

---

---

**Supreme Court of the State of New York**  
**Appellate Division – Second Department**

---

---

**Docket No.:**  
**2023-04614**

JAMES SCHIANO,

*Plaintiff,*

- against -

PETER HARSANYI, individually as fiduciary of SYSTEMS VEND  
MANAGEMENT CORP., VENDING SERVICE.COM, INC.  
and CWS VENDING, INC.,

*Defendants.*

*(See inside cover for continuation of caption)*

---

---

**BRIEF FOR THIRD-PARTY PLAINTIFF-APPELLANT**

---

---

HEITZ LEGAL, P.C.  
43 West 43<sup>rd</sup> Street, Suite 214  
New York, New York 10036  
(212) 804-5706  
dana@heitzlegal.com

*Appellate Counsel to:*

MICHAEL A. MARKOWITZ, P.C.  
1553 Broadway  
Hewlett, New York 11557  
(516) 295-9061  
attorney@mampc.net

*Attorneys for Third-Party Plaintiff-Appellant*

---

---

**Nassau County Clerk's Index No.: 603964/2022**

---

---

APPELLATE INNOVATIONS  
(914) 948-2240



---

SYSTEMS VEND MANAGEMENT CORP.,

*Third-Party Plaintiff-Appellant,*

- against -

JAMES SCHIANO,

*Third-Party Defendant,*

- and -

JOSEPHINE J. CASTRO,

*Third-Party Defendant-Respondent.*

---

## TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES</b> .....	iii
<b>PRELIMINARY STATEMENT</b> .....	1
<b>QUESTIONS PRESENTED</b> .....	3
<b>STATEMENT OF FACTS</b> .....	4
<i>Defendant/Third-Party-Plaintiff's Business Practices</i> .....	4
<i>The Third-Party Defendants' Scheme of Fraud</i> .....	6
<i>Third-Party Defendant/Respondent's Relationship to Defendant/Third-Party Plaintiff/Appellant</i> .....	8
<b>PROCEDURAL HISTORY</b> .....	10
<b>ARGUMENT</b> .....	13
Point I. THIRD-PARTY PLAINTIFF ADEQUATELY ALLEGED EXISTENCE OF A FIDUCIARY DUTY, BASED ON ALLEGATIONS OF A CONFIDENTIAL AND FIDUCIARY RELATIONSHIP OF TRUST WITH THE THIRD-PARTY DEFENDANT.....	14
Point II. APPLYING COURT OF APPEALS JURISPRUDENCE, THIRD-PARTY DEFENDANT ADEQUATELY ALLEGED A CLAIM FOR AIDING AND ABETTING FRAUD.....	19
A. Third-Party Plaintiff Pleaded the Prima Facie Elements of the Claim....	19
<i>Existence of Underlying Fraud</i> .....	19
<i>Substantial Assistance</i> .....	19
<i>Particularity of Claim of Actual Knowledge</i> .....	21

B. Any Purported Inconsistency of the Allegations Is Irrelevant.....26

Point III.

THE THIRD-PARTY COMPLAINT MET THE SPECIFIC  
PLEADING REQUIREMENTS FOR A CLAIM FOR  
BREACH OF FIDUCIARY DUTY.....26

CONCLUSION.....30

PRINTING SPECIFICATIONS STATEMENT.....31

## TABLE OF AUTHORITIES

### *Cases*

<i>AIG Fin. Prods. Corp. v. ICP Asset Mgmt., LLC</i> , 108 A.D.3d 444, 969 N.Y.S.2d 449 (1st Dept. 2013).....	23
<i>Black v. Chittenden</i> , 69 N.Y.2d 665, 511 N.Y.S.2d 833 (1986).....	30
<i>Caravello v. One Mgmt. Grp., LLC</i> , 131 A.D.3d 1191, 17 N.Y.S.3d 453 (2nd Dept. 2015).....	24
<i>CPC Int’l Inc. v. McKesson Corp.</i> , 70 N.Y.2d 268, 519 N.Y.S.2d 804 (1987).....	13
<i>EBC I, Inc. v. Goldman, Sachs &amp; Co.</i> , 5 N.Y.3d 11, 799 N.Y.S.2d 170 (2005).....	16
<i>Eurycleia Partners, LP v. Seward &amp; Kissel, LLP</i> , 12 N.Y.3d 553, 883 N.Y.S.2d 147 (2009).....	17, 24
<i>Fox Paine &amp; Co., LLC v. Hous. Cas. Co.</i> , 153 A.D.3d 673, 60 N.Y.S.3d 294 (2nd Dept. 2017).....	17
<i>Goel v. Ramachandran</i> , 111 A.D.3d 783 (2nd Dept. 2013).....	22, 25
<i>Goldson v. Walker</i> , 65 A.D.3d 1084, 885 N.Y.S.2d 133 (2nd Dept. 2009).....	24
<i>Hartshorne v. Roman Cath. Diocese of Albany</i> , 200 A.D.3d 1427 (3rd Dept. 2021).....	13, 15
<i>Lanzi v. Brooks</i> , 43 N.Y.2d 778, 402 N.Y.S.2d 384 (1977).....	25
<i>Leon v. Martinez</i> , 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994).....	13, 26
<i>Markowits v. Friedman</i> , 144 A.D.3d 993, 42 N.Y.S.3d 218 (2nd Dept. 2016).....	19, 20
<i>Moskowitz v. Masliansky</i> , 198 A.D.3d 637 (2nd Dept. 2021).....	13
<i>N.Y. Workers’ Comp. Bd. v. Wang</i> , 147 A.D.3d 104,, 46 N.Y.S.3d 230 (3rd Dept. 2017).....	23

