

Tagged Opinion



ORDERED in the Southern District of Florida on November 24, 2010.

**Robert A. Mark, Judge
United States Bankruptcy Court**

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

_____)	
In re)	CASE NO. 08-11165-BKC-RAM
)	CHAPTER 7
JET NETWORK, LLC,)	
)	
Debtor.)	
_____)	
)	
ALAN GOLDBERG, Chapter 7)	
Trustee for the Estate of JET)	
NETWORK, LLC,)	
)	
Plaintiff,)	
)	
vs.)	ADV. NO. 10-2701-BKC-RAM-A
)	
MERRILL LYNCH & CO., INC.,)	
THOMAS JAMES SEGRAVE, and)	
SEGRAVE AVIATION, INC.,)	
etc.,)	
)	
Defendants.)	
_____)	

**ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND**

The Court conducted a hearing on October 22, 2010, on Defendant, Merrill Lynch & Co., Inc.'s Motion to Dismiss ("Motion to Dismiss") [DE# 45]. The Court has considered the record, including the Amended Complaint for Damages and Other Relief ("Amended Complaint") [DE# 19], the Motion to Dismiss, the Trustee's Memorandum of Law in Opposition to [the Motion to Dismiss] [DE# 84], and Defendant, Merrill Lynch & Co., Inc.'s Reply in Support of its Motion to Dismiss [DE# 92]. The Court has also considered the arguments of counsel presented at the hearing and applicable law.

At the conclusion of the October 22, 2010 hearing, the Court announced its findings and conclusions with respect to Count VI of the Amended Complaint and with respect to Defendant's argument that the allegations in all counts of the Amended Complaint are insufficient to state a claim against the named Defendant, Merrill Lynch & Co., Inc., because the alleged wrongful conduct was that of a separate corporate subsidiary, Merrill Lynch Global Structured Finance & Investments, LLC ("Merrill Lynch Finance"). Those findings and conclusions, which are incorporated here by reference,

are summarized as follows:

A. The Merrill Lynch entity which directly engaged in the wrongful acts alleged in the Amended Complaint is Merrill Lynch Finance. As stated on the record at the October 22nd hearing, Defendant, Merrill Lynch & Co., Inc.'s counsel has agreed to accept service of a Second Amended Complaint which names Merrill Lynch Finance as a defendant.

B. If Plaintiff also includes Merrill Lynch & Co., Inc. as a defendant in the Second Amended Complaint, each factual allegation pertaining to a Merrill Lynch entity must specifically indicate whether the allegation is directed to Merrill Lynch & Co., Inc. (the "Parent") or to Merrill Lynch Finance. This specificity is required since the acts of Merrill Lynch Finance cannot be attributed to the Parent merely because Merrill Lynch Finance is a subsidiary of the Parent.

C. The allegations in Count VI, the fraudulent conveyance count, must be pled with greater specificity. First, Plaintiff needs to clarify whether Count VI seeks to avoid the \$490,910 allegedly transferred to a YWB account at Merrill Lynch, as described in paragraph 70(ii) of the Amended Complaint. If these transfers are included in Count VI, Plaintiff must allege facts to establish that these funds were transferred to a named Merrill

Lynch Defendant and were subject to its use and control, rather than simply funds transferred to an account held by a Merrill Lynch Defendant, but controlled solely by YWB. Second, Plaintiff must allege additional facts with respect to the \$1,422,384.42 transferred to Merrill Lynch as alleged in paragraph 19 of the Amended Complaint and listed in Exhibit "A" to the Amended Complaint. As to each transfer, the additional allegations must include (1) the specific Merrill Lynch entity which held the account and the account number; (2) the name of the account holder if any of the transfers were to third party customer accounts; and (3) if some or all of these monies were transferred to Merrill Lynch third party customer accounts, allegations that the funds were transferred for the benefit of a Merrill Lynch Defendant and subject to its use and control rather than funds subject to the sole use and control of the third party customer. To summarize briefly, if a Merrill Lynch Defendant was paid fees, commissions or other monies by the Debtor and the Debtor received no benefits, Plaintiff may have a viable constructive fraud claim. However, if the transfers were to accounts at Merrill Lynch, but the monies were the property of third party customers of Merrill Lynch, Merrill Lynch would be simply a conduit and not subject to liability.

Other Counts of the Amended Complaint

At the conclusion of the October 23rd hearing, the Court reserved ruling on the Motion to Dismiss Counts I, II, V, XII, XIII, XIV and XV of the Amended Complaint. As to these counts, the Court now concludes that each of the counts fails to state a claim. The Plaintiff has alleged sufficient facts to support its claim that Paul Parmar ("Parmar") met with representatives of Merrill Lynch Finance to seek financing for a business venture involving the Debtor and Jet First, Inc. ("Jet First"), a venture which the Plaintiff defines as the New Business Model or New Business Plan (Amended Complaint, ¶ 18). The Amended Complaint also contains allegations which would state a claim against Parmar under various tort theories, including breach of his fiduciary duty to the Debtor and his usurpation of a corporate opportunity of the Debtor by eventually obtaining financing for the same New Business Model, but for his own benefit and that of individuals and entities other than the Debtor.

What is lacking in the Amended Complaint are sufficient factual allegations to support the various tort claims against Merrill Lynch for allegedly assisting or conspiring with Parmar or allegedly breaching fiduciary duties Merrill Lynch owed to the Debtor. Plaintiff correctly notes that the Complaint must be

judged under the pleading standards in Rule 8(a), Fed.R.Civ.P., applicable here under Fed.R.Bankr.P. 7008. Nevertheless, under the heightened standard set by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the allegations are insufficient.

