

J.A.O. Acquisition Corp. v Stavitsky

2004 NY Slip Op 30249(U)

September 29, 2004

Supreme Court, New York County

Docket Number: 604798/1999

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
J.A.O. ACQUISITION CORP., J.A.O. HOLDING COMPANY,
INC., and D.B. BROWN, INC.

Plaintiffs,

- against -

JEFFREY D. STAVITSKY, CRESCENT FOOD SALES, INC.
and FIRST UNION NATIONAL BANK f/k/a CORESTATES
BANK, N.A.,

Defendants.

INDEX NO. 604798/1999
MOTION DATE _____
MOTION SEQ. NO. 015
MOTION CAL. NO. _____

W. PAUL BROGOWSKI, JEFFREY BROGOWSKI, DOUGLAS
BROGOWSKI and MATTHEW BROGOWSKI,

Defendants and Counterclaim Plaintiffs.

-----X
W. PAUL BROGOWSKI, JEFFREY BROGOWSKI, DOUGLAS
BROGOWSKI and MATTHEW BROGOWSKI,

Thlrd-Party Plaintiffs,

- against -

JAMES ORTENZIO,

Third-Party Defendant.

-----X
The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

FILED

OCT 06 2004

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is

ORDERED that the motion is decided in accordance with the accompanying Decision and Order.

Dated: September 29, 2004



KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----x
J.A.O. ACQUISITION CORP., J.A.O. HOLDING
COMPANY, INC., and D.B. BROWN, INC.

Plaintiffs,

-against-

Index No. 604798/1999

(Motion Sequence 015)

JEFFREY D. STAVITSKY, CRESCENT FOOD
SALES, INC. and FIRST UNION NATIONAL
BANK f/k/a CORESTATES BANK, N.A.,

Defendants.

DECISION & ORDER

W. PAUL BROGOWSKI, JEFFREY
BROGOWSKI, DOUGLAS BROGOWSKI and
MATTHEW BROGOWSKI,

Defendants and Counterclaim Plaintiffs.

-----x
W. PAUL BROGOWSKI, JEFFREY
BROGOWSKI, DOUGLAS BROGOWSKI and
MATTHEW BROGOWSKI,

Third-Party Plaintiffs,

-against-

JAMES ORTENZIO,

Third-Party Defendant.

-----x
MOSKOWITZ, J:

This is a motion by First Union National Bank f/k/a CoreStates Bank, N.A.
("CoreStates") for an order granting summary judgment in its favor, pursuant to CPLR 3212,
dismissing the claims contained in plaintiffs' second amended complaint, dated February 28,
2003 (the "Complaint") against CoreStates in their entirety, to wit, the fourteenth (negligence),
fifteenth (fraud) and sixteenth (fraud) causes of action. For the reasons discussed infra,

CoreStates' motion for summary judgment is granted.

BACKGROUND

As discussed in greater detail in the court's prior decision and order (J.A.O. Acquisition Corp. v Stavitsky, 192 Misc 2d 7 [Sup Ct NY County 2001], affd 293 AD2d 323 [1st Dept 2002]), this action arises out of a sale of the outstanding capital stock of DB Brown, Inc. ("DB Brown"), a company engaged in the sale and distribution of meat and fish, pursuant to a Stock Purchase Agreement, dated June 3, 1997, between JAO Acquisition Corp. ("JAO Acquisition"), as purchaser,¹ and Paul Brogowski and Jeffrey Stavitsky, as sellers.

Under the Stock Purchase Agreement, the sellers made various representations and warranties regarding DB Brown's condition, as stated in its financial statements, pertaining to, among other things, its accounts receivable, inventory and liabilities. In section 10.7, the sellers represented that DB Brown's net worth was at least 2.2 million dollars. As specified in the Stock Purchase Agreement, JAO Acquisition undertook its own due diligence study of DB Brown and concluded that its worth was approximately 1 million dollars less than previously represented. On October 10, 1997, the date of the closing, the parties entered into an amendment of the Stock Purchase Agreement, that provided, inter alia, for a reduction of the representation of DB Brown's net worth by approximately 1 million dollars and a corresponding reduction of the sales price. The amendment also provided, at paragraph 2.2, for a post-closing price adjustment, to be made within 90 days after the closing, of a final determination of DB Brown's net worth as of October 10, 1997.

¹ JAO Acquisition was formed in 1997 to acquire the outstanding capital stock of DB Brown. JAO Holding is the holding company that holds the stock of JAO Meatpacking Company, Inc. that, in turn holds the stock of JAO Acquisition.

