4-2-2008

Order on Motions to Dismiss (ALLEN FREEMAN)

Elizabeth E. Long
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ALLEN FREEMAN, BARBARA FREEMAN, NELDA FREEMAN, and LOIS MEISER V. VISION	)	
Plaintiffs,	)	
v.	)	**Civil Action File No. 2007CV138599**
VISION FINANCIAL, LP, TRADESTATION SECURITIES, INC., MF GLOBAL INC., f/k/a MAN FINANCIAL INC., ANTHONY MICHAEL RAMUNNO, JR., individually and d/b/a RENAISSANCE ASSET MANAGEMENT, RAM I, LLC, RENAISSANCE ASSET MANAGEMENT, LLC, and WILLIAM STACY WILKINSON	)	
Defendants,	)	

ORDER ON MOTIONS TO DISMISS

On March 16, 2009, counsel for the parties appeared to present oral argument on Motions to Dismiss filed by Vision Financial Markets, LLC ("Vision"), TradeStation Securities, Inc. ("TradeStation"), and MF Global, Inc. ("MF," collectively the "FCM Defendants"). After reviewing the Complaint, the briefs submitted on the Motions, and the oral arguments presented by counsel, the Court finds as follows:

I. FACTS COMMON TO ALL COUNTS

Defendant Michael Ramunno, Jr.[1] is currently incarcerated for operating fraudulent investment schemes. Mr. Ramunno created isolated investments for and managed an unregistered commodity pool which he operated as a Ponzi scheme using new investments to pay "returns". In addition, Defendant Ramunno allegedly perpetrated his scheme by circulating

[1] Defendant Michael Ramunno Jr., was served with the Complaint on August 16, 2007. He has not filed an Answer with the Court.

fictitious monthly account statements, 2004 and 2005 Annual Reports with fake "audited" financial statements, and a Private Placement Memorandum ("PPM") in 2005 with false return summaries and account descriptions.

Plaintiffs,[2] along with many other individuals not named in this lawsuit, invested their money with Defendant Ramunno. Defendant Ramunno perpetrated his scheme through three entities created and controlled by him: Renaissance Asset Management ("Asset Management"),[3] Renaissance Asset Management LLC ("Renaissance"),[4] and RAM I, LLC ("RAM").[5] Defendant William Stacy Wilkinson, a licensed securities and commodities broker, worked with Ramunno as an officer and owner of Renaissance and RAM.

In September, 2008, Plaintiffs amended their complaint to name three futures commodity merchants as Defendants: Vision,[6] TradeStation,[7] and MF.[8] Plaintiffs bring five counts against the FCM Defendants: (1) fraud/conspiracy to defraud, (2) constructive fraud and negligent

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[2] Plaintiffs Allen and Barbara Freeman invested the following amounts with Ramunno: $450,000 in July, 2004; $135,000 in November, 2004; and $700,000 in November, 2005. Plaintiff Nelda Freeman, mother to Allen Freeman, invested the following amounts with Ramunno: $200,000 in November, 2004. Plaintiff Lois Meiser, mother to Barbara Freeman, invested the following amounts with Ramunno: $40,000 in February, 2005.

[3] Asset Management was an unregistered and unlicensed commodity pool operator and trading advisor that operated from 2003-2005 accepting cash from investors, including Plaintiffs. Asset Management was operated as a sole proprietorship.

[4] Renaissance is a Georgia limited liability company created in 2005. In July, 2005, Renaissance submitted a registration application with the Nations Futures Association ("NFA") and became a registered commodity pool operator and trading advisor.

[5] RAM is Delaware limited liability company created in 2005.

[6] Ramunno/Asset Management opened an account in 2003 with Vision as Ramunno d/b/a Renaissance Asset Management.

[7] Ramunno/Asset Management opened an account with Trade Station in May, 2004 under the name "Renaissance Asset Management." In opening the account, Ramunno filled out an account application (attached to the TradeStation Answer) stating that Ramunno was self-employed and asserting that all funds are/will be "personal funds" and none are or were to be solicited from a third party.

[8] Ramunno submitted an account application in 2005 with MF and attached a copy of the PPM. Unlike with the other FCM Defendants, at the time that Ramunno opened the MF account, Renaissance/RAM was a properly registered commodity pool.

misrepresentation, (3) breach of fiduciary duty, (4) aiding and abetting breach of fiduciary duty, and (5) negligence. Plaintiffs allege that the FMC Defendants failed to investigate Ramunno/Renaissance when opening and maintaining the accounts and should have discovered that the commodity pool was unregistered from 2003-2005 and that it was engaged in fraudulent activity. Additionally, Plaintiffs allege that the FCM Defendants failed to segregate funds in the accounts.

II. STANDARD

In reviewing a motion to dismiss pursuant to O.C.G.A. § 9-11-12(b)(6), the Court must determine whether plaintiffs have stated a claim upon which relief can be granted. Under this standard, the Court must grant the motion if "(1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." Stendahl v. Cobb Cty., 284 Ga. 525, 525 (2008).

