

Duffy v Magalhaes

2007 NY Slip Op 31215(U)

May 10, 2007

Supreme Court, Suffolk County

Docket Number: 0003891/2006

Judge: Elizabeth H. Emerson

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**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY**

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 9-15-06
SUBMITTED: 1-10-07
MOTION NO: 001-MG
002-MOT D

X
JAMES R. DUFFY, SR.,

Plaintiff,

-against-

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NICHOLAS F. MAGALHAES (a/k/a "NICHOLAS H. MAGALHAES" a/k/a "NICHOLAS MAGALHAES, JR."), MICHELE SOFOS MAGALHAES (a/k/a "MICHELE SOFOS" a/k/a "MICHELE MAGALHAES"), JAYME MAGALHAES, TROY MAGALHAES, LESLIE ROARK, ARTHUR J. GORDON, ALLEN F. ROSS, STRATEGIC VENTURES INC., PINNACLE WEALTH LTD, PINNACLE WEALTH LP, PINNACLE WEALTH CONCEPTS LTD, PINNACLE WEALTH CONCEPTS MANAGEMENT LLC, PINNACLE WEALTH ENTERPRISES LLC, PINNACLE WEALTH ENTERPRISES LTD, PINNACLE WEALTH GROUP LLC, PINNACLE WEALTH GROUP MANAGEMENT LLC, PINNACLE WEALTH GROUP OF MT. VERNON LLC, ANTHONY DELLA CAMERA, GENESIS WEALTH SYSTEMS LTD (a/k/a "GENESIS WEALTH SYSTEMS LLC"), GENESIS WEALTH SYSTEMS MANAGEMENT LLC, GUY COMPOSTO, I. MEYER PINCUS, JACK I. KIRSCHNER, KATHERINE COYLE, MARCO SCIBELLI, MICHAEL CAMMAROTA, NASSAU PARTNERS, ROBERTA HORNE, SMOKEY'S OF GARDEN CITY (a/k/a "SMOKEY'S OF GARDEN CITY LLC"), SMOKEY'S RIB PLACE, (a/k/a "SMOKE THIS CORP.") SRWH HOLDINGS LTD (a/k/a "SRWH LLC"), JOSEPH J. FLANAGAN, "JOHN DOE" and "JANE DOE,"

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Defendants.

X

Upon the following papers numbered 1 to 42 read on this motion to dismiss and cross-motion to consolidate; Notice of Motion and supporting papers 1-5; Notice of Cross Motion and supporting papers 6-29; Answering Affidavits and supporting papers 30; 35-37; Replying Affidavits and supporting papers 31-32; 33-34; 38-42; it is,

ORDERED that the motion by the defendants Allen F. Ross and Strategic Ventures, Inc., for an order dismissing the complaint insofar as it is asserted against them is granted; and it is further

ORDERED that the branch of the cross motion by the plaintiff which is for an order consolidating this action with another action pending in the Supreme Court, Suffolk County, entitled **Duffy v Pinnacle Wealth Group, Ltd.**, et al. (Index No. 11699-2002) is granted; and it is further

ORDERED that the consolidated action shall proceed under Index No. 11699-2002 and the caption is amended accordingly; and it is further

ORDERED that the Clerk of the court, upon filing a copy of this order with him, shall file all papers and records in this action with all papers and records in **Duffy v Pinnacle Wealth Group, Ltd.**, et al. under Index No. 11699-2002; and it is further

ORDERED that the branch of the cross motion by the plaintiff which is for an order of default against certain defendants is granted, without opposition, to the extent indicated below; and it is further

ORDERED that an assessment of damages is reserved until the time of trial on damages or other disposition of the action against the remaining defendants; and it is further

ORDERED that the parties are directed to appear for a preliminary conference, which shall be held on June 6, 2007 at 9:45 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

The plaintiff alleges that the defendants were involved in a common scheme to own, operate, and promote a number of corporate entities (all of which are defendants) that were engaged in the business of marketing fraudulent tax shelters involving life insurance products and voluntary employee beneficiary associations. The plaintiff alleges that, as part of this scheme, the defendants acted in concert to induce him to lend Pinnacle Wealth Group, Ltd. (a defendant in the related action), and its various corporate alter egos (defendants in this action) \$250,000 based on false representations regarding the fiscal soundness of the corporate defendants and their business activities. The plaintiff further alleges that he has not been repaid the principal and interest due him. The causes of action against the defendant Allen F. Ross and his company, the defendant Strategic Ventures, Inc., allege fraud and violations of the civil RICO statute. Ross and Strategic Ventures move to dismiss the complaint for failure to state a cause of action against them.

To plead a viable cause of action for fraud, the plaintiff must allege that the defendant made a misrepresentation or omission of a material existing fact, which was false and known to be false by the defendant when made, for the purpose of inducing the plaintiff's reliance thereon, that the plaintiff justifiably relied on such misrepresentation or omission, and that the plaintiff was injured thereby (*see*, **Lama Holding Co. v Smith Barney**, 88 NY2d 413, 421; **New**

York Univ. v Continental Ins. Co., 87 NY2d 308, 318; **Friedman v Anderson**, 23 AD3d 163, 166). In addition, CPLR 3016(b) requires that the misconduct complained of be set forth in sufficient detail to clearly inform the defendant of what his role was in such misconduct (*see*, **P.T. Bank Central Asia v ABN AMRO Bank**, 301 AD2d 373, 377; **Williams v Sidley Austin Brown & Wood**, 11 Misc3d 1064[A]). A mere recitation of the elements of fraud is insufficient to state a cause of action (*see*, **Friedman v Anderson**, *supra* at 166; **Williams v Sidley Austin Brown & Wood**, *supra* at *4). The plaintiff is required to set forth specific and detailed factual allegations that the defendant personally participated in or had knowledge of the alleged fraud (*see*, **Friedman v Anderson**, *supra* at 166; **Handel v Bruder**, 209 AD2d 282, 282-283).

Preliminarily, the court notes that the plaintiff avers in his affidavit in support of his cross motion and in opposition to the motion to dismiss by Ross and Strategic Ventures that he loaned \$250,000 to Pinnacle Wealth Group, Ltd., a defendant in the related action, upon its execution of a promissory note. In the related action, the plaintiff alleges that the defendant Nicholas Magalhaes misrepresented the financial condition of Pinnacle Wealth Group, Ltd., in order to induce the plaintiff to lend it \$250,000. In this action, the plaintiff alleges that all of the defendants, including Ross and Strategic Ventures, were involved in a grand scheme to defraud him. However, the plaintiff's broad, blunderbuss allegations fail to delineate, in large measure, their respective roles. While the plaintiff need not prove that each defendant committed every element of fraud, the plaintiff must establish facts that support an inference that the defendants knowingly agreed to cooperate in a fraudulent scheme or shared a perfidious purpose (*see*, **Williams v Sidley Austin Brown & Wood**, *supra* at *4).

The plaintiff does not allege any direct misrepresentations of fact by the moving defendants prior to lending \$250,000 to Pinnacle Wealth Group, Ltd., a company headed by Nicholas Magalhaes (*see*, **Williams v Sidley Austin Brown & Wood**, *supra* at *4 [and cases cited therein]). The plaintiff alleges that Ross was a member of the Tax Advisory Board, the Chief Business Strategist, and the Product Design Strategist of Pinnacle Wealth Group, LLC, another company headed by Nicholas Magalhaes. The plaintiff alleges that Ross, by his imprimatur, helped Nicholas Magalhaes present Pinnacle Wealth Group, Ltd., and its corporate alter egos as legitimate and solvent business enterprises when, in fact, they were not solvent. The plaintiff alleges that Ross helped to prepare documents and promotional materials that were used to deceive potential creditors, including the plaintiff. The plaintiff alleges that Strategic Ventures was set up for the purpose of carrying out Magalhaes' scheme to defraud investors and that it was used to transfer monies between itself and the other corporate defendants to hide corporate debts. The plaintiff contends that the intent to commit fraud by Ross and his company, Strategic Ventures, can be inferred from their participation in Magalhaes' scheme. However, the court finds that the plaintiff has failed to plead facts with sufficient particularity from which it can be inferred that either Magalhaes or Pinnacle Wealth Group, Ltd., had an agency relationship with Ross and Strategic Ventures or had sufficient control over them to allow Magalhaes' purported misrepresentations to be imputed to them (*see*, **Williams v Sidley Austin Brown & Wood**, *supra* at *4 [and cases cited therein]). Moreover, the plaintiff has failed to allege sufficient facts to support an inference that Ross and Strategic Ventures knowingly agreed to cooperate in Magalhaes' fraudulent scheme or shared a perfidious purpose. When, as here, scienter is lacking, the mere fact that a defendant's otherwise lawful activities may have assisted another in the pursuit of guileful objectives is not a

sufficient basis for a finding that they conspired to defraud (**Id.** at *4, *citing Snyder v Puente de Brooklyn Realty Corp.*, 297 AD2d 432, 435). Accordingly, the complaint fails to state a cause of action sounding in fraud against Ross and Strategic Ventures.

