| **GSP Finance LLC v KPMG LLP** |
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| 2015 NY Slip Op 30975(U) |
| June 8, 2015 |
| Supreme Court, New York County |
| Docket Number: 650841/2011 |
| Judge: Scarpulla Saliann |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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GSP FINANCE LLC,

Plaintiff,

**DECISION/ORDER**
**Index No. 650841/2011**

-against-

KPMG LLP,

Defendant.

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HON. SALIANN SCARPULLA, J.:

In this action for fraud, aiding and abetting fraud, and civil conspiracy, plaintiff GSP Finance LLC ("GSP" or "plaintiff") moves for leave to file a proposed amended complaint pursuant to CPLR 3025(b) (motion seq. no. 005). Defendant KPMG LLP ("KPMG" or "defendant") moves for summary judgment pursuant to CPLR 3212 (motion seq. no. 006). Motion sequence nos. 005 and 006 are consolidated for disposition.

**Background**

GSP is the lending arm of Galatioto Sports Partners, a provider of financial services to the professional sports industry. As alleged in the complaint, HSG Sports Group and HSG Sports Group Holdings ("Hicks Sports"), a holding company controlled by Thomas Hicks ("Hicks"), a private equity investor, owned two professional sports teams – Major League Baseball's Texas Rangers and the National Hockey League's Dallas Stars. Hicks Sports (through a predecessor investment vehicle) acquired the

Dallas Stars in 1996 and the Texas Rangers in 1998. Hicks Sports and the teams enjoyed early success, including a Stanley Cup win for the Stars in 1999. But, it is alleged, Hicks Sports began to struggle financially in the early 2000s, when the economy slowed and both teams slipped in the standings. After losing over $200 million between 2002 and 2004, Hicks Sports sought funding from the syndicated credit markets in 2005.

GSP alleges in the complaint that Hicks Sports entered into a $325 million syndicated credit facility in December 2005, which consisted of a $285 million term loan and a $40 million revolving line of credit. The loan was secured by a first lien on substantially all of the assets of Hicks Sports and its subsidiaries ("first lien credit facility"). GSP further alleges that in June 2006, Hicks Sports negotiated an increase in the first lien credit facility to $400 million.

In late 2006, Hicks Sports returned to the lenders for yet another increase to the credit facility. As stated in the compliant, on December 19, 2006, Hicks Sports entered into two additional syndicated credit agreements, which are the basis of this action: the amended and restated first lien credit and guaranty agreement ("first lien credit agreement") and the second lien credit and guaranty agreement ("second lien credit agreement") (together the "credit agreements"). The first lien credit agreement amended the original first lien credit facility, extending an additional $25 million in term loans, for a total of $350 million, and a $75 million revolving credit line. The second lien credit agreement extended $115 million in term loans, and was secured by a second lien on substantially all of the assets of Hicks Sports and its subsidies. In total, Hicks Sports was extended a total of $540 million, from which it borrowed in excess of $525 million.

GSP, as part of the lending syndicate extended loans under both the first and second lien credit agreements for a total of $67 million.

Section 5.1 of the credit agreements provide that Hicks Sports will deliver to the administrative agents and lenders, among other things:

> (c) Annual Financial Statements. As soon as available, and in any event within ninety (90) days after the end of each Fiscal Year, (i) the consolidated and consolidating balance sheets of [Hicks Sports Group Holdings] and its Subsidiaries as at the end of such Fiscal Year and the related consolidated (and with respect to statements of income, consolidating) statements of income, stockholders' equity and cash flows of Holdings and its Subsidiaries for such Fiscal Year, . . .; and (ii) with respect to such consolidated financial statements a report thereon of KPMG LLP or other independent certified public accountants of recognized national standing selected by [Hicks Sports] . . . (which report shall be unqualified as to going concern and scope of audit, and shall state that such consolidated financial statements fairly present, in all material respects, the consolidated financial and its Subsidiaries as at the dates indicated and the results of their operations and their cash flows for the periods indicated in conformity with GAAP applies on a basis consistent with prior years . . . and that the examination by such accountants in connection with such consolidated financial statements has been made in accordance with generally accepted auditing standards) together with a written statement by such independent certified public accountants stating whether, in connection therewith, any condition or event that constitutes an Event of Default . . . has come to their attention and, if such condition or event has come to their attention, specifying the nature and period of existence thereof.
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> (d) Compliance Certificate. Together with each delivery of financial statements of [Hicks Sports] . . . a duly executed and completed Compliance Certificate.

