

First Trinity Life Ins. Co. v Advance Funding LLC

2022 NY Slip Op 30246(U)

January 26, 2022

Supreme Court, New York County

Docket Number: Index No. 652780/2020

Judge: Arlene P. Bluth

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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. ARLENE BLUTH PART 14

Justice

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FIRST TRINITY LIFE INSURANCE COMPANY,

Plaintiff,

- v -

ADVANCE FUNDING LLC, DAN CEVALLOS, MONICA RAY,
CITIBANK N.A.

Defendants.

-----X

INDEX NO. 652780/2020

MOTION DATE 01/24/2022

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 159, 160, 161, 162, 164, 165, 166, 167, 168, 171

were read on this motion to/for

DISMISS

The motion to dismiss by defendant Citibank, N.A. (“Citibank”) is granted.

Background

This case is about a lottery winner: former defendant Martinez. Martinez won a New York State Lottery game in April 2008 that had a minimum prize of \$2 million. In August 2016, Martinez entered into an agreement with defendant Advanced Funding (“AF”) in which he agreed to assign 32 months of prize payments totaling over \$800,000 in exchange for a lump sum payment of \$465,000. AF then assigned its right to the money to plaintiff in exchange for a payment in excess of \$500,000.

In connection with Martinez’s assignment, a petition was brought in Schenectady approving the transfer. However, Martinez later moved (via a new attorney) to strike the assignment and disavow an affidavit he signed in which he agreed to the transaction. He later

withdrew the order to show cause in exchange for an increased lump sum payment. Then Martinez brought another application seeking to stop any more payments by the state's Lottery Commission because AF allegedly did not make the additional payments promised to him in the settlement.

Plaintiff brought this case because it claims it paid a substantial amount of money to AF for the rights to Martinez's lottery prize and the assignment is now in question due to AF's alleged failure to pay Martinez additional monies.

Plaintiff alleges that Citibank assisted Advance Funding with the fraud by allowing them to use multiple bank accounts without signature cards, permitting defendants to transfer money and helping them complete a fraudulent wire transfer to show Martinez was paid for the assignment of his lottery winnings.

Citibank moves to dismiss on the ground that it cannot be held liable for letting AF be a Citibank customer. It argues that it had no actual knowledge of AF's fraud and that the sole basis for plaintiff's claims against Citibank is that AF had accounts with Citibank and completed high dollar transactions. Citibank argues that a bank does not owe a duty to non-customers to protect them from fraud perpetrated by a bank customer. It also contends that plaintiff did not adequately plead that Citibank had actual knowledge of the fraud—a requirement for a cause for action for aiding and abetting fraud.

In opposition, plaintiff alleges that Citibank played a key role in the fraud by housing numerous accounts for AF and the co-conspirators. Plaintiff maintains that AF completed many transactions through Citibank accounts to launder money acquired in their scheme. It observes that millions of dollars were transferred each month. Plaintiff argues that it can state a cause of action for aiding and abetting fraud by pointing to circumstantial evidence because direct

evidence of actual knowledge is exclusively within the bank's possession. It asserts that actual knowledge is not required and that only conscious avoidance is required.

Plaintiff emphasizes that Citibank failed to obtain signature cards, account opening documentation, corporate charters and by-laws among its lack of due diligence. Plaintiff questions how Citibank did not know that transfers for millions of dollars were part of a money laundering scheme and points to the names of the various corporate entities used by AF.

In reply, Citibank contends that the value of the transactions cannot constitute actual knowledge of fraud. It also insists that actual knowledge is required despite plaintiff's effort to change the elements of its cause of action.

Discussion

“On a motion to dismiss, the pleading is to be afforded a liberal construction. We 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. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery” (*Besen v Farhadian*, 195 AD3d 548, 549, 151 NYS3d 31 [1st Dept 2021] [internal quotations and citations omitted]).

“A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance. This Court has stated that actual knowledge need only be pleaded generally, cognizant, particularly at the pre-discovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind. Participants in a fraud do not affirmatively declare to the world that they are

engaged in the perpetration of a fraud. The Court of Appeals has stated that an intent to commit fraud is to be divined from surrounding circumstances. This is not, as defendant argues, constructive knowledge, but actual knowledge of the fraud as discerned from the surrounding circumstances” (*Oster v Kirschner*, 77 AD3d 51, 55-56, 905 NYS2d 69 [1st Dept 2010] [citation omitted]).

Here, the Court find that plaintiff’s pleading fails to state a cause of action for aiding and abetting fraud against Citibank. As an initial matter, plaintiff did not adequately plead the “actual knowledge” element of this cause of action. Although plaintiff may rely on the surrounding circumstances, the “circumstances” detailed simply show a bank providing accounts for various customers. This Court declines to impose, as plaintiff seems to argue, a duty to investigate a customer simply because many high value transactions are completed at the bank. A bank need not expend significant resources to explore the reasons for every transaction. Of course, in retrospect (and with the knowledge that AF purportedly engaged in a fraudulent scheme), it may be easy to see fraud at every turn. But having a bank account and doing a lot of transactions does not suggest actual knowledge of fraud.

Moreover, plaintiff did not adequately plead that Citibank provided substantial assistance. “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 AD3d 472, 476, 883 NYS2d 486 [1st Dept 2009] [internal quotations and citations omitted]). Plaintiff did not adequately plead how Citibank did anything to affirmatively assist, help conceal or do anything to help the fraud other than that the fraudsters used Citibank accounts.

Under plaintiff's theory, every bank provides substantial assistance for a fraudulent scheme merely by letting a customer open and use a bank account. That would make a bank essentially a co-conspirator in countless financial misdeeds. There would be no reason to let anyone open a bank account if liability could arise under those circumstances. That, allegedly, Citibank could not locate signature cards or account opening documents is irrelevant. It does not show that Citibank had actual knowledge or provided substantial assistance to the fraudulent scheme.

Moreover, it is critical to contemplate the cause action for aiding and abetting fraud as a whole. Such a claim is an assertion that a party actually helped advance a fraudulent scheme. In *Oster*, cited above, the First Department found that plaintiffs had stated a cause of action for aiding and abetting fraud where a defendant law firm drafted documents for the fraudsters and knew about their criminal background (*id.* at 54-55). And those documents contained multiple misrepresentations, including the criminal histories of key players and how the investment scheme would work (*id.* at 54). In other words, the fraudulent scheme in *Oster* relied, in part, on certain documents draft by defendants used to induce investors to invest their money.

There are no allegations in the instant case that Citibank did anything like drafting documents used to perpetrate a fraud. Rather, the purported fraudsters merely used bank accounts at Citibank. Such conclusory allegations cannot support a claim for aiding and abetting fraud (*McBride v KPMG Intern.*, 135 AD3d 576, 578, 24 NYS3d 257 [1st Dept 2016]).

Accordingly, it is hereby

ORDERED that the motion to dismiss by Citibank, N.A. is granted and the claim against it is severed and dismissed and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

Remote Conference with Remaining Defendants: March 3, 2022 at 11 a.m. (NYSCEF Doc. No. 170).

1/26/2022
DATE


ARLENE BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE