

Continental Cas. Co. v PricewaterhouseCoopers LLP

2007 NY Slip Op 33619(U)

November 7, 2007

Supreme Court, New York County

Docket Number: 0120016/2003

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
FBEM Justice

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CONTINENTAL CASUALTY COMPANY; CNA EMPLOYEES'
RETIREMENT TRUST; LOEWS CORPORATION CASH
BALANCE RETIREMENT PLAN; EMPLOYEES
RETIREMENT PLAN OF BULOVA CORPORATION;
LORILLARD TOBACCO COMPANY RETIREMENT
ALLOWANCE PLAN FOR HOURLY RATED AND/OR
PIECEWORK EMPLOYEES; THE RETIREMENT PLAN
FOR EMPLOYEES OF LORILLARD TOBACCO
COMPANY; and ONE PARK MEDIA SERVICES-, INC.,
Plaintiffs,

INDEX NO. 120016/2003E
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

- against -
PRICewaterhouseCOOPERS LLP,
Defendant.

-----X
EAGLE PARTNERS, L.P.; THE HENRY & MARILYN TAUB
FOUNDATION; FRED S. LAFER and MARILYN TAUB, AS
TRUSTEES OF THE TAUB FAMILY 1998 TRUST,
Plaintiffs,

INDEX NO. 121132/2003E
MOTION DATE _____
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

- against -
PRICewaterhouseCOOPERS LLP,
Defendant.

-----X
JEREMY M. JONES and PATRICIA L. JONES, AS CO-
TRUSTEES OF THE JONES FAMILY TRUST; and JOHN E.
KREITLER, AS TRUSTEE OF THE JONES FAMILY INCOME
TRUST,
Plaintiffs,

INDEX NO. 602962/2003E
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

- against -
PRICewaterhouseCOOPERS LLP,
Defendant.

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 _____

FILED
NOV 09 2007

Cross-Motion: Yes No

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is

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

Dated: November 7, 2007

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

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CONTINENTAL CASUALTY COMPANY; CNA
EMPLOYEES' RETIREMENT TRUST; LOEWS
CORPORATION CASH BALANCE RETIREMENT PLAN;
EMPLOYEES RETIREMENT PLAN OF BULOVA
CORPORATION; LORILLARD TOBACCO COMPANY
RETIREMENT ALLOWANCE PLAN FOR HOURLY
RATED AND/OR PIECEWORK EMPLOYEES; THE
RETIREMENT PLAN FOR EMPLOYEES OF LORILLARD
TOBACCO COMPANY; and ONE PARK MEDIA SERVICES,
INC.,

601
Index No. 120016/2003

Plaintiffs,

- against -

PRICEWATERHOUSECOOPERS LLP,

Defendant.

ORDER and DECISION

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EAGLE PARTNERS, L.P.; THE HENRY & MARILYN TAUB
FOUNDATION; FRED S. LAFER and MARILYN TAUB, AS
TRUSTEES OF THE TAUB FAMILY 1998 TRUST,

Index No. 121132/2003

Plaintiffs,

- against -

PRICEWATERHOUSECOOPERS LLP,

Defendant.

-----X
JEREMY M. JONES and PATRICIA L. JONES, AS CO-
TRUSTEES OF THE JONES FAMILY TRUST; and JOHN
E. KREITLER, AS TRUSTEE OF THE JONES FAMILY
INCOME TRUST,

Index No. 602962/2003

Plaintiffs,

- against -

PRICEWATERHOUSECOOPERS LLP,

Defendant.

FILED
NOV 09 2007

COUNTY CLERK OFFICE
NEW YORK

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MOSKOWITZ, J.:

The court consolidates the following motions for disposition: motion sequence number

001 in *Continental Casualty Co. v PricewaterhouseCoopers LLP* (Index No. 120016/2003)

(“*Continental* Action”); motion sequence number 001 in *Eagle Partners L.P. v PricewaterhouseCoopers LLP* (Index No. 121132/2003) (“*Eagle* Action”); and motion sequence number 004 in *Jones v PricewaterhouseCoopers LLP* (Index No. 602962/2003) (“*Jones* Action”). In all three actions (together, “Actions”), defendant PricewaterhouseCoopers LLP (“PWC”) moves for summary judgment dismissing the complaints based upon plaintiffs’ lack of standing to assert direct claims.

