SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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UNIVERSAL PROCESSING SERVICES OF WISCONSIN, LLC D/B/A NEWTEK MERCHANT SOLUTIONS,

Plaintiff,

-against-

CHARLES BERGER, *et. al.*,

Defendants.

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DECISION/ORDER
Index No. 154645/2016
Motion Date: 1/3/2017
Mot. Seq. Nos. 001, 002

BRANSTEN, J.

This matter comes before the Court on Defendants Salomon Galitzky and Ruchel Breuer's motion to dismiss pursuant to CPLR § 3211(a)(7). The motion is joined by Defendants Charles Berger, Joseph Fischer, Miriam Grissman, Jacob Goldberg, Gila Bernsetein, Toby Bick, Naftalia Bick, Chaya Gordon, Yosaif Kitay, Moshe Kitkay, Devora Kitay, Blime Adler, Allan Bernstein, Mark Rossenwasser, Aron Grossman, and Congregation Bais Malka.

Also before the Court is a motion to withdraw as counsel for Defendants Salomon Galitzky and Ruchel Breueur by the law firm Cohen LaBarbera & Landrigan, LLP. Both motions are consolidated for disposition herein.

I. Background

Plaintiff Universal Processing Services of Wisconsin, LLC markets credit card processing services to merchants who accept credit cards as a form of payment. Defendants are a group of individuals and a religious institution whose credit cards were allegedly fraudulently charged for a significant number of tablet computers by non-parties The Loft by Angeles Furniture Collection, LLC ("The Loft") and Scorsetti Design, LLC ("Scorsetti") (collectively, the "Merchants"). The Merchants were longtime customers of Plaintiff who processed the credit card receipts of the Merchants' own customers pursuant to a credit processing agreement (the "Agreement") using Plaintiff's electronic payment processing services (the "Processing Account").

According to the Complaint, in or prior to January 2014, the non-party Merchants coordinated with non-party Sungame Corporation ("Sungame," or the "Seller") to fraudulently charge customers for non-existent computer tablets in return for rebates and "educational grants" to inflate the non-parties' sales numbers. Complaint ("Compl.") ¶¶ 40-41. As part of this scheme, the Merchants agreed to let Sungame use their Processing Account provided to them under the Agreement with Plaintiff.

Pursuant to the Agreement, any money refunded for returned purchases ("chargebacks") would be withdrawn from the Merchants' bank accounts. However, if those accounts were insufficient to cover the total value of the chargebacks, then Plaintiff became responsible for reimbursing the customers' credit cards for the chargebacks. Compl. ¶ 37. Furthermore, the Agreement specified that the Merchants "may present for

payment only valid charges that arise from a transaction between a bona fide Cardholder and your establishment." Compl. ¶¶ 3, 35.

Nonetheless, between January and July 2014, the Merchants allegedly processed over $1,750,000, in sham tablet purchases made by Defendants. Compl. ¶¶ 10-30. According to the Complaint, Defendants made these purchases knowing that they would not receive the tablets, and would instead receive the aforementioned rebates and educational grants. Compl. ¶¶ 4, 40.

The complaint further alleges that, once the sham purchases reached a suspicious level, the Merchants' Processing Account was promptly closed, and Plaintiff was left on the hook to reimburse at least $593,700 worth of purchases, with Defendants' accounts representing $501,700 of that total. Compl. ¶¶ 5, 8, 10-16.

Plaintiff filed the instant Complaint on June 2, 2016, alleging aiding and abetting fraud and unjust enrichment against Defendants based on the above facts.

II. Standard of Review

In considering a motion to dismiss for failure to state a claim under CPLR § 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). While factual allegations contained in a complaint are accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled

to preferential consideration. *Sud v. Sud,* 211 A.D.2d 423 (1st Dep't 1995). The motion must be denied if the factual allegations contained within "the pleadings' four corners . . . manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 151-52 (2002).

III. Discussion

Defendants move to dismiss both remaining Counts of the Complaint—aiding and abetting fraud and unjust enrichment.[1] The law firm Cohen LaBarbera & Landrigan, LLP separately moves to withdraw as counsel for Defendants Salomon Galitzky and Ruchel Breueur. The Court will address each issue independently below.

