| **Awasthi v Dillon** |
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| 2018 NY Slip Op 30366(U) |
| February 28, 2018 |
| Supreme Court, New York County |
| Docket Number: 650057/2016 |
| Judge: Barry Ostrager |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. BARRY R. OSTRAGER **PART** 61
*Justice*

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MANEESH AWASTHI and VIRUPAKSHA RAPARTHI, individually and d/b/a MARV INVESTMENT MANAGEMENT, LLC, and derivatively on behalf of BLACKBRIDGE CAPITAL, LLC,

Plaintiffs,

- v -

ALEXANDER DILLON, JULIAN PANAIT, BLACKBRIDGE CAPITAL GROWTH FUND LLC, GPL VENTURES LLC, TSAMUTALIS AND COMPANY, and SOCRATES TSAMUTALIS,

Defendants.

**INDEX NO.** 650057/2016

**MOTION DATE** 11/16/2017

**MOTION SEQ. NO.** 003

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109

were read on this application to/for DISMISSAL

**BARRY R. OSTRAGER, JSC:**

Before the Court is the pre-answer motion by defendants Socrates Tsamutalis and his firm Tsamutalis and Company to dismiss all claims against them pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction and pursuant to CPLR 3211(a)(7) for failure to state a cause of action. The claims at issue are the Seventh Cause of Action in the Amended and Supplemental Complaint for Aiding and Abetting Breach of Fiduciary Duty and the Ninth Cause of Action for Aiding and Abetting Fraud (NYSCEF Doc. No. 85). For the reasons stated below, the motion is granted in part and denied in part.

**Background Facts**

This case arises out of an oral agreement between plaintiffs Maneesh Awasthi and Virupaksha Raparthi and defendants Alexander Dillon and Julian Cosmin Panait to establish the investment fund Blackbridge Capital, LLC in 2014. Plaintiffs together invested a total of about $780,00.00. Defendant Dillon apparently invested only $30,000.00, and defendant Panait invested nothing. The company's accountants are the moving defendants Socrates Tsamutalis and his firm Tsamutalis and Company ("the Accounting Defendants"), who were added to this action by leave of court after some discovery had been completed. It is undisputed that the Accounting Defendants were retained based on an existing personal relationship between co-defendants Dillon and Tsamutalis, and Tsamutalis for the most part simply took directions from Dillon.

Plaintiffs' primary complaint is that Dillon and Panait mismanaged the company and misused the funds plaintiffs invested, even using plaintiffs' investment for defendants' purchase of personal luxury items for themselves, such as expensive cars. Plaintiffs allege that the Accounting Defendants assisted Dillon and Panait in that wrongdoing primarily by reclassifying plaintiffs' initial investments as loans, thereby depriving plaintiffs of any equity interest without any writing or other justification.

**The Jurisdictional Argument**

The Accounting Defendants assert in their motion that this Court lacks long-arm jurisdiction under CPLR 302(a)(3), which applies to a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state". One of the criteria for jurisdiction under this section is that the defendant "derived substantial revenue from interstate or international commerce." *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 (2000).

In support of the motion, Tsamutalis has provided his affidavit attesting that he is a senior accountant in the small firm that employs only 8 people, that the only office is in New Jersey, that he lives in New Jersey and is only licensed in New Jersey, that the firm operates only out of New Jersey and he never practiced outside of New Jersey, and that most of the firm's revenue is from New Jersey-based clients. Thus, the Accounting Defendants assert that the "substantial revenue" requirement for jurisdiction has not been met, and the action must be dismissed.

Plaintiffs do not dispute any of those claims. Instead, they argue that the Court has jurisdiction under CPLR 302(a)(1), which applies to any non-domiciliary who "transacts any business within the state or contracts anywhere to supply good or services in the state." As plaintiffs correctly assert, a single act is enough, even if 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." *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 (2006). Further, the courts have repeatedly sustained long-arm jurisdiction over "commercial actors ... using electronic and telephonic means to project themselves into New York to conduct business transactions." *Deutsche Bank*, 7 NY3d at 71; *see also Semi-Tech Litig., LLC v Ting*, 13 AD3d 185 (1st Dep't 2004) (jurisdiction was established over non-domiciliary accounting firm that provided allegedly false certifications and attended meetings in New York where the certifications were discussed).

To establish the factual basis for its jurisdictional claim, plaintiffs point to the May 9, 2017 affidavit by defendant Tsamutalis submitted in opposition to plaintiffs' motion to amend (Ex 3 to Opposition). There defendant acknowledged that he met with one of the plaintiffs, in person in New York, "for business purposes" and that the New-York based plaintiffs "were parties to group e-mails or conference calls with me [Tsamutalis] on more than one occasion."

Plaintiffs also attach the transcript of the February 8, 2017 deposition taken of Tsamutalis as a then non-party to this action. Although the complete transcript was not provided, the Index confirms that the transcript consists of at least 211 pages of testimony during which 43 Exhibits were discussed. Those Exhibits included various company ledgers and tax returns for the various New York-based Blackbridge entities, as well as multiple e-mails directed to the New York-based individual defendants. During the deposition (at p 71 ff), Tsamutalis confirmed his attendance at a meeting in New York to discuss the "structuring" of the company. Plaintiffs' investment in the company was also discussed at the meeting (p 74).

Based on these facts, plaintiffs assert that they have met their burden of establishing jurisdiction. If the Court disagrees, plaintiffs request jurisdictional discovery. In reply, defendants assert that plaintiffs have failed to come forward with sufficient facts to establish jurisdiction, and they argue that jurisdictional discovery would not be appropriate.

The Court finds that plaintiffs have established a basis for jurisdiction over the Accounting Defendants pursuant to CPLR 302(a)(1). The above-referenced facts set forth in the Tsamutalis affidavit and deposition establish regular contact between the Accounting Defendants and their New York based co-defendants by e-mail and telephone and by participation in a structuring meeting in New York. Whether plaintiffs' contribution should be treated as an investment or a loan was admittedly discussed by Tsamutalis with co-defendant Dillon on various occasions. These activities were sufficiently purposeful, and there is a substantial relationship between those activities and the claims in this case, so as to provide a basis for jurisdiction. The Court therefore denies dismissal for lack of personal jurisdiction.

**Aiding and Abetting Breach of Fiduciary Duty**

A claim for aiding and abetting a breach of fiduciary duty requires: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach ...." *Kaufman v Cohen*, 307 AD2d 113, 125 (1st Dep't 2003) (citations omitted). A showing of "actual knowledge" of both the existence of a fiduciary duty and the breach is required.

Delaware law applies to determine whether Dillon and Panait owed a fiduciary duty to plaintiffs, and that law provides that fiduciary duties are imposed "*only* on managers and those designated as controlling members of an LLC, and not on nonmanaging minority members." *Coventry Real Estate Advisor, LLC v Developers Diversified Realty Corp.*, 84 AD3d 583, 584 (1st Dep't 2011) (emphasis in original). As plaintiffs allege that membership interest in Blackbridge was to be proportional to the parties' respective investments and there was no written agreement otherwise, and since plaintiffs made the larger investment, plaintiffs have failed to allege facts constituting "actual knowledge" on the part of the Accounting Defendants of any fiduciary duty from Dillon and Panait, as minority members, to plaintiffs; the allegations constitute constructive knowledge at best, which is "legally insufficient to impose aiding and abetting liability." *Kaufman*, 307 AD2d at 125.

Similarly, as the parties had no writing as to the treatment of plaintiffs' investment, or how the company was to be operated, plaintiffs have failed to allege actual knowledge by the Accounting Defendants of any breach of any fiduciary duty that may have existed. In any event, the normal business activity of completing financial ledgers based on information provided by the client does not constitute the requisite affirmative action needed to state a claim against the

Accounting Defendants for aiding and abetting a breach of fiduciary duty. *See Kaufman*, 307 AD2d at 126.

Accordingly, the motion by the Accounting Defendants to dismiss the Seventh Cause of Action for Aiding and Abetting a Breach of Fiduciary Duty is granted.

**Aiding and Abetting Fraud**

As defendants themselves note in their moving papers, when analyzing a motion pursuant to CPLR 3211(a)(7) to dismiss for failure to state a cause of action, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail ..." *Guggenheimer v Ginzurg*, 43 NY2d 268, 275 (1977). Such is the case here.

A plaintiff asserting a claim for aiding and abetting fraud must allege "the existence of the underlying fraud, actual knowledge, and substantial assistance" in achieving the fraud. *Oster v Kirschner*, 77 AD3d 51, 54 (1st Dep't 2010). Those criteria have been sufficiently satisfied to survive this pre-answer motion to dismiss. Recognizing that no written contract exists, plaintiffs have asserted that defendants Dillon and Panait made false promises and misrepresentations to induce plaintiffs to invest substantial sums while never intending to use the money for plaintiffs' benefit. Significantly, Dillon and Panait have not moved to dismiss the underlying fraud claim against them.

Allegations that the Accounting Defendants "knowingly or recklessly made misrepresentations" concerning the financial condition of Blackbridge and the status of plaintiffs' investment satisfies the "actual knowledge" requirement, at least at the pleading stage. *Joel v Weber*, 166 AD2d 130, 136 (1st Dep't 1991). Substantial assistance may be in the form of affirmative assistance, concealment, or failure to act when required to do so in a manner that

allows the fraud to proceed. *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 100 (1st Dep't 2003).

On a pre-answer motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the Court is obliged to "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 alleged fit within any cognizable legal theory ..." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Applying this standard, and recognizing the particularity required by CPLR 3016(b), the Court finds that the allegations in the Amended Complaint suffice to withstand this motion to dismiss at the pleadings stage.

The Amended Complaint attributes a significant role to the Accounting Defendants, alleging that Socrates Tsamutalis was "personally responsible for providing accounting services to the Blackbridge Fund and Blackbridge Management and, upon their creation, for Blackbridge Growth and GPL" (¶ 11, 68-69). It also alleges significant wrongdoing, claiming that Tsamutalis "altered and doctored Blackbridge records to make it appear as if Plaintiffs had merely made a 'loan' to Blackbridge" (p 2). More specifically, plaintiffs allege (at ¶ 28) that when they made their initial investment of $100,000 of their individual funds to Blackbridge Fund on March 27, 2014, the "investment was booked in the Blackbridge Fund's general ledger as 'Member's Capital' by Socrates, Blackbridge's accountant and Dillon's close personal friend. Socrates has confirmed that this investment was booked as 'Member's Capital' because that is how Dillon instructed that Socrates book it. Indeed, general ledgers created by Socrates in this time frame reflect separate capital accounts for each of the members --- each of the individual Plaintiffs and [individual defendants] Dillon and Panait --- pursuant to the Parties' agreement."

Socrates allegedly confirmed in a November 3, 2014 email to Dillon that he was aware that plaintiffs "personally … invested in Blackbridge" (¶ 70). Despite this knowledge and the original entries, Socrates later altered the Blackbridge general ledger so that Plaintiffs' investments were now booked as loans" (¶ 72). Socrates later "amended Blackbridge's tax filings, in order to make it appear as if Dillon was the sole owner [and he] admitted that one of the reasons that this was done was to 'funnel all the income and loss' to Dillon'." (¶ 73, 142). Plaintiffs further alleged that Socrates made entries for management fees to Blackbridge by simply tallying up expenses reported by Dillon and Panait, many of which were clearly for personal items (¶ 74).

With respect to the additional investment made by plaintiffs in July 2014, plaintiffs allege (at ¶ 38) that "Socrates again booked Plaintiffs' new investment as 'Member's Capital' in Blackbridge's general ledger. A copy of this general ledger, sent from Socrates to Dillon on August 26, 2014, contains entries of $215,000 for each of the capital accounts for Mr. Awasthi and Mr. Raparthi." The ledgers were later altered to characterize these investments as loans (¶ 140-42).

As to K-1 Forms from the Blackbridge Fund needed for the individuals to file their taxes, "Socrates issued K-1s to Dillon and a Delaware LLC formed on December 22, 2014 with an address in Romania that was controlled by Panait or his mother" confirming distributions of about $450,000 to each, despite their minimal investment in the Fund, but Socrates never issued any K-1 to plaintiffs (¶ 46-47).

Socrates testified at his deposition that he knew Dillon and Paint created new entities, after this action was commenced, without any outside capitalization, and used Blackbridge resources to reap profits for themselves (¶ 75-81).

In the Ninth Cause of Action for Aiding and Abetting Fraud, plaintiffs additionally allege that Socrates knew "Dillon and Panait' s scheme to characterize Plaintiffs' investment capital as 'loans' was a fraud" which Socrates substantially assisted by altering the ledgers to change Plaintiffs' equity investments, initially booked as Member's Capital, to loans and by amending the Blackbridge tax returns to make it appear that Dillon was the sole owner, and by failing to prepare K-1s for plaintiffs, all of which was previously detailed in the Complaint (¶ 153-54).

Based on these allegations, and for the reasons stated above, the motion to dismiss the Ninth Cause of Action is denied without prejudice to renewal as a summary judgment motion following the completion of discovery.

Accordingly, it is hereby

ORDERED that the motion by defendants Socrates Tsamutalis and Tsamutalis and Company to dismiss all claims against them is granted to the extent of dismissing the Seventh Cause of Action for Aiding and Abetting a Breach of Fiduciary Duty, and is otherwise denied without prejudice to renewal as to the Ninth Cause of Action; and it is further

ORDERED that defendants shall efile an Answer within twenty days of the date of this Order, participate in the ongoing discovery in this action, and appear at the compliance conference scheduled for April 4, 2018 at 9:30 a.m.

2/28/2018

DATE

BARRY R. OSTRAGER, J.S.C.

BARRY R. OSTRAGER
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