

Surefire Dividend Capture, LP v Industrial & Commercial Bank of China Fin. Servs. LLC

2022 NY Slip Op 31782(U)

June 2, 2022

Supreme Court, New York County

Docket Number: Index No. 652507/2021

Judge: Barry Ostrager

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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. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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SUREFIRE DIVIDEND CAPTURE, LP,	MOTION DATE _____
Plaintiff,	MOTION SEQ. NO. <u>004</u>
- v -	
INDUSTRIAL AND COMMERCIAL BANK OF CHINA FINANCIAL SERVICES LLC,	
Defendant.	DECISION + ORDER ON MOTION

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HON. BARRY R. OSTRAGER

Before the Court is Motion Sequence 004 by defendants to dismiss plaintiff’s Amended Complaint pursuant to CPLR §3211(a)(3) and (7). The Court heard oral argument on the motion on June 2, 2022, via Microsoft Teams. For the reasons reflected on the transcript of proceedings and as further established herein, the motion is resolved as follows.

This action stems from an alleged underlying fraud that was perpetuated by non-party Brenda Smith, who is presently incarcerated. Smith, the owner of CV Brokerage, controlled two separate hedge funds—TA1 and Broad Reach Capital, LP (“Broad Reach”)—that she allegedly used in connection with a Ponzi scheme to defraud people of their investments. Smith has pled guilty for this fraud. Defendant Industrial and Commercial Bank of China Financial Services LLC (“ICBC”) worked with Smith as the clearing broker for both hedge funds and was allegedly the only clearing broker that would execute Smith’s unique options strategy of “dividend capture trades.” *Cmplt.* ¶26. Plaintiff SureFire Dividend Capture, LP (“SureFire”) alleges it is both a direct investor in Broad Reach and the successor-in-interest of non-parties Aalii Fund, LP and Alpha Capital Partners, LP (collectively, “the A Funds”), which allegedly invested tens of millions of dollars in the Broad Reach fund between September 2016 and May

2018. The A Funds' interest was allegedly assigned to plaintiff SureFire in February 2019.

NYSCEF Doc. No. 85. Plaintiff alleges that defendant ICBC, as clearing broker for Smith's fraudulent hedge funds, aided and abetted Smith's fraud and breach of fiduciary duty.

Under CPLR § 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Amended Complaint as true, "the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (citations omitted).

To the extent SureFire's Amended Complaint is based on allegations that the A Funds assigned its fraud claims to plaintiff SureFire, those claims are dismissed with prejudice for lack of standing under CPLR § 3211(a)(3). In support of its claim that plaintiff is entitled to over \$46 million in damages, representing both the A Funds' investment in Broad Reach and plaintiff's direct investment, plaintiff relies on an "In-Kind Subscription Agreement" executed on February 27, 2019, in which the A Funds transferred "the full balance of [A Funds] interest in Broad Reach Capital LP to Sure Fire Dividend Capture SPV5 [f]or the purposes of facilitating an in-kind subscription to the Fund" NYSCEF Doc. No. 85.

Plaintiff cannot seek recovery based on alleged misrepresentations and fraud with respect to the A Funds, a non-party in this case, because the A Funds have not assigned such claims to plaintiff. First, "Sure Fire Dividend Capture SPV5," the party to which an assignment was made under the In-Kind Subscription Agreement, is not a named party in this case. The plaintiff is "SureFire Dividend Capture L.P." Second, even if the assignment was made to plaintiff, the plain language of the In-Kind Subscription Agreement is unambiguous and does not contain language that evinces any intent to assign any legal claims to SureFire. *See Commonwealth of Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Morgan Stanley & Co.*, 25 N.Y.3d 543, 550

(2015), citing *State of Cal. Pub. Employees' Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427 (2000).

To the extent the Amended Complaint is based on SureFire's direct investment in Broad Reach, the motion to dismiss is denied because plaintiff's facts, as alleged and broadly construed on a pre-answer motion to dismiss, support the causes of action for aiding and abetting fraud/fiduciary duty. Plaintiff's potential damages are limited to the \$4.5 million plaintiff allegedly directly invested. *Cmplt.* ¶121.

