MISSOURI COURT OF APPEALS
WESTERN DISTRICT

SEAN A. BRADY,

Respondent,

v.

JOHN R. ASHCROFT and DAVID M. MINNICK,

Appellants.

DOCKET NUMBER WD84470

Date: January 18, 2022

Appeal from:
Cole County Circuit Court
The Honorable Jon E. Beetem, Judge

Before Special Division: Alok Ahuja, P.J., Mark D. Pfeiffer, J., and W. Ann Hansbrough, Sp.J.

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James R. Layton, St. Louis for Amicus Curiae supporting appellants

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.
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In April 2020, the Securities Division of the Office of the Secretary of State filed an administrative petition requesting that the Commissioner of Securities order civil penalties, restitution, and other remedies against Sean A. Brady. The petition alleged that Brady had engaged in fraudulent activities while acting as an investment adviser between 2010 and 2017, in connection with the services he provided to ten investors. The petition alleged that Brady's actions violated multiple provisions of the Missouri Securities Act of 2003, § 409.1-101, RSMo *et seq.*

While the Securities Division's administrative petition was pending, Brady filed a petition for a writ of prohibition in the Circuit Court of Cole County, contending that the Commissioner lacked authority to take enforcement action against him. The circuit court granted a writ of prohibition barring the Commissioner from proceeding. The circuit court concluded that the Commissioner lacked regulatory jurisdiction over Brady because he was no longer a "registrant" subject to the strictures of the Securities Act. The court also concluded that the administrative enforcement action was barred because Brady had reached a settlement with the private investors he was accused of defrauding.

The Commissioner appeals.

REVERSED.

Special Division holds:

Brady was not required to exhaust his administrative remedies before seeking a writ of prohibition in the circuit court. Brady contended that the Commissioner wholly lacked authority to conduct the administrative enforcement proceeding against him, and that he would suffer irreparable injury if forced to

litigate the unauthorized administrative proceeding. Exhaustion was not required in these circumstances.

We need not decide whether the Commissioner's enforcement authority under § 409.4-412(c), RSMo is limited to persons who are current "registrants" under the Securities Act, or those who have withdrawn their registration within the past year. The Securities Division's petition sought relief both under § 409.4-412(c), but also under § 409.6-604. Brady does not contend that § 6-604 actions are limited to Securities Act "registrants." Therefore, even if the Commissioner was not entitled to proceed under § 4-412(c) because Brady is not a current or recent "registrant," Brady would *still* be subject to an administrative enforcement action under § 6-604 involving most of the same underlying allegations of misconduct, and subjecting him to similar remedies. In such circumstances, there is no justification for a writ of prohibition.

The circuit court erred in concluding that the Commissioner was precluded from proceeding under § 409.6-604, because the affected investors had entered into private settlements with Brady. The Commissioner of Securities' enforcement of the Missouri Securities Act of 2003 seeks to vindicate the broader public interest, and may result in imposition of broader remedies than those available to private parties. Accordingly, private settlements which a wrongdoer reaches with injured parties do not preclude the Commissioner from later bringing an enforcement action involving the same underlying misconduct.

This administrative proceeding is not subject to the limitations periods found in §§ 516.380, .390, and .400, RSMo. Those statutes of limitation apply only to "civil actions" filed in the circuit court, not to administrative proceedings like the one commenced by the Securities Division's petition.

It is irrelevant whether some of the underlying challenged transactions involve financial instruments which are not defined as "securities." The Securities Division's petition invokes, among other statutes, § 409.5-502, RSMo. While § 5-502 only applies to securities professionals, the transactions which are subject to the statute need not themselves be securities-related. Instead, the statute prohibits a securities professional from employing "a device, scheme, or artifice to defraud," and from engaging in a practice "that operates or would operate as a fraud or deceit," without limitation.

Opinion by: Alok Ahuja, Judge January 18, 2022

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