

**Convermat Corp. v JPMorgan Chase & Co.**

2008 NY Slip Op 30626(U)

February 21, 2008

Supreme Court, New York County

Docket Number: 0107247/2006

Judge: Herman Cahn

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

PRESENT: Hon. Herman Cahn  
Justice

PART 49

CONVERMAT CORPORATION, et al.

INDEX NO. 107247 /06

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 003

JP MORGAN CHASE & CO., et al.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

MOTION IS DECIDED IN ACCORDANCE WITH COMPANION ORDER AND DECISION IN MOTION SEQUENCE . . . . .

**RECEIVED**  
FEB 27 2008  
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**FILED**  
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NEW YORK

Dated: February 21, 2008

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

*M DRAFT*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED: \_\_\_\_\_ J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

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CONVERMAT CORPORATION, FARZAD SHAHERY  
and SHAW SHAHERY,

Plaintiffs,

-against-

Index No. 107247/06

JPMORGAN CHASE & CO., CHASE INSURANCE  
AGENCY d/b/a CHASE/USI INSURANCE  
BROKERAGE AND CONSULTING, and LANCE  
REMBAR,

Defendants.

-----X

**HERMAN CAHN, J.:**

Defendants JPMorgan Chase & Co., Chase Insurance Agency d/b/a Chase/USI Insurance Brokerage and Consulting (collectively, Chase) and Lance Rembar (Rembar) move for summary judgment dismissing the complaint, CPLR 3212.

Plaintiffs Convermat Corporation (Convermat), Farzad Shahery (Farzad) and Shaw Shahery (Shaw) seek damages resulting from the IRS disallowing deductions for payments into an employee benefit plan (the BETA Program) that was sold to them by Chase, through its former employee, Rembar. In a prior motion, decided December 7, 2006, this court granted defendants' motion to dismiss to the extent of dismissing two causes of action, for violation of General Business Law § 349, and for unjust enrichment. The only remaining claim is for fraud.

The prior decision contains a recitation of facts, familiarity with which is presumed. Therefore, the facts will not be repeated in full here.

003

## FACTS

Farzad and Shaw Shahery (together, the Shaherys) are the principals of Convermat. As part of their financial planning, the Shaherys purchased the BETA Program from Chase to provide life insurance for each of them, to provide for business succession, and to provide an income tax benefit to Convermat. The Shaherys attended a meeting regarding the program together with their accountant, Marvin Passkoff (Passkoff).

Rembar, a Chase employee who specialized in the sale of life insurance products, provided further information to Passkoff after the meeting. Rembar recommended that the Shaherys obtain independent tax advice regarding the program.

The Shaherys retained the law firm of Schulte Roth & Zabel (Schulte Roth) to review the BETA Program. In May 2000, a Schulte Roth representative met with Rembar and obtained the materials and memos that Rembar had provided. Schulte Roth spent over 15 hours researching the issues surrounding the plan and prepared life insurance trust agreements for the Shaherys in connection with Convermat's adoption of the BETA Program. Plaintiffs maintain that Schulte Roth never provided them with any substantive legal advice regarding the plan.

In June 2000, plaintiffs obtained a tax opinion from Steven Horowitz, Esq., a partner in the then-law firm of Moritt, Hock, Hamroff and Horowitz LLP, on the tax consequences of enrolling in the BETA Program (the Opinion Letter). The Shaherys thereupon decided to enroll in the BETA Program.

The IRS audited the Shaherys' tax returns, as well as those of Convermat, for the years 2000-2002. While there were a number of adjustments made to Convermat's returns, the IRS allowed the deductions for the premiums paid for the BETA Program.

The Shaherys also had a number adjustments on their personal income tax returns, including imputed income based on the premiums paid for the BETA Program. This was based upon the IRS conclusion that the program was not an employee welfare benefit plan that qualified for treatment under Section 419 of the Internal Revenue Code.