Additionally, Section 6.1 of the second lien credit agreement provide that Hicks Sports' indebtedness is not to exceed $3.125 million. Section 6.1 of the first lien credit agreement limits indebtedness with respect to capital leases to not more than $2.5 million.

Section 8 of each agreement addresses "Events of Default." Specifically, Section 8.1 provides that "[I]f any one or more of the following conditions or events shall occur . . .," then "the unpaid principal amount of and accrued interest in the Loans" will become "immediate due and payable." The conditions listed include:

> (a) Failure to Make Payments When Due. Failure by Company to pay (i) when due any installment of principal of any Loan, . . . ; or (ii) any interest on any Loan or any fee or other amount due hereunder within five days after due date; or
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> (b) Default in Other Agreements. (i) Failure of any Credit Party to pay when due any principal of or interest on or any other amount payable in respect of one or more items of Indebtedness (other than Indebtedness referred to in Section 8.1(a)) with an aggregate principal amount of $6,250,000[1], or more . . . .; or
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> * * *
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> (e) Other Defaults Under Credit Agreements. [Hicks Sports] . . . shall default in the performance of or compliance with any term contained herein or any of the other Credit Documents . . . and such default shall not have been remedied or waived within thirty days after the earlier of (i) an Authorized Officer of such Credit Party becoming aware of such default or (ii) receipt by Company of notice from Administrative Agent or any Lender of such default . . . .

As GSP alleges in the complaint, GSP and the lenders included these provisions in the agreements as precautions, to ensure full repayment of the loans extend to Hicks Sports under the credit agreements. From GSP's standpoint, the covenants most relevant to this action pertain to Hicks Sports' obligation to deliver a clean audit report from KPMG or another independent certified public accountant of national recognition which,

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[1] The first credit agreement provides for a maximum indebtedness of $5 million, and the second credit agreement provides for a maximum indebtedness of $6.25 million.

among other things, expressed an unqualified opinion as to Hicks Sports' ability to continue as a going concern, and a letter from the auditor certifying Hicks Sports' compliance with the debt covenant, and a separate covenant requiring Hicks Sports to maintain minimum liquidity reserves. As Brent W. Johnson ("Johnson"), a GSP employee, testified at his deposition, "[r]eceipt of ongoing financial compliance audited by a known firm was a requirement of the deal and was a piece of the puzzle, many pieces of many puzzles, but a piece of the puzzle that would make us want to lend into a situation." Johnson also testified that GSP "would not have done the deal "if the audited financial statements were not required. Failure by Hicks Sports to deliver both the clean audit letter and the letter certifying compliance would constitute an event of default under Section 8.1(c) of the credit agreements.

GSP asserts that while a default under Section 8.1(e) would trigger a thirty (30) day grace period, during which time Hicks Sports could remedy the breach without consequences, a failure to remedy the breach would allow lenders to exercise a range of rights to secure full repayments.

GSP alleges that it relied heavily on "KPMG's exercise of due professional care," and that, if conducted properly, "KPMG's audit should have uncovered the inaccuracies in Hicks Sports' financial statements, doubts as to its ability to meet its obligations as they came due, and warning signs that it was carrying excessive debt or maintaining inadequate liquidity reserves." Failure to properly perform the auditor function, GSP argues, prevented the "bargained-for protections in the Credit Agreement" from providing any measure of security to the lenders.

GSP notes that even with the credit agreements in place, Hicks Sports still suffered losses of more than $32 million in fiscal year 2007. As GSP asserts in the complaint, "the poor 2007 results compounded with a string of substantial net losses in previous years called into question Hicks Sports' ability to generate sufficient cash flow to service the debt it has assumed under the Credit Agreements and elsewhere."

GSP further alleges that Hicks Sports assumed more debt than was permitted under the first lien debt covenant – which would constitute a breach of the agreement – but instead of acknowledging that, Hicks Sports excluded capital leases from its consolidated total debt. GSP further asserts that KPMG allowed Hicks Sports to exclude obligations to Southwest Sports Jet, LLC, an entity controlled by Hicks through which the Stars and Rangers paid for use of a private 757 jet purchased from proceeds of the credit agreements, by categorizing the expense as a long-term debt on Hicks Sports' financial statements. GSP also asserts that KPMG similarly failed to categorize indebtedness to Southwest Rodeo, L.P. and indebtedness incurred in connection with a concessionaire agreement as part of Hicks Sports' total indebtedness, "further exacerbating [Hicks Sports'] breach of the Debt Covenant."

