

Abacus Fed. Sav. Bank v Lim

2011 NY Slip Op 30244(U)

February 3, 2011

Supreme Court, New York County

Docket Number: 108378/03

Judge: Jane S. Solomon

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DECEMENT

JANE R. SOLOMON

PART 55

Index Number : 108378/2003
ABACUS FEDERAL SAVINGS

vs
LIM MEE JOHN CAROL

Sequence Number : 008
AMEND PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied*
in accompanying memorandum
decision + orders

FILED
FEB 03 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/3/11

[Signature]
JANE R. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
ABACUS FEDERAL SAVINGS BANK,

Plaintiff,

-against-

Index No. 108378/03

CAROL JOHN MEE LIM, ZHONG GUI MO,
ZHONG CHENG MO, XIAO MING MO, FRANCES ENG,
ANDERS ENG, MIKATA JAPANESE CUISINE, INC.,
NA FANG MO A/K/A MONA FANG, TIFFANY
INTERNATIONAL TRADE, INC. D/B/A TIFFANY
ENTERTAINMENT GROUP, INC., TIFFANY HAIR/
NAIL SALON, INC., WORLD START CO., INC.,
ORIENTAL GEM FINE ARTS & CRAFTS, INC.,
C&G PRIME REALTY, LLC, CHINA CERAMICS
IMPORTS, INC., JACKY LIANG, THOMAS FUNG,
WAI KWAI LI, CHUN YANG WONG, CHUNKO PANG,
LAI MIND MAN, JOHN DOES 1 through 100, and
COMPANIES A through ZZ,

Defendants.

FILED

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-----X
JANE SOLOMON, J.S.C.:

Plaintiff Abacus Federal Savings Bank moves, pursuant to CPLR 3205 (b), for leave to file a second amended complaint, so as to add a cause of action alleging fraud against defendant Frances Eng. Eng cross-moves, pursuant to CPLR 3126, for an order dismissing the complaint, as to her.

A party seeking leave to amend a pleading must make a prima facie showing that the proposed amendment "is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 500 (1st Dept 2010); see also *Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363 (1st Dept 2007). The prima facie showing must be evidentiary. In *MBIA Ins. Corp.*, an attorney's affirmation accompanied by a transcript of a portion of a deposition was held to suffice. In *Pier 59 Studios, L.P.*, the

evidence consisted, in part, of a letter and a copy of an e-mail.

Here, the documents that plaintiff proffers in support of its motion include the initial complaint and the first amended complaint, without any exhibits attached, an indictment of Eng, charging her with conspiracy to violate 18 USC § 1344, an order accepting her guilty plea, and a judgment, noting the nature of her offense as "conspiracy to commit bank fraud." These documents do not aid plaintiff. A claim alleging common-law fraud must show "material misrepresentation of fact, knowledge of the falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages." *Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 98 (1st Dept 2010), quoting *Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 607 (1st Dept 2010). The elements of justifiable reliance and of damages "have no place in the federal fraud statutes," that is, mail fraud, wire fraud, and bank fraud, inasmuch as those statutes "prohibit[] the 'scheme to defraud,' rather than the completed fraud." *Neder v United States*, 527 US 1, 25 (1999). Thus, the documents included in plaintiff's papers are silent as to two elements of the cause of action that plaintiff seeks leave to assert.

Moreover, the bank fraud statute applies to

[w]hoever knowingly executes, or attempts to execute, a scheme or artifice--

- (1) to defraud a financial institution; or
- (2) to obtain any of the moneys, ... or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises

18 USC § 1344. The indictment to which Eng pled guilty includes in

its single count conspiracy to violate both subsections (1) and (2) of this statute. Nothing in plaintiff's papers indicates that Eng's plea pertained specifically to the offence described in subsection (2). The offenses defined in subsections (1) and (2) are stated in the disjunctive, and a person may commit bank fraud without making a misrepresentation of fact. *Spencer v U.S.*, 142 F3d 436 (Table) (6th Cir 1998); *United States of Am. v Ragosta*, 970 F2d 1085 (2d Cir), cert denied 506 US 1002 (1992); *United States of Am. v Schwartz*, 899 F2d 243 (3d Cir), cert denied 498 US 901 (1990). Additionally, of course, Eng pled guilty to conspiring to violate 18 USC § 1344, not to having violated that section. Thus, plaintiff's papers provide no evidentiary support for the allegation that Eng "knowingly and intentionally misrepresented facts" to plaintiff. Proposed Second Amend Complaint, at 39. Consequently, I am denying plaintiff's motion.

Eng's cross motion is based upon her contention that plaintiff has failed to comply with this court's October 26, 2009 order, directing plaintiff to "provide to all defendants the documents sought by any of them by November 1, 2009." By letter dated October 30, 2009, plaintiff's counsel invited Eng's counsel to schedule a mutually convenient time to review and inspect documents that would be made available at plaintiff's counsel's office. Eng's counsel took the position that the discovery order required plaintiff to deliver the documents, either as such, or on compact discs, rather than merely making them available. See *Mills Affirm.*, Exh. D. A notice to a party to produce documents,

pursuant to CPLR 3120 (1) (i), "may be satisfied by telling the party seeking the discovery where the materials are and providing a reasonable opportunity for that party to look at them and make copies" *Zegarelli v Hughes*, 3 NY3d 64, 69 (2004). Nothing in the October 26, 2009 order was intended to impose a greater obligation upon plaintiff than that generally imposed by CPLR 3120 (1) (i).

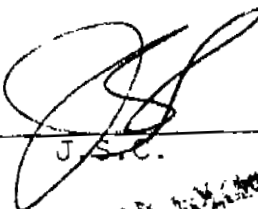
Accordingly, it is hereby

ORDERED that the motion of Abacus Federal Savings Bank for leave to file a second amended complaint is denied; and it is further

ORDERED that defendant Eng's cross motion to dismiss the complaint is denied.

Dated: February 3, 2011

ENTER:


J. S. C.
JAMES J. SULLIVAN

FILED

FEB 03 2011

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