Plaintiffs now seek damages of \$500,000 based upon the additional tax that they were required to pay, arguing that they did not obtain the tax benefit that was expected. They contend that defendants knowingly and fraudulently misrepresented to them that they would obtain those benefits, that they reasonably relied on those misrepresentations and that they were damaged thereby.

#### DISCUSSION

In order to support a claim for fraud, a plaintiff must demonstrate that the defendant knowingly made a material misrepresentation or omission of fact, which the plaintiff reasonably relied upon and which caused damage. *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996). Here, defendants maintain that plaintiffs have no evidence to support any of the four elements.

Plaintiffs contend that Rembar told them that the premiums would not be imputed income to the Shaherys individually, and that such representation was false and known to be false. Initially, it must be noted that during the time in question, the state of the law with respect to plans such as the BETA Program was uncertain. Plaintiffs have not adduced any evidence from an expert in these matters that suggests that it was known, at that time, that the IRS would disallow such treatment. Thus, at the time of the alleged misrepresentation, it was not known to be false by anyone. Plaintiffs have not suggested that Rembar had any special knowledge that

would have alerted him to the risks involved.

Plaintiffs assert that even if Rembar did not know that the tax treatment would be disallowed, he “must have” known that the state of the law was uncertain and should have told plaintiffs about the uncertainty. Further, Farzad testified that Rembar told him that the plan had been approved by the IRS. However, this assertion is not supported by any other evidence and is contradicted by the fact that Rembar provided plaintiffs with an opinion letter regarding the BETA Program. If the program had been approved by the IRS, there would have been no need for the opinion letter. Thus, plaintiffs have not raised a question of fact as to whether Rembar made a misrepresentation of material fact.

Even if plaintiffs had demonstrated a misrepresentation of material fact, plaintiffs have failed to demonstrate that any representation was knowingly false. They speculate that Chase’s life insurance group attorney, Vivian Gilbert, Esq., knew the state of the law and “must have” conveyed that knowledge to Rembar. However, speculation is not evidence, and cannot be considered on a motion for summary judgment. *Zuckerman v City of New York*, 49 NY2d 557 (1980).

Even had plaintiffs raised an issue of fact regarding the first two elements, they have not raised an issue of fact to support their assertion of reasonable reliance. Even though reasonable reliance is generally an issue of fact to be decided by the trier of fact, there are instances when it can be determined as a matter of law on a motion for summary judgment. One of these is when sophisticated business people incur a significant financial obligation, claiming to have done so on information provided by the broker, despite having evidence to the contrary. *See Orlando v Kukielka*, 40 AD3d 829, 832 (2d Dept 2007). This is such a case.

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Generally, when a party has the means of ascertaining the facts by doing its own due diligence, it will not be heard to claim fraud. *East 15360 Corp. v Provident Loan Soc. of New York*, 177 AD2d 280, 281 (1<sup>st</sup> Dept 1991). While plaintiffs assert that Chase's attorneys had more specialized knowledge, because this was their area of expertise, they do not, and cannot, deny that Schulte Roth had access to the same information that Chase's attorneys had. Further, while plaintiffs assert that they never received any substantive legal advice from Schulte Roth, they do not offer any explanation for that rather surprising statement. Their attorney's suggestion, that Schulte Roth "presumably . . . did not have the manpower or expertise to reach a determination" (PI Statement of Disputed Material Facts, ¶ 13) is, to say the least, questionable. In any event, even were that the case, it would not relieve plaintiffs from their obligation to do their own due diligence. *East 15360 Corp. v Provident Loan Soc. of New York*, 177 AD2d at 281. Plaintiffs have not suggested, much less offered evidence, that there was evidence of a flaw in the program, to which only Chase had access.

Plaintiffs contend that the Opinion Letter was, unknown to them, also part of Chase's fraudulent scheme. They maintain that Rembar recommended that they seek the opinion of Steven Horowitz, without advising them that Horowitz was the attorney who advised the BETA Program. They further maintain that Chase should have advised them that the term "substantial authority" used in the Opinion Letter meant that there was a less than 50% chance that the favorable treatment would be allowed by the IRS. Neither of these arguments is compelling.