<i>Oster v. Kirschner</i> , 77 A.D.3d 51, 905 N.Y.S.2d 69 (1st Dept. 2010).....	23, 25
<i>Pludeman v. N. Leasing Sys., Inc.</i> , 10 N.Y.3d 486, 860 N.Y.S.2d 422 (2008).....	29
<i>Rizel v. Bodner</i> , 225 A.D.2d 410, 640 N.Y.S.2d 19 (1st Dept. 1996).....	24
<i>Roni LLC v. Arfa</i> , 18 N.Y.3d 846, 939 N.Y.S.2d 746 (2011).....	17
<i>Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman &amp; Dicker, LLP</i> , 38 A.D.3d 34, 827 N.Y.S.2d 231 (2nd Dept. 2006).....	14
<i>Solomon Capital, LLC v. Lion Biotechnologies, Inc.</i> , 171 A.D.3d 467, 98 N.Y.S.3d 26 (1st Dept. 2019).....	30
<i>Torrance Constr., Inc. v. Jaques</i> , 127 A.D.3d 1261, 8 N.Y.S.3d 441 (3rd Dept. 2015).....	18, 28
<i>US Fire Ins. Co. v. Raia</i> , 94 A.D.3d 749 (2nd Dept. 2012).....	27
<i>William Doyle Galleries, Inc. v. Stettner</i> , 167 A.D.3d 501, 91 N.Y.S.3d 13 (1st Dept. 2018).....	21, 24

**Statutes**

CPLR 3016(b).....	24, 25, 27, 28, 29
CPLR 3211(a)(7).....	11, 13, 14, 15, 26
CPLR 3212.....	11

## PRELIMINARY STATEMENT

This case arose when an office manager swindled his employer, a vending machine company. When this office manager tallied revenue from the company's vending machines to deposit back into the company, he deliberately failed to account for it as "revenue"—instead, he miscategorized it as personal loans or capital contributions, for which he later requested reimbursement. The office manager operated this fraud for years, thanks to cooperation, aiding, and abetting by the company's bookkeeper.

Relying on his prior fraudulent actions, the office manager commenced an action demanding judgment declaring that he is a joint owner of the vending machine company and multiple other companies. In response, the defendant vending machine company filed a third-party complaint against the bookkeeper and office manager detailing their fraud and breach of fiduciary duty.

Before discovery, the court granted the bookkeeper's motion to dismiss the claims against her for aiding and abetting fraud and for breach of fiduciary duty.

This was error. At this pre-discovery stage, the court's application of the particularity requirement was overly rigid, and overlooked the fact-

specific nature of these claims which the allegations addressed. As argued below, this outcome should be reversed.



## QUESTIONS PRESENTED

**Q1.** On a claim for aiding and abetting fraud, the knowledge element may be properly alleged by facts which, in light of the surrounding circumstances, permit a reasonable inference of knowledge of, or participation in, the fraudulent scheme. Where the third-party complaint alleges facts which allowed such an inference, did the motion court err in holding that the complaint failed to state a claim for aiding and abetting the fraud?

**A1.** Yes.

**Q2.** A fiduciary duty arises from a relationship of trust, and depends not on a formalized agreement but rather upon the parties' actual relationship. Where the third-party complaint alleges collaboration in controlling finances, extensive financial oversight, exercise of discretion in financial decision-making, access to secured materials, and the ability to withdraw funds, did the motion court err in holding that the complaint failed to state a claim for breach of a fiduciary duty?

**A2.** Yes.

## STATEMENT OF FACTS

### *Defendant/Third-Party-Plaintiff's Business Practices*

This case arises from allegations of mismanagement, fraud, and embezzlement related to the management and operation of a company which owned and operated vending machines.<sup>1</sup> As discovery has not yet commenced, this Statement of Facts is based on allegations contained in the parties' pleadings, which for purposes of deciding a motion to dismiss must be taken as true (see Argument, below).

Defendant/Third-Party Plaintiff Systems Vend Management Corp. ("Systems Vend") laid out its allegations as follows.

Systems Vend is owned solely by defendant Peter Harsanyi ("Harsanyi") (R.21). It operates a vending machine business (R.21).

Systems Vend's cash payments were regularly collected from its vending machines at various locations by a Systems Vend employee (the "Route Employee") (R.21). This employee would also restock the machines and write down on a meter card each machine's internal calculation of items sold (R.21). The Route Employee would deliver a box containing the cash and meter card to another employee, who would tally and secure the money (the "Counter") (R.21). The Counter would then deliver the meter

---

<sup>1</sup> Note that these facts also gave rise to a lawsuit filed on or about August 6, 2021, by Systems Vend against Schiano. This case is currently pending in the Supreme Court, Nassau County, under Index No. 610088/2021.

card to a "Data Entry Employee," who entered the meter card's information into a computer software system (R.21). The Counter would also deliver final numbers to System Vend's bookkeeper (the "Bookkeeper"), who would account and record the income, and who reported to Systems Vend's owner, office manager and/or accountant (R.22).

This system, which featured cross-checks between employees working independently, imposed a series of checks and balances to deter theft of money or merchandise from Systems Vend (R.22).

In or about 2010, Systems Vend hired James Schiano as an employee (R.22). Schiano began as a part-time worker and, after earning the trust of owner Harsanyi, was eventually promoted to Systems Vend's full-time office manager (R.22). Schiano's responsibilities in this role included general accounting duties and overseeing Systems Vend employees (R.22). Harsanyi heavily trusted and relied on Schiano's management and operation of Systems Vend (R.22).

When Systems Vend needed a bookkeeper in or about 2012, it hired Third-Party Defendant Castro upon Schiano's recommendation and advice (R.23). Castro held herself out to Systems Vend as being knowledgeable, skilled, and qualified to act as the Bookkeeper (R.23). As Bookkeeper

Castro's duties included accounting for receivables and payables, paying bills, helping with bids, maintaining accounting computer programs, and reporting information to the accountant (R.23). Castro had much discretion in her execution of these duties, scheduling her own hours and choosing her own system of record maintenance—one neither controlled nor held by Systems Vend—and Harsanyi depended on her work and performance (R.23).

### *The Third-Party Defendants' Scheme of Fraud*

Systems Vend's complaint against Castro further alleges that sometime after Castro was hired, Schiano devised a fraudulent plan and scheme to allow him to steal money and claim equity ownership of Systems Vend (R.23). Schiano had a close working relationship with Castro, both inside and outside Systems Vend's office, and his fraudulent plan and scheme relied on Castro (R.23).

Specifically, the money which customers deposited in the vending machines, which the Route Employee collected and delivered to the Counter, was generally in the form of single dollar bills (R.23). Schiano demanded that he be the only person to act in the role of Counter and that he receive and tally all the incoming cash in a private room, with no other

individual present (R.23).

Under the pretext of needing the single bills converted into larger currency (e.g., \$20s, \$50s, \$100s), Schiano removed cash from the office without first submitting his tally to the Bookkeeper—Castro—as standard procedures required (R.24).

Castro allowed this to happen (R.24). She allowed Schiano to remove the cash from Systems Vend's office without submitting a report for the money he had tallied (R.24). Castro—whose job it was "to verify all funds" (R.129-130)—did not question this practice (R.24).

Schiano would ultimately furnish the cash from Systems Vend's revenue to Castro, but before doing so he would commingle the revenue with his own money, or would keep some of the revenue, before finally delivering these funds to Castro (R.24). He would also falsely report to Castro that cash delivered was not profits but rather loans or capital contributions made by Schiano to Systems Vend (R.24). Castro used Schiano's reports, which she knew to be false, to enter deceptive accounting in her books and records indicating that Schiano's cash was loans or capital contributions made to Systems Vend (R.24). Castro then purposefully withheld her internal records from Harsanyi and from Systems Vend's accountant (R.24). This allowed Schiano's fraudulent

scheme to continue for years, until March 2021 when Schiano's employment was terminated (R.25).

After Schiano's termination, Castro refused to deliver Systems Vend's business records to the company despite due demand (R.25). When questioned about Schiano and alleged cash loans or capital contributions, Castro removed computer files concerning Systems Vend's business, deleted emails, and quit as Systems Vend's Bookkeeper (R.25).

*Third-Party Defendant/Respondent's Relationship to Defendant/Third-Party Plaintiff/Appellant*

Schiano testified in a parallel proceeding (see note 1 above) that Castro's job entailed "everything. She would be in charge of receivables, payables and payroll" (R.126). She had "collaborative" input in discussions of company finances (R.127). She was one of five individuals with access to financial information kept in a specific office in the building, "which is a secure location with limited access" (R.147). She was "present with every single interaction when [Schiano] would bring money into the building, because her job was to verify all funds" (R.129-130). Schiano testified that Castro "takes the money that comes in and she breaks the egg, so to speak, and divides it between the companies that need the funds" (R.132-133). Besides being a "bookkeeper for all of the companies" (R.98), Castro was a

"signer" on various company bank accounts, giving her the ability to withdraw funds (R.90, 98). Schiano testified that, of numerous companies he purported to own with Harsanyi, "[Castro] handles all the fiduciary responsibilities to all of these companies. There's not one that she doesn't" (R.134).

## PROCEDURAL HISTORY

On March 29, 2022, plaintiff Schiano filed this case against defendants Harsanyi, whom Schiano identified as a fiduciary and as his business partner (R.43-45), and corporations Systems Vend, Vending Service.com Inc., and CWS Vending, Inc. (R.39-54).

Schiano alleges that he and Harsanyi "agreed that they would thereafter be equal partners in the Companies and the business was effectively run that way ... until Harsanyi breached this agreement" (R.44), "unilaterally seiz[ing] full control of the operations of the Companies by ousting Schiano from the corporate office" (R.46). The relief which Plaintiff Schiano seeks includes an accounting, distribution of assets, constructive trust, and declaratory relief (R.41).

Harsanyi answered the complaint individually and on behalf of the defendant corporations (R.55-61).

Defendant/Third-Party Plaintiff/Appellant Systems Vend then filed a third-party complaint against its former office manager Schiano and against its former bookkeeper, Third-Party Defendant/Respondent Castro (R.20).

On May 16, 2022, Systems Vend filed a third-party summons and complaint (R.19-29) seeking damages against Schiano and Castro for,



among other things, fraud by embezzlement of company money and breach of fiduciary duty.

Schiano answered the third-party complaint (R.30-38). Castro did not. Instead, she filed a pre-answer motion under CPLR 3211 to dismiss the second cause of action (for aiding and abetting fraud) and the fourth cause of action (for breach of fiduciary duty). She also moved for summary judgment under CPLR 3212 (R.13-14).

Castro acknowledged that her "motion [was] based entirely on facts alleged in the Third-Party Complaint" (R.16). In support of her motion, she relied on a series of facts to dispute the merits of the Third-Party Complaint (R.17-18).

In opposition to Castro's motion, Systems Vend's opposition noted that Castro's pre-answer motion for summary judgment was premature (R.64) and that, since the third-party complaint is to be afforded a liberal construction, with facts alleged assumed to be true, Systems Vend set forth proper causes of action for aiding and abetting a fraud and for breach of fiduciary duty (R.64).

Castro had no response to these points in opposition, other than to agree that the branch of her motion seeking summary judgment was untimely and to withdraw that branch of her motion (R.175-176).

In an order dated March 14, 2023 and entered on March 17, 2023 (the "Order"), the Supreme Court, Nassau County (Hon. Conrad D. Singer, J.S.C.) granted Castro's motion to dismiss (R.6-12).

As to the second cause of action (aiding and abetting fraud), the Order held that the allegations in the Third-Party Complaint as to Castro's alleged knowledge of Schiano's alleged fraudulent scheme lacked the particularity required for an "aiding and abetting fraud" cause of action (R.10). According to the Order, this outcome was also required by "contradictions between the allegations concerning Schiano's scheme and Castro's alleged knowledge of Schiano's scheme"—specifically allegations both that Schiano insisted on being alone while counting cash and that Castro acted with knowledge of Schiano's fraud (R.10-11).

As to the fourth cause of action (breach of fiduciary duty), the Order held that "the conclusory allegations contained in the Third-Party Complaint ... are conclusory and insufficient to assert a claim for breach of fiduciary duty as against Castro" (R.11).

For the reasons described below, the Order erred on each of these conclusions, and should be reversed.

## ARGUMENT

The motion underlying the Order sought relief under 3211(a)(7). This statute provides that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ... the pleading fails to state a cause of action."

Such a motion requires that the pleading be construed liberally, that the facts as alleged in the complaint be accepted as true, that the plaintiff be afforded every possible favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 974 (1994). The sole question is "whether the facts as alleged fit within any cognizable legal theory," *id.* To make this determination, a court may rely on affidavits or other extrinsic proof to remedy inadequacies in the complaint, because "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one," *Hartshorne v. Roman Cath. Diocese of Albany*, 200 A.D.3d 1427 (3rd Dept. 2021); *accord Moskowitz v. Masliansky*, 198 A.D.3d 637, 639 (2nd Dept. 2021). Such a motion thus requires "[a]pplying the rule that ... "the allegations of a complaint, supplemented by a plaintiff's additional submissions, if any, must be given their most favorable intendment." *CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 284-85, 519 N.Y.S.2d 804, 812 (1987).

A motion to dismiss "will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss," *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38, 827 N.Y.S.2d 231, 234 (2nd Dept. 2006) (citations omitted).

### **Point I.**

#### **THIRD-PARTY PLAINTIFF ADEQUATELY ALLEGED EXISTENCE OF A FIDUCIARY DUTY, BASED ON ALLEGATIONS OF A CONFIDENTIAL AND FIDUCIARY RELATIONSHIP OF TRUST WITH THE THIRD-PARTY DEFENDANT.**

Castro's fiduciary duty is a common element of both claims at issue. A fiduciary duty is a prima facie element of breach of such a duty (as discussed at Point III below) and it also determines the nature of the "substantial assistance" necessary to allege a claim of aiding and abetting fraud—i.e., whether an affirmative act is necessary or whether inaction alone will suffice. (As Point II shows below, the allegations in this case include both types of action.)

As to both claims, and contrary to the outcome of the Order, the element of fiduciary duty is satisfied.

Specifically, the Third-Party Complaint alleges that

Castro, as Systems Vend's Bookkeeper, had a fiduciary duty of loyalty, to not act in any manner inconsistent with her agency or trust, is bound to act at all times in good faith and loyalty in the performance of her duties, and is required to make truthful and complete disclosures to Systems Vend.

(R.27).

Besides this specific allegation, the sworn deposition testimony of Plaintiff/Third-Party Defendant Schiano, taken in a parallel action, includes facts which demonstrate the fiduciary relationship alleged.<sup>2</sup>

Schiano testified that, of numerous companies he purported to own with Harsanyi, "[Castro] handles all the fiduciary responsibilities to all of these companies. There's not one that she doesn't" (R.134).

Castro's job entailed "everything. She would be in charge of receivables, payables and payroll" (R.126, 129). She had daily, "collaborative" input in discussions of company finances (R.127). She was one of five individuals with access to financial information kept in a specific office in the building, "which is a secure location with limited

---

<sup>2</sup> The Court may consider affidavits and other proof submitted in opposition to a CPLR 3211(a)(7) motion, because the inquiry is whether the motion's opponent has a cause of action, not whether the opponent has stated one. *Hartshorne, supra*.

access" (R.147). She was "present with every single interaction when [Schiano] would bring money into the building, because her job was to verify all funds" (R.129-130).

Schiano testified that Castro "takes the money that comes in and she breaks the egg, so to speak, and divides it between the companies that need the funds" (R.132-133). Castro had discretion in her execution of these duties, scheduling her own hours and choosing her own system of record maintenance—one neither controlled nor held by Systems Vend—and Harsanyi depended on her work and performance (R.23).

Besides being a "bookkeeper for all of the companies" (R.98), Castro was a "signer" on various company bank accounts, giving her the ability to withdraw funds (R.90, 98)—even though Harsanyi did not remember putting her on the account (R.98).

The evidence supporting a fiduciary duty must, of course, be expanded in discovery and weighed at trial. But on this fact-specific inquiry, these allegations at least claim a fiduciary duty such that they can survive a motion to dismiss. *See EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170 (2005) ("Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss"). On this point, New York case law is clear.

The Court of Appeals explains that a "fiduciary relationship arises 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. Put differently, a fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other. Ascertaining the existence of such a relationship inevitably requires a fact-specific inquiry." *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 561, 883 N.Y.S.2d 147, 151 (2009) (cleaned up); *accord Roni LLC v. Arfa*, 18 N.Y.3d 846, 939 N.Y.S.2d 746 (2011).

This Court has elaborated: "While courts generally look to the parties' contractual agreement to discover the nature of their relationship, the existence of a fiduciary relationship is not dependent solely upon an agreement or contractual relation. Rather, the actual relationship between the parties determines the existence of a fiduciary duty." *Fox Paine & Co., LLC v. Hous. Cas. Co.*, 153 A.D.3d 673, 676, 60 N.Y.S.3d 294, 297 (2nd Dept. 2017).

*Fox Paine* found error in dismissing a claim for breach of fiduciary duty for failure to allege such a duty, because the complaint "alleged the existence of a special relationship which gave rise to a fiduciary duty on behalf of [defendant] to the plaintiffs and a breach of that duty." The trust

and discretion related to Castro's role show such a special relationship here—as does Schiano's specific acknowledgment that Castro "handles all the fiduciary responsibilities to all of these companies" (R.134).

The relationship between a bookkeeper and employer gave rise to allegations a fiduciary duty in *Torrance Constr., Inc. v. Jaques*, 127 A.D.3d 1261, 1264, 8 N.Y.S.3d 441, 445 (3rd Dept. 2015), where the defendant "was plaintiff's sole bookkeeper and had authorization to write checks on at least one business account," *id.* at 1264. This "put[] him in a confidential and fiduciary relationship of trust with plaintiff," *id.* This also mirrors Castro's position as bookkeeper here (R.23), her access to at least one business account here (R.98), and the companies' trust in and dependence upon her here (R.23).

Contrary to the outcome under the Order, then, the allegations here went beyond a mere contention that "employees owe a duty of loyalty and good faith to their employer in the performance of their duties" (R.11). They pleaded a fiduciary duty, which underlies the claims against Castro.



## Point II.

### APPLYING COURT OF APPEALS JURISPRUDENCE, THIRD-PARTY DEFENDANT ADEQUATELY ALLEGED A CLAIM FOR AIDING AND ABETTING FRAUD.

#### A. Third-Party Plaintiff Pleaded the Prima Facie Elements of the Claim.

The elements of a claim for aiding and abetting fraud are "the existence of an underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud" (R.10) (citing *Markowits v. Friedman*, 144 A.D.3d 993, 996 [2nd Dept. 2016]). Each of these elements was sufficiently pleaded here.

#### *Existence of Underlying Fraud*

The Order recognized that the Third-Party Complaint adequately alleged an underlying fraud (R.10). As the Third-Party Plaintiff is not aggrieved by this part of the Order, we do not address it further.

#### *Substantial Assistance*

"Substantial assistance," as the Order recognized (R.10), "requires an affirmative act on the defendant's part. The mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant

owes a fiduciary duty directly to the plaintiff." *Markowitz*, 144 A.D.3d at 996 (cleaned up).

Having concluded that Castro's knowledge of the fraud was insufficiently pleaded, the Order never reached the "substantial assistance" analysis. Yet a review of the Third-Party Complaint shows that this element was properly alleged. It alleged that "Schiano would not have successfully embezzled money and then fraudulently claim that cash delivered to Systems Vend were loans or a capital contribution without the help and reliance on Castro." (R.26).

Further allegations as to Castro's "substantial assistance" included the following acts:

- Intentionally allowing Schiano to remove cash from the office without first receiving a report (R.24, ¶31).
- Knowingly making false entries in her books and records and fraudulently representing that Schiano's cash (which was in fact revenue from the vending machines) was loans or capital contributions made to Systems Vend (R.24, ¶33).
- Purposefully withholding her internal records from Harsanyi and Systems Vend's accountant despite demand to produce them (R.24, ¶34).

Two of these acts—making false entries and withholding internal records—are affirmative acts on Castro's part.

And Castro's inaction—that she intentionally allowed Schiano to

remove cash unreported—also constitutes substantial assistance, insofar as Point I above shows that Castro owed Systems Vend a fiduciary duty.

Systems Vend has alleged that, financially speaking, nothing happened at the company but that it went through Castro. Castro was in charge of "everything" (R.126). She was a "signer" on company bank accounts and handled "all the fiduciary responsibilities" among numerous companies (R.98, 134).

Without Castro, Schiano's fraud would not have been possible. It was her involvement that "allow[ed] Schiano's fraudulent scheme to continue for years" (R.24, ¶ 34). *William Doyle Galleries, Inc. v. Stettner*, 167 A.D.3d 501, 504-05, 91 N.Y.S.3d 13, 18 (1st Dept. 2018) (plaintiff alleged substantial assistance in claiming that "but for" defendants' verbal assurances, fraudster's scheme would have failed).

### ***Particularity of Claim of Actual Knowledge***

The Third-Party Complaint alleged that, "[w]hile employed as Systems Vend's Bookkeeper, Castro knew that Schiano was converting company money, knew that cash received was not a loan to the business, and intentionally withheld all information from Systems Vend despite due demand for same." (R.26).

The Order found that these allegations were not particular enough. But the very case it cited for this requirement, *Goel v. Ramachandran*, 111 A.D.3d 783, 792 (2nd Dept. 2013), recognizes that the need for particularity "may be met when the material facts alleged in the complaint, in light of the surrounding circumstances, 'are sufficient to permit a reasonable inference of the alleged conduct' including the adverse party's knowledge of, or participation in, the fraudulent scheme." *Id.* at 792-93.

The Order did not account for this, but the allegations here did demonstrate such an inference. Here is how.

Castro knowingly made false entries into Systems Vend's account books and records based upon Schiano's false reports (R.24, ¶ 33).

Castro's duties as bookkeeper required accounting for cash received, paying bills, and reporting information to the company's accountant (R.23, ¶ 23).

Castro had "collaborative" input in discussions of company finances (R.127).

Castro was one of five who had access to secure financial information (R.147).

Castro was "present with every single interaction when [Schiano] would bring money into the building, because her job was to verify all

funds" (R.129-130).

Castro "handle[d] all the fiduciary responsibilities" (R.134).

These activities comprise the circumstances surrounding her co-defendant's fraudulent conduct. And these surrounding circumstances provide a basis to discern Castro's knowledge of the fraud. *Oster v.*

*Kirschner*, 77 A.D.3d 51, 905 N.Y.S.2d 69 (1st Dept. 2010).

Contrary to the Order's conclusion, this is enough. Numerous cases make this clear.

For example, the proposed claim in *N.Y. Workers' Comp. Bd. v. Wang*, 147 A.D.3d 104, 120-21, 46 N.Y.S.3d 230, 243 (3rd Dept. 2017) adequately stated a cause of action against defendant owners and officers of an insurance claims administrator for aiding and abetting fraud. The claim in that case alleged "that these defendants knew of fraudulent acts" by the defendant insurance program administrator "and provided substantial assistance by permitting 'inherent conflicts of interest' and through their 'control over the claims administration process.'" *Id.* And here, Systems Vend has alleged that Castro knew of fraudulent acts in the same manner (besides providing substantial assistance, as discussed above, in a manner similar to that in *Wang*).

In *AIG Fin. Prods. Corp. v. ICP Asset Mgmt., LLC*, 108 A.D.3d 444, 446,

969 N.Y.S.2d 449, 451-52 (1st Dept. 2013), the "surrounding circumstances" alleged permitted a reasonable inference that the defendant actually knew of its co-defendant's alleged fraud, where the defendant was not merely a "passive beneficiary" of the largesse which flowed from the co-defendant fraudster's ill-gotten gains, but also that the defendant "willingly turned a blind eye to evidence" of the fraud. At the pleadings stage, this allegation was enough to state a claim for aiding and abetting fraud, "since to hold otherwise would be to endorse what is essentially a 'see no evil, hear no evil' approach," *id.* (internal citations / quotations omitted).

In *Caravello v. One Mgmt. Grp., LLC*, 131 A.D.3d 1191, 1193, 17 N.Y.S.3d 453, 454-55 (2nd Dept. 2015), this Court recognized that the complaint adequately stated causes of action for aiding and abetting fraud where the allegations "adequately informed" the defendant of the incidents at issue. *Id.* (citing *Eurycleia Partners, supra*, 12 N.Y.3d at 559); *see also William Doyle Galleries, Inc., supra*, 167 A.D.3d at 504; *Goldson v. Walker*, 65 A.D.3d 1084, 885 N.Y.S.2d 133 (2nd Dept. 2009); *Rizel v. Bodner*, 225 A.D.2d 410, 640 N.Y.S.2d 19 (1st Dept. 1996).

The particularity which 3016(b) requires is only "sufficient detail to clearly inform a defendant with respect to the incidents complained of." It "is not to be interpreted so strictly as to prevent an otherwise valid cause of

action in situations where it may be impossible to state in detail the circumstances constituting a fraud." *Lanzi v. Brooks*, 43 N.Y.2d 778, 780, 402 N.Y.S.2d 384, 384-85 (1977) (citations/quotations omitted). Thus, actual knowledge need only be pleaded generally because a plaintiff lacks access to the materials which would illuminate a defendant's state of mind—particularly before discovery. *Oster, supra*, 77 A.D.3d at 55-56. "Participants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud. ... [A]n intent to commit fraud is to be divined from surrounding circumstances." *Id.*

Again, even *Goel*, 111 A.D.3d 783, the Order's own authority (R.10), recognizes this. But the Order's analysis stopped short—it did not account for the holding in *Goel* that CPLR 3016's heightened pleading may be met where the circumstances surrounding the facts alleged in the complaint permit a reasonable inference of the adverse party's knowledge of or participation in the fraud. *Goel*, 111 A.D.3d at 792-93.

And when the *Goel* court held the complaint before it to be insufficient, it was not solely because it found the allegations of defendant's knowledge to be conclusory, but *also* because the facts alleged did not permit a reasonable inference of knowledge. And here, that is not the case, for the reasons described above.

## **B. Any Purported Inconsistency of the Allegations Is Irrelevant.**

Finally, the Order also held that allegations of Castro's "knowledge" are inconsistent with claims that Schiano "needed to be alone" while counting money. Yet research has revealed no controlling cases identifying "conflicting allegations" as a basis to dismiss a claim under 3211(a)(7). Indeed, such a holding would seem to conflict with the requirement that a court deciding such a motion must draw all reasonable inferences in the plaintiff's favor. *Leon, supra*, 84 N.Y.2d at 87.

