SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

MARK C. BRYAN,

Plaintiff,

-against-

JEFFREY L. SLOTHOWER, BATTERY PRIVATE, INC., BATTERY PRIVATE RE, LLC and XYZ CORP. 1-10.,

Defendants.

----------X

DECISION AND ORDER
Index No.: 651014/2018

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, these facts are taken from the Amended Complaint and assumed to be true (NYSCEF Doc. No. 49).

Plaintiff Mark Bryan owns an auto sales and financing business. He opened a Merrill Lynch brokerage account and was assigned defendant Jeffrey Slothower as his representative. Bryan told Slothower that Bryan was an inexperienced investor and wanted to open an account to grow his nest egg and use the account to get business loans from Merrill Lynch and the Bank of America on better terms. Bryan funded the Merrill Lynch account and invested conservatively.

In fall 2014, plaintiff heard about the record breaking initial public offering of Alibaba Group Holdings, Ltd (Alibaba), and instructed Slothower to purchase shares. During the period November 11-16, Bryan purchased 3,500 shares of Alibaba for $412,000. In December 2015, Bryan purchased an additional 1,000 shares for $84,600.

Around December 2015, Slothower informed Bryan that Slothower was leaving Merrill Lynch to start his own firm, defendant Battery Private, Inc. (Battery). Defendant Battery Private RE, LLC is a subsidiary of Battery. Both entities are owned and controlled by Slothower. The entities share common ownership, employees, bank accounts, and address. Plaintiff alleges them to be alter egos. Slothower told Bryan that Battery would be able to loan him 20% more money against his account than Merrill Lynch had done. Bryan did not sign any agreements with Battery. Slothower forged an Interactive Brokers, LLC (Interactive) account application and an Investment Advisory Agreement (Battery Agreement) without Bryan's knowledge or consent, and forged

Bryan's signature on the application, which contains highly inaccurate information about Bryan's finances. Both forged documents are dated August 12, 2016. Slothower also forged several other forms and documents.

As of August 22, 2016, Bryan owned 6,380 shares of Alibaba, worth about $610,000. Later in 2016, Bryan sent defendants hundreds of thousands of dollars with instructions to invest in shares of Alibaba. It is unclear what happened to that money. Slothower periodically assured Bryan the investments were doing well, and made several "dividend" payments, including sending money from Slothower's own account to Bryan, to conceal the fraud.

In the summer of 2017, Bryan told Slothower to sell his shares of Bank of America and use the funds to purchase more shares of Alibaba, which Slothower confirmed. On about August 2, 2017, defendants provided Bryan an "Activity Statement," showing Bryan owned the same 6,380 shares of Alibaba held as of a year earlier.

The price of Alibaba shares continued to rise in 2017, hitting over $190/share in November. Slothower then advised Bryan to sell. Bryan thought he owned 6,380 shares of Alibaba, worth approximately $1,180,300 (at $185/share), and told Slothower to sell. Slothower then informed Bryan that Bryan did not own those shares, that Slothower had played options and lost Bryan's money, and offered to pay him $950,000. Bryan had never heard of or agreed to any strategy regarding options. Upon information and belief, Bryan alleges Slothower merely took the money Bryan sent to be invested and used it to cover losses in other customer accounts (In November 2017, Slothower entered into an Acceptance, Waiver, and Consent (AWC) with FINRA. According to the AWC, from August 2015 to January 2016, a Merrill Lynch customer lost money on options trading while Slothower was his broker. On January 20, 2016, Slothower wired $355,000 to that customer's account without Merrill Lynch's consent. In the AWC, Slothower agreed to a 15 day suspension and $5,000 in fines.).

In December 2017, Bryan and Slothower entered into a settlement agreement in which Slothower agreed to pay Bryan $775,000 by Feb. 10, 2018 (the Settlement Agreement). Slothower failed to pay. Bryan then brought this action. After this court granted a prior partial motion to dismiss claims for fraudulent inducement of the Settlement Agreement, fraud, negligent misrepresentation, breach of fiduciary duty, and conversion, Bryan amended the complaint, asserting claims for:

1) Breach of Contract, seeking rescission of the settlement agreement
2) Fraud
3) Negligent Misrepresentation against Slothower and Battery, for failure to use ordinary care in the management of Bryan's funds.
4) Breach of Fiduciary Duty for forging plaintiff's signature, stealing his money, and/or mismanaging his assets.

Defendants now seek to dismiss all four causes of action pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7).

II. ARGUMENTS

A. Defendants' Arguments to Dismiss

1. Rescission Claim Fails as a Matter of Law

In the original complaint, Bryan asserted a claim for breach of contract, seeking to enforce the Settlement Agreement. Since plaintiff elected to enforce the agreement, plaintiff may not now seek rescission (Memo at 12-14, *see* Decision and Order dated September 21, 2018, NYSCEF Doc. No. 46, at 5, citing *Awards.com, LLC v Kinko's, Inc.*, 42 AD3d 178, 188 [1st Dept 2007], *affd,* 14 NY3d 791 [2010] ["When a party materially breaches a contract, the nonbreaching party must choose between two remedies: it can elect to terminate the contract or continue it. If it chooses the latter course, it loses its right to terminate the contract because of the default"]). The filing of the original complaint served as Bryan's election of remedies (Memo at 13, *In re Garver*, 176 NY 386, 392- 94 [1903] ["It is . . . the settled law of this court that an election of remedies is determined by the commencement of an action, and not by the result of it." "[A] party having resort to one remedy is bound by his first election, and hence barred from the prosecution of the other."]).

As plaintiff elected the remedy of enforcement of the contract in the original complaint, the release in the Settlement Agreement is enforceable, and it clearly precludes the second, third, and fourth causes of action in the Amended Complaint (Memo at 15).

2. Fraud

In addition to being precluded by the release, the fraud claim fails to state a claim (*id.* at 16-17). Plaintiff asserts he never signed any documents to transfer his account to Battery. Apparently, he is alleging his money disappeared from his Merrill Lynch account, and he had no idea where it went. Bryan nonetheless deposited hundreds of thousands of dollars to the Battery

account. From the moment his account was transferred, Bryan was on notice of the move, but did nothing to investigate before depositing more money with Battery. Accordingly, Bryan fails to allege reasonable reliance and the claim fails (*id.* at 18). Further, while plaintiff claims, in conclusory fashion, that the forged account documents contain false information about his finances, he does not provide the correct information, so as to identify the particular misleading facts stated in the allegedly forged document (*id.* at 19). Plaintiff has alleged he reached out to Slothower after his departure from Merrill Lynch. Bryan must have used different contact information for Slothower, as Slothower could no longer have been reached at Merrill (*id.* at 20).

Additionally, plaintiff claims he was told he was heavily invested in Alibaba, but he had access to account statements which showed the truth (*id.* at 19). As the facts alleged are contradicted by documentary evidence, the court need not consider the allegations true for the purpose of this motion (*id.*). The documentary evidence is plaintiff's Consolidated Form 1099 which reflects the options trading which resulted in plaintiff's losses (*id.* at 20, see Exhibit 9 to Slothower aff, NYSCEF Doc. No. 69). Further, there are text messages in which plaintiff acknowledged he was invited to come with Slothower, and did (*id.*, see Exhibit 3 to Slothower aff, NYSCEF Doc. No. 63). He also received account statements from Pershing LLC and Interactive Brokers LLC, the clearing firms used by Battery (*see* Interactive Brokers Statements and Reports Release Notes, attached as Exhibit 4 to Slothower aff, NYSCEF Doc. No. 64). Plaintiffs also admits to having wired money to the new account. These documents also show there was no reasonable reliance.

3. Negligent Misrepresentation

In addition to being precluded by the release, this claim also fails for lack of reasonable reliance, based on the documentary evidence discussed above. Further, plaintiff has failed to allege with particularity the special relationship required to adequately plead this claim (Memo at 22).

4. Breach of Fiduciary Duty

Aside from being precluded by the release, this claim also fails because, under New York law, a stockbroker buying and selling securities for a customer does not owe a fiduciary duty to the purchaser unless the broker has discretion to make trades (*id.*). Plaintiff has not alleged either Slothower or Battery had discretion to make trades (*id.* at 23). He has only alleged he "relied upon Defendants to manage [his] affairs" (*id.*, quoting Amended Complaint, ¶ 84). That is conclusory,

and insufficient to support the claim (Memo at 23). Plaintiff also claims the accounts were managed in a way inconsistent with his objectives and risk tolerance but does not specify what those were (*id.*, citing Amended Complaint, ¶¶ 84, 87). These allegations contradict the prior allegations of the theft of funds. Again, plaintiff has not properly alleged the required reasonable reliance (Memo at 23).

