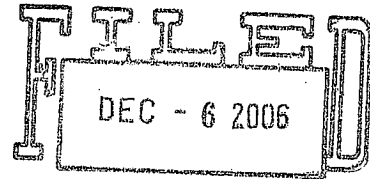


COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER



JOHN MARK,
Petitioner,

v.

THE SUPERIOR COURT OF
RIVERSIDE COUNTY,
Respondent;

THE PEOPLE,
Real Party in Interest.

E041572

(Super.Ct.No. RIF126924)

The County of Riverside

THE COURT

In this matter we have reviewed the petition and the opposition filed by real party in interest. We have determined that resolution of the matter involves the application of settled principles of law and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

We acknowledge that the People's burden at the preliminary hearing is not a heavy one. (*Rideout v. Superior Court* (1967) 67 Cal.2d 471; *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833.) However, there must be *some* evidence of each element of the charged offense. (*Thompson v. Superior Court* (2001) 91 Cal.App.4th 144.) The People's evidence below was insufficient with respect to victims Weiner and Goodman.

The only evidence relating to Weiner's purchase of an interest in "K-OZ" was that she had heard petitioner on the radio and had received "documentation." The evidence does not reflect any particular representation in either petitioner's radio appearance or the "documentation." A violation of Corporations Code section 25401 is committed when a security is sold by means of "an untrue statement of a material fact" or the omission of "a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading." Similarly, a charge of theft by false pretenses (Pen. Code, § 484, subd. (a)) requires deliberate fraud.

COPY

The People suggest that there was an “implied” representation that the securities were properly registered, or perhaps an omission to state that they were not properly registered. However, absent any evidence concerning the actual presentations—written and oral—made by petitioner, we decline to assume that there was a criminal misrepresentation.

With respect to victim Goodman, the record is almost equally devoid of information concerning the purported representations made by petitioner. The testimony that petitioner explained the “concept” of, or made a “pitch” concerning, “EnjoyArts.com” is wholly inadequate to support the inference that any particular false representation or misleading omission was made.

The People argue that the entire transaction was permeated with fraud because petitioner stated to investigators that he felt entitled to use investors’ money for his personal living expenses. However, the People made no effort to trace any expenditures to any particular investment, and failed to show that petitioner in fact made no efforts to develop “EnjoyArts.com.” The stress on the fact that Goodman did not “get his money back” was misplaced; an investor in corporate stock is not the equivalent of a lender, and under the best circumstances has no expectation of being able to withdraw his money or be repaid in cash.

Accordingly, the evidence was insufficient to support the holding order for either securities fraud or false-pretenses theft. We will grant the petition with respect to defendants Goodman and Weiner; in all other respects the petition is denied.

Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to vacate its order denying petitioner’s motion to dismiss the charges involving victims Goodman and Weiner, and to enter a new order granting the motion as to those alleged victims.

Petitioner is DIRECTED to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

/s/ McKinster
Acting P.J.

I concur:

/s/ Richli
J.

cc: See attached list

MAILING LIST FOR CASE: E041572

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-

To Petitioner,

THE PEREMPTORY WRIT SHOULD BE SUBMITTED FOR ISSUANCE **61 DAYS** AFTER THE DATE OF THE ORDER GRANTING THE PEREMPTORY WRIT.

THE WRIT SHOULD BE SUBMITTED WITHIN THIS TIME FRAME EVEN IF A PETITION FOR REVIEW HAS BEEN FILED WITH THE SUPREME COURT.

Submit your writ with enough copies for all parties including the Superior Court and yourself. The clerk will seal, sign and issue the original writ, certify the copies and return the original and copies to you.

DO NOT serve parties with copies prior to the copies being certified. The parties are to be served with the certified copies.

If you are sending the original and copies to this court by mail, make sure you include a self-addressed stamped envelope with enough postage to cover the return of the original and copies to you. The writ with proof of service of the certified copies should be returned to the court for filing immediately!

When the original writ is returned to the court with the proof of service of the certified copies, the original will be filed. If you want a conformed copy of the filed writ, send a copy for conforming with a self-addressed stamped envelope.

Below is the signature block for peremptory writs.

By order of the court.

(Insert name of first Justice to sign order granting writ)

Witness, *the Honorable* _____
(Acting) *Presiding Justice of the Court of Appeal of the State of California, Fourth Appellate District, Division Two.*

Attest *my hand and the seal of this Court on* _____

Stephen M. Kelly
Clerk Administrator

By: _____
Deputy Clerk