No. 63
The People of the State of New York by Andrew M. Cuomo, &c.,
Respondent,
v.
Maurice R. Greenberg, et al.,
Appellants.

David Boies, for appellant Greenberg.
Vincent A. Sama, for appellant Smith.
Barbara D. Underwood, for respondent.
James J. Park; Kate Stith; AARP; Chamber of Commerce of the United States of America et al.; North American Securities Administrators Association, Inc.; Former State and Federal Government Officials; State of Connecticut et al., amici curiae.

SMITH, J.:

We hold that the Attorney General's claims against two former officers of American International Group, Inc. (AIG) have sufficient support in the record to withstand summary judgment.

The Attorney General began this civil suit against AIG, Maurice Greenberg and Howard Smith in 2005. Until shortly before the suit was brought, Greenberg was the Chief Executive Officer,

and Smith the Chief Financial Officer, of AIG. AIG has settled the case; Greenberg and Smith remain as defendants.

The Attorney General alleges that Greenberg and Smith violated section 63(12) of the Executive Law and Article 23-A of the General Business Law (the Martin Act), and committed common law fraud. The statutes on which the Attorney General relies are broadly worded anti-fraud provisions, prohibiting among other things "repeated fraudulent or illegal acts" (Executive Law § 63[12]), "persistent fraud or illegality" (id.), and "fraud, deception, concealment, suppression [or] false pretense" (General Business Law § 352-c [1] [a]). It is not disputed that the Attorney General is empowered to sue for violation of these statutes.

The gist of the Attorney General's claim, to the extent that it is now before us, is that Greenberg and Smith participated in causing AIG to enter into a sham transaction with General Reinsurance Corporation (GenRe) in which AIG purported to reinsure GenRe on certain insurance contracts. The Attorney General asserts that the transaction transferred no real risk from GenRe to AIG, and therefore should not have been treated as an insurance transaction on AIG's books; and that the transaction's sole purpose was to increase the insurance reserves shown on AIG's financial statements, thereby creating the impression of a healthy insurance business and bolstering AIG's stock price. The transaction has been the subject of a federal

criminal case in which Greenberg and Smith were identified as alleged co-conspirators, but were not defendants (see United States v Ferguson, 676 F3d 260 [2d Cir 2011]).

The course of the litigation has been long, and some issues once important have fallen by the wayside. Most recently, as a result of the settlement of a federal class action (see In Re Am. Intl. Group, Inc. Sec. Litig., 2013 WL 1499412 [SD NY Apr. 11, 2013]), the Attorney General has withdrawn his claims for damages and now seeks only equitable relief. The parties agree that, because of this development, the issue of federal preemption, discussed in the majority and dissenting opinions at the Appellate Division (People v Greenberg, 95 AD3d 474, 479-482, 489-492 [1st Dept 2012]), is out of the case. The Attorney General has not appealed from the Appellate Division order denying him summary judgment. And Greenberg and Smith do not challenge here the denial to them of summary judgment on a transaction not involving GenRe.

We are left with two questions to address: whether the evidence of Greenberg's and Smith's knowledge of the fraudulent nature of the AIG-GenRe transaction is sufficient to raise an issue of fact for trial; and whether, on the present record, the Attorney General is barred as a matter of law from obtaining any equitable relief. We answer yes to the first question and no to the second, and therefore affirm the Appellate Division's order denying Greenberg and Smith summary judgment.

We will answer the first question without a detailed discussion of the facts. Much of the relevant evidence is summarized in other decisions, including the opinion of the Court of Appeals for the Second Circuit in United States v Ferguson, which held, among other things, that there was sufficient evidence to support a jury finding -- in a criminal case, beyond a reasonable doubt -- that a fraudulent conspiracy had its inception in a telephone call from Greenberg to GenRe's Chief Executive Officer (see 676 F3d at 289). We have no difficulty in concluding that, in this civil case, there is evidence sufficient for trial that both Greenberg and Smith participated in a fraud. The credibility of their denials is for a fact finder to decide.

Greenberg's and Smith's remaining argument is that no basis exists for granting equitable relief. They argue, in substance, that all such relief that could possibly be awarded has already been obtained in litigation brought by the Securities and Exchange Commission (SEC), which Greenberg and Smith settled in 2009. In the settlement, without admitting or denying the allegations against them, Greenberg and Smith agreed among other things to permanent injunctions against violations of the anti-fraud provisions of the federal securities laws. The Attorney General responds that more relief could be granted in this case "including but not limited to a ban on [Greenberg's and Smith's] participation in the securities industry and a ban on serving as an officer or director of a public company."

We reject the contention of Greenberg and Smith that the Attorney General failed to preserve this argument for our review. While the sufficiency of the claim for equitable relief was not a major focus of any party's attention below, the Attorney General did specifically dispute, in Supreme Court, Greenberg's and Smith's assertion that that claim was barred by the SEC settlement. It is irrelevant to the preservation issue whether the argument was made in the Appellate Division (Matter of Couch v Perales, 78 NY2d 595, 605 n 5 [1991]; Matter of Seitelman v Lavine, 36 NY2d 165, 170 n 2 [1975]).

On the merits, we cannot say as a matter of law that no equitable relief may be awarded. There is no doubt room for argument about whether the lifetime bans that the Attorney General proposes would be a justifiable exercise of a court's discretion; but that question, as well as the availability of any other equitable relief that the Attorney General may seek, must be decided by the lower courts in the first instance.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be affirmed, with costs, and the certified question answered in the affirmative.

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Order, insofar as appealed from, affirmed, with costs, and certified question answered in the affirmative. Opinion by Judge Smith. Judges Graffeo, Read, Pigott, Rivera, Abdus-Salaam and Mastro concur. Chief Judge Lippman took no part.

Decided June 25, 2013