MK Inves. Servs. Ltd. v Montague Morgan Slade Ltd.
2012 NY Slip Op 33285(U)
January 19, 2012
Supreme Court, New York County
Docket Number: 651489/10
Judge: Melvin L. Schweitzer

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

PRESENT: MELVIN L. SCHWEITZER PART 45
Justice

MK INVESTMENT SERVICES LIMITED, et al.,

Plaintiffs,

-against-

MONTAGUE MORGAN SLADE LTD., et al.,

INDEX NO. 651489/10

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

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

	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 to dismiss is DENIED in part and GRANTED IN PART; and further

This motion for summary judgment by plaintiffs is DENIED in part and GRANTED in part per the attached Decision and Order.

Dated: January 19, 2012

MELVIN L. SCHWEITZER, J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

MK INVESTMENT SERVICES LIMITED, ET AL.,	:	
Plaintiffs,	:	Index No. 651489/2010
-against-	:	DECISION AND ORDER
MONTAGUE MORGAN SLADE LTD., ET AL.,	:	Sequence No. 003
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

This case arises out of alleged misrepresentations that were made by defendants Anthony Heald, Michael Brown, and Gordon Spedding (collectively, the "Individual Defendants"), Montague Morgan Slade ("MMS"), Montague Morgan Slade Absolute Performance Fund PLC, Montague Morgan Slade Highly Diversified Fund PLC, Montague Morgan Slade 1095 Fund PLC (collectively, the "Corporate Defendants"), Montague Morgan Slade Holdings Ltd. and Mo-Mo Mama Limited (collectively, the "Additional Corporate Defendants"), Julia Heald, and the Brown Family Trust ("BFT") (collectively with the Individual Defendants, the Corporate Defendants and the Additional Corporate Defendants, the "Defendants") to induce plaintiffs Abdul Hussain Jaffar Rahmat Allah Al Lawati, Martin Baerschmidt, Guy Coghlan, Colin Jobe, Kevin Kaplan, Vinico Fashion LLC, David Shaun Killa, Maheshchandra Purshottam Pawani, Michael Peers, MK Investment Services Limited, Mutrah Insofoam Co., Paulo Alexandre Da Costa Pereira, Steel Panel LLC, Ramesh Sajnani, Tulsidas Sajnani, and Don Surrendra (collectively, the "Plaintiffs") to invest in the MMS funds. The Individual Defendants, Additional Corporate Defendants, Julia Heald, and the BFT move to dismiss the Plaintiffs'

second amended complaint (the "SAC") in its entirety pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction and CPLR 327 for *forum non conveniens*, or, in the alternative, move to dismiss Counts I-V of the SAC pursuant to CPLR 3211(a)(7) for failure to state a claim. The Plaintiffs bring Civil RICO claims in Counts I-III and common law fraud claims in Counts IV-V. The Corporate Defendants move to dismiss Counts I-V for failure to state a claim pursuant to CPLR 3211(a)(7). The Plaintiffs oppose the motions to dismiss and make a cross-motion for summary judgment on Counts VI-XIX of the SAC for breach of contract.

Background

The Plaintiffs allege in the SAC that the Defendants, working in concert, used false and misleading statements, including false and misleading statements transmitted via interstate mail as well as by phone and text message, to solicit investments for MMS and the funds and entities it controlled. The Plaintiffs further allege that rather than making the promised investments, the Defendants diverted the investments and ultimately refused to redeem them upon the Plaintiffs' demands despite a contractual obligation to do so.

The Plaintiffs claim that MMS is a sham corporation with sham subsidiaries and sham investment funds. The Plaintiffs contend that MMS and its related entities were part of a Ponzi scheme perpetrated by the Individual Defendants to defraud investors and steal their money. MMS was organized as a corporation in the Bahamas on May 12, 2000. Initially, Anthony Heald ("Heald") was MMS's sole owner but ownership was transferred in 2008 to Michael Brown ("Brown"). Gordon Spedding ("Spedding") was in charge of MMS's operations in the Middle East and opened bank accounts in MMS's name.

According to the Plaintiffs, MMS purported to offer hedge fund and other investment management programs to investors. MMS produced marketing materials that claimed that MMS

had years of success in managing hundreds of millions of dollars and that all investments were guaranteed. Additionally, MMS's prospectuses and supplements listed Wall Street addresses, first 67 Wall Street, and later 110 Wall Street, New York. The Plaintiffs contend that rather than maintaining an actual Wall Street office, MMS only had a virtual office located in New York and that this was a key misrepresentation that induced Plaintiffs to put their trust and money into MMS and its related funds.

Pursuant to the Defendants' misrepresentations, the Plaintiffs claim that they invested over $8 million with MMS and its funds. Subsequently, the investors received valuations of their investments, showing significant returns, on MMS letterhead that listed a New York address. However, when Plaintiffs attempted to redeem their investments pursuant to their rights under their investment contracts, MMS made excuses and delays. The Plaintiffs never received any of their investments back from MMS. The Plaintiffs allege that the Individual Defendants took millions of dollars out of the MMS and MMS Fund accounts and never actually invested the Plaintiffs' money.

The Plaintiffs allege that the Corporate Defendants and the Additional Corporate Defendants are mere alter egos of Brown, Heald, and Spedding, and have no real, independent existence. The Plaintiffs allege that Julia Heald and the BFT were two of the conduits that the Individual Defendants used to funnel to themselves money they allegedly stole from investors. These allegations are used by the Plaintiffs to put forth their alter-ego theory in order to pierce the corporate veil and obtain personal jurisdiction over many of the Defendants in New York. The Corporate Defendants have stipulated to jurisdiction in New York, but, as stated *supra*, the remaining Defendants reject the alter-ego theory and move to dismiss for lack of personal jurisdiction as well as for *forum non conveniens*.

Discussion

Motion To Dismiss

Personal Jurisdiction

Although the Corporate Defendants have stipulated to jurisdiction in New York, the remaining defendants argue that this court may not exercise *in personam* jurisdiction in this case. The defendants reside all over the world. Anthony and Julia Heald are residents of Ireland, Spedding is a resident of England, and Brown is a resident of California. The BFT is organized under the laws of California and the Additional Corporate Defendants are located in Ireland. As the party seeking jurisdiction over the Defendants, the burden is on the Plaintiffs to prove personal jurisdiction. *O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 (1st Dept 2003). The Defendants argue that the Plaintiffs have not pled sufficient facts to meet the burden of proof that would establish this court's jurisdiction over the Individual Defendants, the Additional Corporate Defendants, Julia Heald, and the BFT.

The Defendants contend that this court cannot assert personal jurisdiction over the Individual Defendants without any jurisdictional contacts that these defendants had beyond their roles as officers and directors of the Corporate Defendants. New York law holds that an individual cannot be subject to jurisdiction under CPLR 301 unless he is doing business in New York as an individual rather than on behalf of a corporation. *Brinkmann v Adrian Carriers, Inc.*, 29 AD3d 615, 617 (2d Dept 2006). The Individual Defendants argue that any actions they took in New York were in their corporate capacity and were taken on behalf of MMS. They argue that the Plaintiffs have presented no evidence that the Individual Defendants were acting in their own capacities in connection with the alleged conduct that would permit the exercise of personal jurisdiction over the Individual Defendants.

Additionally, jurisdiction under CPLR 301 is warranted only when the defendant is engaged in such a continuous and systematic course of doing business in New York as to warrant a finding of his presence in the jurisdiction. *Ball v Metallurgie Hoboken-Overpelt*, 902 F2d 194, 198 (2d Cir 1990). The Plaintiffs allege a number of facts that purport to demonstrate the presence of the Defendants in New York. These include allegations that Heald and Spedding entered into contracts in New York for MMS's office on Wall Street and paid fees for the virtual office pursuant to these contracts, that the Individual Defendants represented to investors that MMS had a "head office" in New York, and that the Individual Defendants created marketing materials and corresponded with investors on letterhead that listed a New York address for MMS. The Defendants assert that these allegations are merely conclusory and therefore the Plaintiffs have not met their burden of proof.

The Defendants argue that using a New York address on letterhead does not constitute doing business in New York. *See Beacon Enters., Inc. v Menzies*, 715 F2d 757, 763 (2d Cir 1983). The Defendants also argue that representations that MMS had a New York office does not constitute doing business in New York and should not be grounds upon which the court can assert personal jurisdiction over the Individual Defendants. *See Guile v Sea Island Co.*, 11 Misc2d 496, 498 (Sup Ct NY Co 1946) ("The fact that the defendant employed the words "New York office" in its literature is no evidence that it was in fact "doing business" at that office. At most this was a representation that it was doing business there, which in the absence of any circumstances creating an estoppel, cannot avail the plaintiff").

The Plaintiffs wish to assert personal jurisdiction over the Individual Defendants and the Additional Corporate Defendants through an alter-ego theory and wish to pierce MMS's corporate veil in order to gain access to the remaining defendants in this court. Under New York

law, an individual who owns a corporation can be subject to jurisdiction if the corporate veil can be pierced or if the corporation acted as an agent for the owner. *Ontel Prods., Inc. v Project Strategies Corp.*, 899 F Supp 1144, 1148 (SDNY 1995). The Plaintiffs assert both that the corporate veil should be pierced and that MMS and the Additional Corporate Defendants acted as agents for the Individual Defendants.

Generally, courts will pierce the corporate veil whenever necessary to prevent fraud or achieve equity. *Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 (1993) (citing *International Aircraft Trading v Manufacturers Trust Co.*, 297 NY 285, 292 (1948)). Piercing 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. *Id.* at 141. Additionally, courts look to factors such as lack of corporate formalities, commingling of funds, and self-dealing to assess the first prong of the standard set out in *Morris*. *See International Credit Brokerage v Agapov*, 249 AD2d 77, 78 (1st Dept 1998).

In an effort to meet this burden, the Plaintiffs have alleged in the SAC, *inter alia,* that the whole purpose of MMS was to defraud investors, that the Plaintiffs' money was never invested as promised but was transferred to the Individual Defendants through their various corporate entities, that Brown is the sole owner, director, and officer of MMS and that both Brown and Heald have powers of attorney to act on behalf of MMS, and that the Additional Corporate Defendants were controlled by the Individual Defendants and used to transfer funds to the Defendants. The Defendants argue that the Plaintiffs have not pled sufficient facts to uphold their alter ego theory of jurisdiction. However, courts must extend every favorable inference to a

complaint that seeks to pierce the corporate veil and such a complaint should be upheld unless it is totally devoid of solid nonconclusory allegations. *Id.*

The Plaintiffs also seek to assert jurisdiction over the Individual Defendants, the Additional Corporate Defendants, Julia Heald, and the BFT as co-conspirators. In New York, jurisdiction over non-resident defendants may be established on the basis of the New York acts of a co-conspirator. *Best Cellars Inc. v Grape Finds at Dupont, Inc.*, 90 FSupp2d 431, 446 (SDNY 2000). To do so, the Plaintiffs must (1) establish a *prima facie* case of conspiracy; (2) allege specific facts warranting the inference that the defendant was a member of the conspiracy; and (3) demonstrate the commission of an overt act in New York during, and pursuant to, the conspiracy. *Id.*

A *prima facie* showing of conspiracy in New York requires allegations of a primary tort and four additional elements: (1) a corrupt 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 damage or injury. *Id.* The Plaintiffs claim that they have sufficiently pled the requirements for a showing of conspiracy by alleging that the Defendants set up sham entities and a New York office, fraudulently induced Plaintiffs to invest in MMS funds, and fraudulently conveyed the funds to themselves through various MMS entities. The Defendants assert that the Plaintiffs have failed to allege fraud against each of the defendants with the required particularity. *See People ex rel Spitzer v H&R Block, Inc.*, 2007 WL 2330924, at *4 (Sup Ct NY Co July 9, 2007).

It is the opinion of the court that the Plaintiffs allegations in the SAC are not entirely devoid of solid nonconclusory allegations and that the Plaintiffs have shown their position not to be frivolous. *See Amigo Foods Corp. v Marine Midland Bank- New York*, 39 NY2d 391, 395

(1976). The Plaintiffs should have further opportunity to prove other contacts and activities of the Defendants that would support the alter ego theory of jurisdiction and conspiracy. Accordingly, the motion to dismiss for lack of personal jurisdiction is denied without prejudice pending jurisdictional discovery. The Defendants may renew the CPLR 3211(a)(8) motion after discovery.

Forum non Conveniens

The Individual Defendants, the Additional Corporate Defendants, Julia Heald, and the BFT also seek to dismiss the SAC on *forum non conveniens* grounds. In determining whether a forum is inconvenient, courts consider (1) the burden on the New York courts; (2) the potential hardship on the defendant; (3) the unavailability of an alternative forum in which the plaintiff may bring the action; (4) whether the parties are nonresidents; (5) the location of the transaction giving rise to the action; and (6) the location of the evidence and the witnesses. *See Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984).

The Defendants argue that the Individual Defendants, the Additional Corporate Defendants, Julia Heald, and the BFT are all located far from New York and that the Plaintiffs reside all over the world, in Dubai, the United Kingdom, and Oman. The Defendants also argue that none of the witnesses or relevant documents are located in New York and that the transaction giving rise to the action does not have a sufficient nexus to New York to justify forum here. *See Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 294 (1st Dept 2005). The Plaintiffs counter that New York would not be an inconvenient forum because the Individual Defendants have traveled to New York in connection with MMS and will have to travel here regardless for the proceedings concerning the Corporate Defendants, who have consented to jurisdiction and venue in this court.

