Marty and Dorothy Silverman Found. v Bollam, Sheedy, Torani & Co., LLP
2015 NY Slip Op 30962(U)
June 5, 2015
Supreme Court, New York County
Docket Number: 156261/2012
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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MARTY AND DOROTHY SILVERMAN FOUNDATION

Plaintiff,

- against -

BOLLAM, SHEEDY, TORANI & CO., LLP, AND RONALD L. GUZIOR,

Defendants.

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DECISION and ORDER

Index No. 156261/2012
Motion Seq. No. 002

SALIANN SCARPULLA, J.:

In an action involving claims of fraud and aiding and abetting fraud against accountants, defendants Bollam, Sheedy, Torani & Co., LLP and Ronald Guzior ("Guzior") (collectively, the "defendants") move to dismiss the amended complaint brought by the Marty and Dorothy Silverman Foundation ("plaintiff") pursuant to CPLR 3211 and 3016(b) .

Previously, on December 4, 2013, Judge Kapnick dismissed plaintiff's Verified Complaint (the "Original Complaint") with causes of action for negligence, gross negligence, fraud, and aiding and abetting fraud, "with leave granted to plaintiff to replead [the fraud claims] with more specificity within 30 days." Plaintiff subsequently filed an amended complaint, restating its aiding and abetting fraud and fraud claims (the "Amended Complaint").

The following facts are alleged in the Amended Complaint: on or around June 21, 2010, plaintiff, a philanthropic nonprofit entity, loaned nonparty Ordway Research Institute, Inc. ("Ordway"), a New York nonprofit entity, $3,500,000 (the "Silverman loan"). A portion of "Program-Related Investment Loan Agreement and Exhibits, Between Marty and Dorothy Silverman Foundation, as Lender and Ordway Research Institute, Inc., as Borrower" (the "loan agreement"), dated June 21, 2010, states that "[t]he Lender and the Borrower agree that the purpose of the Loan is to provide the Borrower with funding for the purchase and renovation of premises located at 130 New Scotland Avenue, Albany, New York," and a separate provision of the loan agreement states that "[t]he Borrower covenants . . . to repay any portion of the loan proceeds not used in furtherance of such purpose."

Plaintiff alleges that a portion of the Silverman loan was used to purchase the 130 New Scotland Avenue, Albany, New York premises but the remainder of the Silverman loan was transferred from Ordway to Charitable Leadership Foundation ("CLF") shortly after the Silverman loan was made. Plaintiff alleges that subsequent transfers occurred among CLF, Ordway, and Center for Medical Science, Inc. ("CMS").[1] Finally, plaintiff contends that, other than the amount used to purchase the building, the remainder of the

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[1] Ordway, CLF, and CMS allegedly were all controlled by nonparties Richard Liebich ("Liebich") and Paul J. Davis ("Davis").

Silverman loan was not used in accordance with the purpose of the loan. In April 2011, Ordway filed a voluntary petition for bankruptcy.

This action arises out of defendants' audit of Ordway and the associated "Financial Statements and Independent Auditor's Report" dated "June 30, 2009 and 2008" (the "June 30, 2009 Audit Report") prepared by defendants. Plaintiff claims that the June 30, 2009 Audit Report was fraudulently prepared as defendants knew or should have known that Ordway was engaged in illegal or improper behavior and failed to report it. Moreover, plaintiff alleges that defendants failed to report the dire state of Ordway's finances.

Before making the Silverman loan, Ordway provided to plaintiff the June 30, 2009 Audit Report. Plaintiff claims that it relied on this June 30, 2009 Audit Report in deciding to extend the Silverman loan. Plaintiff also alleges that "[b]ut for the defendants' conduct . . . and the false financial statements plaintiff was provided with, coupled with the fraudulent conduct of Liebich, Davis and others, Ordway could not have remained in business, and plaintiff never would have loaned $3.5 million to Ordway and would not have lost its funds."

On this motion defendants again contend that the Amended Complaint is insufficient under CPLR § 3016(b). Defendants point out that because plaintiff has included no other allegations than those for malpractice, the fraud-based claims should be dismissed as duplicative. Defendants also argue that there is no proximate causation between plaintiff's allegations regarding the defendants and the plaintiff's injury.

In its opposition, plaintiff contends that it has adequately and particularly pleaded its fraud and aiding and abetting fraud causes of action. It also disputes that proximate causation has been insufficiently pleaded, and it contends that the argument that the fraud claims duplicate negligence claims is misguided largely because the negligence claims have already been dismissed. Plaintiff also requests that, should I find their pleading inadequate, they be given leave to amend the complaint to cure the inadequacy pursuant to CPLR § 3025(b).

Discussion

"When determining a motion to dismiss, 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" (*Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 570–71 [2005] [internal quotations and citations omitted]). A claim of fraud, however, must be pleaded with particularity under CPLR 3016 (b) (*see Gregor v Rossi*, 120 AD3d 447, 447–48 [1st Dept 2014]).

I. Fraud

"The elements of a cause of action for fraud are a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)" (*Eurycleia Partners, LP, v Seward & Kissel*, LLP, 12 N.Y.3d 553, 559 [2009] [internal citations omitted]).

Following Judge Kapnick's finding that the fraud claims in the Original Complaint were insufficiently particular, plaintiff added two alleged substantive and pertinent material misrepresentations to the Amended Complaint. The first addition concerns Note M to the "June 30, 2009 Audit Report. Plaintiff alleges that Note M's notation that "[w]ithin a year of completion of the work space, management estimates the lab will generate revenue in excess of $8.5 million," was a material misrepresentation. However, this statement only purports to relay Ordway's own estimate of future revenue. The statement in Note M is not a material misrepresentation by the accountant defendants.

Second, plaintiff sets out Guzior's alleged statement at a September 2009 Board meeting "that positive statements could be added to [Note M]." Here again, this statement is not a material misrepresentation of fact, but a recommendation by Guzior to the Board.

In addition to the foregoing, plaintiff's other substantive and pertinent additional allegations once again fail to sufficiently allege a fraud claim because plaintiff has not pleaded particular facts to show that defendants knew of Ordway's alleged financial misdealings and/or dire financial situation during the period included in the June 30, 2009 Audit Report. For example, with respect to an allegation that could possibly pertain to the period encapsulated by the June 30, 2009 Audit Report—an allegation that "Defendants knew that as early as 2009 Ordway had serious cash flow problems which they did not

reflect in their report"—it is a conclusory allegation with no particularized facts associated with it.[2]

Additionally, plaintiff fails to allege with any particularity that defendants intended to deceive plaintiff through any false representations on the June 30, 2009 Audit Report. As discussed below in the aiding and abetting context, this is especially true where Ordway's allegedly improper conveyances with entities controlled, in part, by Ordway's chairman all took place after the end of the audit period in question.

For the foregoing reasons, I grant defendants' motion to dismiss the fraud cause of action in the Amended Complaint.

II. Aiding and Abetting Fraud

The elements of a cause of action for aiding and abetting fraud are: "(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"

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[2] Similarly, plaintiff states in its Memorandum of Law in Opposition to Defendants' Motion to Dismiss:

> And even if the Defendants had no evidence of illegal behavior prior to June 30, 2009, the fact that they had (or were willfully blind to) evidence of illegal events occurring between June 30 and September 14 *raises considerable suspicion about illegal activities* occurring prior to June 30 that had not yet come to light (emphasis added).

This allegation is not supported by any factual allegation.

(*Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009] [internal quotation marks and citations omitted]).

In *Stanfield Offshore Leveraged Assets*, the First Department noted that "[s]ubstantial assistance 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" (*id.* [internal quotation marks and citations omitted]). In that case, the court held that a contention that Credit Suisse assisted in the fraud by not disclosing a nonparty's insolvency was "insufficient to support a claim of aiding and abetting fraud absent a fiduciary duty or some other independent duty owed . . . to the plaintiffs" (*id.*).

Here plaintiff fails to state a cause of action for aiding and abetting fraud. Nearly all of Ordway's fraudulent financial dealings as alleged in the Verified Amended Complaint took place after June 30, 2009, the end date for the June 30, 2009 Audit Report.

Additionally, plaintiff's reliance on Note M to the June 30, 2009 Audit Report is insufficient. Plaintiff contends that defendants' report that "*management* estimates that the lab will generate revenue in excess of $8,500,000" is sufficient to allege an aiding and abetting fraud claim. (Emphasis added). Plaintiff is essentially alleging that defendants should have stated that management's estimation was incorrect but did not. But without a separate duty, defendants were under no obligation to state otherwise (*cf. Nat'l Westminster Bank USA v Weksel*, 124 AD2d 144, 148 [1st Dep't 1987] [internal citations

omitted] ["We know of no case where mere inaction by a defendant has been held sufficient to support aider and abettor liability for fraud. Here, there was no independent duty to act on the part of defendant law firm."]).

Finally, Guzior's statement to the Board that "positive statements could be added to [Note M]" does not adequately support an aiding and abetting fraud claim because that statement does not "affirmatively assist[], help[] conceal, or by virtue of failing to act when required to do so enable[] the fraud to proceed" (*Stanfield Offshore Leveraged Assets*, 64 AD3d at 476).

Accordingly, I also dismiss plaintiff's first cause of action for aiding and abetting fraud.[3]

Based on the foregoing, it is

ORDERED that the defendants' motion to dismiss the Verified Amended Complaint herein is granted and the complaint is dismissed in its entirety; and it is further

[3] Plaintiff's informal request, in its opposition to the defendants' motion to dismiss, for leave to replead is denied as procedurally improper. Moreover, plaintiff has already been given leave to replead, and has not articulated why another opportunity to do so would be appropriate.

ORDERED that the Clerk of Court is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Date: New York, New York
June 5, 2015

ENTER:

Saliann Scarpulla, J.S.C.