

15 Misc.3d 1125(A)

**(Table, Text in WESTLAW), Unreported Disposition  
(Cite as: 15 Misc.3d 1125(A), 841 N.Y.S.2d 222)****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This opinion is uncorrected and will not be published in the printed Official Reports.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, Plain-  
tiffs,

v.

Sidley Austin Brown & Wood, L.L.P.; RAYMOND J.  
RUBLE; MULTINATIONAL STRATEGIES, LLC;  
KEVIN M. KOPS; MICHAEL N. SCHWARTZ;  
COASTAL TRADING, LLC; ENTERPRISE FI-  
NANCIAL SERVICES, INC., f/k/a ENTERPRISE  
BANK; DEERHURST MANAGEMENT COM-  
PANY, INC.; BRAXTON MANAGEMENT, INC.;  
BRANDONTON MANAGEMENT, INC.; BECK-  
ENHAM TRADING COMPANY, INC.; PETER  
MOLYNEUX; ANDREW KRIEGER; REFCO  
CAPITAL MARKETS, LTD.; HVB US FINANCE  
INC. f/k/a HVB STRUCTURED FINANCE, INC.;  
and DAVID A. SCHWARTZ, , Defendants.

**600808/05**

Supreme Court, New York County

Decided on April 24, 2007

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

## ABSTRACT

Fraud  
Conspiracy

*Williams v Sidley Austin Brown & Wood, L.L.P.*,  
2007 NY Slip Op 50846(U). Fraud-Conspiracy. (Sup  
Ct, NY County, Apr. 24, 2007, Fried, J.)

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## OPINION OF THE COURT

Bernard J. Fried, J.

The Estate of Peter Molyneux, now deceased, moves, pursuant to [CPLR 3016](#) (b) and [3211](#) (a) and ( c ), to dismiss plaintiffs' Second Amended Complaint, as asserted against its decedent. The motion (seq. 016), supercedes a motion to dismiss, interposed by Peter Molyneux prior to his death, which was denied by Order dated January 30, 2006, with leave to renew on the original papers, and upon substitution of the Estate. The Estate was substituted by Order entered June 16, 2006.

The underlying facts and circumstances, as alleged in plaintiffs' first amended complaint, are outlined in the decision and order entered March 13, 2006, that granted [CPLR 3211](#) (a) and [CPLR 3016](#) (b) motions by defendants Sidley Austin Brown & Wood (Sidley Austin), Raymond J. Ruble, and HVB Structured Finance Inc. f/k/a HVB Structured Finance Inc. (HVB) (seq. 007, 008), in part, to the extent of dismissing the fraud, conspiracy and aiding and abetting claims asserted against them (*Williams v Sidley Austin Brown & Wood, LLP*, [11 Misc 3d 1064\(A\)](#), [816 NYS2d 702](#) [Sup Ct, NY County 2006]) (*Sidley I*). Additional facts and circumstance are outlined in the September 22, 2006 decision and order, that granted

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plaintiffs' motion to reargue and for leave to serve a second amended complaint (seq. 013 and 014), that reinstated the fraud, conspiracy and aiding and abetting claims asserted against HVB and Sidley Austin, based upon admissions made by HVB in a deferred prosecution agreement, and in the related federal criminal information and statement of admitted facts (referred to together as the Deferred Prosecution Agreement), entered 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]) (see [Williams v Sidley Austin Brown & Wood, LLP](#), 13 Misc 3d 1213(A), 824 NYS2d 759 [Sup Ct.NY County 2006], *affd* \_\_AD2d\_\_, 2007 WL 611248 [1st Dept 2007])(*Sidley II*). In *Sidley II*, the admissions contained in the Deferred Prosecution Agreement were made part of, and allowed to supplement the allegations in plaintiffs' second amended complaint.

As outlined in the prior decisions, plaintiffs participated in a “common trust fund” (CTF) tax shelter, and claimed an \$8 million dollar deduction on their 2001 income tax returns. The Internal Revenue Service (IRS), subsequently, disallowed the deduction, and plaintiffs were required to pay back taxes, interest and penalties. Plaintiff Williams is the primary investor and principal of plaintiffs Normandy Trading and Normandy Trust, entities that purportedly were \*2 created by defendants to facilitate Williams' participation in the CTF transaction. Each of the variously named defendants played a role in the creation or implementation of the transaction.