Initially, in the materials that Rembar provided to the Shaherys, it states very clearly that Steven Horowitz was engaged to provide a tax opinion for the BETA Program. Def Ex. 5. Thus, plaintiffs had the information that Horowitz was connected with the BETA Program. If they did

not choose to make use of that information, they cannot not blame someone else. Further, they had already retained Schulte Roth at the time that they sought the Opinion Letter. They could have sought a recommendation from Schulte Roth for an attorney to provide an opinion, which would have been more independent, rather than rely on Chase's recommendation. Their failure to do so does not constitute any wrongdoing on Chase's part.

Plaintiffs' assertion that Chase should have advised them as to the meaning of the term "substantial authority," as used in the Opinion Letter, is similarly unavailing. Chase did not provide the Opinion Letter, nor is Chase an attorney. Thus, it was not Chase's obligation to advise plaintiffs of the definition, and it might well have been improper for Chase to provide what was, essentially, a legal interpretation of a document. Further, plaintiffs would have been aware of the definition if they had read the Opinion Letter. The letter itself distinguishes between "substantial authority" and the "more likely than not" standards as used by the IRS. The letter states that "more likely than not" means that there is a greater than 50% likelihood that the tax treatment of the BETA Program, with respect to the deduction taken by Convermat, would be upheld if challenged by the IRS. The letter states that this is a more stringent standard than the "substantial authority" standard, which means only that "there would be a realistic possibility of success of such positions if the matters reflected by such positions were litigated." Def Ex. 13, Opinion Letter, at 7. The Opinion Letter states that there is "substantial authority" for the position that the employer contributions to the plan are not includable in the employees' federal gross income beyond the portion that would equal the reasonable net premium cost of the insurance protection received by the employee. *Id.* at 9. Thus, plaintiffs were on notice that there was a real risk of the IRS disallowing the tax deduction to them individually. Under such

\* 8 ]  
circumstances, they cannot seek redress from Chase for the risk that they knew, or should have known, existed regarding the anticipated tax treatment.

The court also notes that plaintiffs signed documents in which they acknowledged that they consulted independent legal and tax advisors regarding the income tax effects of participation, they have sufficient knowledge and experience in financial and benefits matters to be capable of evaluating the merits and risks of participating, and obtained competent professional advice regarding the BETA Program. Def Ex. 17, at 352, 354, 359. They further agreed that they relied solely upon their own knowledge, experience and judgment or that of their professional advisors. *Id.* The agreement further states that “[n]o Federal or state agency has passed upon the BETA Program or made any findings or determination with respect thereto.” *Id.* at 360. Therefore, plaintiffs were explicitly advised that the IRS had not approved the program.

Thus, plaintiffs have failed to demonstrate any reasonable reliance upon any purported representations by Chase.

Finally, plaintiffs have not demonstrated damages. While they contend that the Shaherys were obligated to pay \$500,000 in taxes to the IRS, that is not the measure of damages in such a matter. Rather, “[d]amages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained.” *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d at 421. Here, plaintiffs seek compensation for the advantage that they would have gained had the favorable treatment been allowed by the IRS. However, they do not offer any evidence of the damages that they suffered, as a whole, from participation in the BETA Program. Without any such evidence, there is no basis to award them damages. Additionally, plaintiffs fail to contradict defendants’ assertion that, if they were to recover, they

would, in effect, receive a windfall. *Id.* at 422-423.

CONCLUSION

In conclusion, plaintiffs have not demonstrated that there is a material issue of fact regarding any of the elements of fraud.

Accordingly, it is

ORDERED that the motion 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 the Clerk is directed to enter judgment accordingly.

Dated: February 21, 2008

ENTER:

  
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J.S.C.

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