Scan

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

MICHAEL SCLAFANI,

Plaintiff,

-against-

FRANK J. ROMANO, ROBERT RUSSO, CHRISTOPHER O'DELL, ADVANCED CAPITAL COMMERCIAL GROUP, INC., ADVANCED CAPITAL GROUP, INC., ADVANCED CAPITAL PARTNERS, L.P., ADVANCED CAPITAL ADVISORS, INC., and ADVANCED CAPITAL ENERGY, L.P.,

Defendants.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 010537-11

MOTION SUBMISSION
DATE: 11-15-11

MOTION SEQUENCE
NOS. 1, 2, 3, 4

The following papers read on this motion:

Notice of Motion, Affirmation in Support, and Exhibits	X
Affidavit in Opposition to Defendant Romano's Motion to Dismiss	X
Reply Affirmation	X
Notice of Motion, Affidavit in Support, and Exhibits (Deft. Russo)	X
Notice of Motion, Affidavit in Support, and Exhibits (Deft. O'Dell)	X
Affidavit in Opposition to Defendant O'Dell's Motion to Dismiss	X
Amended Notice of Cross-Motion, Affidavit in Opposition to Deft. Russo's Motion to Dismiss and In Support of Default Judgment as Against Defendant Russo	X
Reply Affidavit	X

Defendants, Frank Romano ("Romano"), Advanced Capital Group, Inc., Advanced Capital Partners, L.P., Advanced Capital Advisors, Inc., and Advanced Capital Energy, L.P. (collectively referred to herein as "Advanced"), move [Mot.

Seq. 1], pursuant to CPLR 3211(a)(7), for an Order dismissing the plaintiff, Michael Sclafani's second through tenth causes of action as asserted against them.

Defendant, Robert Russo ("Russo"), moves [Mot. Seq. 2], pursuant to CPLR 3211(a)(7), for an Order dismissing plaintiff's third, fifth, eighth and ninth causes of action as asserted against him.

Defendant, Christopher O'Dell ("O'Dell"), moves [Mot. Seq. 3], pursuant to CPLR 3211(a)(8), or in the alternative pursuant to CPLR 3211(a)(7), for an Order dismissing the plaintiff's complaint as asserted against him.

Finally, plaintiff, Michael Sclafani ("Sclafani"), cross moves [Mot. Seq. 4], pursuant to CPLR 3215, for an Order, granting him a default judgment to be entered against Robert Russo.

The motions and cross motion are determined as herein set forth below.

Insofar as the motions made pursuant to CPLR 3211 require this Court to accept as true the allegations of the complaint (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]), the underlying facts are as follows:

Defendant, Frank J. Romano, an attorney admitted to practice law in the State of New York, together with defendant Robert Russo, own and control defendant Advanced, an investment company in the business of finding

investment opportunities for investors. Defendant, Christopher O'Dell, is and since the beginning of 2008, has been employed by Advanced.

In bringing this action, plaintiff, Michael Sclafani, claims that the defendants Romano and Russo, acting alone or in concert with others, exercised complete domination of Advanced and used it for, among other things, their own purposes.

Specifically, plaintiff claims that in or about the beginning of 2008, he became acquainted with O'Dell who represented that he was employed by Advanced. Following this meeting, also in 2008, Sclafani met with Romano, Russo and O'Dell at the offices of the various defendant Advanced companies all located at 51 East Main Street, Smithtown, New York to discuss investment opportunities. Apparently said address was also the location of Romano's law office.

At this meeting, Romano, Russo and O'Dell told Sclafani that they put investors together and borrow money from them which, in turn, enables Advanced to purchase distressed real properties and then sell them for a profit to a third party purchaser. Defendants explained that these deals are secured by mortgages and that if plaintiff invested monies in these ventures, he would realize a ten percent return on his investment within thirty days from the date of his investment.

Romano, Russo and O'Dell also told Sclafani that, in consideration for the sums of monies he lent to Advanced, Advanced, in turn, would give him a promissory note, due and payable one year from the date of his investment.

