



1 of 100 DOCUMENTS

**GERIANNE COHEN, conservator,¹ & another² vs. BROKERS' SERVICE MARKETING
GROUP II, LLC.**

1 Of Albert Cohen.

2 David Andelman, as executor of the estates of Harold Cohen and Julie Cohen.

14-P-280

APPEALS COURT OF MASSACHUSETTS

87 Mass. App. Ct. 1121; 31 N.E.3d 76; 2015 Mass. App. Unpub. LEXIS 447

May 18, 2015, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28*, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

SUBSEQUENT HISTORY: Appeal denied by *Cohen v. Brokers' Serv. Mktg. Group II*, 472 Mass. 1101, 2015 Mass. LEXIS 456 (Mass., June 26, 2015)

JUDGES: Katzmman, Sullivan & Blake, JJ.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

and conversion of approximately \$1.6 million of the Cohens' retirement funds. At an early stage in the proceedings, both claims against Brokers', which asserted the aiding and abetting of John Baldo's fraud, were ordered dismissed on the ground that there was no allegation that Brokers' had knowledge of the scheme. Many of the claims against the other defendants survived their motions to dismiss. In April, 2012, on the basis of new information learned during the discovery process for the claims against the remaining defendants, the Cohens filed a motion to vacate the order of dismissal of the claims against Brokers'.⁴ Two months later, the Cohens made a motion to file a second amended complaint, to revise and supplement the previously dismissed aiding and abetting claims against Brokers', and add two new claims against Brokers' alleging violations of *G. L. c. 93A*. The motion to vacate was denied in a memorandum and order that also implicitly denied the motion to amend, and the Cohens appeal.⁵ We affirm in part and reverse in part.

3 The plaintiffs' first amended complaint added Sun Life Assurance Company of Canada (U.S.) as an additional defendant.

4 During the interim between the order of dismissal of the claims against Brokers' and the filing of the motion to vacate, Harold Cohen passed away, and David Andelman was appointed executor of his estate. During that same period, Gerianne Cohen was substituted for Albert Cohen as his conservator, due to Albert's advancing dementia.

5 Prior to the filing of the notice of appeal, the plaintiffs had stipulated to the dismissals of each of the other defendants and orders of dismissal entered accordingly. Although it appears that no final judgment of dismissal has entered on the only remaining claims, those against Brokers', we reach the merits of the appeal in our discretion. See *Lalchandani v. Roddy*, 86 Mass. App. Ct. 819, 820 n.2, 22 N.E.3d 166 (2015).

1. *Background.* Viewing the allegations in the light most favorable to the Cohens, *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223, 950 N.E.2d 853 (2011), the relevant facts are as follows. Brokers' is a company that functions as a managing general agent for insurance companies that do not employ their own sales forces. In practice, Brokers' vouches for the character and reputation of independent agents to its affiliated insurance companies, and then acts as intermediary in facilitating paperwork and communication between the insurance companies and the agents selling the companies' products. Acting in this capacity, in the summer of 2005, Brokers' signed agent applications for John Baldo (Baldo), thereby allowing him to sell annuities offered by Allianz. In signing the application, Brokers' certified that it had investigated Baldo's "character, general reputation and background" and was satisfied that Baldo was "trustworthy and qualified to act as an agent." In fact, Baldo had a criminal history of credit card fraud. Beginning in December, 2005, and continuing through August, 2006, Baldo induced the Cohens to write checks payable to his investment company, purportedly for the purchase of Allianz and Sun Life⁶ annuities. Brokers' processed the contract applications and facilitated the transfer of the Cohens' funds. Baldo subsequently embezzled the funds from the annuity accounts.⁷

6 Brokers' had also agreed to function as managing general agent for Sun Life, and processed Baldo's application to become an agent for Sun Life.

7 The amount Baldo embezzled from the surrender of the annuity accounts was only a portion of the total amount Baldo took from the Cohens. The rest he stole by directly cashing the Cohens' checks.

In December, 2005, Brokers' received notification that Baldo had forged a signature on a client's check and had embezzled the proceeds. The letter was written by an attorney, and further informed Brokers' that Baldo had sold an insurance policy to the client by making false representations of the terms of the policy. During this same time frame, a former business associate of Baldo informed Brokers' that Baldo "had been living a life of lies and was a thief." Brokers' did not disclose this information to Sun Life, Allianz, or the Cohens.

