

MK Inves. Servs. Ltd. v Montague Morgan Slade Ltd.
2012 NY Slip Op 33286(U)
January 20, 2012
Supreme Court, New York County
Docket Number: 651489/2010
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

**MK INVESTMENT SERVICES LIMITED,
ET AL.,**

Plaintiffs,

-against-

MONTAGUE MORGAN SLADE LTD., ET AL.,

Defendants.

INDEX NO. 651489/10

MOTION DATE _____

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion _____

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss for lack of personal jurisdiction is **DENIED**;

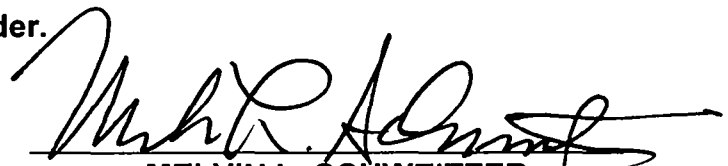
Motion by defendants to dismiss for forum non-conveniens is **DENIED**;

Motion by defendants to dismiss plaintiffs RICO claims is **GRANTED**;

Motion by defendants to dismiss common law fraud claims is **DENIED**;

all as per attached Decision and Order.

Dated: January 20, 2012


MELVIN L. SCHWEITZER, S.C.
MELVIN L. SCHWEITZER
J.S.C.

Check one: FINAL DISPOSITION **NON-FINAL DISPOSITION**

Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

New York law is that jurisdiction may be established over a non-resident defendant on the basis of the New York acts of a co-conspirator. *Best Cellars Inc. v Grape Finds at Dupont, Inc.*, 90 F Supp 2d 431 (SDNY 2000). Here, the court finds that plaintiff has properly plead facts that infer defendant was a member of a conspiracy and facts that infer an overt act in New York, during and pursuant to a conspiracy. That is all that is necessary to meet plaintiffs burden with respect to jurisdictional pleading.

Forum non Conveniens

In determining whether a forum is inconvenient, courts consider (1) the burden on the New York courts; (2) the potential hardship on the defendant; (3) the unavailability of an alternative forum in which the plaintiff may bring the action; (4) whether the parties are nonresidents; (5) the location of the transaction giving rise to the action; and (6) the location of the evidence and the witnesses. *See Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984).

Here, there is a multi-jurisdictional action, with witnesses and relevant documents on several continents. There is no forum which by its situs is per se more convenient than several others. Mr. Rigby has not shown that England, his alternative forum, would be one in which all defendants would be amenable to process. Mr. Rigby has demonstrated no substantial hardship if New York is the forum.

It is well established that unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. *Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 (1st Dept 1991).

RICO Claims

Counts I-III of the plaintiffs' allegations claim that the defendants' fraudulent representations relating to securities and their alleged acts of money laundering and unlawful money transfers constitute violations of 18 USC § 1962, also known as the Racketeer Influenced and Corrupt Organizations Act ("RICO"). To state a claim for damages under RICO, the plaintiffs must allege the existence of seven elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce. *Moss v Morgan Stanley, Inc.*, 719 F2d 5, 17 (2d Cir 1983). The plaintiffs' must then show that they were injured in their business or property by reason of the RICO violation. *Id.*

The defendants argue that the RICO claims fail because the alleged predicate acts constitute securities fraud. The Private Securities Litigation Reform Act of 1995 (the "PSLRA") eliminates as predicate acts for RICO any conduct that would be actionable as securities fraud. 18 USC 1964(c). New York courts hold that alleged misrepresentations made by mail and wire undertaken to induce plaintiff to engage in securities may not constitute predicate acts under RICO and are barred by the PSLRA as a matter of law. *See Blythe v Deutsche Bank AG*, FSupp2d 274, 281 (SDNY 2005); *Stechler v Sidley Austin Brown & Wood*, 382 FSupp2d 580, 597-98 (SDNY 2005); *ABF Capital Mgmt. v Askin Capital Mgmt., LP*, 957 F Supp 1308, 1318-20 (SDNY 1997).

It is the opinion of the court that Counts I-III of the Complaint are barred by the PSLRA because the allegations constitute violations that are actionable as securities fraud. The plaintiffs argue that the PSLRA does not function as a bar to RICO claims where it cannot be established

that the investments were actually made in securities. However, it is clear from the Complaint that the allegedly fraudulent representations made by the defendants were allegedly made to induce plaintiffs to invest in purported hedge funds. This constituted the sale of investment contracts, which are securities for the purpose of PSLRA.

Plaintiffs also argue that while Count I alleges RICO violations based on alleged mail and wire fraud, Count II and III claim RICO violations based on alleged money laundering and unlawful money transfers, which should not be barred by the PSLRA. However, having alleged that all of the defendants' acts were part of a single fraudulent scheme, the plaintiffs cannot surgically separate the scheme into its various component parts. *See Seippel v Jenkins & Gilcrest PC*, 341 FSupp2d 363, 373 (SDNY 2004). The plaintiffs' overarching theory of the case is that the defendants made fraudulent representations regarding securities with the intention of inducing plaintiffs to invest and to steal the money through laundering activities and unlawful money transfers. This theory of the case counts as a single scheme and the securities aspects of the fraud must be aggregated with the non-securities aspects. *See Gilmore v Gilmore*, 2011 WL 3874880, at *6 (SDNY Sept 28, 2010). Accordingly, the PSLRA acts as a bar to the whole of the plaintiffs' RICO claims.

Common Law Fraud

The plaintiffs' fourth cause of action alleges common law fraud against the defendants on the basis of false statements concerning MMS's location on Wall Street, the amount of funds under management, the past performance of the funds, that money transferred from plaintiffs to defendants was being invested, that the investments were guaranteed, and the false valuations of plaintiffs' investments and diversion of the funds. The fifth cause of action alleges common law fraud on the basis of the defendants' false statements regarding redemption of the plaintiffs'

investments. CPLR 3016(b) requires claims based on fraud to be alleged with particularity. *Small v Lorillard Tobacco Co.*, 94 NY2d 43 (1999). Plaintiffs must plead with sufficient particularity the elements of common law fraud, which include a false representation of a material fact, with intent to defraud, reasonable reliance on the misrepresentation, and causation of damages to the plaintiff. *Id.* at 57.

The defendants claim that the plaintiffs have failed to plead with sufficient particularity these elements of fraud. However, the requirements of CPLR 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct. *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 (2008). It is the opinion of the court that the plaintiffs have met their pleading burden regarding Mr. Rigby.

The plaintiffs have alleged that Mr. Rigby made false representations of material facts. The plaintiffs have sufficiently alleged that these misrepresentations were made with the intent to defraud the plaintiffs and induce them not to pursue their remedies against MMS and its affiliates. Allegedly relying on these misrepresentations, the plaintiffs suffered damage as a result in the amounts enumerated in the SAC. The SAC has pled more than enough facts to maintain a claim of common law fraud against Mr. Rigby.

Accordingly, it is

ORDERED that defendants' motion to dismiss for lack of personal jurisdiction is denied; and it is further

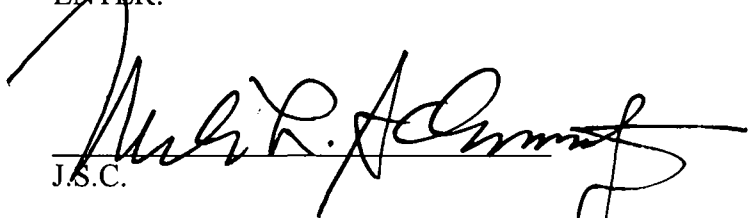
ORDERED that defendants' motion to dismiss for *forum non-conveniens* is denied; and it is further

ORDERED that defendants' motion to dismiss plaintiffs' RICO claims is granted; and it is further

ORDERED that defendants' motion to dismiss the common law fraud claims is denied.

Dated: January 20, 2012

ENTER:

A handwritten signature in black ink, appearing to read "Melvin L. Schweitzer", written over a horizontal line.

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.