

THE BON SECOURS
COMMUNITY INVESTMENT
FUND

Plaintiff

v.

NETWORK TECHNOLOGIES
GROUP

Defendant

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IN THE

CIRCUIT COURT FOR

BALTIMORE CITY

24-C-03-001338
[2003 MDBT 7]

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MEMORANDUM OPINION

The Defendant, Ellin & Tucker, Chartered (“E&T”) moves this Court pursuant to Maryland Rule 2-322(b)(2) to dismiss Count I of Plaintiff’s Complaint, alleging that it fails to state a claim against the Defendant E&T under the Maryland Securities Act, MD CODE ANN., CORPS. & ASS’NS, § 11-101 (1999) (“the Act”).

Plaintiff, Bon Secours Community Investment Fund, L.P., is a Delaware limited partnership. It is a private equity and mezzanine debt fund managed by Smith Whiley & Company (“Smith Whiley”). Smith Whiley is an investment advisory firm with offices in Delaware and Illinois. Bon Secours invests in local businesses located in “empowerment zones,” low- to moderate-income geographical areas, including Baltimore, MD. Defendant, Network Technologies Group, Inc., (“NTG”) is a Delaware corporation that had its principal place of business in Baltimore, MD. NTG was in the business of providing telecommunication infrastructure services. In addition to suing NTG, Plaintiff sued NTG officers Michelle Tobin, Victor Giordani, Thomas Bray, Beverly Baker, Nora Zietz, Robert Stewart and NTG directors John Picciotto and Gerhard Pilcher. Defendant Ellin & Tucker

("E&T") served as NTG's auditor in 2000 and 2001. (Pl.'s Compl. at 11, para. 36.) In August 2001, Bon Secours began preliminary discussions with NTG about possible investment in the company. (Pl.'s Comp. at 12, para. 41.) Through its investment advisor, Smith Whiley, Bon Secours received from NTG a copy of a "PPM," which contained a detailed description of NTG's business, and included financial statements audited by E&T and financial projections prepared with E&T's assistance. (Pl.'s Compl. at 13 para. 42). In September 2001, Smith Whiley began a due diligence investigation of NTG on behalf of Bon Secours. (Pl.'s Compl. at 13, para. 42.) During this process, NTG turned over to Smith Whiley representatives financial statements audited by E&T which misstated NTG's cash flows, income and net worth. (Pl.'s Compl. at 14, para. 48.)

On March 4, 2002, NTG sold to Bon Secours 353,714 shares of NTG's stock (series C Convertible Preferred) for a purchase price of \$1 million dollars. Plaintiff alleges that within four months of the transaction, it discovered that defendants had misled investors regarding the financial condition of NTG. and as a result, Bon Secours incurred losses of greater than \$1 million dollars.

DISCUSSION

"In reviewing the grant of a motion to dismiss pursuant to Maryland Rule 2-322(b)," the Court must assume "the truth of all well pleaded facts and all inferences that can reasonably be drawn from them." *Bennett Heating & Air Conditioning, Inc. v. NationsBank*, 103 Md. App. 749 (1995), *rev'd in part on other grounds*, 342 Md. 169 (1996). 2-322(b)(2). "When moving to dismiss, a defendant is asserting that, even if the allegations of the complaint are true, the plaintiff is not entitled to relief as a matter of law." *Hrehorovich v. Harbor Hosp. Ctr.*, 93 Md. App. 772, 784 (1992). "Thus, in considering a motion to dismiss

for failure to state a claim, the circuit court examines only the sufficiency of the pleading.” *Id.* “The complaint should not be dismissed unless it appears that no set of facts can be proven in support of the claim set forth therein.” *Bennett*, 103 Md. App. at 749.

Defendant contends that it is immune from liability under the Act for three reasons: (1) Defendant was not in privity or otherwise have a direct relationship with Plaintiff; (2) Defendant was not an investment adviser to Plaintiff; and (3) Defendant is an accounting firm and accountants are expressly excluded from the definition of an “investment advisor.” Plaintiff counters that E&T is liable under § 11-703(a)(1)(ii), which provides that a person is liable if he:

Offers or sells the security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and if he does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.

Plaintiff argues that pursuant to subsection (c) of that section E&T is liable as an aider and abettor. Subsection (c)(1) provides joint and several liability for every person “occupying a similar status or performing similar functions [as an “officer or director of the person liable”], ...and every ... agent who materially aids in such conduct.”

The analysis of the adequacy of the allegations must begin with the language of the Act. Section 11-101(h)(2)(iii) states that an accountant is not an agent if his or her “performance of investment advisory services is solely incidental to the practice of the profession....” However, the services of an accountant are not considered “solely incidental” unless:

1. The investment advisory services rendered are connected with and reasonably related to the other professional services rendered;
2. The fee charged for the investment advisory services is based on the same factors as those used to determine the fee for other professional services; and
3. The ... certified public accountant ... does not hold [itself] out as an investment advisor.

Id.

In *Baker, Watts v. Miles & Stockbridge*, 95 Md. App. 145 (1993), the Court discussed cases from several jurisdiction with acts similar to the Maryland Act to support its holding that an attorney is not liable for merely rendering legal advice or drafting documents for use in securities transactions. *Id.* at 168, citing *Rendler v. Markos*, 453 N.W. 2d 202, 206 (Wis. App. 1990). Because an accountant and an attorney are in the same classification under the Act, § 11-101(b)(2)(iii), the holding and discussion in *Baker* is applicable to the claim against E&T.

Baker makes clear that something more than an attorney “engaging in [his or her] traditional advisory functions” is required to establish liability under the Act. *Id.* at 168-170, citing *Ackerman v. Schwartz*, 733 F. Supp. 1231, 1251 (N.D. Ind. 1989), *aff’d in part and rev’d in part on other ground*, 947 F. 2d 841 (7th Cir. 1991) (attorney may be liable if he had “personally and actively” solicited investors); *In re N. Am. Acceptance Corp. Sec. Cases*, 513 F. Supp. 608, 623 (N.D.Ga. 1981) (liability of law firm required a finding that the firm “was so entangled in the actual sale of the security that his activities were at least a substantial factor in purchaser’s decision to buy the security and that his activities were either authorized by or ratified by the issuer”); *Excalibur Oil, Inc. v. Sullivan*, 616 F. Supp. 458, 467 (N.D.Ill. 1985) (attorney who played a direct role including “face-to-face and direct telephonic

representations' to the purchaser" was acting as agent); and *Ahern v. Gaussoin*, 611 F. Supp. 1465, 1491 (D.Or. 1985) (attorney is liable when he "prepares, attends to the execution of, and personally delivers and files documents for registration of a security with the knowledge that the solicitation and sales of such security" have already occurred). The *Baker* Court concluded that an attorney "could conceivably be considered an agent if he or she 'represents a broker-dealer or issuer *in effecting or attempting to effect* the purchase or sale of securities.'" (emphasis in original) (quoting § 11-101(b)(1)). "To rise to the level of effecting the purchase or sale of securities, the attorney must actively assist in offering securities for sale, solicit offers to buy, or actually perform the sale." 95 Md. App. at 171.

In arguing that E&T may be held liable as an aider and abettor, Plaintiff relies upon three cases from other jurisdictions that have securities laws that are substantially similar to § 703(c) of the Maryland Securities Act. In *Johnson v. Colip*, 658 N.E. 2d 575 (1995), the defendant lawyer was retained to incorporate and represent a corporation that was selling limited partnerships in oil properties. The lawyer drafted the prospectus used to solicit investors and attended meetings of perspective investors. The Court held that summary judgment was not appropriate because the "determination of whether" the lawyer's attendance at the "meetings of perspective investors constituted an attempt to effect the sale of securities" was "an issue of fact inappropriate for resolution at summary judgment." *Id.* at 578.

[I]f when called upon at the meetings, [the attorney] primarily reassured investors that risks about which they expressed concern were unlikely to materialize, such behavior made it more likely than not that the investors would purchase the securities and constituted an attempt to effect a purchase or sale. On the other hand, if [the attorney's] principal function at the meeting was to either temper the exuberance of the principal

promoters ...or to discuss the technical aspects of the partnership agreement or its tax consequences with counsel for perspective investors... we think these facts are not susceptible to the inference that an attempt to effect the purchase or sale of a security occurred.

Id.. In *Arthur Young & Co. v. Reves*, 937 F.2d 1310 (8th Cir. 1991), the Court upheld a jury verdict against an accounting firm where the jury was instructed to find liability if it concluded that the accounting firm *knowingly made false statements* that it knew would be relied upon by the purchaser. *Id.* at 1326-7.

In *Prince v. Brydon*, 764 P. 2d 1370, 1371 (Ore. 1988), the Court held that it was error to grant summary judgment to a lawyer who prepared documents and performed other legal services for the partnership that sold the securities. The lawyer “drafted the limited partnership agreement and major portions of the offering circular. He also gave an opinion on the tax status of the partnership which [the partnership] included in the information that it provided prospective investors.” *Id.* The Court held that the question was whether the lawyer of the corporate entity “materially aided” in the sale of securities and concluded that aider and abettor liability turned on whether the drafter’s “knowledge, judgment, and assertions as reflected in the contents of the documents were ‘material’ to the sale.” *Prince*, 764 P.2d at 1375.

Plaintiff alleges that the PPM and other financial documents drafted by E&T contained assertions as to NTG’s financial health and financial projections which Bon Secours relied upon to purchase securities. (Pl’s Compl. at 13 para. 43.) Furthermore, Plaintiff alleges that E&T actively participated in the submission of misleading financial information to Bon Secours, with the expectation that Bon Secours would rely upon it in deciding whether or not to invest in NTG. (Pl.’s Compl. at 12, para. 39; Pl.’s Compl. at 14,

para. 48; Pl.'s Compl. at 16, para. 55-57.) Plaintiff alleges that E&T principal Todd Feuerman headed the NTG audit team and was the main E&T contact for NTG, (Pl.'s Compl. at 11, para. 27), and that in addition to his role as audit manager for NTG, Feuerman performed many of the functions of the chief financial officer of NTG prior to October 2000. (Pl.'s Compl. at 11, para. 38.)

Plaintiff also alleges that E&T had actual knowledge that Bon Secours was considering investing in NTG, and that NTG was providing to Bon Secours financial statements that had been audited by E&T as well as financial projections and other financial documents that had been prepared with E&T's advice and consultation, and that E&T knew that those documents were being prepared specifically for Bon Secours in order for the company to determine whether to invest in NTG. (Pl.'s Compl. at 12, para. 39.) Plaintiff also alleges that E&T was directly involved in advising NTG's directors and officers regarding the value of NTG and in assisting them to plan a negotiation strategy for determining the purchase price of the securities to be purchased by Bon Secours. (Pl.'s Compl. at 15, para. 54.)

Defendant argues that based on *Baker*, it may not be held liable under § 703(c) of the Act, because the Complaint does not allege that E&T was an agent or controlling person of NTG.¹ (Def.'s Mot. to Dismiss at 3, para. 4.) Defendant further argues that on the facts in *Baker*, the allegations against Miles & Stockbridge were far stronger than the allegations made by plaintiff against E&T in the instant suit because "the accused individual attorney

1Plaintiff's also argues that E&T actively solicited securities, but there are no allegations in the Complaint that E&T actively assisted NTG in offering securities for sale, solicited offers to buy NTG securities, or actually performed the sale of such securities.

was a stockholder in the company in which Baker, Watts & Co. had also invested.” (Def.’s Mot. to Dismiss at 4.) However, the motion will be denied because the Complaint alleges more. The allegation that E&T principal Todd Feuerman performed many of the functions of the chief financial officer arguably states a claim that Feuerman “occup[ied] a similar status or perform[ed] similar functions” as corporate officers and directors. *See* MD CODE ANN., CORPS. & ASS’NS, § 11-703(c). Additionally, at this stage it is possible to infer based on the allegations that E&T “materially aided” in the sale because it knowingly made false statements that it knew would be relied upon by Plaintiff.

For all these reasons, the motion to dismiss will be DENIED.

DATE

JUDGE EVELYN OMEGA CANNON

THE BON SECOURS
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ORDER

For the reasons stated in the attached Memorandum Opinion, Defendant Ellin & Tucker, Chartered's ("E&T") Motion to Dismiss Count I of Plaintiff's Complaint is DENIED.

SO ORDERED this 11th day of July, 2003

JUDGE EVELYN OMEGA CANNON

BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM

CASE NAME: BON SECOURS COMMUNITY INVESTMENT FUND v.
 NETWORK TECHNOLOGIES GROUP, et al

CASE NUMBER: 24-C-03-001338

COURT: Circuit Court for Baltimore City

JUDGE: Evelyn Omega Cannon

DATE OF OPINION: July 11, 2003