State of New York v Credit Suisse Sec.
2015 NY Slip Op 32031(U)
July 17, 2015
Supreme Court, New York County
Docket Number: 100185/2013
Judge: Kelly A. O'Neill Levy
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA 7/21/15 E

PRESENT: **HON. KELLY O'NEILL LEVY** PART 19

Justice

Index Number : 100185/2013
WILCOX, THOMAS C.
vs.
CREDIT SUISSE
SEQUENCE NUMBER : 002
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 decided in accordance with the annexed decision/order.

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NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: JUL 17 2015

Kelly O'Neill Levy, J.S.C.
HON. KELLY O'NEILL LEVY

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 19

----------X

THE STATE OF NEW YORK
EX. REL. THOMAS C. WILLCOX,

Plaintiff,

- against -

CREDIT SUISSE SECURITIES (USA) LLC, AS SUCCESSOR-IN-INTEREST TO DONALDSON LUFKIN & JENRETTE SECURITIES CORPORATION, MORGAN STANLEY, JP MORGAN CHASE & CO., AS SUCCESSOR-IN-INTEREST TO BEAR STEARNS & CO., INC., AND BANK OF AMERICA CORPORATION, AS SUCCESSOR-IN-INTEREST TO MERRILL LYNCH & CO., INC.,

Defendants.

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Index No: 100185/2013

DECISION/ORDER
MOT. SEQ. 002, 003 AND 005

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of (i) Defendants' motion to dismiss the amended complaint (Mot. Seq. 002); (ii) Plaintiff-Relator's motion for leave to file a second amended complaint (Mot. Seq. 003); and (iii) Plaintiff-Relator's motion for leave to file a third amended complaint (Mot. Seq. 005).

Papers	**Numbered**
Motion Seq. 002	
Defendants' Notice of Motion, Affirmation, Exhibits, Memorandum of Law, and Compendium of Unreported Cases	1
Plaintiff's Opposition with Exhibits	2
Defendants' Reply Affirmation, Affidavit, Reply Memorandum of Law, and Compendium of Unreported Cases	3
Motion Seq. 003	
Plaintiff's Notice of Motion, Affidavit, Exhibits, Memorandum of Law	1
Defendants' Memorandum of Law in Opposition	2
Plaintiff's Reply	3
Motion Seq. 005	
Plaintiff's Notice of Motion, Affidavit, Exhibits, Memorandum of Law, and Compendium of Unreported Cases	1
Defendants' Memorandum of Law in Opposition	2
Plaintiff's Reply Memorandum of Law	3

The court renders this decision and order after consideration of the papers submitted and oral argument on three motions: (i) Defendants' motion to dismiss the amended complaint (Mot. Seq. 002); (ii) Plaintiff-Relator's ("Relator") motion for leave to file a second amended complaint (Mot. Seq. 003); and (iii) Relator's motion for leave to file a third amended complaint (Mot. Seq. 005).

Brief History

Relator Thomas C. Willcox, Esq. brings the instant qui tam action under the New York False Claims Act ("NY FCA") against Defendants, banks with principal places of business in New York, who are the successors-in-interest to the banks that filed the tax returns at issue in this proceeding.

In 2003, Relator represented PSINet Liquidating, LLC ("Liquidating") in federal actions *PSINet Liquidating LLC. v. Bear Stearns & Co., Inc.*, 02 CIV.6691 GBD, 2003 WL 367863 (S.D.N.Y. Feb. 19, 2003) *aff'd sub nom. PSINet Liquidating LLC v. Bear Stearns & Co.*, 357 F3d 263 (2d Cir. 2004) ("PSINet I") and in *Psinet Liquidating LLC v. Bear, Stearns Intl. Ltd.*, 03 CIV.24 DLC, 2003 WL 21511936 (S.D.N.Y. July 1, 2003) *aff'd sub nom. PSINet Liquidating LLC v. Bear Stearns & Co.*, 357 F.3d 263 (2d Cir. 2004) ("PSINet II"). In both cases, Liquidating alleged that the discounted security notes they sold to Defendants in two 1999 transactions were "sham[s]," because instead of reselling the notes to various external purchasers, the Defendants re-sold the notes to their UK-affiliates. *See PSINet 1*, at *1 (July 1999 transaction); *PSINET II*, at *3 (November 1999 transaction). Liquidating claimed that under this setup, the discounted notes were loans, not securities, and as such, the discount they gave the Defendants in the transactions violated New York's statutory cap on loan brokerage fees. *See PSINet 1*, at *1 (referring to General Obligations Law § 5-531); *PSINET II*, at *1. The district court dismissed both cases, finding that the notes were securities, not loans. *See PSINet 1*, at *6; *PSINET II*, at *4. On appeal, the Second Circuit consolidated the cases and affirmed the dismissal. *See PSINet Liquidating LLC v. Bear Stearns & Co.*, 357 F.3d 263, 265 (2d Cir. 2004).

