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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

ANDY DAUS et al., Plaintiffs and Appellants, v. ANDY MOORE, Defendant and Respondent.	C075019 (Super. Ct. No. CU12078702)

Minority shareholders Andy and Maryclaire Daus (collectively Daus)[1] sued majority shareholders Brian and Paula Howser and Vaughn Warriner (collectively Howser) and Howser's counsel, Andy Moore. Daus alleges he was duped into approving a compensation committee at a board meeting of a corporation which had been treated as a partnership for accounting and tax purposes. That committee promptly awarded

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[1] Because we refer to appellants collectively as Daus, we will use singular verb forms and the masculine pronoun throughout the opinion.

Howser substantial compensation and gave nothing to Daus, devaluing Daus's shares. At a later meeting, Howser voted to dissolve the corporation and planned to steer customers to a new corporation in which Daus held no interest. (The remaining portion of the case as against Howser is not relevant to this appeal.)

The trial court sustained without leave to amend Moore's demurrer to the second amended complaint. Daus timely appeals from the judgment. Because there are no allegations establishing that *Moore* owed Daus any legal duty, or committed any actual fraud in his personal capacity, we shall affirm.

BACKGROUND

As relevant on appeal, the operative claims, miscaptioned as separate causes of action, alleged breach of fiduciary duty ("Fifth Cause of Action"), fraud ("Sixth Cause of Action"), and malpractice ("Seventh Cause of Action").[2]

Daus alleged Moore breached a fiduciary duty because Moore knew "from the outset of the solicitation of his services" that the majority and minority shareholders were at odds, and Howser hired him to find a way to "diminish or eliminate" Daus's participation in the business and value of his shares, and to transfer the business to a new entity controlled by Howser. Moore then prepared a plan to implement Howser's wishes, by setting a special board meeting to create an internal committee, which ultimately caused Daus financial harm. Daus alleged fraud, in that Moore made "omissions and misrepresentations" in addition to taking the above actions. Specifically, Daus alleged that Moore failed to disclose to Daus what Moore was doing, or that his actions caused a conflict of interest, knowing that his omissions, misrepresentations, and actions were "false, deceptive, and misleading," and made with the intent to oust Daus from

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[2] A purported conspiracy claim has not been briefed by Daus and we deem it abandoned. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, p. 769.)

management of the company and devalue his interest therein. Daus alleged these acts and omissions breached Moore's fiduciary duty.

At a hearing on a prior demurrer, Daus had disclaimed any reliance on a theory of constructive fraud, and argued actual fraud was sufficiently pleaded. The trial court rejected this view, finding: "[I]f Mr. Moore were not a lawyer . . . any omission that he would have had in the process would be meaningless . . . . On the other hand, if he's a lawyer, then his duties are governed by his attorney-client relationship." The trial court sustained a demurrer without leave to amend as to the second amended complaint, finding the amendments had not cured the defects identified earlier.

DISCUSSION

I

Fraud

We acknowledge the general rule that majority shareholders occupy " 'a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors.' " (*Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1178.) And, as Daus points out, an attorney can be liable for fraud just as any other person can be liable for fraud. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 346.) Although the parties discuss a number of cases, both sides treat one case as critical, *Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692 (*Skarbrevik*).

In *Skarbrevik*, "The principal questions presented . . . concern[ed] the liability of counsel of a close corporation to a minority shareholder for professional negligence, and the liability of a corporate attorney for conspiring with majority shareholders to defraud the minority shareholder by wrongfully diluting his interest in the corporation." (*Skarbrevik*, *supra*, 231 Cal.App.3d at p. 695.) Skarbrevik, one of four equal corporate shareholders, was offered a buy-out by the other three, who then decided not to pay him anything, and instead sought counsel's help in executing a plan to revise the corporate articles to enable them to dilute Skarbrevik's shares. (*Skarbrevik*, *supra*, 231 Cal.App.3d

at pp. 697-700.) The jury found counsel liable for negligence and conspiracy to defraud. (*Id.* at pp. 695, 696-697.)

Skarbrevik held "that defendant attorneys owed no legal duty to plaintiff, and . . . the court erred in submitting the theory of professional negligence to the jury" and that Skarbrevik's "cause of action for conspiracy to defraud against [one of the attorneys] is barred by principles announced in *Wise v. Southern Pacific Co.* (1963) 223 Cal.App.2d 50, *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566 and *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39 [(*Doctors' Co.*)]." (*Skarbrevik, supra*, 231 Cal.App.3d at p. 695.)

