

**Jebran v LaSalle Business Credit, LLC**

2005 NY Slip Op 30237(U)

December 22, 2005

Supreme Court, New York County

Docket Number: 0601757/2005

Judge: Helen E. Freedman

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

PRESENT.

PART 39

Index Number : 601757/2005

C

JEBRAN, RON

vs

LASALLE BUSINESS CREDIT LLC

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

NYS SUPREME COURT  
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Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with the accompanying memorandum decision.*

**FILED**  
 JAN 17 2006  
 NEW YORK  
 COUNTY CLERK'S OFFICE

Dated: 12/22/05

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X  
RON JEBRAN, DONALD J. GERAGHTY,  
STEVE N. KAMIL, JERRY MEADOWS,  
VERONICA PEREZ, KYRIAKOS STAMATIOUS,  
JAMES ROBERTS, ROBERT WILSON,  
JULIUS RUDEL, ANTHONY RUDELL and  
FINANCIAL INSTITUTIONS RETIREMENT FUND,

Index No. 601757/2005

Plaintiffs,

-against-

LASALLE BUSINESS CREDIT, LLC.,

Defendant.

-----X  
Helen E. Freedman, J.S.C.

In this action, Ron Jebran, Donald J. Geraghty, Steve N. Kamil, Jerry Meadows, Veronica Perez, Kyriakos Stamatiou, James Roberts, Robert Wilson, Julius Rudel, Anthony Rudell, and Financial Institutions Retirement Fund (collectively, the "Plaintiffs") as investors in the company Invatech Corporation ("Invatech") sue LaSalle Business Credit, LLC ("LaSalle"), Invatech's senior lender, to recover the amount of their investments on the grounds of fraudulent misrepresentation and breach of a duty to disclose information. LaSalle moves to dismiss the first amended complaint, contending that the Plaintiffs do not state a cause of action. Plaintiffs consent to dismissing the first amended complaint and move for leave to amend the complaint a second time contending that LaSalle conspired with Invatech to defraud the Plaintiffs and aided and abetted in fraud. LaSalle opposes the motion, contending that the proposed second amended complaint does not state a cause of action.

For the reasons set forth below, LaSalle's motion to dismiss is granted and the Plaintiffs'

motion seeking leave to amend the complaint is denied.

*Background:*

Invatech and LaSalle entered into the Amended and Restated Loan and Security Agreement (the "Loan Agreement") on February 24, 2000. Under the Loan Agreement, LaSalle and other lenders established a \$20 million credit facility for Invatech and its subsidiaries. LaSalle was the designated agent for all lenders. As collateral for the loan, LaSalle retained a lien on most of Invatech's assets. The Loan Agreement provided that in the event of a default, LaSalle could seize the assets and apply them to Invatech's outstanding debt. By the spring of 2002, Invatech's business operations had become unprofitable, and it did not live up to its obligations in the Loan Agreement. On April 1, 2002, LaSalle and Invatech entered into Amendment No.4, which waived all of Invatech's defaults and relaxed some of the financial requirements under the Loan Agreement.

After execution of Amendment No.4, Invatech prepared identical Subordinated Loan and Security Agreements (the "Subordinated Agreements") and distributed them to potential subordinated lenders, including the Plaintiffs. Section 4 REPRESENTATIONS AND WARRANTIES of the Subordinated Agreements provides in Section 4.1(f):

Defaults and Restraints: The Company [Invatech] is not in default in the performance, observation or fulfillment of any of its obligations, covenants or conditions contained in any agreement or document to which the Company is a party or by which the Company or any of its respective property is bound that could have a materially adverse effect on the financial condition of the Company.

The Subordinated Agreements provided that the lenders understood the risks of investing, had access to Invatech's financial information, and acknowledge that their loans were subordinate to the LaSalle loans. Sections 4.2 (b), (c) and (e) state that:

Lenders' Representations and Warranties. Each Lender hereby represents and

warrants that:

(b) Such Lender has substantial experience in evaluating and investing in private early stage companies, is aware of the fundamental risks and possible financial hazards of lending money to the Company, has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of this investment and such Lender acknowledges that a loan to the Company should be considered only by a sophisticated investor financially able to bear the economic risk of its investment.

(c) Such Lender or Lender's advisors have had access to or been furnished with sufficient facts and information to evaluate its Loan to the Company and a reasonable opportunity to request information from or to ask questions of the Company and all such questions have been answered to the full satisfaction of such Lender.

(e) ... (ii) the payment of all the Loan is expressly subordinated to the payment of the LaSalle Lenders.

In a letter dated May 15, 2002, LaSalle granted Invatech permission to receive a subordinated loan in a sum not to exceed \$2 million. Under the Subordinated Agreement, the Plaintiffs had "a first priority security in and lien on" the proceeds of three lawsuits in which Invatech was a plaintiff. However, that security interest was subordinate to Invatech's debt to LaSalle.

On May 17, 2002, Plaintiffs entered into the Subordinated Agreements with Invatech, and loaned Invatech a total amount of \$900,000. Thereafter, Invatech defaulted on some of the Loan Agreement provisions, and LaSalle waived those defaults in December 2002. Two of the lawsuits that constituted the basis of the Plaintiffs' collateral settled, and LaSalle retained the settlement amount. In October 2003, Invatech filed for bankruptcy under Chapter XI.