5. Alter Ego Liability

To the extent the second through fourth claims stand, they should be dismissed against Slothower and Battery RE, as plaintiff has not pled facts sufficient to support alter ego liability (*id.* at 24). The pleadings must allege the corporate form was used to commit a fraud against the plaintiff, and the fraud claim must be pled with specificity. Plaintiff has not done so here. Other than identifying Battery RE, plaintiff says nothing about it (*id.* at 25). To the extent plaintiff points to the allegation of the theft of funds from Bryan's accounts, that allegation is contradicted by the documentary evidence of the account statements, the Consolidated Form 1099, and correspondence about options instead of purchasing additional Alibaba shares (*id.*, citing Exhibits 6-9 to Slothower aff, NYSCEF Docs. No. 66-69.

B. Plaintiff's Opposition

1. Rescission

Bryan argues that, in the original complaint, he was not seeking to enforce the agreement, but to void it, as this court acknowledged in the Decision and Order (Opp at 7, citing Decision and Order at 2). The claim for breach of contract there was stated in the alternative, and the court noted that, if and when Bryan amended the complaint and sought to terminate the Settlement Agreement, the allegations of fraud could survive a motion to dismiss (Opp at 7, citing Decision and Order at 6). Looking at the viability of these claims would have been moot, had the plaintiff been foreclosed from repleading to claim rescission, as the court understood his intention to be (Opp at 7).

Nor is the plaintiff estopped from seeking to rescind the Settlement Agreement (*id.* at 8). The case law relied upon by defendants is old and outdated (*id.*). CPLR 3002(e) provides that "[a] claim for damages sustained as a result of fraud or misrepresentation in the inducement of a contract or other transaction, shall not be deemed inconsistent with a claim for rescission or based upon rescission." Most of the cases cited by defendants pre-date adoption of the CPLR. Plaintiff relies on *Fitzgerald v Tit. Guar. & Tr. Co.* (290 NY 376, 380 [1943]) which recognizes the

"injustice which is bound to arise whenever an unfortunate attempt to elect one remedy for fraud confers upon the wrongdoer immunity, in whole or in part, from liability for damages caused by the wrong or permits the wrongdoer to retain the fruits of his wrong" and allowed a plaintiff to replead a claim (making a different election) when the previously pled claim for damages had been barred by the statute of limitations. Further, as the Third Department has noted, "the election of remedies . . . represents a harsh and arbitrary principle designed only to prevent vexatious litigation (*Clark v. Kirby,* 243 NY 295, 303 [1926]). It should be applied only where there has clearly been an irrevocable election, and such is not the case here where the plaintiffs amended their complaint as of course" (*Strong v Reeves*, 280 AD 301, 305 [3d Dept 1952], *affd,* 306 NY 666 [1953]).

The notes to the CPLR provision also would allow for this amendment. While bringing a second action after the first has failed, and seeking to then change the election of remedies, is barred, if the plaintiff "sees the light *during* the first action," and takes prompt steps, "the transactional analysis rule will not necessarily preclude an amendment or supplementation to add the ground within the first action. This is, after all, the age of liberalized amendment and supplementation of pleadings" (CPLR 3002, C3002:8 Adding Theory or Ground in Amended or Supplemental Pleading [emphasis in original]). Even a change of election of remedy in the same action can be made, if the defendant is not significantly prejudiced (*id.*). Here, defendants have not claimed any prejudice, and none exists (Opp at 9).

The two modern cases cited by defendants, *Awards.com, LLC*, and *Bigda v Fischbach Corp* (898 FSupp 1004 [SDNY 1995]) are not applicable because the election of remedies was made when the parties chose to continue to perform under the relevant agreements prior to litigation, rather than by the pleading (*id.*at 10). Current law permits inconsistent pleading and for the election of remedies to be made later (*id.* at 11-12).

The release is unenforceable, since defendants have breached their most important obligation under the Settlement Agreement. As the claim for rescission stands, so should the claims otherwise barred by the release in the Settlement Agreement (Opp at 13-14). The material breach defeats the contractual objectives of the parties and makes the release unenforceable (*id.* at 14).

As far as defendants claim to provide documentary evidence, it is not in admissible form, and should be disregarded. No foundation has been laid for the documents presented (*id.* at 15).