In their initial and first amended complaint, the Cohens allege that Brokers' committed two counts of aiding and

they learned during the ongoing case against the other defendants. On May 17, 2013, the judge denied the motion to vacate, again concluding that the Cohens had failed to show sufficient knowledge on the part of Brokers' to sustain the aiding and abetting claims. As to the newly proposed c. 93A claims, the judge reached the same conclusion, noting that the claims were based at most on allegations of negligence and were merely derivative of the failed aiding and abetting claims.

2. *Discussion.* Because the denial of the Cohens' motion to vacate was, in substance, also a denial of their motion to amend their complaint as to Brokers', we review it as such. We review the denial of a motion to amend for abuse of discretion.⁸ *Doherty v. Admiral's Flagship Condominium Trust*, 80 Mass. App. Ct. 104, 112, 951 N.E.2d 936 (2011). Reasons for denying a motion to amend "include futility, undue delay, and prejudice to the opposing party." *Ibid.* See *Mass.R.Civ.P. 15(a)*, 365 Mass. 761 (1974) (with respect to amending a pleading, "leave shall be freely given when justice so requires"). A motion to amend is futile if the proposed amendment fails to state a claim upon which relief may be granted. *Jessie v. Boynton*, 372 Mass. 293, 295, 361 N.E.2d 1267 (1977). To move beyond the pleadings stage, the factual allegations in the proposed amended complaint "must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636, 888 N.E.2d 879 (2008), quoting from *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

8 We accordingly disagree with the Cohens' contention that we should conduct de novo review of the rulings of the motion judge.

a. *Aiding and abetting.* To survive a motion to dismiss a claim for aiding and abetting the commission of a tort, the Cohens must sufficiently allege that: "(1) [Baldo] committed the relevant tort; (2) [Brokers'] knew he was committing the tort; and (3) [Brokers'] actively participated in or substantially assisted in his commission of the tort." *Go-Best Assets Ltd. v. Citizens Bank of Mass.*, 463 Mass. 50, 64, 972 N.E.2d 426 (2012) (*Go-Best*), citing *Arcidi v. National Assn. of Govt. Employees*, 447 Mass. 616, 623-624, 856 N.E.2d 167 (2006), and *Restatement (Second) of Torts § 876(b)* (1977). The Cohens' initial complaint contains no allegations concerning the second and third prongs of the *Go-Best* test (knowledge and participation). Although the proposed amended complaint sets forth with more specificity the allegations of aiding and abetting, a void remains concerning Brokers' actual knowledge that Baldo was stealing money from the Cohens. The amended complaint likewise fails to allege that Brokers' actively participated in or assisted in the commission of the tort. Although Brokers' allegedly processed paperwork and facilitated fund transfers, there are no allegations that Brokers' participated in or assisted Baldo in embezzling money from the Cohens. The judge correctly denied the Cohens' motion to amend their complaint as to the aiding and abetting claims.

b. *Violations of c. 93A.* *General Laws c. 93A, § 2*, makes unlawful any unfair or deceptive acts or practices in the conduct of any trade or commerce. *Section 9* of the chapter confers a private cause of action upon individual consumers suffering loss as a result of such prohibited practices. *G. L. c. 93A, § 9*. To succeed in making such a claim, a consumer must show: (1) an unfair or deceptive act or practice committed by the business; (2) a loss or injury; and (3) a causal connection between the deceptive act or practice and that loss or injury. See *Iannacchino v. Ford Motor Co.*, 451 Mass. at 629; *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. 500, 503, 952 N.E.2d 908 (2011).

In their proposed second amended complaint,⁹ the Cohens allege that Brokers' committed unfair and deceptive business and insurance practices by, inter alia, vouching for the character of Baldo to Allianz and Sun Life, despite its knowledge that he had a prior criminal record for fraud; continuing to act as an intermediary for Baldo even after receiving reports of his forgery, embezzlement, and pattern of lies; and in failing to disclose these reports to Allianz, Sun Life, and the Cohens. The Cohens further allege that these practices caused them to suffer economic damages. For

