

**Rabah v Igbara**

2021 NY Slip Op 32629(U)

December 7, 2021

Supreme Court, Kings County

Docket Number: Index No. 502712/2021

Judge: Lillian Wan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 17

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NOOR RABAH, individually and derivatively on behalf of HALAL CAPITAL, LLC, a New Jersey Limited Liability Company, ALI AWAD, ADAM ESSA, MUHAMMAD ABDULLAH, MOHAMED KHATIR, ILEANA DUBINSON, YOUSSEF DOUAH, and RUBA RABAH,

Index No. 502712/2021  
Motion Seq. Nos.: 01, 02, 03 & 06

Plaintiffs,

**DECISION AND ORDER**

-against-

JEBARA IGBARA a/k/a JAY MAZINI, MOTASEM KHALIL a/k/a MOE MAZINI, WESSAM IGBARA, NOURALDEEN IRSHAID a/k/a NOUR IRSHAID, a/k/a NOUR MAZINI, JOUMANA DANOUN, a/k/a JOUMANA IGBARA a/k/a JU MAZINI, JEHAD IGBARA, GADA IGBARA, JERUSALEM JEWELERS, INC. d/b/a "JERUSALEM JEWELERS, a New Jersey Corp.; JERUSALEM JEWELERY Corp. d/b/a "JERUSALEM JEWELERS," a New Jersey Corporation, R & J WHOLESALE CORPORATION, a New Jersey Corporation, and JAY ELECTRONICS CORP., a New Jersey Corporation,

Defendants.

HALAL CAPITAL, LLC, a New Jersey Limited Liability Company,

Nominal Defendant

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the defendants' motion to dismiss the complaint.

The following e-filed documents, listed by NYSCEF document number (Motion 01) 16-18, 85-107, 109-112; (Motion 02) 21-24, 113; (Motion 03) 29, 30, 108; (Motion 06) 71-73, and 114 were read on these motions to dismiss the complaint.

The defendants, Jerusalem Jewelers, Inc. and Jerusalem Jewelry Corp. (referred to collectively as Jewelers) move to dismiss the complaint in lieu of an answer (Motion 01), pursuant to CPLR §§ 3211(a)(7) and (a)(8). Defendants Nouraldeem Irshaid a/k/a Nour Mazini (Nouraldeem) (Motion 02), defendants Jehad Igbara, Gada Igbara and Wessam Igbara (Jehad, Gada, Wessam) (Motion 03), and defendant Motasem Khalil a/k/a Moe Mazini (Khalil) (Motion 06) move for dismissal of the complaint pursuant to CPLR § 3211(a)(7).

All moving defendants seek dismissal of the fourth cause of action for aiding and abetting the breach of a fiduciary duty, and the fifteenth cause of action for aiding and abetting in the commission of a tort. Defendants Jewelers (Motion 01), Jihad, Gada, Wessam (Motion 03), and Khalil (Motion 06) also seek dismissal of the plaintiffs' sixteenth cause of action seeking temporary, preliminary, permanent, and mandatory injunctive relief. After oral argument and upon careful consideration of the parties' submissions, the motions are decided as set forth below.

This action arises from an alleged large-scale fraudulent investment scheme carried out by defendant Jebara Igbara a/k/a Jay Mazini (Jebara), to defraud investors through a company he and plaintiff Noor Rabah (Rabah) established called Halal Capital (HC), a NJ corporation geared toward "religiously appropriate" investments. The plaintiff, Rabah, alleges that he had no knowledge of Jebara's fraudulent scheme, and that in establishing HC and raising funds with Jebara he believed he was helping the needy members of the Muslim community. The funds were raised through community groups, including a mosque and small business owners. In mid-2020, several investors sought to withdraw their funds, and despite their efforts the investors' funds were not returned. The plaintiffs are investors who were allegedly defrauded of part or all of their funds by Jebara and HC.

Defendants Jewelers' Motion to Dismiss pursuant to CPLR § 3211(a)(8)

Jewelers seek dismissal of the complaint pursuant to CPLR § 3211(a)(8), based on lack of personal jurisdiction. The complaint alleges that Jewelers have "marketed and sold products to, and otherwise transacted business with, residents of New York State." The complaint also alleges that the basis of personal jurisdiction is CPLR § 301, however as the defendants concede, there is no legal requirement that the complaint state the statutory basis of personal jurisdictional over the defendants. In support of the motion, Jewelers submit an affidavit of Aref Abuhadba, the co-owner and authorized agent of defendants Jerusalem Jewelers, Inc. and Jerusalem Jewelry Corp., which states, in sum and substance that the defendants do not own or operate any real estate in New York, or employ any individuals in New York. According to the affidavit, they are incorporated and maintain their principal place of business in New Jersey.

In opposition, the plaintiffs argue that personal jurisdiction is established under CPLR § 302(a)(1), which addresses personal jurisdiction over non-domiciliaries of New York. CPLR § 302 states:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state;
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
  - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
  - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

In opposition, the plaintiffs' main argument is that Jewelers transacts business in New York, and point to Jewelers' Instagram page, which boasts that "[W]e Ship Everywhere. Visit online to place an order!" The plaintiffs also argue that Jewelers' website makes clear that the Jewelers defendants market in all 50 states. The plaintiffs assert that neither the affidavit of Aref Abuhadba, nor any submission by the defendants denies that Jewelers transact business in New York. In the alternative, the plaintiffs assert that the facts concerning personal jurisdiction are mostly in Jewelers' custody and control, and that in the event that the Court finds that plaintiffs have not demonstrated personal jurisdiction, then at a minimum plaintiffs' submissions establish that they have made a "sufficient start" to demonstrate that facts "may exist" to warrant the exercise of personal jurisdiction over Jewelers, thereby entitling plaintiffs to discovery, and if necessary, a hearing on the issue.

In reply, the Jewelers defendants submit a further affidavit from Aref Abuhadba which does not dispute, and in fact does not address, whether the defendants transact business in New York. Rather, the affidavit avers that neither the Instagram page nor the website specifically mention New York. Notably, the reply affidavit does not dispute that Jewelers' Instagram page advertises that Jewelers ships anywhere in the United States. In conclusory fashion, the defendants assert that the plaintiffs have not come close to making a sufficient start demonstrating that facts may exist to warrant a finding of personal jurisdiction.

As the party seeking to assert personal jurisdiction, the plaintiff bears the burden of proof. *See Lettieri v Cushing*, 80 AD3d 574 (2d Dept 2011); *see also Castillo v Star Leasing Co.*, 69 AD3d 551(2d Dept 2010); *Shore Pharm. Providers, Inc. v Oakwood Care Ctr., Inc.*, 65 AD3d

623, 624 (2d Dept 2009); *Brinkmann v Adrian Carriers, Inc.*, 29 AD3d 615, 616 (2d Dept 2006); *Ying Jun Chen v Lei Shi*, 19 AD3d 407 (2d Dept 2005). However, “in opposing a motion to dismiss pursuant to CPLR 3211(a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth, a sufficient start, and show[ ] their position not to be frivolous.” See *Shore Pharm. Providers, Inc. v Oakwood Care Ctr., Inc.*, 65 AD3d at 624, quoting *Peterson v Spartan Indus.*, 33 NY2d 463 (1974) (internal quotation marks omitted). “The plaintiffs need only demonstrate that facts ‘may exist’ to exercise personal jurisdiction over the defendant.” See *Ying Jun Chen v Lei Shi*, 19 AD3d at 408, quoting *Peterson v. Spartan Indus.*, 33 NY2d 463; see also *Castillo v Star Leasing Co.*, 69 AD3d 551.

This prong of Jewelers’ motion is denied. Glaringly absent from the defendants’ submissions in support of their motion is evidence concerning whether they have regularly transacted business in the State of New York. It is apparent from the advertisement that “We Ship Everywhere” that the defendants transact business in New York. There is no evidence that the defendants have specifically excluded New York in its advertising, and the defendants’ affidavit does not make such a claim. The plaintiffs are correct that the defendants have not denied those paragraphs of the complaint, i.e. 18 and 19, which allege that Jewelers “marketed and sold products to, and otherwise transacted business with, residents of New York State,” and absent a denial the allegations are deemed admitted. See *DeSouza v Khan*, 128 AD3d 756 (2d Dept 2015). As such, that prong of defendant Jewelers’ motion seeking dismissal, pursuant to CPLR § 3211(a)(8), is denied.

#### Defendants’ Motions to Dismiss pursuant to CPLR § 3211(a)(7)

The defendants argue that the plaintiffs have failed to state a cause of action, pursuant to CPLR § 3211(a)(7), on their fourth cause of action for aiding and abetting the breach of a fiduciary duty, and fifteenth cause of action for aiding and abetting in the commission of a tort, and must be dismissed. The defendants argue that the facts alleged in the complaint are insufficient to meet the second prong of a cause of action for aiding and abetting the breach of a fiduciary duty, i.e. that the defendants knowingly participated in the alleged breach of fiduciary duty. With respect to the fifteenth cause of action, the defendants maintain that the plaintiffs have not alleged facts that demonstrate that the defendants had actual knowledge of the alleged tortious conduct, and that they substantially assisted in the commission of the tort, necessary elements to a cause of action based on aiding and abetting in the commission of a tort.

In their complaint, the plaintiffs allege that Jebara used two or more of the cars he purchased with the funds he obtained from the fraud to satisfy a personal debt to one of the Jewelers defendants. Jebara allegedly instructed plaintiff Rabah to send a check in the amount of \$225,000 to Jewelers, however Rabah prepared the certified check, but never sent it and redeposited the funds into HC’s account. According to the plaintiffs, defendant Nouraldeen is a

longtime friend of Jebara, who allegedly served as a videographer, spokesperson and general helper, and a money manager for Jebara who sometimes transported products and funds from investors according to Jebara's orders. Defendant Jihad is Jebara's father; Gada is Jebara's mother; and Wessam is Jebara's younger brother. The plaintiffs allege that Jebara's parents allowed Jebara to use their home to stash his illegally procured cash. Wessam, along with his parents, are alleged to have served as videographers, spokespersons and general helpers to Jebara, who received funds on Jebara's behalf and provided them to him. Defendant Khalil is also alleged to have been a videographer, spokesperson and general helper to Jebara, as well as his money manager. It is alleged that he utilized and disposed of HC funds according to Jebara's wishes.

In opposition, the plaintiffs submit the affidavits of Rabah, which they claim amplifies the allegations contained in the complaint with respect to each moving defendant. The affidavits contain summaries of alleged conversations Rabah had with the defendants and/or his own observations involving the defendants based on his role in HC and his business relationship with Jebara. In the main, these affidavits do nothing more than speculate, surmise and conclude that based on certain occurrences the defendants knew or should have known that Jebara was conducting this fraudulent scheme.

The defendants argue that the plaintiffs are not permitted to supplement the complaint with affidavits, however a Court may "consider affidavits submitted by plaintiffs to remedy any defects in the complaint, because the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one." *See Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 (2016).

Even accepting the facts as alleged in the complaint as true, and affording the plaintiffs "the benefit of every possible favorable inference," to "determine only whether the facts as alleged fit into any cognizable legal theory," the plaintiffs' fourth and fifteenth causes of action must be dismissed. *See Leon v Martinez*, 84 NY2d 83, 87-88 (1994). To recover damages for aiding and abetting a breach of fiduciary duty, a plaintiff must plead and prove that "a fiduciary duty owed to the plaintiff was breached, that the defendant knowingly induced or participated in the breach, and that the plaintiff was damaged as a result of the breach." *See RD Legal Funding Partners, LP v Worby Groner Edelman & Napoli Bern, LLP*, 195 AD3d 968, 970 (2d Dept 2021), quoting *Smallberg v Raich Ende Malter & Co., LLP*, 140 AD3d 942 (2d Dept 2016)(internal quotation marks omitted); *see also Baron v Galasso*, 83 AD3d 626 (2d Dept 2011). "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator." *See Kaufman v Cohen*, 307 AD2d 113, 126 (1st Dept 2003); *Roni LLC v Arfa*, 15 NY3d 826 (2010); *Monaghan v Ford Motor Co.*, 71 AD3d 848 (2d Dept 2010). Substantial assistance requires an affirmative act on the defendant's part; "mere inaction" can constitute substantial assistance "only if the defendant

owes a fiduciary duty directly to the plaintiff.” See *Kaufman v Cohen*, 307 AD2d at 126; see also *First Keystone Consultants, Inc. v DDR Constr. Servs.*, 74 AD3d 1135 (2d Dept 2010).

The defendants are correct that the factual allegations contained in the complaint do not meet the second prong of the elements, i.e. that the defendants knowingly participated in the breach of fiduciary duty. The complaint at paragraphs 85 and 86 state that defendants Khalil, Wessam and Nouraldeem “knew or should have known” that their actions were “in support and furtherance of Jebara’s wrongdoing.” With respect to defendants Jehada, Gada and the Jewelers defendants, the complaint does not even make that allegation. Instead, the complaint and affidavit contain only barebones allegations which clearly speculate that certain events or transactions occurred which purportedly impute knowledge and substantial assistance to Jebara in committing the fraud. The affidavits submitted by Rabah only highlight the fact that the plaintiffs have not pled specific details that these defendants had knowledge of, and substantially assisted in, the commission of the fraud. The allegations are conclusory, and based on surmise and conjecture rather than facts concerning the defendants’ knowledge of the fraud.

Since a claim of aiding and abetting a breach of fiduciary duty must be supported by an allegation that the defendant had actual knowledge of the breach of duty, as opposed to mere constructive knowledge, an allegation that the defendant “knew or should have known” about the breach of duty is insufficient to support such a claim. See *Global Mins. & Metals Corp. v Holme*, 35 AD3d at 102; see also *Brasseur v Speranza*, 21 AD3d 297 (1<sup>st</sup> Dept 2005). Further, the plaintiffs have failed to plead any facts that support a finding that the defendants owed a fiduciary duty directly to them, and that their inaction constituted substantial assistance. Thus, the plaintiffs have failed to state a cause of action for aiding and abetting a breach of fiduciary duty by the defendants, and the fourth cause of action must be dismissed.

With respect to the plaintiffs’ fifteenth cause of action for aiding and abetting tortious conduct, a plaintiff must allege a defendant’s actual knowledge of the alleged tortious conduct, and substantial assistance in the commission of the underlying tort. See *Land v Forgione*, 177 AD3d 862 (2d Dept 2019). The plaintiffs’ fifteenth cause of action must also be dismissed for the reasons set forth above, i.e. the plaintiffs have failed to plead facts sufficient to establish actual knowledge by the defendants of Jebara and HC’s tortious conduct, and that the moving defendants provided substantial assistance to them in committing the tort. The plaintiffs’ allegations, based “upon information and belief,” and that the defendants knew or should have known, at most amounts to constructive notice, which is insufficient to establish that the defendants substantially assisted Jebara and HC’s alleged tortious conduct. The remainder of the allegations against the moving defendants are conclusory, speculative, and based on mere conjecture, and must be rejected.

Lastly, the plaintiffs have not opposed that prong of the defendants’ motions seeking dismissal of plaintiffs’ sixteenth cause of action seeking temporary, preliminary, permanent, and

mandatory injunctive relief, and as such that cause of action is dismissed. *See generally HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838 (2d Dept 2015).

The remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED**, that the prong of defendant Jewelers' motion to dismiss the complaint (Motion 01), based on lack of personal jurisdiction, pursuant to CPLR §3211(a)(8), is denied; and it is further

**ORDERED**, that the prong of defendant Jewelers' motion to dismiss the fourth, fifteenth and sixteenth causes of action of the complaint, pursuant to CPLR § 3211(a)(7), is granted; and it is further

**ORDERED**, that the motion of defendant Nouraldeen (Motion 02), to dismiss the fourth and fifteenth causes of action of the complaint, pursuant to CPLR § 3211(a)(7), is granted; and it is further

**ORDERED**, that the motion of defendants Jihad, Gada, and Wessam (Motion 03), to dismiss the fourth, fifteenth and sixteenth causes of action of the complaint, pursuant to CPLR § 3211(a)(7) is granted; and it is further

**ORDERED**, that the motion of defendant Khalil (Motion 06), to dismiss the fourth, fifteenth and sixteenth causes of action of the complaint, pursuant to CPLR § 3211(a)(7), is granted.

This constitutes the decision and order of the Court.

Dated: December 7, 2021

  
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HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.