

Tierney v Frey
2012 NY Slip Op 32215(U)
August 20, 2012
Supreme Court, Suffolk County
Docket Number: 29792-2011
Judge: Emily Pines
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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY



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

Original Motion Date: 01-13-2012
Motion Submit Date: 05-08-2012
Motion Sequence No.: 002 MGCASEDISP

[x] FINAL
[] NON FINAL

SHANE TIERNEY,

Plaintiff,

Attorney for Plaintiff Tierney
Scott J. Fine, Esq.
Fine, Fine & Associates, LLP
151 West Carver Street
Huntington, New York, 11743

-against-

**DR. ROBERT FREY, FQS CAPITAL PARTNERS
(US) LP, FQS CAPITAL PARTNARS LLP (f/k/a
FREY QUANTITATIVE STAREGIES LLP) FREY
QUATITIATIVE SERIVES LIMITED (f/k/a TR
MONTAIGNE LTD.), FQS CAPITAL
MANAGEMENT (CAYMAN) LIMITED, FREY
MULTI-STRATEGY (CAYMAN) FUND LIMITED,
FREY MULTI STRATEGY (DELAWARE) FUND
LP and FQS CAPITAL PARTNERS (US) GP, LLC,**

Defendant.

Attorney for Defendants Dr. Frey, FQS
Capital Partners, (US) LP, FQS Capital
Partners, LLP, Frey Quantitative Services
Ltd, FQS Capital Mgt (Cayman) Ltd., and
FQS Capital Partners (US) GP, LLC
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X

In this action, plaintiff Shane Tierney (“Tierney”) asserts causes of action against defendants Dr. Robert Frey (“Frey”) and FQS Capital Partners (US) LP, FQS Capital Partners LLP, Frey Quantitative Services Limited, FQS Capital Management (Cayman) Limited, Frey Multi-Strategy (Cayman) Fund Limited, Frey Multi-Strategy (Delaware) Fund LP, and FQS Capital Partners (US) GP LLC, collectively “the Fund”, for breach of fiduciary duty, conversion, unjust enrichment, and a judgment to create a

constructive trust.¹ The claims against Defendants Frey Multi-Strategy (Cayman) Fund Limited and Frey Multi-Strategy (Delaware) Fund LP were later dismissed by stipulation. In motion sequence #002, Defendants move pursuant to CPLR 3211(a)(1), (a)(7), (a)(10), CPLR 1001, 1003, and 327, to dismiss the complaint as asserted against them.

FACTS

In his complaint, Tierney alleges that he met Patrick Austin (“Austin”), not a party to this action, in the last quarter of 2007, and that Austin solicited Tierney to participate in a short-term, high-yield investment being undertaken by Austin and Frey’s bank, Corporate Finance Montaigne Ltd. Tierney claims that Austin also offered Tierney a position at the bank as Client Services Manager, and represented to Tierney that as a necessary element to his employment, he must invest in a “fund of funds,” which refers to the six entities that comprise the Fund. Tierney alleges that Austin and Frey are the founders and majority owners of the Fund. In reliance upon Austin’s offer, Tierney sold his retail business, rented an apartment in London, and invested £20,000 into the short-term, high-yield investment. Tierney claims that Austin then urged him to reinvest his principal and earnings into the Fund, and that a further \$42,000 was necessary to meet the minimum buy-in requirement of \$100,000. Tierney claims that he thereupon advanced \$42,000 with the expectation that he would receive a 1% equity share in the Fund. Tierney alleges that over the course of 2008 and 2009, Austin refused to pay Tierney his salary, did not provide the various necessary paperwork to allow Tierney to: 1) become licensed in the United Kingdom to provide services for Austin’s bank; 2) establish residency in the U.K.; and 3) establish his taxation status. Austin also did not, according to Tierney, reimburse Tierney for expenses he advanced on the bank’s behalf.

Tierney further alleges that on several occasions during their relationship, Frey undertook to advise, guide, and assist Tierney throughout his dealings with Corporate Finance Montaigne and Austin. Tierney claims that he contacted Frey in 2009 about his concerns with Austin’s failure to follow through

¹ The Court would like to acknowledge the valuable aid of Tanying Dong, legal intern.

on his promises, and Frey assured him that he would speak to Austin. Tierney also alleges that Frey told him he had confidence in Austin and had found nothing suspicious after hiring a private investigator to look into Austin's background. Finally, Tierney alleges that the defendants forwarded to him a certificate of ordinary shares in "TR Montaigne, Ltd.," but they refuse to acknowledge that the certificate indicates his ownership in the Fund.

Plaintiff asserts four causes of action against Frey in his individual capacity as well as against the Fund.

Tierney's first claim seeks damages for breach of fiduciary duty against Frey in his individual capacity. Tierney alleges that he had no previous experience in finance or investment banking, while Frey had extensive expertise in these areas. Tierney goes on to allege that he reposed his trust and confidence in Frey, who accepted and ratified Tierney's reliance on his expertise when he told Tierney to rely on him to ensure the safety of Tierney's investments in the bank and the Fund, and thus there existed a fiduciary duty on the part of Frey. Tierney alleges that Frey breached this duty to him and caused him to be deprived of all the benefits associated with the ownership of and founder status in the Fund.

The second claim is asserted against all defendants, and alleges that Defendants have converted Tierney's indicia of his ownership in the Fund, notably the ownership certificates.

The third claim, asserted against all defendants, alleges that Defendants have been unjustly enriched by Tierney's investments.

Plaintiff's fourth claim is asserted against all defendants and alleges that he owns a portion of the Fund by reason of his investment and is entitled to judgment in the form of a court order creating a constructive trust in his ownership.

In their motion to dismiss, Defendants contend, among other things, that 1) the claim for breach

of fiduciary duty is not properly stated because there is no allegation that any of the defendants were involved in Austin's alleged misconduct, nor does Tierney legitimately allege any fiduciary duty owed to him by any of the defendants, as the allegation is based solely on Frey's statement that he would look into Tierney's concerns about Austin; 2) the claim for conversion is not properly stated because defendants never had possession, ownership or control over the investment by Tierney, and the complaint does not sufficiently identify or specify that any tangible property was converted by the defendants; 3) the claim for unjust enrichment fails to state a cognizable cause of action because there is no allegation that Tierney gave his investment to any of the named defendants; 4) the claim for judgment to create a constructive trust should be dismissed because Tierney fails to allege the necessary elements for creating a constructive trust, such as the existence of a fiduciary relationship; 5) the complaint should be dismissed on the ground of forum non conveniens, as the transactions at issue all took place in the United Kingdom; 6) the complaint should also be dismissed pursuant to CPLR 1001 and 1003, because Tierney failed to join Austin as a necessary party. Defendants state that Frey himself is a victim of Austin's misconduct and theft, and that Frey is now suing Austin in the United States District Court for the Eastern District of New York, alleging RICO violations, theft, fraud, and other misconduct.

In opposition to the motion, Tierney's counsel states that Defendants' motion pursuant to CPLR 3211(a)(1) must not be granted because Defendants offer no documentary evidence, and that the email and affidavit submitted in support of their motion does not qualify as documentary evidence. Tierney further states that the cause of action for breach of fiduciary duty is properly stated because he alleges that he place his trust and confidence in Frey who, having superior knowledge and experience accepted his fiduciary duty, and who failed to protect Tierney's investment by not alerting Tierney about Frey's own suspicions in regard to Austin, as evidenced by Frey's complaint against Austin in which Frey alleged that Austin misappropriated approximately \$2.4 million from him in early 2009.

With regard to the conversion claim, Tierney states that he clearly alleges a possessory right to 50,000 ordinary shares, which represent 1% of the Fund, but that Defendants refuse to deliver the original share certificate.

Tierney states that he properly alleged the claim of unjust enrichment. The fact that the money he invested with the Fund did not end up with the defendants is consistent with how Defendant's promoted the fund, and with how Frey himself invested with the Fund. He further states that Defendants should be compelled to hold his interest in the Fund in trust because he is unclear as to the exact nature of his ownership in the Fund.

Tierney contends that the requirement for joinder of a necessary party under CPLR 1001 does not apply in this case because a necessary party is one whose rights are necessarily affected by the outcome of the suit, and even if Austin is a joint tortfeasor, Austin's rights are not necessarily affected by the outcome of this action.

Lastly, Tierney contends that venue is proper in Suffolk County, as the defendants' promotional materials list their offices in Port Jefferson, New York. Moreover, Defendants themselves have brought an action against Austin in the Eastern District of New York. Tierney states that Frey resides in Suffolk County and many of the facts under which the allegations arose took place in Suffolk. In addition, Tierney states that litigating this case outside of New York would be a hardship for someone with limited means such as he has.

DISCUSSION

A court may always consider whether there has been a failure to join a necessary party, defined as a person who ought to be a party if complete relief is to be accorded between the persons who are parties to the action or a person who might be inequitably affected by a judgment in the action, and an action is subject to dismissal if there has been a failure to join a necessary party.

CPLR 1001(a), CPLR 1003, *City of New York v. Long Island Airports Limousine Serv. Corp.*, 48 NY2d 469, 475 [1979]. The allegations as laid out in Tierney's complaint plainly show that the role Austin played in the transactions involving Tierney overshadows any conduct on the part of Frey. Furthermore, Tierney's complaint strongly implies that Austin may have been the one who had dominion

and control over Tierney's investments. The allegation that giving money over to Austin to be ultimately invested in the Fund is consistent with the way Frey invested in the Fund does not negate the suggestion that Austin was the one in control of the money. A judgment in this case, without having joined Austin, may not grant Tierney the complete relief he seeks.

Austin is also a necessary party as he is one whose interests in a property may be affected by the court's decision. *See Censi v. Cove Landings, Inc.*, 885 NYS2d 359, 361 [2d Dept 2009]. Tierney's complaint alleges that Austin and Frey are founders, majority owners, and managers of the Fund. Should the court rule in Plaintiff's favor, Austin's rights as majority owner of the Fund would be affected. *See Davidoff v. Seidenberg*, 88 NYS2d 5, 6 [2d Dept 1949] (finding an officer of a corporation, its director, to be proper party defendant in an action to compel declaration of a dividend by the corporation). Therefore, this action cannot proceed without joining Austin as a necessary party.

In light of the foregoing, the parties' remaining contentions need not be considered. Defendant's motion to dismiss is hereby granted and Plaintiff's complaint is hereby dismissed in its entirety.

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

Dated: August 20, 2012
Riverhead, New York



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