SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

JONATHAN WINICK, ALETA ROSEN-WINICK, SIDNEY ROSEN and MURIEL ROSEN,

Plaintiffs,

INDEX No. 600098/12

MOTION DATE: June 15, 2012
Motion Sequence # 001

-against-

ROBERT HENRY VAN ZANDT, KIMMARIE GERVASI VAN ZANDT, VAN ZANDT AGENCY INC., BURKE & GRACE AVENUE CORP., EMPIRE BUILDERS OF NEW YORK, CORP., MIG OF WESTCHESTER INC., ROCKWELL CONSULTING OF NY INC., 2108 BRIGHTON & 250 MAISONS DRIVE, INC., R.S. ENTERPRISES OF NEW YORK INC., MICHAEL LEASE, ESQ., IRA SERVICES, INC., and IRA SERVICES TRUST COMPANY,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... XX
Memorandum of Law..... XX
Reply Memorandum of Law..... X

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Motion by defendants IRA Services, Inc. and IRA Services Trust Company to dismiss the complaint for a defense founded upon documentary evidence and failure to state a cause of action is **granted** in part and **denied** in part.

This is an action for fraud. Defendant Robert Van Zandt is a tax preparer who operated through defendant Van Zandt Agency Inc. Plaintiffs Jonathan Winick, Aleta-Rosen Winick, Sidney Rosen, and Muriel Rosen used Van Zandt to prepare their tax returns for a number of years. Beginning in 2001, Van Zandt solicited plaintiffs to invest in certain promissory notes. Van Zandt represented that the notes would be secured by mortgages on real property and would carry a guaranteed rate of return of 9 %. One of the promissory notes was issued by Van Zandt, and another of the promissory notes was issued by defendant Burke & Grace Avenue Corp. Defendant Anthony Donato signed the note on behalf of Burke & Grace.

Defendants represented that the proceeds of the notes would be invested in construction projects in the Bronx, Sullivan County, New York, and Myrtle Beach South Carolina. Defendants also represented that the investments would be suitable for self-directed individual retirement accounts.

Plaintiffs allege that in 2009 they rolled over an IRA account, with a balance of approximately $190,000, into a new IRA which was set up with defendant IRA Services, Inc. as the administrator and defendant IRA Services Trust Company as the custodian. According to the IRA defendants, the actual rollover occurred on May 10, 2009. The same day that the account was opened, plaintiffs executed an "investment authorization," instructing IRA Services to transfer the money to defendant MIG of Westchester, Inc, who also issued notes in which plaintiffs invested. However, IRA Services did not actually issue a check to MIG until June 29, 2009. On the same date that the check was issued, Jonathan Winick signed an "investment agreement" with MIG, which was "agreed and consented to" by IRA Services.

In reality, the investments were a Ponzi scheme in which the money was used to pay interest and principal to existing investors rather than being invested in construction projects. Plaintiffs allege that they invested $2.7 million in the notes and other instruments. The Winick plaintiffs allege that defendant Michael Lease was their attorney in connection with the investments. Approximately 100 other investors were involved, and in total over $20 million was invested in the fraudulent scheme. On April 6, 2011, the New York State Attorney General commenced an action in Supreme Court, New York County to enjoin the fraudulent acts and practices pursuant to § 354 of the General Business Law.

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The present action was commenced on January 20, 2012. Plaintiff asserts claims for fraud, aiding and abetting fraud, conversion, unjust enrichment, General Business Law § 349, General Business Law § 350, legal malpractice, breach of fiduciary duty, negligent misrepresentation, negligence, gross negligence, and breach of contract.

Defendants IRA Services, Inc and IRA Services Trust Company move to dismiss the complaint for a defense founded upon documentary evidence and failure to state a cause of action. The IRA defendants argue in essence that because the IRA accounts were self-directed, the custodian and administrator had no duty of due diligence, and defendants cannot be held liable for aiding and abetting.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction....[The court must] 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"(***Arnav Industries, Inc. v. Brown***, 96 NY2d 300, 303 [2001]).

The Martin Act, New York's "blue sky" law, authorizes the Attorney General to investigate and enjoin fraudulent practices in the marketing of stocks, bonds, and other securities (***Assured Guaranty v J.P. Morgan Investment***, 18 NY3d 341, 349 [2011]). A private litigant may not purse a common law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations (Id at 353). However, an injured investor may bring a common law claim, for fraud or otherwise, that is not entirely dependent on the Martin Act.

To establish a prima facie case for fraud, plaintiff must prove that 1) defendant made a representation as to a material fact, 2) such representation was false, 3) defendant intended to deceive plaintiff, 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct, and 5) as a result of such reliance plaintiff sustained pecuniary loss (***Ross v. Louise Wise Services, Inc.***, 8 NY3d 478, 488 [2007]).

To plead a cause of action for aiding and abetting fraud, the complaint must allege the existence of an underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance in the achievement of the fraud by the aider and abettor (***Winkler v Battery Trading, Inc.***, 89 AD3d 1016 [2d Dept 2011]). Substantial assistance means more than just performing routine business services for the alleged fraudster (***CRT Investments***

v BDO Seidman, 85 AD3d 470 [1st Dept 2011]).

Plaintiffs clearly allege an underlying fraud, i.e. false representations that their money was being invested in legitimate real estate development projects. However, plaintiffs fail to allege any misrepresentation on the part of the IRA defendants. Accordingly, the IRA defendants' motion to dismiss the first cause of action for fraud for failure to state a cause of action is **granted**.

Defendants in effect argue that serving as the administrator, or custodian, of an IRA account is merely providing routine business services which does not constitute substantial assistance. Additionally, because the IRA defendants administered the accounts only briefly, it could be argued that they had insufficient opportunity to gain knowledge of the underlying fraud. However, the fact that the account was rolled over to MIG the same day that it was opened gives rise to an inference that the IRA defendants may have had knowledge of the fraud. The inference may be strengthened, if defendants served as the IRA custodians for other unwitting investors. Nevertheless, regardless of the number of IRA's handled, a 1-day rollover does not appear to be a routine business service. The court concludes that plaintiffs have adequately alleged knowledge of the fraud and substantial assistance on the part of the IRA defendants. The IRA defendants' motion to dismiss the third cause of action for aiding and abetting fraud for failure to state a cause of action is **denied**.

Conversion is an intentional act of dominion or control, over tangible or intangible property, which so seriously interferes with the right of another to control it, that the actor may justly be required to pay the other the full value of the property (***Thyroff v Nationwide Mutual Ins.***, 8 NY3d 283 [2007]). As the custodian or administrator of the IRA account, defendants did not exercise any unauthorized dominion or control over plaintiffs' property. Accordingly, the IRA defendants' motion to dismiss the fourth cause of action for conversion for failure to state a cause of action is **granted**.

An action for unjust enrichment is based upon an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned (***IDT Corp. v Morgan Stanley***, 12 NY3d 132, 142 [2009]). Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded (Id). Plaintiffs executed a "traditional individual retirement custodial account agreement" with IRA Services Trust. Because there was a valid written contract governing the IRA account,

plaintiffs are precluded from proceeding on an unjust enrichment theory. Accordingly, the IRA defendants' motion to dismiss the fifth cause of action for unjust enrichment for failure to state a cause of action is **granted**.

Generally, where parties have entered into a contract, the court looks to the agreement to determine whether they have entered a fiduciary relationship. However, fiduciary liability is not dependent solely upon an agreement, but results when one of the parties is under a duty to act for or give advice for the benefit of the other upon matters within the scope of the relationship (***EBC I, Inc. v Goldman Sachs***, 5 NY3d 11, 19-20 [2005]).

The IRA defendants were under no duty to act for plaintiffs or give them advice with respect to the self-directed IRA accounts. Accordingly, the IRA defendants' motion to dismiss the eleventh cause of action for breach of fiduciary duty for failure to state a cause of action is **granted**.

There can be no negligence or breach of contract on the part of an investment management company, with respect to a self-directed account, unless the investment company disregards the customer's instructions (**Guerrand-Hermes v J.P. Morgan & Co.,** 2 AD3d 235 [1st Dept 2003]). If there can be no negligence, clearly there can be no gross negligence. Accordingly, the IRA defendants' motion to dismiss the twelfth cause of action for gross negligence, the thirteenth cause of action for negligence, and the fourteenth cause of action for breach of contract for failure to state a cause of action is **granted**.

A Preliminary Conference has been scheduled for September 24, 2012 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

So ordered.

Dated AUG 0 2 2012

Stephen A. Bucaria
J.S.C.