

Bailey v Peerstate Equity Fund, L.P.

2012 NY Slip Op 30810(U)

March 14, 2012

Supreme Court, Nassau County

Docket Number: 012439-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**JUDITH W. BAILEY, Individually, as the Executor of
the ESTATE OF RICHARD BAILEY, and as the
Executor of the ESTATE OF SUZANNE BAILEY,**

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Plaintiffs,

Index No: 012439-09

Motion Seq. No: 2

-against-

Submission Date: 2/17/12

**PEERSTATE EQUITY FUND, L.P., ROBERT N.
GETZ, LLC, ROBERT GETZ and STEVEN GETZ,**

Defendants.

-----X

Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affidavit in Opposition and Exhibits.....X**
- Defendants' Memorandum of Law in Opposition.....X**
- Reply Affirmation in Further Support and Exhibits.....X**
- Plaintiffs' Reply Memorandum of Law.....X**

This matter is before the court on the motion by Plaintiffs Judith W. Bailey, Individually, as the Executor of the Estate of Richard Bailey, and as the Executor of the Estate of Suzanne Bailey, filed on January 4, 2012 and submitted on February 17, 2012. For the reasons set forth below, the Court grants leave to renew and, upon renewal, modifies the prior decision of the Court dated August 10, 2010 and 1) denies Defendants' motion to dismiss the Third Cause of Action alleging fraud; and 2) denies Defendants' motion to dismiss the Sixth Cause of Action, alleging unjust enrichment, to the extent that Plaintiffs seek to recover the money invested in Peerstate. To the extent that Plaintiffs seek to recover the management fees received by Getz, however, the Court reaffirms its prior determination that Plaintiffs' claim for unjust enrichment may not proceed as it is merely an item of damages for the breach of fiduciary duty claim.

BACKGROUND

A. Relief Sought

Plaintiffs move, pursuant to CPLR § 2221(e), for an Order a) granting leave to Plaintiffs to renew their opposition to Defendants’ motion to dismiss the Verified Complaint (“Prior Motion”), based on a change in law that would modify that part of the Court’s prior decision dated August 10, 2010 (“Prior Decision”) which granted Defendants’ motion to dismiss Plaintiffs’ Third Cause of Action for fraud and Sixth Cause of Action for unjust enrichment under the Martin Act, N.Y. Gen. Bus. Law §§ 352 *et seq.*; and 2) modifying the Prior Decision by reinstating Plaintiffs’ Third and Sixth Causes of Action.

Defendants oppose Plaintiffs’ motion.

B. The Parties’ History

The parties’ history is set forth in detail in the Prior Decision and the Court incorporates the Prior Decision by reference as if set forth in full herein. As noted in the Prior Decision, this is an action for fraud and breach of fiduciary duty arising from Plaintiffs’ participation in a private investment company account that invested funds with Bernard L. Madoff Investment Securities, LLC (“BMIS”). Bernard Madoff (“Madoff”) had been operating a “Ponzi scheme,” whereby no profits were actually being earned but, rather, earlier investors were paid “profits” from the capital of newer investors. Madoff subsequently declared bankruptcy and was convicted of fraud, perjury, and other crimes in connection with his criminal enterprise.

In the Prior Decision (Ex. C to Reisman Aff. in Supp.), the Court held as follows with respect to the Third and Sixth Causes of Action:

THIRD CAUSE OF ACTION - Fraud

Because the Attorney General has exclusive jurisdiction to enforce the Martin Act, the Court must determine the viability of Plaintiffs’ other claims. *See Shen v. Astoria Fed. Sav & Loan*, 295 A.D.2d 319 (2d Dept. 2002) (private plaintiffs may not, through artful pleading, press claim based on wrong that Attorney General should pursue as Martin Act violation). Plaintiffs allege that Defendants fraudulently induced them to invest in Peerstate by falsely representing the investment role Getz would be performing and failing to disclose their relationship with Madoff and the true risk of the investments. In light of the fact that Plaintiffs’ claim for fraudulent inducement relates to the marketing of the Limited Partnership interests, the Court concludes that it is simply a recast securities fraud claim. Accordingly, the Court concludes that Plaintiffs’ claim for fraud in the inducement is precluded by the Martin Act, and grants Defendants’ motion to dismiss this claim for failure to state a cause of action.

SIXTH CAUSE OF ACTION - Unjust Enrichment

To the extent that Plaintiffs seek to recover the money invested in Peerstate, their claim for unjust enrichment is also simply a recast securities fraud claim. To the extent that Plaintiffs seek to recover the management fees received by Getz, the claim for unjust enrichment is merely an item of damages for the breach of fiduciary duty claim. See *105 East Second Street Assoc. v Bobrow*, 175 A.D.2d 746, 746-747 (1st Dept. 1991) (measure of damages for breach of fiduciary duty is the amount of loss sustained). Thus, Plaintiffs' claim for unjust enrichment is partially precluded by the Martin Act and partially redundant of the breach of fiduciary duty claim. Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' unjust enrichment claim for failure to state a cause of action.

