

Intl. Strategies Group Ltd. v ABN AMRO Bank N.V.

2005 NY Slip Op 30420(U)

July 13, 2005

Supreme Court, New York County

Docket Number: 601604/2004

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ
Justice

PART 03

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INTERNATIONAL STRATEGIES GROUP LTD.,
on its own behalf, as a Federal Court Ordered
Assignee of the Rights of Henry Pearlberg,
Individually and as Trustee of Swan Trust,
and James F. Pomeroy, II, assignors,
Plaintiff,

INDEX NO. 601604/2004
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

-against-

ABN AMRO BANK N.V. and FIRST MERCHANT
BANK OSH LTD.,
Defendants.

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

PAPERS NUMBERED

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 Decision and Order.

FILED
JUN 15 2005

NEW YORK
COUNTY CLERK

Dated: June 13 2005



KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
 INTERNATIONAL STRATEGIES GROUP LTD.,
 on its own behalf, as a Federal Court Ordered
 Assignee of the Rights of Henry Pearlberg,
 Individually and as Trustee of Swan Trust,
 and James F. Pomeroy, II, assignors,

Index No. 601604/2004

Plaintiff,

DECISION and ORDER

- against -

ABN AMRO BANK N.V. and FIRST MERCHANT
 BANK OSH LTD.,

Defendants.

-----X
MOSKOWITZ, J.:

The court previously set forth the facts of this case in detail in a decision and order dated February 8, 2005 (the “prior decision”) and therefore repeats only those facts that are necessary to this decision. The prior decision and order dismissed former co-defendant ABN Amro Bank N.V. (ABN AMRO) from this case. Defendant First Merchant Bank OSH Ltd (“FMB”) had a correspondent banking relationship with ABN AMRO. FMB is allegedly a foreign banking corporation licensed under the laws of the Turkish Republic of Northern Cypress. By this motion (scq. no. 003), FMB moves to dismiss the complaint, dated June 7, 2004 (the “Complaint”), as against it.

BACKGROUND

As I described in the prior decision, on April 29, 1999, Swan Trust and Henry Pearlberg (“Pearlberg”) individually executed a Deed of Assignment, assigning to James F. Pomeroy II (“Pomeroy”) all of their interests in: (1) bank accounts at ABN AMRO in FMB’s name; and

(2) an investment contract. The Deed of Assignment represented that the total balance of the FMB accounts was approximately \$10,850,000, plus a \$100 million credit line.

On April 26, 2004, the United States District Court for the District of Massachusetts, in an action (the “Massachusetts action”) that plaintiff International Strategies Group (“ISG”) had commenced against Corporation of the Bankhouse and others, issued an “Amended Order Under Motion for Sanctions.” (Affirmation of Malcolm I. Lewin [“Lewin Aff.”], dated October 8, 2004, Ex. A). That order assigned all of Pomeroy’s interests to ISG, including the rights that Pomeroy acceded to as assignee of Pearlberg and Swan Trust. The Massachusetts action allegedly resulted in a judgment in favor of ISG in the sum of \$10,468,106. As the prior decision describes, Pearlberg also issued an “Assignment of Rights” individually and in his capacity as head trustee and Chief Executive Officer of Swan Trust, dated May 19, 2003. That assignment expressly assigned to ISG, Pearlberg’s and Swan Trust’s “rights, title, interest in, and to, any and all claims, causes of action, rights and rights of action pertaining to the syndicate funds and to any recovery thereof.” (See prior decision pg 21).

The Complaint asserts one cause of action against FMB for fraud. Some of the elements ISG pleads “in its capacity as assignee.” (Complaint ¶¶ 191-193). Other elements it pleads “both individually and in its capacity as an assignee.” (Complaint ¶¶ 194 and 195). Plaintiff does not explain this discrepancy. However, given that ISG was not itself a customer of FMB, the court assumes for the purposes of this motion that ISG is suing only as an assignee.

In the prior decision, I held that ISG had standing to pursue claims on behalf of Swan Trust by virtue of a valid assignment. (See prior decision pg. 21). However, I also held that ISG did not have a valid assignment from PRCS Ltd. (“PRCS”). (Id.) I also assumed for the purposes

of that motion that St Fredricksund's assignment to ISG was sufficient to assign Danstrupland's claims. This time, although it is rather unclear from plaintiff's memorandum of law and the Complaint, plaintiff apparently only asserts claims against FMB that plaintiff received via assignment from Swan Trust and Pearlberg. Plaintiff seems to believe that, because the investments of PRCS, Danstrupland and ISG were commingled into an account at the Bank of New York to which Pearlberg was a signatory and head trustee, and because Pearlberg's (i.e. Swan Trust's) May 19, 2003 assignment transferred the right to recoup all these amounts to ISG, then Pearlberg assigned all the various claims to ISG. That may or may not be the case. Nevertheless, clearly, the only assignment with which the court need concern itself is the Pearlberg and Swan Trust assignments whatever they encompassed. Because the prior decision already determined that the assignments from Pearlberg/Swan Trust assignments are valid, the issues of assignment and ISG's standing are not issues for this motion. Thus, the only questions remaining are: (1) statute of limitations; (2) pleading fraud with particularity and (3) release.

A. Statute of Limitations

FMB argues that California's statute of limitations applies. ISG does not contest this point. (See transcript of Argument dated February 10, 2005, ["Tr."] pgs 10 and 12). California has a three year statute of limitations for fraud that does not accrue "until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (Cal Civ Pro § 338 [d]). The "plaintiff has the burden of pleading and proving that [it] did not make the discovery until within three years prior to the filing of [its] complaint." (*National Auto & Cas. Ins. Co. v. Payne*, 261 Cal App 2d 403, 408-09 [1st Dist., Div. 2 1968][citation and quotation marks omitted]). The plaintiff must show that it "was not negligent in failing to make the discovery sooner and that [it]

had no actual or presumptive knowledge of facts sufficient to put [it] on inquiry.” (*Id.* at 409).

FMB argues that Pearlberg/Swan Trust were well aware of the alleged fraud more than five years ago and that therefore, ISG’s claims, as assignee, are time-barred. FMB points out that the transfers FMB made were all between February and July 1999 and that the Complaint avers that Pearlberg himself was involved in the alleged fraud concerning the funds of ISG, Danstrupland and PRCS so he would have had to have known of FMB’s fraud.

The Complaint alleges that Pearlberg entered into a joint venture with Corporation of the Bank House (“COB”), using the funds of the syndicate members, and that Pearlberg transferred those funds to several other banks before opening the account with FMB. The essence of FMB’s argument is that because Pearlberg was a wrongdoer also, he must have known about FMB’s fraud. However, all these facts show is that Pearlberg had improper intentions of his own. If anything, the Complaint suggests that FMB sought to defraud Pearlberg out of the funds that he had diverted, not that Pearlberg had any knowledge of FMB’s fraud.

The Complaint and the documents plaintiff submits on this motion indicates that it was not until the facts came out during discovery in the Massachusetts action, sometime during or after 2002, that anyone learned of FMB’S fraud. Accordingly, FMB’s motion to dismiss the fraud claim against it on statute of limitations grounds is denied.

B. Pleading Fraud with Particularity

FMB argues that: (1) ISG failed to allege that FMB made any misrepresentation of material fact or (2) ISG failed to allege that Swan Trust relied on any FMB material misrepresentation; (3) ISG failed to allege scienter; (4) the documentary evidence defeats FMB’s fraud claim; (5) that FMB properly opened and operated its correspondent bank account and (6)

FMB cannot be liable for fraud for its customer's breach of contract with another.

FMB claims that ISG failed to allege how any representation was false or how Swan Trust relied upon it. A simple reading of the Complaint shows otherwise. The Complaint alleges that C. Joan Patrick, an independent broker with the May Davis Group, introduced Pearlberg to FMB. (Compl. ¶ 127). On February 9, 1999, FMB allegedly wrote to Pearlberg stating that it had opened a Sub-Account and Pearlberg was the sole signatory. (Id. ¶ 129). But, apparently, the sub-account was a fiction. Instead, FMB issued sub-account numbers to its clients implying that those clients had control over the funds in their sub account, when in fact, FMB pooled all the funds in a master "Concentration Account" that FMB controlled. (Id. ¶¶ 136-137). The Complaint further alleges that on or about February 5, 1999, FMB, without Pearlberg's knowledge or consent, began withdrawing what would eventually total \$16.7 million. Then, through the use of allegedly bogus investment instruments called Revolving Underwriting Facilities (RUF), FMB proceeded to bilk Pearlberg out of millions of dollars. (Id. ¶¶ 147-154). The Complaint also alleged that FMB simply withdrew funds from the Concentration Account without authorization. (Id. ¶ 153). Reliance is presumed because certainly had Pearlberg realized FMB's fraud, he would not have continued to invest with FMB.

Thus, the Complaint alleges FMB's direct participation in the fraud. The Complaint is very detailed and is certainly sufficient to put FMB on notice of the fraud against it. Due to the allegations of FMB's direct involvement in the fraud, none of the reasons FMB propounds for dismissal are valid. Therefore, FMB's motion to dismiss for failure to plead fraud with particularity is denied.

C. Release


FMB extrapolates from a document in which Pearlberg transferred his “right, title and interest” in his account with FMB to Pomeroy, that Pearlberg released FMB from all the claims that ISG now, as assignee, asserts in this lawsuit. In the July 6, 1999 letter, Pearlberg claims to “release and hold First Merchant Bank OSH Limited, harmless for implementing my specific instructions contained in this written communication.” (See Affidavit of Cenk Ermiya, sworn to on October 5, 2004, Ex 9). ISG argues that this language limits the release to liability concerning the transfer to Pomeroy for which ISG is not suing. The court agrees. The release clearly limits its scope to “implementing my specific instructions” (i.e. the instruction to transfer the funds). Pearlberg did not release FMB for other activities, such as allegedly withdrawing Pearlberg’s money without his consent and transferring that money to itself (Complaint ¶ 146); defrauding Pearlberg’s investment advisor into investing Pearlberg’s money in two RUFs, an allegedly “bogus and non-existent instrument” (Complaint ¶ 150-151) and charging a \$5 million dollar “Fee” as a way to “disguise previous unknown and unauthorized withdrawals” (Complaint ¶ 153). Accordingly, FMB’s motion to dismiss on the grounds of release is denied.

Accordingly, it is

ORDERED THAT the motion of First Merchant Bank OSH Ltd., (motion sequence no. 003) to dismiss is denied; and it is further

ORDERED THAT the parties are directed to appear for a compliance conference on June 23, 2005 at 10 a.m. in the courtroom, room 248, 60 Centre Street, New York, NY.

Dated: June 13 2005



J.S.C.

FILED

JUN 15 2005

NEW YORK
COURT HOUSE