

Oster v Kirschner

2009 NY Slip Op 30130(U)

January 14, 2009

Supreme Court, New York County

Docket Number: 602081/07

Judge: Charles E. Ramos

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: CC [Signature]
Justice

PART 57

Index Number : 602081/2007
OSTER, AVI
VS.
KIRSCHNER, H. STEPHEN
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with
accompanying memorandum decision.

FILED
JAN 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/14/09

[Signature]
CHARLES E. RAMOS
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
AVI OSTER and ANN OSTER,

Plaintiffs,

Index No. 602081/07

-against-

H. STEPHEN KIRSCHNER, THE WISER NOW CORP.,
MARK SHAPIRO, IRVING J. STITSKY,
WILLIAM B. FOSTER, MARTIN P. UNGER, ESQ.,
CERTILMAN BALIN ADLER & HYMAN, LLC,
ROBERT F. COHEN, ESQ., COHEN & WURTZ LLC,
PHILIP L. CHAPMAN, ESQ., LUM, DANZIS,
DRASCO & POSITAN, LLC, and JOHN and JANE
DOES 1-100,

Defendants.

-----X

FILED
JAN 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Charles Edward Ramos, J.S.C.:

Motion sequence 004 and 005 are hereby consolidated for
disposition.

In motion sequence 004 the defendant Lum, Danzis, Drasco &
Positan, LLC ("Lum Danzis") moves to dismiss the second, fourth,
and fifth causes of action in the complaint.

In motion sequence 005 the defendant Philip L. Chapman moves
to dismiss the second, fourth, and fifth causes of action in the
complaint.

This action arises out of an alleged failed Ponzi scheme in
which the plaintiffs Avi Oster and Ann Oster (the "Osters") were
defrauded out of \$1.9 million. The instant motions pertain to
the legal services provided by the co-defendants Chapman and Lum
Danzis allegedly in furtherance of the scheme. For a full
recitation of the relevant facts, see this Court's decision and
order, filed on April 23, 2008.

Application of New York Law

On July 21, 2008, during oral argument, this Court determined that the second, fourth, and fifth causes of action were insufficiently pled under New York law and instructed the parties to submit supplemental briefs on the applicability of New Jersey law (Transcript 41:13).

The complaint sets forth conspiracy and aiding and abetting causes of action each for fraud, breach of fiduciary duty, and conversion. The Osters failure to allege that the defendant's had any actual knowledge of the conspiracy or the underlying wrong was held to be fatal to their causes of action. Conspiracy to commit a tort in and of itself is never a cause of action. Under New York law the "allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." (*Alexander & Alexander, Inc. v Fritzen*, 68 NY2d 968, 969 [1986]).

Additionally, the Osters aiding and abetting causes of action failed to allege that Lum Danzis or Chapman knowingly participated in the underlying wrong. "A person knowingly participates...when he or she provides "substantial assistance" to the primary violator. Substantial assistance occurs when the defendant affirmatively assists, helps conceal, or fails to act when required to do so, thereby enabling the breach to occur." Mere inaction of an alleged aider and abettor does not constitute substantial assistance, unless the defendant owes a fiduciary duty directly to the plaintiff. (*Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]).

The Osters' failure to allege the essential element knowledge is fatal to the conspiracy and aiding and abetting causes of action.

Application of New Jersey Law

The Osters argue that New Jersey law is applicable because the remaining parties in the litigation all reside in New Jersey. Furthermore, because the application of New Jersey law will result in a different outcome, this Court must conduct an interests analysis of the domicile and the locus jurisdictions to determine which laws are applicable. The Osters contend that New Jersey has a greater interest than New York, in having its laws applied.

Lum Danzis has taken the position that the Osters' causes of action should be dismissed under the laws of both New York and New Jersey because the complaint fails to allege with specificity all the requisite elements required to sustain the causes of action.

Pleading requirements, such as those codified in CPLR 3016, are a matter of procedure governed by the law of the forum (*Westdeutsche Landesbank Girozentrale v Learsy*, 284 AD2d 251, [1st Dept 2001]). Therefore, the heightened pleading standard of CPLR 3016(a) applies to the Oster's causes of action. Matters of substantive law are governed by a conflict of laws interests analysis (*Tanges v Heidelberg N. Am., Inc.*, 93 NY2d 48, 53 [1999]).