The majority of claims in this lawsuit are between the sellers and the purchasers in that transaction. Essentially, the purchasers accuse the sellers of misrepresenting the value of DB Brown and assert a host of contract and fraud-based causes of action against them. The sellers, and third-party plaintiffs, in turn, assert various counterclaims against plaintiffs for monies allegedly due and owing in connection with the sale and for plaintiffs' alleged breach of certain related employment and consultant contracts.

This motion pertains to plaintiffs' claims against the sellers' bank, CoreStates, in the fourteenth, fifteenth and sixteenth causes of action in the Complaint, based on CoreStates' alleged negligent misrepresentation and fraud relating to its preparation of a payoff letter on October 10, 1997, that allegedly incorrectly recited the total amount of DB Brown's outstanding indebtedness to CoreStates on that date.

CoreStates provided banking services to DB Brown from the early 1990s through 1998. DB Brown's banking arrangement with CoreStates permitted CoreStates to pay overdraft checks drawn by DB Brown against its own "Zero Balance Account" by loaning money to DB Brown from a revolving line of credit. DB Brown also maintained a Commercial Loan Account with CoreStates pursuant to various loan documents, security agreements and related instruments.

It is not contested that, since as early as 1996 through the date of the closing, CoreStates classified DB Brown's loan as "substandard" and considered DB Brown to be financially troubled and over leveraged. On a number of occasions, CoreStates expressed its concern regarding DB Brown's financial condition and endorsed its support for the proposed acquisition, so that DB Brown's indebtedness to CoreStates would be satisfied.

Chase Manhattan was the lead bank in connection with the provision of financing to JAO

Acquisition for its acquisition of DB Brown's stock. In particular, Chase Manhattan agreed to loan plaintiffs the amounts necessary to effectuate plaintiffs' purchase of the stock, including paying off DB Brown's indebtedness to CoreStates. On October 9, 1997, Chase Manhattan issued an outline of its terms and conditions, including the requirement that it would not close the loan unless, according to plaintiffs, J.A.O. Acquisition and related companies had "excess availability" of \$2 million at the closing.

On the morning of the closing, October 10, 1997, CoreStates was presented with, and paid, two groups of checks DB Brown had drafted, one group at 8:28 a.m., totaling \$1,401,110.45 and the second group at 9:43 a.m. totaling \$165,442.09. In all, CoreStates paid \$1,565,552.54 with respect to these checks. CoreStates' records confirm that, at 10:57 am on October 10, 1997, the Zero Balance Account issued payments of \$1,565,552.54 to cover these checks. CoreStates then transferred \$1,565,552.54 from DB Brown's operating account to its Zero Balance Account, creating a negative balance in DB Brown's operating account in the amount of \$1,319,758.58. Nevertheless, CoreStates did not include the details of these presentments from earlier in the day in the payoff letter.

According to plaintiffs, if proper procedure had been followed, CoreStates would have made a loan from the revolving line of credit to DB Brown's operating account to cover this overdraft. Thus, plaintiffs submit, that consistent with the parties' past practices, CoreStates should have added the \$1,319,758.58 to the \$26,564,628.29 payoff amount set forth in the payoff letter, and the payoff balance should have been adjusted to \$27,884,386.87.

Plaintiffs claim that CoreStates' failure to include this \$1.3 million in check presentments in the payoff letter was negligent and/or fraudulent, and, as a result, plaintiffs sustained damages. With respect to the negligent misrepresentation cause of action against CoreStates, the Complaint

states, in part, that:

116. Pursuant to paragraph 7.2 of the Stock Purchase Agreement [wherein JAO Acquisition agreed to purchase DB Brown's stock], JAO Acquisition agreed to satisfy all liabilities that DB Brown may have with respect to its loans from CoreState.

117. On October 10, 1997, CoreStates represented in a payoff letter that the amount required to pay off DB Brown's indebtedness was \$26,564,628.29.

118. In reliance on the foregoing representation in the payoff letter, plaintiffs purchased the common stock of DB Brown and directed plaintiffs' bank, Chase Manhattan, to pay \$26,564,628.29 to CoreStates from plaintiffs' revolving line of credit.

119. On the date of the closing, October 10, 1997, Chase Manhattan wired \$26,564,628.29 to CoreStates from [plaintiffs'] revolving line of credit

120. On or about October 15, 1997, CoreStates discovered that it negligently computed its pay off computation and that there were additional monies due on the loans owed by DB Brown as of October 10, 1997, which amounted to \$1,319,798.58.

Plaintiffs further allege that, on October 15, 1997, CoreStates demanded that Chase Manhattan pay \$1,758,189.19 to CoreStates to satisfy this \$1,319,798.58 indebtedness, as well as other presentments that occurred subsequent to October 10, 1997, and that Chase Manhattan paid this amount by taking funds from plaintiffs' revolving line of credit (Complaint, ¶¶ 120-122).

Plaintiffs then allege that they would not have purchased DB Brown's stock if they had known that they would have had to pay an additional \$1.3 million to satisfy DB Brown's indebtedness, that CoreStates owed a duty of reasonable care to plaintiffs, that CoreStates' representation that the payoff amount was \$26,564,628.29 was negligent and that plaintiffs suffered damages as a result. (Complaint, ¶¶ 123-127).

Plaintiffs also contend that, had CoreStates disclosed the \$1.3 million in presentments in

the payoff letter, Chase Manhattan would have refused to close on that date because its \$2 million excess availability condition would not have been satisfied. Plaintiffs submit that CoreStates knew of the necessity of an accurate payoff letter, and plaintiffs' reliance on it, as well as that, if the payoff letter did not reveal an excess availability of \$2 million, Chase Manhattan would refuse to fund the transaction, something that CoreStates did not want to happen.

The allegations of fraud against CoreStates in the Complaint are based primarily on the same facts as those alleged in the negligent misrepresentation claim, with the addition of allegations of intentional conduct by CoreStates. Plaintiffs allege that:

130. CoreStates intentionally concealed that \$1,319,798.58 in check presentments had been made to DB Brown's account on the same day as the closing but prior to the time that the closing ended, that \$1,319,798.58 was due and owing to CoreStates on the day of the closing, and that \$1,319,798.58 should have been included in the pay-off letter.

131. CoreStates intentionally understated and concealed the true amounts owed by DB Brown in the pay-off letter because it wanted to rid itself of the DB Brown account, which had been a poorly performing account for several years, and because CoreStates knew that plaintiffs would have been unable to purchase DB Brown if CoreStates revealed that the additional \$1,319,798.58 was due and owing.

DISCUSSION

As a preliminary matter, the court notes that there is no claim that the checks in question were irregular or questionable in any respect. Further, although the parties take opposite positions regarding the question of whether the failure to include the check presentments in the payoff letter was proper, solely for the purpose of this motion, the court assumes that the check payments should have been reflected in a payout letter.

CoreStates takes the position that the payoff letter correctly recited that, as of the date of the letter, CoreStates required \$26,564,628.29 to satisfy DB Brown's loans. CoreStates assert that there is no merit to plaintiffs' contention that an additional \$1.3 million, resulting from check presentments on the date of closing, should have been included in the payoff figure. Rather, according to CoreStates, only outstanding loans (i.e., the anticipated payout of CoreStates' loans to DB Brown), and not checking account activity, is reportable in the payoff letter. Plaintiffs and their experts, take the opposite position - - that the payoff letter should have included the total amount of DB Brown's obligations to CoreStates, not only its loans. Plaintiffs' experts further opine that CoreStates, in failing to report the full amount of said obligations, acted negligently and in breach of its obligations and duties.

To state a cause of action for negligent misrepresentation, a party must demonstrate "(1) an awareness by the maker of a statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance" (State of California Public Employees' Retirement System v Shearman & Sterling, 95 NY2d 427, 434, citing Prudential Ins. Co. of America v Dewey, Ballantine, Bushby, Palmer & Wood, 80 NY2d, 377, 384; Credit Alliance Corp. v Arthur Andersen & Co., 65 NY2d 536, 551, order amended 66 NY2d 812; see also, Parrott v Coopers & Lybrand, LLP, 95 NY2d 479, 484).

"A claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given" (Hudson River Club v Consolidated Edison Co., 275 AD2d 218, 220,

citing General Elec. Capital Corp. v United States Trust Co., 238 AD2d 144 and United Safety v Consolidated Edison Co., 213 AD2d 283, 285-286; Delcor Laboratories, Inc. v Cosmair, Inc., 169 AD2d 639).

