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SHORT FORM ORDER

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

LESLIE B. SHEROFF, Individually and as Trustee of the Mordecai A. Berkun and Judith A. Berkun Irrevocable Trust,

Plaintiff,

INDEX NO.: 020801/2006
MOTION DATE: 07/30/2009
MOTION SEQUENCE: 005

-against-

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THE DREYFUS CORPORATION d/b/a THE DREYFUS FAMILY OF FUNDS,

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed 1
Memorandum of Law in Support of Defendant Dreyfus Service Corporation's Motion for Summary Judgment 2
Letter Response of Noah Sheroff dated 7/20/2009 3

Motion pursuant to CPLR 3212 by the defendants the Dreyfus Corporation, d/b/a the Dreyfus Family of Funds, for summary judgment dismissing the complaint, is granted.

In February 2001, the plaintiff Leslie B. Sheroff became a trustee of the Mordecai A. Berkun and Judith A. Berkun Irrevokable Trust [the "Berkun Trust"] – a trust created in 1995 by her father and step-mother, pursuant to which she and her four step siblings were named the respective beneficiaries of various sub-funds (Giacovas Aff., Exh., "J"; Trust at 8, ¶ 3[e] *see*, Sheroff Dep., 20-22). Prior thereto, in December of 2000, the Trust made a $551,000.00 distribution to Sheroff's fund – as evidenced by a Merrill Lynch check in that amount made out

to the order of "Fund E Trustees * * *" (Giacovas Aff., Exh., "I").

The trust instrument required the selection of a second co-trustee with respect the plaintiff's designated fund – "fund "E" – whom the plaintiff was allegedly told, could not be a family member (Sheroff Dep., 32-33). In February, 2001, and in accord with this directive, the plaintiff selected a then personal friend – one Jason Breska – to serve jointly with her as co-trustee of her fund (Sheroff Dep., 32-33, 35; Cmplt.,¶ 4). Sheroff apparently met Jason Breska in September of 1999 at a flea market where Breska was selling sports memorabilia part-time while allegedly working at Bear, Sterns in the area of international currency (Sheroff Dep., 32-33, 35, 42-43).

In March of 2001, Breska and the plaintiff decided to invest $200,000.00 of the above-described distribution in a Dreyfus money market account. It was agreed that Breska would personally take the check to Dreyfus and open an account into which the $200,000.00 would then be deposited (Sheroff Dep., 100-103). Accordingly, the plaintiff gave Breska a $200,000.00 trust fund check made out to the "Dreyfus Family of Funds," which both she and Breska signed as co-trustees (Sheroff Dep., 100, 103-104; Giacovas Aff., Exh., "C" [Cmplt., Exh.,"A"]).

Breska subsequently brought the check to a Dreyfus branch in Great Neck, Long Island, but instead of opening a trust fund account, he opened a personal account in his own name into which he deposited the $200,000.00 check. In the months which followed, Breska embezzled the proceeds and depleted the entire deposit (Sheroff Dep., 122-123, 126; Cmplt.,¶¶ 7-11; C. Smith Dep., 34-36; Giacovas Aff., Exh., "K").

The plaintiff discovered that the funds had been misappropriated in July of 2001 and reported the theft to the authorities, after which Breska was arrested and charged with grand larceny in the second degree (Penal Law, § 155.40 01). Upon later entering a plea of guilty to grand larceny third degree, Breska was sentenced to five years' probation and ordered to pay $100,000,00 in restitution (Sheroff Dep., 164-165; Cmplt.,¶ 13).

By verified complaint dated December, 2006, the plaintiff commenced the within action as against the "Dreyfus Corporation, d/b/a the Dreyfus Family of Funds" ["Dreyfus" or the "defendant"]. The complaint contains five causes of action sounding in breach of fiduciary duty, aiding and abetting breach of fiduciary duty, scheme to defraud, aiding and abetting conversion,

and negligence (Cmplt., ¶¶ 14-40).

The material allegations of the complaint assert in sum that unidentified Dreyfus employees fraudulently and "actively conspired" with Breska to convert the deposit; that Dreyfus possessed actual knowledge of Breska's improper intentions; that Dreyfus violated undescribed industry guidelines and security procedures by, *inter alia*, allowing Breska to open and maintain a personal account with a trust fund check; and that Dreyfus "substantially assisted," aided and abetted Breska's fiduciary misconduct (Cmplt., ¶¶ 8-13, 17-19, 25, 32, 37).

Dreyfus thereafter moved to dismiss the complaint pursuant to CPLR 3211, arguing, among other things, that the plaintiff's allegations were conclusory and insufficient to a claim against Dreyfus upon any of the theories of recovery relied upon.

By order dated June 4, 2007, this Court agreed and dismissed the action, concluding that the plaintiff had failed to set forth facts which, if credited, would demonstrate that the defendant's employees assisted or participated in the Breska's theft (Order at 2; Giacovas Aff., Exh., "C").

On appeal, however, the Appellate Division modified this Court's order to the extent that it reinstated the aiding and abetting conversion and breach of fiduciary duty claims (*Sheroff v. Dreyfus Corp.*, 50 AD3d 877).

Thereafter, the parties engaged in discovery, and in October of 2008, the plaintiff's deposition was conducted. During her deposition, the plaintiff was asked to identify the specific facts and transactions which supported the key allegation that Dreyfus' employees "actively conspired" with Breska in connection with the theft (Sheroff Dep., 183-184 *see,* Cmplt.,¶ 8).

In pertinent part, Sheroff testified in response that at some point in 2006, she refinanced her home with HFC and that while at the closing she encountered an HFC employee named "Joe," who claimed to have worked at the Dreyfus, Great Neck branch when the subject account was opened (Sheroff Dep., 188-189).

The plaintiff further testified in substance, that "Joe" informed her that "he recalled a situation where somebody came in with a big check opened an account, and two people, a male and a female were soon let go or fired or [were] no longer at that office any more" because they did not follow proper procedures or protocols (Sheroff Dep., 187-188).

Joe could not recall who came in with the big check and did not mention anything about conspiratorial conduct; nor could he recall the names of the two employees who were allegedly fired (Sheroff Dep., 189-192). When asked whether the foregoing transaction with "Joe" was the principal ground supporting her claim that Dreyfus had conspired with Breska, the plaintiff replied, "I guess so, or part of it" (Sheroff Dep., 191).

The plaintiff was then later asked "[a]s you sit here today [October of 2008] do you have any direct or indirect knowledge that any Dreyfus employee actively or knowingly conspired with Mr. Breska to steal your money" – to which the plaintiff replied, "[n]o, I do not" (Sheroff Dep., 194).

According to current Dreyfus employee Diane Schwab – now a senior operations manager – there were no rules or special procedures in place at the time which would have triggered an additional review process upon Breska's presentation of the subject check and his opening of the involved, personal account (Schwab Dep.,46-50).

Relevant discovery has now been completed and the defendant moves for summary judgment dismissing the two remaining aiding and abetting causes of action grounded upon breach of fiduciary duty and conversion. The motion should be granted.

It is settled that "a depositary bank has no duty to monitor fiduciary accounts maintained at its branches in order to safeguard funds in those accounts from fiduciary misappropriation" (*Home Sat. of America, FSB v. Amorous,* 233 AD2d 35, 38-39 *see also*, *Matter of Knox*, 64 NY2d 434, 437-439 [1985]; *Clarke v. Public Natl. Bank & Trust Co.*, 259 NY 285, 288-289 [1932]; *Bischoff v. Yorkville Bank*, 218 NY 106, 211 [1916]). Nor is a bank "in the normal course required to conduct an investigation to protect funds from possible misappropriation by a fiduciary" (*Matter of Knox*, *supra*, at 437-438)

Rather, a bank is generally entitled to assume "that a person acting as a fiduciary will apply entrusted funds to the proper purposes and will adhere to the conditions of the appointment" (*Home Sat. of America, FSB v. Amorous, supra at* 39; *Brown v. Flushing Federal Sat. & Loan Ass'n*, 112 AD2d 185, 186 *see, Roberts v. 112 Duane Associates LLC*, 32 AD3d 366, 369; *Norwest Mortgage, Inc. v. Dime Sat. Bank of New York*, 280 AD2d 653, 654 *cf., Diamore Realty Corp. v. Stern*, 50 AD3d 621, 622).

