

Franklin Mint, LLC v Franklin Mint, Inc.

2011 NY Slip Op 33973(U)

November 18, 2011

Supreme Court, New York County

Docket Number: 652386/2010

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

THE FRANKLIN MINT, LLC, et al

INDEX NO. 652386/2010

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

THE FRANKLIN MINT, INC., et al

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

by defendants Samuel Malamud, Inter-Governmental Philatelic Corporation and Ideal Stamp Corporation to dismiss the third cause of action as against them is GRANTED for the attached Decision and Order.

Dated: November 18, 2011

Melvin L. Schweitzer
MELVIN L. SCHWEITZER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

Mint, a company engaged in the production, marketing and sale of collectibles. *Id.*, ¶¶ 14, 15, 32. Mr. Sisskind and Moshe Malamud controlled the companies' day-to-day operations, first as co-Chief Executive Officers of the Morgan Mint, and later as President and sole Chief Executive Officer, and Chairman of the Board, respectively. *Id.*, ¶ 34. In the spring of 2009, after several years of financial difficulties, the Franklin Mint and the Morgan Mint (together, Morgan/Franklin Mint) were, the complaint alleges, "on the brink of bankruptcy" (*id.*, ¶ 2), and all defendants, including the S. Malamud defendants, faced "sizeable financial losses." *Id.*, ¶ 3. As a result, the complaint alleges, Moshe Malamud and Mr. Sisskind, "in concert with" Samuel Malamud, developed a plan to get more capital (*id.*, ¶ 54), and Moshe Malamud approached the principal of plaintiff JSSI Capital Enterprises, LLC (JSSI) about investing in Morgan/Franklin Mint. *Id.*, ¶¶ 5, 55.

Plaintiffs claim that Moshe Malamud and Mr. Sisskind then misled them about the risks of investing in the companies, by telling JSSI that LLR had caused the financial problems of Franklin/Morgan Mint (*id.*, ¶¶ 55), and by misrepresenting the circumstances surrounding LLR's decision to withhold any further investment in Morgan/Franklin Mint. *Id.*, ¶¶ 56-58. The complaint includes detailed allegations of misrepresentations made by Moshe Malamud and Mr. Sisskind, between May 7, 2009 and June 9, 2009, concerning Morgan/Franklin Mint's past and current financial conditions, and future financial prospects, which induced JSSI to invest in Morgan/Franklin Mint. *Id.*, ¶¶ 59-92.

In May 2009, in anticipation of acquiring a controlling interest in Morgan/Franklin Mint, JSSI formed a limited liability company, the New Franklin Mint, as "an acquisition vehicle" (*id.*, ¶¶ 9, 93), and, on June 9, 2009, plaintiffs entered into an agreement with Morgan/Franklin Mint,

and paid over \$12 million to acquire its assets. *Id.*, ¶¶ 9, 96. The New Franklin Mint also agreed, at that time, to assume approximately \$4 million in subordinated debt owed to the S. Malamud defendants (*id.*, ¶¶ 9, 105), and, at the request of Moshe Malamud, to pay out an “Interested Party Note” in the amount of \$1.975 million to Samuel Malamud and Mr. Sisskind. *Id.*, ¶¶ 9, 104. Plaintiffs claim that they subsequently discovered that they had been “duped” by the misrepresentations of Moshe Malamud and Mr. Sisskind, and learned that the Asset Purchase Agreement included materially false and misleading misrepresentations and warranties. *Id.*, ¶ 11.

With respect to Samuel Malamud, the complaint alleges that, prior to June 2009, he held a 6.7% interest in the Morgan Mint, and that Queensway, a company he owned, held a 34.3% interest, in the Morgan Mint (*id.* ¶ 18), and that, in June 2009, Queensway received a 10% profits-only interest in the New Franklin Mint. *Id.*, ¶¶ 97, 99. The complaint also alleges that, at the time of the June 2009 asset purchase agreement, defendants Ideal Stamp Corporation and Inter-Governmental Philatelic Corporation, of which Samuel Malamud was president, were owed approximately \$3 million by the Morgan Mint. *Id.*, ¶¶ 20, 21, 107. The complaint does not allege that Samuel Malamud made any misrepresentations leading up to plaintiffs’ purchase of Morgan/Franklin Mint, but alleges that he “memorialized his connection to Defendants’ common plan to defraud Plaintiffs” by executing new promissory notes in favor of the S. Malamud defendants, issued by the New Franklin Mint at the closing of the asset purchase transaction, to replace earlier notes owed by the Morgan Mint. *Id.*, ¶¶ 108, 105, 33. The third cause of action for civil conspiracy specifically alleges that:

Sam Malamud, on behalf of himself, IGCP and Ideal Stamp, with full knowledge of the material falsity of the statements and omissions [of Moshe Malamud and Mr. Sisskind] deliberately

failed to disclose the truth to Plaintiffs in order to reap the benefits of Defendants' fraudulent scheme, as reflected by the execution of the New Franklin Mint Subordinated Notes by Sam Malamud, IGCP and Ideal Stamp and by Sam Malamud's acceptance of payment in satisfaction of the August 2007 Interested Party Note.

