

Schantz v Wolfsohn

2014 NY Slip Op 30694(U)

March 12, 2014

Supreme Court, Suffolk County

Docket Number: 13-61462

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8-19-13 (#001)
MOTION DATE 10-17-13 (#002)
ADJ. DATE 10-24-13
Mot. Seq. # 001 - MG
002 - MG

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BRIAN SCHANTZ, EDWARD FLYNN and
TRIDENT PARTNERS, LTD.,

Plaintiffs,

- against -

RACHEL WOLFSOHN, THE RACHEL
WOLFSOHN TRUST, JONATHAN
WOLFSOHN, MICHELE SCHLOSSER, THE
BIONOMICAL COLLECTIVE, INC., and RBS
CITIZENS NA d/b/a CITIZEN'S BANK,

Defendants.

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Upon the following papers e-filed and read on these motions for dismissal: (1) Notice of Motion by defendant Rachel Wolfsohn, dated July 22, 2013, and supporting papers; (2) Notice of Motion by defendant RBS Citizens NA, dated September 16, 2013, and supporting papers; (3) Affirmations in Opposition by plaintiffs, dated October 17, 2013; (4) Reply Affirmation of defendant Rachel Wolfsohn, dated October 18, 2013; and (5) Memoranda of Law, it is,

ORDERED that the motion (#001) by defendant Rachel Wolfsohn and the motion (#002) by defendant RBS Citizens, N.A., are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Rachel Wolfsohn for an order dismissing the complaint against her is granted; and it is further

ORDERED that the motion by defendant RBS Citizens, N.A. for an order dismissing the complaint against it is granted.

Plaintiff Trident Partners, Ltd., a securities broker-dealer registered with the Securities and Exchange Commission, and plaintiffs Brian Schantz and Edward Flynn, principals of the firm, commenced this action to recover damages allegedly resulting from a fraudulent scheme involving a former employee, Francesca Wolfsohn. The complaint alleges that from 2009 through 2011, Francesca Wolfsohn fraudulently diverted approximately \$580,000 from brokerage trading accounts maintained by the firm for two clients, Mary Lamia and Antoinette Aloise, using wire transfers to move the funds into bank accounts maintained at defendant RBS Citizens, N.A. (hereinafter "Citizens Bank"), bearing the names Rachel Wolfsohn Trust, Francesca Wolfsohn and Mary Lamia, and into a bank account maintained at Wachovia Bank bearing the name Bionomical Collective, Inc. It alleges, in part, that the money transferred into the Citizen Bank and Wachovia Bank accounts was for the benefit of defendant Rachel Wolfsohn, who is Francesca Wolfsohn's daughter, and Bionomical Collective, an alleged "shell" corporation formed for the purpose of receiving the money illegally diverted from the Lamia and Aloise trading accounts; that the Rachel Wolfsohn Trust, in fact, was not a trust, but a cash account for the benefit and use of Rachel Wolfsohn; and that an employee or employees of Citizens Bank aided Francesca Wolfsohn and Rachel Wolfsohn in the fraudulent scheme. It further alleges that in 2012 an arbitration proceeding was brought against Trident Partners, Schantz, Flynn and Francesca Wolfsohn by Aloise, and that it has incurred costs and expenses exceeding \$150,000 as a result of such proceeding.

As relevant to the instant motions, the first cause of action in the complaint seeks damages for fraud, and alleges that Rachel Wolfsohn, the Rachel Wolfsohn Trust, Jonathan Wolfsohn, Michelle Schlosser and Bionomical Collective established the bank accounts in Citizens Bank and created Bionomical Collective as part of a scheme to defraud plaintiffs, that they knew the money in such bank accounts had been obtained fraudulently from Trident Partners, and that they used the money for their own benefit. The second cause of action seeks damages for aiding and abetting a fraud, and the third cause of action seeks damages for aiding and abetting a breach of fiduciary duty. The fourth cause of action seeks contribution for any liability or judgment obtained against plaintiffs in the arbitration matter brought by Aloise.

Rachel Wolfsohn now moves for an order dismissing the complaint against her for failure to state a cause of action and lack of personal jurisdiction (*see* CPLR 3211 [a] [7], [8]). In an affidavit in support of the motion, Rachel Wolfsohn avers that she is a resident of California, that she is a full-time student and never conducted business with her mother, that she has no personal knowledge of the facts alleged in the complaint, and that she did not receive any money from the alleged fraudulent transactions involving her mother. An affidavit of Francesca Wolfsohn submitted in support of the motion states, among other things, that Rachel Wolfsohn lives in California and never received any money from Trident Partners or Lamia. It states that service of process on Rachel Wolfsohn "was made at my house," and that Rachel Wolfsohn is 24 years old and has not lived at that residence for five years. Furthermore, Francesca Wolfsohn's affidavit states that while there was a bank account that she controlled for her daughter, her daughter was not an authorized signatory on the account, and that the alleged Rachel Wolfsohn Trust never existed.

Plaintiffs oppose the motion, arguing there is no proof Francesca Wolfsohn rejected service on behalf of her daughter or advised the process server that her daughter did not live at the residence in Port

Washington, New York, where the pleadings allegedly were served. They also argue that Rachel Wolfsohn's affidavit is insufficient, as it fails to provide her address in California. And while they do not challenge the claim that no trust was established for Rachel Wolfsohn, plaintiffs contend that the causes of action asserted in the complaint "are backed up by as specific information as possible at the present regarding both the fraud committed," and meet the pleading requirements. They contend "the thin, self-serving and contradictory affidavits submitted in support of the motion are entirely insufficient" to meet Rachel Wolfsohn's burden under CPLR 3211 (a) (7), and that, as no information regarding the bank accounts at issue has been provided by Rachel or Francesca Wolfsohn, discovery is needed.

Citizens Bank also moves for an order of dismissal, arguing that the complaint fails to state a cause of action against it. Citizens Bank argues, among other things, that the allegations against it in the complaint are conclusory and insufficient to meet the heightened pleading requirements for an aiding and abetting a fraud claim. Plaintiff opposes the motion by Citizens Bank, asserting that allegations in the complaint that Rachel Wolfsohn and Francesca Wolfsohn were "helped or otherwise aided" by an unknown employee of Citizens Bank are sufficient to create an inference that it knew of Francesca's fraudulent actions.

As to the motion by Rachel Wolfsohn, the burden of proving that personal jurisdiction was acquired over a defendant rests on the plaintiff at all times (*see Castillo v Star Leasing Co.*, 69 AD3d 551, 893 NYS2d 123 [2d Dept 2010]; *Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 884 NYS2d 254 [2d Dept 2009]; *Bank of Am. Natl. Trust & Sav. Assn. v Herrick*, 233 AD2d 351, 650 NYS2d 754 [2d Dept 1996]). Although an affidavit of a process server generally is considered *prima facie* evidence of proper service under CPLR 308 (2) (*see Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 884 NYS2d 254; *Scarano v Scarano*, 63 AD3d 716, 880 NYS2d 682 [2d Dept 2009]; *Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner*, 57 AD3d 732, 869 NYS2d 591 [2d Dept 2008]; *Simonds v Grobman*, 277 AD2d 369, 716 NYS2d 692 [2d Dept 2000]), a sworn denial of service with detailed facts rebutting the process server's affidavit raises an issue of fact as to whether service was properly effected (*see Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 884 NYS2d 254; *Delgado v Vecelela*, 56 AD3d 515, 867 NYS2d 521 [2d Dept 2008]; *Baldendran v North Shore Med. Group*, 251 AD2d 522, 674 NYS2d 724 [2d Dept 1998]; *cf. 425 E. 26 th St. Owners Corp. v Beaton*, 50 AD3d 845, 858 NYS2d 188 [2d Dept 2008]). When an affidavit rebuts the process server's affidavit, the plaintiff must establish personal jurisdiction over the defendant by a preponderance of the evidence adduced at a hearing (*see DeStaso v Bottiglieri*, 52 AD3d 453, 861 NYS2d 676 [2d Dept 2008]; *Wern v D'Alessandro*, 219 AD2d 646, 631 NYS2d 425 [2d Dept 1995]; *Frankel v Schilling*, 149 AD2d 657, 540 NYS2d 469 [2d Dept 1989]; *Skyline Agency v Coppotelli, Inc.*, 117 AD2d 135, 502 NYS2d 479 [2d Dept 1986]).

Service of process must be made in strict compliance with the methods for effecting service on a natural person set forth in CPLR 308 (*Estate of Waterman v Jones*, 46 AD3d 63, 65, 843 NYS2d 462 [2d Dept 2007]). "Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court" (*Macchia v Russo*, 67 NY2d 592, 595, 505 NYS2d 591 [1986]; *see DeShong v Marks*, 144 AD2d 623, 535 NYS2d 19 [2d Dept 1988]). CPLR 308 (2)

authorizes service by delivery of the summons within the state to a person of suitable age and discretion at the defendant's actual place of business, dwelling place or usual place of abode and by mailing the summons to the defendant at his or her last known residence or by mailing the summons by first class mail at his or her actual place of business in an envelope bearing the legend "personal and confidential" within 20 days. Both the delivery requirement and the mailing requirement must be complied with for "deliver-and-mail" service pursuant to CPLR 308 (2) to be valid.