A. Aiding and Abetting Fraud

Defendants argue generally that Plaintiff's cause of action for aiding and abetting fraud must be dismissed because the Complaint fails to sufficiently allege the elements of either aiding and abetting fraud, or the underlying fraud itself, as required to state such a claim. *See* Def. Mov. Br. at 1-8.

[1] The Court will consider the motion to dismiss as if made on behalf of Defendants named in both the motion to dismiss and the affidavit of Joseph Churgin, NYSCEF No. 23. *See Merchants T&F, Inc. v. Fisher*, 2004 WL 5363575, (Sup. Ct. N.Y. Cty 2004) (permitting non-moving defendants to join in motion to dismiss via attorney affidavit). The Court will further consider the Churgin Affidavit only for its factual assertions, and will disregard additional legal argument presented in support of Defendants' motion. *See Rubin v. Rubin*, 72 A.D.2d 536, 538-39 (1st Dep't 1979) (declining to consider attorney argument contained in sworn affidavit).

To state a cause of action for aiding and abetting fraud, the plaintiff must allege (1) the existence of the underlying fraud, (2) actual knowledge, and (3) substantial assistance. *Oster v. Kirschner*, 77 A.D.3d 51, 55 (1st Dep't 2010).

Regarding the first element, to assert the underlying occurrence of fraud, the Complaint must allege (1) a material misrepresentation of an existing fact, (2) made with knowledge of the falsity, (3) an intent to induce reliance thereon, (4) justifiable reliance upon the misrepresentation, and (5) damages. *Orchid Const. Corp. v. Gottbetter*, 89 A.D.3d 708, 710 (2nd Dep't 2011). Notably, while a "material misrepresentation of fact" and "justifiable reliance" must be alleged with respect to the underlying fraud claim, neither must be alleged with respect to the defendants against whom the *aiding and abetting* claim is asserted. *See Oster v. Kirschner*, 77 A.D.3d 51, 55 (1st Dep't 2010); *Chambers v. Weinstein*, 44 Misc. 3d 1224(A) at *8 (Sup. Ct. N.Y. Cty. 2014), *aff'd*, 135 A.D.3d 450 (1st Dep't 2016).

Regarding the second element, "a plaintiff alleging an aiding and abetting fraud claim may plead actual knowledge generally, particularly at the prediscovery stage, so long as such intent may be inferred from the surrounding circumstances." *DDJ Mgmt., LLC v. Rhone Grp. L.L.C.*, 78 A.D.3d 442, 443 (1st Dep't 2010).

Regarding the third element, "substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Stanfield Offshore Leveraged*

Assets, Ltd. v. Metro. Life Ins. Co., 64 A.D.3d 472, 476 (1st Dep't 2009) (internal quotation marks omitted). The element of substantial assistance may similarly be inferred from the circumstances alleged in the complaint. *Syncora Guarantee Inc. v. Alinda Capital Partners LLC*, No. 651258/2012, 2013 WL 3477133 (Sup. Ct. N.Y. Cty. 2013).

Finally, "where a cause of action is based upon fraud or aiding and abetting fraud, the 'circumstances constituting the wrong' must be 'stated in detail.'" *Doukas v. Ballard*, 135 A.D.3d 896, 898 (2nd Dep't 2016) (quoting CPLR § 3016).

Here, Defendants argue that "Plaintiff has identified NO false statements by Moving Defendants whatsoever, and NO reliance on those statements by Plaintiff." Def. Mov. Br. at 8. Defendants further argue that the aiding and abetting claim improperly relies on a "third party reliance" theory because the parties who actually committed the alleged fraud are not named Defendants. Def. Mov. Br. at 5-6.

However, it appears that Defendants' arguments conflate the required elements of "fraud" with the elements "aiding and abetting fraud." Indeed, false statements and reliance are not elements of an aiding and abetting claim, so the Complaint need not allege either with regards to the named Defendants. *See Oster v. Kirschner*, 77 A.D.3d 51, 55 (1st Dep't 2010) (setting forth the elements of aiding and abetting fraud claim). Rather, the Court concludes that the Complaint properly asserts that the underlying fraud was committed by non-parties The Loft, Scorsetti, and Sungame, among others, by alleging the non-parties falsely represented to Plaintiff that the tablet purchases were valid, and by

alleging that Plaintiff reasonably relied on these representations in processing the transactions. *See* Compl. ¶¶ 58-59, 60-66.

To properly allege that Defendants *aided and abetted* The Loft, Scorsetti, and Sungame in this fraud, Plaintiff need only allege that Defendants (1) knew of the fraud and (2) offered substantial assistance. *Oster v. Kirschner*, 77 A.D.3d 51, 55 (1st Dep't 2010).

While the Complaint contains no direct factual allegations of Defendants knowledge or direct participation, the complaint nonetheless alleges a series of circumstances from which the Court can reasonably infer Defendants' knowing participation in the Merchants' fraudulent scheme.

For example, the Complaint alleges that Defendants each charged substantial amounts of money for tablet computers to their credit cards, with each ordering between $5,000 and $138,000 worth of tablets over an approximately seven-month period from January to July 2014. *See* Compl. ¶¶ 10-30. Those same Defendants then initiated an identical number of "chargebacks" seeking a refund of their money between July and September 2014. *See id.*

Furthermore, while Defendant Bais Malka is a religious institution whose purchase of numerous tablets alone may not arouse suspicion of fraud, the Complaint alleges that Bais Malka billed its $45,000 tablet purchase to the same address as Defendants Joseph Fisher and Aron Grossman—who ordered a combined 115 tablets in their individual capacities. *See* Compl. ¶ 30. Significantly, the Complaint also alleges that Defendants

believed that their credit purchases would result in a windfall from the Merchants in the form of guaranteed cash rebates and/or "education grants." *See* Compl. ¶¶ 67-71.

Upon review, the Court concludes that these allegations are sufficient to create inferences of both knowledge and substantial assistance regarding the Merchants' alleged fraudulent scheme. *See Balance Return Fund Ltd. v. Royal Bank of Canada*, 83 A.D.3d 429, 431 (1st Dep't 2011) (denying motion to dismiss aiding and abetting fraud claim where plaintiff pled "actual knowledge of the fraud as discerned from the surrounding circumstances"); *Syncora Guarantee Inc. v. Alinda Capital Partners LLC*, No. 651258/2012, 2013 WL 3477133 (Sup. Ct. N.Y. Cty. 2013) (holding that "to the extent [plaintiff] has adequately alleged [defendant's] direct participation in the fraud, at a minimum, it has also met the lesser standard for pleading that defendant's substantial assistance of the fraud"). Accordingly, Defendants' motion to dismiss Count One is denied.[2]

B. Unjust Enrichment

Defendants argue that Plaintiff's cause of action for unjust enrichment must be dismissed for failure to state a claim. Def. mov. Br. at 9.

[2] Defendants also argue that Plaintiff's aiding and abetting fraud claim must be dismissed as "duplicative of its breach of contract claim with persons other than moving Defendants." Def. Mov. Br. at 7. This argument is without merit, however, because the Complaint alleges no cause of action for breach of contract.

To state a cause of action for unjust enrichment, a plaintiff must allege that "(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *GFRE, Inc. v. U.S. Bank, N.A.*, 130 A.D.3d 569, 570 (2nd Dep't 2015). "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Id.* In determining a plaintiff's entitlement to such relief in equity, "courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent." *Goel v. Ramachandran*, 111 A.D.3d 783, 791 (2nd Dep't 2013).

Here, Defendants argue that, because the value of the alleged "chargebacks" that Defendants received from Plaintiff equaled the value of Defendants' initial credit card charges, the chargebacks were merely a return of Defendant's own credit and cannot constitute "enrichment" for the purposes of this claim. Def. Mov. Br. at 9.

While it may be true that Defendants only received a refund of their credit outlays (rather than a cash rebate, as Defendants allegedly hoped), the allegations of Defendants' willing participation in the fraudulent scheme suggest that *Plaintiff* would not have been liable for those refunds but for Defendants' willing participation in the scheme. Indeed, the complaint alleges that Plaintiff only became liable for the chargebacks in the first place because the Merchants, who would be liable for such chargebacks under typical

circumstances, found their bank accounts frozen due to the allegedly fraudulent activity. *See* Compl. ¶¶ 8, 44 (alleging that Plaintiff was required to reimburse Defendants' accounts because The Loft and Scorsetti's Processing Accounts were closed due to the fraud).

