

Miller v Cohn

2010 NY Slip Op 30150(U)

January 14, 2010

Supreme Court, Nassau County

Docket Number: 012150-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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HY MILLER, MARCIA MILLER
and ALBAR FABRICS, INC.,

Plaintiffs,

-against-

MAURICE COHN a/k/a "SONNY COHN"
and COHMAD SECURITIES CORPORATION,

Defendants.

TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 012150-09
Motion Seq. No: 1
Submission Date: 11/24/09

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The following papers having been read on this motion:

- Notice of Motion (and Amended Notice of Motion) and
Memorandum of Law in Support.....X**
- Memorandum of Law in Opposition.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on the motion filed by Defendants Maurice Cohn and Cohmad Securities Corporation on September 24, 2009, which was submitted on November 24, 2009. For the reasons set forth below, the Court denies Defendants' motion in its entirety.

BACKGROUND

A. Relief Sought

Defendants Maurice Cohn a/k/a "Sonny Cohn" ("Cohn") and Cohmad Securities Corporation ("Cohmad") (collectively "Defendants") seek an Order 1) pursuant to CPLR § 3024(a), directing Plaintiffs to provide a more definite statement clarifying the Complaint; and

2) pursuant to CPLR § 3024(b), striking certain allegedly scandalous or prejudicial material from the Complaint.

B. The Parties' History

Paragraph one (1) of the Complaint, titled "Summary of the Complaint," states as follows:

This is a lawsuit by defrauded investors in Bernard L. Madoff Investment Securities LLC ("Madoff Investments") against Maurice Cohn, who introduced the investors to Madoff Investments and who arranged for their investment into Madoff Investments with full knowledge that Madoff Investments was a Ponzi-scheme. Maurice Cohn and the company of which he is the majority owner, Cohmad Securities Corporation derived substantial commissions and fees from Madoff Investments each month based on the money Plaintiffs invested with Madoff Investments. Following the revelation that Madoff Investments was actually a Ponzi-scheme, Plaintiffs personally lost over \$6.8 million dollars (net of withdrawals and payments by the Securities Investor Protection Corporation ("SIPC") to date) as a direct and proximate result of the actions of Maurice Cohn.

The Complaint contains three (3) causes of action. The first cause of action alleges that Cohn fraudulently concealed his purported knowledge that Bernard Madoff ("Madoff") was operating a Ponzi scheme.¹ The second and third causes of action, respectively, allege that 1) Defendants aided and abetted Madoff's fraud by soliciting investors for the Ponzi scheme, for which Defendants received millions of dollars in compensation; and 2) Defendants aided and abetted Madoff's breach of fiduciary duty by soliciting investors for Madoff's Ponzi scheme.

C. The Parties' Positions

Defendants submit that the Complaint fails to make any specific allegations that, if true, would demonstrate that the Defendants had knowledge of Madoff's fraud. Defendants contend that Plaintiffs fail to allege particular facts and circumstances in support of their allegations in the Complaint that Cohn knew from his close personal and business relationship with Madoff and Madoff investments that Madoff was running a Ponzi scheme, referring to the Complaint at ¶¶ 27-29, 32-33, 35-36; reincorporated in ¶¶ 53, 60 and 66. Thus, Defendants submit, they have inadequate information regarding the alleged basis of their knowledge of the fraud to allow them

¹ The Oxford English Dictionary (5th ed. 2002) defines a Ponzi scheme as "[a] form of fraud in which belief in the success of a non-existent enterprise is fostered by payment of quick returns to the first investors from money invested by others."

to prepare an appropriate response to the Complaint.

Defendants argue, further, that the Complaint does not allege specific facts regarding Defendants' alleged solicitation of investors and, therefore, Defendants are unable to respond to those allegations. By way of example, the Complaint makes reference to a letter that Cohn allegedly disseminated to a potential Madoff investor in 1991. The Complaint includes no allegations, *e.g.*, that Plaintiffs received this letter or otherwise had knowledge of it prior to making their decision to invest with Madoff. Thus, Defendants submit, it is unclear what the relevance of this letter is. Defendants argue that this ambiguity is compounded by Plaintiffs' allegation that a third party initiated Plaintiffs' contact with Defendants, which undermines Plaintiffs' claim that Defendants solicited Plaintiffs.

Finally, Defendants request that the Court strike from the Complaint the portion of a letter from Cohn to a potential investor dated November 21, 1991 that is set forth in paragraph 24 of the Complaint, as well as any references to it or allegations of solicitation derived from it.² The portion of the letter at issue reads as follows:

At the suggestion of your brother (name redacted), I am enclosing some information and new account forms to open a managed account at Bernard L. Madoff Investment Securities.

We are not a "household name" and we are not registered investment advisors. Our primary business is not managing client accounts. We do manage accounts for family and friends using a simplistic and most important, a very conservative strategy in a disciplined manner, always "insuring" the accounts against major loss by using put options.

If you have an interest in opening an account with us please telephone me (redacted) as it is important that we determine whether this type of investment is suitable for you.

Defendants argue that, in light of the fact that the Complaint does not allege that Plaintiffs received or were otherwise aware of this letter, which was allegedly prepared more than ten (10) years before Plaintiffs invested with Madoff, it is irrelevant, and creates a substantial risk of

² Although paragraph 24 of the Complaint states that this letter is "annexed as Exhibit 'B'" to the Complaint, there is, in fact, no Exhibit B to the Complaint. By stipulation dated January 12, 2010, counsel for the parties agreed, *inter alia*, that, for purposes of the instant Motion to Strike, the Court should consider only the excerpted sections from the letter set forth in the Complaint.

undue prejudice to Defendants.

Plaintiffs oppose Defendants' motion for a more definite statement, submitting that the allegations in the Complaint, which Defendants have accurately summarized in their motion, provide sufficient information to permit Defendants to interpose a response. Plaintiffs outline those allegations, which include 1) Madoff's guilty plea in 2009 in connection with the Ponzi scheme (¶¶ 10 and 11), 2) Cohn and Madoff's positions as equity owners and managers of Cohmad (¶ 11), 3) the specifics of Cohn's solicitation of Plaintiffs, including a meeting with Plaintiff Hy Miller ("Hy") at which Cohn vouched for Madoff's ability and integrity and convinced Miller of the uniqueness of the investment opportunity (¶¶ 37, 38 and 39), 4) Cohn's alleged failure to disclose the remuneration he would receive if Plaintiffs invested with Madoff, and the fact that Cohmad's primary business consisted of placing investors with Madoff Investments (¶¶ 41 and 42), 5) the fact that Cohmad and Madoff Investments shared the same office space and led investors to believe that the two entities were one and the same (¶¶ 10-36), and 6) Cohn's efforts to downplay his connection to Madoff Investments, and to create the false impression that he was providing potential investors with an opportunity not available to others (¶¶ 13, 14, 26, 38-40).

Plaintiffs also argue that the case law on which Defendants rely relates to a motion to dismiss for failure to state a cause of action, not to a motion for a more definite statement. Plaintiffs submit, further, that even assuming, *arguendo*, that Defendants had filed a motion to dismiss for failure to state a cause of action, the Complaint properly alleges facts that permit the inference that Defendants had knowledge of the fraud, and is therefore sufficient. Finally, Plaintiffs suggest that Defendants filed this motion as a delay tactic.

In their Reply Memorandum of Law, Defendants dispute Plaintiffs' allegation that Defendants filed this motion as a delay tactic, submitting that Defendants are seeking "the factual amplification necessary" to allow them to respond to the Complaint (Reply Memorandum at p.1). Defendants submit that, because the Complaint does not sufficiently set forth details regarding 1) the Defendants' alleged knowledge of Madoff's fraud, and 2) Defendants' alleged solicitation of Plaintiffs, the Defendants are unable to frame an appropriate response to the Complaint.

RULING OF THE COURT

I. Relevant Legal Principles

A. Applicable Statutory Provisions

CPLR § 3024, titled “Motion to correct pleadings,” provides as follows:

- (a) Vague or ambiguous pleadings. If a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response he may move for a more definite statement.
- (b) Scandalous or prejudicial matter. A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.
- (c) Time limits; pleading after disposition. A notice of motion under this rule shall be served within twenty days after service of the challenged pleading. If the motion is denied, the responsive pleading shall be served within ten days after service of notice of entry of the order and, if it is granted, an amended pleading complying with the order shall be served within that time.

B. Elements of Fraud and Aiding and Abetting Fraud

To establish a cause of action for fraud, a plaintiff must plead the following elements:

- (1) a false representation, (2) of material fact, (3) with intent to defraud, (4) reasonable reliance on the representation, and (5) injury. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413 (1996). CPLR § 3016(b) provides that an action for fraud must be pled “with particularity, including specific dates and items, if necessary and insofar as practicable.” Conclusory allegations of fraud will not be sufficient. CPLR § 3016(b); *Dumas v. Fiorito*, 13 A.D.3d 332 (2d Dept. 2004); *Sargiss v. Magarelli*, 50 A.D.3d 1117 (2d Dept. 2008). It is sufficient, however, to plead facts that would allow a reasonable inference of the alleged fraud. *Pludeman v. Northern Leasing Systems, Inc.* 10 N.Y.3d 486 (2008).