III. ARGUMENTS

A. Duty Owed by FCM Defendants to Plaintiffs

The FCM Defendants argue that Plaintiffs were not their ***customers***, and therefore, they did not owe Plaintiffs any duty for purposes of establishing fraud through omission, negligent misrepresentation, breach of fiduciary duty, or negligence. The FCM Defendants assert that Plaintiffs were customers of Ramunno, that Ramunno was a customer of the FCM Defendants, but that there was no customer relationship between the FCM Defendants and Plaintiffs.

Plaintiffs argue that they are the beneficial owners of the pooled accounts, and therefore, are "customers" of the FCM Defendants. Plaintiffs rely upon case law interpreting the definition of "customers" in the context of compulsory arbitration with securities brokers under NASD

rules, which holds that a "customer" is not limited to account holders of FCM defendants. See e.g., WMA Securities, Inc. v. Wynn, 191 F.R.D. 128, 130 (S.D. OH 1999) ("A Customer is defined as anyone who is not a broker or dealer. 'Customer' is not [solely] defined ...as a person who opened an account with a brokerage firm). The cases cited by Plaintiffs, however, are inapplicable because in each case cited, the non-account holder who was found to be a "customer" had contact with and, at a minimum, an "informal business relationship" with a registered representative of the defendant securities broker. See, e.g., Multi-Financial Securities Corp. v. King, 386 F.3d 1364, 1368-71 (11th Cir. 2004) (holding that an investor who relied upon firm's registered representative and firm's reputation is a "customer" pursuant to NASD rules); Oppenheimer & Co., Inc. v. Neidhardt, 56 F.3d 352, 357 (2d Cir. 1995); Vextax Securities Corp. v. McWood, 116 F. Supp.2d 865, 869-870 (E.D. Mich. 2000); Vextax Securities Corp. v. Skillman, 117 F. Supp.2d 654, 657 (N.D. OH 2000); WMA Securities Inc. v. Ruppert, 80 F. Supp.2d. 786 (S.D. OH 1999).

Here, the NASD rules are not applicable. In addition, Plaintiffs have not alleged any communication, contact, or any other fact giving rise to a customer relationship, whether formal (i.e., an account) or informal (i.e., investment advice), between them and the FCM Defendants. Therefore, Plaintiffs' reliance on NASD rules and case law interpreting a broker's fiduciary duties owed to its customers is misplaced. It is undisputed that brokers owe specific duties to customers such as a care and loyalty, but there is no allegation in the Complaint sufficient to impute such a duty on the FCM Defendants with respect to Plaintiffs.

Even if the FCM Defendants owed no fiduciary duty to Plaintiffs, Plaintiffs argue that the FCM Defendants had a duty under Section 4(d)(2) of the Commodity Exchange Act ("CEA"), and the accompanying CFTC regulations, to account separately for all of Plaintiffs' funds and not to commingle or pool such funds. The commodity pool is the "customer" under Section

4(d)(2), not the individual investors. The FCM Defendants were under no duty to account to the individual investors participating in the pool; rather, it was the duty of the commodity pool operator to provide such an accounting. 7 U.S.C. §§ 6d, 6n(4).

Finally, Plaintiffs rely upon common law principles of agency to establish a duty owed to them by the FCM Defendants. See e.g., Webb v. Day, 273 Ga. App. 491, 492 (2005) ("Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."); O.C.G.A. § 23-2-58 ("Any relationship shall be deemed confidential ... where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another ...."). The Complaint in this case, however, is devoid of any allegation that the FCM Defendants exerted control over Plaintiffs or the non-discretionary accounts that Ramunno opened with the FCM Defendants on behalf of the Plaintiffs.

In all of the theories advanced and cases relied upon by Plaintiffs, there is a connection between the brokerage firm and the investors to whom a duty arises. That crucial link is missing in this case. The facts of this case are analogous to the facts of Kolbeck v. LIT America, Inc., 923 F. Supp. 557, 563 (S.D.N.Y. 1996) where the plaintiffs brought negligence, fraud, and breach of fiduciary duty claims against futures commodity merchants who opened accounts for an unregistered commodity pool into which plaintiffs had invested. The Kolbeck court dismissed plaintiffs' complaint finding that the futures commodity merchant defendants owed no duty to plaintiffs. "Securities brokers do not owe a general duty of care or disclosure to the public simply because they are market professionals. A duty of care arises only when the broker does business with the plaintiffs." Id. at 572. The defendants in Kolbeck gave monthly tours of the New York Futures trading floors to potential investors in the unregistered pool, including the plaintiffs in the case. The court rejected plaintiffs' arguments that those tours were sufficient to

create a confidential relationship or a duty between the parties. Id. at 561. Here, Plaintiffs have not alleged a single instance of contact or communication between them and the FCM Defendants. Without facts to support the claim that the FCM Defendants "did business" with Plaintiffs, there is no basis upon which to find that the FCM Defendants owed a duty to Plaintiffs. See also, Damato v. Merrill Lynch Pierce Fenner & Smith, 878 F. Supp. 1156, 1158-1162 (N.D. Ill. 1995) (dismissing claims against FCM defendants because liability under the CEA only extends to those who sold investments in the commodity pool and similarly dismissing fraud claims); Brown v. Royce Brokerage, Inc., 632 F.2d 652 (5th Cir. 1980) (dismissing fraud, breach of fiduciary duty, and negligence claims against FCM defendants because there is no duty to investigate registration status and because plaintiffs were not "customers" of the FCM).

