

Mullin v WL Ross & Co. LLC

2018 NY Slip Op 30330(U)

February 22, 2018

Supreme Court, New York County

Docket Number: 650535/2017

Judge: Andrea Masley

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NYSCEF DOC. NO. 43
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

RECEIVED NYSCEF: 02/23/2018

-----X
JOSEPH E. MULLIN,
Plaintiff,

-against-

Index No. 650535/2017

WL ROSS & CO. LLC, et al.,
Defendants.
-----X

Masley, J.:

Defendants move, pursuant to CPLR 3211 (a) (1), (5), and (7), for an order dismissing the complaint with prejudice.

In the complaint, plaintiff Joseph Mullin, a former employee of defendant WL Ross & Co., LLC (WL Ross) and nonparty Invesco Ltd., alleges that defendants misappropriated more than \$3.6 million in carried interest and profits due to him as the result of his investments in certain private equity funds (Funds) formed by WL Ross. Mr. Mullin further alleges that defendants attempted to conceal their misconduct through opaque and misleading tax statements and disclosures. Mr. Mullin alleges that the misconduct was intended to personally benefit nonparty Wilbur L. Ross, Jr., WL Ross' chief executive officer.

Based on those allegations, Mr. Mullin asserts causes of action for breach of contract and breach of fiduciary duty, and seeks an accounting. Mr. Mullin also seeks to recover compensatory damages in an amount to be proven at trial, together with prejudgment interest, punitive damages, and attorneys' fees and disbursements incurred in prosecuting this action.

On December 30, 2016, one month prior to commencement of this action, Mr. Mullin filed a substantially identical action against defendants before the Federal District Court of the Southern District of New York (*Mullin v WL Ross & Co. LLC*, No. 1:16-CV-10060 [SD NY 2016]) (the Federal Action). By stipulation dated February 1, 2017, Mr.

Mullin voluntarily dismissed the Federal Action without prejudice as against all defendants. Meanwhile, on January 31, 2017, Mr. Mullin commenced this action. Defendants now seek to dismiss the complaint as barred by the applicable statute of limitations and for failure to state a legally cognizable cause of action.

Discussion

CPLR 3211 (a) (5)

The parties dispute whether the claims asserted against defendant Ross CG Associates, L.P. (Ross CGA) are time-barred.

As a threshold matter, the court notes that the law of this state applies to the procedural issues raised here, and that Delaware law applies to the substantive issues raised (*see Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 416 [2010]; Ross CGA Amended Limited Partnership Agreement [the Ross CGA Amended LPA], § 18 [h]).

CPLR 3211 (a) (5) permits dismissal of a claim that is barred by the applicable statute limitations.

"In moving to dismiss a cause of action pursuant to CPLR 3211 (a) (5) as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period"

(*City of Yonkers v 58A JVD Indus., Ltd.*, 115 AD3d 635, 637 [2d Dept 2014] [internal quotation marks and citations omitted]).

Pursuant to CPLR 205 (a), where an action is timely commenced, and is dismissed on grounds other than on the merits, the plaintiff:

"may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period"

(CPLR 205 [a]; see *Norex Petroleum Ltd. v Blavatnick*, 23 NY3d 665, 679 [2014]).

Where both sides agree to dismiss the prior action without prejudice for procedural reasons and to recommence the action, then the remedial effect afforded by CPLR 205 (a) is appropriate (see *George v Mt. Sinai Hosp.*, 47 NY2d 170, 181 [1979]). Here, defendants do not contest Mr. Mullin's allegation that they contended that the court in the Federal Action lacked subject matter jurisdiction, and agreed to Mr. Mullin discontinuing the Federal Action and refiling the complaint before the state court. Thus, for statute of limitations purposes, the date on which the breach of contract, breach of fiduciary duty, and accounting claims were asserted against defendants is December 30, 2016, the date on which Mr. Mullin filed the Federal Action.

With respect to the breach of contract claim, defendants contend that the limitations period began to run in October 2007, when Mr. Mullin resigned from his position as a WL Ross assistant vice president and private equity research analyst, became a withdrawn limited partner in Ross CGA, and ceased receiving payments from Ross CGA. Defendants further contend that, therefore, the limitations period expired in 2013, some three years prior to Mr. Mullin's commencement of the Federal Action.

