SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Charles Edward Ramos PART 53

Index Number : 401620/2004

STATE OF NEW YORK

vs

GRASSO RICHARD A

Sequence Number : 027

SUMMARY JUDGMENT

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 25 2006

COUNTY CLERK'S OFFICE
NEW YORK

is decided in accordance with accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/23/06

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

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PEOPLE OF THE STATE OF NEW YORK, by ELIOT SPITZER, the Attorney General of the State of New York,

Plaintiff,

Index No. 401620/04

-against-

RICHARD A. GRASSO, KENNETH G. LANGONE, and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

----------X

RICHARD A. GRASSO,

Cross Claim Plaintiff,

-against-

THE NEW YORK STOCK EXCHANGE, INC. and JOHN REED,

Cross Claim Defendants.

----------X

RICHARD A. GRASSO,

Third-Party Plaintiff,

-against-

H. CARL McCALL,

Third-Party Defendant.

----------X

Charles Edward Ramos, J.S.C.:

In motion sequence number 027, additional third-party defendant H. Carl McCall (McCall) moves for summary judgment dismissing the third-party complaint of third-party plaintiff Richard A. Grasso (Grasso).

The background of this matter has been set forth in detail in this court's opinion, dated March 15, 2006, denying Grasso's motion to dismiss the first, fourth, fifth and sixth causes of

action in the Attorney General's complaint. Familiarity with that decision will be assumed, and only the facts necessary for the understanding of this decision will be set forth here.

In short, the Attorney General's complaint seeks restitution of (or interest on) payments made to Grasso under three separate compensation agreements made between the New York Stock Exchange (NYSE) and Grasso, as chairman and chief executive officer of NYSE, in 1995, 1999 and 2003. The Attorney General alleges that Grasso received unreasonable and excessive compensation in violation of the Not for Profit Corporation Law (N-PCL), and that pursuant to the 1995 and 1999 Agreements, he received payments of $6.6 and $29.9 million, respectively, in Supplemental Executive Retirement Plan (SERP) benefits prior to retirement, which amounted to improper interest-free loans. The Attorney General further alleges, with respect to the 2003 Agreement, that the board did not effectively vote to approve a Capital Accumulation Plan (CAP) and SERP awards comprising pension benefits and deferred bonuses, because the board was presented with inaccurate and incomplete information regarding the extent of benefits. According to the Attorney General, the unlawful payments should be set aside and Grasso should be directed to make restitution to the NYSE for all payments made to him in violation of the N-PCL.

In his third-party complaint, Grasso seeks contribution from McCall, pursuant to CPLR 1401, for any money judgment assessed against him. He alleges, among other things, that McCall was negligent in failing to apprise himself of the nature and terms

of the 2003 salary agreement (the 2003 Agreement) and refused to permit NYSE staff members to explain the terms of the agreement to members of the board. Grasso further alleges that McCall led him to believe that NYSE's Compensation Committee and Board duly considered and approved the 2003 Agreement. Grasso asserts that, if judgment is entered against him in the Attorney General's action against him based in whole or in part on deficiencies in the process leading to the 2003 Agreement, McCall should be liable for contribution of his proportionate share of the judgment, pursuant to CPLR 1401. Although Grasso has not expressly limited his contribution claim to specified causes of action in the Attorney General's complaint, the court reads his papers as addressing his contribution claim solely to the Attorney General's fifth cause of action, which alleges that the board of directors did not properly approve the 2003 Agreement, in violation of N-PCL § 715 (f).

Alternatively, Grasso seeks damages arising from McCall's allegedly negligent performance as a director of NYSE and chairman of NYSE's Human Resources Policy and Compensation Committee (Compensation Committee).

First Cause of Action for Contribution

CPLR 1401 provides, in pertinent part, as follows:

> two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

CPLR 1401 was enacted to codify equitable principles

developed in the case of *Dole v Dow Chemical Co.* (30 NY2d 143 [1972]), mitigating the prior harsh principles of joint and several liability, which held tortfeasors liable for all of the damages of the plaintiff, regardless of their actual percentage of fault. Prior to *Dole*, pro rata apportionment was only available among those tortfeasors actually sued by plaintiff. *Dole* permitted an adjudicated tortfeasor to seek contribution from another tortfeasor regardless of whether that person had been made a party to the underlying litigation. *See discussion Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26-28 (1987). Although the words tort and tortfeasor are not mentioned in CPLR 1401, the section has routinely been interpreted as providing contribution where the liability on which contribution is based is derived from tort. *See discussion* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1401:1-4 at 501-510. In contrast, purely economic loss resulting from breach of contract is not encompassed by CPLR 1401. *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d at 26. While the court agrees with Grasso that this is not a breach of contract case, neither is it a tort case, which would trigger CPLR 1401.