Interest Analysis

The first consideration in the interests analysis is whether there is any actual conflict between the laws of the competing jurisdictions (*Tanges v Heidelberg N. Am., Inc.*, 93 NY2d 48, 51 [1999]). Under New York law, "where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]).

In determining if there is a conflict of laws, this Court will assess if the Osters' substantive causes of action under New Jersey law pled under CPLR 3016(b), are cognizable and sufficient to defeat a motion to dismiss.

The Osters have inartfully combined the pleadings of both conspiracy and aiding and abetting in each cause of action at issue. However, because this action is in the early pleading stage, this Court will allow both causes of action for conspiracy and aiding and abetting to stand if they are viable.

Conspiracy Causes of Action

This Court will first assess the viability of the Osters' causes of action for conspiracy to commit fraud, conspiracy to breach a fiduciary duty, and conspiracy to commit conversion. Pleading a cause of action for civil conspiracy under New Jersey law requires a combination of two or more persons acting in concert to commit an unlawful act or a lawful act by unlawful means. Liability is attached if one understands the general objectives of the scheme, accepts them, and agrees to act to

further them, but "[a]n unwitting party cannot be liable under a conspiracy theory" (*Banco Popular N. Am. v Gandi*, 184 NJ 161, 177-8 [2005]).

Additionally, contrary to the Osters' contentions, the allegations of an underlying actionable tort are required to sustain the cause of action, and civil conspiracy standing alone, is not a cause of action. "The gravamen of an action in civil conspiracy is not the conspiracy itself but the underlying wrong which, absent the conspiracy, would give a right of action" (*Board of Education v Hoek*, 38 NJ 213, 238 [1962]; *id.* [must satisfy the agreement and knowledge elements of civil conspiracy and the elements of underlying wrong]). In this regard, New York and New Jersey law are substantively identical.

The only allegations in the complaint pertaining to the knowledge and agreement aspects of the conspiracy are based upon information and belief or are vague and conclusory in nature (Complaint ¶¶ 127-133, 153, 166, 173). The allegations do not meet the specificity required by CPLR 3016(b) and fail to state a cause of action.

Aiding and Abetting Causes of Action

The Court will now assess the viability of the Osters' causes of action for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, and aiding and abetting conversion. New Jersey law recognizes a cause of action for aiding and abetting when it is alleged that: (1) the defendant aided a party in performing a wrongful act that causes an injury,

(2) the defendant was generally aware of his role as part of an overall illegal or tortious activity at the time that he provided the assistance, and (3) the defendant knowingly and substantially assisted the principal violation" (State at 481).

Under the heightened pleading requirements of CPLR 3016(b), the allegations are insufficient to sustain this cause of action because the Osters' fail to allege with particularity the elements of knowledge or substantial assistance required to form the causes of action (Complaint ¶¶ 127-133, 153, 166).

The Osters' second cause of action for conspiracy and aiding abetting fraud, fourth cause of action for conspiracy and aiding and abetting breach a fiduciary duty, and fifth cause of action for conspiracy and aiding and abetting conversion must be dismissed because under the pleading requirements of CPLR 3016(b), they fail to state a cause of action.

Consequently, because the same outcome would result, the application of New Jersey law is unwarranted and it is unnecessary to proceed further with the interests analysis (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 [1st Dept 2004]).

Accordingly, it is


ORDERED, that motion sequence 004 is granted thereby dismissing the second, fourth, and fifth causes of action in the complaint against Lum, Danzis, Drasco & Positan LLC.

ORDERED, that motion sequence 005 is granted thereby dismissing the second, fourth, and fifth causes of action in the complaint against Philip L. Chapman.

The parties are directed to contact the Clerk of Part 53 to schedule a Preliminary Conference within 45 days of the filing of this decision.

This constitutes the decision and order of this court.

Dated: January 14, 2009



J.S.C.

CHARLES E. RAMOS

FILED
JAN 23 2009
COUNTY CLERK'S OFFICE
NEW YORK