As for the negligence theory, *Skarbrevik* held the attorney of a corporation owes *no duty* to minority shareholders, even those in a "close" corporation. (*Skarbrevik, supra*, 231 Cal.App.3d at pp. 700-707.) In particular, *Skarbrevik* held:

> "An attorney representing a corporation does not become the representative of its stockholders merely because the attorney's actions on behalf of the corporation also benefit the stockholders; as attorney for the corporation, counsel's first duty is to the corporation. [Citation.] Corporate counsel should, of course, refrain from taking part in any controversies or factional differences among shareholders as to control of the corporation, so that he or she can advise the corporation without bias or prejudice. [Citation.] Even where counsel for a closely held corporation treats the interests of the majority shareholders and the corporation interchangeably, it is the attorney-client relationship with the corporation that is paramount for purposes of upholding the attorney-client privilege against a minority shareholder's challenge. [Citation.] These cases make clear that corporate counsel's direct duty is to the client corporation, not to the shareholders individually, even though the legal advice rendered to the corporation may affect the shareholders." (*Skarbrevik, supra*, 231 Cal.App.3d at pp. 703-704.)

As for conspiracy to defraud, *Skarbrevik* acknowledged the evidence showed the majority shareholders "committed the tort of fraudulent concealment" because *they* "deliberately embarked on a scheme to greatly diminish plaintiff's interest in the corporation by diluting his stock in violation of their fiduciary duty to him as majority shareholders." (*Skarbrevik, supra*, 231 Cal.App.3d at p. 707.) Further, the evidence showed counsel "knowingly participated in the majority shareholders' fraud." (*Id.* at p.

708.) However, in *Doctors' Co.*, "a decision filed after trial of this case, the Supreme Court reaffirmed the rule that a cause of action for civil conspiracy may not arise 'if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have that duty.' " (*Id.* at p. 709, partly quoting *Doctor's Co.*, *supra*, 49 Cal.3d at p. 44.)

Because the *Skarbrevik* defendant was not a shareholder, corporate officer, or director, he "did not share the fiduciary duty owed by the three majority shareholders to plaintiff as a minority shareholder. . . . [He] had no attorney-client relationship with plaintiff which would give rise to a fiduciary relationship, and he had no professional duty to plaintiff as a nonclient. There was no basis for plaintiff to place special trust or confidence in [him], or . . . rely on [him] to act in his best interest in relation to the corporation or the other shareholders." (*Skarbrevik*, *supra*, 231 Cal.App.3d at p. 710.) Thus, counsel "had no personal duty to disclose the facts intentionally concealed. Indeed, the same would be true even if [he] were regarded as attorney for the majority shareholders in addition to, or instead of, counsel for the corporation." (*Id.* at p. 711.)

However, *Skarbrevik* emphasized the case had been submitted to the jury on a theory of "constructive fraud, premised on fraudulent concealment where there was a duty to disclose," not actual fraud, and held "an attorney who conspires with a client to defraud a third party and who commits *actual* fraud in pursuit of the conspiracy may be liable for conspiracy to defraud. In that situation, liability is premised on the breach of the attorney's personal duty to abstain from harming another by false misrepresentation, a duty independent of the client's duty. [Citations.] But an attorney will not be liable for conspiracy to commit *constructive* fraud where that charge rests on a fiduciary duty of disclosure owed only by the client." (*Skarbrevik*, *supra*, 231 Cal.App.3d at p. 711.)

Daus strives to shoehorn his allegations into the "actual fraud" opening left by *Skarbrevik*; however, as we describe *post*, he cannot.

On appeal from a judgment following the sustaining of a demurrer, we deem true all pleaded facts, but not adjectival descriptions or legal conclusions, in determining whether a cause of action has been stated. (See *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Blank v. Kirwin* (1985) 39 Cal.3d 311, 318.)

As summarized *ante*, the purported sixth cause of action alleged fraud by Moore for making "omissions and misrepresentations" and committing certain acts knowing they were "false, deceptive, and misleading," and with the intent to deprive Daus of his right to participate in the management of the corporation. The allegations included misleading Daus about the value of his stock, depriving Daus of the value of that stock, and threatening the tax status of the corporation, and that Daus "actually and reasonably relied upon the omissions, representations, and actions" of Moore.

Incorporated within this claim were the allegations of breach of fiduciary duty purportedly committed by Moore, as detailed in a claim against Howser, and those actions were as follows: Moore knew there was "hostility" between the majority and minority shareholders, and that the majority shareholders hired him to figure out how to oust Daus and devalue his shares, and transfer the company's business to another entity. Daus alleged the *legal conclusion* that Moore's actions violated certain ethical precepts, and created a fiduciary duty between himself and Daus, legal points we discuss and reject in Part II, *post*. Moore planned the strategy whereby the majority called a special meeting at which Daus was removed from management, partly by means of creation of a compensation committee. Daus alleged Moore pre-prepared the meeting minutes, falsely stating Daus voted for the plan.

We fail to see how these allegations adequately plead fraud against Moore.

"The essential allegations for an action in fraud or deceit are false representation as to a material fact, knowledge of its falsity, intent to defraud, *justifiable* reliance and resulting damage." (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d

1324, 1331 (*Wilhelm*).)[3] "While . . . plaintiff's pleading must be taken as true [citation], the allegations in a fraud action need not be liberally construed. [¶] Instead, fraud must be specifically pleaded. This means: (1) general pleading of the legal conclusion of fraud is insufficient; and (2) every element of the cause of action for fraud must be alleged in full, factually and specifically, and the policy of liberal construction of pleading will not usually be invoked to sustain a pleading that is defective in any material respect. [Citation.] 'It is bad for courts to allow and lawyers to use vague but artful pleading of fraud simply to get a foot in the courtroom door.' " (*Ibid.*; see *Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157.)

Daus fails to explain with particularity what actions *he* took in justifiable reliance on anything *Moore* did. Simply stating that he relied on the actions complained of does not satisfy the need to plead the reliance element with particularity. Daus vaguely alleges that had he known what was happening he "might have been able to stop the Special Meeting and/or have taken other measures" to avert the ouster. He fails to explain how he could have stopped or averted anything, and he acknowledges his status as the minority shareholder.

Further, as the trial court explained in the ruling on demurrer, Daus fails to articulate what affirmative misrepresentations Moore made that induced Daus to do anything. Even assuming the minutes falsely recorded Daus's vote at the special meeting, it matters not, because Howser's actions represented the majority of the shareholders and would have been approved at the special meeting whatever Daus's vote

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[3] Daus's claim that the mere participation in the scheme by the majority shareholders is actionable fraud in the absence of any affirmative representation is based on an incomplete reading of authority that, while emphasizing fraud can be committed by all forms of "surprise, trick, cunning, dissembling, and unfair ways," in fact involved actionable misrepresentation. (See *Wells v. Zenz* (1927) 83 Cal.App. 137, 140-141 [false affidavit of service a fraud on the court and other party].)

had been. Daus fails to explain what harm flowed from the allegedly-falsified minutes themselves. And Daus fails to identify with particularity any actionable misrepresentation made by Moore *to him*.

Thus, we fail to see the *actual* fraud elements of false representations to Daus or justifiable reliance by Daus pleaded with particularity herein.

In the reply brief, Daus cites for the first time to a different case, *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282 (*Vega*), to support his contentions. That case is materially distinguishable.[4]

In *Vega*, a law firm explicitly concealed the "so-called toxic terms of a third party financing transaction" which induced Vega to part with his shares of a company in a merger transaction favorable to the firm's client. (*Vega*, *supra*, 121 Cal.App.4th at p. 287.) The firm had prepared a disclosure schedule detailing the "toxic" financing, but did not send a copy to Vega or Vega's counsel, knowing that doing so would kill the deal. Instead, the firm participated in misrepresenting to Vega and his counsel that the financing was " 'standard' and 'nothing unusual' " and that the firm would support those claims with documentation. Instead, the firm sent Vega's counsel a " 'sanitized version' of the disclosure schedule which did not include the 'toxic' stock provisions." (*Id.* at p. 288.)