In discussing a plaintiff's pleading obligation under Rule 8(a), the Court in *Twombly* noted that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," 550 U.S. at 555 (internal citation omitted). The Court added that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* "[T]he complaint cannot suggest the existence of a claim; the complaint must contain 'enough facts to state a claim to relief that is plausible on its face.'" *Mukamal v. Bakes*, No. 08-14346, 2010 WL 1731775, at *5 (11th Cir. April 30, 2010), quoting *Twombly*, 550 U.S. at 570.

Applying that standard to the Amended Complaint, the Plaintiff's tort claims against Merrill Lynch are based largely on conclusory allegations without underlying facts. A brief discussion of the deficiencies in each count follows.

In Count I, Plaintiff alleges that Merrill Lynch aided and abetted Parmar in breaching his fiduciary duty to the Debtor. In

paragraph 82 of the Amended Complaint, Plaintiff alleges that Merrill Lynch rendered "substantial assistance" in regard to the acts and omissions of Parmar. Substantial assistance is an element of aiding and abetting, but Plaintiff must do more than simply recite this element. What specifically did Merrill Lynch do to render substantial assistance? This pleading deficiency applies equally to Count XII which alleges that Merrill Lynch Finance rendered "substantial assistance" to Parmar and Zaharis in the alleged conversion of the New Business Plan (Am. Cp. ¶ 152).

Count II of the Amended Complaint is a conspiracy count. Plaintiff alleges in paragraph 88 that Merrill Lynch Finance conspired with Parmar and Sotorios Zaharis ("Zaharis") to usurp the corporate opportunity of the New Business Model for the benefit of Parmar and Zaharis or their entity, while "cutting out" the Debtor as original owner of the plan. Paragraph 89 contains the conclusory allegation that "Merrill Lynch Finance, Parmar, and Zaharis engaged in overt acts in furtherance of their conspiracy."

These allegations are insufficient to state a claim for conspiracy. In the Eleventh Circuit, a heightened pleading standard is required to adequately allege a conspiracy claim "because a defendant must be informed of the nature of the conspiracy alleged," *Nationwide Advantage Mortgage Company v.*

Federal Guaranty Mortgage Company, No. 09-20372-CIV, 2010 WL 2652496, at *3 (S.D.Fla. Feb. 26, 2010) (quoting *Griswold v. Alabama Dep't of Indus. Relations*, 903 F. Supp 1492, 1500-1501 (M.D.Ala. 1995)). To satisfy the pleading standard, there must be allegations of an agreement between the alleged conspirators. *Id*; see also *Twombly*, 550 U.S. at 565 n. 10 (conclusory allegations of agreement were insufficient where the pleadings "mentioned no specific time, place, or person involved in the alleged conspiracies").

Applying the law to the allegations in Count II, what's missing are allegations naming the person or persons from Merrill Lynch Finance who entered into an agreement to wilfully deprive the Debtor of the New Business Model and instead usurp it for the benefit of Parmar and Zaharis and allegations describing when this agreement was reached. The pleading deficiencies in Count II apply equally to Count XIII, which alleges conspiracy to commit conversion, and Count XIV entitled Civil Conspiracy (Independent Tort) which alleges that Merrill Lynch Finance conspired with Parmar, Zaharis, Segrave and Segrave Aviation "to do an unlawful act or to do a lawful act by unlawful means" (Am. Cp. § 161).

Count V alleges that Merrill Lynch Finance breached a fiduciary duty it owed to the Debtor. The fiduciary duty allegedly

arose because "Merrill Lynch Finance knew or ha[d] reason to know that the Debtor was placing trust and confidence in Merrill Lynch Finance and was relying on Merrill Lynch Finance in connection with the funding of the New Business Plan." Am. Cp. ¶ 105. As with the other counts discussed earlier, these conclusory allegations are insufficient. See *American Honda Motor Co., Inc. v. Motorcycle Information Network, Inc.*, 390 F.Supp.2d 1170, 1179 (M.D.Fla. 2005) ("The fact that one party places trust or confidence in the other does not create a confidential relationship in the absence of some recognition, acceptance or undertaking of the duties of a fiduciary on the part of the other party."). The Amended Complaint is lacking factual allegations that demonstrate why Merrill Lynch Finance, as a potential lender or fund-raiser, had a fiduciary duty to the Debtor.

Finally, Count XV seeks relief under a theory of unjust enrichment based upon Merrill Lynch's alleged receipt of the fraudulent transfers described in Count VI of the Amended Complaint. The Court understands the concept of alternative pleading, but fails to understand how Plaintiff could prevail on a theory of unjust enrichment if it cannot prove a legal basis to set aside the alleged fraudulent transfers.

Conclusion

At the end of its opinion in *Twombly*, the Supreme Court concluded that “[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” 550 U.S. at 570. Plaintiff’s tort claims against Merrill Lynch face the same fate. From reading the Amended Complaint, it is conceivable that Merrill Lynch knowingly and intentionally assisted Parmar and Zaharis in committing bad acts which damaged the Debtor. For these claims to be plausible, however, Plaintiff must allege more.

For the foregoing reasons, it is -

ORDERED as follows:

1. The Motion to Dismiss is granted.
2. Counts I, II, V, VI, XII, XIII, XIV and XV of the Amended Complaint are dismissed without prejudice.
3. Plaintiff shall have 30 days from the date of this Order to file a Second Amended Complaint in conformity with this Order.

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COPIES FURNISHED TO:

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(Attorney Berman is directed to serve a copy of this Order on all other interested parties herein)