. v. Wallenbrock*, 313 F.3d 532, 541 (9th Cir. 2002) (quoting the *Reves* definition of commercial paper as "short-term, high quality instruments issued to fund current operations and sold only to highly sophisticated investors").

he has failed to point to any evidence which establishes that the bridge loan notes were not securities for purposes of the registration requirements. We therefore agree with both the ACC and the superior court that the bridge loan notes are "[s]ecurit[ies]" under A.R.S. § 44-1801.26. Also, because Purvis failed to show that the notes fall within one of the exemptions prescribed by A.R.S. §§ 44-1843, -1843.01, and -1844, we affirm the ACC's findings that Purvis violated A.R.S. §§ 44-1841 and -1842 by selling unregistered securities and by failing to register as a dealer or salesman.[3]

[3] Purvis does not raise this issue specifically, making only a general challenge that the notes are not securities; however, we note that the bridge loan notes are likely securities for purposes of the anti-fraud provisions of the Securities Act. *See MacCollum v. Perkinson*, 185 Ariz. 179, 186, 913 P.2d 1097, 1104 (App. 1996) ("[t]he securities fraud statute . . . includes the sale of even those securities that are exempted from the registration requirements"); *see also Tober*, 173 Ariz. at 212-13, n.3, 841 P.2d at 207-08 n.3.

Respecting the anti-fraud provisions of the Securities Act, promissory notes are presumed to be securities; the presumption is only overcome upon examination of the *Reves* factors. *MacCollum*, 185 Ariz. at 187, 913 P.2d at 1105. Purvis presented his own analysis using the *Reves* factors but we are not persuaded. Because "security" is defined more broadly for purposes of the anti-fraud provisions of the Securities Act, and because Purvis failed to establish an exemption under the registration provisions; he has failed to meet his burden of establishing an exemption for purposes of the anti-fraud provisions. As such, any argument that the notes are not securities under the anti-fraud provisions is not well-taken.

2. Purvis was required to register as a dealer or salesman before selling ACI Holdings stock.

¶15 Purvis argues that he was not required to register as a dealer or salesman for two reasons: (a) because the stock was exempt from registration under federal law; and (b) because Purvis sold the stock in his capacity as director of ACI Holdings.

a. The Federal exemption preempting Arizona registration requirements is not applicable.

¶16 Purvis next argues that 15 U.S.C. § 77r(a)(1)(A) explicitly preempts any state registration requirement for a "covered security," which is defined, in part, as one that is exempt from registration pursuant to federal regulations, i.e., 17 Code of Federal Regulations (C.F.R.) section 230.506 (Rule 506).

¶17 Specifically, Purvis argues that because the ACI stock offering was not made to "unsophisticated investors," the stock offering falls under Rule 506 and is exempt from state registration requirements. Assuming without deciding Purvis is correct that, if the ACI stock is exempt from registration under federal Rule 506 then provisions requiring registration of the stock under the Securities Act are preempted, it would still be necessary to show compliance with Rule 506 in order to avoid state registration.

¶18 Rule 506 is triggered if the unaccredited purchaser of securities has sufficient "knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment." 17 C.F.R. § 230.506(b)(2)(ii). In this case, the ACC made numerous findings that investors were not sophisticated enough to understand their transactions with Purvis. These are factual determinations within the sound discretion of the ACC and we will not disturb them on appeal absent an abuse of discretion. Because we find no abuse of discretion, the Rule 506 exemption does not apply and Purvis's argument fails.[4]

b. Purvis's role as director of ACI Holdings does not exempt him from the registration requirements.

¶19 Purvis also argues that pursuant to "SEC Rule 3(A)41" and Arizona Administrative Code R14-4-140.B. (AAC Rule 140), a director need not be registered to sell stock on behalf of the issuer. First, "SEC Rule 3(A)41" does not exist and it is not clear from the briefs or the record to what this citation refers.

[4] Purvis argues that all the purchasers of ACI stock represented in writing that they were accredited investors and therefore, the ACC is equitably estopped from asserting that Purvis sold securities to non-accredited investors. However, all the cases that Purvis cites are distinguishable because they involve private actions between investors and issuers regarding the purchase of stock. Generally, the equitable defense of estoppel "will not lie against the state, its agencies or subdivisions in matters affecting governmental or sovereign functions." *Mohave Cnty. v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417, 421, 586 P.2d. 978, 982 (1978).

Thus, we do not address it. *See Polanco v. Indus. Comm'n*, 214 Ariz. 489, 491 n.2, ¶ 6, 154 P.3d 391, 393 n.2 (App. 2007) (finding an issue waived on appeal because the party mentioned it in passing, cited no supporting legal authority, and failed to develop it further).

¶20 Second, AAC Rule 140 lists several prerequisites to the exemption, including: (1) a filing with the ACC of administrative forms, a consent to service of process, and a filing fee, *see* A.A.C. R14-4-140.L.; and (2) compliance with 17 C.F.R. § 230.504 (Rule 504), *see* A.A.C. R14-4-140.B. That is, making an offer of securities as the director of a company, alone, is insufficient to trigger the exemption under ACC Rule 140. In this case, the administrative record does not contain evidence of any filing made on behalf of ACI Holdings. Moreover, the exemption under Rule 504 only applies to offerings not exceeding $1 million in a 12-month period. 17 C.F.R. § 230.504(b)(2). However, the ACI Holdings stock offering was for $2 million. Purvis's only argument that he qualifies for exemption under AAC Rule 140 is that he was the director of ACI Holdings at the time of the offering. Purvis has made no argument nor pointed to any evidence in the record that he satisfied the requirements of AAC Rule 140 or that the stock offering was made in compliance with Rule 504. Thus, this argument fails.

3. The evidence was sufficient to support findings that Purvis committed fraud in connection with the sale of stock.

¶21 Purvis argues that the ACC presented insufficient evidence to prove either that he made false statements in connection with the sale of stock, or that the statements alleged were material. Again, we disagree. "We view the facts in the light most favorable to upholding the [agency's] decision." *Eaton*, 206 Ariz. at 431, ¶ 2, 79 P.3d at 1045; *see also State v. Barber*, 133 Ariz. 572, 578, 653 P.2d 29, 35 (App. 1982) (reviewing whether evidence of securities-related crimes was sufficient for presentation to jury: "In reviewing the transcript to determine an issue raised as to the sufficiency of the evidence . . . all reasonable inferences must be resolved against the appellant.").

¶22 "The speaker's knowledge of the falsity of the statements is not a required element to proving fraud under A.R.S. § 44-1991(A)(2). . . . The statute instead imposes only an affirmative duty not to mislead." *Aaron v. Fromkin*, 196 Ariz. 224, 227, ¶ 15, 994 P.2d 1039, 1042 (App. 2000). "Therefore, Plaintiffs' burden of proof requires only that they demonstrate that the statements were material and misleading." *Id*. The standard of materiality "contemplates a 'showing of a substantial likelihood that, under all the circumstances, the omitted [or misrepresented] fact would have assumed actual significance in

the deliberations of the reasonable (buyer).'" *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892 (App. 1981) (quoting *T.S.C. Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). "[T]here is no need to investigate whether an omission or misstatement was actually significant to a particular buyer." *Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136 (App. 1986).

¶23 Not only does the record show that Purvis "failed to disclose the risks associated with the investment, any hidden fees or commissions connected with the offer and sale of the securities . . . and that invested funds would be used for his personal expenses," but it also shows that he "misrepresented the nature of the offerings, the rate of return on investments and further misrepresented his background and ability to guarantee individual investors' security for their investments." For example, Purvis erroneously represented to one witness the stock in ACI Holdings would become publicly traded within 18 months and the stock would increase three to four times in value. Neither of these assertions by Purvis came to fruition, nor is there evidence suggesting they had any factual basis. In fact, Purvis misrepresented the purported increase in value of the investment that would result from making the stock publicly traded, while in reality no progress was being made to actually take the company

public. Thus, there is substantial evidence to affirm the ACC's decision.

4. The ACC's calculations of restitution and penalties are supported by the evidence.

¶24 Finally, Purvis argues that the ACC's calculations of restitution and penalties were not supported by the evidence. However, Purvis has waived any challenge to ACC-imposed administrative penalties, and substantial evidence supports the ACC's findings pertaining to a portion of the restitution.

¶25 The ACC is empowered by statute to order payment of restitution for violations of the Securities Act. A.R.S. § 44-2032.1. (2003). If restitution is ordered, the amount shall include "the fair market value of the consideration paid" by the purchaser plus interest, *less* the "amount of any principal, interest, or other distributions received on the security for the period from the date of purchase payment to the date of repayment." A.A.C. R14-4-308.C.1.c (defining restitution and set-offs). Further, the ACC may assess an administrative penalty of up to $5,000 per violation of the Securities Act. A.R.S. § 44-2036.A. (2003).

¶26 The ACC ordered $75,000 each for violations of A.R.S. §§ 44-1841 and -1842 and $100,000 for violations of A.R.S. § 44-1991, totaling $250,000 in administrative penalties. Thus, at $5,000 per violation, the ACC implicitly found fifteen violations

of § 44-1841, fifteen violations of § 44-1842, and twenty violations of § 44-1991. Furthermore, the ACC ordered "restitution in an amount not to exceed $11,044,912 . . . *subject to legal set-offs* by [Purvis] and confirmed by the Director of Securities." (Emphasis added.)

¶27 Purvis does not challenge the administrative penalty calculations on appeal, making only a general assertion that the ACC "erred in imposing the restitution and penalty amount that was based on an arbitrary number presented by the Securities Division with no supporting evidence." Because he does not articulate on appeal what is wrong with the administrative penalty calculations, his argument is waived. *See Polanco*, 214 Ariz. at 491 n.2, ¶ 6, 154 P.3d at 393 n.2 (finding an issue waived on appeal because the party mentioned it in passing, cited no supporting legal authority, and failed to develop it further). We interpret Purvis's argument regarding the restitution order as a sufficiency of the evidence challenge.

¶28 In calculating restitution, the ACC heard testimony from a forensic accountant. The forensic accountant testified that he reviewed bank statements, copies of checks, wire transfers, and other financial documents in connection with his investigation of Purvis. He prepared a report explaining his findings and showing receipts of $11,044,912 by NCGMI. Purvis

did not cross-examine the witness or present any rebuttal evidence.

¶29 Purvis argues that the ACC failed to meet its burden in connecting him to more than $11 million in losses. That is, Purvis argues that the ACC failed to connect NCGMI's receipts to Purvis's unlawful sales of securities. Specifically, Purvis argues that testimony by the ACC's expert did not support such a finding. Without offering any rebuttal evidence, or supporting legal authority, Purvis asserts that the ACC's showing of receipts by NCGMI for more than $11 million is insufficient to hold him liable for that figure in a restitution order.

¶30 The record shows that Purvis was an agent of NCGMI, which did business through Purvis and Greg Wolfe.[5] Purvis held himself out as the "owner" of NCGMI, issued checks using NCGMI funds, transferred NCGMI funds to offshore accounts, and solicited others to invest in NCGMI. Thus, the record shows a substantial connection between Purvis and NCGMI funds. Moreover, the record shows that NCGMI's receipts include more than $8 million from outside investors. It is not necessary that the ACC trace particular investor funds to Purvis, specifically; it is enough to show that Purvis engaged in unlawful dealings through NCGMI. Thus, the facts in the record are sufficient to connect

[5] The ACC entered a separate order holding Wolfe and NCGMI jointly and severally liable for the exact same amounts entered against Purvis.

Purvis to NCGMI's receipts and to use that number as the starting point for a restitution order.

¶31 Purvis's liability should not, however, extend to the full amount of NCGMI's receipts. The ACC's expert testified that $8,174,534 of NCGMI's receipts could be identified as funds deposited into NCGMI bank accounts from investors. The ACC stated that the reason for NCGMI's additional receipts was not clear. The expert also testified that $4,276,666 could be characterized as payments to investors from NCGMI. As such, Purvis should be liable for restitution in an amount not to exceed $8,174,534, i.e., the amount of receipts deposited with NCGMI from investors, subject to the set-offs prescribed by A.A.C. R14-4-308.C.1.

¶32 In summary, because Purvis's challenge to the administrative penalties on appeal is insufficient, we affirm the ACC's decision with respect to administrative penalties. Although we agree with Purvis that the evidence failed to support the ACC's restitution order in the amount of $11,044,912, the evidence clearly supports restitution in an amount not to exceed $8,174,534. We therefore remand this matter to the superior

court to enter a restitution order in the amount of $8,174,534 subject to set-offs, consistent with this decision.[6]

CONCLUSION

¶33 For the foregoing reasons, the decision by the ACC is affirmed in part and reversed and remanded in part.

/S/
_____
PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
_____
PATRICIA K. NORRIS, Presiding Judge

/S/
_____
JOHN C. GEMMILL, Judge

[6] Remand should be to the superior court where that court is empowered with the necessary authority to enter judgment. *See* A.R.S. § 12-911.A.8. (2003).