

Feinberg v Shaw

2001 NY Slip Op 30046(U)

December 19, 2001

Supreme Court, New York County

Docket Number: 0600824/2001

Judge: Diane A. Lebedeff

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

DIANE A. LEBEDOFF

PRESENT:

Justice

PART 8

Frumberg

- v -

Shaw

600824/01

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

8/13/01

201

9

The following papers, numbered 1 to _____ were read on this motion to/for *disc*

PAPERS NUMBERED

Notice of Motio	Order to Show Cause — Affidavits — Exhibits	<u>1</u>
Answering Affidavits — Exhibits		<u>2-4</u>
Replying Affidavits		<u>5</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE DECISION OF THE ACCOMPANYING MEMORANDUM

SCANNED
DEC 28 2001

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

Dated: _____

DEC 19 2001

Dh

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8

-----X

HERBERT FEINBERG,

Plaintiff,

-against-

Index No. 600824/01
Mot. Seq. No. 001

J. STANLEY SHAW, JOHN DOE LAW PARTNERS
I-X, and SHAW, LICITRA, **BOHNER**, ESERNIO,
SCHWARTZ & PFLUGER, P.C.,

Defendants.

-----X

DIANE A. LEBEDEFF, J.:

Defendants move to dismiss the complaint pursuant to CPLR 3016(b) as against John Doe Law Partners I-X, and pursuant to CPLR 3211(a)(5) against all defendants to the extent the complaint is based on various specified occurrences.

This action for fraud and an accounting springs from a series of investments made by plaintiff from 1986 to 1999 through defendant J. Stanley Shaw ("Shaw"), an attorney and long-standing friend of plaintiff's. As alleged by plaintiff, he invested large sums of money with Shaw in a series of complex loan-related transactions without questioning the particulars too closely because of his great trust in Shaw, who was his attorney as well as his friend. Several years ago, plaintiff began to ask questions because the investments were not yielding the rate of return he expected but received only deceptive answers from Shaw. He then began asking to see records of the various transactions, but his requests went mostly unheeded. Because of Shaw's lack of candour and disclosure, plaintiff did not learn

of the fraud until March, 2000. This complaint, against Shaw, his firm and unspecified partners who may have assisted him in the fraud, was filed in February, 2001.

Defendants now argue that any claims relating to transactions which occurred more than six years before the complaint was filed are time-barred by the applicable statute of limitations, and that all claims asserted against unnamed and unspecified partners must be dismissed as lacking the requisite particularity (CPLR 3016[b]). The court finds both arguments unpersuasive at this stage.

At the outset, the court notes that this is a motion to dismiss pursuant to CPLR 3211. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). This same standard applies to motions pursuant to CPLR 3211(a)[5] (*Gingold v. Beekman*; 183 A.D.2d 870 [2d Dept. 1992]). Plaintiffs affidavit may be considered to supplement the allegations in the complaint (*LeBeau v. Hulse*, 280 A.D.2d 649 [2d Dept. 2001]; see *Butler v. Helmsley Spear, Inc.*, 198 A.D.2d 131 [1st Dept. 1993]). A challenge to "the veracity of some of the statements in the pleadings ... merely raises triable issues of fact" (*LM Ninety CM Corp. v. 2431 Broadway Realty Co.*, 170 A.D.2d 373, 374 [1st Dept. 1991]).

"A cause of action for fraud must be brought within six years from the time of the fraud or within two years from the time the fraud was, or with reasonable diligence could have been, discovered, whichever is longer" (*Yatter v. William Morris Agency, Inc.*, 268

A.D.2d 335 [1st Dept. 2000]; *Niagara Mohawk Power Corporation*, 265 A.D.2d 938, 940 [4th Dept. 1999]. Plaintiff avers he did not learn of the fraud until March, 2000, despite having made diligent efforts for several years to find out the true circumstances of his investments. A fraud claim brought within six years of when "plaintiffs had sufficient facts to discover the alleged fraud" should not be dismissed as a matter of law based on the statutes of limitations (*Fitzgerald v. Thompson*, 187 A.D.2d 557 [2d Dept. 1982]). "When a party moves to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the Statute of Limitations, that party bears the initial burden of establishing the affirmative defense by *prima facie* proof that the time in which to sue has expired" (*Assad v. City of New York*, 238 A.D.2d 456, 456-457 [2d Dept. 1997], mot for lv app dismissed 91 N.Y.2d 848 [1997]). Defendants have not met this burden. "[F]actual issues as to when the plaintiff discovered or should have discovered the alleged wrongdoing" preclude dismissal of a fraud claim pursuant to CPLR 3211(a)(5) (*DiMaggio v. DiMaggio*, 278 A.D.2d 192, 193 [2d Dept. 2000]; *Gingold v. Beekman, supra*).


With respect to that branch of the motion which seeks dismissal as against the unspecified John Doe law partners, the court finds that "[t]he complaint sets forth in sufficient detail the circumstances constituting the wrong (see CPLR 3016[b]) to survive defendants' motion to dismiss the fraud cause of action. It is of no consequence that the allegations of fraud are not directed at any one particular defendant; the complaint sets forth in detail the fraudulent scheme involving all defendants.... At this stage of the action, plaintiff is unable to state the circumstances of the fraudulent scheme in more detail because that information is exclusively in defendants' possession" (*Niagara Mohawk Power*

Corporation, supra, 265 A.D.2d at 939, citations omitted).

Accordingly, defendant's motion is denied. Defendant shall serve an answer within twenty (20) days from service of a copy of this order with notice of entry.

This decision constitutes the order of the court.

Dated: December 19, 2001



J.S.C.