Liquidating later brought a similar action in New York state court which was dismissed on res judicata grounds. *See PSINet Liquidating LLC v. Bear Stearns & Co., et al.*, Index No. 602267/2003 (Sup. Ct. Sept. 8, 2004).

In the present action, Relator alleges that Defendants conspired to and knowingly failed to report the revenue they earned from the July and November 1999 transactions on their 1999

New York State tax returns. Relator seeks judgment in his favor, on behalf of New York State, for the amount of Defendants' alleged unpaid 1999 New York State income taxes, which Relator believes is over $1,000,000. As a qui tam plaintiff, Relator would be entitled to a reward of up to twenty-five percent of the total recovery.[1] *See* New York State Fin. Law § 190(6)(a).

The Instant Motions

Defendants move to dismiss the amended complaint pursuant to CPLR §§ 3211(a)(1), (5), and (7). Relator subsequently moved for leave to file a second and third amended complaint. The court will first address the motion to dismiss.

To prevail on a motion to dismiss, it must be shown that no cause of action exists. *Guggenheimer v. Ginzburg*, 401 N.Y.S.2d 182, 185 (1977). Factual ambiguity is resolved by affording the pleading a "liberal construction" and the benefit of every possible favorable inference." *Leon v. Martinez*, 614 N.Y.S.2d 972, 974 (1994). "On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff." *Benn v. Benn*, 82 A.D.3d 548, 548 (1st Dep't 2011) (internal citations omitted). Applying that standard here, the motion is granted and the court dismisses the complaint as time-barred.

One may be liable under the New York False Claims Act on a number of grounds, including where he "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government" (New York State Fin. Law § 189(1)(g)), or conspires to violate same (State Fin. Law § 189(1)(c)). The statute of limitations for a claim under NY FCA is ten years. *See* State Fin. Law § 192(1) ("A civil action under this article shall be commenced no later than ten years after the date on which the violation of this article is committed."). Under the NY FCA, an action commences when the plaintiff files a complaint. *See id.* The language of the NY FCA is virtually identical to the Federal False Claims Act (31 USC § 3729 *et seq.*) ("Federal FCA"), and

[1] This is not the first time that Relator has sought out a reward for reporting the Defendants' 1999 New York State Tax Returns. Relator reported Defendants to the IRS, as a whistleblower, in 2005 and 2006; however, in both instances the IRS rejected Relator's claims.

it is therefore "appropriate to look to the Federal FCA when interpreting the New York act." *State ex rel. Seiden v. Utica First Ins. Co.*, 96 A.D.3d 67, 71 (1st Dep't 2012).

Relator's NY FCA claim for the alleged fraudulent submission of Defendants' 1999 New York State tax returns is barred by the statute of limitations. The statute of limitations[2] begins to run "on the date the claim is made." *U.S. ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993). Here, Relator alleges that the Defendants violated New York State Finance Law § 189(g) by failing to report income on their 1999 New York State Tax Returns. However, Defendants have produced copies of their 1999 New York State Tax Returns which show that each return was filed on or prior to February 14, 2002. To fall within the NY FCA's ten-year statute of limitations period (§ 192(1)), Relator would have had to file his complaint on or before February 14, 2012. However, Relator filed his complaint on January 28, 2013.

Relator argues for the first time in his memorandum in opposition to the motion to dismiss that the statute of limitations can also begin to run when a false claim is *paid*, and thus, the relevant information for calculating the statute of limitations should be when the government-sent refund checks were issued, not when the tax returns were filed. The court finds this argument unpersuasive. First, a "plaintiff may not amend his complaint to add a new legal theory via statements in a memorandum of law in opposition to a pending dispositive motion." *Rosenberg v. Home Box Office, Inc.*, 2006 WL 5436822, *19, (Sup. Ct. Jan. 30, 2006) *aff'd* 33 A.D.3d 550 (1st Dep't 2006).

Moreover, even if the court were to consider this new legal argument, it would not prevail. Relator cites *Blusal Meats, Inc. v United States*, 638 F. Supp. 824 (S.D.N.Y. 1986) *aff'd*, 817 F.2d 1007 (2d Cir. 1987), to support his argument that the statute of limitations can begin "on the date of payment." However, the position *Blusal* sets forth represents an older, minority position that a recent line of cases rejects. *See U.S. ex rel. Condie v. Bd. of Regents of Univ. of California*, 1993 WL 740185, at *3 (N.D. Cal. Sept. 7, 1993). In addition, NY FCA cases hold that the statute of limitations runs only when the false claim is made. *See People ex rel. Schneiderman v. Bank of New York Mellon Corp.*, 2013 WL 4516209, *28-29, (Sup. Ct.

[2] Relator seems to alternatively suggest that there is no statute of limitations for fraudulent tax returns because of the fraud exception in Tax Law § 1147. However, § 1147 applies to actions taken by the state, and this is an action taken qui tam. More importantly, the relator brought this action under the NY FCA, not Tax Law § 1147.

Aug. 5, 2013] ("[L]iability attaches to an actual claim or demand for payment."). Furthermore, under other New York tax fraud statutes, the limitation period runs from when the false claim is first submitted. *See People ex rel. Schneiderman v. Sprint Nextel Corp.*, 41 Misc. 3d 511, 525 (Sup. Ct. 2013) *aff'd sub nom. People v. Sprint Nextel Corp.*, 114 A.D.3d 622 (1st Dep't 2014); *Roebling Liquors Inc. v. Commr. of Taxation and Fin.*, 284 A.D.2d 669, 672 (3d Dep't 2001).

In any event, even if the Court adopted the *Blusal* approach, and the statute of limitations period began to run when Defendants received refunds for their 1999 New York State Tax Returns, the relator's claims would still be time-barred. Relator argues that the relevant documents for statute of limitations purposes are the refund checks. However, three of the four Defendants, Morgan Stanley, JP Morgan, and Bank of America, did not request a refund on their 1999 New York State Tax Returns. Credit Suisse, the only Defendant that requested a refund on its 1999 New York State Tax Return, received its refund check on March 14, 2001, over ten years before relator filed his complaint.

Relator raises an additional theory of what constitutes a false claim under the NY FCA, arguing that *any* tax return Defendants filed after submitting their alleged fraudulent 1999 New York State Tax Returns would be a false claim, allowing Relator's claims to fall within the statute of limitations. The court rejects this argument. As noted above, it is improper for a plaintiff to raise new legal theories in a memorandum of law opposing a pending dispositive motion. *Rosenberg*, 2006 WL 5436822, at *19. In addition, Relator's new theory, which he offers without any authority, stands in contrast to how courts have interpreted the NY FCA statute of limitations. *See People ex rel. Schneiderman,* 2013 WL 4516209, at *28-29 (liability under the NY FCA attaches to the initial false claim). The result of this theory of liability would vitiate any statute of limitations.

Like his NY FCA fraudulent tax submission claims, Relator's NY FCA conspiracy claim under § 189(1)(c) is also time-barred by the statute of limitations. First, Relator's conspiracy claim will not prevail because the success of his conspiracy claim depends on availability of his underlying NY FCA claim. New York law does not recognize the substantive tort of civil conspiracy as an independent cause of action, and thus conspiracy is available "only if there is evidence of an underlying actionable tort." *UniCredito Italiano SPA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 504 (S.D.N.Y. 2003) (internal citations omitted). Because Relator's §

189(1)(g) claim falls outside the applicable statute of limitations period, the conspiracy claim fails.

Furthermore, even if the court were to decline to dismiss Relator's § 189(1)(g) claim, the conspiracy claim falls outside of the NY FCA statute of limitations period independently. Under the federal FCA, the statute of limitations for conspiracy claims runs when the conspiracy is formed. *See Blusal*, 638 F. Supp. at 829-30. Additionally, subsequent overt acts in furtherance of the conspiracy do not alter the statute of limitations period. *See id.* Here, based on Relator's complaint, the latest the conspiracy could have formed is in 2001,[3] which means that Relator's conspiracy claim, alleged in his 2013 complaint, is barred by the ten-year statute of limitations under the NY FCA.

Accordingly, Defendants' motion to dismiss the amended complaint is granted. The court will not reach the remainder of Defendants' arguments. In light of the dismissal, Plaintiff's motions for leave to amend the complaint are denied as moot. Plaintiff's oral application for discovery in the event the court granted the motion to dismiss is denied.

This constitutes the Decision and Order of the court.

Dated: July 17, 2015
New York, New York

ENTER:

Kelly O'Neill Levy

Hon. Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY

[3] Although Relator did not specifically allege when, or even which Defendants, entered into a conspiracy, it can be inferred that a multiple-defendant conspiracy to defraud the government on 1999 tax returns must have been formed before the first Defendant filed their 1999 New York State Tax Return on February 1, 2001.