

Colarossi v Daly

2008 NY Slip Op 32769(U)

October 2, 2008

Supreme Court, Nassau County

Docket Number: 003334/2008

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

GARY C. COLAROSSO, individually and on behalf of himself and all other Shareholders and Members similarly situated of FIVE FOR FIGHTING, INC., FULL ENVIRONMENTAL SERVICES, LTD. and D&M EXCAVATING, LLC,

Plaintiffs,

INDEX NO.: 003334/2008
MOTION DATE: 08/20/2008
MOTION SEQUENCE: 001 and 002

-against-

KENNETH DALY, AQUA-NOVA COMMERCIAL SERVICES, LLC, AQUA-NOVA, LLC, MARK PERSONEN, KEVIN McGILLOWAY, FIVE FOR FIGHTING, INC., FULL ENVIRONMENTAL SERVICES, LTD. and D&M EXCAVATING, LLC,

Defendants.

The following papers read on this motion:

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| Notice of Motion & Exhibit Annexed | 1 |
| Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint | 2 |
| Notice of Cross-Motion, Affirmation, Affidavits & Exhibits Annexed | 3 |
| Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint | 4 |
| Memorandum of Law in Reply | 5 |
| Letter of Inna N. Cordiale dated 8/15/08, Supplemental Affidavit in Opposition to Motion to Dismiss & Exhibit Annexed | 6 |

This motion by defendants, Aqua-Nova, LLC, Mark Personen [sic] and Kevin McGilloway, (the Aqua-Nova defendants), for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them is determined as follows. The cross-motion by plaintiff for leave to amend the caption to correct Mark Personen to Mark Pesonen is granted.

Plaintiff commenced this action to recover damages resulting from the alleged fraud and breach of fiduciary duty committed by defendant Kenneth Daly who was allegedly aided and abetted by the Aqua-Nova defendants, and as a shareholders derivative suit on behalf of Five for Fighting, Inc.

As is gleaned from the complaint, at all times relevant defendant Kevin Daly operated a business, Full Cesspool, which manufactured goods, installed parts, serviced, maintained and remediated commercial grease traps sinks, cesspools, and leeching fields. On April 23, 2004, Colarossi and Daly formed D&M Excavating, LLC as equal shareholders. In June of 2004, Daly and Colarossi, and two other members of his family, formed Five For Fighting, Inc., as equal shareholders. The purpose of both the corporation and the LLC were to complement the Full Cesspool business by, inter alia, installing septic tanks and providing excavation equipment.

After that Colarossi, on behalf of Five For Fighting, Inc., joined Full Environmental Services, Ltd., ("Full Environmental"), which is owned 50% by Five For Fighting, Inc. and 50% by Kevin Daly. It did subcontract work for Aqua-Nova in the same field.

In May of 2005, the offices of Full Environmental were physically moved to the Aqua-Nova commercial offices. Then the company was sold to Aqua-Nova, LLC, and Daly, Pesonen and McGilloway who took over the cesspool businesses without plaintiff's knowledge. The shareholder and operation agreements and stock certificates were allegedly transferred in the move. Plaintiff was an investor and owner in each of the corporations – Five For Fighting, Inc., D&M Excavating, LLC and Full Environmental – and when the sale occurred he did not realize any return on his investment.

The claims against Daly are that he secretly negotiated and sold the corporations of which plaintiff was an owner without his consent and without sharing the

profits, schemed to take money out of their businesses in a way plaintiff would not detect including diluting the value of receivables and diverting cash payments, reneged on his pledge of receivables from Full Cesspool to Full Environmental and Five For Fighting, paid personal expenses from the receivables, took a salaried job with Aqua Nova and secretly tried to transfer the equipment owned by D&M to Aqua-Nova, negotiated checks that required two signatures, and opened a bank account for Full Environmental without plaintiff's consent.

He claims that the Aqua-Nova defendants were aware of Daly's deception and conspired with him to achieve it. The issue to be determined in the motion sub judice is whether plaintiff has plead sufficient facts to hold the Aqua-Nova defendants answerable for participating in the alleged scheme perpetrated by defendant Daly. In reviewing defendants' motion to dismiss pursuant to CPLR 3211(a)(7) the "facts pleaded are presumed to be true, and the court must afford those allegations every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." Sitar v Sitar, 854 N.Y.S.2d 536, 538 (2d Dept 2008).