Based on these allegations, the Court can reasonably infer that Defendants used their "chargeback" rights against Plaintiff as a form of safety net to avoid losses incurred by the failure of the fraudulent tablet-purchasing scheme in which they participated. If this allegation is subsequently borne out by the evidence, Defendants may very well have unjustly "enriched" themselves at Plaintiffs expense.

Thus, the Court concludes that the inferences raised by the Complaint are sufficient to meet Plaintiff's pleading requirements for enrichment claim at the motion to dismiss stage. *See Eastman Kodak Co. v. Camarata*, No. 05-CV-6384L, 2006 WL 3538944, at *15 (W.D.N.Y. Dec. 6, 2006) (applying New York law) (denying motion to dismiss aiding and abetting and unjust enrichment claims where complaint alleged plaintiff "knowingly furthered the scheme to defraud by means of money laundering, and that in so doing she was enriched through her receipt of substantial sums of money"). Accordingly, Defendants' motion to dismiss Count Two is denied.

C. Defendants' Motion to be Relieved as Counsel

The law firm Cohen LaBarbera & Landrigan, LLP moves, unopposed, to withdraw as counsel for Defendants Salomon Galitzky and Ruchel Breueur pursuant to CPLR 321(b) due to a breakdown in communication with their clients.

CPLR § 321(b)(2) states the following:

> An attorney of record may withdraw . . . upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.

CPLR § 321(b)(2). New York Rule of Professional Conduct 1.16(c)(1) further states that an attorney may withdraw from a representation where "withdrawal can be accomplished without material adverse effect on the interests of the client." NY RPC § 1.16(c)(1).

State courts routinely grant motions to withdraw where a party's failure to respond to her counsel's communications "renders it unreasonably difficult for the lawyer to carry out employment effectively." *Dillon v. Otis Elevator Co.*, 22 A.D.3d 1, 5 (1st Dep't 2005). The decision to grant or deny permission for counsel to withdraw lies within the discretion of the trial court. *See Cashdan v. Cashdan*, 243 A.D.2d 598, 598 (2nd Dep't 1997).

Here, Stuart Thalblum, Esq., on behalf of the law firm Cohen, LaBarbera & Landrigan, LLP, states in an affirmation that since the beginning of the representation, there has been a "breakdown in communication" between the firm and its clients to such a degree that the firm "cannot now continue to effectively serve as counsel to Defendants." NYSCEF No. 33, Thalblum Affirmation ¶ 2. Furthermore, the record indicates that withdrawal would not prejudice the rights of Defendants. This case is still in its early stages—motion practice has been limited to those presently before the Court for resolution, and no Preliminary Conference Order setting discovery deadlines has yet been entered.

Defendants' alleged failure to communicate with counsel would likely prevent present counsel from effectively fulfilling their discovery obligations in any event.

Based on the foregoing analysis, the Court concludes that Defendants' actions have rendered it "unreasonably difficult" for Cohen, LaBarbera & Landrigan, LLP to carry out employment effectively. *See Dillon v. Otis Elevator Co.*, 22 A.D.3d 1, 5 (1st Dep't 2005). Accordingly, Cohen, LaBarbera & Landrigan, LLP's motion to be relieved as counsel for Defendants Salomon Galitzky and Ruchel Breueur is granted.

IV. Conclusion

For the foregoing reasons, Defendants' motion to dismiss is denied, and Cohen, LaBarbera & Landrigan, LLP's motion to be relieved as counsel is granted.

Accordingly, it is

ORDERED that Defendants' motion to dismiss is denied; and it is further

ORDERED that Cohen, LaBarbera & Landrigan, LLP's motion to be relieved as counsel for Defendants Salomon Galitzky and Ruchel Breueur is granted; and it is further

ORDERED that this case is stayed for thirty (30) days from the date this Order is entered and Notice of Entry is filed to allow Defendants Salomon Galitzky and Ruchel Breueur to obtain new counsel; and it is further

ORDERED that counsel are directed to appear for a Preliminary Conference in Room 442, 60 Centre Street, on May 23, 2017 at 10:00 A.M.

Dated: April 13, 2017
New York, New York

ENTER

Hon. Eileen Bransten, J.S.C.