Discussing the privity requirement, the Court of Appeals in Parrott v Coopers & Lybrand, LLP, *supra*, stated:

We have reiterated time and again that "before a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity" (Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood, 80 NY2d 377, 382, rearg denied 81 NY2d 955 [citing Ossining Union Free School Dist. v Anderson LaRocca Anderson, 73 NY2d 417, 424; Credit Alliance Corp. v Andersen & Co., 65 NY2d 536, *supra*]; see also, State of California Pub. Employees' Retirement Sys. v Shearman & Sterling, 95 NY2d 427, 434). We have explained that our decision to circumscribe liability in this area by privity of contract or its equivalent rests on "concern for the indeterminate nature of the risk" (Ossining Union Free School Dist., *supra*, 73 NY2d, at 424), and that "[s]uch a requirement is necessary in order to provide fair and manageable bounds to what otherwise could prove to be limitless liability" (Prudential Ins. Co., *supra*, 80 NY2d, at 382). Although this rule first developed in the context of accountant liability, it has applied equally in cases involving other professions (see, e.g., Prudential Ins. Co., 80 NY2d 377, *supra* [lawyers]; Ossining Union Free School Dist., 73 NY2d 417, *supra* [engineering consultants]).

(*Id.*, 95 NY2d, at 483-484; see also, Houbigant, Inc. v Deloitte & Touche, LLP, 303 AD2d 92, 94 [requisite link lacking despite accounting firm's consent to having financial statements forwarded to plaintiff]).

CoreStates contends that plaintiffs cannot establish any of the elements of a cause of action for negligent misrepresentation, because, among other things, there was no privity and no special relationship between the parties, the payoff letter was not incorrect, there was no reasonable reliance on the information given and CoreStates' actions did not cause plaintiffs any

damages (Hudson River Club v Consolidated Edison Co., supra).

CoreStates asserts that it owed no duty to JAO Acquisition or JAO Holding, because there was no privity of contract between those companies and CoreStates, or a relationship between them so close as to approach that of privity as is necessary before a party can recover for loss sustained as a result of another's negligent misrepresentation (Parrott v Coopers & Lybrand, LLP, supra). In support, CoreStates maintains that neither JAO Acquisition nor any of its related companies was ever a customer of CoreStates, and that, prior to and including the date of the closing, the JAO companies and CoreStates had virtually no contact. CoreStates submits that plaintiffs could not have relied on the payoff letter in determining whether to purchase the capital stock of DB Brown because, among other things: (a) the payoff letter was directed solely to DB Brown, for the benefit of DB Brown and concerned only the repayment of DB Brown's loans; (b) neither JAO Acquisition's chief financial officer, Kevin Kelly, nor its president, James Ortenzio, ever discussed the payoff letter with CoreStates prior to the closing; (c) no correspondence was exchanged between CoreStates and JAO Acquisition before the closing; (d) pursuant to the Stock Purchase Agreement, JAO Acquisition performed its own due diligence study of DB Brown, including document review; and (e) paragraph 2.2 of the amendment, that provides for the preparation of an adjusted net worth of statement within 90 days, demonstrates that JAO Acquisition did not know what the purchase price of DB Brown would be on October 10, 1997 and therefore could not have reasonably relied on the payoff letter.

In response, plaintiffs contend that CoreStates knew that its production of a payoff letter on October 10, 1997, was critical to plaintiffs, both in determining the equity of DB Brown and in acquiring the financing necessary from their lender, Chase Manhattan. Plaintiffs further

contend that CoreStates knew that plaintiffs would rely on the accuracy of the letter to determine whether to purchase DB Brown, what price to set and how to finance the purchase.

A review of the evidence shows that there was virtually no interaction between CoreStates and JAO Acquisition prior to the payoff letter, and that any “relationship” that could be said to have existed between the parties did not rise to the level of privity, or near privity, as the courts in this state have interpreted that requirement (see, e.g., Parrott v Coopers & Lybrand, LLP, supra; Houbigant, Inc. v Deloitte & Touche, LLP, supra). Although plaintiffs continuously state that they relied on the payoff letter and that CoreStates knew of their reliance, this is not enough to demonstrate privity. “[M]ore is needed to show the functional equivalent of privity than that a reliant party was actually known” (Point O’ Woods Assn. v Underwriters at Lloyd’s, London, 288 AD2d78, 79). Contrary to plaintiffs’ contention, plaintiffs did not reasonably rely on the payoff letter in determining whether or not to purchase DB Brown’s stock. Rather, the Stock Purchase Agreement provided for JAO Acquisition to undertake its own due diligence investigation of DB Brown’s financial condition and J.A.O. Acquisition did in fact undertake that investigation. Thus, plaintiffs’ decision to move forward with the purchase was a result of their own investigation of DB Brown’s financial condition and was not based on reliance upon the information CoreStates provided in the payoff letter (see, Miller v Doniger, 272 AD2d 73; see also, Magna Bank of Madison County v W.P. Foods, Inc., 926 SW2d 157). That the amendment to the Stock Purchase Agreement provided for a post-acquisition price adjustment further supports the proposition that the amounts reported in the payoff letter were not intended as a final determination of DB Brown’s banking activities as of the date of the closing.

