

**Bankers Consec Life Ins. Co. v
Egan-Jones Ratings Co.**

2020 NY Slip Op 35591(U)

March 23, 2020

Supreme Court, New York County

Docket Number: Index No. 654289/2019

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

-----X

BANKERS CONSECO LIFE INSURANCE COMPANY and
WASHINGTON NATIONAL INSURANCE COMPANY,

Plaintiffs,

- v -

EGAN-JONES RATINGS COMANY,

Defendant.

-----X

INDEX NO. 654289/2019
MOTION DATE 09/20/2019
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31-58
were read on this motion to/for DISMISS

Upon the foregoing papers, it is ordered that this motion to dismiss (Motion Sequence
Number 002) is decided in accordance with the accompanying decision and order.

3/25/2020

DATE

HON. O. PETER SHERWOOD

O. PETER SHERWOOD, J.S.C.

CHECK ONE:

X CASE DISPOSED
X GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

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

----- X
**BANKERS CONSECO LIFE INSURANCE
COMPANY and WASHINGTON NATIONAL
INSURANCE COMPANY,**

Plaintiffs,

-against-

EGAN-JONES RATINGS COMPANY,

Defendant.

**DECISION AND ORDER
Index No.: 654289/2019**

Motion Sequence No.: 002

----- X
O. PETER SHERWOOD, J.:

As is more fully described in the Decision and Order dated this day in *Bankers Conseco Life Ins. Co. v KPMG LLP*, Index No. 653765/2019 (KPMG Case), plaintiffs allege that they were bilked in a Ponzi-like reinsurance scheme devised by the three co-founders of Platinum Partners LP (Platinum) Murray Huberfeld, David Bodner and Mark Nordlicht (*see* Complaint ¶¶ 21-32; Doc. No. 20).¹ In this case, the KPMG Case and another, plaintiffs seek to recoup some of their losses from third parties who conducted business with Beechwood Re, Ltd. (Beechwood), the reinsurer allegedly used by Platinum to perpetuate the fraud.

Plaintiffs entered into reinsurance agreements with Beechwood on February 10, 2014 (Agreements) (*see* Doc. No. 38, ¶ 7). The complaint alleges that under the Agreements, plaintiffs transferred over \$550 million into four reinsurance trusts to be invested by Beechwood with quarterly reports and valuations (Compl. ¶¶57–59). Beechwood filled the reinsurance trusts with self-serving investments in Platinum-controlled funds and entities, and provided bogus “fair market valuations” using defendant Egan-Jones Ratings Company (“EJ”) (*Id.* ¶¶63–65). The complaint alleges that EJ began a five-year commitment to work as a ratings provider for Beechwood on November 6, 2015, almost two years after plaintiffs entered into the Agreements (*Id.* ¶76). Between this time and the end of Platinum’s scheme, EJ: (i) failed to tell plaintiffs that Nordlicht owned stock in both Beechwood and Platinum, (ii) gave inflated investment ratings to assets contained in the trusts, (iii) and upgraded draft ratings at Beechwood’s request (*Id.* ¶¶80–117).

¹ Doc. No. __ refers to the location of documents filed in this case in the New York State courts electronic filing system.

As against defendant EJ, plaintiffs assert three claims: (i) aiding and abetting fraud, (ii) constructive fraud, and (iii) negligent misrepresentation. These claims must be dismissed for reasons similar to those described in the KPMG case.

The elements of a claim for aiding and abetting fraud are: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aiding and abetting party; and (3) substantial assistance by the aiding and abetting party in achieving this fraud (*see Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]; *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Insurance Co.*, 64 AD3d 472 [1st Dept 2009]). The elements for the underlying fraud are: (a) a misrepresentation or a material omission of fact which was false and known to be false, (b) made for the purpose of inducing the other party to rely upon it, (c) justifiable reliance of the other party on the misrepresentation or material omission, and (d) injury (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]; *Ross v Louise Wise Services, Inc.*, 8 NY3d 478 [2007]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *Tanzman v La Pietra*, 8 AD3d 706 [3rd Dept 2004]).

Plaintiffs claim for aiding and abetting fraud as against EJ must be dismissed as plaintiffs entered the Agreements with Beechwood long before Beechwood engaged EJ. Further, the complaint fails to allege essential elements of a claim of aiding and abetting fraud. In particular, plaintiffs have failed to allege that defendant's possessed actual knowledge of the underlying fraud or that defendant substantially assisted Beechwood in committing the fraud (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]; *Chambers v Weinstein*, 44 Misc3d 1224(A) *5 [Sup. Ct. New York County 2014]). The complaint further fails to allege that defendant's ratings were a proximate cause of or substantially assisted the underlying fraud or caused any actual damage to plaintiffs (*see Silvercreek Management, Inc. v Citigroup, Inc.*, 346 FSupp3d 473, 487 [SDNY 2018]; *SEC v Apuzzo*, 689 F3d 204 [2d Cir 2012]; *In re Refco Inc. Securities Litigation*, 826 FSupp2d 476, 518 [SDNY 2011]; *Aetna Cas. And Sur. Co. v Leahey Const. Co.*, 219 F3d 519, 537 [2d Cir 2000]; *Rosner v Bank of China*, 528 FSupp2d 419, 426 [SDNY 2007]; *Sforza v Health Ins. Plan*, 210 AD2d 214, 215 [2d Dept 1994]).

The elements of constructive fraud are: "(1) a representation was made, (2) the representation dealt with a material fact, (3) the representation was false, (4) the representation was made with the intent to make the other party rely upon it, (5) the other party did, in fact, rely on the representation without knowledge of its falsity, (6) injury resulted and (7) the parties are in a fiduciary or confidential relationship" (*Del Vecchio By Del Vecchio v Nassau County*, 118 AD2d

615, 617-18 [2d Dept 1986] citing *Brown v Lockwood*, 76 AD2d 721, 730 [2nd Dept 1980]). Distinguishing this claim from fraud itself, a claim for constructive fraud does not require proof of “actual knowledge of the falsity of the representation by the defendant” (Del Vecchio By Del Vecchio, 118 AD2d at 617-18; see, *Brown* 76 AD2d at 731; *Pitcher v Sutton*, 238 AD 291 [4th Dept 1933] amended, 240 AD 754 [4th Dept 1933] and amended, 240 AD 759 [4th Dept 1933] and affd, 264 NY 638 [1934]).

Plaintiffs have essentially conceded that the claim for constructive fraud should be dismissed (*see* Transcript, Doc. No. 59 at pp. 17-18). The complaint does not allege essential elements of the claim. First, no fiduciary or confidential relationship existed between the parties throughout the matter at issue (*see Eurycleia Partners, LP*, 12 NY3d at 559; *Loeuis v Grushin*, 126 AD3d 761, 763 [2d Dept 2015]; *Nazareth Nursery Parent Assn. v Nazareth Nursery, Inc.*, 2015 NY Slip Op 30941 *7 [Sup Ct New York County 2015]; *Eastman Kodak Co. v Roopak Enters.*, 202 AD2d 220, 222 [1st Dept 1994]). Further, ratings made by rating agencies, such as defendant, are subjective opinions, not representations of material fact. Although there exists an exception to this rule if the credit rating is not believed by the rating agency and is, instead, made with the intent to deceive a party, here the complaint fails to allege any facts related to defendant’s state of mind (*see Rice v Heilbronner*, 272 AD2d 957 [4th Dept 2000]; *Tolin v Standard & Poor’s Fin. Servs., LLC*, 950 FSupp2d 714, 722 [SDNY 2013]). For these reasons, the constructive fraud claim shall be dismissed.

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” (*see 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]).

Here too, plaintiffs concede the negligent misrepresentation claim will be dismissed for failure to state a claim. Plaintiffs’ complaint fails to allege that a special or privity-like relationship existed between the parties that required defendant to impart correct information to the plaintiff (*see Benzie v Take-Two Interactive Software, Inc.*, 159 AD3d 629, 631 [1st Dept 2018]). Further, the complaint fails to allege sufficiently that plaintiffs relied on defendant’s ratings to their detriment (*see Abu Dhabi Commercial Bank PJSC v Credit Suisse Securities (USA) LLC*, 2011 WL 11074827, at *7–8 [Sup Ct New York County 2011]; *Anschutz Corp. v Merrill Lynch & Co.*,

Inc., 690 F3d 98, 115 [2d Cir 2012]). For these reasons, dismissal of the negligent misrepresentation claim is appropriate.

Accordingly, it is hereby

ORDERED that the motion to dismiss of defendant Egan-Jones Ratings Company is GRANTED in its entirety; and it is further

ORDERED that the complaint is hereby DISMISSED and the Clerk of the court is directed to enter judgment against plaintiffs Bankers Consec Life Insurance Company and Washington National Insurance Company and in favor of defendant Egan-Jones Ratings Company and to assess costs in an amount to be fixed by the Clerk upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: March 23, 2020

ENTER,

O.P. Sherwood

O. PETER SHERWOOD J.S.C.