

Vilar v Rutledge

2012 NY Slip Op 33402(U)

March 9, 2012

Sup Ct, New York County

Docket Number: 651494/11

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CE Ramos
Justice

PART 53

Index Number : 651494/2011
VILAR, ALBERTO
vs
RUTLEDGE, JOHN
Sequence Number : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with
accompanying Memorandum Decision.

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

Dated: 3/19/12

Charles E. Ramos, J.S.C.

CHARLES E. RAMOS

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X

ALBERTO VILAR, GARY TANAKA, and
AMERINDO INVESTMENT ADVISORS, INC.,

Plaintiffs,

Index No. 651494/11

-against-

JOHN RUTLEDGE, CHARLES PARKER and
MUNDER CAPITAL MANAGEMENT, INC.,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

In this action involving an investment advisor's rights and obligations concerning a technology investment fund, defendant, sued here as Munder Capital Management, Inc.¹ (Munder), moves to dismiss the complaint against it (motion sequence 001).

Defendants John Rutledge (Rutledge) and Charles Parker (Parker) move together to dismiss the complaint as to themselves (motion sequence 002). Plaintiffs Alberto Vilar (Vilar), Gary Tanaka (Tanaka) and Amerindo Investment Advisors, Inc. (Amerindo Advisors) cross-move for a default judgment, claiming that all defendants have failed to answer Amerindo Advisors' complaint.

I. Background

Rutledge and Parker, along with Tanaka, were directors in an

¹ Munder claims that its proper name is Munder Capital Management.

investment company known as Amerindo Funds Inc. (Company). The Company is described as an open-ended investment company registered with the Securities and Exchange Commission (SEC), which offered shares to the public through the Amerindo Technology Fund (Fund), a mutual fund dealing predominately in technology stock. Plaintiffs describe the Company as a Maryland corporation. Vilar and Tanaka wholly owned Amerindo Advisors, which contracted in 1996 to be the Fund's investment advisor. According to defendants, Amerindo Advisors is at the present time a suspended California corporation.

Vilar and Tanaka were arrested in May 2005 for securities fraud, and are currently serving time in federal prison (see *United States v Vilar*, 05 Cr 621 [RJS][SD NY]). Although the Indictment against them alleged a broad spectrum of financial wrongdoing, causing the loss of millions of investor dollars involving different investing schemes, the Fund does not appear to have been a target of Vilar and Tanaka's malfeasance. The Indictment was followed by a Superceding Indictment involving further fraudulent acts (see *United States v Vilar*, 05 Cr 621, 2007 WL 1075041 [SD NY 2007]).

The SEC filed a civil action against Vilar and Tanaka in May 2005, shortly after their arrests (see *SEC v Amerindo Investment Advisors Inc.*, 05 CV 5231 [SD NY]).

After Vilar and Tanaka were arrested, Rutledge and Parker,

calling themselves the "Independent Directors" of the Company (as Tanaka had an interest in Amerindo Advisors as well as in the Company), effected the removal of Amerindo Advisor as the Fund's advisor, as of the expiration of its contract, which occurred mere days after Vilar and Tanaka's arrests. Rutledge and Parker, as the "Independent Directors," did not renew the contract.

Defendants maintain that the arrests of Vilar and Tanaka threatened the Fund's reputation, causing significant investor unrest. In order to meet the challenge of stabilizing the Fund, Rutledge and Parker retained Munder as interim investment advisor. Rutledge and Parker then approved an Agreement and Plan of Reorganization, with the intent of merging the Fund with the Munder Internet Fund.

The matter was put to a vote of the Fund's shareholders, who, according to Munder, overwhelmingly approved the merger, and the execution of an investment advisory agreement with Munder.

According to Munder, the federal court in the action against Vilar and Tanaka entered orders of forfeiture against these parties totaling in excess of \$54 million. The court entered an Order of Forfeiture of Substitute Assets in which Vilar and Tanaka forfeit, among other things, all "right, title and interest" in "Amerindo Advisors, Inc. and Amerindo Advisors Inc.," among many other assets (Billy Aff., Ex. 17).

Despite the fact that the events described above occurred in

2005, plaintiffs now bring this action claiming that Rutledge and Parker committed fraud in securing the merger of the Fund with Munder. In the complaint, plaintiffs maintain that Amerindo Advisors, prior to Vilar and Tanaka's arrests, was contemplating a sale of the Fund, and, because of the Fund's exceptional performance under Amerindo's hand, expected to realize a "projected sale price" that "would have ranged from \$10.1 million to 18.5 million" (Complaint, Munder Notice of Motion, Ex. A, ¶ 20).

In the complaint, plaintiffs allege that Rutledge and Parker committed fraud by concluding the merger with Munder absent consideration, despite the Fund's considerable worth. Plaintiffs allege, in short, that the transfer of the Fund to Munder, and the eventual merger of the Fund with Munder, were accomplished illegally, without the requisite meetings of the Company's board of directors, which would have included Tanaka, and that these actions, including SEC filings allegedly falsely asserting that votes of the board of directors had taken place, amounted to fraud. Somehow, plaintiffs claim that these transactions caused them to be injured, based on some unarticulated right they held in the Fund.

The complaint also alleges a cause of action against Munder for aiding and abetting fraud (second cause of action); breach of fiduciary duty against Rutledge and Parker (third cause of

action); and conversion (fourth cause of action), and negligence (fifth cause of action) against all defendants. On each of the causes of action, plaintiffs claim damages of \$15 million, plus punitive damages.

Defendants² argue that plaintiffs lack standing or capacity to sue, due to the fact that Vilar and Tanaka no longer have an interest in Amerindo Advisors, and because Amerindo Advisors lacks capacity to sue as a suspended corporation in California; that plaintiffs cannot bring these claims as a result of the application of the Investment Company Act of 1940 (ICA) section 15(c) (15 USC § 80a-15[c]) to the facts of this matter, which section defendants read to give the independent directors of the Fund control over the decision to retain an advisor; that plaintiffs' claims are time-barred; and that plaintiffs cannot, in any event, state a cause of action on any of their claims.

II. Discussion

A. Plaintiff's Cross-Motion for a Default Judgment

Plaintiffs' cross-motion is addressed here first because its resolution affects the defendants' two motions. Plaintiffs argue that defendants have addressed their motion to the wrong corporation, and so, have failed to respond to the complaint, entitling plaintiffs to a default judgment. Plaintiffs now

² Rutledge and Parker, while presenting their own memorandum of law, join in Munder's arguments.

maintain that there are actually two Amerindo Advisors entities: one with a comma between "Advisors" and "Inc.," a Panama company which plaintiffs say is the company which advised the Fund (and which they call Amerindo Panama), and Amerindo Advisors Inc. (without a comma), a California corporation, which plaintiffs call Amerindo U.S., which is the entity towards which the present motions are, allegedly, directed. That is, allegedly, defendants are raising arguments against a company which is not a party to this action. It is plaintiffs' contention that defendants never answered as to the proper entity, Amerindo Advisors, Inc. (so-called Amerindo Panama), and so, have defaulted, entitling plaintiffs to a default judgment.

Plaintiffs argue that the distinction between the two companies appears throughout many documents related to the criminal charges and elsewhere, and so, the information was easily available to defendants in order to allow them to respond to the correct entity. A simple reading of the complaint, however, puts the lie to plaintiffs' attempts at legalistic legerdemain.

In the complaint, plaintiffs identify plaintiff "Amerindo Advisors, Inc." (with a comma) as "a corporation organized and existing pursuant to the laws of New York,"³ with no mention of

³ While the complaint identifies Amerindo Advisors as a New York corporation, the memorandum of law cites it as a California corporation. Plaintiffs never refer to Amerindo Advisors as a

Panama (Complaint, ¶ 3), and say further that "Amerindo Advisors, Inc." (which they refer to throughout the complaint only as "Amerindo Advisors"), was the manager of the Fund (*id.*, ¶ 7).

Further, the agreements between the parties are executed by "Amerindo Advisors Inc.," indicating that the California company is the party with which the Fund contracted (see Billy Aff., Ex 5, 6). In the "Amendment to Investment Advisory Agreement," Amerindo Advisors Inc. identifies itself as a California corporation (*id.*, Ex. 6).

Thus, it is plaintiffs, in their complaint, who have presented Amerindo Advisors, Inc. as the American corporation which managed the Fund. Plaintiffs cannot now claim that Amerindo Advisors, Inc. is not a California company, and was not the Fund's advisor; their entire complaint hinges on the fact that it was both of these things. Therefore, there is no mistake, and there has been no default.⁴ If plaintiffs insist that Amerindo Panama is the plaintiff they wish to pursue in this action, the action must be dismissed as to Amerindo Panama, which

New York corporation in any of their papers after the complaint.

⁴ The Court here notes that, in the Government Sentencing Memorandum concerning Vilar and Tanaka, at 2 (Supp. Jason O. Billy Aff., Ex. 1), the government states, in speaking of Vilar and Tanaka's various million-dollar frauds, that Vilar and Tanaka, "[i]n furtherance of their scheme...created phony shell corporations in Panama, [and] employed confusing corporate names (differing from each other by only the presence or absence of a comma) to mislead investors..."

had, apparently, nothing to do with the Fund, and hence, has no standing. If the caption needs to be changed to indicate that the Amerindo Advisors pursuing this action is the California corporation which managed the Fund, that can be arranged. The Court is not interested in perpetuating Vilar and Tanaka's corporate shell games.

B. Motions to Dismiss

On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]; see also *Leon v Martinez*, 84 NY2d 83 [1994]).

A motion brought pursuant to CPLR 3211(a)(1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998], quoting *Leon v Martinez*, 84 NY2d at 88; *Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007] ["[t]he documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law"]).

i. Standing

Defendants maintain that plaintiffs have no standing because Vilar and Tanaka no longer have any interest in Amerindo Advisors, and never had an ownership interest in the Fund. Further, they note that Amerindo Advisors has been suspended as a

corporation in California, and so, cannot bring suit against anyone.

"The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution" (*Security Pacific National Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006]). "The most critical requirement of standing...is the presence of 'injury in fact - an actual legal stake in the matter being adjudicated'" (*id.*, quoting *Society of Plastics Industries v County of Suffolk*, 77 NY2d 761, 772 [1991]).

Under the terms of the Forfeiture of Substitute Assets (Billy Aff., Ex. 17), Vilar and Tanaka surrendered all interest in both Amerindo Advisors Inc. and Amerindo Advisors, Inc. No argument convinces this Court that a suit such as this one is not an "asset" under this document. Vilar and Tanaka cannot sue on behalf of any of the two Amerindo entities.⁵

Further, Amerindo Advisors, as investment advisors, never had a stake in the Fund to sell. As the United States Supreme Court has noted, a mutual fund belongs to its shareholders, not to its investment advisors (*Jones v Harris Associates L.P.*,

⁵ This Court does not know if there are any other Amerindo incarnations.

___US___, 130 S Ct 1418 [2010]). Section 15 of the ICA creates a fiduciary relationship on the part of the advisor towards the investment company which it advises (15 USC § 80a-35[b]). It does not create a property right on the part of the investment advisor.

Plaintiffs have no standing to sue because they have no right to control the Fund, and no property right in the Fund. They cannot sue on behalf of the Fund, and are not claiming to do so. If the Fund has been injured by defendants' actions, redress is not possible by a suit brought by the Fund's investment advisor.

Amerindo Advisors, the party with which defendants contracted, is a California corporation which is currently suspended (see *Billy Aff.*, Ex. 3). The printed record of the suspension (*id.*) does not state the reason for the suspension. Regardless, a suspended California corporation lacks capacity to bring a lawsuit (*Cadle Co. v World Wide Hospitality Furniture, Inc.*, 144 Cal App 4th 504 [Cal App 2d Dist 2006]; see also *Signal Data Processing, Inc. v The Rex Humbard Foundation, Inc.*, 99 Ohio App 3d 646, 650 [Ohio App 9th Dist 1994]["[a] suspended California corporation may not bring suit..."]). Therefore, Amerindo Advisors is not a proper plaintiff herein.

ii. Fraud and Aiding and Abetting Fraud

Fraud requires a showing of a representation of "a material

existing fact, falsity, scienter, deception and injury [internal quotation marks and citation omitted]" (*New York University v Continental Insurance Company*, 87 NY2d 308, 318 [1995]; see also *Serino v Lipper*, 47 AD3d 70 [1st Dept 2007], lv dismissed, 10 NY3d 930 [2008]). Each of these elements must be pled with particularity (CPLR 3016[b]; *Papp v Debbane*, 16 AD3d 128 [1st Dept 2005]; *La Salle National Bank v Ernst & Young LLP*, 285 AD2d 101 [1st Dept 2001], rearg denied, 2001 NY App Div LEXIS 11868).

Plaintiffs have failed to plead a cause of action against Rutledge and Parker for fraud. Their premise, that Rutledge and Parker conducted a "fraudulent transfer of the subject investment fund" (Plaintiffs' Memorandum of Law, at 12), by giving away the Fund, a valuable asset, to Munder, for no consideration, does not allege any misrepresentations made to plaintiffs upon which they relied to their detriment. There is no particularization of any fraudulent activity at all, only a complaint that Rutledge and Parker handled the Fund in a way that harmed the Fund, and that plaintiffs, as the Fund's champions, have a right to a significant financial recovery from Rutledge and Parker.

Plaintiffs complain that Munder's memorandum of law is "sanctionably false" by asserting that plaintiffs' claims appear to be that plaintiffs had an "inviolable right to manage the funds" (Plaintiffs' Memorandum of Law, at 10, quoting Munder's Memorandum of Law, at 13), and that Rutledge and Parker's

memorandum of law suffers from the same disability. However, plaintiffs do not allege any particular right in the Fund that could allow them to bring a claim of fraud on its behalf.

As plaintiffs have failed to plead a cause of action in fraud against Rutledge and Parker, there is no cause of action against Munder for aiding and abetting fraud (*Small v Lorillard Tobacco Co.*, 94 NY2d 43 [1999][absent independent tort there is no basis for aiding and abetting theory of action]).

iii. Breach of Fiduciary Duty, Negligence and Conversion

"One of the abiding principles of the law of corporations is that the issue of corporate governance...is governed by the law of the State in which the corporation is chartered..." (*Hart v General Motors Corp.*, 129 AD2d 179, 182 [1st Dept 1987], *lv denied*, 70 NY2d 608; *BBS Norwalk One, Inc. v Raccolta*, 60 F Supp 2d 123, 129 [SD NY 1999], *affd* 205 F3d 1321 [2d Cir 2000]["[u]nder New York law, issues relating to the internal affairs of a corporation are decided in accordance with the law of the state of incorporation"). The internal affairs doctrine is triggered by a cause of action for breach of a fiduciary duty owed to a corporation (*BBS Norwalk One, Inc. v Raccolta*, 60 F Supp 2d 123, *supra*). The internal affairs doctrine applies as to the "relationship between shareholders and directors" (*Graczykowski v Ramppen*, 101 AD2d 978, 979 [3d Dept 1984]). In the present case, Maryland law applies to all actions questioning

the actions of the Company's directors, as Maryland is the state of the Company's incorporation.

Plaintiffs' breach of fiduciary duty claim raises the business judgment rule, as practiced in Maryland. "This standard recognizes that the conduct of the corporation's affairs are placed in the hands of the board of directors and if the majority of the board properly exercises its business judgment, the directors are not ordinarily liable [internal quotation marks and citation omitted]" (*Boland v Boland*, 423 Md 296, 328, 31 A3d 529, 548 [2011]). "In Maryland, 'the business judgment rule creates a presumption that directors act in good faith'" (*Bennett v Damascus Community Bank*, 2006 WL 2458718, *6, 2006 Md Cir Ct LEXIS 14, 17 [Md Cir Ct 2006], quoting *Zimmerman v Bell*, 800 F2d 386, 392 [4th Cir 1986]).

As defendants point out, breach of fiduciary duty is not a "separate tort" in Maryland (*International Brotherhood of Teamsters v Willis Corroon Corp. of Maryland*, 369 Md 724, 728, n 1 [2002]). The breach must give rise to another tort or contract claim (*id.*).

Here, plaintiffs attempt to plead causes of action for conversion and negligence. Both could be combined with a breach of fiduciary duty claim (see e.g. *Vinogradova v Suntrust Bank, Inc.*, 162 Md App 495, 875 A2d 222 [Md App 2005][breach of fiduciary duty and negligence claim construed as a single cause

of action)).

Conversion, under Maryland law, "is an intentional tort...is defined as any distinct act of ownership or dominion exerted by one person over the personal property of another in denial of his right or inconsistent with it [internal quotation marks and citations omitted]" (*Lasater v Guttman*, 194 Md App 431, 446, 5 A3d 79, 88 [Md App 2010]). To establish a claim, "the plaintiff must first demonstrate that he or she had a property interest in property that was allegedly converted" (*Brass Metal Products, Inc. v E-J Enterprises, Inc.*, 189 Md App 310, 339, 984 A2d 361, 378 [Md App 2009]). In the present case, plaintiffs cannot point to any property belonging to them personally which defendants converted. The Fund was never plaintiffs personal property. Effecting the merger of the Funds did not deprive plaintiffs of anything, and no breach of fiduciary duty, or action for conversion, arises from the defendants' actions after Vilar and Tanaka's arrests.

A cause of action for negligence, under Maryland law, must adhere to the following elements: "(1) that defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty" (*Blondell v Littlepage*, 413 Md 96, 119, 991 A2d 80, 94 [2010]). No negligence has been

shown.

Plaintiffs fail to allege any duty running to them from defendants to handle the Fund in any particular way, and do not allege how they were injured by any act committed by defendants. The Fund simply did not belong to plaintiffs, and they had no stake in its future.

The present action is not a shareholder derivative action. It is brought by a mutual fund's investment advisor, and one director, complaining about the disposition of the fund by the majority of the directors, after an overwhelming vote of the fund's shareholders in favor of the debtors' actions. It is puzzling to this Court that plaintiffs have any belief whatsoever that they have been harmed by any action of the defendants in failing to act in a manner which plaintiffs' claim would have been more advantageous to the shareholders. Plaintiffs were not shareholders in the Fund, and defendants owed no fiduciary duty to plaintiffs.

Plaintiffs have also failed to allege that any business judgment made by defendants affected them in any way, and have not convinced the Court that concluding a merger of the Fund with Munder, a proven, successful fund, instead of selling the Fund off, was an unreasonable move on defendants' part, or that any bad faith was involved. There is, in sum, no cause of action for breach of any fiduciary duty, conversion or negligence. There is

no cause of action at all.

As a result of the foregoing, it is not necessary to discuss the application of the statute of limitations to these claims, or to determine what state's law would apply to such an argument.

III. Conclusion

Due consideration of each motion before the Court calls for the dismissal of the action as to all defendants. Plaintiffs' cross-motion for a default judgment is denied.

Accordingly, it is

ORDERED that the motion to dismiss the complaint brought by defendant Munder Capital Management, sued here as Munder Capital Management, Inc., is granted, and the complaint is dismissed as to this defendant with costs and disbursements to this defendant as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further

ORDERED that the motion to dismiss the complaint brought by defendants John Rutledge and Charles Parker is granted, and the complaint is dismissed as to these defendants with costs and disbursements to these defendants as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further


ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiffs' cross-motion for a default judgment

is denied.

Dated: March 9, 2012

ENTER:



CHARLES E. RAMOS