Marks v Marks
2014 NY Slip Op 30948(U)
April 7, 2014
Sup Ct, New York County
Docket Number: 650777/2013
Judge: Melvin L. Schweitzer

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 45

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SAUL MARKS and NATHANIEL WEISLER,

Plaintiffs,

-against-

GLENN MARKS and DAVID WARREN,

Defendants.

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Index No. 650777/2013

DECISION AND ORDER

Motion Sequence No. 002

MELVIN L. SCHWEITZER, J.:

Defendant Glenn Marks moves, pursuant to CPLR 302 (a), 327 (a), and 3211 (a) (3), (a) (7), and (a) (8), for an order dismissing the first amended and restated complaint on the grounds of lack of long-arm jurisdiction, improper service, forum non conveniens, lack of standing, statute of limitations, and failure to state a viable cause of action for conspiracy, or, in the alternative, disqualifying plaintiffs' counsel from representing plaintiffs in this action.

In the amended complaint, plaintiffs Saul Marks, a British subject domiciled in New York, and Nathaniel Weisler, a New Jersey resident, allege that Glenn Marks, a British subject residing in England, and defendant David Warren, a British subject residing in England and Portugal, fraudulently solicited funds from plaintiffs in 2006 and 2007. Saul Marks and Glenn Marks are brothers.

Plaintiffs allege that defendants intentionally misrepresented to them that the funds would be invested in residential and commercial real estate projects in Lisbon, Portugal by Black Raven PLC, a public limited company listed on the AIM Exchange in London, UK, and Equilibrium Holdings, S.A., an off-shore investment company created by Glenn Marks. Plaintiffs allege that,

at all relevant times, defendants misrepresented their connection to Black Raven, and that, in fact, Glenn Marks was not a Black Raven officer and director until 2008.

Plaintiffs allege that defendants were actually operating a Ponzi scheme, that the Portugese real estate ventures did not exist, and that defendants diverted plaintiffs' investments intended for Black Raven to their personal bank accounts and for their own personal use and to maintain a lavish lifestyle.

On these allegations, plaintiffs assert against defendants four causes of action under the Securities Exchange Act of 1934 (SEA) (15 USC §§ 78a, *et seq.*), the Securities Exchange Commission (SEC) Rule 10b-5, and the Securities Act of 1933 (15 USC §§ 77a, *et seq.*) by intentionally making false statements and engaging in fraudulent acts to entice plaintiffs to invest in Black Raven, and at artificially inflated prices. They also assert a cause of action for conspiracy with nonparty Jose Felix to over bill Black Raven for construction work performed by Felix and his companies at one of Black Raven's properties in Lisbon, Portugal.

On these claims, plaintiffs seek to recover compensatory damages, unspecified injunctive relief, rescission, imposition of a constructive trust, litigation costs, including reasonable attorneys' fees, and interest.

Glenn Marks has not filed an answer, and, instead, seeks to dismiss the amended complaint on a variety of grounds.

Warren has not filed an answer, nor has he moved to dismiss this action, although the motion papers filed by Glenn Marks' attorney indicate that the it represents both defendants.

Personal Jurisdiction

Glenn Marks contends that this court lacks personal jurisdiction over him on the ground that his contacts with New York were merely fortuitous, and do not provide a basis upon which to extend this state's long-arm jurisdiction.

In opposition, plaintiffs contend that Glenn Marks visited New York with the intended purpose of soliciting investments from New York residents, including plaintiffs, in the Black Raven real estate project, and was successful in his efforts.

On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating satisfaction of the statutory and due process prerequisites (*Stewart v Volkswagen of Am.*, 81 NY2d 203, 207 [1993]; *see* CPLR 3211 [a] [8]). Where the defendant is a nondomiciliary, the plaintiff must allege facts sufficient to satisfy the relevant statutory requirements, and to warrant a finding of long-arm jurisdiction over the defendant (*see PT. Bank Mizuho Indonesia v PT. Indah Kiat Pulp & Paper Corp.*, 25 AD3d 470, 470-471 [1st Dept 2006]).

Section 302 of the CPLR permits a court to exercise long-arm jurisdiction over a nondomiciliary who transacts business within the state, in certain circumstances. Subsection 302 (a) (1), requires that the defendant conduct purposeful activity within the state, and that there be a substantial relationship between that activity and the plaintiff's claim. "It is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v*

McFadden Oil Corp., 71 NY2d 460, 467 [1988]; *see Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 508 [2007]; CPLR 302 [a] [1]).

"'To determine whether a party has 'transacted business' in New York, courts must look at the totality of circumstances concerning the party's interactions with, and activities within, the state'" *Scheuer v Schwartz*, 42 AD3d 314, 316 [1st Dept 2007], quoting *Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez*, 171 F3d 779, 787 [2d Cir 1999]). The "overriding criterion necessary to establish a transaction of business is some act by which the defendant purposefully avails itself of the privilege of conducting activities within [New York]" (*Ehrenfeld v Bin Mahfouz*, 9 NY3d at 508 [internal quotation marks and citation omitted]).

In addition, constitutional due process considerations require that the defendant's "minimum contacts" with New York be sufficient to make the imposition of jurisdiction reasonable and just according to "'traditional notions of fair play and substantial justice'" (*Asahi Metal Indus. Co., Ltd. v Superior Ct. of Calif., Solano County*, 480 US 102, 113 [1987], quoting *International Shoe Co. v State of Washington, Office of Unemployment Confirmation & Placement*, 326 US 310, 316 [1945]; *see* United States Const., 14th Amend.). "A non-domiciliary tortfeasor has 'minimum contracts' with the forum State – and may thus reasonably foresee the prospect of defending a suit there – if it 'purposefully avails itself of the privilege of conducting activities within the forum State'" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000] [citation omitted]).

Here, the record demonstrates that Glenn Marks had sufficient purposeful contacts with New York to warrant this state's extension of long-arm jurisdiction over him. Plaintiffs allege that Glenn Marks telephoned them in New York regarding the proposed Black Raven

investment, and sent them numerous emails regarding the investment (*see* Saul Marks Sept. 23, 2013 aff, ¶¶ 12-18; amended complaint, ¶¶ 33, 36, 53-57). In addition, the record includes emails and letters from Glenn Marks to Saul Marks, Weisler, and nonparties Philip J. Philips and Donald Olenick in New York, in which he discusses various aspects of the proposed real estate investment.

The record also includes evidence that Glenn Marks visited New York on multiple occasions for the purpose of recruiting investors.

Saul Marks alleges that, on March 11, 2007, Glenn Marks, together with Warren, visited Saul Marks at his house in Westchester, New York, and distributed to Saul Marks, Weisler, and nonparties George McGinnis and Jay Schippers, copies of an architect's renderings of a plot of land outside Lisbon, in Portugal (*see* Saul Marks aff, ¶¶ 19, 20, 21, 22, 28). Glenn Marks admits that he visited New York in March 2007, and alleges that he visited for primarily personal, rather than business, reasons (*see* Glenn Marks Aug. 9, 2013 aff, ¶ 7). However, and contrary to defendants' contention, whether Glenn Marks also celebrated Saul Marks' wife's birthday at the gathering at Saul Marks' home, and discussed other family matters, does not preclude the gathering from constituting evidence that Glenn Marks came to New York to solicit investors for the alleged fraudulent investment project.

More significantly, on June 4, 2007, Glenn Marks admittedly attended a meeting with Saul Marks, Olenick, and nonparty James Forbes at the Carlyle Hotel in Manhattan regarding investment opportunities in Black Raven (*see id.* ¶ 8). Contrary to defendants' contention, whether Glenn Marks was "merely a spectator," and whether Warren, rather than Glenn Marks, headed the meeting and made the presentation (*id.* ¶ 9) do not change the purpose of the meeting,

or his involvement in the solicitation of investors among the persons present. Saul Marks attests that, during the meeting, Glenn Marks presented information about the proposed investment, explained Black Raven, solicited investments from Saul Marks, Olenick, and Parrish, and invited Saul Marks and his associates to visit and examine his personal and business property portfolio in Lisbon (*see* Saul Marks aff, ¶¶ 29, 34).

Saul Marks also attests that Glenn Marks treated him and Phillips to lunch at the Molyvos restaurant in Manhattan, and showed them the Black Raven prospectus, a New York Times article on real estate in Portugal, and an architect's plans for a real estate development in Portugal (*see id.* ¶ 31).

Plaintiffs allege that, as a result of Glenn Marks' visits to New York in 2007 to secure investors, Saul Marks, Weisler, and others invested funds in Glenn Marks' alleged fraudulent real estate investment scheme (*see* Saul Marks aff, ¶¶ 34-35).

Plaintiffs have, thus, alleged facts sufficient to demonstrate that Glenn Marks visited, emailed, and telephoned plaintiffs and others, in New York for the purpose of soliciting their investments in the Black Raven and Equilibrium real estate ventures in Portugal that underlie the claims asserted here. Plaintiffs further adequately allege that Glenn Marks was successful in his efforts, and that Saul Marks, Weisler, and others made the solicited investments. With this conduct, Glenn Marks purposefully projected himself into local commerce, and, therefore, is now subject to this court's long-arm jurisdiction.

Service of Process

Glenn Marks contends that plaintiffs failed to effectuate service of process on him on the ground that they failed to mail a copy of the original summons and amended complaint to his residence in London, UK.

In opposition, plaintiffs contend that they properly effectuated personal service on Glenn Marks by leaving the summons and complaint with nonparty Claire S. Bicknell, Glenn Marks' wife, a person of suitable age and discretion, at Glenn Marks' residence.

Section 313 of the CPLR provides, in relevant part, that a person subject to the long-arm jurisdiction of this state "may be served with the summons without the state, in the same manner as service is made within the state, . . . by any person authorized to make service by the laws of the . . . country in which service is made."

Personal service upon a natural person may be effectuated by delivery of a copy of the summons within the state to a person of suitable age and discretion at the defendant's place of business or dwelling place and by mailing a copy to the defendant's last known residence (CPLR 308 [2]).

In order to properly effectuate service under CPLR 308 (2), the plaintiff must strictly comply with the section's delivery and mailing requirements (*Glikman v Horowitz*, 66 AD2d 814, 814 [2d Dept 1978]). The plaintiff bears the burden of proving by a preponderance of the evidence that jurisdiction was obtained over the defendant by proper service of process (*Frankel v Schilling*, 149 AD2d 657, 659 [2d Dept 1989]). Here, plaintiffs have failed to demonstrate that service on Glenn Marks was completed.

There is no dispute that, at Glenn Marks' U.K. residence, a U.K. process server handed Bicknell a copy of the original summons and complaint, on June 3, 2013, while Glenn Marks was out of town (*see* Claire S. Bicknell Aug. 9, 2013 aff, ¶¶ 1-10, 13-20, 24; Glenn Marks aff, ¶¶ 3-4). Glenn Marks attests that no copy of the original summons and complaint was subsequently mailed to him, although he did receive a copy of the amended summons and amended complaint in the mail in July 2013 (*see* Glenn Marks aff, ¶¶ 3-4).

Plaintiffs do not allege that the process server ever mailed Glenn Marks a copy of the original summons and complaint, nor that they personally served Glenn Marks with a copy of the amended process. Plaintiffs have failed to provide this court with the process server's affidavit of service.

Therefore, plaintiffs have failed to demonstrate that they complied with the statutory requirements and properly effected service of process on Glenn Marks, nor have they raised any issues sufficient to require a traverse hearing.

For these reasons, that branch of the motion to dismiss the amended complaint asserted against Glenn Marks is granted.

Standing

Next, Glenn Marks contends that this action is also fatally defective on the ground that plaintiffs lack standing because they have not commenced this action in their derivative capacities, as Black Raven shareholders.

In opposition, plaintiffs contend that Glenn Marks has mischaracterized this action, and that the claims asserted against him are not derivative because neither plaintiff is a shareholder in

Black Raven or Equilibrium, and because Glenn Marks allegedly acted outside the scope of his authority, if any.