2. Fraud

Plaintiff claims to have alleged reasonable reliance because defendants made a variety of misrepresentations to Bryan about his investments and Bryan received no account statements (*id.* at 17). Those were sent to Slothower. As far as defendants provide any account statements in support of their motion, there is no evidence those were provided to Bryan (*id.* at 18). Nor would Bryan have had any idea he could access the statements online, since he did not know his account had been moved (*id.*). Bryan and Slothower communicated by text message throughout. As far as defendants point to emails allegedly sent to Bryan about accessing online records, there is no indication of when they were sent. The documents provided do not conclusively show he received these documents (*id.* at 19). It is unclear whether Bryan could have understood the emails provided or had or could have made an online account to access the statements (*id.* at 19-20). Even if Bryan did have access to his account statements, that does not disprove Slothower's intent to deceive Bryan. Further, plaintiff alleged the September 2016 deposit was made by certified check, not wire (*id.* at 20).

3. Fiduciary Duty

The case cited by defendants notes that "a broker does not owe a general fiduciary duty to his client" (*id.* at 21, citing *Fesseha v TD Waterhouse Inv. Services, Inc.*, 193 Misc 2d 253, 260 [Sup Ct 2002], *affd,* 305 AD2d 268 [1st Dept 2003]). Plaintiff does not claim a general fiduciary duty, but asserts defendants had specific fiduciary obligations. "The fiduciary obligation between a broker and customer under New York law is limited to affairs entrusted to the broker, and [t]he scope of affairs entrusted to a broker is generally limited to the completion of a transaction" (*Bissell v Merrill Lynch & Co., Inc.*, 937 F Supp 237, 246 [SDNY 1996], *affd,* 157 F3d 138 [2d Cir 1998]). The broker has a fiduciary duty to offer honest and complete information when recommending a transaction and to execute buy and sell orders (*id.* at 246-47). Slothower breached that duty here.

4. Negligent Misrepresentation

While defendants argue Bryan knew his accounts were transferred to Battery, got the account statements, and knew of Interactive Brokers and Battery and wired his money to these entities for the new accounts, these arguments do not address all aspects of this claim. Plaintiff only asked if they were making money and Slothower said yes (Opp at 23). As far as defendants point to the wiring instructions sent to Bryan, "[t]he fact that Plaintiff wired his money to

Interactive has nothing to do with the fact that Defendants lied about the [accounts and investments] and more" (*id.* at 24).

5. Alter Ego Liability

The allegations are made against each of the defendants. The factual determinations made in deciding alter ego liability are inappropriate for a motion to dismiss (*id.*). It is sufficient that plaintiff has alleged "Slothower used Plaintiffs [sic] funds to pay personal and business debts . . . , that Battery and Battery RE are owned and controlled by Slothower. . . , that there is common ownership, employees, address, and even common bank accounts between the defendants . . . , and that Slothower would make 'dividend' payments to Plaintiff directly from his personal bank account" (*id.* at 25).

C. Reply

1. Rescission

Plaintiff elected his remedy when he attempted to enforce the Settlement Agreement in the original complaint. The court applied this election in dismissing claims in the first motion to dismiss (Reply at 1). In the prior Decision and Order, the court held the plaintiff is barred from asserting a claim for rescission, relying on *Awards.com, LLC v Kinko's, Inc.* (42 AD3d 178 [1st Dept 2007], *affd,* 14 NY3d 791 [2010]). That choice, and its implications for the other asserted claims, are now the law of the case (Reply at 3). That precludes this attempt to recind the claim. While amendment to change the election of remedies was allowed in *Fitzgerald*, that was a rare case, to allow the plaintiff to avoid being cut off from any recovery as a result of its election of an unavailable remedy (*id.* at 3). Defendants argue the cases relied on by plaintiff are non-binding and distinguishable (*id.* at 5). As far as plaintiff argues a lack of prejudice from the change of elected remedies, defendants contend there was actually prejudice, in that there would be numerous new claims against them (*id.* at 6).

2. Other Causes of Action

With the election of remedies made to enforce the Settlement Agreement, the other causes of action fail as barred by the release (*id.*). Those causes of action also fail to state claims.

As to the fraud claim, plaintiff had access to all of the relevant information (*id.* at 7). Plaintiff knew or should have known about the situation, and could have discovered the facts (*id.*). Plaintiff does not deny receiving statements from the Battery clearing firms, Pershing LLC and

IB, and e-mails alerting him as to when statements were available. Plaintiff only disputes whether defendants have brought admissible evidence (*id.* at 8). The Slothower affidavit is sufficient to authenticate the documents (*id.*). The submitted documents show plaintiff received and had access to the relevant information. The allegedly forged account opening statements do not concern the question of whether plaintiff had access to the statements (*id.*). For example, Exhibit 8 to the Slothower affidavit is a collection of monthly statements which Slothower emailed to Bryan on November 21, 2017 (NYSCEF Doc. No. 68). Defendants also argue plaintiff has failed to properly allege scienter, which must be alleged with particularity.

As to the negligent misrepresentation claim, the claims are undercut by plaintiff's access to his account statements. He should have exercised reasonable diligence to uncover the truth (Reply at 10). Further, plaintiff transferred hundreds of thousands of dollars to the Battery account (*id.* at 10-11).

As to the breach of fiduciary duty claim, the cases do not establish a general fiduciary duty in the broker/client relationship, barring discretionary trading authority, and the *Bissell* case is not binding on this court. The First Department cases do not create even the limited fiduciary duty of *Bissell,* 937 F Supp at 246 (Reply at 12, citing *RNK Capital LLC v Natsource LLC*, 76 AD3d 840, 842 [1st Dept 2010]; *Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 302 [1st Dept 2008]; *Tradewinds Fin. Corp. v Refco Sec., Inc.*, 5 AD3d 229, 230 [1st Dept 2004]).

3. Alter Ego Liability

Plaintiff has only made vague and conclusory allegations, which are insufficient to pierce the veil (Reply at 12). Particular facts must be pled (*id.* at 12-13, citing *Andejo Corp. v S. St. Seaport Ltd. Partnership*, 40 AD3d 407 [1st Dept 2007] ["plaintiffs failed to allege particularized facts to warrant piercing the corporate veil"]). There are no factual allegations of domination and control over the entity defendants, or allegations that this domination and control related to the loss alleged here (Reply at 13).

III. DISCUSSION

A. Standard

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d

144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the documentary evidence is the communications between Bryan and Slothower, the Settlement Agreement, and the account statements.

CPLR 3211(a)(5), provides that a "party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . .the cause of action may not be maintained because of . . . release."

CPLR 2311(a)(7) provides that, on a motion to dismiss a plaintiff's claim for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to

establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

B. Rescission

The sixth cause of action in the original complaint alleged breach of contract as an alternative claim and sought to enforce the Settlement Agreement. In the prior motion to dismiss, defendants did not move to dismiss the breach of contract claim (sixth cause of action). In the Decision and Order on that motion, the court contemplated an amendment in which plaintiff would elect to terminate the Settlement Agreement instead of enforcing it (NYCEF Doc. No. 75 at 6). Defendants argue that the election in the initial complaint is final, pointing to *Awards.com, LLC v Kinko's, Inc.* (42 AD3d 178, 188 [1st Dept 2007], *affd,* 14 NY3d 791 [2010] ["When a party materially breaches a contract, the nonbreaching party must choose between two remedies: it can elect to terminate the contract or continue it. If it chooses the latter course, it loses its right to terminate the contract because of the default"]). However, that language anticipates action being taken based on the election of remedies. Once the nonbreaching party elects to continue the agreement, it cannot change and terminate based on the prior breach. Here, there has been no change in circumstance based on the claim asserted in the original complaint. No action has been taken. Such amendments have been allowed in the past (*Strong v Reeves*, 280 AD 301, 305 [3d Dept 1952], *affd,* 306 NY 666 [1953] [election of remedies doctrine "should be applied only where there has clearly been an irrevocable election, and such is not the case here where the plaintiffs amended their complaint as of course within the time specified in the Civil Practice Act"]). The amendment shall stand. Accordingly, the claims which were otherwise barred by the release may be considered on their merits. The motion fails, insofar as far as it relies on CPLR 3211(a)(5).

C. Fraud

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). [W]hen the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy . . . . [T]he question of what constitutes reasonable reliance is not

generally a question to be resolved as a matter of law on a motion to dismiss" (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044-45 [2015] [internal citations omitted]). Here, there are indications that plaintiff should have known something was up. Plaintiff admits having wired money to Interactive (Opp at 23). Presumably, plaintiff also stopped receiving statements from the closed accounts at Merrill Lynch and communicated with Slothower by telephone and email at Battery after December 2015. He necessarily received federally mandated IRS Form 1099 annually. He also received wiring instructions, transaction confirmations and monthly brokerage account statements, including copies of statements for January, February, April, August, June and July 2017 by email on November 21, 2017 (NYSCEF Doc. Nos. 28, 66, 67, 68, and 69). He also received an "Activity Statement" dated August 2, 2017 which showed he held 6,360 shares of Alibaba stock, the same number of shares held for his benefit a year earlier in August, 2016, despite having provided funds along with instructions to buy additional shares after August, 2016. Accordingly, plaintiff should have made inquiry. However, plaintiff has alleged the funds were moved and either taken or invested contrary to his instructions before he could have been tipped off to the change. Accordingly, the claim survives.

