

Gregor v Rossi
2013 NY Slip Op 33182(U)
December 12, 2013
Sup Ct, New York County
Docket Number: 651432/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

DEBORAH A. GREGOR AND CARL GERARDI,

INDEX NO. 651432/2013

Plaintiffs,

MOTION DATE _____
MOTION SEQ. NO. 007

- v -

MOTION CAL. NO. _____

JOSEPH J. ROSSI, ANJI ROSSI, VTL DIAGNOSTICS
LLC, VETAURA, INC., BRUCE BERNSTEIN, NANCY
ZIMMERMAN TUNKEL, LUIGI CRESCITELLI, BARBARA
ALESI, ROBERT GROMAN, THOMAS GLASCOCK,
GREGORY TEMBECK, FREDERICK BLUMER, AND JAMES
O'DAY,

Defendants.

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2, 3

Answer — Affidavits — Exhibits _____

4, 5

Replying Affidavits _____

Plaintiffs Deborah A. Gregor and Carl Gerardi (collectively, "Plaintiffs") bring the instant action for fraud, constructive fraud, fraudulent inducement, negligent representation, violation of North Carolina's RICO statute and civil conspiracy. In this action, Plaintiffs allege that they are were fraudulently induced by defendant Joseph J. Rossi ("Rossi"), who was assisted by co-defendants, to invest substantial sums of money through Rossi into defendant companies VTL Diagnostics, LLC ("VTL") and Vetaura, Inc. ("Vetaura").

Plaintiffs allege sixteen causes of action in their Amended Complaint, of which the following are asserted against defendant James O'Day ("O'Day"). The causes of action asserted against O'Day are as follows: fraud; fraudulent inducement; constructive fraud; negligent misrepresentation; professional negligence/malpractice, violation of North Carolina RICO statute NCGSA 75D-4(a)(1); violation of North Carolina RICO statute NCGSA 75D-4(a)(2); violation of North Carolina RICO statute NCGSA 75D-4(a)(3); civil conspiracy, and inspection of corporate records of VTL and Vetaura.

O'Day now moves pursuant to CPLR §3211(a)(7) and §3016(b) for an Order dismissing all causes of action brought against him in the Amended Complaint.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

The following consist of the paragraphs in the Amended Complaint that reference O'Day or relate to the allegations made against O'Day:

2. Joseph Rossi is that confidence man, and his wife Anji, his accountants James O'Day and Frederick Blumer, his attorneys ..., and certain of his supposed fellow shareholders/investors ... were his accomplices, repeatedly making representations on his behalf, to give credibility to Rossi's lies so that the Plaintiffs would continue to invest money in Rossi's scheme to defraud them of their investments.

15. Defendant James O'Day is a Certified Public Accountant with offices at 70 Glen Street, Suite 270, Glen Cove, New York, 11542, and served as the corporate accountant for Vetaura throughout the relevant time period.

136. Plaintiffs repeatedly asked Vetaura's accountant, Defendant James O'Day, for Vetaura's corporate records and financial reports, but O'Day has failed and refused to produce any of the requested documents or information to the Plaintiffs.

137. In February 2012, Mr. Gregor contacted Defendant O'Day, the

company's accountant, to inquire about the tax basis value in Vetaura, to see if tax returns had been filed, and to obtain information and verification of the whereabouts of Mrs. Gregor's investments in VTL and Vetaura.

138. Defendant O'Day refused to discuss these issues with, or to provide any of the requested information or documentation to, the Gregors.

167. In the late summer of 2012, after discovering Rossi's issuance of supposed "loan repayments" to himself, the Plaintiffs began to press Rossi and Accountant O'Day for documentation to substantiate the purported "loans" made by Rossi to Vetaura, the terms of those loans, and the basis for the checks being issued to Rossi for purported "repayment of loans."

168. In response to these inquiries, Defendant O'Day was evasive and provided no answers.

171. Plaintiffs did not discover the nature of the common scheme, nor the deceptions by Defendants, until in or around September 2012, when Mrs. Gregor and Mr. Gerardi received Vetaura K-1 tax documents in the mail, found that none of their investments had been reported or recorded, and learned that Rossi had converted money from Vetaura for his personal use.

172. Rossi first blamed the information discovered as a result of the issuance of the K-1 documents on an error by the accountants who prepared it.

173. When the Plaintiffs continued to pressure Rossi for Vetaura's financial documentation and explanations for the discrepancies reflected by the K-1 statements, Rossi advised the Plaintiffs for the first time that he had not used their investment monies to purchase shares of stock for them from Vetaura, but had, instead, used the monies as payment from the Plaintiffs to himself, in exchange for buying him out of Vetaura, so their money was now his and he could do what he pleased with it.

174. Rossi further advised the Plaintiffs that he had confirmed his position - that their investment money now belonged to him and he could do what he wanted with it, and not have to account to the Plaintiffs for it - with both

Vetaura Accountant O'Day and Vetaura counsel Defendant Roberta Groman.

175. Defendant Accountant O'Day confirmed the foregoing position directly to the Gregors.

176. Defendants Accountant O'Day and Vetaura lawyers Barbara Alesi, Robert Groman, and Thomas Glascock were complicit Rossi's scheme to defraud the Plaintiffs of their investment monies, as evidence by said Defendants' failure and refusal to provide requested documentation and information to the Plaintiffs, in violation of their legal and ethical duties to the Plaintiffs as shareholders of the corporate client they represented and serviced.

177. Defendants Accountant O'Day, and Vetaura lawyers Alesi, Groman and Glascock prepared misleading documents and made false representations to the Plaintiffs upon which the Plaintiffs relied, as a result of which the Plaintiffs suffered great financial and emotional harm.

178. All of the Defendants committed overt acts in furtherance of the scheme.

179. Further, each of the Defendants had fiduciary and special relationships with the Plaintiffs, who were investor [sic] and shareholders of the company, as follows: Rossi as President and Chief Executive Officer of Vetaura; Crescitelli and Tunkel as shareholders, and O'Day and the Vetaura lawyers as providers of professional services to a closely held corporation and, therefore, to its shareholders.

220. Upon information and belief, the VTL and Vetaura accountants, Defendants Frederick Blumer and James O'Day, prepared inaccurate and misleading financial records for the companies.

221. Upon information and belief, the Defendant accountants were aware that these financial records were used by Defendant Rossi for the purpose of inducing the Plaintiffs to invest in the companies and to reassure the Plaintiffs that the companies were viable business entities with significant value and therefore safe investments.

The first cause of action alleges fraud against O'Day. In an action to recover for fraud, a plaintiff must prove (1) a misrepresentation or a material omission of fact; (2) which was false and known to be false by defendant; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance of the other party on the misrepresentation or material omission; and (5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 919 NYS2d 465, 944 NE2d 1104 [2011]).

The second cause of action alleges fraudulent inducement against O'Day. The elements of fraudulent inducement are: (1) a false representation of material fact; (2) known by the utterer to be untrue; (3) made with the intention of inducing reliance and forbearance from further inquiry; (4) that is justifiably relied upon; and (5) results in damages. (*See, MBIA Ins. Corp. v. Credit Suisse Securities USA LLC*, 32 Misc. 3d 758, 927 NYS2d 517 [Sup Ct NY Cty 2011]).

The third cause of action alleges constructive fraud against O'Day. The elements of constructive fraud and actual fraud are identical, except that actual fraud requires an intentional deception, while constructive fraud generally requires "a confidential fiduciary relationship between the parties, or one having superior knowledge over the other" (*see, 60A N.Y. Jur 2d, Fraud and Deceit* 2), and in constructive fraud it is not necessary to demonstrate knowledge of the falsity of a representation (*see, Eden Rock Fin. Fund, L.P., v. Gerova Fin. Gruop, Ltd.*, 34 Misc. 3d 1205[A][Sup Ct NY Cnty 2011]). "Bare allegations of fraud without any allegation of the details constituting the wrong are clearly insufficient to sustain a cause of action." [*Gill v. Carribbean Home Remodeling Co.*, 73 AD2d 609 [2nd Dept 1979]].

The fourth cause of action alleges negligent misrepresentation against O'Day. For such an action, Plaintiffs must establish: (1) Defendant had a duty; (2) based upon some special relationship with Plaintiff; (3) to impart correct information; (4) that the information given was false or incorrect; and (5) that the Plaintiff justifiably relied upon that information provided. (*See, Berger-Vespa v. Rondack Building Inspectors*, 293 AD3d 838, 740 NYS2d 504 [2002]).

CPLR §3016(b) provides, "Where a cause of action or a defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances surrounding the wrong shall be stated in detail."

Here, accepting all allegations as true, the four corners of the Amended Complaint fail to state a causes of action for fraud, fraudulent inducement, constructive fraud, and negligent misrepresentation because there is no allegation of any specific misrepresentation or omission made by O'Day to Plaintiffs that Plaintiffs relied upon in making their investments.

The seventh cause of action of the Amended Complaint alleges professional negligence/malpractice against O'Day. In his motion to dismiss, O'Day does not address this cause of action, specifically. Plaintiffs allege the following in the seventh cause of action:

220) Upon information and belief, the VTL and Vetaura accountants, Defendants Frederick Blumer and James O'Day, prepared inaccurate and misleading financial records for the companies.

221) Upon information and belief, the Defendant accountants were aware that these financial records were used by Defendant Rossi for the purpose of inducing the Plaintiffs to invest in the companies and to reassure the Plaintiffs that the companies were viable business entities with significant value and therefore safe investments.

222) The Defendant accountants owed the Plaintiffs fiduciary duties.

223) The Defendants accountants owed the Plaintiffs fiduciary duties.

223) [sic] The Defendant accountants breached the fiduciary duties that they owed the Plaintiffs herein.

224) As a result of the Defendant accountants' breaches of the fiduciary duties that they owed to the Plaintiffs herein, the Plaintiffs were caused substantial damages.

"A claim of professional negligence requires proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the injury." *D.D. Hamilton Textiles v. Estate of Mate*, 269 A.D. 2d 214, 215 [1st Dept 2000].

"Accountants may be held liable in certain circumstances for negligent misrepresentations made to parties with whom they have had no contractual relationship, but who have relied to their detriment on inaccurate financial statements prepared by the accountant." *Caprer v. Nussbaum*, 36 A.D. 3d 176, 196 [2nd Dept 2006]. In order for a party who is not in privity with accountants to impose liability for negligence in the preparation and of financial reports, "(1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance." *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 551 [N.Y. 1985].

Here, even assuming that O'Day owed a duty to Plaintiffs, Plaintiffs' seventh cause of action fails to state a claim because there are no allegations that O'Day's alleged negligence was the proximate cause of Plaintiffs' alleged loss.

The eighth, ninth and tenth causes of action allege violations by O'Day of the North Carolina RICO statute NCGSA §75D-4(a)(1)(Defendants engaged in a pattern of racketeering activity), NCGSA §75D-4(a)(2)("Defendants have conducted and participated in an enterprise"), and NCGSA §75D-4(a)(3)(Defendants have conspired with one another to violate sections 4(a)(a) and 4(a)(2)).

The alleged sections of the North Carolina RICO statute provide:

§75D-4. Prohibited activities:

(a) No person shall:

(1) Engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or

(2) Conduct or participate in, directly or indirectly, any

enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or

(3) Conspire with another or attempt to violate any of the provisions of subdivision (1) or (2) of this subsection.

Racketeering activity is defined as “to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts which would be chargeable by indictment if such act or acts were accompanied by the necessary mens rea or criminal intent under the following laws of this State...” “‘Enterprise’ means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.”

Here, the Amended Complaint fails to allege a single act by O’Day that would support a cause of action under the North Carolina RICO statute.

As no claims based on fraud or negligent representation have been stated as against O’Day, a claim for civil conspiracy has not been plead. (*see Romano v. Romano*, 2 A.D. 3d 430, 432 [2nd Dept 2003] (“a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort”).

“[P]unitive damages are recoverable in fraud and deceit cases when (a) the fraud is gross, involves high moral culpability and is aimed at the public generally, or (b) the defendant’s conduct evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply criminal indifference to civil obligations.” *Pacific Jin An Trading, Inc. v Zhou*, 2008 N.Y. Misc. LEXIS 7830, *9-10 (N.Y. Sup. Ct. Feb. 6, 2008). Here, the allegations set forth in the Amended Complaint with respect to O’Day do not support a claim for punitive damages as against him.

The fourteenth cause of action, which seeks inspection of corporate books and records of Vetaura and VTL, fails to state a claim as against O’Day, as the

only allegations in the complaint against O'Day are based on O'Day's capacity as VTL's accountant.

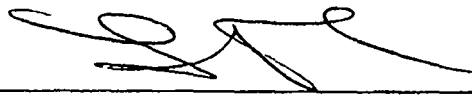
Wherefore, it is hereby,

ORDERED that defendant James O'Day's motion to dismiss the Complaint is granted and the Complaint is dismissed as against James O'Day in its entirety and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated:

12/12/13



J.S.C.
HON. EILEEN A. RAKOWER

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