Pursuant to New York law, an action in which a corporate shareholder alleges a wrong to the corporation, such as depreciation of corporate stock, mismanagement, or diversion of corporate assets or opportunity for personal gain, is an action that must be brought in the shareholder's derivative capacity, on behalf of the corporation (*see Abrams v Donati*, 66 NY2d 951, 953 [1985]; *Yudell v Gilbert*, 99 AD3d 108, 113-114 [1st Dept 2012]). Direct claims may be asserted where they arise out of a duty independent from that owed by the defendant to the corporation; however, where the plaintiff's allegations confuse a shareholder's derivative and individual right, the complaint will be dismissed (*Abrams v Donati*, 66 NY2d at 953; *Yudell v Gilbert*, 99 AD3d at 115).

In the amended complaint, plaintiffs allege that they are Black Raven shareholders and that defendants diverted Black Raven assets (*see e.g.* amended complaint ¶¶ 16, 128, 130).

Significantly, however, plaintiffs also allege that "[n]either plaintiff is a shareholder in Equilibrium or Black Raven PLC" (plaintiffs' memorandum of law in opposition at 16). In the amended complaint, they allege that defendants diverted for their personal use the funds that plaintiffs intended to invest, and believed had been invested in Black Raven stock prior to such investment (*see e.g. id.* ¶¶ 12-15, 17-24, 38). Plaintiffs allege that Glenn Marks took plaintiffs' investments "into his own personal accounts and spent all the money raised on an extravagant lifestyle. Glenn bought no property or buildings with the funds that he raised. Glenn issued Promissory Notes against these funds raised, knowing that he was misleading investors from

New York" (Saul Marks aff, ¶ 63). These allegations, if proven, are sufficient to demonstrate the existence of a duty running from Glenn Marks directly to plaintiffs themselves.

Therefore, that branch of the motion to dismiss the branches of the claims to recover on behalf of Black Raven are granted, and the balance of that branch of the motion is denied. The branches of the claims asserted by plaintiffs to recover funds alleged diverted by defendants without purchase of Black Raven stock are legally viable.

However, even assuming that plaintiffs had properly effectuated service on Glenn Marks, and that they have standing to assert the claims, the claims are barred for the following reasons:

Statute of Limitations

Glenn Marks next contends that the securities fraud claims for violations of SEA §§ 10 (b) and 20 (a), SEC Rule 10b-5, and the Securities Act § 15 are also time-barred, on the ground that plaintiffs had a duty to inquire further into the alleged fraudulent scheme no later than October 2008, when they commenced a federal action on allegations of securities fraud against Warren, and others.

In opposition, plaintiffs contend that plaintiffs did not have actual knowledge of Glenn Marks' active and knowing participation in Warren's alleged fraudulent scheme until June 2013, and, therefore, the limitations period did not begin to run until June 2013, after the original complaint was filed in March 2013.

"[A] private federal action for securities fraud must be commenced before the earlier of '2 years after the discovery of the facts constituting the violation' or '5 years after such violation'" (*Staehr v Hartford Fin. Servs. Group, Inc.*, 547 F3d 406, 411 [2d Cir 2008], quoting

28 USC § 1658 [b], citing *Shah v Meeker*, 435 F3d 244, 248-249, fn 3 [2d Cir 2006]; 15 USC § 78i [e]).

> "The two-year statute of limitations for securities fraud claims under the [SEA] begins to run only after plaintiff obtains actual knowledge of the facts giving rise to the action ***or*** notice of the facts, which in the exercise of reasonable diligence, would have led to actual knowledge. When there is no actual knowledge, but the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded, a duty of inquiry arises, and knowledge will be imputed to the investor who does not make such an inquiry. Such circumstances are often analogized to storm warnings"

(*Staehr v Hartford Fin. Servs. Group*, 547 F3d at 411 [emphasis in original] [internal quotation marks and citations omitted]; *LC Capital Partners, LP v Frontier Ins. Group, Inc.*, 318 F3d 148, 154 [2d Cir 2003]).

When the facts from which knowledge may be imputed are clear from the pleadings and the papers and filings integral to the complaint, the question of inquiry notice may properly be resolved on a motion to dismiss (*see Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; CPLR 3211 [a] [1], [a] [7]; *see also Staehr v Hartford Fin. Servs. Group*, 547 F3d at 412).

The securities fraud claims are time-barred. Plaintiffs filed the original complaint on March 5, 2013 and the amended complaint in July 2013. In both complaints, plaintiffs assert claims for violations of SEA § 10 (b) and SEC Rule 10b-5 arising out of allegations that Glenn Marks made misrepresentations in 2005, 2006, and 2007 that caused plaintiffs to send funds in accordance with Glenn Marks' instructions, ostensibly, for investment in Black Raven in 2006

and 2007 (*see* original complaint, ¶¶ 2, 10-11, 19, 26; amended complaint, ¶¶ 2, 11, 19-20, 31, 36, 41, 42, 46-50, 80, 83).

In October 2008, plaintiffs and others commenced a federal court action against Warren, Felix, and Felix's company, nonparty Arteh Hotels & Resorts, S.A. (*see Marks v Warren*, US DC, SD NY, 08 Civ 8978 [federal action]). In the federal action complaint, Saul Marks asserts claims arising out of the same securities fraud scheme as is alleged here, although he does not allege any wrongdoing by Glenn Marks, and did not join him as a defendant. Instead, Saul Marks alleges that Glenn Marks was defrauded by Warren (*see* federal action complaint, ¶ 17).

There is no dispute that, in 2008, when they filed the federal action, plaintiffs, investors of ordinary intelligence, knew that they had been defrauded, and believed that they had been defrauded by Warren, Glenn Marks' business associate and, perhaps, partner. Further, in 2008, plaintiffs had enough information to suspect that Glenn Marks might have been a knowing participant in the alleged fraud. Therefore, a duty of inquiry arose at that time.

Based on the factual allegations that they made in the federal action complaint, plaintiffs were indisputably in possession of facts giving rise to a duty to investigate the nature of Glenn Marks' participation, and discover whether Glenn Marks was involved, in the fraudulent scheme, no later than 2008 (*see Rothman v Gregor*, 220 F3d 81, 97 [2d Cir 2000] [whether the securities fraud claim of a plaintiff who receives storm warnings is time-barred "turns on when, after obtaining inquiry notice," the plaintiff "in the exercise of reasonable diligence, should have discovered the facts underlying the [defendant's] alleged fraud"]).

However, plaintiffs, here, did not assert any claims against Glenn Marks until they commenced the instant action in March 2013, well more than two years after the duty of inquiry, in the exercise of diligence, arose.

Plaintiffs' repeated contention that they had no warning of Glenn Marks' fraudulent activities until June 2013 cannot be credited, given that plaintiffs commenced this action against Glenn Marks several months earlier, in March 2013.

Plaintiffs' allegations that Glenn Marks made three misrepresentations in 2011 (*see* amended complaint, ¶¶ 33, 52, 54) do not render the securities fraud claims timely asserted. Two of the alleged misrepresentations were made to Phillips, who is not a party to this action, and, therefore, the allegations cannot form the basis of a claim in this action. In the third allegation, plaintiffs state merely that "Glenn has stated on different occasions from 2006 until 2011 that Black Raven had sold or was in the process of selling various Lisbon properties under its control" (amended complaint, ¶ 52). That allegation is so vague that it cannot form the basis of a cause of action for fraud (*see* CPLR 3016 [b]).

For these reasons, the securities fraud claims are time-barred, and that branch of the motion to dismiss them on that ground is granted.

Forum Non Conveniens

Glenn Marks contends that the doctrine of forum non conveniens mandates dismissal of the amended complaint, on the grounds that the documentary evidence and some party and nonparty witnesses are in the United Kingdom and Portugal.

In opposition, plaintiffs contend that they cannot receive substantial justice, unless their claims are adjudicated before the courts of New York.

This action is dismissed on the ground of forum non conveniens.

It is well-settled that New York courts "need not entertain causes of action lacking a substantial nexus with New York" (*Martin v Mieth*, 35 NY2d 414, 418 [1974]). "The common-law doctrine of *forum non conveniens* . . . permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]; *see* CPLR 327 [a]). A motion to dismiss or stay on the ground of forum non conveniens is subject to the discretion of the trial court, and no single factor is controlling (*id.* at 479). Among the factors a court should consider are "the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit" (*id.*). Other relevant factors include the situs of the transactions at issue, the residence of the parties, the location of witnesses and evidence, and the substantive law governing the parties' dispute (*Blueye Nav., Inc. v Den Norske Bank,* 239 AD2d 192, 192 [1st Dept 1997]).

"The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d at 479).

Here, all but one of the parties reside outside New York. While Saul Marks resides in Westchester County in New York and Weisler resides in New Jersey, Glenn Marks resides in England, and Warren resides in both England and Portugal. Saul Marks, Glenn Marks, and Warren are all British subjects, and Black Raven is a British company.

Great Britain and Portugal each have a substantial interest in this action, and are available alternative forums. Not only are three of the four parties British subjects, but Black Raven is a British company that maintains offices in Lisbon, Portugal, and invests in real estate located in Portugal. Plaintiffs allege that defendants operated out of Black Raven's Lisbon office to commit many of the acts of which plaintiffs now complain, including entertaining potential investors and current investors in order to defraud them, and issuing fraudulent promissory notes.

Plaintiffs also allege that defendants used off-shore companies located in Monaco and Liechtenstein to control Black Raven. Equilibrium, a company formed by Glenn Marks and allegedly used by him to carry out the fraud, is based in Portugal. In addition, plaintiffs allege that defendants were responsible for fraudulent reporting to regulatory agencies in the United Kingdom.

Moreover, it appears that maintaining this action in New York will result in substantial hardship for defendants, who would be required to make transatlantic trips for depositions and trial. Many of the nonparty witnesses, including Felix and defendants' attorneys who allegedly knowingly cooperated with defendants, and made the diversion of plaintiffs' investments possible, are based in England and Portugal.

The court notes that, in a related action, *Olenick v Saul Marks* (Sup Ct, NY County, index No. 113605/2011) (*Olenick* action), Saul Marks contends that the alleged fraudulent scheme to defraud Black Raven investors and potential investors has no connection to New York. In the *Olenick* action answer, Saul Marks asserts an affirmative defense based on the theory that "[t]his Court lacks subject matter jurisdiction because Plaintiff's allegations in the Complaint situate the

transaction as having taken place within either or both of England and . . . Portugal" (*Olenick* action answer ¶ 22).

Last, and contrary to plaintiffs' contention, although Saul Marks resides in New York, and although Glenn Marks came to New York to solicit investors, no substantial nexus exists between the alleged fraudulent scheme and New York. Therefore, no real reason exists to add another case to New York's already heavily burdened court system (*see Tilleke & Gibbons Intl. Ltd. v Baker & McKenzie*, 302 AD2d 328, 329 [1st Dept 2003]).

For these reasons, that branch of the motion to dismiss this action on forum non conveniens grounds is granted.

Conspiracy

That branch of the motion to dismiss the conspiracy claim as fatally defective on its face is granted without opposition.

"In New York, there is no substantive tort of conspiracy in and of itself. There must first be pleaded specific wrongful acts which might constitute an independent tort" (*Raymond Corp. v Coopers & Lybrand*, 105 AD2d 926, 926-927 [3d Dept 1984] [internal citation omitted]; *Jebran v LaSalle Bus. Credit, LLC*, 33 AD3d 424, 425 [1st Dept 2006]).

The conspiracy claim, here, is based on allegations that defendants orchestrated overpayments by Black Raven to Jose Felix, a contractor, to satisfy a debt owed by them to Felix. Plaintiffs have failed to plead a separate tort claim regarding the alleged overpayments, nor could they, since such a claim would be derivative, and based on allegations of misappropriation of Black Raven's assets.

Last, that branch of the motion to disqualify John Gleason, Esq. and Gleason & Koatz, LLP from representing plaintiffs in this action on the ground that they had previously represented Glenn Marks is denied as moot, in view of the dismissal of all claims asserted against him here.

Accordingly, it is

ORDERED that the motion of defendant Glenn Marks is granted to the extent that dismissal of the amended complaint is granted, and the amended complaint is dismissed in its entirety as asserted against that defendant, with costs and disbursements to that defendant, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of that defendant; and it is further

ORDERED that the action is severed and continued as against the remaining defendant.

Dated: April 7, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER