SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs -against- WEST HOOKER, FILM NETWORK, INC. and MASTER TELEVISION CORPORATION, Defendants.	:	Index No.41900/1955.

PLAINTIFFS' MEMORANDUM OF LAW.

STATEMENT.

This is a motion for an injunction pendente lite brought in an action for a permanent injunction under and pursuant to Article 23-A of the General Business Law of the State of New York. Service of the summons and complaint who duly effected on all of the defendants above named. By this motion the plaintiffs seek to restrain, during the pendency of this action, each and every one of the defendants from engaging in the securities business in this state, including the issuing of securities directly to the public.

FACTS.

The facts herein have been fully set forth in the complaint and affidavit submitted in support of plaintiffs' motion for a Temporary Injunction. Accordingly, they will only be summarized herein.

During the year 1954 and the early months of 1955, both of the defendant corporations, through their president, the defendant, West Hooker, published, circulated and mailed to the plaintiffs in this state, prospectuses offering the securities of said corporations to the plaintiffs. In connection with the offer and sale of the securities of Film Network, Inc. and Master Television Corporation, the defendant, Hooker, as president of said corporation, published, circulated and mailed in this state to members of the public in this state, a prospectus, a copy of which is annexed to the complaint herein as Exhibit "A", which contained false, misleading, deceptive and fraudulent representations concerning Film Network, Inc.

Among the misrepresentations contained in this prospectus are the following:

1. That "to date over $300,000 has been raised in New York City", whereas Film Network, Inc. never raised more than $50,000;

2. It was stated in said prospectus that certain prominent persons "had contributed financially to the development of Film Network Inc." and were to become members of various "Boards" to be organized by Film Network, Inc., whereas, in fact, at least seven out of the ten persons listed as persons who had contributed financially, never contributed one penny to Film Network, Inc. and many have no knowledge of membership in any "Boards" or that a prospectus exists containing their names;

3. In the same prospectus it is falsely represented that certain major television stations were at one time "ready to go" in the Film Network, Inc. venture, whereas none of these T.V. stations were ever committed to Mr. Hooker or Film Network, Inc. even in a preliminary way.

4. It is represented in the same prospectus, that during the year 1953 and 1954, an additional $312,000 was raised in commitments from a “banking house”, a “film laboratory” and “several producing studios”, whereas, in fact, no commitment was ever obtained from any banking house, film laboratory or producing studio.

5. The prospectus also contains a statement that a pilot sample is available of a certain film series, set in the context of language which easily misleads the reader into believing that this pilot film was made by the well-known actor, Sterling Hayden, whereas, in fact, Mr. Hayden never had any association with Film Network, Inc. and never made any such pilot film, as misleading represented;

6. Additional false and fraudulent representations exist in the prospectus, including the misleading use of the name of xxx General of the Army, Douglas MacArthur.

The aforesaid misrepresentations, as well as others, are contained in said prospectus which was issued and submitted to the plaintiffs and the public generally in the attempt to induce them to purchase securities of Film Network, Inc. and Master Television Corporation. Film Network, Inc. was to act as distributor of films produced by Film production corporations such as Master Television Corporation, promoted and organized by Film Network, Inc. and the defendant, West Hooker.

The affidavit submitted in this section details the false and deceptive and misleading nature of this prospectus and the fraudulent practices committed by all of the above defendants in their frantic efforts to sell securities to the plaintiffs in New York. In excess of $40,000 was obtained by Film Network, Inc. through solicitation and sale of its stock throughout the United States, including the State of New York, and Film Network, Inc. and Master Television Corporation have offered their securities directly to the

plaintiffs and have circulated prospectuses for this purpose, without any of the defendants having first filed required statements with the Department of Law of the State of New York, prior to the offer of said securities, as required by Section 359-e of the General Business Law of the State of New York. An examination of the prospectuses annexed to the complaint as Exhibits "A", "B" and "C" indicates the large amounts of money sought to be raised in this manner from the investing public. Said failures to file constitute a fraudulent practices within the intent and meaning of said statute.

A reading of the affidavit, together with the points of law included herein, indicates that the past conduct of these defendants, by reason of the provisions of Article 23-A of the General Business Law (Martin Act), and the cases cited, in connection therewith, requires the issuance of the relief prayed for herein against the defendants.

THE MARTIN ACT.

Section 352 of Article 23-A provides that an investigation may be instituted by the Attorney General of this State:

> "Whenever it shall appear to the Attorney General either pupon complaint or otherwise, that *** in the issuance, sale, promotion, negotiation, advertisement or distribution within this state, of any stocks, bonds, notes, evidences of interest, or indebtedness, or other securities including * * * negotiable documents of title or foreign currency orders, calls, or options therefor hereinafter called security or securities, any person, partnership, corporation, company, trust or association shall have employed, or employs, or is about to employ any device, scheme or artifice to defraud or for obtaining money or profit by means of any false pretense, representations or promise * * * * or shall have engaged in, or engages in, or is about to engage in any practice or transaction or course of business * * * which is fraudulent or in violation of law, which has operated, or which would operate as a fraud upon the

> purchaser * * * any one or all of which devices, schemes, artifices, * * * practices, transactions and courses of business are hereby declared to be and are hereinafter referred to as a fraudulent practice or fraudulent practices* * *."

When an investigation conducted pursuant to the above section develops evidence which satisfies the Attorney General that any person, firm or corporation

> "has engaged in, is engaged or is about to engage in any of the practices or transactions * * * referred to as and declared to be fraudulent practices,"

he is authorized by section 353 of the Act to

> "Bring an action in the name and on behalf of the people of the State of New York against such person, partnership, corporation, company, trust or association, and any other person or persons theretofore concerned in or in any way participating in or about to participate in such fraudulent practices, to enjoin such persons, partnerships, corporation, company, trust or association and such other person or persons from continuing such fraudulent practices or in engaging therein or doing any act or acts in furtherance thereof *6* *."

Under the same section, where the evidence so developed indicates that any of the defendants actually has or is engaged in a fraudulent practice, he may include in his prayer for relief

> "an application to enjoin permanently such person, partnership, corporation, company, trust or association, and such other person or persons as may have been or may be concerned with or in any way participating pin such fraudulent practice, from selling or offering for sale to the public within this state, as principal, broker or agent, or otherwise, any securities issued or to be issued."

In interpreting the scope and purpose of the fundamental provisions of the Martin Act, the Court of Appeals in People v. Federated Radio Corporation, 244 N.Y. 33, said at pages 37-39:

> "The primary purpose of the law is remedial in its character.

* *

> "While certain practices are declared by the act to be fraudulent, the definition of a fraudulent practice goes no further than to say that a fraud or a violation of law which would operate as a fraud is a fraudulent practice, which may be enjoined, and we must gather from other sources the meaning of the word 'fraud'. In a broad sense, the term includes all deceitful practices contrary to the plain rules of common honesty.
>
> "The purpose of the law is to prevent all kinds of fraud in connection with the sale of securities and commodities and to defeat all unsubstantial and visionary schemes in relation thereto whereby the publis is fraudulently exploited. Hall v. Geiger-Jones Co. 242 U.S. 539. The words 'fraud' and 'fraudulent practice', in this connection should therefore be given a wide meaning, so as to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive or mislead the purchasing public come within the purpose of the law." (Underlining ours)

POINT I.

THE DEFENDANTS, AND EACH OF THEM, HAVE ENGAGED AND PARTICIPATED IN FRAUDULENT PRACTICES AS DEFINED BY SECTION 352 OF THE GENERAL BUSINESS LAW BY ISSUING AND CIRCULATING A FALSE, FRAUDULENT AND MISLEADING PROSPECTUS TO MEMBERS OF THE PUBLIC IN THIS STATE IN THE EFFORT TO INDUCE THE PURCHASE OF SECURITIES.

The condition of affairs uncovered by the Attorney General in this matter is one patently calling for application of the relief provided for in the Martin Act. Investigation discloses that the defendants carried on a course of conduct in connection with their dealings in securities in such a reckless, improvident, illegal and fraudulent manner that members of the securities-dealing public of this state were placed in a position where they could easily be defrauded and wrongfully deprived of their property.

It is only too clear that these defendants have, by their acts have exhibited their ineptness to engage in a business so charged with the public interest as the offer and sale of securities.

(Dunham v. Ottinger, 243 N.Y. 423, 435, 436).

The fact situation involved in this case is closely similar in many respects to that presented to the Court of Appeals in the landmark case of People v. Federated Radio Corp. (244 N.Y. 33).

In the Federated case, the Court stated that in the situation presented in that case, "that the allegations are in effect that the advertising matter of the defendants, contained in a promoter's prospectus, unduly inflates the value of the stock and conceals certain facts in regard to such values which should in good faith be revealed." The Court of Appeals pointed out that circulation of a prospectus containing misrepresentations constituted a violation of Section 421 of the Penal Law, and

> "a complaint which alleges that defendants are putting forth untrue and misleading advertisements with intent to sell securities alleges a fraudulent practice, i.e., a 'violation of law which has operated or would operate as a fraud upon the purchaser,' (Section 352)".

The Court of Appeals in the Federated case also stated the purpose of the Martin Act in the following language:

> "The purpose of the law is to prevent all kinds of fraud in connection with the sale of securities and commodities and to defeat all unsubstantial and visionary schemes in relation thereto whereby the public is fraudulently exploited. (Hall v. Geiger-Jones Co., 242 U.S. 539.) The words 'fraud' and 'fraudulent

> practice' in this connection should, therefore, be given a wide meaning so as to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive or mislead the purchasing public come within the purpose of the law."

It should be noted, that in regard to promoters, the Court of Appeals stated:

> "Promoters are under a duty to make reasonable investigation before issuing a prospectus and to the extent that they fail in the performance of their duty, lack of scienter will not relieve them from liability in actions brought under the Martin Act." (underlining the Court's).

POINT II.

UNDER THE MARTIN ACT, IT IS SUFFICIENT FOR AN INJUNCTION TO BE ISSUED THAT THE DEFENDANT FRAUDULENTLY CIRCULATED TO THE PLAINTIFFS FALSE AND MISLEADING PROSPECTUSES, IRRESPECTIVE OF THE FACT THAT NO PURCHASES WERE ACTUALLY MADE.

The defendants are seeking millions of dollars from the sale of stock to the plaintiffs by the use of a fraudulent prospectus.

This is an action for an injunction. An injunction is obviously a restraint on further action. The only real effect that an injunction can have is a preventive and remedial effect. Therefore, if an attempt to sell stock by the use of a fraudulent practices can be enjoined before any extensive damage is done, the injunction has real meaning and is a real protection for the public of this state. This was recognized by the Legislature when it empowered the Attorney General even to proceed against anyone "about to engage" in any fraudulent practice. (Secs. 352, 353).

This fact has been recognized time and again by the Courts of this State. In People v. Electro Process, Inc. (284 App. Div. 833) The Appellate Division stated:

> "The learned Official Referee points out in his decision that 'The preparation and use of the pamphlets, exhibits 9 and 10, and the giving of the information to the newspapers and to the trade journals were practices which come under the condemnation of the statute." (General Business Law, art. 23-A, Secs. 352.) The fact, if it is a fact, that no sales of stock have resulted from such printed matter does not permit the escape from such condemnation, as the statute specifically provides in its declaration as to what constitutes a fraudulent practice or fraudulent practices."

See also People v. Royal Securities Corp., New York Law Journal, May 31, 1955.

In the Royal Securities case, supra, Judge Wasservogel summarized the intent and purposes if the Martin Act, as follows:

> "Although the complaint sounds in fraud, many of the requirements of an ordinary legal action for fraud need not be established by a plaintiff in an action brought pursuant to the provisions of the Martin Act. In actions of this type, a plaintiff need not prove reliance by the purchasers of the securities involved on the fraudulent representations, nor is it necessary for a plaintiff to prove any element of damage (People v. Electro Process, Inc., 284 App. Div. 883). Likewise, an absence of scienter or intent to defraud will not relieve a defendant from liability where the purchasing public is actually being deceived and defrauded (People v. Federated Radio Corp., 216 App. Div. 250, 251, aff'd 244 N.Y. 33, 37-38). The opinion of the Court of Appeals in this case clearly indicates that the primary purpose of the Martin Act is 'remedial in its character' (supra, p. 37). It was designed to prevent all kinds of fraud in connection with the sales of stocks, bonds and other commodities and to defeat all unsubstantial and visionary schemes in relation thereto, whereby the public is fraudulently exploited. The provisions of this 'blue sky law' must be literally construed by the court, therefore, in order that its beneficient purposes may, so far as possible, be attained and the inexperienced, confiding and credulous investor protected from his own foolish cupidity (People v. Wachtel, 181 Misc. 1010, 1011). Thus, the words 'fraud' and 'fraudulent practice' in connection with defendants' alleged activities must be given a wide meaning so as to encompass all acts, although not originating in any actual evil design or contrivance or perpetrate a fraud or injury upon others, do, by their tendency to deceive or mislead the purchasing

> public, come within the purpose and intendment of Article 23-A of the General Business Law (People v. Federated Radio Corp'n, supra, pp. 38-39).

POINT III.

THE ARTFUL STATEMENT OF FACTS WHICH IN THEIR CONTEXT CONSTITUTE DECEPTION IN A PROSPECTUS IS A FRAUDULENT PRACTICE.

It is obvious that where a promoter in a prospectus attempts to mislead the public by suppressing material facts in a misleading setting, we have a situation which is "contrary to the plain rules of common honesty". (People v. Federated Radio Corp. 244 N.Y. 33).

As Mr. Justice Dineen has stated in a Martin Act Case:

> "The question to be decided is whether the methods used in selling the stock had a tendency to deceive or mislead the purchasing public. If so, an injunction should issue (People &c v. Federated Radio Corp'n. 244 N.Y. 33; People &c v. Smith Co., 230 App. Div. 268). A statement need not always be false in order to be misleading. Facts may be artfully stated so as to accomplish deception (Downey v. Finucane, 205 N.Y. 251, 264).

People v. Hevenor, New York Law Journal, June 13, 1941, Aff'd 269 App. Div. 657.

Judge Wasservogel, in the Royal Securities case, supra, stated, in regard to a similar question:

> "Likewise, the offering circular with respect to the stock of American & Foreign Productions, Inc. (hereinafter referred to as "American") failed to disclose the material fact that American merely had a limited interest in the properties mentioned therein, which limited interest was subject to termination in the sole and absolute discretion of the actual owners of these properties. Thus, the purchasing public remained ignorant of such vital information, which Royal and Milliken were under the unquestionable duty of setting forth in the offering circular and other sales media."

The defendant, Hooker, in the prospectus annexed to the complaint as Exhibit "A", time and again suppressed from the public important and substantial facts, which suppression would tend to mislead the public. For example, it is stated that $312,000 has been raised in committments as producing capital, whereas, in fact, only preliminary negotiations were carried on by Hooker which never, in any way even approached definite commitments. Moreover, the use of names by Mr. Hooker is often misleading in a similar way. For example, he uses the name of the actor, Sterling Hayden, in a manner which would indicate that a pilot film has been made by Mr. Hayden for Film Network, Inc. which is entirely untrue.

POINT IV.

A PROMOTER IS UNDER A DUTY TO MAKE A CAREFUL AND PRECISE INVESTIGATION OF ALL FACTS REPRESENTED IN A PROSPECTUS ISSUED TO THE PLAINTIFFS IN ORDER TO INDUCE THE PURCHASE OF STOCK.

Mr. Hooker recklessly included the names of many prominent Americans in his prospectus without authority and stated that they had contributed financially to the development of Film Network, Inc. He also represented that certain major television stations were at one time "ready to go" in the Film Network, Inc. venture, among his very many visionary and unfounded and fraudulent representations.

In People v. Federated Radio Corp., the Court of Appeals, in a Martin Act case, laid down the stringent standard placed by the Legislature on those persons who attempt to secure monies in this state through the sale of securities by the use of a prospectus. In that case, the highest court in the state stated in a unanimous decision:

> "Promoters are under a duty to make reasonable investigation before issuing a prospectus and to the extent that they fail in the performance of other duty, lack of scienter will not relieve them from liability in actions brought under the Martin Act."
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> Accord: See, also People v. Royal Securities, supra.

In People v. Royal Securities, supra, Judge Wasservogel recently stated in regard to this specific question:

> "With respect to the sale of stock of Albert Black Television Productions, Inc., American & Foreign Productions, Inc. and Northwest Uranium Corporation, contrary to defendants' contention, Royal and Milliken were promoters and/or underwriters of these securities. As such, they were under a duty to make a reasonable investigation concernint the truth and accuracy of the statements contained in the offering circulars and other sales literature before they were issued to the general public for its consumption (People v. Federated Radio Corp'n, supra, p. 41). The proof adduced upon the trial clearly establishes that they failed to comply with their duty. In the offering circular distributed to the public by Royal to promote the sale of stock of Albert Black Television Productions, Inc., over a period from May 13, 1952, to May 11, 1953, it was represented that the latter-mentioned corporation owned a series of 'telefilms' which purportedly were in the hands of a large television film distribution corporation and were being shown on television stations throughout the country. None of these 'telefilm,' however, was in fact shown on any television at any time, and the corporation derived no income or revenue therefrom."

POINT V.

FAILURE OF AN ISSUING CORPORATION OFFERING ITS SECURITIES IN THIS STATE TO THE PUBLIC AS A DEALER, TO FILE A DEALER'S STATEMENT UNDER SECTION 359-e OF THE GENERAL BUSINESS LAW, CONSTITUTES A FRAUDULENT PRACTICE AS DEFINED IN SECTION 352 OF THE MARTIN ACT.

The Martin Act in Section 352 where the word "fraud" is defined, includes within its definition the situation where,

> "any dealer, as defined by section three hundred and fifty-nine – e of this article, has sold or offered for sale or is attempting to offer for sale * * * any security * * * in violation of the provisions of said section."

Moreover, such statute defines as a fraudulent practice any transaction or course of business which is "in violation of law and which has operated or which would operate as a fraud upon the purchaser". In People v. Peterkin, New York Law Journal, February 23, 1954, page 7, Mr. Justice Nathan held that failure to file a Dealer's Statement constitutes a violation of law which operates as a fraud upon the public and a fraudulent practice upon which the Court may issue a temporary injunction. The decision in that case reads as follows:

> "People, &C., v. Peterkin –Motion for an injunction pendente lite pursuant to the Martin Act (General Business Law, article 23-A is granted. It appears from the papers submitted that the defendant had violated the provisions of section 359-e of the General Business Law, by failing to file a dealer's statement before engaging in the sales complained of. Such a violation is a misdemeanor (General Business Law, sec. 359-g2). The papers further indicate the defendant was engaged in fraudulent practices within the meaning of sections 352 and 353 of the statute. (see People, &c., v. Wachtell, 181 Misc. 1010; same, 181 Misc., 1012). Settle order which may contain a provision for an early trial."

Clearly, the defendants have failed to comply with Section 359-e of the General Business Law. A corporation offering for sale its own securities to the public directly, comes within the definition of the word "dealer" as used in Section 359-e of the Martin Act.

Section 359-e of the Martin Act defines a "dealer" to include "Every * * * corporation who engages directly or through an agent in the business of trading in

securities in such manner that as part of such business any of such securities are sold or offered for sale to the public of this State." (Underlining ours).

While it is true that the defendants were never successful in selling securities after the aforesaid prospectus was published and circulated to the public, it is certainly true that Film Network, Inc. sold its securities for an amount in excess of $40,000 and such sales included sales made to the plaintiffs in the State of New York. It can easily be seen from examining the prospectus of Film Network, Inc. which is Exhibit "A" of the complaint, and the prospectuses of Master Television Corporation, which are Exhibits "B" and "C", that a major offering of securities is intended by the defendants which could very well, if successful, procure for the corporation, millions of dollars in funds from residents of this state, as well as residents of states all over the country. The affidavit contains evidence of the vast solicitation of funds carried on on a national scale by the defendants.

CONCLUSIONS.

THE RELIEF PRAYED FOR IN THIS MOTION SHOULD BE GRANTED IN ALL RESPECTS

Dated, New York, N.Y., November 21, 1955.

Respectfully submitted

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