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| <b>Mannucci v Cabrini Med. Ctr.</b>                                                                                                                                                                                                                              |
| 2009 NY Slip Op 33416(U)                                                                                                                                                                                                                                         |
| November 14, 2009                                                                                                                                                                                                                                                |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 602284/08                                                                                                                                                                                                                                         |
| Judge: Eileen Bransten                                                                                                                                                                                                                                           |
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 SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART THREE

-----X  
 :  
 MANNUCCIO MANNUCCI, M.D., ANGELO  
 TARANTA, M.D., GUIDO PADULA, M.D. and :  
 DILVA SALVIONI, :

Plaintiffs, :

-against- :

CABRINI MEDICAL CENTER, THE MISSIONARY  
 SISTERS OF THE SACRED HEART OF JESUS and :  
 MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., :

Defendants. :  
 -----X

Index No. 602284/08  
 Motion Date: 9/18/09  
 Motions Seq. No: 001, 002

EILEEN BRANSTEN, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, defendant Missionary Sisters of the Sacred Heart of Jesus ("Missionary Sisters") moves for dismissal of the causes of action against it, pursuant to CPLR 3211 (a) (1) and (7).<sup>\*</sup> In motion sequence number 002, defendant Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") also seeks dismissal of the claims against it, pursuant to CPLR 3211 (a) (1), (7) and 3016 (b).

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<sup>\*</sup> In motion sequence number 001, defendant Cabrini Medical Center also seeks dismissal of the claims against it for injunctive relief and misappropriation. However, since the filing of the motion, it has filed for bankruptcy through a Chapter 11 petition. The bankruptcy petition is proceeding in the United States Bankruptcy Court for the Southern District of New York, case number 09-14398 (9/18/09 Ltr). Accordingly, this action, including this motion, is stayed as against Cabrini Medical Center (11 USC § 362).

### BACKGROUND

Plaintiffs are three retired doctors, Mannuccio Mannucci, M.D., Angelo Taranta, M.D., and Guido Padula, M.D., as well as Dilva Salvioni, the widow of a fourth retired doctor, Daniele Salvioni, M.D. (collectively, “the Doctors”). The Doctors were employed at Cabrini Medical Center (“Cabrini”) and have all retired. During their employment at Cabrini, the Doctors deferred significant portions of their compensation into plans set up by Cabrini (“the Deferred Compensation Plans”). The Doctors’ contributions were to be invested and they were to receive yearly distributions following their retirement.

In 1998, the Deferred Compensation Plans were transferred to accounts at Merrill Lynch. The accounts were converted from Working Capital Management Accounts to Endowment Management Accounts in 2002 (“the Accounts”). The Doctors each received monthly account statements from Merrill Lynch (Compl, ¶ 33).

Defendant Missionary Sisters is an international religious order and missionary congregation (*id.*, ¶ 13). Plaintiffs allege that Missionary Sisters is a sponsor of Cabrini, and that it purchased Cabrini assets at below market rates and exercised de facto control over Cabrini’s financial affairs (*id.*, ¶¶ 13, 15). They further contend that Missionary Sisters was a signatory to certain Deferred Compensation Plans and shared responsibility for their administration (*id.*, ¶ 14).

In November 2006, Cabrini sent a letter to each of the Plaintiffs, stating that it was in need of working capital in order to maintain its operations, and would “temporarily move” funds from the Deferred Compensation Plans into its own operating account (*id.*, ¶ 38). The letter also stated that:

“It is expected that these funds, along with any interest that would have accrued, will be returned to the deferred compensation investment account during 2007 . . . . Please be assured that Cabrini Medical Center is committed to fulfilling its obligation under the Deferred Compensation Agreement with you, including making the 2007 distribution, and will keep you informed of the progress of our efforts to replenish the deferred investment account” (*id.*, ¶ 38).

By letter, dated November 16, 2006, Cabrini instructed Merrill Lynch to transfer certain amounts to it from the Accounts (Gold Aff, Exh L).

Plaintiffs allege that in or around April 2007, additional monies were taken from the Accounts, without any prior notice and without their knowledge or authorization (Compl, ¶ 42). Thereafter, by letter dated June 21, 2007, Cabrini instructed Merrill Lynch to close the Accounts, and send Cabrini the remaining balances (Gold Aff, Exh M). Plaintiffs contend that this was again done without notice to them and without their knowledge or authorization (*id.*, ¶ 43).

Plaintiffs allege that, in total, \$2,956,176 was taken from the Accounts (*id.*, ¶ 44). They aver that, following the closing of the Accounts, all payments due under the Deferred Compensation Plans ceased.

