SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. CAROL EDMEAD

Index Number : 651579/2014
CHANIN, ALVIN
VS
MACHCINSKI, JR., VICTOR A.
Sequence Number : 001
DISMISS

PART 35

INDEX NO. _____
MOTION DATE 10/28/14
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Plaintiffs Alvin Chanin and Myra Chanin ("plaintiffs"), who lost their entire $352,500 investment in a hedge fund, the Meditron Fundamental Value/Growth Fund (the "Fund"), commenced this negligent representation action against Victor A. Machcinski, Jr. ("Machcinski") and Krebsbach & Snyder, P.C. (the "Firm") (collectively, "defendants"), who allegedly made certain representations in a letter to plaintiffs about the Fund in response to an inquiry by the Securities and Exchange Commission (the "SEC").

By way of background, beginning in 2011, plaintiffs made a series of investments into the Fund. Prior thereto, and during 2011, monies from the Fund were allegedly diverted to SMC Electrical Contracting, Inc. ("SMC") in purported loans, which later proved insufficient to prevent SMC from filing for bankruptcy protection in September 2011. SMC's bankruptcy filings show the Fund as an unsecured, non-priority creditor. In the fall of 2011, the SEC contacted plaintiffs about their investments in the Fund. Plaintiffs "were concerned" with the inquiry and considered seeking counsel to compel the return of their investment. However, before doing so, they sought an explanation from Dr. Walter V. Gerasimowicz ("Gerasimowicz") (who owned and controlled the Fund along with two other companies, Meditron Management Group, LLC and Meditron Asset Management, LLC ("Meditron"), over which he also exercised control).

In response, on October 10, 2011, Machcinski sent a letter to plaintiffs, on which plaintiffs' complaint is based, stating, in part:

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: _____ _____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

> . . . The SEC has vigorously implemented its new oversight responsibilities under Dodd-Frank, and its communications with you regarding the Fund resulted from this new and very expansive authority. Please be assured that there has been no suggestion or insinuation by the SEC that there is or has been any impropriety regarding Meditron's services to the Fund.

Defendants now move pursuant to CPLR 3211(a)(1) and (a)(7) and 3212 for dismissal of the complaint. Defendants argue that (1) there are no allegations or facts showing the requisite "privity" or "near privity" relationship between plaintiffs and defendants to support a negligent misrepresentation claim; (2) the letter on which plaintiffs rely does not contain any misrepresentation, in that statements therein were true at the time and charges of wrongdoing were not made until nearly a year later; (3) plaintiffs' reliance on such letter in deciding not to withdraw their investment was unreasonable; and (4) neither the letter nor plaintiffs' reliance thereon proximately caused the alleged losses, as the Fund was largely depleted at the time of plaintiffs' investments and the entity to which the Fund's monies had been diverted filed for bankruptcy prior to the issuance of the letter. According to Machcinski, Gerasimowicz and the Meditron engaged the Firm in January 2011 to represent them in connection with the SEC's requests for documents and information. The requests were issued after the SEC conducted an audit of Meditron. In February 2011, the SEC issued a subpoena to formalize its requests, which Machcinski worked to produce. In September 2011, Gerasimowicz requested that he inquire of the SEC of the SEC's questioning of plaintiffs. The SEC advised that the calls were only for information-gathering purposes and not accusatory. Therefore, Gerasimowicz told Machcinski that plaintiffs requested a letter from Gerasimowicz's attorneys explaining why the SEC contacted them, Machcinski prepared the letter. Machcinski denies any knowledge of SMC's bankruptcy filing and states that neither he nor the Firm represented SMC. And, it was not until March 2012 that the SEC's interest in Meditron and Gerasimowicz had shifted and a notice advising of the SEC's intent to bring an enforcement action was issued.

Defendants also point out that the body of the complaint names "defendant Allan Machcinski" as opposed to the defendant named in the caption, "Victor A. Machcinski, Jr." Further, there are no specific allegations of wrongdoing by the Firm.

In response, plaintiffs argue that the motion is premature because defendants have not produced any of the documents referenced in their motion papers, no depositions have been held, and there has been no discovery. The motion is based solely on Machcinski's affirmation, which is inadmissible under CPLR 2106 because an attorney who is a party may not submit evidence by affirmation. Further, Machcinski's affirmation does not dispose of all issues in the case, but raises more questions as to what exactly he knew when he wrote the letter based on the SEC investigation he describes. Thus, summary judgment must be denied.

Similarly, dismissal under CPLR Rule 3211(a)(7) must be denied because the complaint adequately states a claim for negligent misrepresentation.

Plaintiffs also cross move to amend the complaint to correct the typo of Machcinski's first name as pointed out by defendants, as defendants did not consent to the amendment.

In reply, defendants add that the amendment is futile since the complaint lacks merit, especially against the Firm since no allegations are made against the Firm. The complaint lacks allegations to support the negligent misrepresentation claim. Further, plaintiffs are not entitled to attorneys' fees. And, plaintiffs waited three years to assert, after the filing of this motion, that discovery is needed, and failed to identify any discovery in the sole possession of defendants, that is necessary to defeat the motion. And, to cure the procedural error noted by plaintiffs, Machcinski submits an affidavit to attest to the facts asserted in his earlier affirmation.

Discussion

CPLR 3211(a)(1)

Pursuant to CPLR 3211(a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). "Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*VisionChina Media Inc. v Shareholder Representative VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]).

Affidavits do not qualify as "documentary evidence" for purposes of this rule (*see Regini v Board of Managers of Loft Space Condominium*, 107 AD3d 496, 968 NYS2d 18 [1st Dept 2013]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 924 NYS2d 336 [1st Dept 2011]; *Marin v AI Holdings (USA) Corp.*, 35 Misc 3d 1227(A), 953 NYS2d 550 (Table) [Supreme Court, New York County 2012]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court, Bronx County 2004]; *Williamson, Picket, Gross v Hirschfeld*, 92 AD2d 289, 290 [1st Dept 1983] [stating that affidavits do not qualify as "documentary evidence" for purposes of this rule]).

Based upon a review of the letter, in its entirety, and the Machcinski affirmation and affidavit, it cannot be said that these documents conclusively establish a defense as a matter of law to the claims herein. Therefore, dismissal pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211(a)(7)

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "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" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "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 as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*,

84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack,* 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

"The elements of negligent misrepresentation are: '(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information'" (*Wexler v KPMG LLP*, 2014 WL 1292665 (Trial Order) [Supreme Court, New York 2014] *citing J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). "A special relationship may be established by 'persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 919 NYS2d 465 [2011] *citing Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). Although "[p]rofessionals, such as lawyers . . . , by virtue of their training and expertise, may have special relationships of confidence and trust with their clients, and in certain situations [courts] have imposed liability for negligent misrepresentation when they have failed to speak with care" (*Kimmell v Schaefer* 89 NY2d 257, 652 NYS2d 715 [1996]), the lack of allegations showing a privity, or a privity-like relationship with defendants requires dismissal of plaintiffs' claim.

Notwithstanding plaintiffs' uncontested allegation that defendant Machcinski had direct contact with the plaintiffs *via* his letter, neither the complaint nor plaintiffs' opposition alleges that plaintiffs solicited the explanation from Machcinski (or the Firm), and or that Machcinski knew of plaintiffs' purpose of the letter, *to wit*: to determine whether to withdraw their invested funds; in fact, plaintiffs solicited an explanation from non-party Gerasimowicz, and the letter clearly indicates that defendants "are counsel" to Meditron regarding concerns plaintiffs had about the SEC's inquiry. Other than stating that the complaint states a claim for negligent misrepresentation, and citing to caselaw that is factually distinguishable, plaintiffs fail to assert

facts giving rise to a special relationship of confidence and trust between them and defendants.[1]

As the pleadings fail to allege the existence of a privity, or a privity-like relationship between plaintiffs that would support a negligent misrepresentation claim, the claim fails.

CPLR 3212

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]).

Based on the above, dismissal pursuant to CPLR 3212 for failure to demonstrate a special relationship of confidence and trust between them and defendants is likewise warranted. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

And, plaintiffs claim that discovery is necessary is insufficient to overcome defendants' entitlement to dismissal. "Under CPLR 3212 (f), where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 824 NYS2d 210 [1st Dept 2006]). "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion (*id. citing Overseas*

---

[1] A determination of whether the statements in the letter were true at the time and contained no misrepresentation, whether plaintiffs' reliance on such letter in deciding not to withdraw their investment was unreasonable, and whether the letter or plaintiffs' reliance thereon proximately caused the alleged losses, as the Fund was largely depleted at the time of plaintiffs' investments, is premature at this juncture, as such issues cannot be determined on the basis of the complaint, letter, and Machcinski's letter, alone.

Reliance Tours & Travel Serv. v Sarne Co., 17 AD2d 578, 580 [1st Dept 1963]). Further the "party invoking the section must provide a proper evidentiary basis supporting its request for further discovery (*Global Mins. & Metals Corp. v Holme, supra*).

Here, plaintiffs failed to identify any facts necessary to oppose defendants' motion that are within the control of the defendants. And, the record does not indicate that plaintiffs were denied the opportunity to conduct discovery. Plaintiffs failed to submit any affidavit containing facts showing the requisite level of privity to sustain a negligent misrepresentation claim.

Thus, summary dismissal of the complaint is likewise warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) and 3212 is granted pursuant to CPLR 3211(a)(7) and 3212; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiffs within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 12/23/14

J.S.C.

HON. CAROL EDMEAD

1. CHECK ONE : ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE : MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE : ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE