Public Sector Pension Inv. Bd. v Saba Capital Mgt., L.P.
2016 NY Slip Op 32344(U)
November 22, 2016
Supreme Court, New York County
Docket Number: 653216/2015
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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PUBLIC SECTOR PENSION INVESTMENT BOARD,

Plaintiff,

-against-

SABA CAPITAL MANAGEMENT, L.P., SABA CAPITAL OFFSHORE FUND, LTD., SABA CAPITAL, LLC and BOAZ WEINSTEIN,

Defendants.

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DECISION AND ORDER

Index No. 653216/2015

Mot. Seq. 003-004

HON. ANIL C. SINGH, J.:

In this action for, *inter alia*, breach of contract and fiduciary duty, plaintiff moves pursuant to CPLR 2221 and 3025(b) for an order for reargument (mot. seq. 003) and an order for leave to file an amended complaint (mot. seq. 004). For purposes of this decision, both motions have been consolidated.

Analysis

Motion for Reargument

Plaintiff's motion for reargument is denied. "A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously

decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion." Foley v. Roche, 68 A.D.2d 558, 567-568 (1st Dept 1979).

Reargument is denied as movant fails to show that the Court misconstrued the facts and misapplied any controlling principles of law.

Motion for Leave to Amend

Plaintiff's motion for leave to amend is denied in part and granted in part. Leave to amend a pleading is freely granted. See CPLR 3025[b]; see also MBIA Ins. Corp. v. Greystone & Co., 74 A.D.3d 499 (1st Dept 2010). In determining a party's application for a leave to amend, the party must show that "the proffered amendment is not palpably insufficient or clearly devoid of merit." Fairport Cos., LLC v. Vella, 134 A.D.3d 645, 645 (1st Dept 2015). However, concern for the conservation of judicial resources warrants examination of the merit underlying a proposed cause of action. East Asiatic Co. v. Corash, 34 A.D.2d 432, 434 (1st Dept 1970); see also Mayers v. D'Agostino, 58 N.Y.2d 696, 698 (1982); Wieder v. Skala, 168 A.D.2d 355 (1st Dept 1990).

Where no cause of action is stated, leave to amend will be denied. Crimmins Contr. Co. v. City of New York, 74 N.Y.2d 166 (1989); Daniels v. Empire-Orr, Inc., 151 A.D.2d 370, 371 (1st Dept 1989). A motion to leave to amend a pleading is also properly denied where a party seeks to reassert a cause of action previously dismissed in an earlier action. Blum v. New York Stock Exchange, 298 A.D.2d 343, 345 (2d Dept 2002).

PSP's Motion to Amend the Breach of Contract Cause of Action

Public Sector Pension Investment Board's ("Plaintiff" or "PSP") motion for leave to amend its first cause of action for breach of contract against Saba Capital Management L.P. ("Saba") is granted. Under New York law, motions to amend a complaint are freely granted and are denied in limited circumstances such as when amendment is "palpably insufficient or clearly devoid of merit." Fairport, 134 A.D.3d at 645; CPLR 3025(b). Here, at this preliminary stage, Saba has not adequately shown that PSP's proposed amended complaint for breach of contract is insufficient or devoid of merit. Therefore, PSP's motion to amend the first cause of action for breach of contract is granted.

Breach of Fiduciary Duty

PSP's motion for leave to amend its second cause of action for breach of fiduciary duty against Saba is denied. "[W]hile causes of action for breach of

fiduciary duty that merely restate contract claims must be dismissed, conduct amounting to breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract which is nonetheless independent of such contract." Bullmore v Ernst & Young Cayman Is., 45 A.D.3d 461, 463 (1st Dept 2007) (internal citations omitted).

A breach of fiduciary duty claim is properly dismissed where "the agreement 'covers the precise subject matter of the alleged fiduciary duty.'" Celle v. Barclays Bank P.L.C., 48 A.D.3d 301, 302 (1st Dept 2008) quoting Pane v. Citibank, N.A., 19 A.D.3d 278, 279 (1st Dept 2005). However, when a party to a contract is also a fiduciary to the other party, it owes a duty outside the scope of the agreement which can support a claim of negligence arising from the same facts as a breach of contract claim. Sergeants Benev. Ass'n Annuity Fund v. Renck, 19 A.D.3d 107 (1st Dept 2005). A contracting party may be charged with a separate tort liability arising from a breach of duty distinct from, or in addition to, the breach of the contract. Meyers v. Waverly Fabrics, Div. of F. Schumacher & Co., 65 N.Y.2d 75 (1985).

"A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'" EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (2005), quoting Restatement [Second] of Torts § 874, Comment a). "Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than

normally present in the marketplace between those involved in arm's length business transactions" Id. "It is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect." Birnbaum v. Birnbaum, 73 N.Y.2d 461, 466 (1989).

The case at hand deals with a fairly unsettled area of the law, namely whether an investment manager, such as Saba, owes fiduciary duties to PSP, who is an investor in the hedge fund Saba manages, Saba Capital Offshore Fund Ltd. (the "Fund"). PSP's reliance on the ruling in Bullmore, in which the liquidators for the funds sued the investment manager of related hedge funds for violation of fiduciary duties owed to those funds, is misguided in that the First Department has subsequently held Bullmore to be limited to the facts of that case. Bullmore "does not stand for the proposition that a manager for an entity like a hedge fund...has any duties to the individual investors in the funds it manages." Cobalt Partners, L.P. v. GSC Capital Corp., 97 A.D.3d 35, 43 (1st Dept 2012).