On August 6, 2008, Plaintiffs commenced this action against Cabrini, Missionary Sisters and Merrill Lynch. Plaintiffs allege that Missionary Sisters violated their ERISA rights and breached a contract (the first cause of action). They seek recovery of benefits due under the Deferred Compensation Plans (the second cause of action), injunctive relief, restoration of the assets and enforcement of the terms of the Deferred Compensation Plans (the third cause of action), and damages for misappropriation (the seventh cause of action).

Plaintiffs further allege that Merrill Lynch is liable for allowing Cabrini to withdraw funds from the Accounts and seek recovery against it for fraud (the fourth cause of action), breach of fiduciary duty (the fifth cause of action) and breach of contract (the sixth cause of action).

Missionary Sisters and Merrill Lynch move for dismissal of all the claims against them. Missionary Sisters argues that, as a corporate member of Cabrini, it is insulated from liability by New York's Not-For-Profit Corporation Law. It also maintains that, inasmuch as it is neither a party nor a signatory to the Agreements, it cannot be held liable for their breach. Merrill Lynch argues that documentary evidence establishes that Plaintiffs were not

its customers and that it was required to follow the directions of its client--Cabrini. It argues that it, therefore, has no fiduciary or contractual duties to Plaintiffs.

### ANALYSIS

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and ‘the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one’”

(*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted]).

### Missionary Sisters

#### Statutory Immunity

Missionary Sisters argues that Section 517 (a) of New York’s Not-For-Profit Corporation Law explicitly precludes its liability. This section (“Liabilities of Members”) provides:

(a) The members of a corporation shall not be personally liable for the debts, liabilities or obligations of the corporation.

(b) A member shall be liable to the corporation only to the extent of any unpaid portion of the initiation fees, membership dues or assessments which the corporation may have lawfully imposed upon him, or for any other indebtedness owed by him to the corporation. No action shall be brought by any creditor of the corporation to reach and apply any such liability to any debt of the corporation until after final judgment shall have been rendered against the corporation in favor of the creditor and execution thereon returned unsatisfied, or the corporation shall have been adjudged bankrupt, or a receiver shall have been appointed with power to collect debts, and which receiver, on demand of a creditor to bring suit thereon, has refused to sue for such unpaid amount, or the corporation shall have been dissolved or ceased its activities leaving debts unpaid. No such action shall be brought more than three years after the happening of any one of such events (emphasis added).

Missionary Sisters argues that the explicit language of this section precludes liability to members of a not-for-profit corporation, and has exceptions only in limited contexts and only after a final judgment has been rendered against the corporation itself. Accordingly, it contends that the claims against it are premature, as no final judgment has been rendered against Cabrini (Reply Br at 4-5).

Plaintiffs contend that, inasmuch as Missionary Sisters is “and/or select[s] all of the members [of Cabrini] as well as the Board of Trustees of Cabrini and exercise *de facto* control over Cabrini . . . the Missionary Sisters cannot be shielded from liability by § 517 (a)” (Opp Br at 11-12). They argue that the purpose of Section 517 (a) is to shield a member of

a non-profit corporation from liability for the debts or other liabilities of that non-profit corporation, but the member is not shielded from liability based on acts that the member commits on behalf of the corporation or on behalf of itself, but under the guise of acting on behalf of the corporation (*id.* at 12).

Section 517 (a) of the Not for Profit Corporation Law clearly precludes bringing a claim against Missionary Sisters until after a judgment is rendered against Cabrini. Any claims against Missionary Sisters predicated on a theory that it is responsible for acts committed by Cabrini as its alter ego or through piercing the corporate veil, were not adequately pleaded in the Complaint. To survive a motion to dismiss, a complaint must not be “totally devoid of solid, nonconclusory allegations’ regarding defendant’s use of [the other corporate entity] as his corporate alter-ego” (*Int’l Credit Brokerage Co. v Agapov*, 249 AD2d 77, 78 [1st Dept 1998] [internal citations omitted]). Here, although there are indirect hints alluding to such theories--the Complaint contains the allegation that the Missionary Sisters has “exerted *de facto* control over Cabrini’s financial affairs” (Compl, ¶ 15 [emphasis in original])--nowhere in the Complaint do Plaintiffs use phrases such as “piercing the corporate veil” or “alter ego.”

Because Plaintiffs’ claims are too conclusory and vague--Plaintiffs’ offer no facts to support the theories asserted--the causes of action against the Missionary Sisters are

dismissed, without prejudice. Plaintiffs have 45 days from entry of this decision and order to file an amended complaint, if they so choose.