Neither of the parties have cited, nor has this court found, any case applying contribution, pursuant to CPLR 1401, where the basis of the harm is a violation of a statute, rather than a tort. *See e.g. Carrion v City of New York*, 2002 WL 31107747 *3,

n 2 (SD NY 2002)(contribution claims are "'inconsistent'" with the deterrence policies of federal civil rights statutes and state law used to remedy federal violations must be consistent with federal law). CPLR 1401 has been applied to extend the statute of limitations for contribution under the Vehicle and Traffic Law; however, the underlying harm was a tort, a garden-variety personal injury action involving a collision of two tractor trailers. In *Mowczan v Bacon* (92 NY2d 281 [1998]), the passenger sued the owner and operator of the vehicle in which he was riding, and they, in turn, brought a third-party action against the owner of the trailer portion of the other vehicle involved in the collision, who was vicariously liable under the Vehicle and Traffic Law, though the plaintiff had not sued him, and was legally foreclosed from doing so because the statute of limitations under the Vehicle and Traffic Law had run. Because Vehicle and Traffic Law § 388 provided for standard principles of joint and several liability among the parties responsible for the accident, prior to the decision in *Dole v Dow*, or the enactment of CPLR 1401, the Court of Appeals concluded that permitting the application of CPLR 1401 in the personal injury action was consistent with the legislative intent in its earlier establishment of joint and several liability in Vehicle and Traffic Law § 388. Although the N-PCL provides for joint and several liability of directors, that liability is *to the corporation*, not to third parties. *See* N-PCL § 719 (a).

Here, the Attorney General alleges that the NYSE board of

directors did not properly approve any obligation to make future payments to Grasso (including the CAP awards and the SERP benefits) in violation of N-PCL § 715 (f) which provides that "[t]he fixing of salaries of officers, if not done in or pursuant to the by-laws, shall require the affirmative vote of a majority of the entire board unless a higher proportion is set by the certificate of incorporation or by-laws." According to the Attorney General, because those portions of Grasso's compensation package were not properly authorized, they are void, and Grasso must return them to NYSE.

Grasso argues that contribution is available to him, pursuant to CPLR 1401, because should the Attorney General succeed in establishing that the 2003 Agreement violated the N-PCL, he will suffer damage to his property. In support of his argument, Grasso cites *Masterwear Corp. v Bernard* (3 AD3d 305, 306-07 [1ST Dept 2004]), which holds that any tortious act (other than personal injury) including conversion, that result in damages constitutes "injury to property" for the purposes of CPLR 1401. While it is true that "injury to property" need not be physical injury (*Lippes v Atlantic Bank of New York*, 69 AD2d 127, 138-139 (1st Dept 1979), that does not convert all cases which involve a potential loss or diminution of property into a tort case for which contribution is available pursuant to CPLR 1401. In fact, in *Masterwear*, in applying contribution pursuant to CPLR 1401, the Court expressly noted that the underlying claims of conversion, fraud and breach of fiduciary duty against the

defendant were tort claims.

N-PCL § 715 (f) is not a tort provision; rather, it establishes a procedural requirement for the fixing of compensation of officers. If, according to the Attorney General, that requirement is not met, the salary is unauthorized and void, and must be returned to NYSE. Nothing in the N-PCL suggests that an officer who receives unauthorized salary payments and who is required to disgorge those payments, may be reimbursed by members of the board that were involved in the allegedly faulty authorization process. This court does not believe that the equitable principles of *Dole v Dow*, codified in CPLR 1401, should be so extended, without a clear indication of legislative intent to do so. Grasso's cause of action for contribution is, therefore, dismissed.

Second Cause of Action for Negligence and Negligent Misrepresentation

Grasso alleges that McCall was negligent in performing his duties as chairman of the Compensation Committee, and that he owed a duty of care to Grasso in the exercise of those duties. Grasso further alleges that McCall led him to believe, inter alia, that the Compensation Committee and the Board of Directors had been fully informed of the terms of the 2003 Agreement, that the agreement was duly approved by the board, and that he relied on McCall's representations to his detriment, by abandoning any opportunity to collect his accrued compensation and benefits upon retirement from NYSE in 2003 or 2005, and therefore, was harmed as a result of McCall's alleged negligence.

In order to state a cause of action for negligence, the plaintiff must first establish the existence of a duty of care by the defendant to the plaintiff. *Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 (1st Dept 2006). To state a claim for negligent misrepresentation, the plaintiff must show "a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another." *Hudson River Club v Consolidated Edison Co. of New York, Inc.*, 275 AD2d 218, 218 (1st Dept 2000). In addition, plaintiff must show "(1) an awareness by the maker of an untrue statement that it is to be used for a particular purpose, (2) reliance by a known party on that statement in furtherance of that purpose, and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance." *Kimmel v Schaefer*, 224 AD2d 217, 218 (1st Dept), *affd* 89 NY2d 257 (1996), citing *Prudential Ins. Co. of America v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 384 (1992). A negligent misrepresentation claim is properly dismissed where the plaintiff fails to set forth with specificity what false representations were allegedly made. *Lipton v Unumprovident Corp.*, 10 AD3d 703, 707 (4th Dept 2004).

Grasso contends that as a director of NYSE and chairman of the Compensation Committee, McCall had a special relationship of trust and confidence with, and owed a special duty to, Grasso, a fellow director, chairman of the Board and chief executive officer of NYSE. Certainly, as a director and chairman of the

Compensation Committee, McCall did have a duty of loyalty, but that duty was to the corporation, NYSE. *See Foley v D'Agostino*, 21 AD2d 60, 66-67 (1st Dept 1964)("'Officers and directors of a corporation owe it to [*sic*] their undivided and unqualified loyalty.'"). Here, where the dealings between Grasso and the Board of Directors related to the Board's decisions regarding Grasso's compensation, McCall, as chairman of the Compensation Committee, would appropriately have had an arm's-length relationship with Grasso, and his duty of undivided loyalty would be to the Compensation Committee and the Board. Grasso cites *Heard v City of New York* (82 NY2d 66, 74 [1993]) for the proposition that where a party seeks specific information from someone in exclusive control of that information, and purports to investigate the matter before responding, the latter may be liable based upon negligent misrepresentation. However, Grasso fails to allege any specific information that he sought from McCall, any investigation conducted by McCall, or any specific response to the purported inquiry. In fact, Grasso fails to allege *any* specific statements by McCall which constituted negligent misrepresentations. Rather, Grasso makes general allegations such as the following:

> Mr. McCall by express and implied representation, led Mr. Grasso to believe that Mr. McCall had advised the Board of the terms of the 2003 Agreement, and that the Board had approved it. *** Mr. Grasso was never informed by Mr. McCall at any time of any alleged deficiencies in the process or the deliberations of the Compensation Committee and/or the Board of Directors that did or could (according to the Attorney General's Complaint) render his 2003 Agreement unlawful or voidable.

Third-Party Complaint, ¶26. In his Counterstatement Of Material Facts, Grasso merely states that McCall informed him "that the Stock Exchange Board of Directors had approved the proposed 2003 Agreement." Counterstatement Of Material Facts, ¶182. He further states, in a conclusory fashion, "[r]elying on Mr. McCall's representation the Board had *properly* approved the agreement (which was confirmed in the written contract), Mr. Grasso entered into the agreement with the Stock Exchange." *Id.*, ¶185 (emphasis supplied). In support of this statement, however, he provides no evidence that McCall in any way characterized the approval of the 2003 Agreement by the Board of Directors. In his own deposition, Grasso states that he reviewed the terms of the contract with his attorneys, not with McCall, and that he did not remember any conversations with McCall between August 7, the date of the Board meeting, and August 27, the date the contract was signed; he did not remember any specific conversations with McCall other than a short, less than 10 minute, conversation at which he informed McCall that we would sign the contract and McCall congratulated him. Grasso Deposition, at 1253-1255. Even assuming that Grasso had established a special duty on McCall's part, Grasso has not pleaded any alleged negligent misrepresentations with sufficient specificity. *See Lipton v Unumprovident Corp.*, 10 AD3d 703, *supra*.

For these reasons, Grasso fails to establish any special duty owed him by McCall, or any specific misrepresentations made by McCall that provide a sufficient basis for Grasso's cause of

action for negligence and negligent misrepresentation. It is not necessary, therefore, to reach the question of whether any of McCall's actions constituted negligence.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion of third-party defendant Carl McCall is granted, and the third-party complaint is dismissed with costs and disbursements to third-party defendant as taxed by the Clerk on submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 23, 2006

J.S.C.
CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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