

Rite Aid Corp. v Grass
2007 NY Slip Op 30928(U)
April 20, 2007
Supreme Court, New York County
Docket Number: 0603384/2005
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

FBEM

RITE AID CORPORATION and RITE FUND, INC. (as
successor to Life-Aid Services, Inc.),
Plaintiffs,
-against-

INDEX NO. 603384/2005E
MOTION DATE _____
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

ALEX GRASS, MARTIN GRASS, A.G. CAPITAL, INC.,
KAREN BROWN as TRUSTEE OF THE 1994 ALEXANDER
GRASS DESCENDANTS' TRUST, FRANKLIN BROWN and
JOSEPH ROSEN,
Defendants.

RITE AID CORPORATION and RITE FUND, INC.
(as successor to Life-Aid Services, Inc.),
Plaintiffs,
-against-

INDEX NO. 601347/2006 E
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

FRANKLIN BROWN,
Defendant.

FILED

APR 25 2007

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 _____

NEW YORK
COUNTY CLERK'S OFFICE

PAPERS NUMBERED
RECEIVED
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IAS MOTION
SUPPORT OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is

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

Dated: April 20, 2007

Ky

KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE
Case 013P

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

-----X
RITE AID CORPORATION and RITE FUND, INC.
(as successor to Life-Aid Services, Inc.),

Index No. 603384/2005

Plaintiffs,

-against-

ALEX GRASS, MARTIN GRASS, A.G. CAPITAL,
INC., KAREN BROWN as TRUSTEE OF THE 1994
ALEXANDER GRASS DESCENDANTS' TRUST,
FRANKLIN BROWN and JOSEPH ROSEN,

DECISION and ORDER

Defendants.

-----X
RITE AID CORPORATION and RITE FUND, INC.
(as successor to Life-Aid Services, Inc.),

Index No. 601347/2006

Plaintiffs,

-against-

FRANKLIN BROWN,

FILED

APR 25 2007

Defendant. NEW YORK
COUNTY CLERK'S OFFICE

-----X
Moskowitz, J.:

In this decision and order, the court consolidates motion sequence numbers 005 and 006 for disposition.

Plaintiffs Rite Aid Corporation ("Rite Aid") and Rite Fund, Inc. ("Rite Fund"), as successor to Life-Aid Services, Inc. ("Life-Aid"), claim that the individual defendants exploited their positions as senior executives of Rite Aid by using Rite Aid's October 1994 sale of non-party Sera-Tec Biologicals, Inc. ("Sera-Tec") to conceal the transfer of Rite Aid's ownership interests in non-parties Isolyser Company, Inc. ("Isolyser") and Immucor, Inc. ("Immucor") to defendants Alex Grass and A.G. Capital, Inc. The pleadings allege that, in 1994, Rite Aid's

senior management sought to divest Rite Aid of interests in several businesses unrelated to its core drug store business. Alex Grass, at that time Rite Aid's chief executive officer and the chairman of its board of directors, expressed an interest in acquiring Sera-Tec and informed the board that he intended to step down from his management positions. On April 6, 1994, Rite Aid's Board constituted a Special Committee, consisting of outside directors, to oversee the sale of Sera-Tec and Rite Aid's other non-core businesses.

The Special Committee retained Donaldson Lufkin & Jenrette Securities Corp. ("DLJ") as its financial advisor in connection with the divestitures, and it retained the law firm of Fried Frank Harris Shriver & Jacobson ("Fried Frank") as its attorney. Fried Frank was also counsel for Rite Aid. DLJ prepared a Confidential Information Memorandum ("Sera-Tec Memorandum") that described Sera-Tec for the Special Committee and circulated it to potential bidders. According to DLJ, the purpose of the Sera-Tec Memorandum was "to provide potential bidders with a complete and accurate disclosure of the assets, revenue and income of the business to be sold." (Nolan Aff., ¶ 3). The parties do not dispute that the Sera-Tec Memorandum does not mention Rite Aid's investments in either Immucor or Isolyser.