### Injunctive Relief

Plaintiffs also seek injunctive relief, requesting the return of all the funds taken or, in the alternative, an order placing the funds in the control of a neutral trustee (Opp Br at 7-8). They contend that they face irreparable harm because “there will be no money to satisfy the judgment,” absent injunctive relief (*id.* at 8). Plaintiffs concede that the damage they allege “can be compensated by the award of money damages” (*id.* at 7). They argue, however, that any award cannot come from the Accounts themselves, which have been emptied, and Plaintiffs are concerned that by the time of any judgment, Cabrini’s financial position will render it unable to honor any award. Plaintiffs contend that they have met the pleading obligations and that they intend to conduct discovery on this issue (*id.* at 8-9).

Missionary Sisters argues that Plaintiffs cannot meet their burden of demonstrating entitlement to injunctive relief. Specifically, it contends that Plaintiffs cannot establish irreparable harm. It also argues that damages would be a sufficient remedy.

Significantly, Plaintiffs fail to allege why monetary damages would be insufficient as to their claims against Missionary Sisters. As such, they are <sup>not</sup> ~~un~~entitled to injunctive relief. ✓

### Merrill Lynch

#### Breach of Contract

Plaintiffs contend that for almost ten years they received periodic account statements directly from Merrill Lynch (*see* Harrison Aff, Exhs A-D). They point out that this account documentation included language that “You, the Client, and we, Merrill Lynch . . .” (*see, e.g.,* Harrison Aff, Exh A at 4). Plaintiffs argue that there was nothing in the account statements indicating that the Accounts were anything other than their own individual accounts. Plaintiffs further argue that they themselves withdrew funds from the Accounts without going through Cabrini (Compl, ¶ 36). Plaintiffs allege that the evidence they submitted contradicts Merrill Lynch’s argument that the Accounts were solely Cabrini’s and in Cabrini’s control and, as such, demonstrates the need for discovery.

They further argue that, even if there was no direct contractual relationship, they may assert third-party beneficiary claims. Plaintiffs contend that they were clearly intended beneficiaries meant to receive the benefits from the Accounts set up in their names and that

their receipt of benefits was the “entire point of the contractual relationship between Merrill Lynch and Cabrini” (Opp Br at 11).

Merrill Lynch argues that the Accounts are corporate accounts. It explains that, in 1998, when the Accounts were opened as Working Capital Management Accounts: they were in Cabrini’s name; the papers were signed by a Cabrini representative; Cabrini’s chief executive officer was designated as the sole representative authorized to give Merrill Lynch instructions; Cabrini’s four most senior officials and its taxpayer identification number were listed; Plaintiffs’ contact information and social security numbers were not included; and Plaintiffs were not signatories (Gold Aff, Exhs B-C). In 2002, the Accounts were converted to Endowment Management Accounts, which are reserved exclusively for not-for-profit corporations. At that time again: paperwork was signed by Cabrini officers; Cabrini’s vice president of finance was designated as the sole representative authorized to give Merrill Lynch instructions; Cabrini’s taxpayer identification number was listed; and Plaintiffs never signed the documents nor included their contact information or social security numbers (*id.*, Exhs F-I).

Merrill Lynch argues that Cabrini sent it written instructions regarding distributions, and that the checks Merrill Lynch sent in response to those instructions were sent and made payable only to Cabrini (*id.*, Exhs J-K). It asserts that the statements sent to Plaintiffs were

merely duplicates of those sent to Cabrini, were clearly labeled as such and were sent to Plaintiffs only as a courtesy. It argues that the clear notation that the statements were duplicates conveys that the originals were being sent elsewhere. It also argues that use of the pronouns “you” and “your” are addressed to Cabrini, as Cabrini was the customer from whose statements duplicates were made and sent to Plaintiffs.

Merrill Lynch denies that Plaintiffs withdrew funds directly from the Accounts (Greecham Aff at ¶¶ 3, 9). It argues that when certain Plaintiffs called to inquire about the Accounts, they were reminded that only Cabrini made decisions and it instructed them to contact Cabrini (*id.* at ¶ 8).

Merrill Lynch argues that it cannot have breached any contractual obligations to Plaintiffs inasmuch as it never entered into a contract with them. It further argues that, even if the account statements created ambiguity, Plaintiffs have not sufficiently demonstrated the existence of a contractual obligation owed to them. Plaintiffs have not identified any obligation that Merrill Lynch owed to Cabrini that it breached and upon which Plaintiffs could recover.

