

Weinstein v Cohnreznick LLP
2014 NY Slip Op 33838(U)
April 21, 2014
Supreme Court, Suffolk County
Docket Number: 13E-12479
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX No. 13E-12479

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 10-4-13
ADJ. DATE 1-8-14
Mot. Seq. #001 - MG; CASEDISP

ALLEN WEINSTEIN, SOLAS PLUMBING
CORP. and SLD 20 LLC,

Plaintiffs,

- against -

COHNREZNICK LLP f/k/a J.H. COHN LLP,

Defendant.

RAIMONDI LAW, P.C.
Attorney for Plaintiffs
552 Broadway
Massapequa, New York 11758

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Upon the following papers numbered 1 to 21 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-7; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 8-18; Replying Affidavits and supporting papers 19-21; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant for an order, pursuant to CPLR 3211(7), granting dismissal of the complaint against it is granted

The amended complaint alleges seven causes of action against the defendant Cohnreznick, LLP ("Cohnreznick") herein: breach of fiduciary duty; aiding and abetting breach of fiduciary duty; accounting malpractice; aiding and abetting conversion; fraud; aiding and abetting fraud; and fraudulent concealment.

Defendant now moves for an order, pursuant to CPLR 3211(7) dismissing the complaint and each cause of action contained therein. In support of the motion, defendant submits, *inter alia*, its attorney's affirmation, the amended complaint, an engagement letter from defendant to SMAX Plumbing, LLC ("SMAX") dated March 1, 2010, a copy of the amended verified complaint in an action entitled Allen Weinstein, individually and as a member SMAX Plumbing, LLC, Solas Plumbing Corp ("Solas"), and SLD 20 LLC v David Levine et al, filed in the Supreme Court, Suffolk County, under Index Number 25629/11, and a memorandum of law. In opposition, the plaintiffs submit, *inter alia*, their attorney's affirmation, copies of reports on financial statements for SMAX for 2009 and 2010, a draft operating agreement for SMAX, the contents of defendant's "engagement file", and their memorandum of law.

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Plaintiffs allege that plaintiff Solas was incorporated in 2005 and through 2009 or 2010 did business as a plumbing contractor. Since 2007, plaintiff Weinstein has been the sole owner of Solas. From late 2007 through 2008 Weinstein suffered from numerous medical conditions that required surgery and other treatment. During late 2008 and early 2009, he had numerous conversations with non-parties L. Levine and Thomas Costarelli ("Costarelli") about Levine's involvement in the Solas business. It is alleged that on or about April 5, 2010 SMAX was formed by L. Levine and J. Levine ("the Levines"). On or about April 5, 2010 the Levines formed East End Plumbing LLC ("East End") to hold their interest in SMAX. This was done without Weinstein's knowledge. Prior to the formation of SMAX, the Levines took over the business of Solas, without the knowledge or consent of Weinstein. SMAX, under the control of the Levines, through East End, took over the business of Solas, without Weinstein's knowledge or consent, allegedly while he was undergoing medical treatments and recovering from illnesses. It is alleged that SMAX took control of the inventory, equipment, contracts and other assets of Solas, and began serving customers, without paying any consideration to Weinstein. Prior to 2010, Solas incurred debts for ordinary and necessary business expenses in the approximate amount of \$125,039.62, which debts were personally guaranteed by Weinstein. After April 2010, the Levines refused to pay these expenses and they were paid off by Weinstein. In May or June of 2010, SMAX, under the control of the Levines, ceased making rent payments and payments of other business obligations of Solas. Weinstein alleges that he paid these expenses. Weinstein also alleges that he made approximately \$2,793,541.06 in loans to Solas, which Solas has been unable to repay because the Levines and SMAX have usurped all of the assets of Solas. Upon the formation of SMAX in April 2010, the Levines caused the membership interest in SMAX to be issued 47.5% to East End, 47.5% to Weinstein and 5% to Costarelli. No operating agreement was ever signed by the purported members of SMAX.

Plaintiffs allege that in 2010, and prior, the Levines engaged defendant to provide accounting and professional services to entities and/or individuals that are controlled by the Levines, including SMAX. Plaintiffs allege that defendant rendered assistance to the Levines and East End against Weinstein and Solas. This includes, but is not limited to, posting as a member loan in the books and records of SMAX, allegedly due from Weinstein, without any proof thereof; that defendant prepared tax returns for 2009, when SMAX did not legally exist, and 2010, and prepared K-1Forms showing Weinstein as a 47.5% member; that defendant prepared financial statements for SMAX for 2009 and 2010, based on their review of the books and employee interviews; that Weinstein did not receive copies of the tax returns and financial statements at the time they were prepared. That in July of 2011, he contacted defendant and demanded various information with regard to SMAX, including partnership tax returns, documentation of loans, records as to how the partnership designated its "tax member", pursuant to Section 6231(a)(7) of the Income Tax Code; documentation on how Costarelli's membership interest was divided between Weinstein and East End to give each a 50% interest in SMAX. Weinstein also demanded that defendant amend the financial statements to correct what he deemed to be inaccurate.

Defendant, as part of its response, submits its letter to SMAX setting forth the services it would perform, relevant portions of which are set forth below:

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We will review the balance sheet for SMAX Plumbing LLC as of December 31, 2009 with the related statements of income and member equity and cash flows for the year then ended and issue an accountants' report thereon in accordance with Statements on Standards for Accounting and Review issued by the American Institute of Certified Public Accountants. The objective of a review engagement is to express limited assurance that there are no material modifications that should be made in order for the statements to be in accordance with accounting principles generally accepted in the United States of America.

A review differs significantly from an audit of financial statements, in which the auditor provides reasonable assurance that the financial statements, taken as a whole, are free of material misstatements. A review does not contemplate obtaining an understanding of the entity's internal control; assessing fraud risk; tests of accounting records by obtaining sufficient appropriate audit evidence through inspection, observation, confirmation, or the of source documents...; and the other procedures ordinarily performed in an audit. Therefore a review only provides limited assurance that there are no material modifications that should be made in order for the statements to be in accordance with accounting principles generally accepted in the United States of America.

Our engagement cannot be relied on to disclose errors, fraud, or illegal acts that may exist. However, we will inform you of any material errors and any evidence or information that comes to our attention during the performance of review procedures, that fraud may have occurred. In addition, we will report to you any evidence or information that comes to our attention during the performance of our review procedures... We have no responsibility to identify and communicate deficiencies in your internal control as part of this engagement.

A review engagement is not a fraud investigation. The responsibility prevention and detection of fraud rest with the Company, and our engagement cannot be relied on to detect fraud, defalcations or other irregularities. We expressly disclaim any responsibility for detecting fraud affecting the Company and are undertaking this engagement based upon your express agreement that you are releasing us from any liability for failure to detect fraud.

With regard to preparation of federal and state business income taxes, and franchise tax returns, the agreement states, in relevant part:

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We will prepare the above returns based upon information you furnish us. We will not audit or verify the data, although we may ask you to clarify some of it. You represent that the information you are supplying us is accurate and complete to the best of your knowledge and that you have disclosed to us the relevant facts affecting the returns.

The agreement further states:

Our work in the preparation of your income tax does not include any procedures designed to discover defalcations or other irregularities, should any exist. You are responsible for the safeguarding of assets, the proper recording of transactions in the books and accounts, the substantial accuracy of the financial records, and full and accurate disclosure of all relevant facts affecting the return(s) to us. You have the final responsibility for the filing of all necessary tax returns and the payment of any taxes due on them. Therefore, you should review the returns carefully before you sign and file them.

Plaintiffs have also submitted the contents of the defendant's SMAX "engagement file", which contains documents related to defendant's work for SMAX.

Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (*Pacific Carlton Development Corp. v 752 Pacific, LLC*, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; *Gjonlekaj v Sot*, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (*Scoyni v Chabowski*, 72 AD3d 792, 898 NYS2d 482 [2d Dept 2010]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 [1977]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*Leon v Martinez*, supra; *Ofman v Katz*, 89 AD3d 909, 933 NYS2d 101 [2d Dept 2011]; *International Oil Field Supply Services Corp. v Fadeyi*, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Upon a motion to dismiss, such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (*AGS Marine Insurance Company v Scottsdale Insurance Company*, 102 AD3d 899, 958 NYS2d 753 [2d Dept 2013]; *Chan Ming v Chui Pak Hoi et al*, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]). "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]; see *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). However, conclusory allegations, which fail to adequately allege the material elements of a cause of action, will not withstand a motion to dismiss (*Peterec-Tolino v Harap*, 68 AD3d 1083, 1084 [2d Dept 2009]). Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 570 NYS2d 799 [1st Dept 1991], lv. denied 80 NY2d 788, 587 NYS2d 284, [1992]).

