

101 A.D.3d 485, 956 N.Y.S.2d 16, 2012 N.Y. Slip Op. 08638
(Cite as: 101 A.D.3d 485, 956 N.Y.S.2d 16)

Supreme Court, Appellate Division, First Department,
New York.
CDR CRÉANCES S.A.S., Plaintiff-Appellant,
v.
FIRST HOTELS & RESORTS INVESTMENTS,
INC. (also known as LES Premiers Investissements
Hoteliers & Villegiature, Inc.), et al., Defendants-Respondents,
Board of Managers of the Trump World Tower
Condominium, et al., Defendants.

Dec. 13, 2012.

Background: Foreign judgment creditor filed suit to force sale of property whose mortgagor was owned by nonparties foreign judgment debtors that engaged in fraudulent scheme resulting in loss to creditor of hundreds of millions of dollars by using their accounts at mortgagee bank to move money that creditor alleged was partially fraudulently obtained. After debtors were indicted, creditor moved for leave to amend complaint to add claim against mortgagee for aiding and abetting conspiracy to defraud, and to add claims against mortgagor for alleged fraud and conspiracy to defraud, based on information in Department of Justice (DOJ) documents that mortgagee produced in connection with debtors' indictments. The Supreme Court, New York County, O. Peter Sherwood, J., denied motion. Creditor appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) proposed amended complaint failed to state claim for aiding and abetting fraud, and
- (2) amendment adding fraud claims against mortgagor was not warranted.

Affirmed.

West Headnotes

[1] Pretrial Procedure 307A ↪46

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(A) Discovery in General

307Ak44 Failure to Disclose; Sanctions

307Ak46 k. Dismissal or default judgment. Most Cited Cases

The ultimate sanction for discovery misconduct is a default judgment.

[2] Fraud 184 ↪30

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k30 k. Persons liable. Most Cited Cases

Foreign judgment creditor's proposed amended complaint failed to state aiding and abetting fraud claim against mortgagee for property whose mortgagor was owned by nonparty foreign judgment debtors that engaged in fraudulent scheme resulting in judgment that creditor was seeking to enforce by sale of property; creditor alleged that mortgagee had actual knowledge of fraudulent scheme, but then merely set forth very detailed allegations of debtors' fraud against mortgagee rather than allegations of mortgagee aiding and abetting debtors' fraud.

[3] Fraud 184 ↪30

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k30 k. Persons liable. Most Cited Cases

Aiding and abetting is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud.

[4] Fraud 184 ↪30

184 Fraud

184I Deception Constituting Fraud, and Liability

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ity Therefor

184k30 k. Persons liable. Most Cited Cases

Foreign judgment creditor's proposed amendment to complaint to add claims against mortgagor for alleged fraud and conspiracy to defraud, based on allegedly new information in Department of Justice (DOJ) documents that mortgagee produced in connection with indictments of foreign judgment debtors, would not be allowed, since DOJ documents did not contain evidence newly discovered by creditor, whose prior claim in first complaint alleging that mortgagor conspired to defraud was dismissed, and no allegation in proposed amended complaint sufficed to connect mortgagor with fraud that occurred decades before mortgagor existed.

****17** Kellner Herlihy Getty & Friedman, LLP, New York (Douglas A. Kellner of counsel), for appellant.

Stern Tannenbaum & Bell LLP, New York (David S. Tannenbaum of counsel), for First Hotels & Resorts Investments, Inc., respondent.

Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC (Carl J. Nichols of the bars of the State of Virginia and the District of Columbia, admitted pro hac vice, of counsel), for HSBC Bank USA, N.A., respondent.

GONZALEZ, P.J., MAZZARELLI, ACOSTA, ROMÁN, JJ.

****18 *485** Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 8, 2012, which denied plaintiff's motion for leave to amend its complaint, unanimously affirmed, with costs.

Plaintiff brought this action to force the sale of property owned by defendant First Hotels & Resorts Investments, Inc., the mortgage on which was held by defendant HSBC Bank USA, N.A. First Hotels was one of many entities owned by non-

parties Leon Cohen, Maurice Cohen and Sonia Cohen. It is undisputed that the Cohens engaged in a web of fraudulent activity that resulted in the loss to plaintiff of hundreds of millions of dollars and that they used their accounts at HSBC to move money that plaintiff alleges was at least in part fraudulently obtained. Plaintiff sued the Cohens, among others, and obtained judgments against them from courts in New York and Florida. In ***486** seeking to collect on the judgments, plaintiff issued subpoenas to HSBC, inter alia. HSBC responded to the subpoenas, albeit not always to plaintiff's satisfaction.

After HSBC responded to the subpoenas, two members of the Cohen family were indicted for various tax violations. In connection with the indictments, the United States Department of Justice issued a grand jury subpoena to HSBC. HSBC produced many documents (the DOJ Documents), some of which had not been produced to plaintiff in response to its civil subpoena. Plaintiff requested and received copies of the DOJ Documents. Plaintiff asserts that HSBC's failure to produce the documents to it was intentional; HSBC asserts that the documents were not produced because they were not responsive, or for other reasons.

Plaintiff now seeks to amend the complaint in this action, to, inter alia, assert a claim of "aiding and abetting a conspiracy to defraud" against HSBC, add a number of new defendants who have no connection with the property or its sale, and add new allegations against First Hotels, including a claim of fraud and conspiracy to defraud. Plaintiff maintains that amendment is warranted by new information revealed by the DOJ Documents.

[1] Nothing in the DOJ Documents, however, warrants amendment of the complaint. Plaintiff's argument amounts to little more than that, because HSBC failed to produce the DOJ Documents in response to its subpoena, it must have been concealing those documents in an effort to further the Cohens' fraud against plaintiff. Even though HSBC should have produced the DOJ Documents in re-

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sponse to plaintiff's subpoena, the proper action for plaintiff in the face of what is essentially discovery misconduct is not to make HSBC a defendant in its action for fraud. As we observed in a prior appeal in this case, the "ultimate sanction" for discovery misconduct is a default judgment (*see* 62 A.D.3d 576, 577, 880 N.Y.S.2d 251 [1st Dept. 2009]).

[2][3] In any event, the proposed amended complaint fails to state a cause of action for aiding and abetting fraud (*see Oster v. Kirschner*, 77 A.D.3d 51, 905 N.Y.S.2d 69 [1st Dept. 2010]; *see also National Westminster Bank v. Weksel*, 124 A.D.2d 144, 149, 511 N.Y.S.2d 626 [1st Dept. 1987], *lv. denied* 70 N.Y.2d 604, 519 N.Y.S.2d 1027, 513 N.E.2d 1307 [1987]). Like the dismissed complaint in *Weksel*, it is "devoid of any but the most conclusory allegations" (124 A.D.2d at 149, 511 N.Y.S.2d 626). Plaintiff states, citing *Oster*, 77 A.D.3d at 56, 905 N.Y.S.2d 69, that HSBC had actual knowledge of the fraud as discerned from the surrounding circumstances, but to identify those circumstances it sets forth its very detailed allegations of the Cohens' fraud against HSBC. As we observed in *Weksel*, aiding **19 and abetting*487 "is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud" (124 A.D.2d at 149, 511 N.Y.S.2d 626).

[4] The proposed allegations of fraud and conspiracy to defraud against First Hotels, which the motion court did not address, are supported by the same allegedly newly discovered evidence as underlies the proposed HSBC amendment. Its use against First Hotels is more offensive, because most of this evidence is not new at all, and plaintiff asserted a claim for conspiracy to defraud against First Hotels in the first complaint, and the claim was dismissed. Moreover, while it would not be impossible for plaintiff to say that it only discovered the extent of HSBC's alleged involvement in the conspiracy after reviewing the DOJ Documents, it could not say that about First Hotels.

To the extent First Hotels can be deemed liable

for amounts owed pursuant to the aforementioned judgments obtained by plaintiff, plaintiff's appropriate course is to seek amendment of those judgments, not to seek relief via this completely unrelated action. Indeed, plaintiff's counsel stated at oral argument that if the court denied amendment, plaintiff would bring a special proceeding pursuant to CPLR 5225. Moreover, no allegation in the proposed amended complaint suffices to connect First Hotels, an entity that did not even exist until 2004, when it was created to purchase the property, with a fraud by the Cohens that occurred decades ago, regardless of any use the Cohens may ultimately have made of it.

N.Y.A.D. 1 Dept.,2012.

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