Commercial division update: The 'substantial assistance' element of aiding and abetting fraud claims

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The tort of aiding and abetting common law fraud is often asserted when an advisor or consultant to a defendant is involved in a transaction in which plaintiff alleges the defendant committed fraud.

Plaintiffs may claim that the advisor or consultant – perhaps with deeper pockets than the defendant – helped facilitate the fraud, and therefore should be held accountable. Such claims have been brought against a whole array of targets, including financial advisors, trustees, officers and directors and attorneys.

As is well recognized, plaintiffs asserting fraud claims in New York must plead fraud with more particularity than with most other causes of action, as CPLR Rule 3016(b) requires that circumstances constituting fraud "shall be stated in detail."

New York courts have held that this requirement also is to be strictly applied to aiding and abetting fraud claims, because one "should not be called to account for the intentional tort of another unless the circumstances of his connection therewith can be alleged in detail from the outset." *Chambers v. Weinstein*, 997 N.Y.S.2d 668, 673 (N.Y. Co. 2014), aff'd, 135 A.D. 450 (1st Dep't 2016).

As such, to survive a motion to dismiss, an aiding and abetting fraud claim must allege specific facts that create a "reasonable inference" that the defendant aided and abetted the fraud.

The legal standard

The New York courts have set forth the elements that a plaintiff's complaint must allege with sufficient detail to state a claim for aiding and abetting fraud: "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 64 A.D.3d 472, 476 (1st Dep't 2009) (*quoting UniCredito Italiano Spa v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 502 (S.D.N.Y. 2003)).

The "substantial assistance" oftentimes can be the most difficult to satisfy at the pleading stage. It generally requires factual allegations that suggest "(1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated."

Allegations of inaction or nondisclosure can be enough "only if the defendant owes a fiduciary duty directly to the plaintiff." *Betz v. Blatt*, 160 A.D.3d 696, 700 (2d Dep't 2018).

Thomas J. Hall and **Judith A. Archer** are partners with Norton Rose Fulbright US LLP. Associate **Meredith Berger** assisted with the preparation of this column.

Prior to discovery, it can be difficult for a plaintiff to have enough information to adequately allege substantial assistance with the specificity required, and many such claims are dismissed for failure to state a claim.

We examine below how the Commercial Division has analyzed the sufficiency of allegations of substantial assistance in different contexts.

Claims avoiding dismissal

The Commercial Division cases addressing whether a complaint adequately pleads aiding and abetting fraud generally fall into two categories.

First, where no fiduciary duty existed between the plaintiff and the alleged aider and abettor, the complaint generally must set forth particularized examples of how the defendant advanced the fraudulent scheme forward.

On the other hand, where a fiduciary duty is alleged to exist, the pleading standard is lessened, and it has been found adequate that the complaint alleged the aider and abettor failed to disclose or failed to act where it should have.

As to the first category, in *MBIA Ins. Corp. v. Royal Bank of Canada*, 958 N.Y.S.2d 62 (West. Co. 2010), plaintiffs alleged that defendant Royal Bank of Canada (RBC) defrauded them in connection with their purchase of mortgage-backed securities from RBC.

The plaintiffs further alleged certain of RBC's bank affiliates aided and abetted that fraud, because they acted as manager, arranger and marketer for the transactions at issue that they allegedly knew would fail due to their specialized knowledge of the low value of the securities involved.

Specifically, plaintiffs alleged that defendants knew that losses were occurring in the collateral, and therefore knew that their credit ratings did not accurately reflect the quality of that collateral, yet went forward with including misrepresentations in their marketing and transaction documents.

Justice Alan Scheinkman of the Westchester County Commercial Division held that these allegations were specific enough to maintain the claim.

While the complaint alleged that these defendants were liable because they failed to disclose certain facts to plaintiff – which alone may have doomed the claim, had it been limited to this allegation in the absence of a fiduciary duty – the complaint went on to allege that those defendants had actual knowledge of the fraud in marketing materials and transaction documents through their active roles in the transactions.

Similarly, in *Stichting Pensioenfonds ABP v. Credit Suisse Grp. AG*, 966 N.Y.S.2d 349 (N.Y. Co. 2012), plaintiff alleged that Credit Suisse made misrepresentations in offering documents for mortgaged-backed securities and that its directors and officers aided and abetted that fraud by directing, supervising and otherwise knowing about the "abandonment of underwriting practices and the utilization of improper appraisal methods; the inaccuracy of the ratings assigned by the rating agencies; and the failure to convey to the issuing trusts legal title to the underlying mortgages."

Plaintiff's complaint further alleged that each of the directors and officers had signed at least one registration statement that furthered the fraudulent securitization process.

Justice Melvin Schweitzer of the New York County Commercial Division held that these allegations were enough at the pleading stage to state a claim for aiding and abetting fraud, because they specifically set forth acts, such as signing a registration statement containing incorrect information, that furthered the fraudulent scheme.

In the second category of cases where the existence of a fiduciary duty is alleged, in *State of New York, Workers' Comp. Bd. v. Cody Mgmt., Inc.*, 2015 N.Y. Slip Op. 50740(U) (Albany Co. 2015), plaintiffs alleged fraud against various defendants allegedly responsible for underfunding a trust established to provide workers' compensation insurance to employees in various industries, and they alleged claims of aiding and abetting fraud against the trustees of that trust.

Plaintiffs alleged that the trustees provided substantial assistance to the fraud by "affirmatively assisting, helping conceal, or failing to disclose the fraud, in contravention of their fiduciary duties[.]"

Justice Richard Platkin of the Albany County Commercial Division held that, at the motion to dismiss stage, it was enough that the complaint alleged that the trustees took affirmative action to conceal the trust’s financial condition, because the rest of the record permitted a rational inference of a scheme to defraud.

Therefore, even though the complaint lacked specific factual allegations of exactly how the trustees affirmatively acted to further the fraud, by virtue of the trustees being fiduciaries to the trust beneficiaries, they had a duty to actively monitor and keep accountings of the trust, as well as to warn the beneficiaries of any issues.

Insufficient allegations

Where no fiduciary duty exists, plaintiffs usually face a higher pleading hurdle. In *VFP Invs. I LLC v. Foot Locker*, 26 N.Y.S.3d 727 (N.Y. Co. 2015), aff’d, 48 N.Y.S.3d 27 (1st Dep’t 2017), plaintiff, a Foot Locker lender, alleged that defendant Foot Locker aided and abetted fraud by its employees, who fraudulently verified financial information that plaintiff relied upon to disburse loan proceeds.

The court held that there were insufficient allegations of substantial assistance, because the claim was based on a failure to warn and there were no allegations that a fiduciary existed between the parties to give rise to a duty to disclose.

Most recently, in *Talipot ESG Invs. LLC v. Bulltick Fin. Advisory Servs. LLC*, 2025 NY Slip. Op. 50349 (U) (N.Y. Co. March 19, 2025), plaintiffs alleged they invested $20 million in an entity, not knowing it was on the brink of insolvency.

Plaintiffs asserted claims for aiding and abetting fraud against a special-purpose entity formed to manage the transaction at issue and against a member of the alleged defrauder’s management team.

The crux of the allegations against them was that they prepared and disseminated documents in furtherance of the transaction between plaintiffs and a fraudulent entity. Justice Margaret Chan of the New York County Commercial Division found these allegations to be insufficient.

The court relied on the well-recognized standard that defendants are liable for aiding and abetting fraud only if their actions “made ‘a substantial contribution to the fraud.’”

The court held that there was no basis here to conclude that preparation and dissemination of the documents at issue substantially contributed to the alleged fraud such that these defendants were an “essential” part of that fraud.

The court found that there were various other alleged misrepresentations and omissions attributable to other parties that were more consequential to the transaction, and therefore, the complaint failed to allege enough to demonstrate that the alleged aiders and abettors’ acts proximate caused the harm.

Conclusion

Due to the specificity requirements of CPLR 3016(b), the Commercial Division and other New York courts have been rigorous in requiring that plaintiffs plead with particularity how the aider and abettor’s overt actions furthered the fraudulent scheme, especially when no fiduciary relationship existed between the plaintiff and the alleged aider and abettor.

Absent a fiduciary relationship, the courts have consistently dismissed such claims when the complaint failed to specify what exactly the defendant did to enact the harm suffered.