

13 Misc.3d 1213(A)

**(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 13 Misc.3d 1213(A), 824 N.Y.S.2d 759)****H**

This opinion is uncorrected and will not be published in the printed Official Reports.

E. Roger Williams, Normandy Trading, Inc. And
Normandy Investment Trust, Plaintiffs,

v.

Sidley Austin Brown & Wood, L.L.P.; Raymond J. Ruble; Multinational Strategies, LLC; Kevin M. Kops; Michael N. Schwartz; Coastal Trading, LLC; Enterprise Financial Services Inc., f/k/a Enterprise Bank; Deerhurst Management Company, Inc; Braxton Management, Inc; Brandonten Management, Inc.; Beckenham Trading Company, Inc.; Peter Molyneux; Andrew Krieger; Refco Capital Markets, Ltd.; HVB US Finance Inc. f/k/a HVB Structured Finance; and David A. Schwartz, Defendants.

600808/05

Supreme Court, New York County

Decided on September 22, 2006

CITE TITLE AS: Williams v Sidley Austin Brown & Wood, L.L.P.

ABSTRACT

Pleading
Complaint
Amendment

Williams v Sidley Austin Brown & Wood, L.L.P., 2006 NY Slip Op 51810(U). Pleading-Complaint-Amendment. [Civil Practice Law and Rules-§ 2221](#) (e) (Motion affecting prior order; motion for leave to renew). (Sup Ct, NY County, Sept. 22, 2006, Fried, J.)

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OPINION OF THE COURT

Bernard J. Fried, J.

The facts and circumstances of this case, as alleged in plaintiffs' amended complaint, are outlined in the March 13, 2006 Order, entered March 15, 2006, which dismissed plaintiffs' amended complaint, in part, as asserted against defendants Sidley Austin Brown & Wood, LLP (Sidley Austin), and a former partner of Sidley Austin, defendant Raymond J. Ruble (Ruble), and which dismissed the amended complaint, in its entirety, as asserted against HVB US Finance, Inc. f/k/a HVB Structured Finance Inc. (HVB), for failure to plead fraud and conspiracy to commit fraud with particularity pursuant to [CPLR 3016](#) (b), and upon the ground that plaintiffs failed to allege any misrepresentations of fact by these defendants which fraudulently induced them to enter into the underlying Common Trust Fund (CTF) tax shelter transaction (see [Williams v Sidley Austin Brown & Wood, L.L.P.](#), 11 Misc 3d 1064(A), 816 NYS 2d 702, 2006 WL 684599 [Sup Ct, NY County 2006]). Plaintiffs now move to renew, for reconsideration (motion sequences 013), and for leave to serve a second amended complaint (motion sequence 014). The motions are consolidated for determination.

Plaintiffs' motion to renew is based, in part, upon a deferred prosecution agreement, executed by a HVB Management Committee, and filed in the United States District Court for the Southern District of New York on or about February 17, 2006 (*United States v Bayerische Hypo-Und Vereinsbank AGI*, No. 1:06-CR-00162 [SD NY 2006]). Annexed to and made

part of the deferred prosecution agreement are, a federal criminal information, and a statement of admitted facts. Defendants' assertion that the deferred prosecution agreement does not constitute new or previously unavailable evidence is unpersuasive. The requirement that a motion for leave to renew be based on "new facts not offered on the prior motion" ([CPLR 2221](#) [e][2]), is a flexible *2 one, and thus does not impede the exercise of discretion to consider the proffered evidence, in this case, which became available after submissions and oral argument on the prior motions but before entry of the decision sought to be reviewed (see [Petsako v Zweig](#), 8 AD3d 355 [2d Dept 2004]; [Framapac Delicatessen, Inc. v Aetna Casualty and Sur. Co.](#), 249 AD2d 36 [1st Dept 1998]). By contrast, the transactional documents and correspondence between plaintiffs and HVB are not new evidence, and plaintiffs do not offer a reasonable excuse for not placing the documents before the court in connection with the prior motions (see [CPLR 2221](#)[e][3]). Accordingly, the transactional documents and correspondence that plaintiffs seek to introduce will not be considered. The preclusion of such evidence in relation to the motion to renew, however, does not constitute a determination as to its admissibility at the appropriate time.

As previously stated, evidence submitted by the parties, in connection with motions to dismiss pursuant to [CPLR 3211](#)(a)(7), may be used to supplement, and to remedy any defects in the pleading ([Leon v Martinez](#), 84 NY2d 83, 88 [1994]; [Rovello v Orofino Realty Co.](#), 40 NY2d 633, 636[1976]). The federal criminal information, for all intents and purposes, is the equivalent of an indictment (see [FRCRP §7](#) [b], [c][1]). Indictments are often admitted into evidence, in civil cases, to demonstrate probable cause to believe that a certain set of facts occurred (see e.g. [Strange v County of Westchester](#), 29 AD3d 676 [2d Dept 2006]; [Haynes v City of New York](#), 29 AD3d 521 [2d Dept 2006]; [Diaz v Espada](#), 8 AD3d 49 [1st Dept 2004]; [Gomez v Singh](#), 309 AD2d 620 [1st Dept 2003]; [Spota v Conti](#), 9 Misc 3d 349 [Sup Ct, Suffolk County 2005]). There is no impediment to considering the criminal information in this case, or the deferred prosecution agreement and statement of admitted. Thus, all of the documents comprising the deferred prosecution agreement will be considered to the extent that they are relevant to the causes of action alleged by plaintiffs in the amended and proposed second amended complaint.

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In the deferred prosecution agreement, HVB's Management Committee agreed to the entry of a one-count criminal information, against Bayerische Hypo-und Vereinsbank and the related HVB entities named herein, (deferred prosecution agreement, exhibit B), charging HVB with conspiracy to commit tax fraud against the United States. The criminal information alleges, among other things, that between 1996 and 2003, the co-head of HVB's New York Financial Engineering Group, Domenick DeGiorgio, supervised HVB's participation in various tax shelter transactions, and that in doing so, DeGiorgio met and corresponded with tax shelter promoters, and caused the drafting and execution of various documents that falsely and misleadingly described HVB's role in the tax shelter transactions. The criminal information further alleges that during this time, DeGiorgio worked directly with former Sidley Austin partner, defendant R. J. Ruble, and a number of others, not named in this action, to set up, market, and implement, tax shelters that were designed to fraudulently eliminate or reduce taxable income or gain, and to generate fees equivalent to 5% of the desired tax loss. The criminal information charges HVB and its co-conspirators with providing clients with opinion letters that contained false and fraudulent representations and statements, with the intent, that clients would claim the fraudulent tax shelter losses on tax returns. The criminal information also charges HVB with knowledge that its co-conspirators issued, or caused to be issued, the opinion letters, and charges HVB with knowledge that the documents used to implement the alleged loans and investments contained false and misleading information regarding the nature of the transactions with regard to the purported loans provided by HVB (4/17/06 Notice of Motion, Exh. B).*3

In the statement of admitted facts, annexed to the deferred prosecution agreement, as exhibit C, HVB acknowledged that it "participated in a number of fraudulent tax shelter transactions devised by other, including a series of transactions known as ... common trust fund'... transactions," and that its activities in connection with these and other transactions included:

(i) participating in transactions purporting to be loans that were not bona fide loans; (ii) participating in trading activity on instructions from promoters that

was intended to create the appearance of investment activity but that had no real substance; (iii) participating in creating documentation that contained false representations concerning the purpose and design of transactions; and (iv) engaging in activity with others, including accounting firms, investment advisory firms various individuals affiliated with those entities, lawyers and clients (defined herein to include the high net worth U.S. individuals and purported entities they created who participated in the transactions to obtain and generate the tax losses), all directed toward the implementation of the tax shelters designed to defraud the United States.

HVB admitted that the conduct occurred under the supervision and direction of DeGiorgio, and stated that although DeGiorgio made false and misleading representations to HVB concerning the legitimacy of the various transactions, HVB accepted responsibility for DeGiorgio's actions because it placed him in a supervisory position, permitted him to operate and manage HVB's Financial Engineering Department with few controls, and rewarded him for generating substantial fees for the bank by participating in the tax shelter transactions.

As stated in my prior decision, New York does not recognize civil conspiracy as an independent cause of action ([Alexander & Alexander of NY v Fritzen](#), 68 NY2d 968, 969 [1986]; [Ward v City of New York](#), 15 AD3d 392, 393 [2d Dept 2005]; [Litras v Litras](#), 254 AD2d 395 (2d Dept 1998); [Riverbank Realty Co. v Koffman](#), 179 AD2d 542, 543 [1st Dept 1992]; see also [Lewis v Rosenfeld](#), 138 F Supp 2d 466, 479 [SD NY 2001]). However, allegations of conspiracy are permitted, to connect the actions of separate defendants, with an otherwise actionable tort ([Alexander & Alexander of NY v Fritzen](#), 68 NY2d at 969). The elements of a conspiracy are: (1) a corrupt agreement between two or more parties; (2) an overt act in furtherance of the agreement, which constitutes an independent tort or wrongful act; (3) the defendant's intentional participation in the furtherance of the plan or purpose; and (4) resulting damages or injury (see [Lewis v Rosenfeld](#) 138 F Supp 2d at 479; [Best Cellars Inc. v Grape Finds at Dupont, Inc.](#), 90 F Supp 2d 431, 446 [SD NY 2000]; see also [Truong v AT&T](#), 243 AD2d 278 [1st Dept 1997]; [Albion Fund v State St. Bank](#), 8 Misc 3d 264, 273 [Sup Ct, NY County], [affd](#) 2 AD3d 162 [1st Dept 2003]; [Riverbank Realty Company v Koffman](#), 179 AD2d at 543).