It is well established that unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. *Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 (1st Dept 1991). Accordingly, the *forum non conveniens* motion is denied without prejudice pending jurisdictional discovery. However, if it is held that there is jurisdiction over the Individual Defendants, the Additional Corporate Defendants, Julia Heald, and the BFT through veil piercing, the court in all probability will find that these defendants are bound by the Corporate Defendants' consenting to venue.

RICO Claims

Counts I-III of the Plaintiffs' allegations claim that the Defendants' fraudulent representations relating to securities and their alleged acts of money laundering and unlawful money transfers constitute violations of 18 USC § 1962, also known as the Racketeer Influenced and Corrupt Organizations Act ("RICO"). To state a claim for damages under RICO, the Plaintiffs must allege the existence of seven elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce. *Moss v Morgan Stanley, Inc.*, 719 F2d 5, 17 (2d Cir 1983). The Plaintiffs' must then show that they were injured in their business or property by reason of the RICO violation. *Id.*

The Defendants argue that the RICO claims fail because the alleged predicate acts constitute securities fraud. The Private Securities Litigation Reform Act of 1995 (the "PSLRA") eliminates as predicate acts for RICO any conduct that would be actionable as securities fraud. 18 USC 1964(c). New York courts hold that alleged misrepresentations made by mail and wire undertaken to induce plaintiff to engage in securities may not constitute predicate acts under

RICO and are barred by the PSLRA as a matter of law. *See Blythe v Deutsche Bank AG*, FSupp2d 274, 281 (SDNY 2005); *Stechler v Sidley Austin Brown & Wood*, 382 FSupp2d 580, 597-98 (SDNY 2005); *ABF Capital Mgmt. v Askin Capital Mgmt., LP*, 957 F Supp 1308, 1318-20 (SDNY 1997).

It is the opinion of the court that Counts I-III of the Complaint are barred by the PSLRA because the allegations constitute violations that are actionable as securities fraud. The Plaintiffs argue that the PSLRA does not function as a bar to RICO claims where it cannot be established that the investments were actually made in securities. However, it is clear from the Complaint that the allegedly fraudulent representations made by the Defendants were allegedly made to induce Plaintiffs to invest in purported hedge funds. This constituted the sale of investment contracts, which are securities for the purpose of PSLRA.

Plaintiffs also argue that while Count I alleges RICO violations based on alleged mail and wire fraud, Count II and III claim RICO violations based on alleged money laundering and unlawful money transfers, which should not be barred by the PSLRA. However, having alleged that all of the Defendants' acts were part of a single fraudulent scheme, the Plaintiffs cannot surgically separate the scheme into its various component parts. *See Seippel v Jenkens & Gilchrest PC*, 341 FSupp2d 363, 373 (SDNY 2004). The Plaintiffs' overarching theory of the case is that the Defendants made fraudulent representations regarding securities with the intention of inducing Plaintiffs to invest and to steal the money through laundering activities and unlawful money transfers. This theory of the case counts as a single scheme and the securities aspects of the fraud must be aggregated with the non-securities aspects. *See Gilmore v Gilmore*, 2011 WL 3874880, at *6 (SDNY Sept 28, 2010). Accordingly, the PSLRA acts as a bar to the whole of the Plaintiffs' RICO claims.

Common Law Fraud

The Plaintiffs' fourth cause of action alleges common law fraud against the Defendants on the basis of false statements concerning MMS's location on Wall Street, the amount of funds under management, the past performance of the funds, that money transferred from Plaintiffs to Defendants was being invested, that the investments were guaranteed, and the false valuations of Plaintiffs' investments and diversion of the funds. The fifth cause of action alleges common law fraud on the basis of the Defendants' false statements regarding redemption of the Plaintiffs' investments. CPLR 3016(b) requires claims based on fraud to be alleged with particularity. *Small v Lorillard Tobacco Co.*, 94 NY2d 43 (1999). Plaintiffs must plead with sufficient particularity the elements of common law fraud, which include a false representation of a material fact, with intent to defraud, reasonable reliance on the misrepresentation, and causation of damages to the plaintiff. *Id.* at 57.