At this meeting, Sclafani claims that Romano pointed out his law degree and stated that he was an attorney and that he would be involved in the closings on the purchase of real property and would also represent the investors' interests, including the interests of the plaintiff.

Following this meeting, and based upon Romano, Russo and O'Dell's representations that he would realize a ten percent return on his money within thirty days, Sclafani invested $150,000.00 with Advanced for the purpose of purchasing real property. Advanced, in turn, executed a promissory note for said investment and promised to pay plaintiff ten percent for said loan due and payable within one year. Ultimately, Sclafani concedes that shortly after he invested $150,000.00 with Advanced, and prior to the expiration of the Note, Advanced re-paid the sum of $150,000.00 together with $15,000.00, representing the promised ten percent return on his investment, to the plaintiff.

Subsequently, in December 2008, Sclafani retained Romano to represent him in the purchase of a home in Dix Hills, New York which purchase ultimately fell through and was cancelled. Nonetheless, at this time, Romano again entered

into discussions with Sclafani with a view to having him again invest monies with Advanced. Romano again proposed a similar investment in real estate on the same terms: ten percent return on Sclafani's investment within thirty days from the date of the investment. Plaintiff agreed and on February 6, 2009, having relied upon Romano's representations, invested $225,000.00 with Advanced in the purchase of real property. Advanced, in turn, executed a promissory note on the same date. Shortly after this investment but prior to the maturity date of Advanced's promissory note, i.e., before February 6, 2010, Advanced admittedly repaid the plaintiff the sum of $225,000.00 and an additional ten percent interest on his investment.

Sclafani claims that beginning in January 2007 – i.e., before he became acquainted with O'Dell, Russo, Romano and/or Advanced – non-party Joseph Suarez a/k/a Jose Gilberto Suarez, Jr. ("Suarez") had also contacted and met with Russo to discuss doing business with Advanced. Then apparently, in January 2009 and on numerous other occasions during 2009 and 2010, Suarez solicited Advanced to invest money in Suarez's company, Suarez Investments & Development, LLC. ("Suarez LLC"). Specifically, Suarez spoke to defendants Romano and Russo about an oil deal in which Suarez and Suarez LLC intended to purchase two million metric tons of crude oil with the intention of immediately

reselling the oil at a profit. Suarez requested that Romano, Russo and Advanced act as an intermediary for the oil transaction by depositing $500,000.00 in an escrow account with non-party Katherine Ferro, an attorney located in Florida and in business with Suarez. Suarez stated that if the defendants so acted, Suarez would pay Romano, Russo and Advanced a fee of Ten Million ($10,000,000.00) Dollars. The $500,000.00 representing a "good faith deposit" would remain in Ferro's escrow account for thirty days at which point it would be returned to Advanced.

In June 2009, Advanced agreed to deposit $500,000.00 into Ferro's escrow account.

Meanwhile, beginning June 1, 2009, O'Dell approached Sclafani and informed him that the defendants were looking for monies from investors like him to invest in an oil deal and that plaintiff would realize a twenty percent return on his money. Sclafani told O'Dell that he was not familiar with investing in an oil deal as he was only familiar with real estate deals. O'Dell stated in turn that Suarez just needed a good faith deposit and that O'Dell's investment monies were guaranteed safe. On June 1, 2009, after plaintiff declined O'Dell's offer to invest in the Suarez oil deal, plaintiff received several phone calls from Romano who stated in sum and substance during his calls to the plaintiff that

> "This is the real deal. It's a great deal. It's 100% legit, he in the oil business and it's the same deal that you did before with us. The money is guaranteed...Anytime you want to pull the money out, it is an escrow account and its guaranteed safe. It's the same thing as your other two deals."

Sclafani claims that despite repeated phone calls from Romano asking him to invest in the oil deal, he time and time again told Romano that he was not interested, as he had concerns about the oil deal and the security of his money. Nonetheless, after plaintiff declined Romano's repeated requests for monies, Romano told Sclafani that he would be guaranteed a 40% (more than the initial promised return of 20%) return of $100,000.00 on his investment of $250,000.00 and that plaintiff would receive his investment and $100,000.00 within thirty to sixty days, after he made this investment.