GSP notes that forecasts for Hicks Sports' fiscal year 2008 "provided additional cause for concern," projecting a shortfall of over $60 million at a time when Hicks Sports had already borrowed the maximum allowed under the credit agreements. Looking forward, Hicks Sports anticipated needing to borrow an additional $60 million over fiscal years 2009 through 2010.

GSP argues that when KPMG undertook its audit of Hicks Sports, KPMG owed duties to GSP and the lenders. Specifically, GSP cites Section 5.1(c) of the credit agreements, which required Hicks Sports to provide an auditor's report which stated that, among other things, the examination of the financial statements was made in accordance with generally accepted auditing standards and conformed to generally accepted accounting principles ("GAAP"). Upon agreeing to perform the audit of Hicks Sports, GSP argues, KPMG assumed duties to both Hicks Sports and to GSP and the lenders to exercise professional due care, as KPMG knew that Hicks Sports would provide the auditors' report to GSP and the lenders, who would rely on the opinions KPMG expressed in the report.

GSP maintains that KPMG disregarded GAAP, and failed to exercise due professional care, by not reporting Hicks Sports' insufficient cash flow and mounting debt, and not questioning whether Hicks Sports could continue as a going concern. KPMG should also have, GSP argues, disputed Hicks Sports exclusion of capital leases and other debt obligations from its total debt, instead it should have alerted the lenders that Hicks Sports breach the debt covenant.

GSP asserts that KPMG allowed the specter of potential future business from Hicks to "cloud its judgment," and that KPMG chose to value further business from Hicks Sports above its duties to GSP and the other lenders. GSP alleges that because KPMG issued a clean audit report and opinion with the compliance letter, Hicks Sports avoided an event of default on March 31, 2008, and then notified lenders on July 8, 2008 that it was relying on subscription commitments to the extent of $15 million. Hicks

Sports therefore furthered its breach, GSP asserts, by drawing an additional $15 million from the revolving line of credit in 2008.[2]

Hicks Sports lost $58 million in fiscal year 2008, and failed to make a scheduled interest payment on March 31, 2009. This missed payment constituted a default, which constituted an event of default as it was not cured with five (5) days of the missed payment. The lenders then exercised their rights under the credit agreements, terminating the line of credit and accelerating repayment on the full amount of the outstanding loans.

GSP alleges that Hicks Sports "strategically timed its default to take advantage of a corollary to the Credit Agreements," which prevented GSP and the lenders from foreclosing on collateral if Hick Sports defaulted within 180 days of National Hockey League's opening day. GSP maintains that the March 31, 2009 default occurred 179 days before the opening day of the NHL's 2009-2010 season, October 2, 20098. GSP argues that if KPMG had accurately represented Hicks Sport's financial situation in March 2008, the lenders would have been able to declare Hicks Sports in breach, and exercise their rights accordingly, one year earlier, at a time which they could have obtained full repayment of their loans.

In its complaint, GSP alleges three causes of action, for fraud, aiding and abetting fraud, and civil conspiracy. A fourth cause of action for negligent misrepresentation was dismissed by this court (J. Kapnick) by decision and order dated September 6, 2012.

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[2] GSP also alleges that the Rangers breached the regulations of Major League Baseball by failing to contribute more than $39.5 million to a deferred compensation fund.

GSP moves for leave to amend the complaint to reinstate a claim for negligent misrepresentation. GSP asserts that the claim was originally dismissed by this Court on the ground that GSP failed to sufficiently allege the "known party" prong of the test articulated in *Credit Alliance Corp. v. Arthur Andersen & co.*, 65 N.Y. 2d 536 (1985), but that discovery in this action establishes that KPMG did know that GSP was a lender who was relying on KPMG's audit report. In opposition, KPMG asserts that the arguments raised in the motion for leave to amend were all raised before, and addressed by Justice Kapnick at oral argument held on September 22, 2011 and in her decision dated September 6, 2012, and that the ensuing discovery has not added anything to support GSP's allegations.

