

**JPS Partners v Binn**

2013 NY Slip Op 33335(U)

April 22, 2013

Sup Ct, New York County

Docket Number: 650430/12

Judge: Melvin L. Schweitzer

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: EDELMAN L. SCHWEITZER
Justice

PART 45

JPS Partners
moreton binn, et al.
and
Binn and Partners, LLC

INDEX NO. 650430/12
MOTION DATE
MOTION SEQ. NO. 005

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 by defendant Lilac Ventures Fund, Ltd. to dismiss the amended complaint against it for aiding and abetting a breach of fiduciary duty is GRANTED per the attached decision and order.

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

Dated: April 22, 2013

[Signature]
EDELMAN L. SCHWEITZER

- 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 : PART 45

-----X  
 JPS PARTNERS in its own right, and derivatively in :  
 the right of BINN AND PARTNERS, LLC, :  
 :  
 Plaintiffs, :  
 :  
 -against- :  
 :  
 MORETON BINN, an individual, GUGGENHEIM :  
 SECURITIES, LLC, MISTRAL EQUITY PARTNERS, :  
 MISTRAL CAPITAL MANAGEMENT, LLC, and :  
 LILAC VENTURES MASTER FUND, LTD. :  
 :  
 Defendants, :  
 :  
 -and- :  
 :  
 BINN AND PARTNERS, LLC, :  
 :  
 Nominal Defendant. :  
 -----X

Index No. 650430/12  
 DECISION AND ORDER  
 Motion Sequence No. 005

**MELVIN L. SCHWEITZER, J.:**

This case arises from a dispute between investors in Binn and Partners, LLC (Binn). Binn owned a controlling interest in XpresSpa Holdings, LLC (XpresSpa Holdings), which operates airport spas throughout the world.

Lilac Ventures Master Fund Ltd (Lilac), an investor in Binn, is named only in direct and derivative claims alleging aiding and abetting a breach of fiduciary duty.

**Background**

The facts are taken from the amended complaint.

In August 2008, Binn obtained a three-year, \$15 million dollar line of credit from Bank of America. Moreton Binn (Mr. Binn), who with his wife owned over 50% interest in Binn,

personally guaranteed all of the loan payments. Bank of America obtained a security interest in all of the assets of Binn. In addition to the loan from Bank of America, Lilac also loaned Binn \$1 million dollars at a rate of 10% per annum. Lilac also received put options with respect to shares of Binn.

In September 2011, Bank of America agreed to extend Binn's line of credit for one year provided that the members of Binn agreed to continue to guarantee the \$13.66 million dollars that was currently outstanding, maintain liquidity of at least \$5 million dollars, and pledge \$2.5 million dollars of liquid assets to Bank of America. Binn offered all of its members the opportunity to guarantee a portion of the Bank of America loan in exchange for put options of Binn. Lilac was the only member who was willing to guarantee a portion of the Bank of America loan, and agreed to guarantee 50% of the outstanding loan. The Bank of America loan also continued to be guaranteed by Mr. Binn.

Binn engaged Guggenheim Securities (Guggenheim) to act as its financial advisor in identifying additional investors so that the XpresSpa business could continue to operate despite Binn's significant lack of liquidity. In doing so, Guggenheim carried out an "extremely broad auction process" and contacted more than 50 prospective investors of all types "with an openness to exploring a wide variety of transaction structures."

On December 26, 2011, Mistral and Binn executed a term sheet pursuant to which Mistral would invest of \$23.8 million dollars with Binn in exchange for \$23.8 million dollars of preferred stock and a \$1.8 million dollar transaction fee (Transaction). Mistral's investment in Binn was to be used to continue to fund the operation of XpresSpa business and to pay off outstanding debts. Following the close of the Transaction, Lilac would be relieved of its

guarantee to Bank of America because the Bank of America loan would be substantially paid off with a portion of the proceeds. Lilac also agreed to refinance its existing loans to Binn, as opposed to being paid off in full from Mistral's investment, in exchange for a higher interest rate.

On February 16, 2012, Binn held a telephone conference for its members to discuss and vote on the Transaction. A majority of votes were cast in favor of the Transaction, including those of Lilac and Binn. JPS was present on the telephone call and cast the sole vote against the Transaction.

On July 26, 2012, JPS filed an amended complaint adding Guggenheim, Mistral, and Lilac to Mr. Binn as defendants in this action. The amended complaint alleges, *inter alia*, that the Transaction constitutes a breach of fiduciary duty by Mr. Binn, and seeks to hold Lilac liable for aiding and abetting that alleged breach.

Lilac moves to dismiss the causes of action against it.

#### Aiding and Abetting a Breach of Fiduciary Duty

To properly allege a cause of action for aiding and abetting a breach of fiduciary duty, a plaintiff must allege: (1) the existence of a fiduciary duty, (2) a breach of a fiduciary duty by another, (3) that the defendant knowingly induced or participated in the breach, and (4) that the plaintiff suffered damages resulting from the concerted actions of the fiduciary and the non-fiduciary. *See Kaufman v Cohen*, 307 AD2d 113, 125 (1st Dept 2003); *In re Bear Stearns Litig.*, 870 NYS2d 709, 739 (Sup. Ct. N.Y. County 2008).

An adequately pleaded claim for aiding and abetting another party's breach of fiduciary duty must include allegations that the aider and abettor had actual knowledge of the breach of duty, and that they provided substantial assistance to the fiduciary in furtherance of the breach of

duty. *Kaufman v Cohen*, 307 AD2d 113, 125 (1st Dept 2003). “[P]laintiff may not rely on conclusory and sparse allegations that the aider or abettor” had knowledge of the primary breach of duty and provided substantial assistance towards its occurrence. *Global Minerals & Metals Corp. v Holme*, 35 A.D. 93, 101-102 (1st Dept 2006).

The assertions against Lilac in the complaint are nothing more than bare legal conclusions which cannot be used to support a claim for aiding and abetting against Lilac. *See Godfrey v Spano*, 13 NY3d 358, 373 (2009) (“Claims consisting of bare legal conclusions with no factual specificity . . . are insufficient to survive a motion to dismiss.”) (citation omitted).

New York courts have repeatedly held that a non-fiduciary cannot be found liable for aiding and abetting an alleged breach of fiduciary duty as a result of a transaction that is entered into at arm’s-length. *See e.g. In re Bear Stearns Litig.*, 870 NYS2d at 739. The plaintiff admits that the Transaction was agreed upon following an involved process in which Guggenheim evaluated over fifty potential bidders, and that “a wide variety of transaction structures” were considered. The plaintiff does not allege that Lilac either exerted influence over, or offered a side deal to one of the other parties involved in the Transaction, which are the two exceptions to the arm’s-length rule. *See In re Allion Healthcare, Inc.*, No. 41990-09, 2010 WL 3384398, at \*9 (Sup. Ct. Suffolk County Aug. 13, 2010) (dismissing claims of aiding and abetting a breach of fiduciary duty where plaintiffs “fail[ed] to allege that the negotiations were not conducted at arms length.” Defendants did not exert an influence over the other counter-parties to the transaction, nor did they offer a side deal to induce them to breach their duties.

Plaintiff does not allege that the Transaction was not made at arm’s-length, or that Lilac provided substantial assistance for a breach by Binn.

Plaintiff attempts to fabricate a conflict of interest by virtue of the fact that Lilac is a member of Binn, as well as a creditor and former guarantor. This does not advance its case.

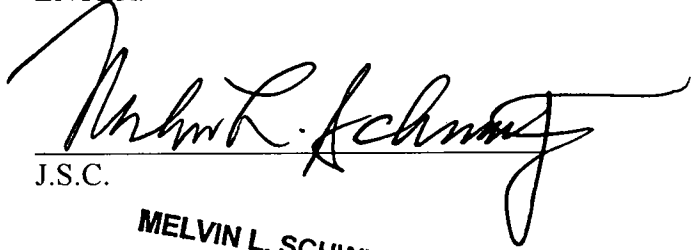
The amended complaint does not adequately allege a cause of action against Lilac for aiding and abetting Binn's breach of fiduciary duty. Lilac's motion to dismiss is granted.

Accordingly, it is

ORDERED that Lilac's motion to dismiss is granted.

Dated: April 22, 2013

ENTER:



J.S.C.

MELVIN L. SCHWEITZER