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Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty

The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (*Varveris v Zacharakos*, 110 AD3d 1059, 973 NYS2d 774 [2d Dept 2013]; *Palmetto Partners, LP v AJW Qualified Partners, LLC*, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]; *Bullmore v Ernst & Young Cayman Islands*, 45 AD3d 461, 846 NYS2d 145 [1st Dept 2007]). A fiduciary relationship is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions (Restatement (Second) of Torts § 874; see *EBC I, Inc. v Goldman, Sachs & Co.*, *supra*, at p.19 of 5 NY3d). A duty owed by an accountant to a client is generally not fiduciary in nature, as required to state a claim of breach of fiduciary duty (*Able Energy, Inc. v Marcum & Kliegman LLP*, 69 AD3d 443, 893 NYS2d 36 [1st Dept 2010]; *Bitter v Renzo*, 101 AD3d 465, 955 NYS2d 332 [1st Dept 2012]). Under normal circumstances, an accountant has no fiduciary duty to the co-owner of a limited liability company since the company and not the co-owner is the client of the accounting firm (see *Tal v Superior Vending, LLC*, 20 AD3d 520, 799 NYS2d 532 [2d Dept 2005]). A fiduciary relationship arises between two persons when one of the parties is under a duty to act for or give advice for the benefit of another upon matters in the scope of the relation (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]).

“[A]iding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach” (*Kaufman v Cohen*, 307 AD2d 113, 125, 760 NYS2d 157 [1st Dept 2003]). “A person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator” (*id.* at 126). Allegations that an accountant agreed to provide accounting and consulting services for a company in which plaintiffs held a financial interest was insufficient to allege accountant owed plaintiffs a fiduciary duty as required to support a claim of aiding and abetting a breach of fiduciary duty (*Bitter v Renzo*, *supra*).

Here, there was never a fiduciary relationship between the plaintiffs and the defendant. Plaintiff was not a client of the defendant. Defendant's client was SMAX. In fact, there was no relationship at all prior July 2011, and that relationship, as shown by the pleadings, immediately became adversarial. The complaint also shows that plaintiff Weinstein was not in possession of the work done by defendant for SMAX prior to this time, and, thus, he could not have relied on it prior to July 2011. Therefore, these causes of action must be dismissed, as no fiduciary duty existed between plaintiffs and defendant. Plaintiffs reliance on *Nate B. & Frances Spingold Foundation v Wallin, Simon, Black and Co.*, 184 AD2d 464, 585 NYS2d 416 [st Dept 1992] is misplaced. That case involved the alleged knowledge and concealment of illegal acts involving the accountant's own client. The court found that, as a result, there was a fiduciary relationship between the accountants and there own client, not a third-party. Based on the foregoing these causes of action must be dismissed.

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Accounting Malpractice

To establish accounting malpractice, plaintiff must demonstrate that the accountant failed to exercise due care and materially deviated from recognized and accepted professional standards for accountants, and that such deviation proximately caused plaintiff's injuries (*see Kristina Denise Enterprises v Arnold*, 41 AD3d 788, 838 NYS2d 667 [2d Dept 2007]; *D.D. Hamilton Textiles, Inc. v Estate of Mate*, 269 AD2d 214, 703 NYS2d 451 [1st Dept 2000]).

In *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551, 493 NYS2d 435 [1985], the Court of Appeals specified prerequisites that must be satisfied in order to extend accountants' liability outside the sphere of privity:

(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. While these criteria permit some flexibility in the application of the doctrine of privity to accountants' liability, they do not represent a departure from the principles articulated in *Ultramares Corp. v Touche*, 255 NY 170 (1931)], *Glanzer v Shepard*, 233 N.Y. 236 (1922)], and *White v Guarente*, 43 NY2d 356, 401 NYS2d 474 (1977)], but, rather, they are intended to preserve the wisdom and policy set forth therein.

It is not disputed that there was no privity between plaintiff Weinstein and the defendant. Weinstein was never defendant's client. Plaintiffs argue, rather, that the circumstances herein require the extension of liability to the defendant outside of the sphere of privity. However, here there is no "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". In fact there was no link between the parties, because there was no relationship at all between the parties until July 2011, after the events upon which plaintiffs base their claims. Nor is there any indication that defendant would have any understanding of any reliance by Weinstein, due to this lack of any prior relationship. Furthermore, although plaintiffs make various conclusory statement alleging defendant violated recognized and accepted professional standards for accountants", the complaint does not point to a single specific standard which was violated by the defendant. Accordingly, this cause of action also must be dismissed.

Fraud and Aiding and Abetting Fraud

To state a cause of action sounding in fraud, a plaintiff must allege that (1) the defendant made a representation or a material omission of fact which was false and the defendant knew to be false, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury (*Selechnik v Law Off. of Howard R. Birnbach*, 82 AD3d 1077, 1078, 920 NYS2d 128 [2d Dept 2011]; *see Eurycleia*

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Partners, LP v Seward & Kissel, LLP, supra; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421, 646 NYS2d 76 [1996]; *Pace v Raisman & Assocs., Esqs., LLP*, 95 AD3d 1185, 1188–1189, 945 NYS2d 118 [2d Dept 2012]).

Rule 3016 (b) of the CPLR mandates that where a cause of action is based upon fraud, “the circumstances constituting the wrong shall be stated in detail.” The elements of common law fraud, which include a misrepresentation of a material fact, falsity, scienter, reliance, and injury, must be set forth in order for the complaint to withstand a motion for its dismissal; a dismissal of the complaint is warranted if the pleadings do not set forth the factual details and circumstances of the alleged fraud and misrepresentation with sufficient particularity (see *Black Car and Livery Ins. Inc. v H&W Brokerage Inc.*, 28 AD3d 595, 813 NYS2d 751 [2d Dept 2006]; *68 Burns New Holding, Inc. v Burns St. Owners Corp.*, 18 AD3d 857, 796 NYS2d 677 [2d Dept 2005]; *Kline v Taukpoint Realty Corp.*, 302 AD2d 433, 754 NYS2d 899 [2d Dept 2003]).

Plaintiffs have failed to state a cause of action for fraud or aiding and abetting fraud against the defendant. Although plaintiffs make conclusory allegations that Weinstein acted and relied on the documents prepared by the defendant, the actual factual allegations in the complaint belie that claim. It is alleged that Weinstein first communicated with the defendant in July of 2011. At that time he demanded copies of the SMAX tax returns from the defendant for 2009 and 2010 and his K-1 forms, which he received in October 2011. Upon receipt thereof, he immediately challenged the accuracy of these documents. Therefore, plaintiffs never relied on the documents prepared by the defendant. Thus, the element of reliance is missing, and no cause of action for fraud has been stated against the defendant. Since this cause of action must be dismissed, so must the cause of action for aiding and abetting fraud be dismissed (see *Dickenson v Igoni*, 76 AD3d 943, 908 NYS2d 85 [2d Dept 2010]).

Aiding and Abetting Conversion

The elements of an aiding and abetting a conversion claim are “(1) the existence of a violation by the primary (as opposed to the aiding and abetting) party; (2) knowledge of this violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the violation.” (*Dangerfield v. Merrill Lynch, Pierce, Fenner & Smith*, 2006 WL 335357 at 5 [S.D.N.Y. 2006]; see *Sheroff v Dreyfus Corp.*, 50 AD3d 877, 855 NYS2d 902 [2d Dept 2008]). Plaintiffs allege that the non-party Levines took over the business of Solas prior to the formation of SMAX. Thus, defendant, who was first engaged by SMAX in March of 2010, and provided no work product prior to October of 2010 (see Plaintiffs’ Exhibit “A”) could not have aided and abetted in that alleged tort, which would have already occurred. In any event, the cause of action is time barred pursuant to the three year statute of limitations contained in CPLR 214[3]. This cause of action must be dismissed.

Fraudulent Concealment

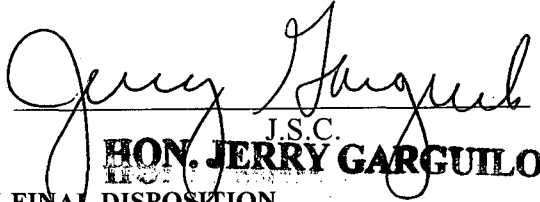
“A cause of action to recover damages for fraudulent concealment requires, in addition to allegations of scienter, reliance and damages, an allegation that the defendant had a duty to disclose material information and that it failed to do so” (*High Tides, LLC v DeMichele*, 88 AD3d 954, 957, 931 NYS2d 377 [2d Dept 2011]; see *Consolidated Bus Tr., Inc. v Treiber Group, LLC.*, 97 AD3d 778, 779,

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948 NYS2d 679 [2d Dept 2012]; *see also Kaufman v Cohen*, 307 AD2d 113, 119-120, 760 NYS2d 157 [1st Dept 2003]). Again, this cause of action falls because there are no facts pleaded sufficient to show reliance on the part of the plaintiff. As already noted, the plaintiff first contacted the defendant in July of 20011. The pleadings establish that the relationship between Weinstein and the defendant was adversarial from the very beginning, with Weinstein challenging the accuracy of the documents prepared by defendant as soon as they were received. The pleadings make clear that Weinstein never believed the information given by the defendant and, thus, cannot claim to have relied on it. On this basis, plaintiffs have failed to properly plead a cause of action for fraudulent concealment and the purported cause of action must be dismissed

In light of the foregoing, defendant's motion to dismiss the complaint is granted in all respects.

Dated: 4/21/14


J.S.C.
HON. JERRY GARGUILO

FINAL DISPOSITION NON-FINAL DISPOSITION