UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PELICAN EQUITY, LLC,

Plaintiff,

09 Civ. 5927 (NRB)

-against-

ROBERT V. BRAZELL, STEPHEN L. NORRIS, TALOS PARTNERS, LLC, RAMA RAMACHANDRAN, DARL McBRIDE, and BRYAN CAVE LLP,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS TALOS DEFENDANTS' COUNTERCLAIM

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INTRODUCTION

Plaintiff Pelican Equity, LLC ("Pelican") submits this memorandum in support of its motion to dismiss the amended counterclaim (the "Counterclaim") asserted by defendants Robert Brazell, Stephen Norris, Rama Ramachandran, and Talos Partners, LLC (collectively, the "Talos Defendants"). This memorandum is supported by the accompanying declaration of Eric Rosenberg and the exhibits to it.

The Talos Defendants' Counterclaim for "fraud" should be dismissed because those defendants do not adequately allege that Pelican defrauded them or that Pelican is liable for any misrepresentations of Pelican's predecessor in interest, American Institutional Partners LLC ("AIP") or AIP's principal, Mark Robbins. The Talos Defendants' allegations that Pelican made false allegations in this lawsuit do not state a fraud claim against AIP because, among other

things, those defendants did not rely, and could not have reasonably relied, on Pelican's allegations. Those defendants showed that they did not believe Pelican's allegations about AIP's intellectual property, expertise, and assets because they denied those allegations in every version of their answer. Further, the only way in which the Talos Defendants allege that they relied on any purported misrepresentations is that they invested time and money in AIP's stock loan business, which is something that necessarily occurred prior to Pelican's commencement of this action.

The Talos Defendants also do not state a claim against Pelican under any other legal theories. They do not sufficiently allege alter ego liability because they do not allege facts showing Pelican's complete domination and control of AIP and/or Mark Robbins and its use of that domination to defraud them. Indeed, their alter ego allegation is limited to the phrase "alter ego." To the extent that the Talos Defendants intend to state a claim for conspiracy to defraud them - something that is itself far from clear - they do not state such a claim because they do not allege fraud against anybody with particularity and do not adequately allege Pelican's or anyone else's agreement to defraud them. Nor do the Talos Defendants plausibly allege Pelican's intentional participation in any such scheme through institution of this lawsuit, as any purported "fraud" against those defendants of the kind they describe had to have run its course before the commencement of this action in order for them to rely on it. They do not even allege Pelican's existence at any time at which they were, or could have been, defrauded.

BACKGROUND

The Complaint

In the Complaint (Rosenberg Dec. Exh. C), Pelican alleges that it is a successor in interest to AIP, a company that, largely through its principal officer, Mark Robbins, developed a novel stock loan program. (Complaint ¶¶ 7, 17-19) The AIP stock loan program, the structure of the transactions effected in it, the model contracts and other documents created for it, and related agreements and discussions with financial institutions and others, allegedly constitute valuable trade secrets. (Id. ¶ 19) Each of the individual defendants came to work for AIP in 2007 and 2008. Robert Brazell began to work at AIP in late 2008, acted as an officer of that company, obtained access to much of its confidential information, and held himself out as a partner and "co-chairman" of AIP. (Complaint at ¶¶ 8, 23-29) Darl McBride worked there from 2007 through early 2009. (Id. at ¶ 20) Stephen Norris worked on AIP's stock loan program and had a consulting agreement with the company before he began working with Mr. Brazell and AIP employee Rama Ramachandran full time on the stock loan program in November 2008. (Id. ¶¶ 9, 11, 26, 29-30) Both Mr. Brazell and Mr. Norris also came to have access to confidential AIP information. (Id. at ¶¶ 23, 25, 27, 29) Pelican alleges that in December 2008 or early January 2009, while still working for AIP, defendants Brazell, Norris, McBride, and Ramachandran agreed to, and did, steal AIP's business, destroy AIP, and move forward with AIP's stock loan product but without Robbins or AIP. (Complaint ¶¶ 37-48)

Talos Defendants' Initial Answer and Second Answer and Counterclaim

In their August 19, 2009 answer (Exh. B), the Talos Defendants denied the material allegations of Pelican's original complaint (Exh. A) and specifically denied that AIP

"ever had any proprietary intellectual property." (Rosenberg Dec. Exh. B: answer at ¶ 8) They did the same in their October 19 answer and counterclaim. (Exh. D: answer/counterclaim at ¶ 7) In that latter pleading, the Talos Defendants started their one-and-a-half page Counterclaim for "fraud" with the allegation that "[p]laintiff [Pelican] has conspired, and continues to conspire and act in concert with its alter egos [Mark] Robbins and AIP, as well as others to misrepresent and falsely portray Robbins's and AIP's business and assets in an effort to defraud the Talos Defendants, prospective investors and customers." (Exh. D: answer/counterclaim at ¶ 97)

The Talos Defendants further alleged that AIP and Mark Robbins falsely represented [to an unidentified person or persons at some undisclosed time(s)] that they had stock loan expertise, had concluded numerous stock loan transactions, had assets and financial backing, and had developed proprietary intellectual property for a stock loan business. (Id. at ¶ 98) According to them, AIP and Mr. Robbins concealed from them the purported fact that they were sued as a result of their one stock loan transaction. (Id. at ¶ 99) "Plaintiff, Robbins, and AIP" allegedly knew those representations to be false, yet they are alleged to have made them in order to induce the Talos Defendants to invest time and money in AIP's business. (¶ 100) The Talos Defendants also alleged that "[b]y bringing this lawsuit Plaintiff has joined with and is acting in furtherance of the fraudulent schemes of Robbins, AIP and others." (¶ 101) The Talos Defendants claimed they had relied upon and were misled by those purported "misrepresentations and concealments" in unexplained ways - presumably the investment of time and money into AIP - and were thereby damaged. (Exh. D ¶ 102)

Talos Defendants' Amended Counterclaim

On October 28, 2009, Pelican sought permission, by letter to the Court, to move to dismiss the Talos Defendants' counterclaim. In response, the Talos Defendants asserted in an October 29 letter to the Court (Exh. E, p. 2) that they stated a claim for fraud against Pelican in that counterclaim. On November 13, 2009, the Talos Defendants filed their Answer and amended Counterclaim (Exh. F). The Counterclaim is substantially identical to those defendants' October 9 counterclaim except that it includes several additional clauses and two new paragraphs. In a clause they added to paragraph 98, the Talos Defendants allege that the misrepresentations by AIP and Mr. Robbins were made to, "among others, the Talos Defendants." In a new paragraph 99, they allege that "Robbins and AIP made these false representations in numerous meetings, conversations (both in person and by telephone) and emails with the Talos Defendants during the period of November 2008 through January 2009 and have continued to make the same false claims and representations thereafter." And in a new paragraph 102, they allege that "[a]s the assignee of AIP and Robbins, Plaintiff stands in the shoes of and is charged with the knowledge of the acts and misrepresentations of Robbins and AIP."

ARGUMENT

I. THE TALOS DEFENDANTS HAVE NOT STATED A CLAIM FOR FRAUD AGAINST PELICAN.

"'The elements of fraud under New York law are: (1) a misrepresentation or a material omission of material fact which was false and known by defendant to be false, (2) made for the purpose of inducing the plaintiff to rely on it, and (3) justifiably relied upon by the

plaintiff, (4) who then suffered an injury as a result of such reliance." Abrahams v. Inc. Village of Hempstead, 2009 WL 1560164 at * 8 (E.D.N.Y. 2009), quoting City of New York v. Smokes-Spirits.Com, Inc., 541 F.3d 425, 454 (2d Cir. 2008). See also Physicians Mutual Ins. Co. v. Greystone Servicing Corp., 2009 WL 855648 at * 4 (S.D.N.Y. 2008).

Pursuant to Fed.R.Civ.Pro. 9(b), allegations of fraud must be pled with particularity. In Re Parmalat Sec. Lit., 479 F.Supp.2d 332, 339-40 (S.D.N.Y. 2007). As the court recited in Odyssey Re (London) Limited v. Stirling Cooke Brown Holdings, 85 F. Supp.2d 282, 293 (S.D.N.Y. 2000):

> "To pass muster [under rule 9(b)] in this Circuit, a complaint 'must allege with some specificity the acts constituting fraud' . . .' conclusory allegations that defendant's conduct was fraudulent or deceptive are not enough." [citations omitted] Specifically, Rule 9(b) requires plaintiffs to allege "(1) the specific statement or omission; (2) the aspect of the statement or omission that makes it false or misleading; (3) when the statement was made; (4) where the statement was made; and (5) which defendant was responsible for the statement or omission." [citations omitted]

See also Parmalat Sec. Lit., 479 F. Supp.2d at 339; Granite Partners, L.P. v. Bear, Stearns & Co. Inc., 17 F. Supp.2d 275, 287 (S.D.N.Y. 1998). And the plaintiff must allege "particularized" facts that "give rise to a strong inference of fraudulent intent." Shields v. Citytrust Bancorp, 25 F.3d 1124, 1128-29 (2d Cir. 1994).

In order to defeat a motion to dismiss a claim, claimants must also provide "plausible grounds" in their pleadings for the allegations with "enough fact to raise a reasonable expectation that discovery will reveal evidence" to support them. Mazzaro De Abreu v. Bank of America Corp., 2007 WL 2609535 at * 3 (S.D.N.Y. 2007), citing Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007). "[T]he court is not required to accept as true

conclusory allegations that are unsupported by factual assertions." Garza Cantu v. Flanigan, 2007 WL 2480119 at * 3 (E.D.N.Y. 2007). Further, "[a] formulaic recitation of the elements of a cause of action will not do . . . Factual allegations must be enough to raise a right to relief above the speculative level . . ." Abrahams v. Inc. Village of Hempstead, 2009 WL 1560164 at * 2.

The Talos Defendants do not adequately state a claim for fraud against Pelican because they fail to allege several of the necessary elements of such a claim. Their allegations that Mark Robbins and AIP made false representations to some Talos Defendants at some time and place (Counterclaim ¶¶ 98-100) obviously could not state a fraud claim against Pelican even if those allegations were pled with the required particularity. Nor is it sufficient for the Talos Defendants to allege that Pelican has defrauded them by "bringing this lawsuit" and asserting allegedly false allegations. (Id. at ¶ 103) Among other things, the Talos Defendants allege no facts even plausibly suggesting that they relied to their detriment on anything in the Complaint or on anything Pelican has done in this lawsuit. See e.g. Abrahams v. Inc. Village of Hempstead, 2009 WL 1560164 at * 8 (dismissing, for lack of plausible reliance allegations, claim that defendants "defrauded" plaintiff by inter alia making false and perjured allegations against him in legal proceedings).

The Talos Defendants' apparent implication that they relied on AIP's and Mr. Robbins' misrepresentations by investing time and money in the AIP stock loan business (Exh. F ¶ 101) is obviously inapplicable to Pelican's maintenance of this lawsuit. Even if the Court were to infer an allegation by the Talos Defendants that they relied on Pelican's Complaint in that same way, such an allegation would not just be implausible; it would be literally impossible. As indicated in the Complaint itself, the parties had fallen out and the Talos Defendants had gone

into business for themselves before the lawsuit was commenced. (Rosenberg Exh. C: Complaint at ¶¶ 37-51 and 63-64) The Talos Defendants' alienation from AIP and Mr. Robbins is the very predicate for this action. Further, because the Talos Defendants denied Pelican's material allegations and specifically averred that Pelican owned no proprietary confidential information (Exh. F: Answer ¶ 7),[1] they could not have been misled by those allegations into doing anything in reliance on them. Further, had they relied on any of the allegations of the Complaint to their detriment, then their fraud claim would still be deficient because that reliance would obviously not be reasonable or justifiable as a matter of law. See Manning v. Utilities Mutual Ins. Co., 254 F.3d 387, 401 (2d Cir. 2001) (failure to allege reasonable reliance is "fatal" to a fraud claim); Granite Partners, L.P. v. Bear, Stearns & Co. Inc., 17 F. Supp.2d at 290-91. Any contention that Pelican even intended to induce the Talos Defendants' reliance on its allegations against those defendants, as also required for a fraud claim, would also be preposterous.

II. THE TALOS DEFENDANTS HAVE NOT ALLEGED ALTER EGO OR CONSPIRACY LIABILITY AGAINST PELICAN.

It is unclear whether the Talos Defendants even intend to assert that Pelican is liable to them under an "alter ego" or conspiracy theory. After Pelican showed in a letter to the Court that those defendants' counterclaim did not adequately allege either theory, they responded that they did not allege liability solely on the basis of an alter ego theory and did not even address the subject of conspiracy liability. (Rosenberg Dec. Exh. E) They also "simply stated" that their claim is that "the filing and prosecution of this action is fraudulent." (Id. at p. 2) Nonetheless, it

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[1] The Talos Defendants denied AIP's possession of intellectual property again at ¶ 19 of their Answer. They also denied it in the first two versions of their answer. (See Exh. B at ¶ 8 and Exh. D at ¶ 7)

bears reiterating that their allegation of "alter ego" liability, consisting solely of the phrase "alter ego," is woefully inadequate to assert Pelican's liability under that legal theory. They have failed to allege facts showing that Pelican exercised complete domination and control over AIP and Mark Robbins, including the factors that determine that issue, or that that control was used to commit a fraud or wrong against them.[2]

The same is true of the Talos Defendants' ersatz allegation of "conspiracy." It consists of their conclusory allegation that Pelican "conspired" with AIP and Mr. Robbins. (Counterclaim at ¶ 97) Nowhere do they adequately allege the commission of a tort, an agreement to commit the tort, or Pelican's intentional participation in a scheme to commit that tort.[3] Their allegations that AIP and Pelican committed a tort - fraud - still fall woefully short of the required particularity. (Counterclaim ¶¶ 98-101) Although they now allege that "Robbins and AIP" made the alleged misrepresentations to "the Talos Defendants" (id. at ¶¶ 98-99), they still do not identify the person(s) who spoke for AIP or state which of Robbins and AIP made which alleged misrepresentations to which of the Talos Defendants.[4] Their allegations that the "misrepresentations" occurred in "numerous meetings, conversations . . . and emails" during the period from November 2008 through January 2009 is also a far cry from specifying the time and

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[2] Physicians Mutual Ins. Co. v. Greystone Servicing Corp., 2009 WL 855648 at * 3-4; Zinaman v. USTS New York, Inc., 798 F. Supp. 128, 132 (S.D.N.Y. 1992).

[3] Treppel v. Biovail Corp., 2005 WL 2086339 at * 5-6 (S.D.N.Y. 2005); Schwartz v. The Society of the New York Hospital, 199 A.D.2d 129, 130, 605 N.Y.S.2d 72, 73 (1st Dep't 1993).

[4] In Re Parmalat Sec. Lit., 479 F.Supp.2d at 339-40; Odyssey Re (London) Limited v. Stirling Cooke Brown Holdings, 85 F. Supp.2d at 293; Granite Partners, L.P. v. Bear, Stearns & Co. Inc., 17 F. Supp.2d at 287.

place of, and participants in, each fraudulent communication as required. Id. As shown above, the Talos Defendants have also not sufficiently alleged fraud (or any other wrongful conduct) against Pelican itself. Nor have they specifically alleged an agreement among any persons to engage in fraud. The closest they come - and it is not very close - is to refer to an ill-defined "scheme" among Pelican, AIP, and Mr. Robbins. Finally, the Talos Defendants have not plausibly alleged Pelican's intentional participation in AIP's and Mr. Robbins' purported scheme to defraud them by bringing this action because, as shown above, any purported fraud against those defendants of the kind that they allege, including any reliance by them on it, had to have run its course before commencement of this lawsuit.

The Talos Defendants also do not state any other claim, such as abuse of process or malicious prosecution, that might arise from the prosecution of legal proceedings. A criminal proceeding is required for malicious prosecution. Cuthbert v. Nat'l Org. for Women, 207 A.D.2d 624, 626, 615 N.Y.S.2d 534, 536 (3d Dep't 1994). The filing of a summons and complaint cannot form the basis for a claim for abuse of process. See Curiano v. Suozzi, 63 N.Y.2d 113, 116-17, 469 N.Y.S.2d 466, 468 (1984).

CONCLUSION

For the foregoing reasons, the Talos Defendants' counterclaim against Pelican should be dismissed.

New York, New York
November 16, 2009

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DECLARATION OF SERVICE

Eric Rosenberg hereby declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

I am an attorney licensed to practice law in the State of New York and am associated with Altman & Company PC, attorneys for plaintiff Pelican Equity. On this day, November 17, 2009, I served the attached memorandum of law and accompanying notice of motion, declaration of Eric Rosenberg, and exhibits by filing them through the ECF system and by sending copies of them by first class U.S. mail to the following persons:

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