In opposition, Mr. Mullin contends that defendants bore a recurring contractual obligation to make periodic and ongoing payments of his due share of Ross CGA's carried interest and ordinary income in each specific year, and that, therefore, the claim accrued independently, each time that Ross CGA failed to make the required payment.

Mullin v WL Ross & Co., LLC, et al., Index No. 650535/2017
Motion Sequence No. 001

Under CPLR 213 [2], the relevant statute of limitations imposes a six-year limitations period on contract claims). "In New York, a breach of contract cause of action accrues at the time of the breach. [T]he Statute runs from the time of the breach though no damage occurs until later" (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993] [internal quotation marks and citations omitted]). Under CPLR 203 [a] for such claims, except in cases of fraud, "the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury" (*id.* at 403 [internal quotation marks and citations omitted]).

In the complaint, Mr. Mullin alleges that, pursuant to certain limited partnership and limited liability operating agreements, he made payments to his capital accounts in certain Funds, during and immediately after his employment, totaling \$557,293. Mr. Mullin further alleges that, in exchange, as a limited partner, he received a capital interest in each limited partnership, and was entitled to receive a percentage of the annual net profits, based upon the percentage of his capital contribution, in relation to the capital contributions made by the other limited partners. Mr. Mullin also alleges that, upon his resignation from WL Ross in 2007, defendants improperly treated him as a Ross CGA withdrawn partner and did not distribute to him carried interest and profits. Mr. Mullin further alleges that his status as a Ross CGA limited partner did not terminate when he resigned, because Ross CGA's general partner never issued a notice of mandatory withdrawal, as required by the Ross CGA Amended LPA to terminate a partnership interest.

The breach of contract claim is not timely asserted against Ross CGA. As

Mullin v WL Ross & Co., LLC, et al., Index No. 650535/2017
Motion Sequence No. 001

alleged by Mr. Mullin, the breach by Ross CGA occurred in 2007, when it began treating him as a withdrawn partner. That treatment consisted, primarily, of ceasing all payments of carried interest or profits to him, after his October 2007 resignation (see Ross CGA Amended LPA, § 11 [c] [i]). Ross CGA's repeated failure to make payments in the years following that alleged breach does not serve to revive the claim for statute of limitations purposes (see *Welwart v Dataware Elecs. Corp.*, 277 AD2d 372, 373 [2d Dept 2000] [holding that, for statute of limitations purposes, the breach allegedly occurred when the defendant improperly failed to issue to the plaintiff shares of common stock in a closely held corporation, and not on the dates that the profits were allegedly diverted]).

Contrary to Mr. Mullin's contentions, the Ross CGA Amended LPA is not an installment contract, and did not guarantee Mr. Mullin periodic payment of carried interest or profits. Rather, the right to such payments was based on his contractual status as a Ross CGA limited partner.

Next, the parties dispute whether the breach of fiduciary duty claim is timely asserted against Ross CGA. In that claim, Mr. Mullin alleges that, when he resigned from WL Ross in 2007, Ross CGA breached its fiduciary duty by improperly treating him as a withdrawn partner, and failing to distribute some \$3.6 million in carried interest and profits due to him¹. Mr. Mullin also alleges that Ross CGA and its co-defendants wilfully concealed Ross CGA's profitability, and misled Mr. Mullin into believing that the

¹ The court notes that, although Mr. Mullin represents that he intends to seek leave to amend the complaint to add factual allegations of fraud (see Memorandum of Law in Opposition at 15, fn 5), he has not yet done so.

Mullin v WL Ross & Co., LLC, et al., Index No. 650535/2017
Motion Sequence No. 001

no payments were due him. On those allegations, Mr. Mullin seeks to recover compensatory and punitive damages.

The limitations period for a breach of fiduciary duty claim in which the plaintiff seeks money damages is three years (see *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]; *Access Point Med., LLC v Mandell*, 106 AD3d 40, 43 [1st Dept 2013]; CPLR 214). If the plaintiff seeks equitable relief, then the claim is subject to a six-year limitations period (see *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 139).

Whether the claim is subject to a three- or six-year limitations period, it is untimely asserted. A breach of fiduciary duty claim accrues when all the elements of the tort cause of action, including the element of damages, "can be truthfully alleged in a complaint" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 140). It accrues when "the fiduciary openly repudiates his or her obligation – i.e., once damages are sustained" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]).

Pursuant to the facts alleged by Mr. Mullin, Ross CGA openly repudiated the fiduciary relationship no later than 2007, when it began treating him as a withdrawn partner and failed to pay him his share of the carried interest and profits. Therefore, even applying the more generous six-year limitations period, Mr. Mullin would have had to commence his action in 2013, approximately three years prior to the commencement of the Federal Action.

Contrary to Mr. Mullin's contention, Ross CGA's alleged fraudulent action in withholding the payments due him pursuant to a contract does not render the fraud limitations period applicable here. "Where the alleged fraud is merely the means of

Mullin v WL Ross & Co., LLC, et al., Index No. 650535/2017
Motion Sequence No. 001

accomplishing the breach and add[s] nothing to the causes of action, the Statute of Limitations applicable to fraud claims will not control" (*Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 120 [1st Dept 1985] [internal quotation marks and citation omitted], *affd* 67 NY2d 981 [1986]).

Even were Mr. Mullin to adequately allege fraud essential, rather than incidental, to the claim, the claim would still be time-barred. Under CPLR 213 [8], where the fraud alleged is essential to the breach of fiduciary duty claim, then the limitations period is six years from the breach or two years from the date of discovery of the fraud, whichever is later (*see Kaufman v Cohen*, 307 AD2d 113, 119-121 [1st Dept 2003]). Under the discovery rule, the limitations period begins to run when a person of ordinary intelligence, exercising reasonable diligence, "possessed knowledge of facts from which the fraud could be reasonably inferred" (*Rite Aid Corp. v Grass*, 48 AD3d 363, 364 [1st Dept 2008] [internal quotation marks and citation omitted]; *see Apt v Morgan Stanley DW, Inc.*, 115 AD3d 466, 467 [1st Dept 2014]).

The facts as alleged by Mr. Mullin demonstrate that he possessed sufficient knowledge of facts requiring him to investigate and assert a claim no later than April 3, 2014, when he received a distribution from Ross CGA, liquidating his capital contribution. Mr. Mullin did not commence the Federal Action until December 2016, more than two years later.

The claim for an accounting against Ross CGA is also time-barred. In his claim for an accounting, Mr. Mullin alleges the existence of a fiduciary relationship between himself and Ross CGA, that it continued after his October 2007 resignation, and that Ross CGA wrongfully withheld payments due him annually.

Mullin v WL Ross & Co., LLC, et al., Index No. 650535/2017
Motion Sequence No. 001

Under CPLR 213 [1], an accounting claim is subject to a six-year limitations period (see *Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 201 [2008]). A claim for an accounting asserted against a fiduciary accrues when the trust relationship is at an end (*Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d at 201; *McMahan & Co. v Bass*, 250 AD2d 460, 463 [1st Dept 1998] [The "termination of [the defendants'] status as limited partners ends their fiduciary relationship with the partnership"]).

Even assuming for purposes of this motion that a fiduciary relationship existed between Mr. Mullin and Ross CGA, that relationship ended when Ross CGA began treating Mr. Mullin as a withdrawn partner in October 2007. Therefore, the limitations period expired no later than the end of 2013, again, more than three years prior to the commencement of the Federal Action. Based on the foregoing, the complaint is dismissed in its entirety against Ross CGA on statute of limitations grounds.

CPLR 3211 (a) (1) & (7)

Defendants also move to dismiss the complaint against all defendants based on documentary evidence and for failure to state a cause of action.

Under CPLR 3211 [a] [7], on a motion addressing the sufficiency of the pleadings, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88).

Where a written contract "unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes

Mullin v WL Ross & Co., LLC, et al., Index No. 650535/2017
Motion Sequence No. 001

documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]). On a motion to dismiss, a plaintiff may supplement the complaint by affidavit, to further apprise the defendant of the transactions and matters that form the basis of the complaint (*High Definition MRI, P.C. v Travelers Cos., Inc.*, 137 AD3d 602, 603 [1st Dept 2016]; see CPLR 3013).

Defendants seek to dismiss the claim for breach of fiduciary duty against all defendants as duplicative of the contract claim and fatally defective on its face. In opposition, Mr. Mullin contends that the claim includes allegations of a breach of trust independent from those supporting the contract claim.

The law of the state of incorporation applies to a breach of fiduciary duty claim (see *Leviton Mfg. Co. v Blumberg*, 242 AD2d 205, 207 [1st Dept 1997] ["Since this litigation concerns the internal affairs of a Delaware corporation, the fiduciary duty issues should be governed by Delaware law"]). Here, Delaware law applies to the merits of the fiduciary duty claim asserted against all but one of the defendants because all but one are incorporated in Delaware. Cayman Islands law applies to claims asserted against defendant WLR Recovery Associates IV DSS AIV, L.P. (WLR Recovery IV), a Cayman Islands Exempted Limited Partnership (ELP).

Pursuant to Delaware law, a breach of fiduciary duty claim requires proof of a fiduciary relationship and a breach of the duty arising out of that relationship (see *Beard Research, Inc. v Kates*, 8 A3d 573, 601 [Del Ch 2010], *affd sub nom. ASDI, Inc. v Beard Research, Inc.*, 11 A3d 749 [Del 2010]). Further, "the general partner of a limited

Mullin v WL Ross & Co., LLC, et al., Index No. 650535/2017
Motion Sequence No. 001

partnership owes direct fiduciary duties to the partnership and to its limited partners" (*Wallace ex rel. Cencom Cable Income Partners II, L.P. v Wood*, 752 A2d 1175, 1180 [Del Ch 1999]). Those duties may be expanded, restricted or eliminated by provisions in the limited partnership agreement (6 Del. Code § 17-1101 [d]).

"Delaware respects the primacy of contract law over fiduciary law in matters involving . . . contractual rights and obligations and does not allow fiduciary duty claims to proceed in parallel with breach of contract claims unless there is an independent basis for the fiduciary duty claims apart from the contractual claims. To determine whether there is an independent basis for fiduciary claims arising from the same general events, the Court inquires whether the fiduciary duty claims depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy"

(*Renco Group, Inc. MacAndrews AMG Holdings LLC*, 2015 WL 394011, *7, 2015 Del Ch LEXIS 25 [Del Ch 2015] [internal quotation marks and citations omitted]).

In this breach of fiduciary duty claim, Mr. Mullin alleges that defendants owe him fiduciary duties because he is a limited partner or member of each defendant partnership, and contributed his own capital to, and performed services for, those partnerships in reliance upon their fair accounting and distribution of carried interest and profits. Mr. Mullin also alleges that defendants breached their fiduciary duties by unlawfully manipulating the income, expenses, and accounting treatment of certain partnerships, prior to the declaration and allocation of annual profits. Mr. Mullin further alleges that defendants breached certain sections of the relevant limited partnership agreements. For example, he alleges that defendants breached the Ross CGA Amended LPA § 8 (b) (ii) by failing to distribute cash and other property attributable to certain incentive amounts to him, in proportion to his respective carried interest percentages as of the date of distribution.

Mullin v WL Ross & Co., LLC, et al., Index No. 650535/2017
Motion Sequence No. 001

Mr. Mullin's allegations in support of his breach of fiduciary duty claim simply repeat the same factual allegations that underlie his breach of contract claim. In both claims, Mr. Mullin alleges breaches of certain provisions of the relevant limited partnership agreements by defendants' wrongful retention of a combined total \$3.6 million in interest and profits due him and overcharging expenses to his capital accounts (see Complaint, ¶¶ 44, 57, 61). Mr. Mullin fails to plead any obligations arising outside the scope of the relevant partnership agreements.

In regard to defendant WLR Recovery IV, pursuant to Cayman Islands law, an ELP does not have a legal personality separate from that of its partners, and therefore, cannot owe its partners any fiduciary duties (Exempted Limited Partnership Law [ELPL] §§ 14 [2], 16 [2], 33 [1]; *Arklow Invs. Ltd. v MacLean* [2000] 1 WLR 594 [PC]; Snell's Equity §§ 7-002, 7-003 [33rd ed]). Further, the alleged breach of fiduciary duty must arise separately from any contractual obligations (see *Walton aff.*, ¶¶ 5, 6, exhibit 2; *In re Goldcorp Exch. Ltd.* [1995] 1 AC 74 [PC]).

For the foregoing reasons, the breach of fiduciary duty claim fails to state a legally cognizable cause of action, as a matter of law.

Similarly, the claim for an accounting is fatally defective on its face. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Palazzo v Palazzo*, 121 AD2d 261, 265 [2d Dept 1986]).