The case of Magna Bank v W.P. Foods, Inc., supra, is directly on point. In Magna, the

Missouri Court of Appeals dismissed a purchaser's fraud claim against the seller's bank because the purchaser, having undertaken its own investigation of the seller's company, could not show that it had relied on the truth of the representations in the closing statement the bank provided.

The Court stated:

Here, Evans did not establish the essential elements of a fraud claim as a matter of law. One element which Evans failed to prove was that he signed either the purchase agreement or the promissory notes in reliance on the truth of the representations contained in the closing statement furnished by Magna Bank.

Evans did not demonstrate that the closing statement induced him to enter into the purchase agreement with Williams. By his own admission, Evans determined to purchase the business and negotiated the terms of the purchase agreement prior to seeing the closing statement provided by Magna Bank. The terms of his agreement with Williams were merely memorialized in the purchase agreement of August 10, 1990. Magna Bank did not participate in the negotiations leading up to the agreement between Evans and Williams.

In addition, Evans conducted his own investigation and evaluation of the business prior to the closing. But for supplying information about the aggregate amount of the loans Williams had with it, Magna Bank was not a party to Evans' investigation. When a party makes an independent investigation, he is presumed to have relied on what he learned from that investigation and may not claim that he relied on a contrary representation (Arnott v Kruse, 730 SW2d 597, 601 [Mo App 1987]).

Moreover, under New York law, "there is no fiduciary duty . . . arising out of the contractual arm's length debtor and creditor legal relationship between a borrower and a bank which would give rise to a cause of action for negligent misrepresentation" (FAB Indus., Inc. v BNY Financial Corp., 252 AD2d 367, quoting Banque Nationale de Paris v 1567 Broadway Ownership Assocs., 214 AD2d 359, 360; see also, River Glen Assocs., Ltd. v Merrill Lynch Credit Corp. 295 AD2d 274, 275 [in a commercial mortgage context, mortgagee was entitled to summary judgment in its favor because "as this Court has repeatedly held, an arm's length

borrower-lender relationship is not of a confidential or fiduciary nature and therefore does not support a cause of action for negligent misrepresentation”)). The reason why a fiduciary relationship does not exist in the typical case between a borrower and a bank, is because “a special relationship ‘requires a closer degree of trust than an ordinary business relationship’” (Fleet Bank v Pine Knoll Corp., 290 AD2d 792, 795-796, quoting Busino v Meachem, 270 AD2d 606, 608; see also, Trustco Bank, Natl. Assn. v Cannon Bldg. of Troy Assocs., 246 AD2d 797, 799).

Thus, generally, even though a bank and its customer are in privity, unless their dealings entail a degree of trust greater than an ordinary business relationship, their relationship is not considered “special” and the bank does not owe a fiduciary duty to the customer sufficient to support a negligent misrepresentation claim. Here, plaintiffs have made no showing that DB Brown’s relationship with CoreStates was anything other than a typical banking relationship. As such, neither DB Brown (that was in privity with CoreStates) nor JAO Acquisition or JAO Holding (that had no relationship with CoreStates) can establish a special relationship sufficient to maintain a cause of action for negligent misrepresentation against CoreStates (see, River Glen Assocs., Ltd. v Merrill Lynch Credit Corp., *supra*; FAB Indus., Inc. v BNY Financial Corp., *supra*; Banque Nationale de Paris v 1567 Broadway Ownership Assocs., *supra*).

Fleet Bank v Pine Knoll Corp., *supra*, presents vastly different facts than this case and does not compel a different result. In that case, in response to a summary judgment motion, the principal of the defendant/bank customer argued that the plaintiff/bank repeatedly assured her that crucial financing, consisting of a second loan, would be forthcoming to defendant in connection with a proposed real estate purchase. According to defendants, after acting in

reliance upon the bank's representations of a second loan and purchasing the property, the bank refused to provide the second loan and then sought to foreclose on its first loan. Under the particular circumstances of that case, the Third Department held that defendants tendered sufficient proof to raise a question of fact as to whether a special relationship existed between the parties, and, if so, whether defendant's reliance upon the information conveyed was reasonable. Here, by contrast, JAO Acquisition did not have a prior banking relationship with CoreStates, did not receive any assurances from CoreStates and undertook its own due diligence.

