

<b>Sky Lofts LLC v CA Bedford Holdings LLC</b>
2020 NY Slip Op 31044(U)
April 20, 2020
Supreme Court, New York County
Docket Number: 650009/2015
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK**

**COUNTY OF NEW YORK: I.A.S. PART 15**

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SKY LOFTS LLC, individually and derivatively on  
behalf of CAB BEDFORD LLC,

Plaintiff,

-against-

INDEX NO.: 650009/2015

SEQ. NO.: 005

DECISION AND ORDER

CA BEDFORD HOLDINGS LLC, CA BEDFORD  
HOLDINGS II LLC, CAB BEDFORD LLC, ALEX  
ADJMI AND IRA GORDON,

Defendants.

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**MELISSA A. CRANE, J.S.C.:**

Defendants CA Bedford Holdings LLC (“CA”), CA Bedford Holdings II LLC (“CA II”), CAB Bedford LLC (“CAB”), Alex Adjmi (“Adjmi”), and Ira Gordon (“Gordon”) (hereinafter, collectively, the “defendants”) move to dismiss plaintiff, Sky Lofts, LLC (“Sky Lofts”), re-pled fraud claims asserted in the Second Amended Complaint (“SAC”) pursuant to CPLR 3016(b) and CPLR 3211(a)(7).

On January 5, 2015, plaintiff commenced this action. On January 11, 2018, the court granted plaintiff leave to file the First Amended Complaint (“FAC”), dated September 25, 2017. Plaintiff added fifteen new causes of action in the FAC. On February 23, 2018, defendants moved to dismiss the FAC. On December 11, 2018, the court granted defendants’ motion to dismiss the FAC, in part, including dismissal of the fraud claims - the seventh and fifteenth causes of action - with leave to replead. Thereafter, on January 25, 2019, plaintiff filed the SAC and re-pled the fraud claims, which involve allegedly fraudulent tax loss allocations of less than

a 35% share to plaintiff. Specifically, the relevant re-pled allegations state, with regard to

Gordon:

**45.** Gordon, as CA's longstanding accountant, was fully aware that Plaintiff was supposed to receive a 35% share of the tax losses for each tax year and that Plaintiff was not being allocated its full share of the tax losses for tax years 2012, 2013, 2015, and 2016.

Nonetheless, Gordon:

- prepared, filed, and signed, as CA's accountant, yearly tax returns for Bedford in which Plaintiff was allocated less than 35% of Bedford's yearly tax losses
- prepared and delivered to plaintiff, on CA's behalf, the K-1 tax schedules referenced above allocating less than 35% of Bedford's tax losses to Plaintiff

Gordon prepared and delivered the inaccurate K-1s to Plaintiff knowing that, as CA is Bedford's manager and controls Bedford's books and records, Plaintiff would rely upon the accuracy of the K-1 tax schedules it received. Gordon did this in order to benefit CA at Plaintiff's expense. (*see* SAC ¶ 45).

As to Adjmi, plaintiff's new allegation states:

**46.** Adjmi also directly participated in the misappropriation of Plaintiff's tax losses. Adjmi was fully aware that Plaintiff's was supposed to receive 35% of Bedford's yearly tax losses and that Plaintiff was not being allocated its full share of the tax losses for tax years 2012, 2013, 2015 and 2016. Nonetheless, Adjmi"

- authorized and approved the filing of Bedford's inaccurate tax returns for each of those tax years;
- upon information and belief, authorized and approved the delivery of the inaccurate K-1 tax schedules to Plaintiff during those tax years.

Adjmi approved the delivery of the inaccurate K-1s to Plaintiff knowing that, as CA is Bedford's manager and controls Bedford's books and records, Plaintiff would rely upon the accuracy of the K-1 tax schedules it received. Gordon did this in order to benefit CA at Plaintiff's expense. (*see* SAC ¶ 46).

Plaintiff alleges in its seventh cause of action for fraud:

**112.** The Fraud Defendants' misrepresentations were knowing and willful - in other words, CA, Gordon, and Adjmi knew that Plaintiff was supposed to receive 35% of Bedford's tax losses, and knew that Plaintiff was being allocated less than this share - and designed to deceive Plaintiff and induce Plaintiff's reliance so that CA could receive more

Than 65% of Bedford's tax losses.

**113.** Plaintiff, who did not have managerial control of Bedford, reasonably and justifiably relied to its detriment upon these fraudulent K-1s in its filings for tax year 2012.  
(see SAC ¶¶ 112, 113).

Finally, plaintiff alleges in its fifteenth cause of action for aiding and abetting fraud:

**155.** Among other things; the Aiding and Abetting Defendants actively participated in the fraud by:

- In the case of Gordon, preparing, signing, and filing Bedford's Fraudulent tax returns, and preparing and delivering the fraudulent K-1s to Plaintiff, all with the purpose of facilitating the defrauding of Plaintiff;
- In the case of Adjmi, approving the filing of Bedford's fraudulent tax returns, and approving the delivery to Plaintiff of the fraudulent K-1s, all with the purpose of facilitating the defrauding of Plaintiff.

(see SAC ¶ 155).

#### *Fraud Claim*

To plead fraud, movant must show (1) a material false representation; (2) made with knowledge of its falsity; (3) with an intent to defraud; and (4) reasonable reliance on the part of movant (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1st Dept, 1996]). A fraud claim must consist of "a material misrepresentation or a material omission of fact which was false and known to be false by 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" (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 421 [1996]). Fraud claims require requisite particularity under CPLR 3016(b) (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d at 550). Courts may hold corporate officers and directors individually liable if they participated in, or had knowledge of the fraud, even if they did not gain personally (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 55 [2001]). Scierter requires a plaintiff to allege specific facts that makes it

possible to infer defendant's knowledge of the falsity of its statements (*Houbigant, Inc v Deloitte & Touche LLP*, 303 Ad2d 92, 98 [1st Dept 2003]). Scienter requires plaintiff to plead "specific facts from which it is possible to infer defendant's knowledge of the falsity of its statements" (*id.* at 99).

The issue here is whether plaintiff re-plead fraud with requisite particularity.<sup>1</sup> According to the SAC, Gordon made a material misrepresentation when he prepared and delivered tax schedules that allocated less than 35% of Bedford's tax losses to plaintiff. Gordon allegedly knew that plaintiff was entitled to a 35% share of the tax losses because he was CA's accountant (SAC ¶ 45). Adjmi, as CA and CA II's manager, despite knowing that plaintiff should have received 35% of Bedford's yearly tax losses, authorized and approved the delivery of inaccurate K-1s (SAC ¶ 46). For the tax year 2012, plaintiff relied on the allegedly falsified K-1s to prepare their own tax filings. In 2012, the tax schedule allocated 0% of Bedford's losses to plaintiff and 100% of losses to CA. In doing so, CA then received more than 65% of Bedford's tax losses (SAC ¶ 47). For the tax years 2013, 2015, and 2016, plaintiff realized that the K-1s contained improper allocation of loss to plaintiff and, therefore, filed an Internal Revenue Form 8082 with the IRS disputing the losses that CA, Adjmi, and Gordon allocated (*id.*).

Here, the SAC conclusorily alleges that Gordon knew plaintiff should receive a 35% share of tax losses, but the K-1s issued gave plaintiff less. Gordon apparently knows this because he is CA's accountant. Without additional details, Gordon's mere role as CA's accountant is not enough to infer his knowledge of the falsified tax documents (*see MP Cool Investments Ltd v Forkosh*, 142 AD3d 286, 292 [1st Dept 2016] [motion to dismiss plaintiff's

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<sup>1</sup> Contrary to plaintiff's assertions, the court did not rule that scienter was the only element of fraud not sufficiently plead. Rather, the court dismissed the fraud claims in their entirety because they were insufficiently pled, and gave leave to re-plead.

fraud claims granted where, although scienter element of fraud claim most likely within sole knowledge of defendants, plaintiff still required to allege facts to infer defendants' knowledge of the falsity of their statements]; *cf. Israel Discount Bank of New York v Eisneramper LLP*, 45 Misc3d 1218[A] [NY Co, Sup Ct 2014]). Plaintiff does not state what Gordon's responsibilities are as CA's accountant. Neither does plaintiff allege that Gordon acted with reckless disregard or blindness to plaintiff's financial situation (*see Warshaw v Mendelow*, 2011 WL 11100990 at \*16 [NY Co, Sup Ct 2011]).

That Adjmi knew that plaintiff should receive 35% of losses is more convincing, yet he did not prepare or deliver the K-1s. There is also no allegation that Adjmi passed on information to Gordon as to tax gains or losses. Plaintiff asks the court to speculate how Gordon knew that Section 6 of the Operating Agreement provided plaintiff with a 35% share of Bedford's yearly tax losses (SAC ¶ 39).

Further, it is unclear why plaintiff relied on the K-1 for the 2012 tax year, yet contested the tax schedules that Gordon provided in the following years (SAC ¶ 47). Plaintiff argues that it had no underlying financial documents that would tip plaintiff of that it received less than its 35% share of the Company's losses (Segal Memo of Law, dated August 2, 2019, p. 12). Yet plaintiff's own allegations indicate that plaintiff knew the K-1s for 2013, 2015, and 2016 were inaccurate. Indeed, after 2012, plaintiff disputed the loss allocations with the IRS. Therefore, plaintiff fails to show reasonable reliance on false tax schedules (*see MP Cool Investments Ltd v Forkosh*, 142 AD3d at 291 [where plaintiff is a sophisticated party and has means available to know the true quality of representation, it cannot complain of defendants' inducement]).