Plaintiffs claim that DLJ conducted an auction and received several bids and expressions of interest for the purchase of Sera-Tec. DLJ allegedly concluded that the offer Alex Grass submitted was the best offer Rite-Aid received. Rite Aid also obtained an opinion from another independent financial advisor, Bear Stearns & Co. ("Bear Stearns"). Bear Stearns allegedly concluded that Alex Grass's offer was fair to Rite Aid financially.

By letters dated June 29 and July 5, 1994, defendants Joseph Rosen and Alex Grass informed the Special Committee, through Fried Frank, that "[t]he only projections or financial

information furnished to Mr. Grass and his financing sources were those furnished to all bidders for Sera-Tec.” (Raab Aff., Exs. B and C). Plaintiffs aver that Alex Grass was able to out-bid other potential purchasers of Sera-Tec, because the individual defendants knew the transfer of Sera-Tec included interests in Immucor and Isolyser but concealed this information from the Special Committee and other bidders who relied solely upon the Sera-Tec Memorandum, that did not mention Immucor or Isolyser. Plaintiffs also allege that neither the Purchase Agreement nor the official schedules for Sera-Tec mention Immucor and Isolyser and that Rite Aid’s closing binders contain no documentation of any conveyance of Immucor and Isolyser stock.

In essence, plaintiffs claim that defendants and their co-conspirators dominated Rite Aid’s senior management and concealed the fraudulent transfer of Immucor and Isolyser from the Special Committee and anyone else able to take any action. Plaintiffs allegedly did not know about the concealment until Franklin Brown revealed the fraud after his conviction in September 2004. Plaintiffs then corroborated Brown’s disclosure during a subsequent investigation.

Plaintiffs commenced this action on September 22, 2005. In April 2006, defendants cross-moved for summary judgment dismissing the action as time-barred. Defendants based their cross-motion on a facsimile letter, dated October 7, 1994, that Robert C. Campbell (“Campbell”), as president of Life-Aid, sent to Fried Frank in connection with the Sera-Tec transaction (“10/7/94 Campbell Letter”). The 10/7/94 Campbell Letter states that Life-Aid received approximately \$61 million “as the net proceeds from the sale of its Sera-Tec, Immucor and Isolyser common stock.” Campbell’s affidavit, submitted on the underlying motion, states: “In accordance with my usual custom and practice, I would have prepared and sent [the letter] based upon instructions and information that I received from other personnel within the Rite Aid

organization.” On July 27, 2006, the court heard arguments and denied the cross-motion, because an issue of fact existed as to whether the 10/7/94 Campbell Letter constituted sufficient notice, under the discovery accrual rule, to start the statute of limitations. The court ordered the parties to continue discovery.

Plaintiffs now move (in motion sequence number 005) for an order permitting the deposition of Brown, who is currently incarcerated in federal prison in Pennsylvania.

Defendants move (in motion sequence number 006), by order to show cause, to renew their summary judgment motion based upon newly discovered evidence, pursuant to CPLR 2221 (e). Defendants claim that, during discovery in November 2006, they received new documentary evidence that conclusively proves Rite Aid and Life-Aid had notice that the Sera-Tec transaction included the stock of Isolyser and Immucor.

Discussion

Under CPLR 2221 (e) (2), renewal “shall be based upon new facts not offered on the prior motion that would change the prior determination” Renewal is appropriate “where new information arises which existed at the time the prior motion was made and is relevant to the moving party’s claim, but which was unavailable or unknown to that party at the time of the original motion.” (*Lee v Ogden Allied Maintenance Corp.*, 226 AD2d 226, 227 [1st Dept 1996]).

Defendants’ new evidence consists of plaintiffs’ closing binder from the Sera-Tec transaction, time records of the Special Committee’s attorneys at Fried Frank, board meeting minutes of the Special Committee, an October 7, 1994 letter from Campbell to Wilmington Trust Company that was later faxed to Rite Aid’s comptroller, Richard Varnecky (“Varnecky”), and Life-Aid’s financial records. These documents, and the information gleaned from them, “existed

at the time the prior motion was made and [are] relevant to the moving party's claim, but ... [were] unavailable or unknown to that party at the time of the original motion." (*Lee*, 226 AD2d at 227). Therefore, the court grants renewal, and, for the following reasons, these documents change the court's prior outcome that denied defendants' motion for summary judgment on the basis of the statute of limitations.

Under CPLR 213 (8), a party must commence a cause of action for fraud within six years of the fraud, within two years from discovery of the fraud or within two years from the time when, with reasonable diligence, the party could have discovered the fraud.

[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.

(*Prestandrea v Stein*, 262 AD2d 621, 622 [2d Dept 1999]; see also *Espie v Murphy*, 35 AD3d 346 [2d Dept 2006]; *Huynh v Greene, Brian and Stern Partnership*, 34 AD3d 363 [1st Dept 2006]).

In *Prestandrea*, the plaintiff alleged that the defendants defrauded him by misrepresenting the security and income of certain investments the defendants recommended. The defendants moved for summary judgment dismissal based upon the statute of limitations. The trial court denied the motion. The Appellate Division reversed, because the plaintiff had received prospectuses, private placement memoranda, and other documents "advising of losses on investments or that certain investments were not performing well." (*Prestandrea*, 262 AD2d at 622-23). There was also evidence that the plaintiff "had filed numerous tax returns claiming substantial capital losses, all before the unspecified date in 1994 when he maintains he first

discovered the fraud.” (*Id.*). Based upon this evidence, the court dismissed the action as time-barred, because the plaintiff failed to commence the action within two years of when the plaintiff should have discovered the fraud. (*Id.*).

Here, Campbell, Life-Aid’s president, sent the 10/7/94 Letter on the day of the closing to Fried Frank, counsel for the Special Committee and for Rite Aid. On the previous, underlying motion, plaintiffs characterized this letter as “an ambiguous one page fax, the provenance and circumstances of which have not been examined and which, in any event, did not and could not reasonably have been expected to place the Special Committee or its financial advisors on notice of what defendants were doing.” (Plaintiffs’ Opp. Mem. of Law, at 2).

However, the new evidence establishes that Fried Frank received the 10/7/94 Campbell Letter and included it as a separately indexed and tabbed document in Rite Aid’s closing binder. Moreover, when the court heard arguments on defendants’ renewal motion, plaintiffs’ counsel conceded that Fried Frank was an agent of the Special Committee and that Fried Frank received the letter. (1/18/07 Tr., at 13-15). In addition, Aryeh Davis (“Davis”), the Fried Frank lawyer who prepared the closing binder, submitted the closing binder to Rite Aid, with a copy to his co-counsel, Shimon Rosenfeld (“Rosenfeld”), at Fried Frank. The parties also do not dispute that Davis and Rosenfeld attended, served as secretary and took minutes at meetings of the Special Committee. Rosenfeld was present and served as secretary at the first meeting of the Special Committee, and the minutes of that meeting expressly state that the Special Committee was “constituted to review, evaluate, negotiate and make recommendations to the Board of Directors as to the sale of four divisions including American Discount Auto Parts, Encore Books, Concord Custom Cleaners and Sera-Tec Biologicals” (Adelson Aff., Ex. F). Nothing contained in any

of the Special Committee's minutes indicates that the Sera-Tec transaction included Immucor or Isolyser.

The documentary evidence of Fried Frank's attorney time records, that show that Davis and Rosenfeld worked extensively on the Sera-Tec transaction, corroborate these facts. (Adelson Aff., Ex. C). Of the billing records submitted, Davis and Rosenfeld billed over sixty percent of the total attorney time on the Sera-Tec transaction, of which approximately thirty-two percent was Davis. He appears to have been the only Fried Frank lawyer who attended the actual closing of the transaction. The time records indicate that the attorneys worked on the purchase agreement, closing materials, and documents distributed to the Special Committee, none of which mention Immucor or Isolyser. However, given the overall contact the Fried Frank attorneys had with the Sera-Tec transaction and, most especially, the inclusion of the 10/7/94 Campbell Letter, that mentions receipt of proceeds from the sale of "Sera-Tec, Immucor and Isolyser common stock," in Rite Aid's closing binder that Fried Frank received, Fried Frank had notice that the transaction included Immucor and Isolyser stock. This notice should have triggered an inquiry, and this notice is imputed to the Special Committee and to Rite Aid. (*Link v Wabash R.R. Co.*, 370 US 626, 634 [1962] ["[P]arty is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" [citation omitted]; *Center v Hampton Affiliates, Inc.*, 66 NY2d 782, 784 [1985] ["[K]nowledge acquired by an agent acting within the scope of his agency is imputed to his principal and the latter is bound by such knowledge although the information is never actually communicated to it"]).

Moreover, by letter dated October 7, 1994, Campbell provided wire transfer instructions

to Wilmington Trust Company, notifying it that Life-Aid “will be receiving \$60,909,481.00 as the net proceeds from the sale of its Sera-Tec, Immucor and Isolyser common stock.” (Adelson Aff., Ex. D). Later that month, Campbell faxed this document to Varnecky, a senior financial officer of Rite Aid, with a fax transmittal letter requesting that Varnecky contact Campbell if there are any problems. (*Id.*). Varnecky is not a named defendant in this action and is not involved in plaintiffs’ claims against defendants. Thus, Rite Aid also had knowledge through Varnecky.

Campbell’s September 15, 1994 letter to Frank Bergonzi (“Bergonzi”) shows Life-Aid’s knowledge that the Sera-Tec transaction included the Immucor and Isolyser stock. Campbell also sent with this letter Immucor and Isolyser stock certificates for inclusion in the Sera-Tec transaction. Specifically, the letter states, “Enclosed are the following shares of stock which will be included as part of the Sera-Tec sale,” and lists 937,500 shares of Immucor common stock and 602,100 shares of Isolyser common stock. While plaintiffs allege that Bergonzi participated in the concealment, they do not allege that Campbell, Life-Aid’s president, participated. Thus, the record reveals that Campbell authored at least three letters acknowledging that Immucor and Isolyser were part of the Sera-Tec transaction.

Further, Life-Aid’s Final Statement of Income for 1993 and 1995 list Immucor and Isolyser as assets in 1993 but not in 1995. In addition, Life-Aid’s General Ledger for 1994 shows that it took credits “to record net proceeds in sale of Sera-Tec, Immucor and Isolyser.” Therefore, Life-Aid’s financial records indicate that it sold Immucor and Isolyser stock in 1994.

For the foregoing reasons, through Fried Frank, Campbell and Varnecky, none of whom plaintiffs implicate, the Special Committee, Life-Aid and Rite Aid had knowledge in 1994 that

the Sera-Tec transaction included Immucor and Isolyser. Therefore, while the court is sympathetic to plaintiffs' position, this action, that plaintiffs commenced 11 years later, is time-barred. (*Prestandrea*, 262 AD2d 621, *supra*; *Espie*, 35 AD3d 346, *supra*; *Huynh*, 34 AD3d 363, *supra*).

Accordingly, it is hereby

ORDERED that defendants' motion (motion sequence number 006) for renewal is granted and, on renewal, summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

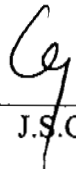
ORDERED that plaintiffs' motion (motion sequence number 005) for an order permitting the deposition of defendant Franklin Brown is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 20 2007

ENTER:

FILED
APR 25 2007
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J.S.C.