The CTF transaction was structured to create a loss through the use of a loan from defendant HVB which, according to the promoters, would be used to purchase foreign currency options in what the parties describe as simultaneous “straddle” and “strangle” positions. The negative basis in the transaction, created by the loan, was used to generate the loss. However, in disallowing the deductions, the IRS took the position that the “offsetting positions entered into by the CTF transaction did not have any effect on the CTF's net economic position or non-tax objectives....”

In the Deferred Prosecution Agreement, HVB admitted, in pertinent part, that:

...between 1996 and 2002 HVB participated in a number of fraudulent tax shelter transactions derived by others including...“common trust fund,”... transactions. HVB's activities in connection with these...transactions included: ( i) participating in 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 the transactions; and (iv) engaging in activity with others, including ...investment advisory firms, various individuals affiliated with those entities... lawyers, and clients... all directed toward the implementation of the tax shelters designed to defraud the United States...

(Statement of Admitted Facts, p 1, ¶2). These admissions were incorporated by reference and made part of plaintiffs' Second Amended Complaint, which alleges, in pertinent part:

39...as part of the Defendants' pre-planned and orchestrated scheme, Braxton (a Deerhurst affiliate) allegedly borrowed \$8,000,000.00 from HVB. Molyneux, as Principal for Braxton, signed for this alleged loan. Even though Braxton was the “borrower” of this alleged loan, HVB charged Williams a loan origination fee of 100 basis points, and instructed Williams to sign various loan documents that required Williams to invest the loan proceeds as directed by Molyneux and Braxton. After executing the alleged loan with HVB, Braxton immediately loaned \$8,000,000.00 to Williams. Once again, Molyneux, as Principal for Braxton, signed the loan documents on behalf of Braxton. Then...Williams loaned \$8,000,000.00 to Normandy Trading. Because an investment in a common trust fund must be made through a trust, Normandy Trading...established Normandy Investment Trust with Enterprise serving as trustee....

40. Enterprise, at the direction of Defendants, used a large portion of the Fund proceeds to acquire a structured note established by Brandonton (another Deerfield affiliate). The Brandonton structured note represented approximately 90% of Normandy Trust's investment in the Fund. Enterprise then invested ap-

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proximately 10% of the remaining cash in the Fund into...(1) a leveraged account with Deerhurst; (2) the Lone Star Fund (a fund managed by Deerhurst)....

\* \* \* \*3

42. Upon information and belief, the \$8,000,000.00 borrowed from HVB through Braxton to initiate the CTF Transaction was ultimately repaid to HVB directly from Brandonton....

Plaintiffs' Second Amended Complaint, at paragraph 18, alleges that Peter Molyneux, was a "principal in and managing director of" defendant Deerhurst Management Company, Inc. (Deerhurst), a "principal" in defendant Northbridge Capital Management, Inc. (Northbridge) and Beckenham Trading Company, Inc. (Beckenham), the "sole principal" of defendant Braxton Management, Inc., and the "sole owner" of defendant Brandonton Management, Inc. (Brandonton). Plaintiffs' Second Amended Complaint alleges that Deerhurst, Northbridge, Braxton, Beckenham, defendant Krieger, and Molyneux, were involved in the design, implementation, and execution of the CTF transaction, and that Beckenham, another Deerhurst affiliate, was the "counterparty" on the purportedly leveraged option transactions. Thus, the allegations of plaintiff's complaint place Deerhurst, Braxton, Brandonton and Northbridge, and by implication, Molyneux, at the center of the loan and investment components of the transaction, which HVB admitted were illusory and fraudulently represented. Plaintiffs' Second Amended Complaint joins Molyneux on the first cause of action asserted against all of the defendants for fraud, the eighth cause of action for aiding and abetting fraud, the ninth cause of action for aiding and abetting a breach of fiduciary duty, the tenth cause of action for breach of the implied covenant of good faith and fair dealing, and the eleventh cause of action, which, in *Sidley II*, was upheld as a claim for Conspiracy to Commit Fraud (*see* [13 Misc 3d 1213\(A\)](#), [824 NYS2d 759](#), *supra*).

In support of its motion to dismiss, the Estate submits the affidavit of Peter Molyneux, executed prior to his death, as authorized by the January 30, 2006 order. In his affidavit, Molyneux admits that he was Chief Administrative Officer and director of Northbridge, Deerhurst and Beckenham, and that he was chief financial officer of Northbridge. Molyneux alleged that

his responsibility in those companies was limited to back office or administrative functions such as basic accounting, compliance for registered entities, support for trading activity, trade entry and trade confirmation, issuance of reports, maintenance of margin with clearing firms, making margin calls on customers, and handling deposits and redemptions. The Molyneux affidavit does not disclose his ownership interest in those entities.

With respect to the transactions underlying plaintiffs' complaint Molyneux stated that in or around May 2001, Krieger told him about a "proposal" from defendants Schwartz and Kops, of defendant Multinational Strategies, LLC, involving a tax advantaged trading program, which Krieger advised him had been reviewed by the law firm of Rosenman & Colin LLP. Molyneux stated that he was advised that the Rosenman firm would prepare all of the paperwork necessary for Deerhurst, Northbridge and investors in the program, and that it was his responsibility to manage the administrative details in accordance with directions given by Schwartz. Molyneux's affidavit states that Schwartz advised him to establish two additional companies, Braxton, to lend funds to customers, and Brandonton, to provide a structured note to the common trust fund. Molyneux stated that he was made the sole nominal shareholder and director of Brandonton, which became the parent to Braxton, and that he never received any salary, fee or distribution from either entity. Molyneux stated that he handled administration of the trading program as part \*4 of his regular responsibilities, and that he was willing to do so because all aspects of the transactions were cleared through the numerous law firms, including three non-party law firms. Molyneux additionally alleged that he himself invested \$35,000, that the deduction was disallowed, and that he too had to file an amended return and pay additional taxes, interest and penalties in December 2003.

Plaintiffs' first cause of action, as worded, clearly charts a course for fraud in the inducement. To state a viable cause of action for fraud in the inducement, the complaint must allege that the defendant in question (1) made misrepresentations of material existing fact, (2) which were false and known to be false by the defendant when made, (3) for the purpose of inducing plaintiffs' reliance, (4) plaintiffs' justifiable reliance on the alleged misrepresentation or omission, and (5) compensable damages (*Lama Holding Co. v*

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*Smith Barney, Inc.*, 88 NY2d 413 [1996]; *New York University v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]). CPLR 3016 (b) requires that a complaint for fraud articulate the misconduct complained of, in sufficient detail to clearly inform each defendant of what their respective roles were in the incidents complained of (see *P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 377 [1st Dept 2003]; *Abrahami v UPC Constr. Co., Inc.*, 176 AD2d 180 [1st Dept 1991]; but c.f. *Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). The Estate asserts, and plaintiffs admit, that their second amended complaint does not identify any statements or misrepresentations made by Molyneux to plaintiffs, that induced them to enter into the CTF transactions, and contrary to plaintiffs' assertions, there are no facts alleged in the second complaint from which a fiduciary relationship may be inferred, that would give rise to a duty to disclose, even if Molyneux knew of some underlying fraud or illegality (see *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 545-48 [1985]; *Rovello v Klein*, 304 AD2d 638 [2d Dept], *lv denied*, 100 NY2d 509 [2003]; *Conti v Polizzotto*, 243 AD2d 672 [2d Dept 1997]; *Maves v UVI Holdings, Inc.*, 280 AD2d 153, 161-2 [1st Dept 2001]; *Singer v Whitman & Ransom*, 83 AD2d 862, 863 [2d Dept 1981]; *National Westminster Bank v Weksel*, *supra*, 124 AD2d 144, 148 [1st Dept 1987]; *Banque Arabe et International D'Investissement v Maryland Natl. Bank*, 57 F 3d 158 [2d Cir 1995]). Thus, plaintiffs' first cause of action for fraud in the inducement, as alleged against Molyneux, is facially deficient.

On a motion pursuant to CPLR 3211 (a), however, the inquiry is whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 414). In making this analysis, facts, as alleged in plaintiffs' complaint, are accepted as true, and must be given the benefit of every favorable inference (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 AD2d at 375-76). Plaintiffs' additional submissions, which may be used to supplement the pleadings, must also be given the benefit of every favorable inference (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 [1998]). As discussed in *Sidley II*, the crux of the illegality in the CTF transaction, as highlighted by the Deferred Prosecution Agreement, is a sham or

illusory loan, and non-substantive investments. The inferences to be drawn from the allegations of plaintiffs' second amended complaint and the admissions contained in the Deferred Prosecution Agreement, are that the paper proceeds of the illusory loan in this case, were transferred to Molyneux, as sole officer and shareholder of Braxton. Molyneux, then passed these illusory proceeds on to plaintiffs, who then transferred the \*5 non-existent proceeds back to Molyneux, as principal of Brandonton. The non-existent proceeds were then used as the basis for the non-substantive investments that were made through the Deerfield entities, of which Molyneux, admittedly, was chief administrative or chief financial officer. According to plaintiff's second amended complaint, after the loss was claimed, Molyneux, through Brandonton, then transferred the illusory proceeds back to HVB, and according to the Deferred Prosecution Agreement, all of the transactions took place, without money ever leaving the bank. Molyneux admitted that he and/or his companies worked with numerous lawyers and others to set up and structure the transactions. Molyneux's position in those entities gave him access to actual knowledge regarding whether the loan proceeds were actually distributed and used to make the underlying investments as allegedly represented by the Multinational defendants and Sidley Austin.

Thus, although plaintiffs do not allege any direct oral representations by Molyneux prior to their determination to enter into the CTF transactions, the allegations of plaintiffs' complaint, as supplemented by the admissions contained in the Deferred Prosecution Agreement, and Molyneux's own statements, give rise to permissible inferences, that Molyneux knowingly forwarded loan documentation to plaintiffs that purported to be something that it was not, made accounting or trade entries, or generated reports misrepresenting the nature of the transactions, and that he acted in concert with the Multi National defendants, HVB, Sidley Austin and the other defendants to create, design, market, promote and implement fraudulent tax shelters, the information generated with respect to which was relied upon by plaintiffs in claiming the deductions. Such permissible inferences are sufficient to sustain plaintiffs' causes of action for fraud (see *William v Sidley Austin Brown & Wood, LLP*, AD2d, 2007 WL 611248, *supra*; *Knight Securities LP v Fiduciary Trust Co.*, 5 AD3d 172, 173-74 [1st Dept 2004]).

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The same allegations, moreover, adequately support the independent action, and inference of scienter necessary to sustain plaintiffs' causes of action for conspiracy to commit fraud (see *Pope v Rice*, 2005 WL 613085, \*13 [SD NY 2005], citing *Kashi v Gratsos*, 790 F2d 1050, 1055 [2d Cir 1986]; *Semi-Tech Litigation, LLC v Ting*, 13 AD3d 185, 187 [1st Dept 2004]), for aiding and abetting the alleged fraud (see *Semi-Tech Litigation, LLC v Ting*, 13 AD3d at 187; *Knight Securities LP v Fiduciary Trust Co.*, 5 AD3d at 173-74; *Houbigant, Inc. v Deloitte & Touche LLP*, 303 AD2d 92, 100 [1st Dept 2003]), and for aiding and abetting a breach of fiduciary duty by the attorney and Trustee defendants (see *Global Minerals and Metals Corp. v Holme*, 35 AD3d 93 [1st Dept 2006], *lv denied* \_\_NY3d\_\_ [Feb. 15, 2007]; *Aranki v Goldman & Assoc. LLP*, 34 AD3d 510 [2d Dept 2006]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” in determining a CPLR 3211 motion to dismiss (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d at 19), and Molyneux's protestations of innocence, and reliance on the advise of third parties do not provide a defense, as a matter of law (see e.g. *Kimmell v Schaefer*, 89 NY2d 257, 265 [1996][reliance on information provided by employees not reasonable and would not shield chief financial officer from liability]), particularly within the context of a pre-joinder motion pursuant to CPLR 3211 (a) (see

The Estate's argument, that plaintiffs' cause of action for aiding and abetting the breach of fiduciary duty is time barred, is without merit. New York law does not provide any single limitations period for breach of fiduciary duty claims (*Kaufman v Cohen*, 307 AD2d 113, 118 [1st \*6 Dept 2003]). The applicable statute of limitations for aiding and abetting a breach of fiduciary duty depends on substantive remedy being sought (*Lonegard v Santa Fe Indus., Inc.*, 70 NY2d 262, 266 [1987]; *Kaufman v Cohen*, 307 AD2d at 118), and where, as in this case, the underlying breach is predicated on fraud, which is intrinsic and not incidental to the primary causes of action, the statute of limitations is six years, notwithstanding the fact that plaintiffs seek solely monetary relief (see *Klein v Gutman*, 12 AD3d 417, 419 [2d Dept 2004]; *Kaufman v Cohen*, 307 AD2d at 118). Plaintiffs' complaint was filed well within the six year period of limitations.

Accordingly, for the reasons stated above, it is

ORDERED, that the motion by the substituted defendant, Estate of Peter Molyneux, pursuant to CPLR 3211 and 3216 (b), to dismiss plaintiffs' complaint, as asserted against its decedent, is denied.

Dated: April 24, 2007

E N T E R:

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J.S.C.

Copr. (c) 2009, Secretary of State, State of New York  
N.Y. Sup. 2007.

Williams v Sidley Austin Brown &amp; Wood, L.L.P

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