In the accounting claim, Mr. Mullin once again fails to adequately plead that a fiduciary relationship existed between defendants and himself and that defendants

Mullin v WL Ross & Co., LLC, et al., Index No. 650535/2017
Motion Sequence No. 001

breached those duties. Instead, Mr. Mullin alleges only facts supporting the breach of contract claim, and seeks monetary relief. An accounting claim will not lie where the money allegedly owed derives from a contractual relationship, rather than a fiduciary relationship (*Kazi v General Elec. Capital Bus. Asset Funding Corp. of Conn.*, 116 AD3d 592, 592 [1st Dept 2014]).

Defendants also argue that all claims, including the breach of contract claim, asserted against Ross Expansion FLP, L.P. (Ross Expansion), the Remaining Defendants², and WL Ross fail too as matter of law for the following reasons.

The parties dispute whether all claims asserted against Ross Expansion are fatally defective, as vague and conclusory or disproven by the undisputed documentary evidence. Specifically, defendants argue that the allegations against Ross Expansion are too vague to provide that defendant with notice of any wrongdoing.

CPLR 3013 requires that the allegations set forth in a complaint must be sufficiently particularized to give adequate notice to the court and to the parties of the transactions and occurrences intended to be proved (*Berardi v Berardi*, 108 AD3d 406, 407 [1st Dept 2013]; *Foley v D'Agostino*, 21 AD2d 60, 63-64 [1st Dept 1964]; See also CPLR 3016 [b]). "A complaint is insufficient if based solely on conclusory statements, unsupported by factual allegations" (*Melito v Interboro-Mutual Indem. Ins. Co.*, 73 AD2d 819, 820 [4th Dept 1979]).

Mr. Mullin's allegations set forth in the complaint and in his affidavit are

² "Remaining Defendants" refers collectively to Absolute Recovery Advisors, L.P., Absolute Recovery Capital Partners, LLC, Asia Recovery Associates L.P., India Asset Recovery Associates LLC, WLR Nanotechnology GP LLC, WLR Nanotechnology LP LLC, WLR Recovery Associates LLC, WLR Recovery Associates II LLC, WLR Recovery Associates III LLC, WLR Recovery Associates IV LLC, and WLR Recovery Associates IV DSS AIV, L.P.

Mullin v WL Ross & Co., LLC, et al., Index No. 65035/2017
Motion Sequence No. 001

insufficient to support any viable claims against Ross Expansion. In the complaint, Mr. Mullin alleges that WL Ross and Ross Expansion did not "appropriately account for or distribute to him Carried Interest or profits of the underlying Fund, and wrongfully deducted inappropriate expenses" (Complaint ¶ 52). In his affidavit, Mr. Mullin attests that defendants failed to properly credit him with \$79,646 in capital contributions that he made to Ross Expansion, and failed to pay him \$1.5 million in profits (Joseph E. Mullin, March 24, 2017 aff, ¶¶ 11-12).

Significantly, however, Mr. Mullin fails to specify what carried interest and profits he allegedly should have received, when he should have received them, or the grounds for his belief that such funds were wrongfully withheld. Mr. Mullin also fails to identify the allegedly inappropriate expenses, and when they were allegedly charged to his account, or to explain why they are inappropriate. Such conclusory allegations are insufficient to support legally viable claims for breach of contract, breach of fiduciary duty, or an accounting. "[F]or a plaintiff to satisfy the requirements of CPLR 3013, the plaintiff cannot rely upon mere 'buzz words' or vague and conclusory allegations, but must instead set forth facts that truly address the underlying transactions and occurrences and the material elements of the claim" (*East Hampton Union Free Sch. Dist. v Sandpebble Bldrs. Inc.*, 66 AD3d 122, 131 [2d Dept 2009]).

Further, the allegation that Ross Expansion failed to credit a \$79,646 contribution to Mr. Mullin's account is directly contradicted by the documentary evidence. A Ross Expansion contribution schedule created contemporaneously with Mr. Mullin's becoming a Ross Expansion limited partner credited him with making two contributions which, together, total \$79,646.09 (see Kevin F. Meade, Feb. 24, 2017, aff,

Mullin v WL Ross & Co., LLC, et al., Index No. 650535/2017
Motion Sequence No. 001

¶ 5, exhibit 4). Mr. Mullin does not dispute the accuracy of that schedule, or that he made the contribution in 2007, nor does he allege that he made other contributions at other specific times. Thus, for all of the foregoing reasons, the complaint is dismissed against Ross Expansion in its entirety.

With regard to the Remaining Defendants, Mr. Mullin alleges that: "[b]ased upon the limited information he has obtained, and his analysis of the purported accounting statements and tax related disclosures presented to him by the remaining Disputed Partnerships, [he] has identified irregularities, such as inappropriate deductions charged to him for purported expenses, totaling no less than \$606,856" (Complaint, ¶ 54).

Although Mr. Mullin alleges that he has obtained some limited information, he has failed to allege the details of that information or any facts specifying which entity charged him excessive expenses, when such charges occurred, what the irregularities are, why the deductions were inappropriate, and why he characterizes them as purported expenses. Mr. Mullin does not deny defendants' contention that the documentary evidence demonstrates that, since 2011, Mr. Mullin's capital accounts were charged expenses totaling approximately \$1,850. Mr. Mullin merely refers to certain amounts listed on his income tax and K-1 tax statements as "dubious" or "unexplained" (see Mullin aff, ¶¶ 15-20). Such vague language is not sufficient to support a legally viable claim (see *Melito v Interboro Mutual Indem. Ins. Co.*, 73 AD2d at 820).

Mr. Mullin's reliance on a May 20, 2016 press release issued by WL Ross, indicating that Ross CGA made larger profits than anticipated is misplaced. Mr. Mullin's allegation that he received approximately \$1.5 million less than the amount to which Mr.

Mullin v WL Ross & Co., LLC, et al., Index No. 650535/2017
Motion Sequence No. 001

Mullin was entitled is mere speculation. Mr. Mullin does not allege how he came to that conclusion. "A complaint is properly dismissed if it is based on pure speculation" (*State ex rel. Willcox, v Credit Suisse Sec. (USA) LLC*, 140 AD3d 622, 623 [1st Dept 2016] [internal quotation marks omitted]). Thus, for all of the foregoing reasons, the complaint is dismissed in its entirety against the Remaining Defendants.

Mr. Mullin's request for leave to replead the claim after obtaining appropriate discovery is denied. Discovery "is not permissible as a fishing expedition to ascertain whether a cause of action exists and is only available where a petitioner demonstrates that he or she has a meritorious cause of action" (*Bishop v Stevenson Commons Assoc., L.P.*, 74 AD3d 640, 641 [1st Dept 2010] [internal quotation marks and citation omitted]; *Forman v Henkin*, 134 AD3d 529, 530 [1st Dept 2015]). Mr. Mullin merely speculates that additional facts will be disclosed during discovery.

Finally, defendants seek to dismiss all claims asserted against WL Ross on the ground that Mr. Mullin has failed to allege any specific factual basis upon which to hold that company liable. In opposition, Mr. Mullin seeks leave to replead all claims against WL Ross, based on allegations made in his affidavit.

In the complaint, Mr. Mullin alleges no facts specifically against WL Ross, but merely lists that company with the rest of the defendants. Courts have dismissed claims asserted against a defendant who had been listed with other defendants, on the ground that no specific wrongdoing by the particular defendant was alleged by the plaintiff (*see e.g. TYT E. Corp v Lam*, 139 AD3d 498, 500-502 [1st Dept 2016]). Here, neither in the complaint nor in his affidavit, does Mr. Mullin allege any contractual or fiduciary relationship between WL Ross and himself in existence after his resignation in

Mullin v WL Ross & Co., LLC, et al., Index No. 65035/2017
Motion Sequence No. 001

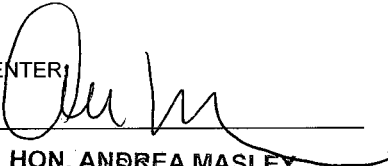
October 2007.

Mr. Mullin's allegation that WL Ross controlled the actions of the other defendants, and, therefore, may be held liable for their actions, is unavailing. To the extent that Mr. Mullin is seeking to make an alter ego argument, his allegations are not sufficient to state a viable cause of action. Delaware law requires that a plaintiff seeking to pierce the corporate veil must allege that the business entities are nothing more than "a sham and exist for no other purpose than as a vehicle for fraud" (*Wallace ex rel. Cencom Cable Income Partners II, Inc. v Wood*, 752 A2d at 1184). Mr. Mullin has failed to so allege. The complaint is dismissed against WL Ross.

Accordingly, it is

ORDERED that the defendants' motion to dismiss the complaint in its entirety is granted and the complaint is dismissed as against all defendants, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants.

Dated: February 22, 2018

ENTER: 
HON. ANDREA MASLEY