KPMG moves for summary judgment to dismiss the remainder of the complaint. KPMG argues that GSP cannot maintain its fraud claims against GSP because it cannot establish justifiable reliance on KPMG. KPMG also asserts that summary judgment should be granted because GSP cannot prove causation between KPMG's alleged misrepresentation and GSP's loss. Lastly, KPMG asserts that GSP can not prove aiding and abetting fraud or conspiracy.

In opposition, GSP asserts that summary judgment is inappropriate here because GSP was compelled to rely on KPMG's misrepresentations, and took precautions to protect itself against deception. GSP also asserts that KPMG has not satisfied its initial burden on the motion for summary judgment as to the misrepresentations in the audit report, which failed to include a qualified opinion as to "going concern," and has failed to meet its burden as to the alleged misrepresentations in the debt compliance letter

concerning the liquidity covenant. GSP also argues that there are triable issues of fact regarding KPMG's misrepresentation concerning the total debt covenant, which preclude summary judgment.

**Discussion**

**GSP's Motion for Leave to Amend the Complaint**

"While leave to amend the pleadings is ordinarily freely given (CPLR 3025 [b])," a court may exercise its discretion in denying plaintiff leave to amend where "the proposed amended pleading clearly lacks merit." *Garcia v New York-Presbyt. Hosp.*, 114 A.D.3d 615 (1st Dep't 2014). This is especially true where, as here, "plaintiff's proposed amended complaint impermissibly attempt[s] to circumvent [a] prior order[] of dismissal." *Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Bros. Int'l, Ltd.*, 268 A.D.2d 373, 374 (1st Dep't 2000).

As it did before Justice Kapnick, GSP on this motion attempts to distinguish this case from the other cases in which the Court of Appeals has addressed the "known party" prong, noting that the audit letter issued by KPMG is not addressed solely to Hicks Sports, but also to the "note holders." In opposition, KPMG argued that the audit report is addressed to Hicks Sports LLC, the audit client, and while there is a separate debt compliance letter which does address "note holders," that "note holders" is not a sufficiently definite category of parties to satisfy the "known party" prong.

On the record at oral argument, Justice Kapnick stated "the known party thing was a big thing. You were clearly not a known party. The cases really say it's important. I don't care if they knew of an affiliate, that it not what the law says." After extensive

briefing and oral argument, Justice Kapnick noted in the decision to dismiss the claim for negligent misrepresentation that "[s]ince there was admittedly no contract between these parties, the Complaint had to allege that plaintiff was a 'known party' to KPMG at the relevant time and that there was 'linking conduct' between GSP and KPMG in connection with the audit." (*Citing Skyes v. RFD Third Ave. 1 Assoc., LLC*, 15 N.Y.3d 370, 373-374 (2010); *Westpac Banking Corp. v. Deschamps*, 66 N.Y.2d 16 (1985); *Credit Alliance Corp. v. Anderson & Co.*, 65 N.Y.2d 536 (1985)).

The motion to dismiss the complaint before Justice Kapnick, and GSP's motion before me now seeking leave to amend the complaint, show that GSP is attempting to allege the same cause of action for negligent misrepresentation previously dismissed. GSP is making the same argument before me which was made and rejected by Justice Kapnick – that GSP was a "known party" to KPMG because it was listed and named in the various credit agreement documents. These documents did not become known to GSP though the discovery process, but were in fact relied on by GSP in its opposition to the motion to dismiss.

As I noted at oral argument on October 9, 2014, simply because GSP confirmed through discovery what it had previously alleged – that KPMG was in possession of the credit agreements which identified GSP as a member of the lending syndicate – does not change GSP's argument at all. As GSP's argument was already raised and rejected by Justice Kapnick, and GSP has failed to introduce anything additional to support its motion for leave to amend the complaint to restate the case of action for negligent misrepresentation, GSP's motion to amend the complaint is denied. *See Warner v.*

*Levinson*, 188 A.D.2d 268 (1st Dep't 1992) ("defendants were properly denied leave to amend their answer, counterclaims and third-party complaint in that the proposed submissions were nothing more than a repackaging of the prior deficient pleadings").[3]

**KPMG's Motion for Summary Judgment**

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

"In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996). *See also*

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[3] Moreover, shortly after moving for leave to amend the complaint, but before the motion was submitted to the court, plaintiff filed its note of issue, certifying that all discovery was complete and the case was ready for trail. This is yet another reason to deny GSP's motion for leave to amend the complaint. *See Bailey v. Village of Saranac Lake, Inc.*, 100 A.D.3d 1089, 1090 (3d Dep't 2012) ("where a plaintiff files a note of issue certifying that the case is ready for trial and subsequently seeks to amend the complaint, a trial court's discretion to grant a motion to amend should be exercised with caution") (internal quotation omitted).

*VisionChina Media Inc. v Shareholder Representative Servs.*, LLC, 109 A.D.3d 49, 57 (1st Dep't 2013).

"What constitutes reasonable reliance is 'always nettlesome' because it is so fact-intensive. Sophisticated investors must show they used due diligence and took affirmative steps to protect themselves from misrepresentations by employing what means of verification were available at the time." *VisionChina Media Inc. v Shareholder Representative Servs.*, LLC, 109 A.D.3d 49, 57 (1st Dep't 2013) (quoting *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 N.Y.3d 147, 155 [2010]). As the Court of Appeals recently stated, "[m]oreover, '[w]hen the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy.'" *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 2015 N.Y. LEXIS 982, 2, 2015 NY Slip Op 03876 (May 7, 2015) (quoting *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 279, [2011]). "Nevertheless, the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law . . . ." *ACA Fin. Guar. Corp.*, 2015 N.Y. LEXIS 982, 3 (citing *DDJ Mgt., LLC*, 15 N.Y.3d at 156) (finding plaintiff sufficiently pleaded justifiable reliance for the causes of action for fraud in the inducement and fraudulent concealment on a motion to dismiss).[4]

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[4] However, in certain circumstances, the question of reasonable reliance may be resolved on a motion for summary judgment. As the Appellate Division, First Department held:

> [W]e set aside the contention that issues of material misrepresentation and reasonable reliance are not subject to summary disposition. In *J.A.O.*

Here, KPMG and GSP are not "parties across a bargaining table," but rather a lender, and the independent auditor hired pursuant to the credit agreements to assess the creditworthiness of Hicks Sports, the borrower. While GSP may have had "hints" that Hicks Sports was experiencing financial troubles which would have jeopardized its ability to repay its debts, the role of an independent auditor is to assess an entity's financial stability and provide an independent evaluation upon which other parties may rely. *See Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 482 (2010) (citing Shapiro, *Who Pays the Auditor Calls the Tune?: Auditing Regulations and Clients' Incentives*, 35 Seton Hall L Rev 1029, 1034 [2005] [the purpose of audits is to "provide some independent assurance that those entrusted with resources are made accountable to those who have provided the resources"]). As discussed above, the particulars of each situation make the question of justifiable reliance a fact intensive one, and therefore, one which is best determined by the ultimate trier of fact, and not the court, on a motion for summary judgment. *See, e.g., DDJ Mgt.,* LLC, 15 N.Y.3d at 155 (2010).

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> *Acquisition Corp. v Stavitsky* (18 AD3d 389, 795 NYS2d 569 [1st Dept 2005]), we concluded that occasionally, the facts in the case may present a rare circumstance in which the issue of reasonable reliance can be resolved at the stage of summary judgment. Similarly, in *Shea v Hambros PLC* (244 AD2d 39, 47, 673 NYS2d 369, 374 [1st Dept 1998]), we held that, as a matter of law, the element of reliance was conspicuously absent because the plaintiff 'can hardly claim with any credibility that he, a savvy businessman, entered into the resulting agreements lulled by faith or trust in the parties across the bargaining table, or that he unwittingly gave up some valued right in the bargain.'

*Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93 (1st Dep't 2006).

KPMG argues that GSP cannot demonstrate reasonable reliance because it holds itself out as a sophisticated party, an expert in the field of financial services to the professional sports industry. KPMG asserts that the three (3) GSP bankers responsible for the transactions at issue are all well-educated, highly qualified professionals with decades of experience.

GSP alleges that it was deceived in two main ways: (1) that Hicks Sports was in compliance with the consolidated total debt cap of $600 million; and (2) that GSP was deceived into believing that Hicks Spots would continue as a going concern. KPMG maintains that the evidence is to the contrary, and that GSP had ample evidence that Hicks Sports had borrowed above the total debt cap, and that GSP was told in early 2008 that Hicks Sports was going to run out of money by the middle of 2008. [5]

While these disputed facts may be true, requiring GSP to be responsible to perform the due diligence KPMG was engaged to perform under the credit agreement would write KPMG's auditor function out of the credit agreement. Especially on a motion for summary judgment, the court cannot make meaningless an agreed upon term of a contract. *See Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007) ("The court should construe the agreements so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless")

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[5] Nowhere in the motion papers does KPMG dispute that it Hicks Sports breached the terms of the credit agreements, or that KPMG made misrepresentations regarding Hicks Sports financial circumstances when it issued unqualified audits and certifications. KPMG only argues that GSP did not justifiably rely on KPMG's audit reports and certifications, and that GSP cannot establish causation.

(internal citations and quotations omitted). Accepting KPMG's argument that GSP should not have taken KPMG's audit at face value would eviscerate the meaning and function of the independent auditor report in the credit agreements.

Accordingly, I find that there is a question of fact as to whether GSP reasonably relied on KPMG's audit opinion in waiting to declare an event of default, and summary judgment on the fraud cause of action is denied.[6] Further, as in the context of fraud, reliance and causation "are often intertwined," I find there is also a question of fact regarding the causation element of GSP's fraud claim. *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 30 (2000) (citing Restatement [Second] of Torts § 548A ["A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance"]).

As to the remaining causes of action for aiding and abetting fraud and civil conspiracy, KPMG makes almost no arguments in favor of summary judgment dismissing the causes of action, and merely asserts that because GSP can establish neither justifiable reliance nor causation, the cause of action for aiding and abetting fraud must

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[6] KPMG also argues that GSP was not bound to rely on KPMG's audit and reports, and that GSP could declare an event of default under other provisions of the credit agreements. In particular, KPMG suggests a breach of the covenant regarding Consolidated Total Debt would constitute an additional basis for declaring an event of default. Even if I were to agree with KPMG that there was evidence in the record that GSP may have thought Hicks Sports was in violation of this covenant, it would be nearly impossible for a lender to declare Hicks Sports in violation of this covenant in the face of KPMG's unqualified audit letter to the contrary, stating that there have been no events of default. *See* Credit Agreements at §5.1(c).

be dismissed. As I find that there exists questions of fact to preclude summary judgment on the fraud cause of action, I find that, for the same reasons, the motion for summary judgment dismissing the aiding and abetting fraud claim is denied.

As to civil conspiracy, while KPMG correctly states that a cause of action for civil conspiracy can not survive by itself, as the fraud and aiding and abetting causes of actions survive, so does the derivative cause of action for civil conspiracy. *See Nissan Motor Acceptance Corp. v Scialpi,* 94 A.D.3d 1067, 1069 (2d Dep't 2012) ("a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying torts").[7]

In accordance with the foregoing, it is

ORDERED that the motion by plaintiff GSP Finance LLC for leave to file a proposed amended complaint pursuant to CPLR 3025(b) (motion seq. no. 005) is denied; it is further

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[7] While neither party mentioned this in their papers on this motion, the cause of action for civil conspiracy in the complaint (and the proposed amended complaint) purports to allege a cause of action under Texas law. *See* Compl. ¶ 110 ("As set forth above, KPMG and Hicks Sports conspired in violation of Texas civil law to fraudulently misrepresent Hicks Sports's consolidate financial statements and its compliance with the Consolidated Total Debt and Liquidity Covenants"). As both parties ignore this allegation, and the law of civil conspiracy in Texas is substantially the same as that in New York, *see Chon Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005) (actionable civil conspiracy elements include: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result"); *Macias v. Gomez*, 2014 Tex. App. LEXIS 13197 (Tex. App. Corpus Christi Dec. 11, 2014) ("In other words, conspiracy and aiding and abetting are both derivative claims that require the commission of an underlying tort to be viable"), the action will proceed under New York Law.

ORDERED that the motion by defendant KPMG LLP for summary judgment pursuant to CPLR 3212 dismissing the complaint (motion seq. no. 006) is denied; it is further

ORDERED that all parties shall appear for a pre-trial conference before the Court at 60 Centre Street, Room 208, on September 9, 2015 at 2:15 pm.

This constitutes the decision and order of the Court.

DATE : 6/8/15

SCARPULLA, SALIANN, JSC