Instructive on the requisite particularity to allege fraud is *Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92 (1st Dept. 2003). There, the First Department held:

The language of CPLR 3016(b) requires that a claim of fraud be pleaded in sufficient detail to give adequate notice [citations omitted]. Indeed, the Court of Appeals has specifically noted that this rule “is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be ‘impossible to state in detail the circumstances constituting a fraud [citations omitted].’”

Id. at 97-98.

The essential elements of a cause of action for aiding and abetting fraud are that

- 1) plaintiff had actual knowledge of the fraud; and 2) plaintiff provided substantial assistance to

the commission of the fraud. *Goldson v. Walker*, 65 A.D.3d 1084 (2d Dept. 2009) (lower court properly denied motion to dismiss complaint alleging that attorney, who represented owner of corporation that purchased real property in allegedly fraudulent transaction, aided and abetted fraud). Substantial assistance exists where 1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed; and 2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated. *Stanfield Offshore v. Metropolitan Life*, 64 A.D.3d 472, 476 (1st Dept. 2009), citing *Unicredito Italiano SPA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 502 (S.D.N.Y. 2003), quoting *McDaniel v. Bear Stearns & Co., Inc.*, 196 F. Supp. 2d 343, 352 (S.D.N.Y. 2002).

C. Elements of Breach of Fiduciary Duty and Aiding and Abetting Fiduciary Duty

The elements of a claim for breach of fiduciary duty are: (1) the existence of a fiduciary relationship, (2) misconduct, and (3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007). A cause of action for aiding and abetting a breach of fiduciary duty requires proof that: (1) there was a breach by a fiduciary of obligations to another; (2) the defendant knowingly induced or participated in the breach; and (3) plaintiff suffered damage as a result of the breach. *AHA Sales, Inc. v. Creative Bath, supra*, quoting *Kaufman v Cohen*, 307 A.D.2d 113 (1st Dept. 2003). Although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty. Constructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability. *Id.*

Under New York law, as generally, there is no general fiduciary duty inherent in an ordinary broker/customer relationship. Such a duty can arise only where the customer has delegated discretionary trading authority to the broker. *Independent Order of Foresters v. Donald, Lufkin & Jenrette*, 157 F.3d 933, 940 (2d Cir. 1998). With respect to any causes of action dependent upon a fiduciary relationship, however, the facts alleged may give rise to an informal fiduciary relationship, which is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another, and which may be found to exist, in appropriate circumstances, between close friends or where the confidence is based upon prior business dealings. *Apple Records v. Capitol Records*, 137 A.D.2d 50, 57 (1st Dept 1988). The “‘exact limits’ of such relationship are impossible of statement,” *Penato v. George*, 52 A.D.2d 939, 942

(2d Dept. 1976), *app. disp.* 42 N.Y.2d 908 (1977), and are “fact specific,” *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 115 (1st Dept 1998).

II. Application of these Principles to this Case

The Court has reviewed the Complaint,³ which includes allegations regarding 1) the close relationship between Defendants and Madoff Investments, 2) the conduct that Defendants performed in encouraging Plaintiffs to invest with Madoff Investments, 3) Defendants’ financial incentive to encourage Plaintiffs to invest with Madoff Investments, and 4) Defendants’ misrepresentations regarding the close nature of their relationship with Madoff Investments, and their ability to place investments with that firm. The Court concludes that those allegations are not so vague or ambiguous that Defendants cannot reasonably be required to frame a response.

The Court also concludes that the portion of the letter set forth in paragraph 24 of the Complaint does not contain scandalous or prejudicial matter that was unnecessarily inserted in it. This excerpt is arguably relevant to issues including 1) the nature of Cohn’s relationship to Madoff Investments, and 2) efforts that Cohn made to encourage individuals to invest with Madoff Investments. The Court does not find the excerpt scandalous, or gratuitous, and denies Defendants’ motion to strike that material from the Complaint. *Cf. Kinzer v. Bederman*, 59 A.D.3d 496 (2d Dept. 2009) (reversed lower court’s denial of motion to strike language that was irrelevant to the viability of dental malpractice cause of action and prejudicial to defendants). Accordingly, the Court denies Defendants’ motion in its entirety and directs Defendants to serve their responsive pleading within ten days after service of notice of entry of this Order.

The Court also directs counsel for the parties to appear before the Court for a Preliminary Conference on February 24, 2010 at 9:30 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
January 14, 2010

ENTER

HON. TIMOTHY S. ...
J.S.C.

ENTERED
JAN 22 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

³ The Court has obtained and reviewed a copy of the Complaint, which is not a part of the court's papers.