As a matter of law, the Court finds that Plaintiffs are not customers of the FCM Defendants, and therefore, the FCM Defendants owed no duties to Plaintiffs.

The absence of a duty owed to Plaintiffs by the FCM Defendants necessitates dismissal of the fraud by fraudulent omission claim in Count I, constructive fraud and negligent misrepresentation claims in Count II, breach of fiduciary duty claim in Count III, and negligence claims in Count V. See, Ades v. Werther, 256 Ga. App. 8, 11 (2002) (fraud); O.C.G.A. § 23-2-51 (constructive fraud); Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc., 267 Ga. 424, 426 (1997) (negligent misrepresentation); Perry Golf Course Dev. LLC v. Housing Authority of City of Atlanta, 294 Ga. App. 387, 393 (2008) (breach of fiduciary duty); Bradley Center v. Wessner, 250 Ga. 199, 200 (1982) (negligence).

B. Conspiracy to Defraud

Plaintiffs allege that the FCM Defendants participated in a conspiracy to defraud Plaintiffs. In order to demonstrate a conspiracy, Plaintiffs must show that the FCM Defendants acted in concert with Ramunno and Wilkerson to "accomplish an unlawful end or to accomplish

a lawful end by unlawful means." First Federal Sav. Bank v. Hart, 185 Ga. App. 304, 305 (1987). The Complaint alleges that the FCM Defendants knew or were extremely reckless in not knowing that Asset Management was an unregistered commodity pool operator,[9] that Ramunno, Wilkinson, the Asset Management/Renaissance entities made false statements to investors, and that the PPM contained false and fraudulent misrepresentations. Taking Plaintiffs' allegations as true, there is nothing in the Complaint, however, to sustain allegations that the FCM Defendants acted in concert with Ramunno, Wilkinson, or the Asset Management/Renaissance entities in order to defraud Plaintiffs. Plaintiffs merely allege knowledge, which is not conspiracy. Having previously held that the FCM Defendants had no duty to disclose information, conspiracy to defraud must also be dismissed in the absence of factual allegations to support the existence of such a conspiracy.

C. Aiding and Abetting

Plaintiffs allege that the FCM Defendants aided and abetted Defendant Ramunno's breach of his fiduciary duties owed to Plaintiffs. To establish a claim of aiding and abetting, one must show that "(1) through improper action or wrongful conduct and without privilege, the defendant acted to procure a breach of the primary wrongdoer's fiduciary duty to the plaintiff; (2) with knowledge that the primary wrongdoer owed the plaintiff a fiduciary duty, the defendant acted purposely and with malice and the intent to injure; (3) the defendant's wrongful conduct procured a breach of the primary wrongdoer's fiduciary duty; and (4) the defendant's tortious conduct proximately caused damage to the plaintiff." Insight Technology, Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 25-26 (2006) (citations omitted). Count IV of the Complaint closely follows the language of Insight in alleging aiding and abetting. The language of the Complaint

[9] This claim in inapplicable to Defendant MF Global, Inc., because Asset Management/Renaissance was registered at the time that Ramunno opened an account with this Defendant.

states that the FCM Defendants acted purposefully and with malice and the intent to injure, but the Complaint is devoid of any allegation to support such a legal conclusion. "While the complaint need not include detailed factual allegations, it must contain more than a formulaic recitation of the elements of a legal cause of action." Charles H. Wesley Educ. Foundation, Inc. v. State Election Bd., 282 Ga. 707, 714 (2007); see also, Papasan v. Allain, 478 U.S. 265, 286 (1986) (on a motion to dismiss, a court is "not bound to accept as true a legal conclusion couched as a factual allegation"). Without a factual allegation of malice or intent to injure, the Court must dismiss Plaintiffs' claim of aiding and abetting breach of fiduciary duty. See Kolbeck v. LIT America, Inc., 939 F. Supp. 240, 244 (S.D.N.Y. 1996) aff'd 153 F.3d 918 (2d Cir. 1998) (affirming dismissal of FCM defendants on aiding and abetting claims).

D. Punitive Damages & Attorneys Fees

Without the underlying counts in this action, Plaintiffs claims for punitive damages and attorneys' fees must also be dismissed.

IV. CONCLUSION

The Court hereby **GRANTS** the FCM Defendants' Motions to Dismiss and **ORDERS** that they be dismissed with prejudice.

SO ORDERED this 2nd day of April, 2009.

ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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