Id., ¶ 181.

The complaint goes on to allege, as against Samuel Malamud, that, in December 2009, due to its continuing financial problems, the New Franklin Mint sought additional funds from its members, including Queensway, and asked Samuel Malamud to return the \$1.975 million that the New Franklin Mint had previously paid him on a note. *Id.*, ¶¶ 155-156. Plaintiffs claim that Samuel Malamud refused, and instead "attempted to condition their capital participation on JSSI Capital 'agree[ing] to waive any alleged wrongdoings' by the Malamuds, Mr. Sisskind and their entities." *Id.*, ¶ 158.

The Law

On a motion to dismiss pursuant to CPLR 3211 (a) (7), pleadings are to be given a liberal construction. *See* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 (1994). The court must "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." *Leon*, 84 NY2d at 87-88; *see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002); *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). The court is not required, however, to accept as true "legal conclusions that are unsupported based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]), or "factual claims either inherently incredible or flatly contradicted by documentary evidence." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999)(citation omitted), *aff'd* 94 NY2d 659

(2000); see *JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 (1st Dept 2009). Further, liberal construction cannot “be used as a substitute for substance” (*Carnival Co. v Metro-Goldwyn-Mayer, Inc.*, 23 AD2d 75, 77 [1st Dept 1965]), and where a plaintiff cannot succeed upon “any reasonable view of the facts stated,” dismissal of a claim pursuant to CPLR 3211(a)(7) is proper. Cf. *Campaign for Fiscal Equity, Inc. v State of New York*, 86 NY2d 307, 318 (1995); *People v New York City Tr. Auth.*, 59 NY2d 343, 348 (1983).

“In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.” *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996); see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011); *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 407 (1958). Fraud claims are subject to the heightened pleading requirements of CPLR 3016 (b), which provides that “the circumstances constituting the wrong shall be stated in detail.” See *Mandarin Trading Ltd.*, 16 NY3d at 178; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 (1999); *Moore v Liberty Power Corp., LLC*, 72 AD3d 660, 661 (2d Dept 2010). While “that requirement should not be confused with unassailable proof of fraud” (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]), the allegations must be “set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of.” *Lanzi v Brooks*, 43 NY2d 778, 780 (1977); see *Mandarin Trading Ltd.*, 16 NY3d at 178; *Sargiss v Magarelli*, 12 NY3d 527, 530 (2009). CPLR 3216 (b) may be satisfied “when the facts are sufficient to permit a reasonable inference of the

alleged conduct.” *Pludeman*, 10 NY3d at 492; *see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009).

“[L]iability for fraud may be premised on knowing participation in a scheme to defraud, even if that participation does not by itself suffice to constitute the fraud.” *Kuo Feng Corp. v Ma*, 248 AD2d 168, 168-169 (1st Dept 1998); *see CPC Intl. Inc. v McKesson Corp.*, 70 NY2d 268, 286 (1987); *Danna v Malco Realty, Inc.*, 51 AD3d 621, 622 (2d Dept 2008). Thus, although it is correct that no independent cause of action for civil conspiracy exists under New York law (*see Alexander & Alexander of N.Y., Inc. v Fritzen*, 68 NY2d 968, 969 [1986]), a plaintiff may plead the tort of civil conspiracy in order to “connect the actions of separate defendants with an otherwise actionable tort.” *Id.*; *see Levin v Kitsis*, 82 AD3d 1051, 1052 (2d Dept 2011); *see also Corris v White*, 29 AD2d 470, 472-473 (4th Dept 1968) (gravamen of a conspiracy claim is fraud and damage and not the conspiracy); *Cuker Indus., Inc. v Crow Constr. Co.*, 6 AD2d 415, 417 (1st Dept 1958) (actionable wrong lies in commission of a tortious act, not upon the agreement to commit the prohibited act). “The conspiracy, if established, might well render all defendants liable for each other's acts in furtherance thereof, and thus broaden liability.” *Keller v Levy*, 265 AD 723, 724 (1st Dept 1943); *see Carroll v LeBoeuf, Lamb, Greene & MacRae, LLP*, 623 F Supp 2d 504, 510 (SD NY 2009).

“In an action for fraud, corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud.” *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 55 (2001); *see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, *supra*; *DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442 (1st Dept 2010). “However, mere association does not constitute a conspiracy. There must be evidence of a common plan.” *Crazy Eddie, Inc.*

v Antar, 1992 WL 406543, *10, 1992 Bankr. LEXIS 2018, *33 (Bankr SD NY 1992) (internal citation omitted); see *National Westminster Bank USA v Weksel*, 124 AD2d 144 (1st Dept 1987) (law firm's preparation of fraudulent documents does not show agreement to cooperate in fraud); *Vision Specialty Food Prods., Inc. v Ultimate Gourmet, L.L.C.*, 2001 WL 1505008, 2001 US Dist LEXIS 19295 (SD NY 2001) (involvement as wife of fraud defendant, and principal of defendant company benefitting from fraud, insufficient to show agreement); see also *Transport Workers Union of Am. Local 100 AFL-CIO v Schwartz*, 17 AD3d 218, 218 (1st Dept 2005) ("nothing more than knowing acquiescence" of non-fiduciary does not show conspiracy).

Discussion

To the extent that the third cause of action of the complaint seeks to assert a fraud claim against the S. Malamud defendants, the complaint does not allege, and plaintiffs do not now argue, that Samuel Malamud knowingly made material misrepresentations on which plaintiffs relied. Rather, the fraud claim against the S. Malamud defendants is limited to conspiracy to defraud plaintiffs, and is based on the underlying allegations of fraud against Moshe Malamud and Mr. Siskind. It could, therefore, subject Samuel Malamud to liability for fraud, even if he did not specifically make any misrepresentations to plaintiffs. See *Dooley v Metropolitan Jewish Health Sys.*, 2003 WL 22171876, *11, 2003 US Dist LEXIS 16520, *32 (ED NY 2003).

"[T]o establish a claim of civil conspiracy, the plaintiff 'must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damages or injury.'" *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 (1st Dept 2010), quoting *World Wrestling Fedn. Entertainment, Inc. v Bozell*, 142 F

Supp 2d 514, 532 (SD NY 2001); see *Albion Alliance Mezzanine Fund, L.P. v State St. Bank & Trust Co.*, 8 Misc 3d 264, 273 (Sup Ct, NY County), *affd* 2 AD3d 162 (1st Dept 2003). As one court further explained,

A common design is the essence of a conspiracy, and while it is not essential to one's liability for ensuing damages that he shall have joined in the beginning, or that he should have complete knowledge of all the aims of the conspirators, or that he take part in each branch of the conspiracy, or that he even know of all the steps taken toward the common design, it nevertheless is necessary that there be intentional participation with a view to the furtherance of the common design.

Ballantine v Ferretti, 28 NYS2d 668, 691 (Sup Ct, NY County 1941); see *Fidelity Funding of Calif., Inc. v Reinhold*, 79 F Supp 2d 110, 124 (ED NY 1997); see generally *Goldstein v Siegel*, 19 AD2d 489, 493 (1st Dept 1963).

“Unlike criminal conspiracy where the conspiracy itself is the crime, a plaintiff in a civil conspiracy action may recover damages only for any overt act or acts.” *Sterling Natl. Bank & Trust Co. v Federated Dept. Stores*, 612 F Supp 144, 146 n 1 (SD NY 1985); see *Resnick v Resnick*, 1990 US Dist LEXIS 14206, *14 (SD NY 1990) (overt acts give rise to liability, not the conspiracy itself); but see *Nederlandsche Handel-Maatschappij N.V. v Schreiber*, 17 AD2d 783, 784 (1st Dept 1962) (liability for conspiracy does not depend on active participation in particular overt acts). “An overt act must be pleaded” (*Corris*, 29 AD2d at 472), and “must be an independent act that tends to carry out the conspiracy.” *People v Arroyo*, 93 NY2d 990, 992 (1999) (internal quotation marks and citations omitted). This “requirement that there be an overt act in furtherance of the conspiracy ... is simply to manifest that the conspiracy is at work.” *Id.*

Here, while the complaint is replete with allegations of specific actions taken by Moshe Malamud and Mr. Sisskind to defraud plaintiffs, there are no specific factual allegations that Samuel Malamud was involved in planning or presenting the alleged misrepresentations, or that he met with or otherwise communicated with plaintiffs, or co-defendants, in regard to the alleged fraud. *Compare Bernstein v Kelso & Co.*, 231 AD2d 314, 320 (1st Dept 1997) (although complaint did not specify which defendants attended secret meetings or which participated in secret contracts, allegations were sufficient that all were actively involved). Nor are there any allegations that he was involved in the management or day-to-day operations of Franklin/Morgan Mint. *Compare Pludeman*, 10 NY3d at 491 (inference could be drawn that individual defendants, top management involved in day-to-day business, were involved in or knew about alleged fraud); *Polonetsky*, 97 NY2d at 55 (allegations that company president involved in day-to-day operations sufficient to create inference that he knew of company's scheme to defraud consumers); *DDJ Mgt., LLC*, 78 AD3d at 444 (inferences may arise from corporate positions and responsibilities of individual defendants).

The sole factual allegations connecting Samuel Malamud to the conspiracy are that, in conjunction with the asset purchase transaction, he accepted payment on a pre-existing note owed to him by the New Franklin Mint's predecessor, and he executed new notes in his favor to replace previously existing notes. Notably, both of these acts occurred at the closing of the agreement, and neither act was alleged to have been part of what induced plaintiffs to enter the asset purchase agreement. Even giving the allegations against the S. Malamud defendants every favorable inference, the complaint does not describe facts from which it can be inferred that there was an agreement between Samuel Malamud and Moshe Malamud and Mr. Sisskind to engage in

a common plan to defraud plaintiffs, or that Samuel Malamud took any overt actions in the furtherance of such an agreement. The bare allegation that Samuel Malamud was acting in concert with Moshe Malamud and Mr. Siskind, “without any allegation of independent culpable behavior on his part,” is insufficient to link him to the alleged fraudulent misrepresentations of Moshe Malamud and Mr. Siskind. *Schwartz v Society of N.Y. Hosp.*, 199 AD2d 129, 130 (1st Dept 1993); *see LeFebvre v New York Life Ins. & Annuity Corp.*, 214 AD2d 911 (3d Dept 1995); *Abrahami v UPC Constr. Co.*, 176 AD2d 180 (1st Dept 1991); *Ferguson v Meridian Distribution Servs., Inc.*, 155 AD2d 642 (2d Dept 1989); *Macaluso v Hoatson*, 2009 WL 285394, 2009 NY Misc LEXIS 4585, 2009 NY Slip Op 30169(U) (Sup Ct, NY County 2009); *see also Campbell v Thales Fund Mgt., LLC*, 2010 WL 4455299, 2010 US Dist LEXIS 114439, *19 (SD NY 2010); *Meisel v Grunberg*, 651 F Supp 2d 98, 122 (SD NY 2009).

* * *

Defendants also move to have the court vacate its Order of October 6, 2011 directing defendants to produce a copy of Samuel Malamud’s 2009 tax return.¹ The court’s principal reason for directing the production of the tax return was due to the allegation that Samuel Malamud’s son, Moshe Malamud, had falsely represented that his father was in desperate need of cash resulting in plaintiffs’ agreement to accelerate a payment in connection with the purchase of assets, which purchase is alleged to have been made based on defendants’ false representations. After the court’s October 6, 2011 ruling, defendants offered to stipulate that the statement attributed to Moshe Malamud was false, thus, defendants argue, obviating the need to

¹ In connection with this application, the court has read and considered letters addressed to the court (i) dated November 1, 2011, from R. Jeffrey More; (ii) dated November 3, 2011, from Danielle L. Rose; (iii) dated November 7, 2011, from R. Jeffrey More; and (iv) dated November 9, 2011, from Danielle L. Rose.

produce Samuel Malamud's tax return. Defendants invoke the rule recently reiterated in *CDR Creances S.A.S. v Cohen*, 77 AD3d 489, 491 (1st Dept 2010), that there is a need for a strong showing of an "overriding necessity" for the information contained in a tax return in order to require its discovery. In light of the court's decision to dismiss Mr. Samuel Malamud as a defendant in this action, the court finds there is no longer a strong showing of such overriding necessity, and, thus, vacates its October 6, 2011 Order.

Accordingly, it is

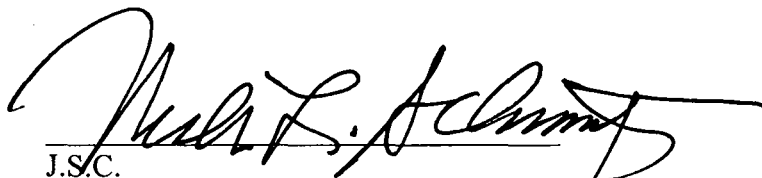
ORDERED that defendants' motion is granted to the extent that the third cause of action is dismissed as against defendants Samuel Malamud, Ideal Stamp Corporation, and Inter-Governmental Philatelic Corporation; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that the court's Order of October 6, 2011 directing defendants to produce a copy of Samuel Malamud's 2009 tax return is vacated.

Dated: November 19, 2011

ENTER:



J.S.C.

MELVIN L. SCHWEITZER
J.S.C.