The first cause of action seeks imposition of a constructive trust and accounting of the assets of Full Environmental, Five For Fighting and D&M Excavating which are in the possession of Daly and the Aqua-Nova defendants. "The elements of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance upon the promise, and (4) unjust enrichment." Nathanson v Nathanson, 20 A.D.3d, 403 (2d Dept 2005), citing to Simonds v Simonds, 45 N.Y.2d 233; Modica v Modica, 15 A.D.3d 635. It is an equitable remedy and is not precluded when one is in possession of misappropriated property. See Revankar v Tzabar, 16 Misc.3d --- 207 WL 2385091 * (Sup. Ct. Kings Co. 2007) (The absence of any one factor will not itself defeat the imposition of a constructive trust when otherwise required by equity." (In re Koreag, Controle et Revision S.A., 961 F.2d at 354). The key factor is unjust enrichment (see id; Simonds, 45 N.Y.2d at 242).

The second cause of action claims that Daly and the Aqua-Nova defendants acted in concert to take and convert monies of plaintiff, and Five For Fighting, Full Environmental and D&M Excavating by fraud, deceit, intentional and unlawful acts.

“Fraud requires a representation of a material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury.” Global Minerals and Metals Corp.v Holme, 35 A.D.3d 93, 98 (1st Dept 2006). No authority need be cited for the proposition that Daly as a shareholder in the defendant closely held corporations owed a duty to the other shareholders, and was unequivocally barred from any self dealing. Id.

The third cause of action is for the sum of \$500,000 or monies had and received representing plaintiff and the corporations in whose name he sues.

All of the above stated causes of action focus on Daly’s alleged fraud and breach of duty. The first and third causes of action are only remedies for that fraud. The elements of fraud and breach of fiduciary duty alleged in the second cause of action are amply supported by the factual allegations in the paragraphs coming before it. They describe an intricate scheme to deprive plaintiff of his \$400,000 investment, his guarantee of equipment and right and interest in any profit to be made on them to sustain the cause of action, which to the view of the court is so convoluted that it is naturally described, in the words of defense counsel, by a “rambling and confusing pleading.” Memo of Law in Reply, page 2 (unnumbered). Shearson Lehman v Bagley, 205 A.D.2d 467 (1st Dept 1964).

Still, the Aqua-Nova defendants’ participation is the issue here. A claim of aiding and abetting requires allegations of a nexus between Daly’s individual tort and the Aqua-Nova defendants’ knowledge of the fraud and their intention to advance the fraud for their benefit. Revankar v Tzabar, 847 N.Y.S. 904, 207 WL 2385091 * (Sup. Ct. Kings Co. 2007). Constructive notice will not suffice, it must be actual notice with substantial assistance. Global Mines, 35 A.D.3d at 101. A defendant provides substantial assistance to the primary violator that would give rise to liability when defendant affirmatively assists, helps conceal or fails to act when required to do so thus enabling the breach to occur. Kaufman v Cohn, 307 A.D.2d 113 (1st Dept 2003).

The pleadings claim that at first Full Environmental was a sub-contractor of Aqua-Nova, who therefore knew that it was a separate entity who it paid for services,

presumably including sales tax. Through its business dealings it knew that D&M Excavating owned heavy equipment; taking possession and trying to change title without knowing or clearing what liens were on the equipment was deceitful. Merging the offices of the defendant corporations with Aqua-Nova before concluding a sale was, in the words of Daly a convenient period of "feeling out." Aqua-Nova had opportunity to observe the legal status of the cesspool businesses existence. If it knew that there was more than one owner, i.e. Daly, of any one business that it assumed, and it is nearly impossible to conclude that it did not actually know that, it concluded the sale in his absence at their peril. Facilitating by failure to act in the face of knowledge of a fraud will not exempt defendant from consequences. It is the law that "one who participates with a fiduciary in a breach of trust is liable for the full amount of damages to the injured party." Klein v Gutman, 12 A.D.3d 348, 351 (2d Dept 2004).

On the basis of the foregoing, the pleadings against the Aqua-Nova defendants successfully allege all the elements necessary to sustain a claim for aiding and abetting, and in so far as the three causes of action are viable against one who substantially assists a tortfeasor, the motion is denied.

Defendants shall serve an answer within thirty (30) days.

A Preliminary Conference (see NYCRR 202.12) shall be held on December 10, 2008, at 9:30 A.M., before the undersigned in the Supreme Court of Nassau County.

Counsel for all parties are reminded that this matter has been assigned to the Commercial Division of the Supreme Court of Nassau County and the parties are directed to follow the Rules of this Division.

Dated: October 2, 2008


J.S.C.

ENTERED

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