

**Red & Russell Holding LLC v Mazzaro**

2006 NY Slip Op 30720(U)

November 21, 2006

Supreme Court, New York County

Docket Number: 106896/06

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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RED & RUSSELL HOLDING LLC,

*Plaintiff,*

- against -

ROBERT MAZZARO, et al.,

*Defendants.*

Index No.: 106896/06

DECISION/ORDER

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In this action, the complaint alleges that defendant 136 West 19<sup>th</sup> LLC (“19<sup>th</sup> LLC”), along with its principals, defendants Moise Schuster and Ran Korelik (“defendant investors”), aided and abetted defendant Robert Mazzaro in breaching his fiduciary duty to assist plaintiff in purchasing an investment property located at 136 West 19<sup>th</sup> Street in Manhattan (“19<sup>th</sup> Street property”). The complaint also alleges a cause of action against 19<sup>th</sup> LLC for tortious interference with prospective economic advantage arising out its purchase of the 19<sup>th</sup> Street property. Defendant 19<sup>th</sup> LLC moves to dismiss the complaint against it pursuant to CPLR 3211 (a)(1) and (a)(7).

It is well settled that “[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026). We 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.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co., 98

NY2d 144 [2002].) The test “is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” (Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 [1<sup>st</sup> Dept 1990].) Further, the court may consider a plaintiff’s opposing affidavits to amplify the pleadings. (Rovello v Orofino Realty Co., 40 NY2d 633, 635 [1976]; Eastern Consol. Props., Inc. v Lucas, 285 AD2d 421, 422 [1<sup>st</sup> Dept 2001].) When documentary evidence is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 [2001].)

In moving to dismiss, defendant 19<sup>th</sup> LLC contends that the complaint fails to state a cause of action for aider and abettor liability because defendant was not incorporated until after commission of the acts which allegedly constituted a breach of fiduciary duty by defendant Mazzaro, and because defendant therefore neither had actual knowledge of defendant Mazzaro’s breach nor substantially assisted him in committing the breach.

“A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach.” (Kaufman v Cohen, 307 AD2d 113, 125 [1<sup>st</sup> Dept 2003].) It is further established that “[a] person knowingly participates in a breach of fiduciary duty only when he or she provides ‘substantial assistance’ to the primary violator. Actual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory or sparse allegations that the aider or

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abettor knew or should have known about the primary breach of fiduciary duty. Furthermore, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.” (Global Mins. & Metals Corp. v Holme, \_\_\_ AD3d \_\_\_, 2006 NY App Div Lexis 11880, \*\* 18 [1<sup>st</sup> Dept 2006][internal citations and quotation marks omitted]; Kaufman, 307 AD2d at 125-126.)

In the instant case, defendant’s aider and abettor liability is not predicated merely on its silence about or concealment of defendant Mazzaro’s alleged breach of fiduciary duty. (Compare Kaufman v Cohen, 307 AD2d 113, supra.) Rather, plaintiff claims that defendant Mazzaro breached his fiduciary duty to plaintiff by assisting defendant investors to purchase the 19<sup>th</sup> Street property. Plaintiff further alleges that its principal, Alan Ballinger, specifically informed defendant investors that Mazzaro “worked for plaintiff” on real estate acquisitions, and that plaintiff and Mazzaro were working on acquiring a property on 19<sup>th</sup> Street (Ballinger Aff., ¶¶ 7, 8); that plaintiff diverted the opportunity to purchase the 19<sup>th</sup> Street property from plaintiff to defendant investors; that 19<sup>th</sup> LLC was the instrumentality created by defendant investors to purchase the property; and that 19<sup>th</sup> LLC thereby knowingly and actively aided and abetted plaintiff’s breach. (See Complaint ¶¶ 30-35.) Contrary to defendant’s contention, these allegations are sufficient to plead actual knowledge on 19<sup>th</sup> LLC’s part, and state a cause of action against 19<sup>th</sup> LLC for aider and abettor liability. (See Berger Grantor Trust No. 1 v Adell, 292 AD2d 295 [1<sup>st</sup> Dept 2002]; American Baptist Churches of Met. New York v Galloway, 271 AD2d 92 [1<sup>st</sup> Dept 2000].)

The complaint also states a cause of action against defendant 19<sup>th</sup> LLC for tortious interference with prospective economic advantage. This cause of action may be maintained

based on 19<sup>th</sup> LLC's alleged commission of the independent tort of aiding and abetting defendant Mazzaro's breach of fiduciary duty. (See American Baptist Churches of Met. New York v Galloway, 271 AD2d 92, supra. See generally Carvel Corp. v Noonan, 3 NY3d 182 [2004].)

It is accordingly hereby ORDERED that the motion of defendant 136 West 19<sup>th</sup> LLC to dismiss the complaint is denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
November 21, 2006

  
MARC J. FRIEDMAN, J.S.C.

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