IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1261

HSSM #7 LIMITED PARTNERSHIP,

Plaintiff-Appellee,
Cross-Appellant,

versus

PAUL BILZERIAN, ET AL.,

Defendants,

PAUL BILZERIAN and BICOASTAL FINANCIAL CORPORATION,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the Northern District of Texas
(CA3 89 0965 R)

(March 9, 1993)

Before REAVLEY, KING and WIENER, Circuit Judges.

PER CURIAM:[1]

A jury found that Paul Bilzerian and Bicoastal Financial Corporation (collectively "Appellants") fraudulently induced Craig Hall, on behalf of HSSM #7 Limited Partnership (HSSM), to

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

enter into the Suncoast Partners Limited Partnership agreement. The district court entered judgment for rescission and punitive damages thereon. We affirm, because:

1. The district court decision to allow HSSM to present evidence of Bilzerian's prior conviction, *United States v. Bilzerian*, No. 88-CR-962 (S.D.N.Y. Sept. 27, 1989), *aff'd*, 926 F.2d 1285 (2d Cir.), *cert. denied*, 112 S. Ct. 63 (1991), and of the SEC's civil investigation of and action against Bilzerian which arose from that conviction, *SEC v. Bilzerian*, 750 F. Supp. 14 (D.D.C. 1990), was not an abuse of discretion.

   Under Fed. R. Evid. 609(a)(1), the district court must permit evidence of a prior felony conviction in a civil case, regardless of unfair prejudice. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 526, 109 S. Ct. 1981, 1993 (1989). The "balancing" requirement of Fed. R. Evid. 403 is inapplicable. *Id.* The nature of the crime, not mere identity, is admissible. *United States v. Gordon*, 780 F.2d 1165, 1176 (5th Cir. 1986). Evidence of prior or pending civil actions *is* subject to Rule 403 balancing. However, to the extent that evidence of the SEC's civil investigation and suit was used to bolster HSSM's fraudulent inducement claim, that evidence was critical to the case and was entitled to be allowed unless extremely prejudicial.[2] Any

[2] Furthermore, to the extent that evidence of the SEC's civil investigation and suit was used for impeachment purposes, HSSM argues that it was used to rebut Bilzerian's claim that

prejudice was not sufficient to warrant excluding this otherwise relevant evidence.

2. The district court did not prejudice Appellants' ability to prove ratification by excluding evidence that HSSM orally agreed to sell its interest in Suncoast to Singer before Singer went bankrupt. To the contrary, after initially ruling that such evidence was inadmissible, the district court eventually permitted Appellants to develop this argument over HSSM's objection, concluding that the evidence was relevant to Appellants' ratification defense.

3. The district court did not abuse its discretion after it permitted HSSM to present as evidence information which Hall received during conversations with his attorney. Appellants contend that, by allowing testimony as to portions of these communications, HSSM waived its attorney-client privilege, and therefore Appellants should have been permitted to fully explore through those communications whether HSSM's attorneys' had knowledge of Bilzerian's allegedly fraudulent statements. Appellants were not denied the opportunity to disprove inducement, and as for Hall's communications with his lawyer, no privilege was involved because the testimony offered was about *facts* and not legal advice. *See United States v. El Paso Co.*, 682 F.2d 530, 538-39 n.10 (5th Cir.

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there had been no such investigation regarding the Singer transaction. In fact, the SEC investigation *did* encompass the Singer transaction, for which Bilzerian solicited the funds from HSSM which are the source of this litigation. *SEC*, 750 F. Supp. at 15 n.3.

1982), *cert. denied*, 466 U.S. 944, 104 S. Ct. 1927 (1984). There was no waiver to "open the door" to further questioning by Appellants.

4. The district court's jury charge will constitute reversible error only when we find that the charge *as a whole* creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations. *Bommarito v. Penrod Drilling Corp.*, 929 F.2d 186, 189 (5th Cir. 1991). Jury instructions that are comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury will be deemed adequate. *Scheib v. Williams-McWilliams Co.*, 628 F.2d 509, 511 (5th Cir. 1980).

Bilzerian specifically complains that (1) the district court's recitation of the parties' contentions was "slanted and prejudicial," (2) the instruction on witness credibility was "slanted and prejudicial and incorrectly stated the law of impeachment," (3) the special issue on fraudulent inducement failed to distinguish which of HSSM's theories it was based on, and (4) the ratification instruction was "misleading." We find no merit in any of these complaints.

5. The district court properly denied Appellants' motions for directed verdict and j.n.o.v. Based upon our review of the record, there is "substantial evidence such that reasonable and impartial minds could differ" with Bilzerian's version of the facts. *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 250 (5th Cir. 1990).

6. The district court did not err when it concluded that the jury's answer that "HSSM did prove" "that on December 31, 1988 there was a market value of HSSM's capital account in the Suncoast Limited Partnership," was inconsistent with the district court's Conclusion of Law No. 1 that, *inter alia*, "there was no readily ascertainable value in the [o]pen market for HSSM's interest on December 31, 1988" and that the jury's answer "had no legal significance, under either prong of Florida's test for awarding specific performance." Finding no legal basis in the jury's verdict to order specific performance, the district court ordered that HSSM was entitled to rescission.

7. An award of exemplary or punitive damages for fraudulent inducement requires proof that misrepresentations were made wilfully and with knowledge of their falsity at the time they were made. *Life Ins. Co. of Va. v. Murray Inv. Co.*, 646 F.2d 224, 228 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163, 102 S. Ct. 1037 (1982); *see also Nabours v. Longview Sav. & Loan Ass'n*, 700 S.W.2d 901, 904 (Tex. 1985) (authorizing the recovery of exemplary damages on the grounds of fraudulent inducement). A finding of common-law fraud satisfies the wilfulness and knowledge requirement in a fraudulent inducement case. *See Life Ins. Co. of Va.*, 646 F.2d at 229. The jury's answer to special issue no. 1 constituted such a finding.

8. The district court's award of prejudgment interest at a rate of 10% per annum is consistent with our reading of TEX. CIV. STAT. ANN. art. 5609-1.05 §§ 2, 6 and with *Enserch Corp. v. Shand Morahan & Co.*, 952 F.2d 1485, 1499 (5th Cir. 1992), and *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 930 (Tex. 1988) (both holding that Article 5609-1.05 applies in cases where the amount of damages, as well as liability, is disputed).

9. The district court did not abuse its discretion when it awarded HSSM $20,006.75 of specified costs. Notwithstanding Bilzerian's arguments to the contrary, we find that HSSM adequately argued that the claimed costs for exemplification and copying expenses and for deposition expenses satisfied 28 U.S.C. § 1920. All other costs awarded by the district court were clearly within its discretion.

AFFIRMED.