Dismissal of the complaint against Rachel Wolfson based on a lack of personal jurisdiction is granted. Here, the affidavits in support of the motion assert that Rachel Wolfsohn lives in California and has not lived at Francesca Wolfsohn's Port Washington house, where the summons was delivered, for years. While a process server's sworn affidavit ordinarily constitutes *prima facie* evidence of the method of service and raises a presumption of proper service (see *Goralski v Nadzan*, 89 AD3d 801, 932 NYS2d 376 [2d Dept 2011]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 756 NYS2d 92 [2d Dept 2003]), plaintiffs failed to submit a copy of the process server's affidavit in opposition to the motion. In fact, a review of the Court's computerized records indicates that a copy of the process server's affidavit of service has not been filed by plaintiffs either electronically or with the Clerk of the Court.

As to the motion by Citizens Bank, when a party moves under CPLR 3211 (a) (7) for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). A court must determine whether, accepting the facts as alleged in the pleading as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). Affidavits may be used to remedy pleading defects, thereby preserving "inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). However, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts" (*Muka v Greene County*, 101 AD2d 965, 965, 477 NYS2d 444 [4th Dept 1984]; see *DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; *Melito v Interboro-Mutual Indem. Ins. Co.*, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]; *Greschler v Greschler*, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]).

To properly plead a cause of action to recover damages for aiding and abetting fraud, a complaint must allege the existence of an underlying fraud, knowledge of the fraud on the part of the aider and abettor, and substantial assistance by the aider and abettor in achievement of the fraud (*Winkler v Battery Trading*, 89 AD3d 1016, 1017, 934 NYS2d 199 [2d Dept 2011]; *Stanfield Offshore Leveraged Assets v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476, 883 NYS2d 486 [1st Dept], *lv denied* 13 NY3d 709, 890 NYS2d 447 [2009]). Actual knowledge of the fraud may be averred generally (see *Stanfield Offshore Leveraged Assets v Metropolitan Life Ins. Co.*, 64 AD3d 472, 883 NYS2d 486; *DDJ Mgt., LLC v Rhone Group*, 78 AD3d 442, 911 NYS2d 7 [1st Dept 2010]; *Oster v Kirschner*, 77 AD3d 51, 905 NYS2d 69 [1st Dept 2010]). Further, substantial assistance exists where a defendant affirmatively

assists, helps conceal, or, by virtue of failing to act when required to do so, enables the fraud to proceed (see *Stanfield Offshore Leveraged Assets v Metropolitan Life Ins. Co.*, 64 AD3d 472, 883 NYS2d 486).

Moreover, a cause of action rooted in fraud, including aiding and abetting fraud, must meet the pleading requirement set forth in CPLR 3016 (b) that “the circumstances constituting the wrong shall be stated in detail” (see *Goel v Ramachandran*, 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]; *High Tides, LLC v DeMichele*, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]). Although “unassailable proof” is not required at the pleading stage, a complaint alleging fraud must set forth “the basic facts to establish the elements of the cause of action” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]). Thus, a claim of aiding and abetting fraud “‘is not made out simply by allegations which would be sufficient to state a claim against the principal participants in a fraud’ combined with conclusory allegations that the aider and abettor had actual knowledge of such fraud” (*Goel v Ramachandran*, 111 AD3d 783, 792, 975 NYS2d 428, quoting *National Westminster Bank v Wechsel*, 124 AD2d 144, 149, 511 NYS2d 626 [1st Dept 1987]).


Here, the underlying fraud alleged in the complaint was Francesca Wolfsohn’s diversion of funds from brokerage accounts established by clients of Trident Partners to bank accounts maintained at Citizens Bank for the benefit of Rachel Wolfsohn. The complaint alleges in general terms that the wire transfer requests “were accepted by Citizens Bank despite the fact that they were fraudulent and were otherwise false,” that Citizens Bank accepted the wire transfers “despite the fact that they were not in proper format, were otherwise missing relevant or necessary information or had that information outright wrong and/or had clearly been falsified,” and that Rachel Wolfsohn and Francesca Wolfsohn “were helped or otherwise aided by an employee or employees of Citizens Bank in processing and acknowledging/notarizing fraudulent wire” transfers. The first cause of the complaint alleges that defendants “had knowledge of the fraud against Trident [Partners] and participated in and otherwise substantially assisted in the same,” that defendants participated in the formation of the fraudulent bank accounts, and that Citizens Bank “allowed fraudulent wire transfers to occur, thereby facilitating defendants’ fraud and despite the fact that Citizens Bank knew or should have known that the relevant wire transfer requests submitted were false and fraudulent.”

Absent from the complaint, however, are allegations that Citizens Bank had knowledge of Francesca Wolfsohn’s fraudulent transfers of money from the brokerage accounts or allegations containing specific facts from which it could reasonably be inferred it had knowledge of such fraud (see *Goel v Ramachandran*, 111 AD3d 783, 975 NYS2d 428; *National Westminster Bank v Wechsel*, 124 AD2d 144, 511 NYS2d 626; *125 Assoc. v Cranlin Trading Assoc.*, 196 AD2d 630, 601 NYS2d 196 [2d Dept 1993]; cf. *Balance Return Fund Ltd. v Royal Bank of Canada*, 83 AD3d 429, 921 NYS2d 328 [1st Dept 2011]). Also, the conclusory allegations that Citizens Bank “substantially assisted” Francesca Wolfsohn in her fraudulent conduct and “allowed fraudulent wire transfers to occur” do not meet the pleading requirement of factual details showing the bank, which did not have a relationship with Trident Partners or the individual plaintiffs, provided substantial assistance to the achievement of the underlying fraud (see *Winkler v Battery Trading, Inc.*, 89 AD3d 1016, 934 NYS2d 199; *National Westminster Bank v Wechsel*, 124 AD2d 144, 511 NYS2d 626).

The cause of action against Citizens Bank for aiding and abetting a breach of fiduciary duty also suffers from a pleading deficiency. To establish a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must establish a breach of a fiduciary obligation owed to another, that the defendant knowingly induced or participated in the breach, and that the plaintiff suffered damages as a result of the breach (*see Baron v Galasso*, 83 AD3d 626, 921 NYS2d 100 [2d Dept 2011]; *Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003]; *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 824 NYS2d 210 [1st Dept 2006], *lv denied* 8 NY3d 804, 831 NYS2d 106 [2007]). “One who aids and abets a breach of a fiduciary duty is liable for that breach, even if he or she had no independent fiduciary obligation to the alleged injured party, if the alleged aider and abettor rendered substantial assistance to the fiduciary in the course of effecting the alleged breach of duty” (*Sanford/Kissena Owners Corp. v Daral Props., LLC*, 84 AD3d 1210, 1212, 923 NYS2d 692 [2d Dept 2011]; *see Monaghan v Ford Motor Co.*, 71 AD3d 848, 897 NYS2d 482 [2d Dept 2010]; *Velazquez v Decaudin*, 49 AD3d 712, 854 NYS2d 163 [2d Dept 2008]; *see also Baron v Galasso*, 83 AD3d 626, 921 NYS2d 100). For purposes of a claim alleging aiding and abetting a breach of fiduciary duty, substantial assistance can be established with proof showing the defendant affirmatively assisted, helped conceal, or, by virtue of failing to act when required to do so, allowed the breach to happen (*see Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157). Mere inaction on the part of the defendant, however, will constitute substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff (*Sanford/Kissena Owners Corp. v Daral Props., LLC*, 84 AD3d 1210, 1212, 923 NYS2d 692; *Kaufman v Cohen*, 307 AD2d 113, 126, 760 NYS2d 157). Further, the plaintiff must show that the defendant had actual knowledge of the breach of fiduciary duty; constructive notice of the breach is insufficient to impose liability for aiding and abetting (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101, 824 NYS2d 210; *Kaufman v Cohen*, 307 AD2d 113, 125, 760 NYS2d 157; *see Baron v Galasso*, 83 AD3d 626, 921 NYS2d 100).

The third cause of action alleges that Francesca Wolfsohn breached a fiduciary duty owed to Trident Partners by misappropriating assets belonging to its clients, and that defendants “knowingly induced, participated, substantially assisted and reaped the benefit of such breach,” resulting in damages to plaintiffs. The complaint contains no allegations that Citizens Bank had actual knowledge of Francesca Wolfsohn’s alleged breach of a fiduciary duty owed to Trident Partners (*see Evans v Rosen*, 111 AD3d 459, 976 NYS2d 18 [1st Dept 2013]; *Kaufman v Cohen*, 307 AD2d 113, 760 NYS2d 157). The third cause of action against Citizens Bank, therefore, is dismissed. Finally, absent allegations that Citizen Bank breached a duty owed to plaintiffs or to the clients of Trident Partners who suffered damages due to the alleged misconduct of Francesca Wolfsohn, the claim for contribution against it is dismissed.

Dated: March 12, 2014


 Hon. Joseph Farneti
 Acting Justice Supreme Court

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