Accordingly, summary judgment dismissing the negligent misrepresentation cause of action is granted. It is therefore unnecessary for the court to reach the issues of loss causation and damages.

Plaintiffs fare no better with respect to the fraud causes of action. As explained by the Court of Appeals:

In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (see, Channel Master Corp. v Aluminium Ltd. Sales, 4 NY2d 403 [1958]; New York Univ. v Continental Ins. Co., 87 NY2d 308, 318 [1995]).

(Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421; Lanzi v Brooks, 54 AD2d 1057, 1058, aff'd 43 NY2d 778 [the required elements include "representation of a material existing fact, falsity, scienter, deception and injury"]; see also, LaSalle Natl. Bank v Ernst & Young LLP, 285 AD2d 101, 109-110.

Plaintiffs have come forward with no support in the record that would tend to link any concern that CoreStates may have had with DB Brown's financial performance with the manner

in which it prepared the payoff letter. Plaintiffs have not presented any evidence that raises any questions with respect to CoreStates' alleged knowledge of the checks' presentment earlier in the day nor of any purposeful decision to exclude this information from the payoff letter. Thus, that CoreStates may have been displeased with DB Brown's performance, does not, without more, raise an issue with respect to whether CoreStates fraudulently understated and concealed information in the payoff letter from plaintiffs pertaining to the check presentments.

Moreover, plaintiffs' fraud claims in the Complaint essentially rehash the negligence claims and cannot survive. As explained by the First Department, in LaSalle Natl. Bank v Ernst & Young LLP, *supra*:

[M]ost of the allegations set forth in the complaint under the fourth cause of action sounding in fraud actually allege conduct amounting to negligence rather than the intent to mislead the complaining party, to its detriment, that is the hallmark of a fraud claim. . . . As this Court has previously stated, negligence claims cannot be deemed fraud solely because of the nomenclature used and conclusory allegations of fraud (*Dworman v Lee*, 83 AD2d 507, *aff'd* 56 NY2d 816). Nor, as we more recently have stated, would the "mere conclusory assertion of recklessness and intent, appended to the identical set of facts as are alleged in the negligence claim ... meet the special pleading standards required under CPLR 3016 (b)" (*Marine Midland Bank v Grant Thornton*, 260 AD2d 318, 319, citing *Credit Alliance*, *supra*, at 554). Elsewhere under the fraud cause of action, plaintiffs allege that Ernst & Young supplied false information with the awareness that plaintiffs would rely on it, that Ernst & Young "manifested its understanding that plaintiffs intended to rely on the Kent Financials and Reports," that the loan agreements would not have been entered into but for the opinions and conclusions in the Financials and that the lenders thereby justifiably relied to their detriment on Ernst & Young's representations. However, as we stated elsewhere, these allegations do not "sufficiently allege the element of scienter required in a fraud cause of action asserted against a preparer of a financial statement," especially when the accountant's knowingly false statement, and knowing and direct participation in the fraud, are not shown (*John Hancock Mut. Life Ins. Co. v KPMG Peat Marwick*, 232 AD2d 283, *lv denied* 89 NY2d 809). Therefore, the fraud claim also cannot be sustained.

(*Id.* at 109-110; see also, *Giant Group, Ltd. v Arthur Andersen LLP*, 2 AD3d 189, 190 [pleading

that defendants simply knew or recklessly failed to discover certain improprieties in the financial statements, without more, does not turn an allegation of negligence into fraud)).

Accordingly, CoreStates is entitled to summary judgment dismissing the fraud causes of action.

CONCLUSION

It is ORDERED that the motion by defendant First Union National Bank f/k/a CoreStates Bank, N.A. for summary judgment dismissing the fourteenth, fifteenth and sixteenth causes of action asserted in the Complaint against it is granted; and it is further


It is ORDERED that the Complaint is dismissed as against defendant First Union National Bank F/k/a CoreStates Bank, N.A.; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant First Union National Bank f/k/a CoreStates Bank, N.A. with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action is severed and continue against the remaining defendants.

Dated: September 29, 2004

ENTER:



J.S.C.

FILED

OCT 06 2004

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