The Defendants claim that the Plaintiffs have failed to plead with sufficient particularity these elements of fraud. However, the requirements of CPLR 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct. *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 (2008). It is the opinion of the court that the Plaintiffs have met their pleading burden regarding the Corporate Defendants, the Individual Defendants, the Additional Corporate Defendants and the BFT, but have failed to plead with sufficiently particularity as to the alleged conduct of Julia Heald.

The Plaintiffs have alleged that the Individual Defendants, Corporate Defendants, Additional Corporate Defendants, and the BFT made false representations of material facts such as the location of the MMS offices, the nature of the investments, and distributed to Plaintiffs false prospectuses and valuations of the investments. The Plaintiffs have sufficiently alleged

that these misrepresentations were made with the intent to defraud the Plaintiffs and induce them to transfer funds to the Defendants. Allegedly relying on these misrepresentations, the Plaintiffs did transfer the funds to the Defendants and allegedly suffered damage as a result in the amounts enumerated in the SAC. The Plaintiffs have adequately pled how various entities controlled by the Individual Defendants transferred the Plaintiffs' funds with the alleged purpose of concealing and stealing the money. The SAC has pled more than enough facts to maintain a claim of common law fraud against these particular defendants.

However, the SAC has not pled sufficient facts to sustain a claim of fraud against Julia Heald. The only claims in the SAC regarding Julia Heald are that she is the wife of Anthony Heald and received payments from MMS bank accounts. This is not enough to elicit a reasonable inference of fraud or knowledge of the fraud on the part of Mrs. Heald. Accordingly, the Defendants' motion to dismiss Counts IV and V of the SAC is denied as regards the Individual Defendants, the Corporate Defendants, the Additional Corporate Defendants, and the BFT, and is granted as regards Julia Heald.

Summary Judgment

Sixth Cause of Action

This cause of action relates to settlement agreements MMS made with certain plaintiffs. Only partial payment has been made thereunder. The remaining payments are in default. There is no material issue of fact with respect to this claim and summary judgment is granted against MMS. However, there are numerous questions of material fact surrounding the allegations of this claim as it relates to Heald, Brown and Spedding. Therefore, summary judgment against Heald, Brown and Spedding is denied.

Seventh through Nineteenth Causes of Action

These causes of action relate to the failure of defendant MMS and affiliates to redeem plaintiffs' investments. There is no contention on the part of MMS that the relevant prospectuses do not provide for the redemption of the plaintiffs' investments. However, MMS argues that there are disputes as to the terms of redemption in the agreements between plaintiffs MMS and the affiliates, and, therefore, summary judgment cannot be granted.

In particular, MMS relies on language in the prospectuses to the effect that redemption may take longer than 10 days under certain circumstances, in an effort to create a question of fact. This carve out was created to permit MMS and the affiliates to redeem investments in other hedge funds in an orderly manner to facilitate redeeming plaintiffs' investments. MMS and the affiliates proffer no evidence that this was ever the case, and plaintiffs point out that plaintiffs have been waiting a year or longer to receive their redemption amounts.

Further, MMS and the affiliates raise issues as to whether plaintiffs have properly made demands for redemption. After review of the parties' submissions, the court cannot identify any issue of material fact related to the propriety of plaintiffs' demands for redemption. They were clearly made in a manner compliant with the relevant contract.

In conclusion, the court finds no issue of material fact with respect to the claims of the relevant plaintiffs against MMS and, accordingly, grants summary judgment on plaintiffs' seventh through nineteenth causes of action against MMS and Montague Morgan Slade 1095 Fund PLC, which have stipulated to jurisdiction in New York. However, the court finds numerous questions of material fact surrounding these causes of action as they relate to the affiliates of MMS who have not stipulated to jurisdiction and as they relate to Heald, Brown and

Spedding. Consequently, summary judgment against such affiliates and Heald, Brown and Spedding is denied.

Accordingly, it is

ORDERED that defendants' motion to dismiss for lack of personal jurisdiction is denied; and it is further

ORDERED that defendants' motion to dismiss for *forum non-conveniens* is denied; and it is further

ORDERED that defendants' motion to dismiss plaintiffs' RICO claims is granted; and it is further

ORDERED that defendants' motion to dismiss the common law fraud claims is denied, except that it is granted with respect to Julia Heald; and it is further

ORDERED that plaintiffs' motion for summary judgment against MMS and Montague Morgan Slade 1095 Fund PLC on its sixth through nineteenth causes of action is granted; and it is further

ORDERED that plaintiffs' motion for summary judgment on its sixth through nineteenth causes of action against MMS affiliates who have not stipulated to jurisdiction in New York and Heald, Brown and Spedding is denied.

Dated: January 19, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.