Plaintiffs have failed to allege facts sufficient to sustain a claim of breach of contract, as either principals or third-party beneficiaries. Nor do the documents currently before the

Court support a claim for breach of contract. As such, their breach of contract claim against Merrill Lynch is dismissed.

### Breach of Fiduciary Duty

Plaintiffs argue that, even if the court determines that they were not Merrill Lynch's customers, there is still evidence that Merrill Lynch did not follow its own purported procedural requirements with regard to the Accounts. Plaintiffs cite to a distribution letter, and note that it was signed, not by the individual designated as the authorized representative from Cabrini, but by an individual within Missionary Sisters (Gold Aff, Exh J). They argue that such a violation of Merrill Lynch's own procedures gives reason to inquire into whether there were other unauthorized transactions, in breach of its fiduciary duties.

Merrill Lunch argues that it cannot have breached a fiduciary duty to Plaintiffs, because it had no such duty. It claims that the individual who signed the distribution letter was, in fact, a Cabrini employee. Merrill Lynch further contends that, upon receipt of this letter, it contacted the individual who was designated as the authorized representative on the account forms and confirmed that the instructions should be followed (Greecham Aff at ¶ 10). It further asserts that Plaintiffs' argument is immaterial, as this letter was not in regard to either of the transactions at issue in this case.

Plaintiffs have failed to identify any basis for a fiduciary duty owed to them by Merrill Lynch, nor do the documents they rely on support such a claim. Accordingly, their breach of fiduciary duty claim against Merrill Lynch is dismissed.

### Fraud

Plaintiffs claim that if they were not clients of Merrill Lynch, then all the account statements they received were fraudulent. They contend that for years, the monthly and year-end account statements they received represented that they were Merrill Lynch clients. They allege that they justifiably relied on Merrill Lynch's statements, trusted that their Accounts were in safe hands and, as a result of that reliance, lost all the assets in the Accounts.

Merrill Lynch contends that the fraud claim also fails because Plaintiffs did not allege any of the elements (*see* CPLR 3211 [a] [7], 3016 [b]). Merrill Lynch argues that Plaintiffs have not even pleaded that it intended to defraud them. It asserts that there is no specific misrepresentation alleged in the Complaint. It further argues that Plaintiffs' claim that they relied to their detriment on Merrill Lynch safeguarding the funds in the Accounts is untenable because, if Plaintiffs truly believed so, they would have closed their accounts, or otherwise addressed the issue, upon the November 2006 withdrawal. Merrill Lynch argues that their failure to do so indicates that they were not relying on it.

“To state a claim for fraud, a plaintiff must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury. Plaintiffs failed to plead fraud with the particularity required by CPLR 3016 (b)” (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006] [internal citations omitted]). Accordingly, Plaintiffs’ fraud claim against Merrill Lynch is dismissed.

However, “the instant complaint and supporting affidavit, although inartfully drafted, adequately allege” facts that may support claims against Merrill Lynch (*Leon*, 84 NY2d at 88 [denying dismissal of claims]). As such, the claims against Merrill Lynch are dismissed without prejudice and plaintiffs have 45 days from entry of this decision and order to file an amended complaint, setting forth claims against Merrill Lynch, if they so choose.

The Court has considered the parties’ other arguments and found them unavailing.

Accordingly, it is

ORDERED that the motion to dismiss of defendant Missionary Sisters of the Sacred Heart of Jesus is granted and the claims against it are dismissed, without prejudice; and it is further

ORDERED that the motion to dismiss of Merrill Lynch, Pierce, Fenner & Smith, Inc.’s is granted and the claims against it are dismissed, without prejudice; and it is further

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ORDERED that Plaintiffs are granted leave to serve an amended complaint within 45 days from entry of this decision and order. In the event that Plaintiffs fail to serve an amended complaint within such time, leave to replead shall be deemed denied and the action shall be dismissed as against defendants Missionary Sisters of the Sacred Heart of Jesus and Merrill Lynch, Pierce, Fenner & Smith, Inc. with prejudice.

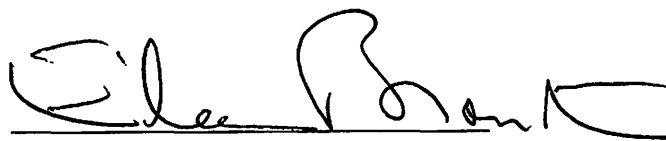
ORDERED that Cabrini Medical Center's motion to dismiss remains stayed.

This constitutes the Decision and Order of the Court.

Dated: New York, New York

November 14, 2009

ENTER

  
Hon. Eileen Bransten