*Contentions:*

The Plaintiffs claim that LaSalle conspired with Invatech to defraud them by approving the Subordinated Agreements, which in Section 4.1(f) represented that Invatech "was not in default of ...any of its obligations." The Plaintiffs contend that Section 4.1(f) is incomplete and misleading because Invatech would have been in default if LaSalle had not waived the default. Moreover, Plaintiffs contend that LaSalle aided and abetted Invatech's fraud in order to induce individuals to

invest and to provide Invatech with assets with which to repay LaSalle. The Plaintiffs allege that they reasonably relied on Section 4.1(f) when they decided to loan money to Invatech and would not have loaned the money had they known Invatech's true financial status and history of defaults. Originally, Plaintiffs believed that LaSalle prepared the Subordinated Agreements and thus committed fraud on the potential investors. However, now Plaintiffs consent to dismiss the fraud, misrepresentation, and nondisclosure claims asserted in the first amended complaint, and seek leave to amend their complaint to add claims for civil conspiracy and aiding and abetting fraud.

LaSalle opposes Plaintiff's motion seeking leave to amend the complaint because LaSalle contends that it does not state a cause of action for aiding and abetting fraud or for civil conspiracy. LaSalle contends that Section 4.1(f) expresses a true statement, LaSalle never made any representations to the Plaintiffs, and Plaintiffs' reliance on Section 4.1(f) was not justified because the Plaintiffs were sophisticated investors who had access to Invatech's financial information. Thus, LaSalle contends no underlying fraud exists, and the proposed second amended complaint inadequately alleges facts to support the causes of action.

*Discussion:*

Although leave to amend complaints should be liberally granted, in order to conserve judicial resources, it is necessary to examine the merits of the proposed pleading and deny leave to amend when the proposed pleading does not state a cause of action. *See Konrad v. 136 East 64<sup>th</sup> Street Corp.*, 246 A.D.2d 324 (1<sup>st</sup> Dept. 1998).

In order to support a claim for aiding and abetting fraud, the Plaintiffs must allege the existence of an underlying fraud, defendant's actual knowledge of the underlying fraud, and defendant's substantial assistance in the fraud. *See National Westminster Bank USA v. Weksel*, 124

A.D.2d 144 (1<sup>st</sup> Dept. 1987). (Finding the defendant law firm's mere non-disclosure an insufficient basis for aiding and abetting fraud).

In this case, the Plaintiffs do not allege sufficient facts to establish either the underlying fraud or LaSalle's substantial assistance in the fraud. The allegedly misleading statement in Section 4.1(f) was not false because Invatech was not in default at the time the parties executed the Subordinated Agreements. In addition, Section 4.2 of the Subordinated Agreements provided that the Plaintiff lenders represented and warranted that they had access to Invatech's financial records and were sophisticated investors who understood the risks of investing in a new company such as Invatech. The Plaintiffs do not allege that they requested Invatech's financial information or loan agreements with LaSalle and were refused access to documents. The Plaintiffs had a "duty to exercise ordinary diligence and conduct an independent appraisal of the risk they were assuming" and thus cannot complain that they were "induced to enter into the transaction by misrepresentations." *Abrahami v. UPC Construction Co. Inc.*, 224 A.D.2d 231 (1<sup>st</sup> Dept. 1996). *See also Permasteelisa, S.P.A. v. Lincolnshire Mgmt., Inc.*, 16 A.D.3d 352, 793 N.Y.S.2d 16 (1<sup>st</sup> Dept. 2005)(finding that the buyer of a company failed to show reasonable reliance and thus failed to support a fraud claim where a provision in the parties' agreement provided that the buyer had the necessary information and where the buyer neglected to seek the company's financial books and records).

LaSalle's consent to the terms of the Subordinated Agreements does not constitute "substantial assistance" and thus cannot support a claim for aiding and abetting fraud. *See Albion Alliance Mezzanine Fund, L.P. v. State Street Bank and Trust Co.*, 8 Misc.3d 264 (Sup.Ct.N.Y.Co. 2003) *aff'd*, 2 A.D.3d 162 (1<sup>st</sup> Dept. 2003)(finding that a bank's mere acceptance of a loan repayment despite knowledge of the debtor's wrongful conduct does not rise to the level of aiding and abetting

fraud). Silence and inaction cannot sustain a claim for aiding and abetting fraud unless the defendant has an independent duty to the plaintiffs. *Id.* Generally, a bank does not have a duty “to disclose information regarding a borrower to the borrower’s investors, even where the bank might benefit from its silence.” *Id.* (citations omitted). A bank’s superior knowledge regarding its borrower does not create a duty to disclose. *See Societe Nationale D’Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Bros. Int’l. Ltd.*, 268 A.D.2d 373 (1<sup>st</sup> Dept. 2000).

Plaintiffs do not allege sufficient facts to support a claim for civil conspiracy against LaSalle. As discussed above, Plaintiffs fail to allege sufficient facts to support an underlying fraud claim and thus cannot support a claim for civil conspiracy. *See Truong v. AT&T*, 243 A.D.2d 278 (1<sup>st</sup> Dept. 1997). Plaintiffs have not alleged sufficient facts to show that Invatech and LaSalle had an “agreement to engage in a common scheme or plan to deprive plaintiff of his property.” *Id.* at 278. LaSalle’s waiver of Invatech’s defaults and permission to obtain subordinate lenders does not constitute a common scheme to deprive the Plaintiffs of their property.

Accordingly, it is

ORDERED that Defendant’s motion to dismiss the complaint is granted and it is further

ORDERED that Plaintiff’s motion seeking leave to amend the complaint is denied, and it is

further

ORDERED that the clerk is directed to enter judgment accordingly.

DATED: December 22, 2005

ENTER:

**FILED**

JAN 17 2006

NEW YORK  
COUNTY CLERK'S OFFICE

  
Helen E. Freedman, J.S.C.