SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 601065/11

MOTION DATE: June 18, 2012
Motion Sequence # 001

MR. SAN LLC, JORDAN MOST, GERALD PINSKY, BOTNICK TRUST, MOTTI HELLMANS, CORTLAND REALTY INVESTMENTS, LLC,

Plaintiffs,

-against-

ZUCKER & KWESTEL LLP, STEVEN KWESTEL,

Defendants.

ZUCKER & KWESTEL LLP, STEVEN KWESTEL,

Third-Party Plaintiffs,

-against-

GERSHON BARKANY,

Third-Party Defendant.

The following papers read on this motion:

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

MR. SAN LLC, et al v ZUCKER & KWESTEL, LLP, et al Index no. 601065/11

Motion by defendants Zucker & Kwestel LLP and Steven Kwestel 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. Motion by defendants to join BarCred Holdings Affiliates LLC as a party plaintiff is **denied**.

This is an action for aiding and abetting fraud. Plaintiffs invested substantial amounts of money with Gershon Barkany who held himself out as a financial advisor and real estate investor. Plaintiffs allege that Barkany represented that the money was to be used to fund real estate loans and other investments but Barkany was actually running a Ponzi scheme. Plaintiffs further allege that Barkany presented defendants Zucker & Kwestel LLP and Steven Kwestel as his attorneys in connection with the sham real estate transactions, and the firm accepted wire transfers of plaintiffs' funds into its escrow account.

This action was commenced on September 14, 2011. Plaintiffs assert claims for legal malpractice, breach of fiduciary duty, aiding and abetting fraud, unjust enrichment, and conversion.

Defendants move to dismiss the complaint for a defense founded upon documentary evidence and failure to state a cause of action. Defendants argue that they had no attorney-client relationship with plaintiffs. Defendants further argue that they did not breach a fiduciary duty because plaintiffs did not instruct them how to apply the transferred funds. Defendants argue that plaintiffs have not stated the circumstances of their alleged wrongful conduct in sufficient detail as required by CPLR 3016. Defendants argue that the conversion and unjust enrichment claims are legally insufficient.

Alternatively, defendants move to join BarCred Holdings Affiliates LLC as a party plaintiff. Defendant Steven Kwestel alleges that he borrowed $475,000 from Barkany and issued a demand note payable to Barkany on January 23, 2011. Kwestel further alleges that on February 22, 2011 Barkany assigned the note to BarCred Holdings, which was allegedly established to recover funds on behalf of the defrauded investors.

"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]).

Absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties, for harm caused by professional negligence, unless there is a relationship sufficiently approaching privity between the attorney and the alleged client (***Schneider v Finman***, 15 NY3d 306, 309 [2010]). This rule protects attorneys from legal malpractice suits by indeterminate classes of plaintiffs whose interests may be at odds with the interests of the acknowledged client (Id).

Since an attorney-client relationship does not depend upon a formal retainer agreement or upon payment of a fee, the court must look to the words and actions of the parties (***Moran v Hurst***, 32 AD3d 909, 911 [2d Dept 2006]). The unilateral belief of a plaintiff alone does not confer upon him or her the status of a client (Id).

Plaintiffs allege that Barkany presented defendants as his attorneys, rather than the attorneys for the plaintiffs. An attorney for an organization is not the attorney for its members (Professional Conduct Rule 1.13). However, it appears that no company had been formed at the time that plaintiffs made their investment. At the time that plaintiffs invested their funds, their interests seemed aligned with Barkany's, at least as to the expected profitability of the venture. Moreover, the fact that Kwestel borrowed money from Barkany suggests that there may have been collusion between client and attorney and perhaps even knowledge on Kwestel's part as to Barkany's fraud upon the plaintiff. In these circumstances, the court must give plaintiffs the benefit of the possible favorable inference that an attorney-client relationship arose when defendants accepted plaintiffs' money into their escrow account. Defendants' motion to dismiss plaintiffs' malpractice claim for a defense founded upon documentary evidence and failure to state a cause of action is denied.

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]). An attorney for a limited liability company may have a fiduciary duty towards an individual member, at least with respect the member's share of distributions of the company's profits (***Kurtzman v Burgol***, 40 AD3d 588 [2d Dept 2007]). As noted, it appears that no company had been formed at the time that plaintiffs made their investment. Nevertheless, having accepted plaintiffs' money into escrow, defendants may have had a fiduciary duty to make sure that the funds were applied to the real estate investment. Defendants' motion to dismiss plaintiffs' breach of fiduciary duty claim for a defense founded upon documentary evidence and failure to state a cause of action is **denied**.

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]). On this motion to dismiss, the court must assume that defendants had knowledge of Barkany's fraud and gave substantial assistance by accepting plaintiffs' funds into their escrow account. Defendants' motion to dismiss plaintiffs' aiding and abetting fraud claim for a defense founded upon documentary evidence and failure to state a cause of action is **denied**.

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]). Plaintiffs argue that defendants were unjustly enriched by having received legal fees. However, plaintiffs do not allege that defendants were paid these legal fees by plaintiffs. Defendants' motion to dismiss plaintiffs' unjust enrichment claim for failure to state a cause of action is **granted**.

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]). An action for conversion of money will lie where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question (***Thys v Fortis Securities***, 74 AD3d 546 [1st Dept 2010]).

Plaintiffs argue that their monies held in escrow constitute a specific, identifiable fund. However, while defendants may have been under a fiduciary duty to ensure these funds were used for real estate investment, they were not necessarily required to return the funds upon plaintiffs' demand or apply them to a particular investment. Defendants' motion to dismiss plaintiffs' conversion claim for failure to state a cause of action is **granted**.

Persons who ought to be parties if complete relief is to be accorded between persons who are parties to the action or who might be inequitably effected by a judgment shall be made plaintiffs or defendants (CPLR § 1001). An example of joinder to promote "complete relief" is where defendant may be exposed to double or multiple liability. An example of joinder to avoid an absent person being inequitably effected is where distribution of a fund might exhaust assets to which the absent person may be entitled (McKinney's practice commentary C1001:1). Defendants will not be exposed to double liability if BarCred is not

joined. Although BarCred is now the payee of Kwestel's note, BarCred would hold the proceeds of the note for the benefit of defrauded investors. Since BarCred was not itself a defrauded investor, it presumably does not assert a claim on defendants' escrow account and would not be inequitably effected by a judgment. Defendants' motion to join BarCred Holdings as a necessary party plaintiff is **denied**.

So ordered.

Dated AUG 0 2 2012

J.S.C.

ENTERED

AUG 07 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE