

Aversano v MacNamara
2010 NY Slip Op 33162(U)
October 27, 2010
Supreme Court, Suffolk County
Docket Number: 07643/2010
Judge: Emily Pines
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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: HON. EMILY PINES
 J. S. C.

Original Motion Date: 06-18-2010
 Motion Submit Date: 08-19-2010
 Motion Sequence No.: 002 MG

[] FINAL DISP
 [x] NON - FINAL DISP

_____ X
**RANDOLPH V. AVERSANO, individually, directly as
 an officer and director and derivatively as a
 shareholder of EQUUS ASSOCIATES, LTD., and
 LAWRENCE G. GRAEV and RANDOLPH
 AVERSANO as offices, directors and derivatively as
 members of THE SOUTHAMPTON HUNT & POLO
 CLUB, Inc.,**

Plaintiff/Petitioners,

CHRISTOPHER NELSON,

Plaintiff,

-against-

**FRANCIS W. MACNAMARA, PATRICIA STEWART,
 LAURA NEWCOMB, AND EQUUS ASSOCIATES, LTD.,
 d/b/a SOUTHAMPTON HUNT & POLO CLUB and THE
 SOUTHAMPTON HUNT & POLO CLUB, INC.,**
 Defendants/Respondents.

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ORDERED, that the motion (motion sequence number 002) by defendant/respondent Laura Newcomb pursuant to CPLR 3211(a)(1), 3211(a)(7) and 3016(b), to dismiss the Complaint against her, is granted; and it is further

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ORDERED, that the caption in this matter shall be amended to delete Laura Newcomb in accordance with the determination herein; and it is further

ORDERED, that the trial in this matter is scheduled for March 28, 2011 at 9:30 a.m. before the undersigned.

Plaintiffs/Petitioners (hereinafter referred to as simply “plaintiffs”) commenced this hybrid action/proceeding arising out of a dispute about the management and operation of Equus Associates, Ltd. (“Equus”) and the not-for-profit corporation, the Southampton Hunt & Polo Club (“SHPC”). Plaintiffs seek dissolution of the corporations and ancillary relief and this matter is currently scheduled for trial on March 28, 2011. A temporary receiver has previously been appointed by Order of this Court. In sum, plaintiffs/petitioners assert that defendant/respondent Francis W. MacNamara (“MacNamara”) and his wife, defendant/respondent Patricia Stewart (“Stewart”), “diverted business and business opportunities from EQUUS and SHPC, commingled personal funds and assets of EQUUS and SHPC together with their own funds, engaged in innumerable unauthorized acts for MacNamara’s and Stewart’s personal benefit at the expense of the two corporations and the shareholders or members (other than MacNamara) and concealed their acts by intentionally failing to maintain proper accounting and financial records and by failing to disclose the foregoing violations of fiduciary duty and other tortious acts to the shareholders of EQUUS and members of SHPC.” Amended Verified Petition/Complaint at ¶29.

Defendant/Respondent Laura Newcomb (“Newcomb”) now moves, by Notice of Motion dated May 21, 2010, for an Order dismissing the action against her pursuant to CPLR 3211(a)(1) and 3211(a)(7) and 3016(b). The Amended Verified Petition/Complaint sets forth three causes of action against Newcomb: the second cause of action alleges fraud and unjust enrichment; the third cause of action alleges breach of fiduciary duty, fraud, embezzlement, conversion and construction trust; and the sixth cause of action seeks an accounting. The gravamen of the claims against Newcomb are that she aided and abetted MacNamara, in his breach of fiduciary duty by her sale of shares of Equus stock to MacNamara and by joining the Board of Directors of SHPC in 2009. Newcomb argues that the allegations of the Petition/Complaint are insufficient to state a cause of action against her, that the Petition/Complaint fails to set forth detailed allegations of fraud as required by CPLR 3016(b) and further, that an independent accountant has determined that she did not receive any funds from EQUUS.

Specifically, the second cause of action, at ¶66, alleges that Newcomb “has provided substantial

assistance in the implementation, concealment and attempted ratification of the acts of MacNamara and Stewart, and voted in favor of ratifying the conduct and misdeeds of MacNamara and Stewart.” The Amended Petition/Complaint also alleges that Newcomb was unjustly enriched. Here, plaintiffs seek compensatory and punitive damages. Newcomb argues that this cause of action, essentially charging her with aiding and abetting fraud committed by MacNamara and Stewart, must fail because the Amended Complaint/Petition does not plead that she had actual knowledge of the fraud on the part of the co-defendants/respondents. The Amended Complaint/Petition does not allege that Newcomb knew MacNamara was engaged in a scheme to defraud, and thus, this cause of action must be dismissed. Additionally, Newcomb argues that this cause of action, as well as the unjust enrichment claim, must be dismissed because it does not meet the specificity pleading requirements of CPLR 3016(b). Newcomb further argues that the unjust enrichment claim fails, based upon an affidavit by Certified Public Accountant, Martin Randisi, who states that he examined the business records of Equus and found no checks payable to Newcomb. Thus, plaintiffs cannot demonstrate that Newcomb was unjustly enriched because there is no evidence she received any benefit from Equus.

Similarly, Newcomb argues that the third cause of action alleging a breach of fiduciary duty must also fail. Here, the Complaint alleges that Newcomb breached her fiduciary duty to Equus and its shareholders by transferring her shares of Equus stock to MacNamara, giving him a majority interest in the corporation. Newcomb explains that in 2004, she sold her 250 shares of Equus stock to MacNamara for \$10 because it represented less than 1% of the total outstanding shares and she was not a member of the Board of Directors of Equus at that time. As merely a minority shareholder, she was not a fiduciary and thus cannot be liable for breach of any fiduciary duty and the third cause of action must also be dismissed.

The sixth cause of action seeks an accounting from all defendants, including Newcomb. She argues that since she was not in a fiduciary relationship with plaintiffs/petitioners, she is not required to provide an accounting. Therefore, Newcomb argues that this claim must also be dismissed as against her.

Plaintiffs oppose the motion by memorandum of law by their counsel and argue that the Amended Verified Petition/Complaint states a cause of action and that Newcomb’s affidavit and the Randisi affidavit are insufficient to dismiss based upon documentary evidence. Counsel details the allegations of the Amended Verified Petition/Complaint which set forth the actions by MacNamara and Stewart which plaintiffs allege constituted fraud and argue that Newcomb, as a director of Equus, breached her

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fiduciary duty to the shareholders by voting to confirm, ratify and approve these acts. Plaintiffs claim that these acts included MacNamara's purchase of a \$100,000 automobile, the unauthorized payment of compensation to MacNamara, conversion of funds, and payment of personal expenses of MacNamara and Stewart. Plaintiffs argue that Newcomb approved these actions and as such, breached her fiduciary duty to the Equus shareholders. Plaintiffs argue that the Amended Verified Petition/Complaint adequately pleads the elements of a cause of action for both breach of fiduciary duty and aiding and abetting a breach of fiduciary duty (by MacNamara and Stewart) by the allegations set forth therein, and the motion to dismiss must be denied. Plaintiffs also claim that with regard to the lack of specificity argument, some of the details are exclusively within the knowledge of defendants and cannot be set forth in full detail without further discovery.

Plaintiffs also argue that the documentary evidence submitted by Newcomb is insufficient to warrant dismissal of the Complaint. Plaintiffs argue that Newcomb and Randisi's affidavits are merely self-serving declarations and cannot constitute the documentary evidence required by CPLR 3211(a)(1). Thus, the motion to dismiss must be denied in its entirety.

In reply, Newcomb notes that plaintiffs do not even address their claim that she breached a fiduciary duty by the sale of her stock to MacNamara. Newcomb also challenges the assertion that further discovery is needed to provide additional details of their unjust enrichment claim. Newcomb argues plaintiffs were unable to point to anything deficient in Randisi's report and have failed to set forth when and how much money they claim she improperly received. Newcomb reiterates that the aiding and abetting claim fails to meet the pleading requirements of CPLR 3016(b) and despite the production of minutes of all of the relevant Board meetings, plaintiffs have been unable to identify any vote by Newcomb that approved any of the alleged misconduct.

Based upon all of the foregoing, Newcomb urges the Court to dismiss the Complaint against her in its entirety.

It is well settled that a motion to dismiss pursuant to CPLR 3211(a)(1) will be granted "only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim". *Fontanetta v. Doe*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010)(internal quotations omitted). The documentary evidence must conclusively establish a defense as a matter of law. *Suchmacher v. Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010). *See also, Levenherz v.*

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Povinelli, 14 A.D.3d 658, 789 N.Y.S.2d 295 (2d Dept. 2005). Further, in “reviewing a motion to dismiss under CPLR 3211(a)(7) for failure

to state a cause of action, the allegations of the complaint are deemed to be true. The pleading will be deemed to allege whatever may be implied from its statements by reasonable intendment and the court must give the pleader the benefit of all favorable inferences that may be drawn from the complaint...”.

Dunn v. Gelardi, 59 A.D.3d 385, 872 N.Y.S.2d 528 (2d Dept. 2009)(internal quotations omitted). *See also, Peterec-Tolino v. Harap*, 68 A.D.3d 1083, 892 N.Y.S.2d 154 (2d Dept. 2009). When evidentiary material is submitted in support of a motion to dismiss for failure to state a cause of action, the Court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated a cause of action. **Peter F. Gaito Architecture, LLC v. Simone Development Corp.**, 46 A.D.3d 530, 846 N.Y.S.2d 368 (2d Dept. 2007).

A claim for aiding and abetting a breach of fiduciary duty requires “(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach”. **AHA Sales, Inc., v. Creative Bath Products, Inc.**, 58 A.D.3d 6, 867 N.Y.S.2d 169 (2d Dept. 2008)(internal quotations omitted). There must be an allegation that the defendant had actual knowledge of the breach of duty, constructive knowledge is insufficient to impose liability. *Id.* The defendant must have rendered “substantial assistance” to the fiduciary in the course of effecting the alleged breach of fiduciary duty. **Velazquez, v. Decaudin**, 49 A.D.3d 712, 854 N.Y.S.2d 163 (2d Dept. 2008). In the absence of evidence that defendant acted with the actual intent to aid in the fraud allegedly perpetrated, the cause of action must fail. **Greenfield v. Tassinari**, 8 A.D.3d 529, 779 N.Y.S.2d 531 (2d Dept. 2004).

In the case at bar, the Court finds that the allegations of the Amended Verified Petition/Complaint cannot withstand a motion to dismiss pursuant to CPLR §§3211(a)(1) and (a)(7). Plaintiffs claims arise out of the alleged misconduct and breaches of fiduciary duty by MacNamara and Stewart, and plaintiffs even set forth in the Amended Verified Petition/Complaint that MacNamara made fraudulent representations to Newcomb to induce her to sell her shares to him. Amended Verified Petition/Complaint at ¶45. Moreover, the Amended Verified Petition/Complaint is wholly devoid of any allegations that Newcomb had actual knowledge of the alleged fraud by MacNamara, which is fatal to the claim that she aided and abetted a breach of fiduciary duty. Likewise, the Amended Verified Petition/Complaint fails to set forth the benefit received by Newcomb by the sale of her shares of stock to MacNamara; and in fact,

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the submissions reflect that she did not receive a pecuniary gain beyond the \$10.00 sale price. Newcomb was only a minority shareholder and not an officer or director of Equus at the time of the sale and thus, did not owe a fiduciary duty to the other shareholders. Moreover, the Randisi affidavit indicates that there is no evidence that any corporate funds were paid or diverted to Newcomb. Thus, the claims contained within the second and third causes of action are deficient and are dismissed in its entirety.

Similarly, since Newcomb was not in a fiduciary relationship, she is not required to provide an accounting and the sixth cause of action must be dismissed.

Based on the foregoing, the motion to dismiss by defendant Laura Newcomb is granted in its entirety and the Amended Verified Petition/Complaint is dismissed as against her.

Counsel are reminded that the trial of this matter is scheduled for March 28, 2011 at 9:30 a.m. before the undersigned.

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

Dated: October 27, 2010
Riverhead, New York



EMILY PINES
J. S. C.

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