Vega characterized the firm's manufacture and transmittal of the sanitized disclosure schedule as an affirmative misrepresentation, specifically "active concealment or suppression of facts," successfully designed to induce Vega to go through with the merger. (*Vega*, *supra*, 121 Cal.App.4th at p. 292; see also *id.* at pp. 291-294.)

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[4] We accept Daus's counsel's apology, and address the belatedly-cited authority on the merits. We note that Moore did not accept Daus's invitation to seek to file a supplemental brief in reply to the new authority.

Vega applied the following rule: "While an attorney's professional duty of care extends only to his own client and intended beneficiaries of his legal work, the limitations on liability for negligence do not apply to liability for fraud. [Citation.] Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient [citation], and may be liable to a nonclient for fraudulent statements made during business negotiations. (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202 ['the case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length'].)" (*Vega*, *supra*, 121 Cal.App.4th at p. 291; see *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 69-70.)

In response to the contention that the firm "as counsel for the adverse party in a merger . . . owed no duty to disclose" the financing terms, the *Vega* court reasoned that it "specifically undertook to disclose the transaction and, having done so, is not at liberty to conceal a material term. Even where no duty to disclose would otherwise exist, 'where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. [Citation.] One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud.' " (*Vega*, *supra*, 121 Cal.App.4th at p. 292; see *Freedman v. Brutzkus* (2010) 182 Cal.App.4th 1065, 1069-1070.)

Justifiable reliance was pleaded, although the true terms of the toxic financing had been disclosed in a public document filed with the Delaware Secretary of State before the deal was consummated, because the "mere fact that information exists somewhere in the public domain" was not a sure defense. (*Vega*, *supra*, 121 Cal.App.4th at p. 292.) Further, the true facts, while actually known and suppressed by the firm, were not known to Vega or his counsel, who relied on the firm's "sanitized" supporting documentation, which the firm provided with knowledge that the truth would kill the deal. In such

circumstances, the fraud claim survived a demurrer. (*Vega*, *supra*, 121 Cal.App.4th at pp. 294-295.)

We see no similarity between the allegations in *Vega* and the allegations herein. The only false document allegedly prepared by Moore was the pre-prepared meeting minutes, allegedly falsely stating Daus voted for the plan at the special meeting. But Daus has not explained how those inaccurate minutes were material, given that Howser had the votes to pass the planned changes with or without Daus's votes.[5] Nor, unlike in *Vega*, has Daus demonstrated how he *justifiably relied* on anything Moore did. Vega was induced to complete a merger based on intentionally falsified documentation supplied by counsel for the other side. Daus was not induced to do anything by *Moore's* conduct; the *facts* he pleads shows he was simply the hapless victim of the majority shareholders.

Accordingly, the trial court properly sustained the demurrer to the fraud claim.

II

Fiduciary Duty and Malpractice

Daus combines his arguments about the fifth and seventh "causes of action" alleging breach of fiduciary duty and malpractice, and contends these portions of the complaint "impute a duty by Moore" towards Daus which Moore breached. Daus characterizes this as a claim for *constructive* fraud, despite his disavowal of such a theory in the trial court.

In large measure, Daus echoes his contentions that *Skarbrevik* governs this case and favors his position, a claim we have already rejected.

Daus also alleges violations by Moore of ethical duties binding attorneys, reflected in the California Rules of Professional Conduct. However, as Daus at one point appears to concede, those ethical rules "are not intended to create new civil causes of action.

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[5] We express no view on the propriety of such act. Further, we do not address Daus's claims that Moore improperly advised Howser, as those claims are not relevant herein.

Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty." (Rules Prof. Conduct, rule 1-100(A); see *Wilhelm*, *supra*, 186 Cal.App.3d at p. 1333, fn. 5.) Although we do not disagree that "the rules, 'together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which the attorney owes to his or her client' " (*BGJ Associates, LLC v. Wilson* (2003) 113 Cal.App.4th 1217, 1227; see *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086-1087), *Daus* was not Moore's client. Therefore, ethical rules governing the attorney-client relationship have no relevance to the dispute between Daus and Moore.[6]

DISPOSITION

The judgment is affirmed. Daus shall pay Moore's costs of this appeal. (See Cal. Rules of Court, rule 8.278 (a)(2).)

DUARTE, J.

We concur:

HULL, Acting P. J.

MAURO, J.

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[6] In light of our holding, we do not address alternative grounds raised in support of the demurrer.