These actions arise out of the demise of Lipper Convertibles, L.P. and Lipper Fixed Income Fund L.P. (collectively “Funds” or “Partnerships”). Each of the complaints in these actions assert claims for fraud and aiding and abetting fraud, negligent misrepresentation, aiding and abetting breach of fiduciary duty and negligence.

The court discussed the facts underlying these actions in detail in the prior decisions *Jones v PricewaterhouseCoopers LLP* (6 Misc 3d 1014[A], 2004 WL 3140909 [Sup Ct, NY County 2004]) and *Morgado Family Partners, LP v Lipper* (6 Misc 3d 1014[A], 2004 WL 3142198 [Sup Ct, NY County 2004], *affd* 19 AD3d 262 [1st Dept 2005]). Therefore, the court presumes familiarity with the facts and refers the parties to these decisions.

Discussion

PWC argues that the court should dismiss the *Continental*, *Eagle* and *Jones* Actions, because plaintiffs cannot substantiate any non-derivative injury in support of their individual claims. Plaintiffs counter that their injury arose when PWC fraudulently induced them, through its improper audit reports, to purchase their limited partnership interests and that PWC’s audit reports induced them to maintain their investments. Plaintiffs argue that their claims all rely upon fraudulent inducement, making them direct.

“In determining whether a cause of action is derivative in nature regarding limited partnership law, the case law relevant to corporation law may be looked to for guidance.” (*Strain v Seven Hills Assoc.*, 75 AD2d 360, 370 [1st Dept 1980]). In determining whether claims are direct or derivative, the Appellate Division, First Department has looked to the test the Supreme Court of Delaware enunciated in *Tooley v Donaldson, Lufken & Jenrette, Inc.*, 845 A2d 1031, 1033 (Del 2004). (See *Buechner v Avery*, 38 AD3d 443 [1st Dept 2007] and *Nemazee v Premier Purchasing Partners, L.P.*, 24 AD3d 196 [1st Dept 2005]).

Under the “*Tooley test*,” a court considers: “(1) who suffered the alleged harm (the corporation or the suing stockholders, individually) and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually.)” (*Id.*). More specifically,

a court should look to the nature of the wrong and to whom the relief should go. The stockholder’s claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.

(*Id.* at 1039).

Here, PWC submits as documentary evidence the December 15, 2003 plan of BDO Seidman, that pertains to the limited partners’ distribution rights and that this court approved in an order dated February 13, 2004 (“BDO Report”). PWC also submits the affidavit of Chudozie Okongwu (“Okongwu”), providing expert testimony on “the sources of the losses allegedly suffered by the Plaintiffs in the Actions” under the distribution model in the BDO Report. (Okongwu Aff., at 2, 4). According to PWC’s expert, differences in the limited partners’ net

capital investments and their June 30, 2002 ending capital balances are attributable to three possible sources: (1) the limited partners' share in the net losses of the Funds; (2) the Fund's overpayment of general partner fees and (3) unrecovered overpayments of capital to withdrawn limited partners.

The documentary evidence establishes that the limited partner plaintiffs had no divisible right in the portfolio of the Funds (Fournier Aff., Ex. II, Amended and Restated Limited Partnership Agreement, art. 8.1 [b] ["[n]o Partner shall have the right to receive property other than cash in return for the amount of its Capital Account"]) and withdrawing limited partners received cash distributions or securities out of the Funds' assets. (*Id.*, art. 8.2). Thus, claims based upon mismanagement of partnership assets that resulted in net losses to the Partnerships, overpayments to withdrawing limited partners and overpayment of fees to the general partner all state derivative claims that all limited partners share equally proportionate with their investments in the Funds. (*See Abrams v Donati*, 66 NY2d 951, 953 [1985]; *see also Blank v Schafrann*, 70 NY2d 887, 888 [1987]).

As this court already stated in *Jones* (2004 WL 3140909, at *4), claims for excess fees paid to the general partner are derivative claims. (*See Broome v ML Media Opportunity Partners L.P.*, 273 AD2d 63, 64 [1st Dept 2000] [wrongful deferral and payment of management fees claims were derivative in nature because they alleged no more than mismanagement and diversion of assets]). Significantly, none of the limited partners' claimed direct injuries are independent of any alleged injury to the Partnerships.

Further, the general partner engaged PWC to perform the audits of the Partnerships' financial statements. While the general partner concedes that it was obligated to deliver audited

financial statements to the limited partners, plaintiffs do not claim that PWC performed any audit on their behalf either before or after their investments. Nor do plaintiffs show a breach of a duty PWC owed to them independent of any duty owed to the Partnerships. Thus, the injuries that plaintiffs suffered derived from their status as limited partners. Any duty that PWC owed to the limited partners was derivative of PWC's obligations to the limited partnership. Plaintiffs' resulting injury is attributable to a loss the limited partnerships suffered and then to plaintiffs through the allocation of those losses on a pro rata basis. For the foregoing reasons, PWC has demonstrated that plaintiffs' claims are derivative, not direct.

The essence of plaintiffs' rebuttal argument is that they can pursue their fraudulent inducement claims, because they "became injured at the moment they were fraudulently induced by PWC to purchase their limited partnership interests in the Fund, limited partnership interests that were indisputably overvalued long before they purchased their investments." (Plaintiffs' Opp. Mem. of Law, at 14). Indeed as the United States District Court for the Southern District of New York has observed, "courts have consistently held that a shareholder . . . has standing to sue on its own behalf where it claims 'that it was fraudulently induced to become a shareholder in the first place.'" (*Solutia Inc. v FMC Corp.*, 385 F Supp 2d 324, 333 [SD NY 2005] [citations omitted]; *but see Capital Z Fin. Servs. Fund II, v. Healthnet, Inc.*, 43 AD3d 100, 111 [1st Dept 2007] [applying Delaware law and citing *Tooley*, court held plaintiffs lacked standing to assert direct claims that defendants induced them to enter into purchase agreement]).

However, discovery is now closed and plaintiffs fail to produce any evidence to support their claim that they suffered a direct injury at the time of their investments that is distinct from the injury to the Partnerships. Rather, for the reasons discussed above, plaintiffs cannot prevail

without showing an injury to the Partnerships and PWC did not owe a duty to plaintiffs. In short, the only loss plaintiffs can demonstrate is the diminution in value of their investment in the Partnerships, stemming from the Partnerships' overpayments and trading losses. Thus, the nature of the injury is derivative. As plaintiffs fail to rebut PWC's prima facie showing, the court is constrained to grant PWC's motions for summary judgment dismissing the complaints. On the other hand, the Trustee's action against PWC on behalf of the Partnerships will continue. Any recovery the Trustee receives on behalf of the Partnerships is for the sole benefit of the limited partners who lost money. (See decision of today in *Williamson v PricewaterhouseCoopers*, Index No. 602106/2004).

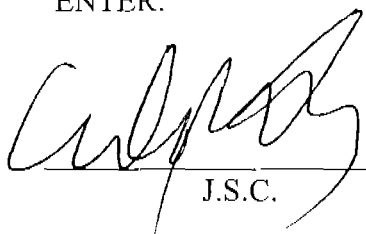
Accordingly, it is hereby

ORDERED that the court grants defendant's motions for summary judgment and dismisses the complaints; and it is further

ORDERED that the Clerk is directed to enter judgments accordingly.

Dated: November 7, 2007

ENTER:



J.S.C.

FILED
NOV 09 2007
COUNTY CLERK'S OFFICE
NEW YORK