### **Point III.**

#### **THE THIRD-PARTY COMPLAINT MET THE SPECIFIC PLEADING REQUIREMENTS FOR A CLAIM FOR BREACH OF FIDUCIARY DUTY.**

As to the fourth cause of action, for breach of fiduciary duty, the Order agreed with Systems Vend that "employees owe a duty of loyalty and good faith to their employer in the performance of their duties," (R.11), but held that, "[h]owever, the conclusory allegations contained in the Third-Party Complaint, even as augmented by Systems Vend's opposition papers and the EBT testimony from James Schiano, are conclusory and insufficient to assert a claim for breach of fiduciary duty as against Castro." (R.11).



This conclusion was in itself conclusory. It does not specify what element is lacking. Nor does not account for the full scope of the allegations on this claim. More fundamentally, it is incorrect.

On this claim the Order began by reciting its underlying elements: “[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct.” (R.11). It went on to recognize that “‘A breach of fiduciary duty cause of action must be pleaded with the particularity required by CPLR 3016 [b]’. (*US. Fire Ins. Co. v Raia*, 94 AD3d 749, 751 [2d Dept 2012] [citations omitted])” (R.11). CPLR 3016(b), in turn, requires that in causes of action based on fraud, “the circumstances constituting the wrong shall be stated in detail.”

But while correctly stating the law, the Order incorrectly applied it. Rather than consisting merely of “conclusory allegations” (R.11), the Third-Party Complaint sufficiently pleaded each element of breach of fiduciary duty.

As to the first element, Point I above describes how the Third-Party Complaint alleges the existence of a fiduciary duty—in this case, a confidential and fiduciary relationship of trust between bookkeeper and

employer. *See Torrance Constr., supra*, 127 A.D.3d at 1264.

As to the second element, the Third-Party Complaint also alleges misconduct by Castro. It alleges that, knowing that Schiano was converting company money and cash received was not a loan to the business, Castro intentionally acted against her employer's interests when she withheld information from Systems Vend and actively falsified information by delivering false reports, claiming that cash revenue was actually loans or capital contributions by Schiano to Systems Vend (R.24). It also alleges that Castro

violated her fiduciary duty to Systems Vend by, among other things, intentionally ... allowing Schiano to embezzle money, falsely reporting cash received as loans made by Schiano to Systems Vend, deceptively accounting embezzled cash as loans and capital contributions made by Schiano, removing and failing to deliver Systems Vend's business records, and withholding information from Systems Vend, both before and after being questioned by Harsanyi.

(R.27).

That such acts could not amount to misconduct is inconceivable. (The Memorandum of Law which Castro submitted on her motion is outside the Record, but notably, it never challenged this point.)

Even under the particularity requirements of CPLR 3016(b), these allegations make out a claim, because they put the third-party defendant

on notice of the incidents complained of. (Again, in her Memo. of Law Castro did not challenge this.)

The Court of Appeals is clear "that section 3016 (b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud. Thus, where concrete facts are peculiarly within the knowledge of the party charged with the fraud, it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings." *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 491-92, 860 N.Y.S.2d 422, 425 (2008) (cleaned up). After all, "[m]isrepresenters have not been known to keep elaborate diaries of their fraud for the use of the defrauded in court." *Id.* (citing Siegel, 2003 Supp Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR C3016:3, 2008 Pocket Part, at 17).

As to the final element, the Third-Party Complaint also alleges damages, i.e. that, "by reason of Castro's breach of fiduciary duty, Systems Vend has been damaged in a sum to be determined at trial" (R.27). While 3016(b) unquestionably requires specificity as to the alleged *conduct*, see *Pludeman*, 10 N.Y.3d at 492, it is "not necessary ... that the measure of damages be pleaded, so long as facts are alleged from which damages may

properly be inferred," *Black v. Chittenden*, 69 N.Y.2d 665, 668, 511 N.Y.S.2d 833, 835 (1986) (internal quotations omitted); *Solomon Capital, LLC v. Lion Biotechnologies, Inc.*, 171 A.D.3d 467, 469, 98 N.Y.S.3d 26, 29 (1st Dept. 2019).

The Third-Party Complaint properly alleged each element of a claim for breach of fiduciary duty.

### CONCLUSION

The Order failed to correctly apply the standard on a motion to dismiss and failed to consider the implications of the facts alleged for the claims pleaded.

For the reasons stated above, Defendant/Third-Party Plaintiff/ Appellant Systems Vend Management Corp. respectfully requests that this Court reverse the Order.

Dated: July 27, 2023



---

Dana E. Heitz