This court also finds the holding in Goldstein v. S.E.C., 451 F.3d 873, 881 (D.C. Cir. 2006), regarding the possibility of an investment manager owing a duty to both the fund and investors, persuasive. Although the court focuses on the SEC's regulation of hedge funds under the Investment Advisers Act of 1940, the court discusses whether investors of a fund are owed a duty by the investment advisers of the fund,

> If the investors are owed a fiduciary duty and the entity is also owed a fiduciary duty, then the adviser will inevitably face conflicts of interest. Consider an investment adviser to a hedge fund that is about to go bankrupt. His advice to the fund will likely include any and all measures to remain solvent. His advice to an investor in the fund, however, would likely be to sell...It simply cannot be the case that investment advisers are the servants of two masters in this way.

Id.; see also Barneli & Cie S.A. v. Dutch Book Funds, SPC, Ltd., 28 Misc. 3d 1232(A), at *6 (Sup. Ct. N.Y. Cnty. May 29, 2012).

However, Goldstein does not "create a categorical rule that hedge fund advisers can never have fiduciary duties to their individual investors." Goldenson v. Steffens, 802 F.Supp.2d 240, 267 (D. Me. 2011); see also United States v. Lay, 612 F.3d 440 (6th Cir. 2010). Rather the court must engage in a fact-specific inquiry as to whether a fiduciary relationship exists. See Goldenson, 802 F.Supp.2d at 268. In making this determination, the court should weigh the following,

> [A] client of an investment adviser typically is provided with individualized advice that is based on the client's financial situation and investment objectives. In contrast, the investment adviser of an investment company need not consider the individual needs of the company's shareholders when making investment decisions, and thus has no obligation to ensure that each security purchased for the company's portfolio is an appropriate investment for each shareholder.

Goldstein, 451 F.3d at 880.

This court has already engaged in the task of undergoing a factual analysis regarding whether there is a fiduciary duty owed PSP, and has determined that there is no fiduciary duty owed. See Pub. Sector Pension Inv. Bd. v. Saba Capital Mgmt.,

L.P., 2016 WL 2869747 (Sup. Ct. N.Y. Cnty. May 16, 2016). As this court has previously stated, Saba did not undertake any further duties when it allegedly made oral agreements to work with PSP to ensure that PSP would receive fair value for its Fund shares. This is expressly because the terms of the side letter agreement, dated February 29, 2012 (the "Side Letter"), controlled any oral agreements. See Side Letter at 17 ("any inconsistency between the terms of this letter agreement and the terms of any other document or agreement relating to investment in the Fund....shall be controlled by this letter agreement....[t]his letter agreement may be amended only in writing.").

Furthermore, PSP's argument that this court has held that Saba conceded it owed a fiduciary duty to PSP is without merit. See Supplemental Memo. of Law in Support, at *3. This court did hold in Pub. Sector Pension Inv. Bd. v. Saba Capital Mgmt., L.P., 2016 N.Y. Slip Op. 30215(U), at *6 that Saba "has conceded it owed a fiduciary duty to PSP...and the affirmative representation illuminates the scope of that duty." However, this finding was based on what was then, an incomplete record. Namely, Saba had not yet introduced the Side Letter into the record. The Side Letter fundamentally changed this court's analysis. See *supra*.

Similarly, PSP's reliance on the Southern District's ruling in Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC, 376 F.Supp.2d 385 (S.D.N.Y. 2005), is unpersuasive. The case involved three hedge funds, which were all eventually

managed by a feeder fund. Id. at 390. The case revolved around the loss of value in the net asset values. PSP is correct that the court held that the advisors had a fiduciary duty to the shareholders. Id. at 411. However, this ruling is conclusory in nature, and is only mentioned by the court in passing and without any further elucidation. This court finds the reasoning in Goldstein far more persuasive, particularly when read in conjunction with Cobalt Partners, which tempers the seemingly expansive reading of Bullmore that an investment manager owes any duties to the individual investors in the fund.

Therefore, this court finds that Saba does not owe any fiduciary duties to PSP.

Aiding and Abetting Breach of Fiduciary Duty Claim Against Mr. Weinstein

PSP's third amended cause of action for aiding and abetting a breach of fiduciary duty is also denied. It is axiomatic that a party may not bring a claim for aiding and abetting a breach of fiduciary duty where there is no breach of a fiduciary duty. See OFSI Fund II, LLC v. Canadian Imperial Bank of Commerce, 82 A.D.3d 537, 540 (1st Dept 2011) ("as there is no breach of fiduciary duty claim, there can be no claim for aiding and abetting breach of fiduciary duty."); Fiala v. Metropolitan Life Ins. Co., 6 A.D.3d 320, 323 (1st Dept 2004) ("because the Fiala plaintiffs' primary claims for breach of fiduciary duty were properly dismissed, their claim...for aiding and abetting a breach of fiduciary duty cannot stand.") Since this court finds that there is no claim for a breach of fiduciary duty against Saba, there

can likewise be no cause of action for aiding and abetting a breach of fiduciary duty against Mr. Weinstein.

Accordingly, it is

ORDERED that PSP's motion for reargument is denied; and it is further

ORDERED that PSP's motion to amend the first cause of action for breach of contract is granted; and it is further

ORDERED that PSP's motion to amend the second cause of action for breach of fiduciary duty is denied; and it is further

ORDERED that PSP's motion to amend the third cause of action for aiding and abetting a breach of fiduciary duty is denied.

Date: November 22, 2016
New York, New York

Anil C. Singh