

**Mannucci v Missionary Sisters of the Sacred Heart
of Jesus**

2011 NY Slip Op 34250(U)

January 4, 2011

Supreme Court, New York County

Docket Number: 602284/2008

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

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MANNUCCIO MANNUCCI, M.D.;
ANGELO TARANTA, M.D.;
GUIDO PADULA, M.D.;
and DILVA SALVIONI;

Plaintiffs,

Index No.: 602284/2008
Motion Date: 07/16/10
Motion Seq. No.: 003

-against-

THE MISSIONARY SISTERS OF THE
SACRED HEART OF JESUS;
and MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.;

Defendants.

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PRESENT: EILEEN BRANSTEN, J.:

Defendant Missionary Sisters of the Sacred Heart of Jesus moves to dismiss all claims against them. For the reasons stated below, the motion to dismiss is granted.

PROCEDURAL HISTORY

On March 1, 2010, Plaintiffs Mannuccio Mannucci, M.D. (“Mannucci”), Angelo Taranta, M.D. (“Taranta”), Guido Padula, M.D. (“Padula”) and Dilva Salvioni (Salvioni) (collectively, “Plaintiffs”) filed an amended complaint against Defendants The Missionary Sisters of the Sacred Heart of Jesus (“MSSH”) and Merrill Lynch, Pierce, Fenner & Smith, Inc. (“Merrill”) (together, “Defendants”). The amended complaint alleges five causes of action: 1) a claim against Defendant MSSH for violating Plaintiffs’ rights under the deferred

compensation plans; 2) a claim against Defendant MSSH to recover benefits; 3) a claim against Defendant MSSH for misappropriation; 4) a claim against Defendant MSSH for conversion; and 5) a claim against Defendant Merrill for fraud.

On April 23, 2010, Defendant MSSH moved to dismiss the amended complaint as against it. On May 28, 2010, Plaintiffs filed its opposition. On June 11, 2010, Defendant MSSH filed a memorandum of law in further support of its motion to dismiss.¹ The court heard oral argument on June 15, 2010.

FACTUAL BACKGROUND

Plaintiffs are three doctors and the widow of a fourth doctor, all of whom worked at Cabrini Medical Center (“Cabrini”) (Amended Complaint, ¶ 2). Plaintiffs are now all retired or, in the case of Dilva Salvioni’s husband, deceased (*id.*). Unless otherwise noted, the late Dr. Salvioni (as opposed to his widow, Ms. Salvioni) shall be referred to as a Plaintiff for ease of understanding.

Beginning in the 1960s, Plaintiffs began deferring portions of their salary into compensation plans set up by the Cabrini Medical Center (*id.* at ¶ 3). Under these plans, the

¹In Motion Sequence No. 004, prior to the return date of Merrill Lynch’s motion to dismiss, Plaintiffs discontinued the action as against Merrill Lynch with prejudice.

money was invested and then annually paid out to the Plaintiffs upon retirement (*id.*). Defendant Merrill held, and Cabrini administered, these accounts for Plaintiffs (*id.* at ¶¶ 3-6).

In 2006, Cabrini withdrew almost \$2 million from the Plaintiffs' plans without Plaintiffs' consent (*id.* at ¶ 4). In 2007, Cabrini withdrew Plaintiffs' remaining \$3 million, again without consent (*id.* at ¶ 5). None of this money has been returned to Plaintiffs, and Plaintiffs have not been paid under the plans since the withdrawals (*id.* at ¶ 6). In 2009, Cabrini filed for bankruptcy (*id.* at ¶ 64).

According to Plaintiffs, Defendant MSSH dominated and controlled Cabrini (*id.* at ¶ 65). Plaintiffs assert that Cabrini "is the mere instrument, agent and alter ego of" Defendants MSSH (*id.* at ¶ 20). Plaintiffs thus argue all of Cabrini's actions are really the actions of Defendants MSSH (*id.*). Plaintiffs do not include Cabrini as a defendant.

STANDARD OF LAW

1. Motion to Dismiss

CPLR 3211 (a) (7) permits a party to move for dismissal of one or more causes of action on the ground that "the pleading fails to state a cause of action."

On a motion to dismiss pursuant to CPLR 3211 (a) (7), "initially the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion

for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In evaluating the motion, the “court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, the criterion being not whether the proponent of the pleading has simply stated a cause of action, but whether he or she actually has one” (*Amaro ex rel. Almazan v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009] [citing *Guggenheimer*, 43 NY2d at 275]). CPLR 3211 (a) (7) thus allows a cause of action to move forward if the court can discern the claim from the whole of the pleading.

On a motion to dismiss pursuant to either CPLR 3211 (a) (7), the “pleadings must be liberally construed and the facts alleged accepted as true; the court must determine ‘only whether the facts as alleged fit within any cognizable legal theory’” (*Wiener v Lazard Freres & Co.*, 672 NYS2d 8, 13 [1st Dept 1998][quoting *Leon*, 84 NY2d at 87-88]).

