
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)

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

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SYSTEMS VEND MANAGEMENT CORP.,

Third-Party Plaintiff-Appellant,

- against -

JAMES SCHIANO,

Third-Party Defendant,

- and -

JOSEPHINE J. CASTRO,

Third-Party Defendant-Respondent.

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ARGUMENT IN REPLY

Point I.

THIRD-PARTY DEFENDANT-RESPONDENT'S BRIEF FAILS TO RESPOND TO FUNDAMENTAL ARGUMENTS.

Castro's Respondent's Brief correctly recognizes that the standard of review on a CPLR 3211(a)(7) motion to dismiss requires a court to accept the facts as alleged in the pleading as true, to accord the pleading party "every possible favorable inference," and to "determine only whether the facts as alleged fit within any cognizable legal theory" (Resp. Br. 5, quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]).

From there, her Brief is a series of failures to apply this standard.

Over and over, Castro relies on *evidentiary* arguments—on questions of fact—as measurements for the sufficiency of allegations. This leaves her unable to do her job of responding to Systems Vend's arguments.

For example, Castro argues that "it would not have been her place to question [Schiano], let alone 'allow' him to do anything; nor could she have known that his reports were false" (Resp. Br. 16). This is all well and good, *if* it is so. But *whether* it is so is a matter which evidence will determine.

Castro's contention that she "was not a fiduciary" (Resp. Br. 13) is the premise for her argument as to aiding and abetting fraud ("her silence

would not have been actionable absent a fiduciary obligation that she did not possess," Resp. Br. 11). But whether she had a fiduciary obligation will be determined by the evidence, not the pleadings.

Castro, though, would rather ignore the evidence which supplements the allegations here. *See CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 284-85, 519 N.Y.S.2d 804, 812 (1987) (recognizing that a court on a 3211[a][7] motion may consider additional submissions beyond the complaint). Not once does she acknowledge Schiano's statement 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, emphasis added). Nor does she offer any non-fiduciary explanation for her job duties requiring a special relationship of trust, described at App. Br. 15-16.

Castro is happy to discuss the convenient parts of her job description (Resp. Br. 14), and to assert that her title of bookkeeper means she could not be a fiduciary as a matter of law (Resp. Br. 14-15).¹ But Castro's *title* does not define her fiduciary status. What defines her fiduciary status is the company's special relationship to her of trust, which, again, Systems Vend

¹ Castro also reads into the law additional requirements, for example in faulting Systems Vend for not providing "factual information as to how Castro's purported fiduciary duty came about" (Resp. Br. 17). But she does not cite a case which requires factual allegations of an origin story before a claim of fiduciary duty will be recognized.

described at App. Br. 15-16.

Systems Vend also provided law allowing for a relationship of this nature to rise to a fiduciary one, at App. Br. 17-18.² One such case, *Fox Paine & Co., LLC v. Hous. Cas. Co.*, 153 A.D.3d 673, 676, 60 N.Y.S.3d 294, 297 (2nd Dept. 2017), recognizes that a fiduciary relationship cannot be determined based on "agreement or contractual relation" alone but rather depends on allegations of a special relationship of trust. The pleading at issue here involves such allegations.

Another such case, *Torrance Constr., Inc. v. Jaques*, 127 A.D.3d 1261, 1264, 8 N.Y.S.3d 441, 445 (3rd Dept. 2015), allowed allegations of a fiduciary duty to proceed against a bookkeeper. This is contrary to the categorical exception which Castro tries to claim (Resp. Br. 13, "Castro, as SVMC's bookkeeper, was not a fiduciary.")

The Respondent's Brief does not distinguish this law.

Castro reiterates the heightened pleading standard underlying claims for a breach of fiduciary duty (Resp. Br. 17). What she doesn't do is explain how, under this Court's elucidation of the particularity standard discussed at App. Br. 24-25, the allegations lacked the "sufficient detail" needed "to

² The cases discussed here were *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 883 N.Y.S.2d 147 (2009); *Roni LLC v. Arfa*, 18 N.Y.3d 846, 939 N.Y.S.2d 746 (2011); *Fox Paine & Co., LLC v. Hous. Cas. Co.*, 153 A.D.3d 673, 60 N.Y.S.3d 294 (2nd Dept. 2017); *Torrance Constr., Inc. v. Jaques*, 127 A.D.3d 1261, 8 N.Y.S.3d 441 (3rd Dept. 2015).

clearly inform [her] with respect to the incidents complained of." *Lanzi v. Brooks*, 43 N.Y.2d 778, 780, 402 N.Y.S.2d 384, 384-85 (1977); *Caravello v. One Mgmt. Grp., LLC*, 131 A.D.3d 1191, 1193, 17 N.Y.S.3d 453, 454-55 (2nd Dept. 2015). Castro, as the party charged with fraud, has specific knowledge of the facts at issue this case. Because "any pleading deficiency might be cured later in the proceedings," it would work an injustice to affirm the dismissal of this claim at this early stage. *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 491-92, 860 N.Y.S.2d 422, 425 (2008).

The Respondent's Brief does not address this argument.

It's also silent on two further central points. As to Castro's actual knowledge of Schiano's fraudulent conduct, Systems Vend explained (at App. Br. 22-25) that "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." *Goel v. Ramachandran*, 111 A.D.3d 783, 792-93 (2nd Dept. 2013); *see N.Y. Workers' Comp. Bd. v. Wang*, 147 A.D.3d 104, 120-21, 46 N.Y.S.3d 230, 243 (3rd Dept. 2017); *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).

Again, the Respondent's Brief doesn't discuss, let alone distinguish, a

single one of the cases on this point. Its only authority on this point at all comes from the Supreme Court (Resp. Br. 8-9).

As to whether an affirmative act is required for aiding and abetting fraud or whether an omission will suffice, here Castro falls short twice over. She never addresses the law that, *given her status as fiduciary*, an omission is already a sufficient basis for this claim (App. Br. 19-21). And she never addresses the fact that Systems Vend's allegations of "making false entries" (R.24) go beyond omission and constitute allegations of an affirmative act (App. Br. 20).

Although Castro filed a Respondent's Brief, she did not actually respond to these points.

Point II.

HAVING FAILED TO ESTABLISH THAT A FIDUCIARY DUTY WAS INADEQUATELY PLEADED, THIRD-PARTY DEFENDANT-RESPONDENT DID NOT MET HER BURDEN ON THE CLAIMS FOR BREACH OF A DUTY OR AIDING & ABETTING FRAUD.

While Castro contends that the motion court properly dismissed her complaint "considering the information provided" (Resp. Br. 5), her focus on "the information provided" forgets that "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) (quotation omitted); *accord Moskowitz v. Masliansky*, 198 A.D.3d 637, 639 (2nd Dept. 2021).

A. Systems Vend has a cause of action for aiding and abetting fraud.

Here, Castro argues, first, that Systems Vend did not plead an affirmative act, despite what she infers as the requirement that it do so. Second, she argues that Systems Vend's pleadings fell short of the necessary heightened standard.

Substantial assistance

According to Castro, a claim for aiding and abetting a fraud requires a showing of affirmative assistance in the fraud's commission (Resp. Br. 10). Although she recognizes that inaction may satisfy the element of substantial assistance where the defendant owes a fiduciary duty (Resp. Br. 10), she fails to address this standard—despite the fact that Systems Vend made this argument at App. Br. 19-20.

And as Point I shows above (along with Point I of the Appellant's Brief), Systems Vend has indeed alleged that Castro stood in a fiduciary relationship with it.

This undermines Castro's position that, even if she had actual

knowledge, her failure to act would not amount to aiding and abetting here. As Castro implicitly recognizes, in light of a fiduciary obligation, even silence may amount to substantial assistance (see Resp. Br. 11).

In any event, the pleadings here also allege affirmative acts. Her argument that Systems Vend "does not allege that Castro was responsible for drafting or disseminating the reports that Schiano allegedly falsified" is nonsensical on its face, in light of the allegations that "Castro ... deceptively accounted on her books and records that Schiano's cash were loans or capital contributions made to Systems Vend" and that she "purposefully withheld her internal records from" Systems Vend's owner (R.24, 27) and that she "intentionally withheld all information from Systems Vend despite due demand" (R.26, 27).

Heightened pleading standard

Castro also contends that Systems Vend's pleadings fell short of the heightened standard which CPLR 3016 imposes on claims involving a fraud. She claims that this heightened standard requires actual knowledge, not constructive (Resp. Br. 8-9)—a claim which she bases upon a series of Supreme Court cases (Resp. Br. 8-9), without ever distinguishing or even addressing Systems Vend's authority on this point (App. Br. 22-25).

Castro's silence is especially loud on Systems Vend's argument (App. Br. 22) that the heightened standard on an aiding and abetting claim may be met when the material facts alleged, and the surrounding circumstances, "permit a reasonable inference of the alleged conduct including the adverse party's knowledge of, or participation in, the fraudulent scheme." *Goel*, 111 A.D.3d at 792-793 (internal quotation omitted). Whether discovery ultimately bears out the allegations of Castro's actual knowledge of the fraud is irrelevant. At this stage, "actual knowledge need only be pleaded generally," because "[p]articipants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud," and "particularly at the prediscovery stage ... a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind." *Oster v. Kirschner*, 77 A.D.3d 51, 905 N.Y.S.2d 69 (1st Dept. 2010).

Castro did not address the "reasonable inferences" to be drawn here, so there's nothing to refute.

Finally, as to allegations which, in both Castro's telling and in the Order, "conflict" with one another (for example, challenging Castro's not questioning Schiano and her allowing him to remove cash in light of the claim that Schiano was Castro's supervisor with ability to count cash alone, R.10-11; Resp. Br. 10), "[i]t is well established that a party may plead

alternative theories, even on the basis of allegations that contradict each other." *Raglan Realty Corp. v. Tudor Hotel Corp.*, 149 A.D.2d 373, 375 (1st Dept. 1989) (citations omitted).

B. Systems Vend has a cause of action for breach of fiduciary duty.

As for breach of fiduciary duty, it's interesting that Castro never challenges the element of misconduct by the defendant, though she acknowledges it as an element twice over (Resp. Br. 12, 16).

What Castro does argue is, first, that she was not a fiduciary. As described at Point I above, this argument depends on fact-specific claims. She has not shown how the allegations here fail to fit within a cognizable theory—instead, her response relies on facts which will be proven (or not) in the course of discovery.

Finally, Castro correctly notes that "actual injury" is an element of both a claim for breach of fiduciary duty (Resp. Br. 18) and for aiding and abetting fraud (Resp. Br. 12). What she doesn't do is respond to this very point in the Appellant's Brief, at pages 29-30, which establishes how the Third-Party Complaint pleads all the damages required.

CONCLUSION

The Order correctly recognized that Systems Vend had adequately alleged an underlying fraud (R.10).

From there, though, the Order failed to recognize that, giving the allegations supplemented by additional submissions "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), Systems Vend had likewise alleged the other elements of its claims against Castro.

For these reasons, the Order erred. Defendant-Third-Party Plaintiff-Appellant Defendant/Third-Party Plaintiff Systems Vend Management Corp. respectfully requests that this Court reverse the Order and reinstate its Third-Party Complaint.

Dated: November 8, 2023



Dana E. Heitz