To state a claim for damages under RICO, a plaintiff must allege that the defendant, through the commission of two or more acts constituting a pattern of racketeering activity, directly or indirectly invests in, maintains an interest in, or participates in an enterprise, the activities of which affect interstate or foreign commerce (*see, Moss v Morgan Stanley*, 719 F2d 5, 17). Moreover, the plaintiff must set forth in the complaint the predicate offenses with reasonable specificity in order for the court to identify the predicate acts and to determine their relationship from one to another (*see, Lichtenstein v Polizzotto*, 152 Misc 2d 241, 246).

The plaintiff relies on the allegedly fraudulent activities of the defendants Ross and Strategic Ventures in order to show that they engaged in a pattern of racketeering activity. The plaintiff also alleges that Ross and Strategic Ventures committed the following predicate acts: mail fraud, wire fraud, selling fraudulent tax shelters, evading income tax, conversion, theft, and larceny.

18 USC § 1961(1) enumerates the different predicate offenses that constitute racketeering activity. They include mail fraud, wire fraud, and numerous federal and state law felonies (*see, Lichtenstein v Polizzotto, supra* at 243). Since the complaint fails to state a claim that Ross and Strategic Ventures defrauded the plaintiff, it contains no valid allegation of fraud to underpin the predicate acts of racketeering against Ross and Strategic Ventures (*see, Moss v Morgan Stanley, supra* at 18-19). In addition, the plaintiff's failure to identify any specific act of mail or wire fraud committed by Ross and Strategic Ventures renders the plaintiff's RICO claim defective (*see, Lichtenstein v Polizzotto, supra* at 245-246). The remaining predicate acts alleged by the plaintiff do not constitute predicate offenses within the meaning of 18 USC § 1961(1). Accordingly, the complaint fails to state a RICO cause of action against Ross and Strategic Ventures.

In view of the foregoing, the motion by the defendants Ross and Strategic Ventures for an order dismissing the complaint insofar as it is asserted against them is granted.

The plaintiff seeks leave to replead the causes of action against Ross and Strategic Ventures if the court finds that they were not pleaded with sufficient particularity. However, the plaintiff has not submitted a copy of the proposed new causes of action, nor has he demonstrated that they would have merit (*see, Lupski v County of Nassau*, 32 AD3d 997, 999; **Abbott v Herzfeld & Rubin**, 202 AD2d 351, 352; **Hickey v National League of Professional Baseball Clubs**, 169 AD2d 685). Accordingly, the plaintiff's application for leave to replead is denied.

A motion for consolidation pursuant to CPLR 602(a) rests in the sound discretion of the court. Consolidation is favored by the courts in serving the interests of justice and judicial economy. When, as here, both actions share material questions of law and fact, consolidation is appropriate (*see, J & A Vending v J.A.M. Vending*, 268 AD2d 505, 506; **Flaherty v RCP Assocs.**, 208 AD2d 496, 498). Accordingly, the branch of the plaintiff's cross motion which is for consolidation is granted, and the caption is amended accordingly.

Finally, the branch of the plaintiff's cross motion which is for an order of default is granted, without opposition, against the following defendants, who have failed to answer the complaint or appear in this action: Nicholas F. Magalhaes, Michele Sofos Magalhaes, Jayme Magalhaes, Troy Magalhaes, Pinnacle Wealth Ltd., Pinnacle Wealth LP, Pinnacle Wealth Concepts Ltd., Pinnacle Wealth Concepts Management LLC, Pinnacle Wealth Enterprises LLC, Pinnacle Wealth Enterprises Ltd., Pinnacle Wealth Group LLC, Pinnacle Wealth Group Management LLC, Pinnacle Wealth Group of Mt. Vernon LLC, Anthony Della Camera, Genesis Wealth Systems Ltd., Genesis Wealth Systems Management LLC, Marco Scibelli, Smokey's of Garden City, Smokey's Rib Place, and SRWH Holdings Ltd. The court declines to issue a conditional order of default against the defendants Jack I. Kirschner and Michael Cammarota, who have appeared pro se and answered the complaint.

DATED: May 10, 2007

HON. ELIZABETH HAZLITT EMERSON

J. S.C.