With respect to aiding and abetting liability, a plaintiff must plead and prove, *inter alia*, that the defendant "knowingly induced or participated in the" underlying tort by "substantially assisting" the primary violator (*Kaufman v. Cohen*, 307 AD2d 113, 126 *see*, *Global Minerals and Metals Corp. v. Holme*, 35 AD3d 93, 101-103 *see generally, AHA Sales, Inc. v. Creative Bath Products, Inc.*, 58 AD3d 6, 23; *Bullmore v. Ernst & Young Cayman Islands*, 45AD3d 461, 464).

"Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling * * * [the tortious conduct] to occur" (*Kaufman v. Cohen*, *supra*).

Notably,"'[a]ctual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach * * *" (*Bullmore v. Ernst & Young Cayman Islands*, *supra,* 45AD3d 461, 464, *quoting from*, *Global Mins. & Metals*, *supra*, 35 AD3d at 101-102 *see, Rand Intern. Leisure Products, Inc. v. Bruno*, 22 Misc.3d 1111(A), 2009 WL 130136 at 2-3 [Supreme Court, Nassau County, 2009]).

Upon the evidence presented, the defendant has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that Dreyfus had no complicity in, or actionable involvement with, Breska's embezzlement and/or his conversion of the subject funds (*see generally, Bullmore v. Ernst & Young Cayman Islands*, *supra*; *Schmidt v. Fleet Bank*, 280 AD2d 260; *Brown v. Flushing Federal Sat. & Loan Ass'n*, *supra*, 112 AD2d at 186).

The plaintiff's own testimony established that she had no knowledge of any specific facts supportive of her claim that Dreyfus knowingly participated in the misconduct perpetrated by Breska. The plaintiff plainly testified in this respect that she had no knowledge that any Dreyfus employee actively and knowingly conspired with Breska "to steal * * * [her] money" (Sheroff Dep., 194). The nebulously recounted comments made by "Joe," do not establish that Dreyfus breached any affirmative duty of care to the plaintiff or that Dreyfus participated in, or substantially assisted, Breska's fiduciary misconduct (*Schmidt v. Fleet Bank, supra*). It is settled that "a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach" of an alleged duty of care (*Bullmore v. Ernst & Young Cayman Islands*, *supra*).

Nor is there any additional evidence which otherwise establishes that Dreyfus possessed "'some notice of [a] threatened misappropriation, and, with that notice, aid[ed] the misappropriation'" (*Brown v. Flushing Federal Sat. & Loan Ass'n, supra,* 112 AD2d at 186 *see also, Matter of Knox, supra*, 64 NY2d at 437; *Clarke v. Public Nat. Bank & Trust* Co., *supra*, 259 NY at 290; *Bullmore v. Ernst & Young Cayman Islands, supra*). The individual nature of the account opened does not create an issue of fact warranting denial of the motion. It has been held in this respect that "[a] fiduciary may legally deposit the trust funds in a bank to his individual account and credit" (*Clarke v. Public Nat. Bank & Trust Co. of New York, supra*, 259 NY at 289 [internal quotations removed] *cf., Bradford Trust Co. v. Citibank, N.A.*, 60 NY2d 868, 670 [1983]).

Lastly, the Court notes the defendant's employees testified without contradiction that there were no special procedures or rules which would have triggered an internal review upon Breska's presentation of the check and/or his opening of the subject, personal account (*Clarke v. Public Nat. Bank & Trust Co. of New York, supra*).

Since the record fails to generate a factual issue with respect to the plaintiff's remaining causes of action, Dreyfus' motion for summary judgment dismissing the complaint should be granted (*Bullmore v. Ernst & Young Cayman Islands, supra; Schmidt v. Fleet Bank, supra*, 280 AD2d 260; *Brown v. Flushing Federal Sat. & Loan Ass'n, supra*, 112 AD2d at 186).

Accordingly, it is,

ORDERED that the motion pursuant to CPLR 3212 by the defendants the Dreyfus Corporation, d/b/a the Dreyfus Family of Funds, for summary judgment dismissing the complaint, is granted.

The foregoing constitutes the decision and order of the Court.

Dated: September 16, 2009

J.S.C.

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