UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR STEINBERG as receiver for Northshore Asset Management, LLC et. al.,

Plaintiff,

-against-

GLENN SHERMAN et. al.,

Defendants.

07 Civ. 1001 (WHP)

MEMORANDUM AND ORDER

FRANCIS SALDUTTI,

Third-Party Plaintiff,

-against-

KENNETH SLEPICKA,

Third-Party Defendant.

WILLIAM H. PAULEY III, District Judge:

Plaintiff Arthur Steinberg (the "Receiver"), as Receiver for Northshore Asset Management, LLC ("Northshore"), Ardent Research Partners L.P. ("Ardent Domestic"), Ardent Research Partners Ltd. ("Ardent Offshore") (together, the "Ardent Entities"), and Saldutti Capital Management, L.P. ("SCM"), brings this action against Glenn Sherman ("Sherman"), Kevin Kelley ("Kelley"), Robert Wildeman ("Wildeman"), Douglas Ballew ("Ballew") (collectively, the "Northshore Defendants"), and Francis Saldutti ("Saldutti") asserting fifty-one different claims. The background of this action is set forth in this Court's Memorandum and Order dated May 2, 2008 and its Memorandum and Order dated May 5, 2008 in a related action.

Familiarity with this Court's prior memoranda and orders is presumed, and the Court will not repeat fully those facts in this Memorandum and Order.

Saldutti asserts ten cross-claims claims against Wildeman and identical claims against third-party defendant Kenneth Slepicka ("Slepicka"). Saldutti's claims include violations of the Securities Exchange Act of 1934 and state law claims for common law fraud, breach of fiduciary duty, civil conspiracy, conversion, indemnification, contribution, and rescission. Wildeman and Slepicka move separately to dismiss Saldutti's cross-claims and third-party claims. Ruling from the bench on March 20, 2008, this Court granted Wildeman and Slepicka's motions to dismiss. This Memorandum and Order explains that oral ruling.

BACKGROUND

For the purposes of these motions, the Court accepts as true the following additional facts set forth in Saldutti's Cross-Claims and Third-Party claims.

In the summer of 2002, Saldutti became aware of a Delaware limited liability company known as Northshore. (Answer, Counterclaims, Cross-claims and Third-party Claims of Francis Saldutti dated Apr. 20, 2007 ("Claims") ¶¶ 11, 25.) At that time, Kelley told Saldutti that Northshore—which Kelley co-owned with Wildeman and Sherman—offered investors the ability to invest in a family of hedge funds. (Claims ¶ 25, 26, 27.) Beginning in late 2002, the Northshore Defendants and Slepicka made representations to Saldutti about Northshore's financial condition and operating history. (Claims ¶ 29.) Kelley told Saldutti that he, Wildeman, and Sherman had each committed $2.5 million to Northshore, and that Northshore had secured a $50 million line of credit. (Claims ¶ 30.) Kelley also showed Saldutti a net worth statement indicating that Kelley's personal net worth exceeded $7.5 million. (Claims ¶¶ 33, 34.)

I. The LaSalle Investments

The Northshore Defendants touted Wildeman as a short-term cash management expert, based on his experience managing uninvested funds at Citadel. (Claims ¶¶ 37, 38, 52.) The Northshore Defendants and Slepicka also told Saldutti that LaSalle, a "timing fund" managed by Slepicka, would allow a manager to hedge a short position by acquiring a counter-balancing long position. (Claims ¶ 40.) In addition, they told Saldutti that LaSalle would achieve short-term gains by purchasing shares in offshore mutual funds at the end of the day and selling at the next day's opening prices, which would beneficially reflect events after the market closed. (Claims ¶ 41.) Finally, they told Saldutti that Northshore had conducted considerable testing of LaSalle's strategy, and that it had produced excellent results. (Claims ¶ 43.) The Northshore Defendants and Slepicka shared the LaSalle prospectus with Saldutti, which described LaSalle's strategy. (Claims ¶ 44.) In October 2002, Saldutti invested $2.5 million of Ardent Domestic funds and $4 million of Ardent Offshore funds in LaSalle. (Claims ¶ 45.) Northshore, the Northshore Defendants, and Slepicka provided Saldutti with monthly written performance summaries showing significant returns on these investments. (Claims ¶ 46.)

II. The Sale of SCM

Shortly after Saldutti invested Ardent funds in LaSalle, Kelley informed him that Northshore was interested in acquiring SCM. (Claims ¶ 28.) The Northshore Defendants represented that Wildeman would manage the Ardent Entities' cash and yield a return of approximately three percent, substantially more than the return Saldutti was receiving from the cash maintained at Banc of America. The Northshore Defendants also represented that

Northshore's investments would not put the Ardent Entities' cash at any greater risk, and would not be held for longer than six months. (Claims ¶ 52.)

By agreement dated April 1, 2003, Salduttti sold his general partnership interest in SCM to Northshore for $12 million (the "Purchase Agreement"). (Claims ¶ 55.) The Purchase Agreement listed Northshore as the "buyer," and the $12 million purchase price was payable in installments, beginning with a $4 million initial payment after the closing (the "Initial Payment"), followed by $500,000 quarterly installment payments beginning fifteen months later. (Claims ¶ 56.) While the transaction closed on April 23, 2003, Northshore did not make the Initial Payment until May 23, 2003. (Claims ¶¶ 59, 60.)

III. Further Transfers to Northshore

On May 6, 2003, Saldutti transferred $12.3 million of the Ardent Entities' uninvested cash to Northshore. (Claims ¶ 71.) Wildeman told Saldutti that he was going to use the $12.3 million to make a short-term investment for the benefit of the Ardent Entities. (Claims ¶ 73.) Following the transfer, the Northshore Defendants provided monthly performance summaries detailing the value and growth of the Ardent Entities' investment in the short-term cash management program. (Claims ¶ 74.)

Over the course of the next year, Saldutti made the following additional transfers of the Ardent Entities' money to Northshore: (1) $6.15 million on July 8, 2003; (2) $21 million on November 13, 2003; and (3) $2.5 million on June 7, 2004. (Claims ¶¶ 76, 85, 89.) In addition, on September 23, 2003, Saldutti transferred $7 million to the LaSalle timing fund (Claims ¶ 81), and on August 27, 2004, transferred $10 million to be used to offset a withdrawal penalty LaSalle faced. (Claims ¶¶ 94, 95, 98.)

IV. Misappropriation of Funds

Beginning in the summer of 2004, Saldutti's relationship with Northshore deteriorated. In May 2004, Saldutti had difficulty effectuating a redemption for one of the Ardent Offshore investors. (Claims ¶¶ 99-109.) Saldutti claims that, by the summer of 2004, he was having difficulty communicating with Northshore and the Northshore Defendants. (Claims ¶¶ 110-113.) Saldutti also alleges that it was not until January 26, 2005 that he learned from his counsel that the Ardent Entities' money had been used improperly by the Northshore Defendants. (Claims ¶ 119.) Finally, Saldutti claims to have learned from the Receiver that Northshore and the Northshore Defendants had schemed to defraud him and the other investors in the Ardent Entities. (Claims ¶ 122.)

DISCUSSION

I. Legal Standards

A. Motion to Dismiss

On a motion to dismiss, the Court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor. Grandon v. Merrill Lynch & Co., 147 F.3d 184, 188 (2d Cir. 1998). Nonetheless, "factual allegations must be enough to raise a right of relief above the speculative level, on the assumption that all of the allegations in the complaint are true." Bell Atl. Corp. v. Twombly, ___ U.S. ___, 127 S. Ct. 1955, 1965 (2007) (requiring plaintiff to plead "enough fact[s] to raise a reasonable expectation

that discovery will reveal evidence of [his claim]"); see also ATSI Communs., Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) ("We have declined to read Twombly's flexible 'plausibility standard' as relating only to antitrust cases.").

Dismissal is also proper where a plaintiff fails to plead the basic elements of a claim. Wright v. Giuliani, No. 99 Civ. 10091 (WHP), 2000 WL 777940, at *4 (S.D.N.Y. June 14, 2000). The issue on a motion to dismiss "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support [his] claims." Villager Pond. Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995) (citation omitted). A court's "consideration [on a motion to dismiss] is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).

B. Choice of Law

Diversity is the jurisdictional basis for Saldutti's supplemental claims. 28 U.S.C. § 1332. In diversity actions, federal courts apply the choice-of-law rules of the forum state to determine the applicable substantive law. Campbell v. Metropolitan Prop. & Cas. Ins. Co., 239 F.3d 179, 186 (2d Cir. 2001). With respect to Saldutti's common law fraud, conversion, misrepresentation, and civil conspiracy claims, the location of the tort generally determines the applicable law. See AroChem Intern. Inc. v. Buirkle, 968 F.2d 266, 270 (2d Cir. 1992). Because Saldutti—the purported victim—resides in New York and because Ardent Domestic is incorporated here, New York law governs Saldutti's state law tort claims.

For breach of fiduciary duty claims, New York applies the law of the state of incorporation. Walton v. Morgan Stanley & Co. Inc., 623 F.2d 796, 798 n.3 (2d Cir. 1980) (citing Diamond v. Oreamuno, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969)). Accordingly, because Northshore is a Delaware corporation, Delaware law applies to Saldutti's breach of fiduciary duty claims.

As for Saldutti's claims for implied indemnification and contribution, courts begin with domicile and then consider other factors, such as where the injury occurred. Cooney v. Osgood Mach., Inc., 612 N.E.2d 277, 280 (N.Y. 1993); Esco Fasteners, Co. v. Korea Hinomoto Co., 928 F. Supp. 252, 256 (E.D.N.Y. 1996) (citing Cooney, 612 N.E.2d at 281). In this case, the parties are domiciled in different states but Saldutti's injury occurred in New York. Accordingly, New York law governs Saldutti's indemnification and contribution claims.

II. Securities Claims

To state a claim under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, a plaintiff must allege that "the defendant, in connection with the purchase or sale of securities, made a materially false statement or omitted a material fact, with scienter, and that plaintiff's reliance on defendant's action caused injury to the plaintiff." Lawrence v. Cohn, 325 F.3d 141, 147 (2d Cir. 2003) (citation omitted). To plead a Rule 10b-5 claim with the particularity required by Rule 9(b) and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the plaintiff must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Stevelman v. Alias Research, Inc., 174 F.3d 79, 84 (2d Cir. 1999) (citations and internal quotation marks omitted);

Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993) ("Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to 'defendants.'"); see also 15 U.S.C. § 74u-4(b)(1).

The group pleading exception, which permits plaintiffs to "rely on a presumption that statements in prospectuses, registration statements, annual reports, press releases, or other group-published information, are the collective work of those individuals with direct involvement in the everyday business of the company," In re Oxford Health Plans, Inc., 187 F.R.D. 133, 142 (S.D.N.Y. 1999) (internal quotation marks omitted), "applies only to group-published documents, such as SEC filings and press releases," and not to oral statements. Goldin Associates, L.L.C. v. Donaldson, Lufkin & Jenrette Secs. Corp., No. 00 Civ. 8688 (WHP), 2003 WL 22218643, at *5 (S.D.N.Y. Sept. 25, 2003) (citations omitted); Elliott Assoc., L.P. v. Covance, Inc., No. 00 Civ. 4115 (SAS), 2000 WL 1752848, at *12 (S.D.N.Y. Nov. 28, 2000).

Saldutti's Rule 10b-5 claim alleges that the Northshore Defendants and Slepicka knowingly made material misrepresentations and omissions in connection with Northshore's purchase of SCM.[1] Saldutti makes no allegations concerning purported misrepresentations by Slepicka alone, and the only alleged misrepresentation he attributes to Wildeman is that "[o]n or about May 6, 2003, Wildeman told Saldutti that he was going to use the $12.3 million to make a short-term investment for the benefit of the Ardent Funds." (Claims ¶ 73.) Otherwise, Saldutti attributes every misrepresentation to Kelley or generally to "the Northshore Defendants and Slepicka." (Claims ¶¶ 2, 3, 4, 6, 8, 9, 29, 40, 41, 42, 44, 45, 46, 47, 48, 50, 81, 95.) These allegations fail to set forth specifically what Wildeman or Slepicka said or why their statements were misleading. Furthermore, although Saldutti has alleged certain written misrepresentations

[1] The following analysis assumes that Saldutti's general partner interest could be considered a "security." But see Hirsch v. DuPont, 396 F. Supp. 1214, 1220 (S.D.N.Y. 1975), aff'd, 553 F.2d 750 (2d Cir. 1977).

by the Northshore Defendants and Slepicka, such as financial statements he received, these allegations are insufficiently specific because they fail to set forth the dates on which such statements were made, what in particular was stated, and why those statements were fraudulent.

Accordingly, because Saldutti has failed to plead his Rule 10b-5 claims against Wildeman and Slepicka with the particularity required by Rule 9(b) and the PSLRA, these claims are dismissed.

III. Common Law Fraud Claims

A claim for common law fraud under New York law must also satisfy the requirements of Rule 9(b). Lewis v. Rosenfeld, 138 F. Supp. 2d 466, 477-78 (S.D.N.Y. 2001). For the reasons explained above, Saldutti has failed to identify with sufficient particularity any material misrepresentations made by Wildeman or Slepicka. Accordingly, Saldutti's common law fraud claims against Wildeman and Slepicka are dismissed. See, e.g., Rich v. Maidstone Fin., Inc., No. 98 Civ. 2569 (DAB), 2002 WL 31867724, at *13 (S.D.N.Y. Dec. 20, 2002); Gabriel Capital, L.P. v. NatWest Finance, Inc., 94 F. Supp. 2d 491, 511 (S.D.N.Y. 2000).

IV. Breach of Fiduciary Duty Claims

To state a claim for breach of fiduciary duty under Delaware law, a plaintiff must allege that (1) a fiduciary duty exists and (2) the fiduciary breached that duty. See, e.g., Davimos v. Halle, No. 03 Civ. 9199 (JGK), 2006 WL 859368, at *4 (S.D.N.Y. Mar. 31, 2006) (citing York Linings v. Roach, No. 16622, 1999 WL 608850, at *2 (Del. Ch. July 28, 1999). Where a plaintiff is one of a number of investors, he will have standing "[o]nly when [he] alleges a 'special injury' or the breach of a duty owed uniquely to him (rather than a duty to shareholders

generally)." ABF Capital Mgmt. v. Askin Capital Mgmt., L.P., 957 F. Supp. 1308, 1333 (S.D.N.Y. 1997). Absent a special injury, "[t]he breach of such a general duty is insufficient to confer standing to bring a direct claim for breach of fiduciary duty." ABF Capital Management, 957 F. Supp. at 1333; see also Dieterich v. Harrer, 857 A.2d 1017, 1027-28 (Del. Ch. 2004). Saldutti lacks standing under Delaware law because he has failed to allege a special injury or a duty uniquely owed to him. See ABF Capital Management, 957 F. Supp. at 1333.

In addition, a plaintiff may not rely on group pleading to assert a breach of fiduciary duty claim. See Goldin Assoc., L.L.C., 2003 WL 22218643, at *4-5; Elliott Assocs., L.P. v. Hayes, 141 F. Supp. 2d 344, 354 (S.D.N.Y. 2000); In re Oxford Health Plans, Inc., 187 F.R.D. 133, 142 (S.D.N.Y. 1999). Because Saldutti improperly employs group pleading, vaguely attributing misconduct to "the Northshore Defendants and Slepicka," (see, e.g., Claims ¶¶ 2, 3, 4), his breach of fiduciary duty claims against Wildeman and Slepicka are dismissed.

V. Conversion Claims

Under New York law, a plaintiff alleging conversion must show that the defendant has "exercise[d] unauthorized dominion over personal property in interference with a plaintiff's legal title or superior right of possession." Lopresti v. Terwilliger, 126 F.3d 34, 41 (2d Cir. 1997). "Money may be the subject of conversion if it is specifically identifiable." Hoffman v. Unterberg, 9 A.D.3d 386, 388 (N.Y. App. Div. 2004) (collecting cases). "The funds of a specific, named bank account are sufficiently identifiable" for the tort of conversion. Republic of Haiti v. Duvalier, 211 A.D.2d 379, 384 (N.Y. App. Div. 1995) (citation omitted). However, an action for conversion of bank account funds will lie only if "there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in

question." Mfrs. Hanover Trust Co. v. Chem. Bank, 160 A.D.2d 113, 124 (N.Y. App. Div. 1990); High View Fund, L.P. v. Hall, 27 F. Supp. 2d 420, 429 (S.D.N.Y. 1998) (dismissing conversion claim for failure to identify specific and segregated funds).

Saldutti alleges that he has been damaged "in an amount not less than the value of his proportional 20% interest in the $36 million of Ardent Funds that were transferred to Northshore for investment in LaSalle and management in the Northshore short-term cash management program." (Claims ¶ 184.) In contrast to the Receiver's claim for conversion, see SEC v. Northshore, No. 05-2192, slip op. at 6-8 (S.D.N.Y. filed May 2, 2008), because Saldutti does not claim ownership of a "specifically identifiable and segregated" or definite sum of money, see Chem. Bank, 160 A.D.2d at 124, he fails to state a claim for conversion of money. See High View Fund, L.P., 27 F. Supp. 2d at 429. Accordingly, Saldutti's conversion claims against Wildeman and Slepicka are dismissed.

VI. Indemnification Claims

To state a claim for indemnification under New York law, the third-party plaintiff must allege that both he and the third-party defendant owed a duty to the plaintiff in the underlying action, and that the third-party defendant owed an express or implied duty to indemnify the third-party plaintiff for breach of the underlying duty. Sierra Rutile Ltd. v. Katz, 90 Civ. 4913 (JFK), 1995 WL 622691, at *4 (S.D.N.Y. Oct. 24, 1995); see also Bellevue S. Assocs. v. HRH Constr. Corp., 574 N.Y.S.2d 165, 171 (1991); Trustees of Columbia Univ. in the City of New York v. Mitchell/Giurgola Associates, 109 A.D.2d 449, 451-52 (N.Y. App. Div. 1985). However, "[n]o right to implied indemnification exists when the proposed indemnitee *retains* a duty it owes directly to the plaintiff." Matter of Poling Transp. Corp., 784 F. Supp.

1045, 1048 (S.D.N.Y. 1992) (discussing Rosado v. Proctor & Schwartz, Inc., 484 N.E.2d 1354 (N.Y. 1985)) (emphasis added).

Saldutti has not entered into an express indemnification agreement with Wildeman or Slepicka. Saldutti fails to allege that Wildeman and Slepicka breached duties owed to the primary plaintiff in the underlying action, namely the Receiver. Therefore he has no implied right to indemnification. See Panigeon v. Alliance Navigation Line, Inc., No. 96 Civ. 8350 (SAS), 1997 WL 473385, at *6 (S.D.N.Y. Aug. 19, 1997). Further, because Saldutti retained control of the Ardent Entities' accounts at Banc of America, he retained duties to the Ardent Entites' investors, and therefore his indemnification claims are defective for that reason as well. See Matter of Poling Transp. Corp., 784 F. Supp. at 1048. Accordingly, Saldutti's indemnification claims against Wildeman and Slepicka are dismissed.

VII. Contribution Claims

Under New York law, a claim for contribution requires that both the third-party plaintiff and the co- or third-party defendant share responsibility for an injury in violation of duties they both owed to the injured party. Schauer v. Joyce, 429 N.E.2d 83 (N.Y. 1981); N.Y.C.P.L.R. § 1401. In order to state a claim for contribution, the party against whom recovery is sought must have contributed to the "same injury" suffered by the underlying plaintiff. McCoy v. Goldberg, 883 F. Supp. 927, 933 (S.D.N.Y. 1995). A claim for "contribution will not lie unless all of the essential elements of a cause of action against the proposed contributor can be made out." Jordan v. Madison Leasing Co., 596 F. Supp. 707, 710 (S.D.N.Y. 1984) (citing Lodino v. Health Ins. Plan of Greater New York, Inc., 401 N.Y.S.2d 950, 951 (1977)).

Here, Saldutti fails to plead specific facts that Wildeman and Slepicka owed duties to the parties represented by the Receiver or that they contributed to the injuries suffered by those parties. While Saldutti purports to adopt certain allegations in the Receiver's complaint (see Memorandum of Law of Defendant Francis Saldutti in Opposition to Defendant Robert Wildeman's "Amended" Motion to Dismiss Cross-Claims at 5), they are not enumerated in his third-party complaint. Accordingly, Saldutti's claims against Wildeman and Slepicka for contribution are dismissed.

VIII. Rescission Claims

A claim for rescission cannot be maintained against a person who was not a party to the contract. This is true even where that individual joined in the false representations that induced the contract. Alexander City Bank v. Equitable Trust Co. of New York, 223 A.D. 24, 28 (N.Y. App. Div. 1928); McGarry v. Miller, 158 A.D.2d 327, 328 (N.Y. App. Div. 1990); Dworin v. Deutsch, No. 06 Civ. 13265 (PKC), 2008 WL 508019, at *8 (S.D.N.Y. Feb. 22, 2008). Neither Wildeman nor Slepicka were parties to any contract with Saldutti. Accordingly, Saldutti's claims for rescission against them must be dismissed.

IX. Civil Conspiracy Claims

Under New York law, a plaintiff may proceed on a theory of civil conspiracy only if he can establish an underlying tort. World Wrestling Fed. Entm't, Inc. v. Bozell, 142 F. Supp. 2d 514, 532 (S.D.N.Y. 2001) (citations omitted). Because Saldutti has failed to establish any underlying tort, his civil conspiracy claims against Wildeman and Slepicka must be dismissed.

CONCLUSION

For the foregoing reasons, Wildeman's motion to dismiss Saldutti's cross-claims and Slepicka's motion to dismiss Saldutti's third-party claims are granted.

Dated: May 8, 2008
New York, New York

SO ORDERED.

WILLIAM H. PAULEY III
U.S.D.J.

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