

Sinopodis v Cosmo

2010 NY Slip Op 30837(U)

April 6, 2010

Supreme Court, Suffolk County

Docket Number: 26348-20009

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**

J. S. C.

Original Motion Date: 11-17-2009

Motion Submit Date: 01-27-2010

Motion Sequence : 001 MG

_____ X
**GEORGE SINOPODIS and EKATERINI
 KARPETIS, individually and on behalf of all
 others similarly situated,**

Plaintiffs,

-against-

**NICHOLAS COSMO, AGAPE WORLD, INC.,
 AGAPE MERCHANT LLC, PREMIUM
 PROTECTION PLAN LLC AND BANK OF
 AMERICA, N.A., AND JOHN DOES 1-12,**

Defendants.

_____ X

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CAS & DSP

ORDERED, that the motion (motion sequence number 001) by defendant, Bank of America, to dismiss the Complaint, is granted in its entirety and this action is dismissed.

This class action arises out of the alleged Ponzi scheme perpetrated by defendants, Nicholas Cosmo ("Cosmo") and his corporate entities, Agape World, Inc., Agape Merchant LLC, Protection Plan LLC (collectively known as "Agape") against the individual plaintiffs. Defendant, Bank of America ("BOA"), provided banking services to Agape. In the general allegations of the Complaint, plaintiffs allege that BOA "knowingly rendered substantial assistance to the Agape Defendants in the perpetration of the fraudulent transactions alleged" (Complaint at ¶6); "provided all of the accounts and affected all of the transactions through which the fraudulent scheme was conducted" (Complaint at ¶7); "knew that their facilities were being used for transactions that were criminal" (Complaint at ¶8); and "learned of the fraudulent nature of the Agape Defendants' transactions by virtue of following its anti-money laundering and 'Know Your Customer' fraud-election procedures" (Complaint at ¶10).

Count III and Count IV of the Complaint are asserted against Bank of America for aiding and abetting common law fraud and aiding and abetting breach of fiduciary duty, respectively.

In Counts III and IV, plaintiffs allege that BOA aided and abetted the fraud perpetrated by the Agape defendants by providing all of the accounts through which the allegedly fraudulent transactions were conducted, lent its “good name and reputation” for use by the Agape defendants and setting up a physical presence for a full-time BOA employee in the Agape office. (Complaint at ¶77). Thus, plaintiffs assert that BOA had actual knowledge of the fraud as the BOA employee working in the Agape offices “were privy to the activities of the Agape defendants”, the bank records showed the unlawful scheme and the anti-money laundering procedures would demonstrate that the transactions at issue were not proper business transactions. (Complaint at ¶78).

Bank of America moves to dismiss the Complaint initially pursuant to CPLR §3211(a)(4) on the ground that there is another action pending, to wit, a federal class pending captioned, *In re Agape Litigation*, case no. 09-CV-1066 (E.D.N.Y. filed July 17, 2009). BOA argues that the federal class action encompasses all potential class members in this action and thus there is substantial identity between the plaintiffs and defendants in the two actions, warranting dismissal. Both cases arise out of the same Ponzi scheme perpetrated by defendants and assert the same claims against BOA. Defendant BOA argues that allowing this case to proceed would result in a waste of judicial resources and thus, dismissal of this action is appropriate.

Turning to the merits, BOA argues that even if the Court does not dismiss the case pursuant to CPLR §3211(a)(4), the Complaint fails to state a cause of action against BOA for aiding and abetting fraud and aiding and abetting a breach of fiduciary duty. Specifically, with regard to the cause of action for aiding and abetting fraud, BOA asserts that plaintiff must allege (1) the existence of the underlying fraud; (2) that BOA had actual knowledge of the fraud; and (3) that BOA provided substantial assistance in the commission of the fraud. Here, BOA argues that plaintiff has failed to meet the second and third prongs of this test in that it failed to allege that BOA had actual knowledge of the fraud or that it substantially assistance Cosmo’s perpetration of the fraud. Additionally, BOA claims that plaintiffs have failed to meet the heightened pleading requirements of CPLR §3016(b) as pertains to fraud causes of action. Instead, BOA claims that the Complaint really sets forth allegations of constructive rather than

actual fraud (that BOA should have known that Cosmo was defrauding the plaintiffs) and such is insufficient to sustain a cause of action for aiding and abetting fraud. Moreover, BOA argues that plaintiffs have failed to sufficiently allege that BOA substantially assisted Cosmo and Agape in the fraud.

Similarly, BOA seeks dismissal of the cause of action for aiding and abetting breach of fiduciary duty. Here, BOA states that plaintiffs must allege (1) a breach by a fiduciary of obligations to another, of which the aider and abettor had actual knowledge; (2) that defendant knowingly induced or participated in the breach; and (3) that plaintiffs suffered damages as a result of the breach. BOA asserts that plaintiffs must allege that BOA had actual knowledge of Cosmo's breach of fiduciary duty and that BOA provided substantial assistance to Cosmo that proximately caused the harm to plaintiffs. Based upon its arguments above, BOA argues that this cause of action must also be dismissed as plaintiffs have failed to allege that BOA had actual knowledge or substantial assistance to Cosmo or Agape. Therefore, this cause of action must also be dismissed.

Plaintiffs oppose the motion and argue that dismissal or a stay of this action based upon the pendency of the federal class action would prejudice the class. Plaintiffs note that issue has not even been joined in the federal case and thus the request to dismiss on this ground is premature. Plaintiffs further note that BOA moved to dismiss the federal case¹ and if it is successful, this action is the only mechanism to prosecute its claims against BOA. Plaintiffs also argue that the federal court could dismiss the case for failure to meet the requirements of the Class Action Fairness Act or based on lack of subject matter jurisdiction.

On the merits, plaintiffs argue that the Complaint states a claim for aiding and abetting a breach of fiduciary duty and aiding and abetting fraud. Specifically, plaintiffs argue that the Complaint adequately pleads BOA's actual knowledge in that it asserts that BOA had a full-time employee at Agape offices, with dedicated BOA computers, who functioned as Agape's "back office". In such role, this employee or employees, according to plaintiffs, became aware of what Agape was actually doing - to wit, improperly diverting client funds. Moreover, prosecutors relied on information from BOA to indict

¹The Court notes that the Federal Court (SPATT, J.) has rendered a determination dismissing the claims against BOA, which will be discussed more fully below.

Cosmo. Plaintiffs assert that the Complaint sufficiently alleges that BOA employees knew about and substantially assisted the underlying fraud and breach of fiduciary duty, such as to withstand the motion to dismiss.

In reply, BOA argues that plaintiffs failed to adequately rebut its argument that the action should be dismissed based on another action pending and that it has met the grounds for dismissal under CPLR §3211(a)(4). BOA asserts that the fact that issue was not joined in the federal case is irrelevant to an analysis under CPLR §3211(a)(4) and moreover, that plaintiffs' arguments regarding the Class Action Fairness Act are inapposite. BOA asserts that plaintiffs will not be prejudiced if this case is dismissed because they are members of the putative class in the federal class action. Instead, BOA claims it will be prejudiced if this action is not dismissed because it would be forced to litigate in two forums.

Additionally, BOA reiterates that plaintiffs have failed to apply the appropriate standard for actual knowledge and instead incorrectly argue that particularity is not required. BOA attacks plaintiffs' claim that its employees knew of Agape's fraud because they (the BOA employees) worked in Agape's offices. Plaintiffs did not name specific employees nor indicate that any employee made any representations regarding knowledge of Agape's activities. BOA argues that plaintiffs cannot overcome the case law that refuses to extend liabilities to banks just because its customers used their bank accounts to perpetrate a fraud. BOA also urges the Court to recognize that plaintiffs have failed to allege substantial assistance by BOA and failed to allege that such assistance proximately caused plaintiffs' damages. Therefore, in the event the Court declines to dismiss this action based upon another action pending, BOA urges to dismiss the causes of action against it for failure to state a cause of action.

The Court notes that subsequent to the submission of this motion, on January 29, 2010, Judge Spatt issued a decision in the federal class action which dismissed all the claims against BOA, including the claims for aiding and abetting fraud and aiding and abetting breach of fiduciary duty.

CPLR §3211(a)(4) provides that a party may move for judgment dismissing one or more causes of action on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." The Court may dismiss when there is substantial identity of the

parties and causes of action but it is not necessary that the precise legal theories presented in the first action also be presented in the second action. *Cherico, Cherico & Assoc., v. Midollo*, 67 A.D.3d 622, 886 N.Y.S.2d 914 (2d Dept. 2009). The relief sought must be “the same or substantially the same”. *Montalvo v. Air Dock Systems*, 37 A.D.3d 567, 830 N.Y.S.2d 255 (2d Dept. 2007)(internal citations omitted).

Here, a review of the Complaints in the federal and instant action demonstrate why dismissal under CPLR §3211(a)(4) is appropriate. Plaintiffs commenced the federal class action filed July 17, 2009 on behalf of themselves “and all other persons in the United States who within the applicable statute of limitations as of the date of the commencement of this action have lost any money invested in or paid to Agape.” The Federal action relates to a Cosmo operated Ponzi scheme commencing in 2003 through his arrest January 19, 2009, (Federal complaint ¶31). (Federal Complaint at ¶103). The action in State Court was brought on behalf of a class consisting of “all New York domiciliaries who invested money in supposed loans brokered by the Agape Defendants at any time from October 2003 to January 2009 (the “Class Period”), and who suffered damages thereby.” (Complaint at ¶21). Thus, there is a substantial identity between the parties in the two actions as the definition of the class in this action is subsumed within the definition of the class in the federal action. Likewise, the substantive allegations against the defendants in both actions arise out of the same Ponzi scheme perpetrated by Cosmo and Agape and their related entities. Thus, the Court finds that dismissal of this action based upon another action pending pursuant to CPLR §3211(a)(4) is appropriate and the case is dismissed in its entirety. Plaintiff’s speculative theories regarding the federal court’s declining to exercise jurisdiction are insufficient to defeat the motion to dismiss.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: April 6, 2010
Riverhead, New York



EMILY PINES
J. S. C.