

**Connecticut N.Y. Light. Co. v Manos Bus. Mgt. Co.
Inc.**

2015 NY Slip Op 32931(U)

December 10, 2014

Supreme Court, Westchester County

Docket Number: 59101/2014

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
CONNECTICUT NEW YORK LIGHTING COMPANY,

Plaintiff,

- against -

**FILED
AND
ENTERED**
ON 12-11 2015
**WESTCHESTER
COUNTY CLERK**

DECISION AND ORDER

MANOS BUSINESS MANAGEMENT COMPANY INC.,
A/k/a MANOS BUSINESS MANAGEMENT CO., a/k/a
MANOS BUSINESS MANAGEMENT, INC., STEFAN
MALGARINOS and THEODORE S. MALGARINOS,

Index No. 59101/2014
Sequence No. 1

Defendants.

-----X
WOOD, J.

The following papers numbered 1-13 were read in connection with defendants' motion to dismiss the complaint:

- Defendants' notice of motion, Counsel's Affirmation, Malgarinos Affidavit, Exhibits. 1-4
- Plaintiff's Counsel's Affirmation, Exhibits, Memorandum of Law. 5-12
- Defendants' Reply Memorandum of Law. 13

Defendants bring this motion to dismiss the complaint on the grounds that pursuant to CPLR 3211(a), an action cannot be maintained due to the expiration of the relevant statute of limitations; pursuant to CPLR 3211(c) dismissing the complaint as to defendant Theodore S.

Malgarinos, for failure to state a cause of action; and pursuant to 3211(a)(7) for failure to state a cause of action upon which relief can be granted against all defendants for failure to plead with specificity.

This action was commenced with the filing of the summons and complaint on or about June 6, 2014. According to the complaint, in or about 2007, defendant Manos Business Management Company Inc., a/k/a Manos Business Management Co, a/k/a Maños Business Management, Inc., (“Manos”), began providing employee payroll services to plaintiff. In connection therewith, Manos agreed to perform all of plaintiff’s payroll and related tax duties associated with plaintiff’s compensation of its employees, including federal and state income tax withholding and reporting and paying social security, medicare, unemployment and income taxes to the appropriate governmental authorities on plaintiff’s behalf, for a fee. Manos acted as plaintiff’s payroll services provider during a portion of 2007, throughout the years 2008, 2009, 2010, 2011 and a portion of 2012. Throughout this time, Manos provided written accountings to plaintiff. In or about 2011, plaintiff began receiving notices from federal and state tax authorities that certain of its required payroll reports were filed late or not at all, and that certain funds that were due for social security, medicare, unemployment, and income taxes for plaintiff’s employees were remitted late, only partially, or not at all. These notices were inconsistent with the accountings plaintiff had been receiving from Manos, and when plaintiff brought these notices to the attention of defendant Stefan Malgarinos, he represented to plaintiff that the error was on the part of federal and state authorities that sent the notices, and he represented and assured plaintiff that Manos was continuing to perform all of its payroll services obligations. Plaintiff now opposes defendants’ motion to dismiss the complaint.

NOW, based upon the foregoing papers, the motion is decided as follows:

STATUTE OF LIMITATIONS

In moving to dismiss a cause of action pursuant to CPLR 3211 (a) (5), as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired A.F. Rockland Plumbing Supply Corp. v Hudson Shore Associated Ltd. Partnership, 96 AD3d 885, 886 [2d Dept 2012]). The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (Torah v Dell Equity, LLC, 90 AD3d 746, [2d Dept 2011]).

Here, defendants allege that this action is time-barred by the relevant statutes of limitations, because the conduct complained of supposedly began in 2007, which is seven years ago. As plaintiff points out, and the court agrees that the year 2007, appears to be the year that plaintiff began to use defendants for payroll services, not the time of the alleged wrongdoing, and should not be used as the measuring time for the statute of limitations as discussed below.

The first cause of action based upon breach of contract are governed by a six-year statute of limitations, which is measured from the time of the breach (see CPLR 213 [2]; Ely-Cruikshank Co. v Bank of Montreal, 81 NY2d 399, 402 [1993]). When a contract contains a continuing obligation or provides for continuing performance over a period of time, “a claim accrues each time the agreement is allegedly breached” (New York Cent. Mut. Fire Ins. Co. v Glider Oil Co., Inc., 90 AD3d 1638 [2011]). However, a reading of the complaint, specifically, paragraph 19 provides that “...Defendants perpetrated their fraud upon plaintiff commencing in or about August 2010, and continued to do so throughout all or most of 2011, but kept their misconduct and

misappropriations of plaintiff's fund secret from plaintiff through their false representations, assurances and accounting reports". Plaintiff represents that defendants' wrongful and illegal activities were not discovered and could not through the exercises of reasonable diligence have been discovered by plaintiff until approximately the middle of 2012.

Accordingly, based upon the record, plaintiff alleges Manos conduct constituting breach of contract began in or about August 2010, thus, this action was commenced less than four years later. The first cause of action is timely.

The second cause of action is fraud based which must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or 'could with reasonable diligence have discovered it,' " whichever is later (Vilsack v Meyer, 96 AD3d 827, 828 [2d Dept 2012]). Here it is clear that plaintiff alleges that defendants' fraudulent scheme began in or about August 2010, well-within the applicable six year period of limitation.

With regard to the third cause of action, New York law does not provide a single statute of limitations for causes of action alleging a breach of fiduciary duty. Rather, the choice of the applicable limitations period depends on the substantive remedy sought by the plaintiff. Where the remedy sought is purely monetary in nature, courts construe the action as alleging "injuries to property" within the meaning CPLR 214(4), which has a three-year limitations period (Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies. Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8). However, if the fraud allegation is only incidental to the allegation of breach of fiduciary duty, and not essential to it, then the three-year statute of limitations will apply (Monaghan v Ford Motor Co., 71 AD3d 848,

849-50 [2d Dept 2010]). Under these circumstances, the third cause of action is timely, as a breach of a fiduciary duty claims based upon allegations of actual fraud are subject to a six year statute of limitations.

The fourth cause of action for breach of trust can be similarly characterized as predicated upon defendants' breach of fiduciary duty or upon their breach of contract, and that cause of action is timely commenced.

Regarding the fifth cause of action, the applicable statute of limitations is six years for unjust enrichment, (Matter of Lamb, 145 AD2d 935 [2d Dept 1988]), constructive trust (*see* CPLR 213[1]; Mazzone v. Mazzone, 269 AD2d 574 [2d Dept 2000]), and an accounting (Knobel v. Shaw, 90 AD3d 493 [1st Dept 2011]). It is well settled that the Statute of Limitations for the imposition of a constructive trust begins to run either (1) when the constructive trustee's interest in the property first becomes adverse to the plaintiff's interests, or (2) when the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary (Sitkowski v Petzing, 175 AD2d 801 [2d Dept 1991]). Moreover, "the claim does not begin to accrue until there is either an open repudiation of the fiduciary's obligation or a judicial settlement of the fiduciary's obligation to account" (Matter of Meyer, 303 AD2d 682, 683 [2d Dept 2003]). Thus, the statute of limitations for an accounting has not run. "A determination of when the wrongful act triggering the running of the Statute of Limitations occurs depends upon ... whether the constructive trustee wrongfully withholds property acquired lawfully from the beneficiary, in which case the property would be held adversely from the date the trustee breaches or repudiates the agreement to transfer the property" (De Laurentis v. De Laurentis, 47 AD3d 750, 751–752 [2d Dept 2008]). Here, it appears that plaintiff's relationship with Manos and the individual defendants continued until in

or about July 2012, when plaintiff terminated its contract with Manos. Accordingly, the fifth cause of action is timely.

The sixth cause of action for conversion is subject to three years statute of limitations (*see* CPLR 214 ; *see also* Gold Sun Shipping Ltd. v Ionian Transp. Inc., 245 AD2d 420, 421 [2d Dept 1997]). Accrual runs from the date the conversion takes place. Here this action was commenced less than three years after the termination of plaintiff's contract with Manos, and less than six months after a demand letter was sent to defendants on behalf of plaintiff's by its attorneys, demanding payment of the sums that defendants allegedly misappropriated.

Likewise, the seventh cause of action alleges that the individual defendants are individually liable for plaintiff's damages both by reason of their own alleged fraudulent conduct are also commenced on a timely basis, as discussed above.

MOTION TO DISMISS

It is well settled that pursuant to CPLR (a)(7) "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory"¹ (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v. Leader, 74 A.D.3d 1180, [2d Dept 2010]); (Bua v Purcell & Ingraio, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857, 984 NE2d 324 [2013]). However, this

¹Internal citations omitted.

does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]). Moreover, if the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a) (7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint,” and if the court does so, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Thus, affidavits and other evidentiary material may also be considered to “establish conclusively that plaintiff has no cause of action” (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]). The court may also consider further affidavits where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]).

More succinctly, under CPLR 3211(a) (7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes “whether the proponent of the pleading has a cause of action” (Sokol v Leader, 74 AD3d 1180, 1181-82 [2010]; Marist College v Chazen Env'tl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

PLAINTIFF'S CAUSES OF ACTION

Defendants alleges that the causes of action consist of unspecified, conclusory allegation of breach of contract; fraudulent inducement; breach of fiduciary duty; misappropriation of funds;

conversion; and individual liability of individual defendants. Pursuant to CPLR 3013

“[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” CPLR 3014 provides that “[e]very pleading shall consist of plain and concise statements in consecutively numbered paragraphs.” It further provides that “[e]ach paragraph shall contain, as far as practicable, a single allegation., the complaint should be liberally construed in the plaintiffs' favor and the facts alleged in the complaint should be assumed to be true (Palazzolo v. Herrick, Feinstein, LLP, 298 AD2d 372, [2d Dept. 2002]; JP Morgan Chase v J.H. Elec. of New York, Inc., 69 AD3d 802, 803 [2d Dept 2010]). Where a cause of action is based upon, inter alia, misrepresentation, fraud or breach of trust, the pleader is statutorily required to state the circumstances constituting the wrong... in detail (CPLR 3016[b]; see Stein v. Doukas, 98 AD3d 1024, 1025-1026 [2d Dept 2012]).

Breach of Contract

Plaintiff's first cause of action alleges that as a direct and proximate result of defendants' several breaches of contract by their failure to perform its payroll services obligations, plaintiff had suffered substantial damages no less than \$300,000. Defendants argue that the reason plaintiff fails to identify any contract is because there was no valid contract of any kind between the parties.

As an initial matter, the court notes that the Statute of Fraud provides that an agreement will not be recognized or enforced if it is not in writing and subscribed by the party to be charged when the agreement by its terms is not to be performed within one year from its making or is not completed before the end of a lifetime (General Obligation Law § 5-701(a)(1)). If a contractual

obligation could have been intended to be performed within one year and thus would not require a written instrument (Constantini v. Bimco Industries, Inc., 125 AD2d 531, [2d Dept 1986]). In any event, as long as the agreement may be fairly and reasonably interpreted as capable of performance within a year, which could be the case here, the statute of frauds would not apply. Where the alleged oral agreement requires the balance of the contract price to be paid at a date beyond one year, the contract can not be performed within one year and is therefore void under the Statute of Frauds (A. Aversa Brokerage, Inc. v. Honig Insurance Agency, Inc., 249 A.D.2d 345, 671 N.Y.S.2d 135 (2d Dept 1998)).

Here, the essential elements of the contract have been specified, *inter alia*, that Manos agreed to perform all of plaintiff's payroll and related tax duties associated with plaintiff's compensation of its employees for a fee. Plaintiff paid Manos on a weekly basis an amount equal to plaintiff's obligation to pay said compensation and obligations, including Manos' fee, and Manos agreed to be responsible not only to pay plaintiff's employees their net compensation but also to remit to the appropriate federal and state governmental authorities as and when due the correct amount of withheld income taxes and other monies.

In light of the foregoing, applying these principles to the instant matter, the complaint adequately alleges all of the essential elements of a cause of action to recover damages for breach of contract, to wit: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages. Accordingly, the complaint sufficiently stated a cause of action to recover damages for breach of contract (*see* CPLR 3211[a][7]); JP Morgan Chase v J.H. Elec. of New York, Inc., 69 AD3d 802, 803 [2d Dept 2010]).

Fraud

The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (Deutsche Bank Natl. Trust Co. v. Sinclair, 68 AD3d 914, 916 [2d Dept 2009]). Furthermore, a fraud claim must be based upon a misrepresentation of an existing fact rather than upon an “expression of future expectations” (Deutsche Bank Natl. Trust Co. v. Sinclair, 68 AD3d 914, 916 [2d Dept 2009]).

However, even if plead with sufficient particularity to comply with the requirements of CPLR 3016, “a cause of action premised upon fraud cannot lie where it is based on the same allegations as the breach of contract claim” (Heffez v. L & G Gen. Constr., Inc., 56 AD3d 526, [2d Dept 2008]), as a cause of action “for fraud does not lie where the only fraud claimed relates to an alleged breach of contract” (Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC, 107 AD3d 788, 791, 967 N.Y.S.2d 119 [2d Dept 2013]).

At bar, defendants argue that no facts are alleged which show any specific misrepresentation, which was false and known to be false by defendants or made for the purpose of inducing the other party to rely upon it. Plaintiff retorts that defendants knew their misrepresentations were false, referring to the false accounting reports provided to plaintiff, and that defendants intended that plaintiff rely upon defendants’ misrepresentations, and that plaintiff suffered damages as a result.

Based upon the record, the cause of action alleging fraud was pleaded with the requisite particularity pursuant to CPLR 3016 (b) and it adequately informed defendants of the complained-

of incidents (Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553,559 [2009]).

Breach of fiduciary duty claim

To state a cause of action to recover damages for breach of fiduciary duty, a plaintiff must allege: “(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct” (Rut v. Young Adult Inst., Inc., 74 AD3d 776, 777, [2d Dept 2010]). A breach of fiduciary duty cause of action must be pleaded with the particularity required by CPLR 3016(b) (U.S. Fire Ins. Co. v Raia, 94 AD3d 749, 751 [2d Dept 2012]). A fundamental element of a fiduciary relationship is that a fiduciary owes undivided loyalty to those whose interest the fiduciary is to protect (Birnbaum v. Birnbaum, 73 NY2d 461, 466 [1989]). A fiduciary duty arises between parties when one party is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]). Moreover, a fiduciary relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other (Roni LLC v Arfa, 18 NY3d 846, 848 [2011]). The issue of the existence of a fiduciary relationship between contracting parties is fact-based, and therefore, not generally subject to dismissal on the pleadings. (Ritani, LLC v. Aghjayan, 880 F.Supp.2d 425, 455 [S.D.N.Y.2012]).

Here, defendants were entrusted on a weekly basis with all the funds necessary to pay plaintiff's employees their salaries, as well as the sums withheld from employees' paychecks that were required to be remitted to federal and state authorities. For purposes of determining the defendants' motion, the court accepts plaintiff's allegations that defendants owed them a fiduciary duty, as the pleading sufficiently raises an issue as to the existence of at least an informal fiduciary relationship.

Misappropriation and Conversion of Funds Claims

Generally, a court will consider four elements to the imposition of a constructive trust: (i) a confidential or fiduciary relationship; (ii) a promise, express or implied; (iii) a transfer in reliance thereon; and (iv) unjust enrichment (Sharp v. Kosmalski, 40 N.Y.2d 119, 121 [1976]). Bodden v Kean, 34 Misc 3d 1225(A) [Sup Ct, Kings Cty 2009] adhered to on rearg., 34 Misc 3d 1225(A), 950 NYS2d 490 [Sup Ct 2010] affd., 86 AD3d 524, 927 NYS2d 137 [2d Dept 2011] and affd., 86 AD3d 524, 927 NYS2d 137 [2d Dept 2011]). The general rule includes the requirement of a sufficient demonstration that the property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest (Sharp v. Kosmalski, 40 NY2d 119 at 121 (1976)). In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: 1) a confidential or fiduciary relation, 2) a promise, 3) a transfer in reliance thereon and 4) unjust enrichment (Sharp v. Kosmalski, *supra*, at 121; Depena v. Shocker, 83 AD3d 885 [2d Dept 2011]). The remedy is somewhat flexible, and in this spirit, the promise need not be express, but may be implied based upon the circumstances of the relationship and the nature of the transaction.

Property is converted when a person intentionally and without authority exercises control over it in a manner that interferes with another's right of possession (Scott v. Fields, 85 AD3d 756 [2d Dept 2011]). The two elements of conversion are: (1) the plaintiff's possessory interest in the property, and (2) the defendant's control over the property or interference with it, in derogation of the plaintiff's rights. "A cause of action alleging conversion should be dismissed when the plaintiff does not allege "legal ownership or an immediate right of possession to specifically identifiable funds and that the defendant exercised an unauthorized dominion over

such funds to the exclusion of the plaintiff's rights" (Barker v Amorini, 2013-09300, 2014 WL 5151424 [2d Dept Oct. 15, 2014]).

At bar, defendants argue that the fourth and sixth causes of action assert conclusory claims of misappropriation of funds (and to the extent they plead conversion of funds), *inter alia* the complaint completely fails to identify any facts, which would demonstrate any misappropriation or conversion of any funds belonging to plaintiff. The facts alleged in the complaint recite that Manos and the other defendants acted as trustee for plaintiff in receiving funds that defendants knew were required to be remitted on plaintiff's behalf to federal and state authorities. Overall, accepting plaintiff's allegations as true, and according it the benefit of every possible favorable inference, they are sufficient to state a cause of action for conversion and to impose a constructive trust.

Accounting and Unjust Enrichment cause s of action

In order to prevail on a claim of unjust enrichment, it must be shown that the other party was enriched, at that party's expense, and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (Old Republic Natl. Tit. Ins. Co. v. Luft, 52 AD3d 491 [2d Dept 2008]). A cause of action for unjust enrichment arises when one party possesses money or obtains a benefit that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to another" (Menthe v. Wenzel, 178 AD2d 705 [3d Dept 1991]; *see* Parsa v. State of New York, 64 N.Y.2d 143 [1984]).

An accounting is an equitable remedy designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession (Roslyn Union Free Sch. Dist. v. Barkan, 16 NY3d 643, 653 (2011)).

A plaintiff must show a demand for an accounting and a failure or refusal by the partner with the books, records, profits or other assets of the partnership in his possession to account to the other partner or partners (Conroy v. Cadillac Fairview Shopping Ctr. Properties (Maryland), Inc., 143 AD2d 726, 726-27 [2d Dept 1988]). Defendants argue that requesting an accounting is not a cause of action, but relief that plaintiff requests. Faced with multiple notices of late payments and non-payment from federal and state tax authorities, plaintiff may be entitled to an accounting from defendants in order to determine what monies were remitted by them, when and to what governmental entity.

The complaint details how defendants misappropriated plaintiff's money and failed to remit it to the federal and state authorities as required for plaintiff's employees' payroll withholding. Based upon the record, the court finds that plaintiff's complaint sufficiently pleads the requisite elements of a cause of action for an accounting and unjust enrichment by alleging a demand for and refusal of access to records and an accounting of all funds entrusted from plaintiff to defendants to be applied to remitting the employee withholdings to the proper authorities.

Individual Liability Claims

Generally, a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability E. Hampton Union Free School Dist. v Sandpebble Builders, Inc., 66 AD3d 122, 126 [2d Dept 2009] affd., 16 NY3d 775, 944 NE2d 1135 [2011]). A plaintiff seeking to pierce the corporate veil must demonstrate that "a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so,

abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff” (E. Hampton Union Free School Dist. v Sandpebble Builders, Inc., 66 AD3d 122, 126 [2d Dept 2009] affd., 16 NY3d 775, [2011]).

Defendants assert that the seventh cause of action is simply a reiteration of plaintiff’s breach of fiduciary duty claims, which lack specificity. There are no specific facts which demonstrate a duty to act by the individual defendants. Plaintiffs counter that this cause of action seeks to recover damages from the individual defendants both by reason of their own fraudulent conduct, and on the ground that sufficient facts exist to pierce the corporate veil of defendant Manos. Plaintiffs allege that based upon information gained from New York State Department of State’s corporation database, it appears that defendant Manos was in fact defunct before plaintiff even started doing business with defendants, and if so, there would be no basis for defendants asserting individual immunity from suit, as the corporation behind which they seek to hide has not existed for some 18 years. Therefore, plaintiff argues that if defendant Manos is indeed a defunct corporation that was dissolved by proclamation, all corporation protections are lost.

In any event, plaintiff has pleaded facts in the complaint that allege that the individual defendants corrupted corporate defendant Manos, turning it from a payroll service provider company into a vehicle to commit wrongdoing. Specifically, the complaint reads that plaintiff brought the government notices that certain of its required payroll reports were filed late or not at all, to the attention of individual Stefan Malgarinos, who represented to plaintiff that there was an error on the part of the authorities and he assured plaintiff that Manos was continuing to perform all of its payroll services obligations. The complaint also states that the individual defendants were responsible for the content of the false accounting reports sent to plaintiff and knew of their

falsity at the time they were sent out. The complaint contains that individual defendant, Theodore Malgarinos was actively a part of the Manos payroll services business throughout the alleged wrongdoing, and knew that his son Stefan Malgarinos had represented and assured plaintiff that Manos was not in default, and actively participated in and aided and abetted the ongoing deception.

Based upon the foregoing, and keeping in mind the liberal notice pleading requirements, the material elements of this cause of action have been satisfied.

COMPLAINT AS AGAINST THEODORE S. MALGARINOS

It is well settled, corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, “even if they did not stand to gain personally” (Pludeman v N. Leasing Sys., Inc., 10 NY3d 486, 491 [2008]). CPLR section 3016(b) pleading requirement may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct (Pludeman v N. Leasing Sys., Inc., 10 NY3d at 492). “A person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator” (Palmetto Partners, L.P. v AJW Qualified Partners, LLC, 83 AD3d 804, 809 [2d Dept 2011]). Similarly, agents of a corporation, such as officers and directors, may not be held liable on behalf of their principal, absent proof of independently tortious conduct (Murtha v Yonkers Child Care Ass'n, Inc., 45 NY2d 913, 915 [1978]).

Here, defendants argue that the complaint must be dismissed as against Theodore S. Malgarinos, who has absolutely nothing to do with the conduct complained of in the complaint, as he is merely the father of defendant Stefan Malgarinos. Moreover, defendants deny that Theodore S. Malgarinos is the owner, employee, officer, director and agent of defendant Manos, and the

complaint lacks any basis for relief against him inasmuch as he has never been associated with Manos in the manner alleged by plaintiff. Theodore Malgarinos represents that he is an accountant for his own firm and has never provided payroll services to plaintiff. Plaintiff counters that Theodore S. Malgarinos is listed on the NYS Department of state's corporations database as the Chief Executive Officer of defendant Manos, and shares the same business address, and telephone number. Moreover in other online web sites, Theodore Malgarinos is listed as the owner and or the contact person for Manos. Plaintiff claims that Theodore Malgarinos was actively a part of the Manos payroll services business.

Taking the allegations in the light most favorable to the complainant, gives rise to the reasonable inference—that Theodore Malgarinos, could very likely be an individual in a key position, and knew of and/or were involved in the fraud. Here, it cannot be said, as a matter of law, that a finder of fact could not reasonably infer the requisite knowledge or participation by Theodore S. Malgarinos.

Accordingly, in the light most favorable to the nonmoving party, taking into consideration the early stage of this proceeding, and according that party the benefit of every possible favorable inference, the facts as alleged are cognizable within the claim asserted to section 3016(b)'s satisfaction.

Accordingly, based on the stated reasons, it is hereby

ORDERED, that defendants' motion to dismiss the complaint is denied in its entirety; and it is further

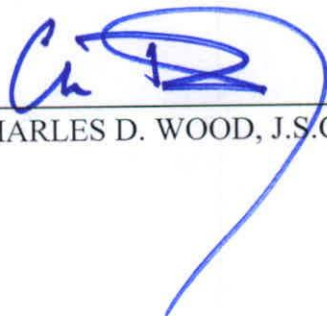
ORDERED, that plaintiff shall serve a copy of this order to all parties within ten (10) days of notice of entry, and file proof of service within five (5) days of service; and it is further

ORDERED, that the parties are directed to appear in the Preliminary Conference
Part on **January 12**, 201**5** in Room 811 of the Westchester County Courthouse.

All matters not specifically addressed are herewith denied.

This constitutes the decision and order of the court.

Dated: White Plains, New York
December 10, 2014



CHARLES D. WOOD, J.S.C.

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