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Briefs and Other Related Documents

Resolution Trust Corp. v. del Re
 Castellett D.N.J., 1993. Only the Westlaw citation is
 currently available.

United States District Court, D. New Jersey.
 RESOLUTION TRUST CORPORATION, Plaintiff,
 v.

Marisa del RE CASTELLETT, et al., Defendants.
 Civ. A. No. 92-4635(AMW).

Sept. 7, 1993.

David A. Mazie, Nagel & Rice, Livingston, NJ,
 Jean E. Fielder, Federbusch & Fiedler, Hackensack,
 NJ, for plaintiff Resolution Trust Corporation.

Andrew Robert Jacobs, Gern Dunetz Davision &
 Weinstein, Andrew Robert Jacobs, Starr, Gern,
 Davison & Rubin, Roseland, NJ, Andrew Robert
 Jacobs, Fitzsimmons, Ringle & Jacobs, Newark, NJ,
 for defendant Marisa del Re Castellett.

Marisa del Re Castellett, pro se.

Michael P. Shea, pro se.

David Goldberg, Clark, NJ, for defendant Stephanie
 W. Shea.

Roger B. Kaplan, Robert W. Smith, Wilentz,
 Goldman & Spitzer, P.C., Woodbridge, NJ, for
 defendants Stewart Gardner, Walter Long,
 Frederick Wilhelms.

William S. Jeremiah II, Buttermore, Mullen,
 Jeremiah & Phillips, Westfield, NJ, for defendant
 William Semmes.

Roger B. Kaplan, Robert W. Smith, Wilentz,
 Goldman & Spitzer, P.C., Woodbridge, NJ, James
 P. Beggans, Jr., West Orange, NJ, for defendant
 Alan Pearce.

Alan Pearce, pro se.

Roger B. Kaplan, Wilentz, Goldman & Spitzer,
 P.C., Woodbridge, NJ, for defendant Ronald
 Heymann.

Steven Michael Eisenhauer, Epstein, Epstein,
 Brown & Bosek, Springfield, NJ, for defendant
 Henry Valenti.

William Cyril Cagney, Lane & Mittendorf, Edison,
 NJ, for defendant William Biunno.

Peter L. Korn, McDonough, Korn & Eichhorn, PC,
 Springfield, NJ, for defendant John O'Lone.

Rafael Betancourt, Pisano & Triarsi, Cranford, NJ,
 for defendant George Roman.

William B. McGuire, Tompkins, McGuire &
 Wachenfeld, Newark, NJ, for defendant William
 Parker Seeley.

Walter John Fleischer, Jr., Shanley & Fisher, PC,
 Morristown, NJ, for defendant Pullman & Comley.

Thaddeus J. Hubert III, Hoagland, Longo, Oropollo
 & Moran, New Brunswick, NJ, for defendants Stein
 & McGuire, Alfred A. Stein, III, John McGuire.

Seth David Levine, Roseland, NJ, for defendant
 United Evaluators, Inc.

Richard C. Rosen, Wilkie, Farr & Gallagher, New
 York City, for third-party defendants BDO
 Seidman, Paul Garfinkle.

MEMORANDUM and ORDER

WOLIN, District Judge.

*1 This matter reaches the Court on the motion of
 defendant Pullman & Comley to dismiss plaintiff's
 complaint for lack of personal jurisdiction pursuant
 to Federal Rule of Civil Procedure 12(b)(2), to
 dismiss Counts Seven and Eight of the complaint
 for failure to state a claim pursuant to Federal Rule
 of Civil Procedure 12(b)(6) and to dismiss Counts
 Five and Seven for failure to plead fraud with
 particularity pursuant to Federal Rule of Civil
 Procedure 9(b). Plaintiff filed a cross-motion for
 sanctions.

The Court referred this matter to the Honorable Joel
 A. Pisano, United States Magistrate Judge, pursuant
 to 28 U.S.C. § 636(b)(1)(B) for a Report and
 Recommendation. In his report filed March 8,
 1993, Judge Pisano recommended that the Court
 deny without prejudice defendant's motion to
 dismiss based on personal jurisdiction, grant
 defendant's motion to dismiss Count Eight for
 failure to state a claim, deny defendant's motion to
 dismiss Count Seven for failure to state a claim,

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grant defendant's motion to dismiss Counts Five and Seven without prejudice for failure adequately to plead fraud and deny plaintiff's cross-motion for sanctions.

Having reviewed these recommendations and considered the objections filed by plaintiff, in accordance with the Report and Recommendation of Judge Pisano, the Court will deny defendant's motion to dismiss Count Seven for failure to state a claim, grant defendant's motion to dismiss Count Eight with prejudice and deny plaintiff's cross-motion for sanctions. For the reasons set forth below, however, the Court will deny with prejudice defendant's motion to dismiss the complaint for lack of personal jurisdiction and deny defendant's motion to dismiss Counts Five and Seven under Rule 9(b).

DISCUSSION

A. Standard of Review

The Court must conduct a *de novo* review of those portions of the report and recommendation to which the parties object. 28 U.S.C. § 636(b)(1); *Magicorp. v. Kinetic Presentations, Inc.*, 718 F.Supp. 334, 335 (D.N.J.1989). Plaintiff states three objections to the magistrate's ruling and argues that: (1) plaintiff has satisfied Rule 9(b) with respect to its allegations of fraud in Count Five; (2) Rule 9(b) does not apply to the claim for negligent misrepresentation raised in Count Seven; and that (3) defendant's motion to dismiss for lack of personal jurisdiction should be denied with prejudice. Defendant makes no objections but filed opposition in response to plaintiff's requested modifications of the magistrate's report.

B. Personal Jurisdiction

Based on a review of the complaint and plaintiff's affidavits filed in opposition to defendant's motion to dismiss on personal jurisdiction grounds, Judge Pisano found that plaintiff had demonstrated that defendant was properly before the Court. He

dismissed defendant's motion without prejudice, however, subject to the completion of discovery. "At that time," Judge Pisano wrote, "defendant may renew its motion if plaintiff fails to amend its complaint to include factual allegations either derived from the documents attached to its brief in opposition, or from the subpoenaed documents currently under review." Opinion Supporting Report & Recommendation, at 11.

*2 Plaintiff contends that defendant's motion should be denied with prejudice since Judge Pisano found jurisdiction and properly considered the complaint along with its pleadings and affidavits. Defendant argues that Judge Pisano correctly denied the motion without prejudice, thereby preserving its right to renew the motion should "subsequent facts demonstrate that jurisdiction is, in fact, questionable." Opposition to Plaintiff's Objections to Report & Recommendation at 3-4.

As stated above, however, Judge Pisano contemplated a renewed motion to dismiss the complaint only in the event that plaintiff failed to amend its complaint to include the facts contained in its previously-submitted affidavits. Because courts may consider affidavits and other supporting materials along with plaintiff's pleadings when reviewing personal jurisdiction issues, *see LaRose v. Sponco Mfg.*, 712 F.Supp. 455, 458 (D.N.J.1989), Judge Pisano's determination is not lacking. A rule that requires amendment of the complaint to include facts already properly submitted to and considered by the Court elevates form over substance and will not be adopted.

C. Rule 9(b) Fraud

Judge Pisano recommended that the Court dismiss without prejudice plaintiff's claims stated in Counts Five and Seven for failure to plead fraud with particularity. Count Five seeks recovery against Pullman & Comley for the fraudulent acts of its former partner William Parker Seeley ("Seeley"), while Count Seven focuses on his alleged negligent misrepresentations and omissions.

At the outset the Court notes that Rule 9(b) does not

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reach claims grounded in negligence. *See Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 288 (3d Cir.), *cert. denied*, 113 S.Ct. 365 (1992); *see also Rose v. Bartle*, 871 F.2d 331, 362 n. 53 (3d Cir.1989) (allegations of malice, intent and knowledge may be pleaded generally). Count Seven does not, as defendant argues, incorporate the allegations of Count Five. While the events underlying both counts are exact, plaintiff is entitled to proceed on alternate grounds of liability.

Rule 9(b) does apply to Count Five, which incorporates the preceding paragraphs of the complaint and states:

101. At all times relevant herein, Seeley was a partner of Pullman & Comley.

102. Each of the fraudulent acts committed by Seeley were perpetrated and consummated in his professional capacity as legal counsel for Castellett and his numerous entities, and occurred while Seeley was a partner with Pullman & Comley. Upon information and belief, Pullman & Comley billed fees for these legal services.

103. Pullman & Comley is therefore vicariously liable for the fraudulent acts of Seeley which were performed in his professional capacity as a partner of Pullman & Comley.

104. By reason of the foregoing, and as a direct and proximate result of the aforesaid fraud by Seeley and the Conspirators, Colonial became financially impaired and insolvent and sustained losses so substantial that they eventually rendered it insolvent and required it to be placed in conservatorship, and then receivership. As a direct and proximate result of the fraud, Colonial suffered losses and incurred damages in amounts yet to be ascertained, but believed to exceed \$40 million.

*3 Complaint ¶¶ 101-104. Seeley, plaintiff alleges, was instrumental in Castellett's acquisition of Colonial and Colonial's subsequent purchase of an office building located in Norwalk, Connecticut (the "Norwalk property"). After noting that Castellett demonstrated the capital necessary to maintain Colonial's regulatory net worth with an inflated financial statement based on interlocking shell corporations, plaintiff continues:34. Castellett was able to create this illusion with the assistance of his attorney, William Parker Seeley ("Seeley") of

Pullman & Comley, who created many of the entities and who constantly advised and continually restructured the Castellett empire. Seeley aided and abetted the fraud by masking Castellett's control of Nitrosul and Nitrophus, Ltd., the two major trading partners of the companies Castellett admitted to own. Thus, with the assistance of Seeley and others, it appeared that Nitrosul and Nitrophus were owned by third parties. Seeley knew that Castellett's control of these entities was not disclosed to others, including, most notably, BDO Seidman, the auditors for Castellett's many companies, as well as third parties such as Colonial and the FHLBB who foreseeably relied on the audited financial statements. Seeley failed to alert BDO Seidman of Castellett's control of these entities in the audit legal representation letters he submitted to them.

35. By creating the appearance that the business conducted with Nitrosul and Nitrophus was legitimate, Seeley and Castellett were able to create false profits from those numerous and substantial transactions, and have them treated in an unqualified manner on the audited financial statement of Deltacorp, the main holding company for Castellett's empire. Had the control or relationship between Castellett and Nitrosul or Nitrophus been disclosed, the accounting treatment for these sales would have been far different, and BDO Seidman would have either uncovered the fraud by auditing Nitrosul and Nitrophus as related entities, or qualified Deltacorp's financial statements thereby alerting the reader that the tremendous profits reported were the result of transactions among related and interlocking companies.

36. By masking Castellett's control of Nitrosul and Nitrophus, Seeley enabled the phony transactions to remain a secret; circumvented the need for BDO Seidman to audit Nitrosul and Nitrophus; and enabled Castellett to create a fictitiously inflated financial statement.

37. In reliance on Castellett's inflated financial statement, the Colonial Board of Directors and the FHLBB authorized his acquisition of Colonial.

Id. ¶¶ 34-37. Turning to the Norwalk property, which was acquired jointly with the New Jersey Realty Title Insurance Company ("NJRT"), plaintiff

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outlines various misrepresentations and omissions Castellett made to regulators and the Colonial Board of Directors, including:67.(d) Castellett represented that Colonial was to acquire both the Norwalk Property and an appurtenant parking lot. Until a few weeks before the closing, both the Norwalk Property and the parking lot were held in one deed. Unbeknownst to the Colonial Board of Directors, shortly before closing, Seeley split the ownership of the building and the parking lot into two deeds and transferred them to different entities. Thus, the parking lot was never transferred to Colonial.

*4 *Id.* ¶ 67.(d). Regarding Seeley's involvement with this ill-fated project, plaintiff continues:69. Upon information and belief, Seeley was aware of many of the erroneous aspects of the Gold Appraisal and of Castellett's omissions and misrepresentations regarding the Norwalk Property. Nevertheless, Seeley, although in communication with the Board and the regulators on Castellett's behalf, never revealed that they were relying on materially erroneous information.

Id. ¶ 69.

Judge Pisano recommends that the Court rule that these pleadings are insufficient. He points out that plaintiff fails to specify "with whom, how, when, or where Seeley committed these acts." Opinion at 19. In particular, he focuses on plaintiff's failure to specify what entities Seeley created, how exactly he masked Castellett's control of the two entities and how these acts render Pullman & Comley liable for fraud. Plaintiff, however, has answered these questions to the extent the applicable pleading standard requires.

To satisfy Rule 9(b), plaintiffs must: plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior. It is certainly true that allegations of 'date, place or time' fulfill these functions, but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision

and some measure of substantiation into their allegations of fraud.

Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir.1984), cert. denied, 469 U.S. 1211, 105 S.Ct. 1179 (1985). The *Seville* court concluded that the plaintiff, who had charged defendants with violating the federal wire and mail fraud statutes, had adequately injected such precision into its complaint by "identifying with great specificity the pieces of machinery that were the subject of the alleged fraud" and "set[ting] forth the nature of the alleged misrepresentations." Although the complaint did "not describe the precise words used, each allegation of fraud adequately describe[d] the nature and subject of the alleged misrepresentation." *Id.*

Although *Seville* provides wide latitude to plaintiffs with respect to meeting the requirements of Rule 9(b), their discretion is not unlimited as *Saporito v. Combustion Eng'g, Inc.*, 843 F.2d 666 (3d Cir.1988), vacated on other grounds, 489 U.S. 1049, 109 S.Ct. 1306 (1989), demonstrates. In *Saporito*, plaintiffs sought to state RICO claims predicated on mail and wire fraud, alleging, "Upon information and belief, defendants and/or persons acting under their direction or control provided notice to certain [of defendant company's] employees other than plaintiffs, during the [early separation plan] option period, that [defendant company] was in the process of planning and promulgating [a separation incentive plan]." *Id.* at 673.

*5 The Third Circuit rejected this pleading as inadequate under the 9(b) standard, as defined in *Seville*:

The complaint in *Seville* indicated who made the representations to whom, and the general content of the representations. Although the appellants' complaint does indicate the general content of the representations ('notice that [defendant company] was in the process of planning and promulgating [a separation incentive plan]'), it does not indicate who the speakers were ('defendants and/or persons acting under their direction and control ') or who received the information ('certain [of defendant company's] employees other than plaintiffs').

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Id. at 675 (emphasis in original) (footnotes omitted). Contrary to the magistrate's ruling, plaintiff need not outline the "when" and "where" aspects of the fraud. *Seville*, 742 F.2d at 791. Instead, to supply the precise and substantiated claims under the *Seville/Saporito* standard, plaintiff's allegations must contain "the general content of the representations" as well as the identity of the providers and recipients of the tainted information.

Plaintiff satisfies the threshold showing mandated by *Saporito*. The Complaint identifies the transactions in which Seeley participated, *see* Complaint ¶¶ 34-36 (Colonial), 60-69 (Norwalk property), outlines his specific role therein, *see id.* ¶¶ 34-36 (masked Castellett's control of trading partners thereby creating false profits), 67, 69 (divided property in two deeds and transferred to different entities), and identifies the allegedly misleading documents he submitted or sanctioned. *See id.* ¶¶ 34 (audit legal representation letters), 35 (Deltacorp financial statement), 69 (Gold Appraisal). Plaintiff reaches Pullman & Comley with a vicarious liability theory, *see id.* ¶ 103, tying in the law firm by identifying Seeley as a Pullman & Comley partner acting in his professional capacity. *See id.* ¶¶ 101-102.

Moreover, there is no confusion as to the identity of the individuals who generated and received the offending information. Along with Castellett, plaintiff identifies Seeley as a source of the misimpressions. *See* Complaint ¶¶ 35, 69. Plaintiff also names the members of defendant's audience, alleging that bank regulators, outside auditors and the Board of Directors of Colonial received and relied upon this information. *See id.* ¶¶ 34, 37, 69.

These pleadings will allow defendant to determine which of its statements and actions are contested and on what basis the allegations of impropriety rest. The Court thus concludes that, at this stage of the proceedings, the central purpose of Rule 9(b) of putting defendant on notice of the claims against it has been served. If plaintiff's allegations are not substantiated by discovery, that failing may be addressed by a motion for summary judgment.

It is on this 7Th day of September, 1993,

ORDERED that defendant's motion to dismiss the complaint for lack of personal jurisdiction is denied with prejudice, and it is further

*6 ORDERED that defendant's motion to dismiss Counts Five and Seven under Rule 9(b) is denied, and it is further

ORDERED that in all other respects the Report and Recommendation of Magistrate Judge Pisano is adopted as the opinion of the Court; and it is further

ORDERED that defendant's motion to dismiss Count Seven for failure to state a claim is denied without prejudice, and it is further

ORDERED that defendant's motion to dismiss Count Eight is granted with prejudice, and it is further

ORDERED that plaintiff's cross-motion for sanctions is denied.

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• 2:92CV04635 (Docket) (Nov. 06, 1992)

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