Accordingly, the court dismisses the fraud claim.

*Aiding and Abetting Fraud Claim*

To state a claim for aiding and abetting fraud, the plaintiff must allege: (i) the existence of an underlying fraud; (ii) defendant's knowledge of the fraud; and (iii) substantial assistance of the defendant in the achievement of the fraud (*CRT Investments, Ltd. v BDO Seidman, LLP*, 85 AD3d 470 [1st Dept 2011], citing *National Westminster Bank USA v Weksel*, 124 AD2d 144, 147 [1st Dept], appeal denied 70 N.Y.2d 604 [1987]). “‘Substantial assistance,’ a necessary element of aiding and abetting fraud, means more than just performing routine business services for the alleged fraudster” (*CRT Investments, Ltd.*, 85 AD3d at 472). The purported aider and abettor must act with the intent of aiding the primary fraudulent scheme; however, one may satisfy the intent requirement by “the proposed aider's knowledge of the fraud” (*Nat'l Westminster Bank USA v Weksel*, 124 AD2d 144, 149 [1st Dept 1987]).

Here, plaintiff's claim fails for the same reasons as its fraud claim, that plaintiff failed to establish Gordon's knowledge of the underlying fraud. *Houbigant, Inc v Deloitte & Touche* is distinguishable from this case (303 Ad2d 92, 98 [1st Dept 2003]). The defendants in that case were auditors and responsible for providing advice on financial statements. Auditors have a responsibility to verify independently and investigate if they know the corporation had severe internal control and reporting problems. In *Hoffman v RSM US LLP*, the First Department distinguished *Houbigant, Inc v Deloitte & Touche*, 303 Ad2d 92, 98 [1st Dept 2003]), and reasoned that an aiding and abetting fraud claim may not survive a motion to dismiss where defendants acted as tax preparers and did not provide any opinion about financial statements, as opposed to auditors who provided specific advice on accounting matters (169 AD3d 522, 523 [1st Dept 2019]).

In this case, Gordon acted as a tax preparer when he issued the K-1 tax schedules to plaintiff. Gordon was not responsible for providing any opinion to plaintiff, and therefore, it is

unclear whether Gordon “substantially assisted” in the fraud, either through direct knowledge that plaintiff received less than a 35% share of loss as reflected on the K-1 tax schedules, or through Gordon’s “willful ignorance.”

Further, plaintiffs maintain, “upon information and belief,” that defendants knew that some of the tax losses allocated to CA and CA II were those of plaintiff, and they acted intentionally (SAC ¶ 156). However, plaintiff’s claim is that Gordon prepared, signed, and filed fraudulent tax schedules to plaintiff. Plaintiff does not allege an independent duty that Gordon owed to plaintiff (*see Stanfield Offshore Leveraged Assets, Ltd v. Metropolitan Life Ins. Co.*, 65 AD3d 472, 476 [1st Dept 2009]). Accordingly, the court dismisses the aiding and abetting fraud claim.

#### *Duplicative Claims*

The fraud claims rely on the same facts, and seek the same relief, as plaintiff’s claims for breach of contract. Plaintiff’s breach of contract claim alleges that defendants’ breached the terms of the Operating Agreement in allocating the tax losses. Plaintiff’s fraud claim alleges that defendants knew plaintiff was entitled to a 35% share under the Operating Agreement, yet allocated less in the K-1s to deceive plaintiff. That plaintiff asserts fraud claims against individual non-party defendants to the Operating Agreement does not change the fact that the Operating Agreement governs the conduct that plaintiff alleges as wrongful - specifically, the tax loss allocations. Plaintiff’s argument that defendant owed plaintiff an independent duty outside of the Operating Agreement is unavailing. The SAC makes no mention duties of care imposed on Gordon or Adjmi under the IRS or LLC law. IRS § 702 does not impose responsibilities to allocate tax losses a certain way. Similarly, LLC Law § 409 merely states a manager must carry

out his duties in good faith. Rather, the Operating Agreement discusses the allocation of tax losses, not the IRS or LLC Law. Therefore, the court dismisses the fraud claims as duplicative.

Accordingly, it is

**ORDERED** that the court grants defendant's motion to dismiss the plaintiff's re-pled fraud claims - the seventh cause of action and the fifteenth cause of action with prejudice.

Dated: April 20, 2020

ENTER:

  
HON. MELISSA A. CRANE, J.S.C.