2. Piercing the Corporate Veil

“[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury”(*Morris v State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]).

“An action to pierce the corporate veil requires that the purported dummy corporations be parties, even if the parent corporation is alleged to be the one which unjustly retains the funds” (*Popowich v Korman*, 73 AD3d 515, 517 [1st Dept 2010], quoting *Stewart Tenants*

Corp v Square Indus. Inc, 269 AD2d 246, 248 [1st Dept 2000] *see also Boczar v Greene*, 2008 NY Slip Op 30138[U], at *6-7 [Sup Ct NY County January 16, 2008] [“[f]urther, an action to pierce the corporate veil requires that the controlled corporation(s) be named as defendants in the action”]).

ANALYSIS

Plaintiff asserts four causes of action against Defendant MSSH: 1) violation of Plaintiffs’ rights under the deferred compensation plans; 2) a claim to recover benefits due to Plaintiffs under the deferred compensation plans; 3) misappropriation; and 4) conversion.

The entity that actually performed the actions that give rise to Plaintiffs’ claims was Cabrini, not Defendant MSSH (Amended Complaint, ¶¶ 51-62). Plaintiffs allege that Cabrini, not Defendant MSSH, withdrew the money from Plaintiffs’ plans without consent (*id.*). Plaintiffs contend that Cabrini was dominated and controlled by Defendant MSSH and therefore Defendant MSSH is responsible (*id.* at ¶ 65-67). Plaintiffs thus assert that Cabrini was Defendant MSSH’s alter ego (*id.*). In so asserting, Plaintiffs ask the court to “pierce the corporate veil” under the alter ego theory and find Defendant MSSH responsible for Cabirni’s actions (*see* Plaintiffs’ Opp., pp. 8-13).

Case law is clear that for a claim to pierce the corporate veil, “the purported dummy corporations [must] be parties, even if the parent corporation is alleged to be the one which unjustly retains the funds” (*Popowich*, 73 AD3d at 517). No separate cause of action to

pierce the corporate veil may stand without the controlled corporation being a party to the instant action (*Boczar*, 2008 NY Slip Op 30138[U] at *6).

The *Popowich* case is instructive here. In *Popowich* the defendant appealed from a decision granting plaintiff-appellee a money judgment on loans that plaintiff-appellee made to the defendant-appellant's corporations (*Popowich*, 73 AD3d at 516). The defendant's corporations were not made parties to the action (*id.* at 517). The lower court found that defendant-appellant ran the corporations as his alter ego and pierced the corporate veil to find him personally liable (*id.*). The First Department overturned on the grounds that the corporations were not made parties to the action (*id.*). The First Department stated that in order to pierce the corporate veil, the dummy corporation must be made a defendant (*id.*). The money judgment was vacated and the action for the money judgment was dismissed (*id.* at 516).

Boczar is also helpful. In *Boczar*, the plaintiff was the former president and the defendant was the CEO of a corporation known as BPC (*Boczar*, 2008 NY Slip Op 30138[U], at *2). The defendant fired the plaintiff (*id.*). In an arbitration before the National Association of Securities Dealers ("NASD"), the plaintiff won an award against BPC, the corporation, for his termination (*id.* at *2-3). The plaintiff then filed the lawsuit in court against the defendant (*id.* at *3). The plaintiff therein sought to hold the defendant personally liable for the corporations' judgment debt to the plaintiff (*id.* at *3). The plaintiff

alleged that the defendant dominated and controlled BPC (*id.*). The corporation was not named as a party in the suit (*id.* at *6). The court found that the corporation was a necessary party to a suit alleging it was the alter ego of the plaintiff (*id.*). The court stayed the action so that the plaintiff could amend the complaint to include the corporation (*id.*).

Plaintiffs have not asserted any action in the Amended Complaint against Cabrini. All of Plaintiffs' claims against Defendant MSSH stem from Cabrini's actions done to Plaintiffs that Plaintiffs impute to Defendant MSSH. Therefore, as a matter of law, Plaintiffs' claims against Defendant MSSH fail and are dismissed, without prejudice and with leave to replead.

Accordingly, it is

ORDERED that Defendant MSSH's motion to dismiss is GRANTED, without prejudice and with leave to replead; and it is further

ORDERED that Plaintiffs are granted leave to serve an amended complaint so as to plead its causes of action against Defendant MSSH and Cabrini within 30 days after service on Plaintiffs' attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that Plaintiffs fail to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied,

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and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by Defendant MSSH's counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to Defendant MSSH as taxed by the Clerk.

Dated: New York, New York
January 4, 2011.

ENTER



Hon. Eileen Bransten, J.S.C.