

Ellen's Stardust, Inc. v Sturm

2025 NY Slip Op 30488(U)

February 6, 2025

Supreme Court, New York County

Docket Number: Index No. 651690/2021

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X

ELLEN'S STARDUST, INC., ELLEN STURM, GST
EXEMPT STURM FAMILY TRUST, GST NONEXEMPT
STURM FAMILY TRUST, ELLEN STURM, GST EXEMPT
STURM FAMILY TRUST, GST NON-EXEMPT STURM
FAMILY TRUST

INDEX NO. 651690/2021

MOTION DATE 09/26/2024

MOTION SEQ. NO. 005

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

KENNETH STURM, GETZEL, SCHIFF & PESCE, LLP,
JOHN DOES 1-10, ABC CORPORATIONS 1-10,

Defendant.

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188

were read on this motion to/for DISMISS.

The defendants in this case are not entitled to dismissal of the third amended complaint (the **TAC**; NYCEF Doc. No. 155).

Reference is made to a Decision and Order of the Appellate Division (NYSCEF Doc. No. 131), dated April 4, 2024, which provided that the plaintiffs stated a cause of action sounding in accounting malpractice and aiding and abetting fraud where the scope of representation was limited to compilation services and the amount of the alleged harm was disclosed in the financial statements because the movant was alleged to be on notice of the potential fraudulent conduct and participated in it:

We find that the claims for accounting malpractice and aiding and abetting fraud should not have been dismissed pursuant to CPLR 3211(a)(7) and CPLR 3211(a)(1). A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint or petition on the ground that a defense is founded on documentary evidence may be appropriately granted where the documentary evidence utterly refutes the plaintiff's or petitioner's allegations conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). On a motion to dismiss a pleading pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff or petitioner the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008], *lv dismissed* 12 NY3d 878 [2009]).

Plaintiffs sufficiently pleaded causes of action for accounting malpractice and aiding and abetting fraud, which are not utterly refuted by the documentary evidence. "A party alleging a claim of accountant malpractice must show that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury" (*KBL, LLP v Community Counseling & Mediation Servs.*, 123 AD3d 488, 488 [1st Dept 2014]). A plaintiff alleging an aiding and abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance (*see Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]).

Defendant makes no contention that the claims of accounting malpractice and aiding and abetting fraud by Kenneth are not sufficiently pleaded. Instead, defendant primarily argues that the malpractice and fraud claims are refuted by the fact that the accounting firm was hired to prepare tax returns and other financial statements that documented the loans at issue, and thus that investigating and reporting Kenneth's alleged fraud were beyond its duties.

Plaintiffs' claims, however, are not that defendant was hired to discover Kenneth's wrongdoing, but rather that information obtained by defendant during its business interactions with Kenneth and information used by defendant in order to prepare tax returns and financial statements put defendant on notice about the impropriety of Kenneth's loans to himself such that defendant had a duty to inform plaintiffs of the questionable payments. The law is very clear that an agreement to perform unaudited services does not shield an accountant from liability because an accountant must perform all services in accordance with the standard of a reasonable accountant under similar circumstances, which includes reporting fraud that is or should be apparent (*see 1136 Tenants' Corp. v Rothenberg & Co.*, 36 AD2d 804 [1st Dept 1971], *affd* 30 NY2d 585 [1972]; *see also William Iselin & Co., Inc. v Mann Judd Landau*, 71 NY2d 420, 424-425 [1988]; *United States v Natelli*, 527 F2d 311, 320-321 [2d Cir 1975], *cert denied* 425 US 934 [1976]; *Blakely v Lisac*, 357 F Supp 255, 265-266 [D Or 1972]; *Robert Wooler Co. v Fidelity Bank*, 330 Pa Super 523, 531-535, 479 A2d 1027, 1031-1033 [1984]).

In addition, "[o]ne who aids and abets a breach of a fiduciary duty is liable for that breach as well, even if he or she had no independent fiduciary obligation to the allegedly injured party, if the alleged aider and abettor rendered 'substantial assistance' to the fiduciary in the course of effecting the alleged breaches of duty" (*Caprer v Nussbaum*, 36 AD3d 176, 193 [2d Dept 2006] [Where "the accountants had complete knowledge of the

misuse of condominium funds, and were indispensable to the board-member defendants in their efforts to conceal the misuse of those funds, the accountants may be held liable for aiding and abetting the breach of fiduciary duty by the board-member defendants"; *see also Operative Cake Corp. v Nassour*, 21 AD3 1020 [2d Dept 2005]). In this case, it is alleged not only that the accountant had knowledge of Kenneth's alleged improper transactions but that he participated in the alleged breaches.

Alternatively, defendant argues that the claims of accounting malpractice and the claims of aiding and abetting fraud are refuted by the fact that the allegedly improper loans were included in the tax returns and financial statements, which plaintiff Ellen had a duty to review. However, while plaintiffs' own negligence in monitoring Kenneth's activities in managing the Diner may have been a factor in enabling Kenneth to continue his alleged fraudulent scheme for several years, the pleadings and documentary evidence submitted do not show that such negligence was the sole proximate cause of the Diner's loss. It has not been established that such negligence impeded defendant's duties to reveal to plaintiffs what it knew about Kenneth's alleged improper conduct regarding the loans (*see Collins v Esserman & Pelter*, 256 AD2d 754, 757 [3d Dept 1998]; *National Sur. Corp. v Lybrand*, 256 App Div 226, 235-236 [1st Dept 1939]).

Accordingly, the order of the Supreme Court, New York County (Andrew Borrok, J.), entered April 26, 2023, which, insofar as appealed from, granted defendant Getzel Schiff & Pesce, LLP's motion to dismiss, should be reversed, on the law, without costs, and the motion denied.

(NYSCEF Doc. No. 131).

In coming to this conclusion the Appellate Division found it not dispositive that Kenneth Sturm's \$12 million loan was disclosed to the plaintiffs and that the plaintiffs forgave the loans:

To maintain harmony within the family, I am forgiving the approximately \$12 million dollar loan balance you owe to the Diner. Based on the records you have produced, I have determined that you are insolvent and unable to repay the balance. I had the accountants prepare the required forms and have forwarded a copy to you (Form 1099c). I was informed that you have tax attributes to mitigate any tax impact the cancellation of debt may cause. This will alleviate one part of the various issues you are dealing with. The accountants will need to know, of the total loan of \$12 million dollars, approximately how much was used to invest in your various real estate and/or restaurant ventures. Please detail the aforementioned by entity and amount.

(NYSCEF Doc. No 155, ¶ 55).

Thus, the defendants are not correct that they are entitled to dismissal of the causes of action sounding in malpractice (fourth cause of action) or aiding and abetting fraud (fifth cause of action).

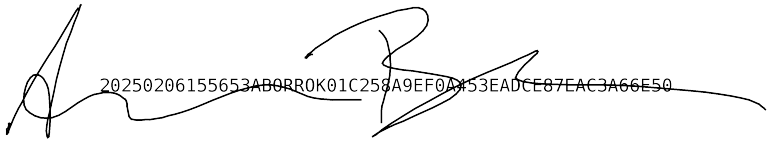
It simply does not matter that previously the plaintiff was formerly known as 1650 Broadway or when the alleged fraudulent underlying conduct took place given when it is alleged to have been revealed.

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that the motion (Mtn. Seq. No. 005) to dismiss the TAC is denied; and it is further

ORDERED that the defendants shall file an answer to the TAC within 20 days of this Decision and Order.



20250206155653AB0RR0K01C258A9EF0A153EADCE07EAC3A66E50

2/6/2025
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input 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