To state a claim for aiding and abetting fraud, plaintiff must sufficiently plead (1) the existence of an underlying fraud, (2) knowledge of this fraud on the part of the aider and abettor, and (3) substantial assistance by the aider and abettor in achievement of the fraud. *Stanfield Offshore Leveraged Assets, Ltd. v. Metro Life Ins. Co.*, 64 A.D.3d 472, 476. To state a claim for aiding and abetting breach of fiduciary duty, plaintiff must sufficiently plead (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damages as a result of the breach. *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003). The existence of the underlying fraud/breach of fiduciary duty is undisputed.

Plaintiff has sufficiently alleged actual knowledge, which need only be alleged generally at the pre-discovery stage of this litigation. *See Oster v. Kirschner*, 77 A.D.3d 51, 55-56 (1st Dept. 2010). CPLR § 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct. *Eurycleia Partners, LP v. Seward & Kissle, LLP*, 12 N.Y.3d 553, 559 (2009). The allegations contained in plaintiff's Amended Complaint are supported by facts and surrounding circumstances giving rise to a reasonable inference that defendant knew about the underlying fraud/breach of fiduciary duty perpetuated by Brenda Smith.

Substantial assistance in aiding and abetting 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. *Kaufman*, 307 A.D.2d at 126. Where a defendant does not owe a fiduciary duty directly to plaintiff, such as in the clearing firm context, mere inaction cannot constitute substantial assistance; however, when a clearing firm moves beyond performing mere ministerial or routine clearing functions and becomes actively and directly involved, it may be liable for aiding and abetting. *See McDaniel v. Bear Stearns & Co., Inc.*, F. Supp.2d 343, 352-53 (S.D.N.Y. 2002).

Plaintiff's Amended Complaint makes several allegations that defendant's actions went beyond routine clearing functions, including that defendant: gave Smith advanced warning when defendant believed certain transactions would trigger compliance reporting alarms (*Cmplt.* ¶2); manufactured excuses for Smith's violations to allow her to continue her scheme free of regulatory scrutiny (*Cmplt.* ¶41); assisted in concealing Smith's misconduct (*Cmplt.* ¶73-77); processed many fraudulent transfers which raised numerous red flags constituting suspicious activity under FINRA rules and regulations (*Cmplt.* ¶46-77); and that defendant provided plaintiff with a "Comfort Letter" to help induce plaintiff's investment (*Cmplt.* ¶123-24).

Liberal construed and treated as true, as is necessary at the pre-answer motion to dismiss stage, the allegations contained in plaintiff's Amended Complaint would deprive defendant of the benefit of the general rule that a clearing broker cannot be liable for aiding and abetting fraud for performing mere routine clearing functions. *See, e.g., McDaniel*, 196 F.Supp. 2d at 356. It is premature to make a determination as to whether defendant's alleged actions did, in fact, constitute routine clearing functions or if the actions went beyond.

Plaintiff’s allegations of proximate causation are likewise sufficient. While Courts have dismissed claims of aiding and abetting “when a plaintiff cannot show how a conventional business relationship alleged proximate cause,” See In re Agape Litig., 773 F. Supp.2d 298, 325 (E.D.N.Y. 2011), this is not such a case. The issue of proximate causation cannot be decided as a matter of law because there is a dispute as to whether defendant’s actions amounted to routine clearing functions or something more.

Defendant is directed to submit an Answer to plaintiff’s Amended Complaint within twenty days of this Order. A Preliminary Conference is scheduled for July 21, 2022 at 10:00 a.m. The parties are directed to submit a dial-in number for the conference no later than July 6, 2022. To that end, the parties are directed to meet and confer to agree upon the terms of a Preliminary Conference Order using the form available on the Part 61 website with a Note of Issue deadline no later than 22 months from the date of this Order, and e-file it with a request to so Order by July 6, 2022. If the proposed Preliminary Conference Order is acceptable to the Court, it will be So Ordered and no appearance will be necessary on July 21, 2022.

Dated: June 2, 2022



 BARRY R. OSTRAGER, J.S.C.

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