As far as the fraud claim is also asserted against the entity defendants based on a veil piercing theory, New York law disfavors disregard of the corporate form. "Generally, . . . piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" (*TNS Holdings v MKL Sec. Corp.*, 92 NY2d 335, 339 [1998]). New York courts also reject veil-piercing allegations that are "unaccompanied by allegations of consequent wrongs" (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept 2012]).

Here, plaintiff provides vague allegations of domination and control, stating "[u]pon information and belief, [the entities] are alter-egos of one another, which share common ownership, employees, bank accounts, and an address" (Amended Complaint, ¶ 8). Plaintiff also flatly asserts the entities are owned and controlled by Slothower (*id.* ¶ 7). Plaintiff does not allege

facts which would go to show that this alleged domination and control led to the alleged fraud. Accordingly, this claim (and any others that survive), shall be dismissed as to the entity defendants.

D. Negligent Misrepresentation

The elements of a claim for negligent misrepresentation are: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *see Hudson Riv. Club v Consol. Edison Co. of New York, Inc.*, 275 AD2d 218, 220 [1st Dept 2000]). Plaintiff has alleged his broker, Slothower, provided incorrect information to him about his investment account. However, this information was easily disprovable, had Plaintiff done minimal diligence by checking his account statements. Even if he was not aware of the account transfer (despite documentary proof to the contrary including evidence of the money transfer to Interactive), if he had sought to view the statements from Merrill Lynch, he would have discovered the account had been moved and been alerted to the situation. Plaintiff has failed to plead reasonable reliance. This claim shall be dismissed.

E. Breach of Fiduciary Duty

In order to establish a claim of breach of fiduciary duty, a plaintiff must show the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct (*Pokoik v Pokoik,* 115 AD3d 428 [1st Dept 2014]). A fiduciary relationship is grounded in a higher level of trust than exists between those engaged in arms-length transactions in the marketplace (*Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584 [2012]). A fiduciary is "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive" (*Meinhard v Salmon*, 249 NY 458 [1928]). The fiduciary is bound to exercise the utmost good faith and undivided loyalty to the principal throughout their relationship (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]).

The determination of whether a fiduciary duty exists is "necessarily fact-specific" and looks to whether the relationship is "grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" *Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 593 [2012] [internal quotation marks and citation omitted]). A fiduciary relationship may be found where a party "is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation," or "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]). Although "a contractual relationship is not required for a fiduciary relationship, 'if [the parties] do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship

and fashion the stricter duty for them'" (*Oddo Asset Mgt.*, 19 NY3d at 593, quoting *Northeast Gen. Corp.*, 82 NY2d at 162).

The First Department cases do not support the existence of even a limited fiduciary duty under the circumstances alleged here (*RNK Capital LLC v Natsource LLC*, 76 AD3d 840, 842 [1st Dept 2010]; *Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 302 [1st Dept 2008]; *Tradewinds Fin. Corp. v Refco Sec., Inc.*, 5 AD3d 229, 230 [1st Dept 2004]). "[T]he most plaintiff[] ha[s alleged] is that the parties had engaged in a series of transactions in which . . . defendants represented plaintiff[] on a nondiscretionary basis, with no authority to bind plaintiff[] to any deal without the latter's "specific authorization." This kind of nonagency relationship is not fiduciary in nature" (*RNK Capital LLC,* 76 AD3d at 841). This claim also fails.

IV. CONCLUSIONS

For the reasons discussed above, the claims for rescission of the settlement agreement and fraud survive. The other claims shall be dismissed. It is hereby

ORDERED that the motion of defendants to dismiss the complaint is granted to the extent that the third (negligent misrepresentation) and fourth (breach of fiduciary duty) causes of action are hereby DISMISSED the motion is and otherwise DENIED; and it is further

ORDERED that the alter ego claim is DISMISSED; and it is further

ORDERED that defendants shall answer the complaint as to the remaining claims within twenty (20) days of service of this Decision and Order with Notice of Entry; and it is further

ORDERED that the counsel for parties are directed to appear for a preliminary conference at Part 49, Room 252, 60 Centre Street, New York, New York, on Tuesday, December 17, 2019, at 9:30 AM.

This constitutes the decision and order of the court.

DATED: October 21, 2019

E N T E R,

O. PETER SHERWOOD J.S.C.