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The deferred prosecution agreement supplies the element of scienter and a shared “perfidious purpose” found lacking in plaintiffs' amended complaint, as asserted against HVB, Ruble and Sidley Austin (see *Williams v Sidley Austin Brown & Wood, LLP, supra*, 2006 WL 684599 at ***4, ***5; *Snyder v Puente de Brooklyn Realty Corp.* 297 AD2d 432 [3rd Dept 2002]; *National Westminster Bank USA v Wexsel*, 124 AD2d 144, 147 [1st Dept], *app denied*, 70 NY2d 604 [1987]). According to the deferred prosecution agreement, HVB, Ruble and/or Sidley *4 Austin, and others purposefully drafted the opinion letters and transactional documents to include misrepresentations regarding the substance, implementation and purpose of the CTF transactions, which went beyond the mere “predictions and expressions of future events,” originally alleged in plaintiffs' amended complaint (*William v Sidley Austin Brown & Wood, LLP, supra* 2006 WL 684599 at ***5). HVB's admissions show that Sidley Austin, Ruble and HVB purposefully participated with accountants and promoters to market and implement fraudulent tax shelters by making it appear that investors were taking loans to make leveraged investments when they were not, and indicates that, contrary to the positions taken in support of the initial motions to dismiss, HVB, Ruble and Sidley Austin were more than just peripheral parties used to conduct otherwise lawful business transactions or provide subsequent support services. Thus, as indicated in the deferred prosecution agreement, the shared purpose of marketing and implementing fraudulent tax shelters was coupled with the independent torts of participating in the creation of false and misleading transactional documents, opinion letters, the making bogus loans, and participating in sham investment transactions.

Whether plaintiffs were the unwitting victims of the conspiracy, as alleged in the amended complaint, or were co-conspirators, as argued by HVB from the language of the deferred prosecution agreement, is an issue of fact for trial. It is sufficient, at this juncture, that plaintiffs' amended complaint alleges that the transaction was sold to Williams based upon the same set of misrepresentations, and that Ruble and HVB knew and intended that it would be (see *Houbigant, Inc. v Deloitte & Touche LLP*, 303 AD2d 92, 100 [1st Dept 2003]; *Fiduciary Co., Ltd v Micro-Therapeutics, Inc.*, 83 AD2d 814 [1st Dept 1981]).

In opposition to plaintiffs' motion to serve a second amended complaint, HVB annexes a copy of a November 26, 2001 letter to Roger Williams, pursuant to which HVB requested and obtained an acknowledgment from Roger Williams that, “HVB has had no involvement in, and accepts no responsibility for, the establishment, promotion or marketing of the Transaction” (see Nicholas I. Leitzes Aff., Exh. A). HVB asserts that this letter serves as further acknowledgment that HVB played no part in inducing Williams to enter into the CTF transaction. However, the representations of non-participation contained in the November 26, 2001 correspondence are contradicted by the admissions made by HVB in the deferred prosecution agreement regarding its complicity with Sidley Austin, accountants and tax shelter promoters in creating false and misleading documents that were used to market and implement fraudulent tax shelters, and, thus, raises additional issues of fact with respect to HVB's participation in the dissemination of false and misleading statements to Williams in connection with the loan.

The factual allegations of plaintiffs' second amended complaint, which precede the pleading of the numbered causes of action, adequately apprise the various defendants of their alleged roles in the CTF transactions, and the nature of the tortious conduct being alleged (see *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 123 [1st Dept 1998]; *Ackerman v Vertical Club Corp.*, 94 AD2d 665 [1st Dept], *app dismissed* 60 NY2d 644 [1983]). The additional allegations, and the evidence admitted in connection with the CPLR 3211 motions, are sufficient to sustain plaintiffs' causes of action for fraud and conspiracy to commit fraud as asserted against Ruble and Sidley Austin, and for fraud, conspiracy to commit fraud, aiding and abetting a fraud, and aiding and abetting a breach of fiduciary duty against HVB (see *Higgins v NY Stock Exchange, Inc.*, 10 Misc 3d 257, 287 [Sup Ct, NY County 2005]; *5 *Louis Capital Mkts. L.P. v REFCO Group, Ltd, LLC*, 9 Misc 3d 283, 286 [Sup Ct, NY County 2005]). Defendants do not object to the additional causes of action asserted against them as set forth in the balance of the proposed second amended complaint.

Accordingly, for the reasons set forth herein it is:

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ORDERED, that plaintiffs' motion for renewal and reconsideration (motion sequence 013), is granted, and the causes of action asserted against Sidley Austin Brown & Wood, LLP Raymond J. Ruble and HVB USA Finance, Inc. f/k/a HVB Structured Finance Inc. (HVB) are reinstated, as indicated herein; and it is further

ORDERED, that plaintiffs' motion for leave to serve a second amended complaint (motion sequence 014), is granted, and the second amended complaint, in the proposed form annexed to the moving papers, shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED, that the defendants shall serve an answer to the amended complaint within 20 days from the date of said service.

DATED:September 22, 2006

E N T E R:

J.S.C.

Copr. (c) 2009, Secretary of State, State of New York
N.Y.Sup. 2006.
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