In support of Plaintiffs' motion to reargue, Plaintiffs submit that the recent New York Court of Appeals case titled *Assured Guaranty (UK) Ltd. v. J. P. Morgan Investment Mgmt. Inc.*, 18 N.Y.3d 341 (2011) compels modification of the Prior Decision. Plaintiffs contend that, in *Assured Guaranty*, the Court of Appeals "has settled the long-time split in authority by finally determining that **the Martin Act does not preempt validly pleaded common law causes of action** [emphasis in original]" (Reisman Aff. in Supp. at ¶ 4). Plaintiffs argue that, in light of *Assured Guaranty*, the Court should modify the Prior Decision and reinstate the fraud and unjust enrichment causes of action.

In opposition, Defendants provide certain documentation for the Court's consideration, consisting of 1) the Complaint, 2) Peerstate's Confidential Private Offering Memorandum dated September 1996, 3) Peerstate's Original Limited Partnership Agreement, 4) the Subscription Agreements executed by Plaintiffs, 4) a letter from Getz, LLC, signed and acknowledged by Plaintiffs, and 5) Peerstate's Amended and Restated Limited Partnership Agreement dated as of January 1, 2004, signed by Plaintiffs. This documentation is annexed as Exhibits 1-6D to the Stechman Affidavit in Opposition.

Defendants oppose Plaintiffs' motion, submitting that *Assured Guaranty* does not warrant the modification of the Prior Decision because the previously dismissed causes of action are legally insufficient independent of any application of the Martin Act. Defendants contend, specifically, that 1) Plaintiffs failed to allege their fraud claim with adequate specificity, *e.g.*, by failing to allege which representations were made, which Defendant(s) made the specific misrepresentations and why the statements were fraudulent; and 2) Plaintiffs failed to satisfy the necessary elements of a fraud claim by failing to demonstrate a) reasonable and justifiable

reliance on any misrepresentation, particularly in light of the Plaintiffs' status as sophisticated investors and the language in the Offering Memorandum which instructed investors to conduct their own due diligence, b) the *scienter* element, *i.e.*, that Defendants knew of the falsity of the statements and intended to deceive Plaintiffs, and c) a direct causal connection between the alleged misrepresentations and Plaintiffs' injury.

Defendants also argue that Plaintiffs' fraud claim is time-barred, contending that the six-year statute of limitations period began to run when Plaintiffs decided to become limited partners in the Fund in 1996, 1997 and 2000. Alternatively, to the extent that Plaintiffs contend that they could not have discovered the fraud at those times, Defendants argue that Plaintiffs could have discovered the alleged fraud in 2004 when Plaintiffs were notified of the changes in the Partnership Agreement which included the establishment of an account with BMIS. Thus, as the Complaint was filed more than two (2) years after that notification, Plaintiffs' claims are still time-barred. Finally, Defendants submit that Plaintiffs' fraud claim is merely a restatement of their breach of contract claim, and should be dismissed on that basis.

Defendants also note that *Assured Guaranty* did not involve a fraud claim, but rather claims for breach of fiduciary duty and gross negligence. Moreover, the Court of Appeals in *Assured Guaranty* held that the Martin Act does not preclude a private litigant from bringing a nonfraud common law cause of action, and the Court of Appeals' brief reference to a fraud claim in "a single parenthetical comment" (Ds' Memo. of Law at p. 26) does not establish that Plaintiffs' fraud claim is not preempted by the Martin Act.

Defendants also argue that Plaintiffs' unjust enrichment claim is time-barred in whole or in part. Defendants submit that Plaintiffs have failed to allege facts that would permit a determination as to when the allegedly actionable conduct took place and contend that, to the extent that Defendants improperly received money or property prior to June 2003, the Sixth Cause of Action should have been dismissed. Defendants submit, further, that in light of the fact that the Court in the Prior Decision also concluded that the unjust enrichment claim was duplicative of the breach of the fiduciary duty claim, there exists a basis, unrelated to preemption under the Martin Act, for dismissal of the unjust enrichment cause of action.

In reply, Plaintiffs note that the Court of Appeals in *Assured Guaranty* held that 1) the Martin Act does not preclude a private litigant from bringing a nonfraud common law cause of

action; and 2) an injured investor may bring a common law claim, for fraud or otherwise, that is not entirely dependent on the Martin Act for its viability (Ps' Reply Memo. of Law at p. 5, citing *Assured Guaranty*, 18 N.Y.3d at 351, 353). Plaintiffs submit, further, that they have alleged a cognizable cause of action for fraud by alleging that 1) Defendants fraudulently induced Plaintiffs to invest in the Fund, maintain their investments in the Fund and contribute additional money to the Fund by making false representations which are detailed in the Complaint; and 2) Plaintiffs suffered injury in the form of a loss of over \$1 million.

RULING OF THE COURT

Pursuant to CPLR § 2221(e), a motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. The Court concludes that, in light of *Assured Guaranty*, a modification of the Prior Decision is warranted.

The Court of Appeals, in *Assured Guaranty*, concluded that its prior decisions in *CPC Intl. v. McKesson Corp.*, 70 N.Y.2d 268 (1987) and *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 N.Y.3d 236 (2009), when read together:

stand for the proposition that a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute. But, an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies.

18 N.Y.3d at 353.

To establish a *prima facie* case for fraud, plaintiff must allege that 1) defendant made a representation as to a material fact; 2) such representation was false; 3) defendant intended to deceive plaintiff; 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and 5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007).

CPLR § 3016(b) provides that where a cause of action is based upon misrepresentation, fraud, breach of trust, and certain other claims the circumstances constituting the wrong shall be stated in detail. The purpose of this pleading requirement is to inform a defendant of the incidents which form the basis of the action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d

486, 491 (2008). Where it is impossible to state the circumstances constituting the fraud in detail, CPLR § 3016(b) should not be so strictly interpreted as to prevent plaintiff from asserting an otherwise valid cause of action. *Id.* There is no requirement of unassailable proof at the pleading stage. Rather, the complaint must allege the basic facts to establish the elements of the cause of action. *Id.* at 492. CPLR § 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct. In certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud. *Id.* at 493. *See also Eurycleia Partners v Seward & Kissel*, 12 N.Y.3d 553 (2009).

An action based upon fraud shall be commenced within the greater of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it. CPLR § 213(8). A cause of action accrues, for the purpose of measuring the period of limitations, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to relief in court. *Poughkeepsie v. Espie*, 41 A.D.3d 701, 704 (2d Dept. 2007), *app. disp.*, 9 N.Y.3d 1003 (2007), quoting *Matter of Motor Veh. Acc. Indem. Corp. v. Aetna Cas.*, 89 N.Y.2d 214, 221 (1996). A cause of action alleging fraud accrues at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence. *Poughkeepsie* at 705 (town's cause of action for fraud accrued when it executed more expensive lease agreement that defendant, allegedly falsely, represented was necessary for unexpected renovations costs).

As noted in the Prior Decision, Plaintiffs allege that Defendants fraudulently induced them to invest in Peerstate by falsely representing the investment role Getz would be performing and failing to disclose their relationship with Madoff and the true risk of the investments. The Complaint contains extensive detail regarding Defendants' allegedly fraudulent conduct, including relevant documentation supplied by Defendants on which Plaintiffs allegedly relied to their detriment, and the injury suffered by Plaintiffs as a result of Defendants' alleged fraud. Moreover, the Court relies on its analysis in the Prior Decision regarding the equitable estoppel doctrine in concluding that the fraud cause of action is not time-barred. Based on the Court's conclusion that the allegations in the Complaint, which are set forth in detail in the Prior Decision, plead a cause of action for fraud, are not preempted by the Martin Act, and are not

time-barred, the Court modifies the Prior Decision, and denies Defendants' motion to dismiss the Third Cause of Action alleging fraud.

With respect to the sixth cause of action alleging unjust enrichment, the Court held in the Prior Decision that 1) to the extent that Plaintiffs seek to recover the money invested in Peerstate, their claim for unjust enrichment was simply a recast securities fraud claim that was precluded by the Martin Action; and 2) to the extent that Plaintiffs seek to recover the management fees received by Getz, their claim for unjust enrichment was merely an item of damages for the breach of fiduciary duty claim. Preliminarily, the Court concludes that this cause of action is not time-barred. The statute of limitations for unjust enrichment is six years, which starts to run upon the occurrence of the wrongful act giving rise to a duty of restitution. *Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp.*, 129 A.D.2d 501, 503 (2d Dept. 1993). The Court again relies on its analysis in the Prior Decision regarding the equitable estoppel doctrine in concluding that the unjust enrichment cause of action is not time-barred.

In consideration of the principles espoused in *Assured Guaranty*, the Court modifies the Prior Decision to the extent that the Court determines that, to the extent that Plaintiffs seek to recover the money invested in Peerstate, their claim for unjust enrichment is not precluded by the Martin Action. To the extent that Plaintiffs seek to recover the management fees received by Getz, however, the Court reaffirms its prior determination that Plaintiffs' claim for unjust enrichment may not proceed as it is merely an item of damages for the breach of fiduciary duty claim.

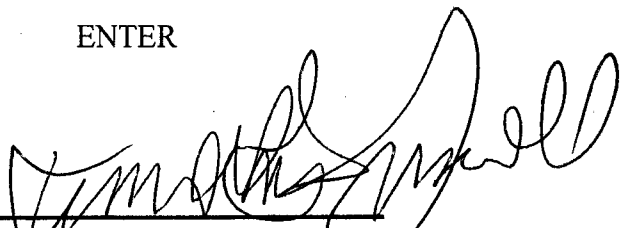
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a conference on April 3, 2012 at 9:30 a.m.

DATED: Mineola, NY
March 14, 2012

ENTER


HON. TIMOTHY S. DRISCOLL

J.S.C. **ENTERED**

MAR 27 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**