On several occasions from on or about June 1, 2009 to June 12, 2009, Romano represented to the plaintiff that he, Romano, would make sure that Sclafani's money would be protected. Romano insisted during his telephone conversations with the plaintiff that he "really needed to pick up a check from the plaintiff" and further that "we will make a lot of money," "everything will be secure, it's not going anywhere," and that "they [Suarez and Ferro] can't touch the money."

Ultimately, based upon the statements made by Romano and knowing that Romano would have his investment protected and that it was guaranteed secure, plaintiff agreed to invest $250,000.00 with Advanced. Specifically, on June 11, 2009, Romano prepared a promissory note to secure Sclafani's investment, with said note having Advanced promising to pay $250,000.00 to Sclafani on or by June 12, 2010 at the per annum interest rate of 40%. This promissory note was signed by Romano. Also on June 11, 2009, an escrow agreement was entered into between Advanced and Ferro, with respect to the payment of investor monies, including Sclafani's $250,000.00 investment with Advanced. The balance of Advanced's $500,000.00 investment in the Suarez oil deal was received by another person who invested $250,000.00 with Advanced – namely, Anthony Petrunti.

On June 12, 2009, plaintiff paid $250,000.00 to Advanced which then, pursuant to the Escrow Agreement between Advanced and Ferro, transferred the monies by wire into Ferro's escrow bank account. After receiving Advanced's wire deposit, Ferro apparently transferred Advanced's investment, consisting of plaintiff's monies, from her escrow bank account to her law firm account.

Apparently, between June 12, 2009 and on or about June 25, 2009, Ferro withdrew funds from the Ferro law firm account and misappropriated and

converted Advanced's investment, including plaintiff's monies, for Suarez's and Ferro's personal use. Ultimately, on August 3, 2009, Ferro, by formal written agreement with the Florida Bar, entered an unconditional guilty plea and consented to being disbarred on account of the depletion of monies entrusted to her.

Subsequently, on August 17, 2009, Romano sent an email to Ferro threatening that if the monies deposited in her escrow account were not returned to Advanced by 12:00 p.m. on Thursday August 18, 2009, time being of the essence, that he would refer the matter to the Miami-Dade County Attorney's Office and the Florida Bar Association without further notice.

On September 30, 2009, plaintiff questioned Romano and Russo about the return of his monies and asked them to contact law enforcement as well as commence legal action against Suarez and Ferro. That same day, Russo replied to Sclafani via a text message which stated:

> "I spoke to the bank officer and confirmed everything, the bank is a holding bank and the wire has to go through corporate which takes 24 to 48 hours before it is released, which I confirmed on my own. The wire was ordered yesterday so it should be out the latest tomorrow, maybe even tonight! I think Joe (Suarez) is actually telling the truth here!"

In bringing this action, Sclafani alleges herein that on more than one occasion, defendants Romano and Russo told him that he did not need to know the details pertaining to his loan to Advanced and did not need to know about the investment of his monies with Suarez and Ferro and how and where the money was to be spent.

Plaintiff alleges that although Romano and Russo never initiated contact with the FBI or any law enforcement agency to investigate the theft of monies by Ferro and Suarez, on October 2, 2009, Romano stated in a text message to the plaintiff that he spoke to "FBI HQ in Wash. DC." Further, on October 15, 2009, Russo stated to the plaintiff in a text message:

> "After a call with the bank and Joe [Suarez], they started to release the money today. This is from the bank itself."

Sclafani claims that the information provided to him by Russo was false and that Russo misrepresented to him that payment would soon be made on his investment with Advanced. In addition, Sclafani claims that although, at his insistence, Romano prepared a complaint to be filed against Joseph Suarez, Suarez Investments & Development, LLC, and Kathleen Ferro on November 23, 2009, said complaint was not filed with the United States District Court, Eastern District until December 18, 2009. Furthermore, between December 18, 2009 and March 3,

2010, Romano took no action with respect to the lawsuit against Ferro and Suarez and did not serve said lawsuit on Ferro and Suarez. Plaintiff claims that only on his insistence did Romano file, on March 3, 2010, a Temporary Restraining Order, pertaining to the assets of Suarez and Ferro.

In bringing this action, plaintiff claims that continuing from August 2009 up through and including August 2010, Romano and Russo continued making statements and sending emails to the plaintiff misrepresenting to him that his monies were safe, that he would be receiving the return of his monies, and that Suarez would soon be making good on returning the money. Plaintiff claims that at all times that defendants Russo and Romano made said representations to him, they did so intentionally and knowing them to be false. Plaintiff claims that based upon all the promises and assurances made by Romano and Russo, he delayed and or withheld from instituting legal action against Russo, Romano, Suarez and Ferro and those acting in concert with them. He claims that based upon the representations of Romano and Russo, he agreed to withhold from reporting and/or making inquiry with regard to criminal charges against said individuals, including in regard to any claims of federal wire fraud.

Plaintiff claims that when he requested Romano to provide the documents relating to the oil deal and his monies, Romano stated to the plaintiff that "it's not

your deal, you're just an investor." In addition, when plaintiff asked defendant Romano to have Advanced pay him back the monies he invested, Romano advised plaintiff that none of the Advanced corporate entities has any assets and that plaintiff would receive nothing. Similarly, when plaintiff asked Romano to pay him back the monies he invested, Romano advised him that he will not receive anything because Romano would be filing a Chapter 7 bankruptcy which will discharge any monetary obligation that he has to the plaintiff.

Plaintiff alleges ten causes of action. The defendants all seek to dismiss plaintiff's complaint as asserted against them, with the exception of plaintiff's first cause of action on the promissory note as asserted against Advanced.

A motion made pursuant to CPLR 3211(a)(7) permits this court to dismiss a complaint if it fails to state a cause of action. When deciding such a motion, this court must determine whether the plaintiff has a legally cognizable cause of action and not whether the action has been properly plead (*Guggenheimer v. Ginzburg*, supra; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). The complaint must be liberally construed and the plaintiff must be given the benefit of every favorable inference (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). If, from the facts alleged in the complaint and the inferences which can be drawn from those facts, this court determines that the pleader has a cognizable cause of action, the

motion must be denied (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]).

Breach of Fiduciary Duty

Plaintiff's breach of fiduciary duty claim is predicated upon the Suarez oil deal. Plaintiff alleges that he "reasonably placed his trust and confidence in [Romano] to safeguard the monies [he] invested with defendant [Advanced]" and that "[Romano] had a fiduciary duty to [the plaintiff] to provide timely, complete, accurate and truthful information about the investment being made with Plaintiff's monies" (Complaint, ¶¶ 73, 76). The breach, plaintiff alleges, occurred when Romano failed to take any action, untimely or otherwise, to safeguard and protect plaintiff's monies, and by failing to perform due diligence with respect to the oil deal (*Id.*, ¶¶ 77-78).

Fiduciary obligations do not exist between parties operating at arms-length (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 22 [2005]; *Dembeck v. 220 Central Park South, LLC*, 33 AD3d 491 [1st Dept. 2006]). Where, as here, the parties were involved in multiple arms-length business transactions involving the purchase and resale of distressed real properties for a profit to a third party purchaser, and the purchase and resale of two million metric tons of crude oil at a profit, no fiduciary relationship can be found to exist (*WIT Holding Corp. v. Klein*,

282 AD2d 527 [2nd Dept. 2001]). The cause of action for breach of fiduciary duty fails because no such relationship was created. Rather, the Suarez oil deal (just as the two preceding real estate investments) were "simple business transaction[s] between a potential investor and a company soliciting such investors" (*Elliott v. Qwest Communications Corp.*, 25 AD3d 897, 898 [3rd Dept. 2006]). Consequently plaintiff's claim for a breach of fiduciary duty against Romano is dismissed.

Further, while admittedly defendant Romano represented the plaintiff for the purchase of his home, the claims forming plaintiff's second cause of action are not based upon his *attorney* relationship with the defendant Romano (*Solow v. Grace & Co.*, 83 NY2d 303 [1994]). Rather, the plain language of plaintiff's allegations in his second cause of action confirm that said allegations are predicated upon the Suarez investment oil deal – not the purchase of his Dix Hills home.

Accordingly, the cause of action for breach of fiduciary duty is dismissed.

Negligent Misrepresentation

It is settled that, "[a] cause of action based on negligent misrepresentation requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information"

(*Kimmell v. Schaefer*, 89 NY2d 257, 263 [1996]; *Fresh Direct, LLC v. Blue Martini Software, Inc.*, 7 AD3d 487, 489 [2nd Dept. 2004]).

"This reliance must be justifiable, as a casual response given informally does not stand on the same legal footing as a deliberate representation for purposes of determining whether an action in negligence has been established" (*Kimmell v. Schaefer*, supra at 263, *quoting Heard v. City of New York*, 82 NY2d 66, 74–75 [1993]).

Moreover, "since a vast majority of commercial transactions are comprised of such casual statements and contacts" liability for negligent misrepresentation has been imposed in the commercial context only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified (*Kimmell v. Schaefer*, supra; *see also*, *Murphy v. Kuhn*, 90 NY2d 266, 270 [1997]; *WIT Holding Corp. v. Klein*, supra at 529).

This action is premised upon a failed international oil deal, i.e., a commercial transaction.

Thus, in order to sustain a claim for negligent misrepresentation, plaintiff is required to demonstrate, *inter alia*, the existence of a special or privity-like relationship imposing a duty upon the defendants to impart correct information to

the plaintiff (*J.A.O. Acquisition Corp. v. Stavitsky*, 8 NY3d 144, 148 [2007]; *Parrott v. Coopers & Lybrand*, 95 NY2d 479, 484 [2000]). As stated above, the Court of Appeals has clarified that, in the commercial context, "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v. Schaefer*, supra at 263–264; *Fresh Direct, LLC v. Blue Martini Software, Inc.*, supra at 489).

Here, plaintiff has failed to plead facts establishing the existence of a special or fiduciary relationship with the defendants – "a necessary element of the tort of negligent misrepresentation" (*Kimmell v. Schaefer*, supra at 264). Nor is there any indication in this commercial context, that either Romano, Russo, O'Dell or Advanced "was in a special position of confidence and trust" with respect to the plaintiff (*Gardianos v. Calpine Corp.*, 16 AD3d 456 [2nd Dept. 2005]).

Accordingly, plaintiff's third cause of action sounding in negligent misrepresentation is also dismissed in its entirety.

Legal Malpractice

Plaintiff's legal malpractice claim against Romano is predicated upon his allegations that Romano, an attorney, represented himself, Advanced and the

plaintiff as an attorney at all times referenced in the complaint and that in that capacity, he failed to perform his duty to protect plaintiff's monies from conversion or misappropriation.

In order to prevail on a claim of legal malpractice, a plaintiff must demonstrate a duty owed by the attorney, a breach of that duty and proof that actual damages were proximately caused by the breach (*Ippolito v. McCormack Damiani Lowe & Mellon*, 265 AD2d 303 [2nd Dept. 1999]). In order to prove proximate cause a plaintiff must prove that, "but for" the attorney's breach, he/she would have obtained a better result (*Parksville Mobile Modular v. Fabricant*, 73 AD2d 595, 599 [2nd Dept. 1979]). A failure in any one element will result in a dismissal of the claim (*Albanese v. Hametz*, 4 AD3d 379, 381 [2nd Dept. 2004]).

Even under the most liberal reading of the plaintiff's complaint, this Court does not read the allegations to support the claim that the plaintiff and the defendant Romano had any attorney client relationship during the period at issue. Undoubtedly, Romano represented the plaintiff in the purchase of his home. However, that relationship cannot be extrapolated to cover the three investments plaintiff had with Advanced and/or Romano; to wit, the two real estate investments and the subject international oil deal. The fact that the attorney client relationship ended in February 2009 is also supported by defendant Romano's

letter to the plaintiff returning plaintiff's down payment check for the cancelled purchase of a home in Dix Hills (Motion, Ex. C). Notably, plaintiff does not allege that Romano's representation of the plaintiff continued past April 2, 2009. Further, this Court cannot overlook the fact that plaintiff's complaint is devoid of any allegations that plaintiff's damages were proximately caused by the breach of any purported duty owed by Romano.

Therefore, plaintiff's fourth cause of action for legal malpractice is also dismissed.

Fraud

Plaintiff claims that defendants Romano, Russo and O'Dell's representations to him that he did not need to know the details pertaining to his investment with Advanced and that his money was 100% safe, secure and guaranteed were statements that were knowingly and intentionally false when made. This, plaintiff claims, was the reason he was fraudulently induced into making the $250,000.00 payment to Advanced and acted to his detriment and damage.

In addition, plaintiff claims that the defendants Romano and Russo repeatedly attempted to induce him to withhold from initiating legal action in this Court or any other Court, from reporting the foregoing facts and circumstances to

law enforcement, including by reason of repeatedly making clear and unequivocal promises that plaintiff would soon be receiving money from Advanced because Suarez would make good on the oil deal.

In order to establish a cause of action for fraud, a plaintiff must plead the following elements: (1) a false representation; (2) of material fact; (3) with intent to defraud; (4) reasonable reliance on the representation; (5) causing damages to the plaintiff (*Lama Holding Co. v. Smith Barney*, 88 NY2d 413 [1996]). Similarly, in order to assert a claim for fraud in the inducement, a plaintiff must establish that the defendant made material misrepresentations that were false, the defendant knew the representations were false when made, the misrepresentations were made with intent to deceive the plaintiff, the plaintiff justifiably relied upon these representations and plaintiff was damaged as a result of relying upon these misrepresentations (*Leno v. DePasquale*, 18 AD3d 514 [2nd Dept. 2005]).

CPLR 3016(b) provides that an action for fraud must be pled "with particularity, including specific dates and items, if necessary and insofar as practicable." Conclusory allegations of fraud will not be sufficient (CPLR 3016[b]; *Dumas v. Fiorito*, 13 AD3d 332 [2nd Dept. 2004]; *Sargiss v. Magarelli*, 50 AD3d 1117 [2nd Dept. 2008]). However, it is sufficient to plead facts that

would allow a reasonable inference of the alleged fraud (*Pludeman v. Northern Leasing Systems, Inc.*, 10 NY3d 486 [2008]).

In this case, the cause of action for common law fraud or fraud in the inducement is also dismissed based upon Sclafani's failure to allege the necessary elements and to plead sufficient facts to allow a reasonable inference of fraud. Additionally, Sclafani fails to plead the requisite intent to defraud.

Specifically, Sclafani's allegation that the defendants "statements...were knowingly and intentionally false when made and defendants knew that said monies were not 100% secure" (Complaint, ¶105) cannot be interpreted to mean that said defendants uttered those statements with the *intent* to defraud. There is no allegation that the defendants made this statement or any other statement to the plaintiff with the intent to induce action. In fact, by plaintiff's own allegations, it is clear that plaintiff is aware that the perpetrators of the fraud were in fact Suarez and Ferro. Thus, reading the complaint in its entirety, this Court is hard pressed to find that plaintiff's allegations establish that the defendants herein made false representations of material facts and with intent to defraud. Plaintiff states that he was aware that the international oil deal was not something that Advanced ordinarily engaged in; that it was Suarez and Ferro that proposed the investment to the defendants; and that ultimately, Suarez and Ferro who were criminally charged

and prosecuted, mislead the scheme. Thus, even under the most liberal construction of the complaint, this Court cannot find that plaintiff has established that the *defendants knowingly* made material misrepresentations that were false, the *defendants* knew the representations were false when made, and that the misrepresentations were made with intent to deceive the plaintiff (*Leno v. DePasquale*, supra). Accordingly, this Court finds that the plaintiff has failed to assert a claim for fraud and/or fraud in the inducement. His fifth cause of action is also dismissed.

Violation of Judiciary Law

As against Romano, plaintiff vaguely claims that the defendant was guilty of deceit and intended to deceive the plaintiff with respect to his investment and that this constitutes a violation of Judiciary Law §487.

Judiciary Law § 487 entitled "Misconduct by attorneys" states in full as follows:

> "An attorney or counselor who:
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
>
> 2. Wilfully delays his [or her] client's suit with a view to his [or her] own gain; or, wilfully receives any money or allowance for or on account of any money which he [or she] has not laid out, or becomes answerable for,

> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he [or she] forfeits to the party injured treble damages, to be recovered in a civil action."

While the statute is broad enough to include the protection of persons other than an attorney's client (*Fields v. Turner*, 1 Misc.2d 679 [Sup. Ct. New York 1955]), the statute does require that it apply only to the conduct of attorneys (*Rudow v. City of New York*, 642 F. Supp. 1456 [SDNY 1986], *jdgmt aff'd on other grounds*, 822 F.2d 324 [2nd Cir. 1987]).

Here, as stated above, while Romano was undoubtedly an attorney, with respect to the claims herein, Romano was not acting in his capacity as an attorney. In fact, by plaintiff's own allegations, Romano owned and controlled Advanced and that his "deceit" was with respect to plaintiff's investment in Advanced.

Therefore, plaintiff's sixth cause of action is also dismissed for failure to state a cause of action.

Third Party Beneficiary Claims for Breach of Contract by Advanced

Plaintiff alleges in his seventh cause of action that he is third party beneficiary of the contract entered into by Advanced Capital Commercial Group, Inc. and Advanced Capital Group, Inc. He alleges that the Agreement between Advanced Capital Commercial Group, Inc. and Advanced Capital Group, Inc. was

intended to benefit the individual investors of Advanced Capital Group Inc. and that Advanced Capital Commercial Group, Inc. breached its agreement by failing to provide adequate protection of plaintiff's investment monies from theft.

Notably while defendants Romano and the collective Advanced entities against whom the seventh cause of action is addressed move to dismiss said cause of action, they fail to proffer any actual argument or support for this relief.

Nonetheless, it is noted that while a third-party may sue to enforce a contract made for its benefit (*Port Chester Elec. Constr. Corp. v. Atlas*, 40 NY2d 652 [1976]), in order to be able to maintain an action to recover as the third-party beneficiary of a contract, he or she must establish that it was the specific intent of the contracting parties to benefit the third-party (*Id*). A third-party who is only an incidental beneficiary to the contract may not sue to enforce the contract (*Amin Realty, LLC v. K & R Construction Corp.*, 306 AD2d 230 [2nd Dept. 2003]; *Board of Mgrs. of Riverview at Coll. Point Condominium III v. Schorr Bros. Dev. Corp.*, 182 AD2d 664 [2nd Dept. 1992]).

Here, the plaintiff has not established any of these elements. Indeed the only allegations of any contracts and/or agreements made with respect to plaintiff's dealings with Advanced were the promissory note prepared by Romano on June 11, 2009 to secure Sclafani's investment and the escrow agreement entered into

between Advanced and Ferro on the same date, dealing with the payment of investor monies, including Sclafani's $250,000.00 investment.

While pursuant to CPLR 3211(a)(7) factual allegations contained in the complaint are deemed true, legal conclusions and facts contradicted on the record are not entitled to a presumption of truth (*In re Loukoumi, Inc.*, 285 AD2d 595 [2nd Dept. 2001]; *Doria v. Masucci*, 230 AD2d 764 [2nd Dept. 1996]). Here, simply plaintiff's own allegations do not support a claim for a third party beneficiary claim for breach of contract by Advanced Capital Commercial Group, Inc.

Therefore, plaintiff's seventh cause of action is also dismissed for failure to state a cause of action.

Gross Negligence

As part of his eighth cause of action, plaintiff, for the first time, identifies the defendants as his investment advisors, that had discretionary control over the assets of the Advanced and also had a special relationship with the plaintiff which gave rise a duty to exercise due care in the management of plaintiff's monies invested with Advanced and in the selection and monitoring of investments made by Advanced. In this capacity, plaintiff alleges that the defendants Romano and Russo grossly failed to exercise due care and acted in reckless disregard of their duties and thereby injured the plaintiff.

Gross negligence is the failure to use even slight care or involves conduct that is so careless as to demonstrate a complete disregard for the rights of others (*Sommer v. Federal Signal Corp.*, 79 NY2d 540 [1992]; *Matter of Coniber v. Hults*, 15 AD2d 252 [4th Dept. 1962]).

Plaintiff fails to plead that the defendants' conduct was intentional. While the complaint alleges "gross negligence", there are no factual allegations in the complaint from which the Court could infer that the defendants' conduct constituted gross negligence. As stated above, legal conclusions plead in a complaint are not entitled to the presumption of truth (*In re Loukoumi, Inc.*,supra; *Doria v. Masucci*, supra). The complaint pleads gross negligence as a legal conclusion unsupported by any facts.

Moreover, although deficiencies in the pleadings may be cured by factual allegations contained in affidavits made by parties with actual knowledge of the facts (*Well v. Rambam*, 300 AD2d 580 [2nd Dept. 2002]), the plaintiff fails to remedy this pleading defect in his affidavit in opposition to the defendants' motion (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Accordingly, the eighth cause of action is dismissed.

Piercing the Corporate Veil

Finally, in his ninth cause of action, plaintiff claims that defendants Romano

and Russo, acting individually or in concert with others, exercised complete domination of the Advanced entities and such domination was used to commit the fraud alleged herein. Plaintiff alleges that defendants Romano and Russo treated the Advanced entities as their alter ego and routinely and consistently conducted the business of said companies in a manner such that the corporate form should be disregarded and liability for purported corporate conduct should be vested on the individuals.

Similarly, in his tenth cause of action, plaintiff claims that each of the defendant companies treated the other defendant companies as if all companies were merged into one, without formal agreements between the companies evidencing each companies separate rights and obligations, and all controlled by the same persons, namely Romano and Russo, who conducted business without regard to maintaining separate and distinct corporate form for each fo the defendant companies. He claims that the companies were used to shield defendants Romano and Russo from personal liability, and each company was used to shield the other companies from liabilities so as to commit fraud an/do default in the payment of debts, in contravention of plaintiff's rights.

To establish a basis for piercing the corporate veil, there must be a showing that the corporate owner exercised complete domination of the corporation and

that such domination was used to commit a fraud or wrong (*Morris v. New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). Complete domination standing alone is not enough. Id. In this case, as demonstrated above, plaintiff's fraud claim has been dismissed for failure to state a cause of action. Accordingly no basis for individual liability, or piercing the corporate veil, has been demonstrated or sufficiently alleged. Similarly, the corporate veil will not be pierced simply because the same person or persons controlled multiple entities (*Treeline Mineola, LLC v. Berg*, 21 AD3d 1028 [2nd Dept. 2005]). There are no factual allegations to support the claim that the Advanced entities have disregarded the corporate form to suit their convenience and perpetrate a fraud upon the plaintiff (*Walkovszky v. Carlton*, 18 NY2d 414 [1966]).

Therefore, plaintiff's ninth and tenth causes of action are also dismissed.

Accordingly, the motions by defendants Romano and Advanced, Russo and O'Dell each for an Order dismissing the plaintiff's various causes of action against them are granted and Plaintiff's second through tenth causes of action are dismissed in their entirety. The only claim to survive this decision is plaintiff's first cause of action on the promissory note asserted against Advanced.

With respect to plaintiff's cross motion for an Order pursuant to CPLR 3215, granting him a default judgment as against Robert Russo, said cross motion

is denied. A party may seek a default judgment against a Defendant who fails to make an appearance (CPLR 3215[a]). On an application for a default judgment, the moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due (CPLR 3215[f]). The moving party must also make a prima facie showing of a cause of action against the defaulting party (*Joosten v. Gale*, 129 AD2d 531 [1st Dept. 1987]). Here, as demonstrated above, in light of the fact that the plaintiff has failed to make a prima facie showing of a cause of action against Russo, his cross motion for a default judgment must be denied.

This shall constitute the Decision and Order of this Court.

Dated: January 23, 2012

STEVEN M. JAEGER, A.J.S.C.

ENTERED
JAN 25 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE