

**Duffy v Pinnacle Wealth Group, Ltd.**

2008 NY Slip Op 30618(U)

March 5, 2008

Supreme Court, Suffolk County

Docket Number: 0011699/2002

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 6-27-07  
 SUBMITTED: 10-10-08  
 MOTION NO: 006-MG

\_\_\_\_\_X  
 JAMES R. DUFFY, SR.,

Plaintiff,

-against-

**ROBERT & ROBERT PLLC**  
 Attorneys for Plaintiff  
 150 Broad Hollow Road, Suite 314  
 Melville, New York 11747

**L'ABBATE, BALKAN, COLAVITA &  
 CONTINI, L.L.P.**  
 Attorneys for Defendant Roberta Horne  
 1001 Franklin Avenue  
 Garden City, New York 11530

PINNACLE WEALTH GROUP, LTD; ASSET  
 ACCUMULATION, INC.; NICHOLAS MAGALHAES;  
 ROBERT J. WATSON; SEAN ROARK; and WILLIAM  
 D.B. HOLT, 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,"

Defendants.

\_\_\_\_\_X

Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion and supporting papers 1-7; Notice of Cross Motion and supporting papers\_\_\_; Answering Affidavits and supporting papers 8-15; Repeating Affidavits and supporting papers 17-18; it is,

**ORDERED** that this motion by the defendant Roberta Horne for summary judgment dismissing the plaintiff's 28<sup>th</sup>, 34<sup>th</sup>, and 35<sup>th</sup> causes of action insofar as they are asserted against her is granted.

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 the defendant Pinnacle Wealth Group, Ltd., \$250,000 at a time when it was insolvent. The plaintiff alleges that the defendants misrepresented the financial condition of the defendant Pinnacle Wealth Group, Ltd., in order to induce him to lend it \$250,000. The plaintiff further alleges that the defendant Pinnacle Wealth Group, Ltd., defaulted and has not repaid the principal and interest due him. The causes of action against the defendant Roberta Horne seek to recover damages for fraud and violations of the civil RICO statute, as well as attorney's fees. The defendant Roberta Horne moves for summary judgment dismissing those causes of action on the ground, inter alia, that the fraud and RICO causes of action are not pled with sufficient particularity.

Preliminarily, the court notes that the plaintiff does not oppose so much of the motion as seeks summary judgment dismissing the 34<sup>th</sup> cause of action for attorney's fees insofar as it is asserted against the defendant Roberta Horne. Accordingly, that branch of the motion is granted.

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 Misc 3d 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).

The plaintiff does not allege any direct misrepresentations of fact by the defendant Roberta Horne prior to lending \$250,000 to Pinnacle Wealth Group, Ltd., a company headed by the

defendant Nicholas Magalhaes (*see, Williams v Sidley Austin Brown & Wood, supra* at \*5 [and cases cited therein]). The plaintiff alleges that Horne served as staff counsel to the defendant Pinnacle Wealth Group, LLC, another company headed by Magalhaes, and the other corporate defendants. The plaintiff alleges that Horne, by her imprimatur, helped Magalhaes present Pinnacle Wealth Group, Ltd., and its corporate alter egos as legitimate business enterprises when, in fact, they were merely frauds designed to swindle people out of their money. The plaintiff alleges that Horne helped to set up and market the tax shelters that were sold by the defendants and that she prepared documents and promotional materials that were used to deceive potential creditors, including the plaintiff. The plaintiff alleges that Horne's activities were part of Magalhaes' grand scheme to defraud him.

The plaintiff's broad, blunderbuss allegations fail to delineate, in large measure, the respective roles of each of the defendants, including Horne. 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 \*5). When, as here liability for fraud is to be extended beyond the principal actors to those who are said to have aided and encouraged its commission, it is especially important that the command of CPLR 3016(b) be strictly adhered to (*see, 125 Associates v Cralin Trading Associates, 196 AD2d 630, 631*). Absent scienter, the mere fact that a defendant's otherwise lawful activities may have assisted another in the pursuit of guileful objectives is not a sufficient finding that she conspired to defraud (*see, Williams v Sidley Austin Brown & Wood, supra* at \*5, *citing Snyder v Puente de Brooklyn Realty Corp., 297 AD2d 432, 435; National Westminster Bank USA v Weskel, 124 AD2d 144, 147*). The court finds that the plaintiff's claim of fraud against Horne is deficient because it contains no allegations of fact from which it can be inferred that there existed an agreement or understanding between Horne and Magalhaes or Horne and Pinnacle Wealth Group, Ltd., to cooperate in a fraudulent scheme (*see, National Westminster Bank USA v Weskel, supra* at 147). Accordingly, the branch of the motion which is for summary judgment dismissing the 28<sup>th</sup> cause of action is granted.

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 reasonably 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 Horne's allegedly fraudulent activities in order to show that she engaged in a pattern of racketeering activity. The plaintiff also alleges that Horne 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 Horne defrauded the plaintiff, it contains no valid allegation of fraud to underpin the predicate acts of racketeering against her (*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 Horne 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 Horne, and the 35<sup>th</sup> cause of action is dismissed insofar as it is asserted against her.

The plaintiff's affidavit in opposition to the motion contains a proposed amended complaint, which the plaintiff asks the court to consider if it finds his fraud and RICO claims to be deficient. The plaintiff's affidavit is insufficient to constitute a cross motion (*see*, CPLR 2215; **Bauer v Facilities Dev. Corp.**, 210 AD2d 992), and the court is without jurisdiction to grant the relief requested by the plaintiff (*see*, **Myung Chun v N. Am. Mtge. Co.**, 285 AD2d 42, 45; *see also*, **J.A. Valenti Elec. Co. v Power Line Constructors**, 123 AD2d 604). In any event, the plaintiff has failed to demonstrate that the proposed amendment has 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). Moreover, the amended allegations fail to correct the aforementioned deficiencies. Accordingly, the motion is granted, and the complaint is dismissed insofar as it is asserted against the defendant Roberta Horne.

DATED: March 5, 2008

**HON. ELIZABETH HAZLITT EMERSON**

J. S.C.