08-4873-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELIOT I. BERNSTEIN, individually and P. STEPHEN LAMONT on behalf of SHAREHOLDERS OF IVIEWIT HOLDINGS, INC., IVIEWIT TECHNOLOGIES, INC., UVIEW.COM, INC., IVIEWIT.COM, INC., I.C., INC., IVIEWIT.COM LLC, IVIEWIT LLC, IVIEWIT CORPORATION, IVIEWIT, INC., and PATENT INTEREST HOLDERS,

Plaintiffs-Appellants,

- against -

APPELLATE DIVISION FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, THOMAS J. CAHILL, in his official and individual capacity, JOSEPH WIGLEY, in his official and individual capacity,

(Caption Continued on Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF SUBMITTED ON BEHALF OF DEFENDANTS-APPELLEES, MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP AND LEWIS S. MELTZER

MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP
Attorneys for Defendants-Appellees
Meltzer, Lippe, Goldstein & Breitstone, LLP
and Lewis S. Meltzer
190 Willis Avenue
Mineola, New York 11501
(516) 747-0300

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CATHERINE O'HAGEN WOLFE, in her official and individual capacity, PAUL CURRAN, in his official and individual capacity, MARTIN R. GOLD, in his official and individual capacity, ANGELA M. MAZZARELLI, in her official and individual capacity, RICHARD T. ANDRIAS, in his official and individual capacity, DAVID B. SAXE, in his official and individual capacity, DAVID FRIEDMAN, in his official and individual capacity, LUIS A. GONZALES, in his official and individual capacity, APPELLATE DIVISION SECOND DEPARTMENT, LAWRENCE F. DiGIOVANNA, in his official and individual capacity, DIANA MAXFIELD KEARSE, in her official and individual capacity, JAMES E. PELTZER, in his official and individual capacity, A. GAIL PRUDENTI, in her official and individual capacity, STEVEN C. KRANE, in his official and individual capacity, HON. JUDITH S. KAYE, in her official and individual capacity, KENNETH RUBENSTEIN, ESTATE OF STEPHEN KAYE, PROSKAUER ROSE LLP, MELTZER LIPPE GOLDSTEIN & BREITSTONE LLP, LEWIS S. MELTZER, RAYMOND A. JOAO, FOLEY LARDNER LLP, MICHAEL C. GREBE, WILLIAM J. DICK, DOUGLAS A. BOEHM, STEVEN C. BECKER, STATE OF NEW YORK COMMISSION OF INVESTIGATION, LAWYERS FUND FOR CLIENT PROTECTION OF THE STATE, THE FLORIDA BAR, LORRAINE CHRISTINE HOFFMAN, in their official and individual capacity, ERIC TURNER, in his official and individual capacity, JOHN ANTHONY BOGGS, in his official and individual capacity, KENNETH MARVIN, in his official and individual capacity, THOMAS HALL, in his official and individual capacity, DEBORAH YARBOROUGH, VIRGINIA STATE BAR, ANDREW H. GOODMAN, in their official and individual capacity, NOEL SENGEL, in her official and individual capacity, MARY W. MARTELINO, in her official and individual capacity, and JOHN DOES,

Defendants-Appellees.

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ISSUES PRESENTED FOR REVIEW

1. Whether Judge Scheindlin properly dismissed the claims against Meltzer, Lippe, Goldstein Wolf & Schlissel, P.C. now known as Meltzer, Lippe, Goldstein & Breitstone, LLP and Lewis S. Meltzer, which claims asserted vicarious liability for the allegedly fraudulent conduct of Raymond Joao in 1999 due to the expiration of the Statute of Limitations of the action commenced some eight (8) years later in 2007?

ANSWER: Obviously, eight (8) years is well in excess of the applicable statute of limitations. The attempts of Messrs. Bernstein and Lamont to extend the statute as being equitably tolled are unavailing as each acknowledges that the purported tort(s) of Mr. Joao was/were discovered and corrected immediately (Decision of Judge Scheindlin at Page 7)[1], some seven (7) to eight (8) years ago. The total of three (3) paragraphs devoted to this issue by Messrs. Lamont and Bernstein in their respective briefs on appeal, reveal the absence of merit to their position.

2. Whether vicarious liability may be asserted as a cognizable claim against a party based upon *ultra vires* acts?

ANSWER: While Judge Scheindlin did not rely upon this basis for dismissal (as the Statute of Limitations applied to numerous claims for relief and numerous

[1] / As no Appendix or Record on Appeal has been served upon or provided to Counsel to Meltzer, Lippe, Goldstein & Breitstone, LLP or Lewis Meltzer, references to Judge Scheindlin's decision will have to be provided in this fashion.

Defendants), it is equally well settled and equally applicable as a basis for dismissing the claims of Messrs. Lamont and Bernstein against Meltzer, Lippe, Goldstein & Breitstone, LLP and Lewis S. Meltzer.

STATEMENT OF THE CASE

Messrs. Bernstein and Lamont assert that in 1999, Raymond Joao, while affiliated in some fashion with Meltzer, Lippe, Goldstein & Breitstone, LLP, sought to change and somehow appropriate patent applications of Messrs. Bernstein and Lamont or their affiliates. Messrs. Bernstein and Lamont, however, have acknowledged that the purported deception was immediately discovered and corrected. (*See* Decision of Judge Scheindlin at Page 7, Mr. Lamont's Brief as Appellant at P. 9-10.) Despite the immediate discovery of the alleged actions of Mr. Joao, Messrs. Bernstein and Lamont did not commence the Subject Action until some eight (8) years thereafter, well after the expiration of the applicable statute of limitations.

In any event, if Mr. Joao had committed such an intentionally illegal act (as alleged by Messrs. Bernstein and Lamont), then it was *per se, ultra vires* and no vicarious liability may be found as a matter of well settled law.

STATEMENT OF FACTS

In addition to the salient facts set forth in the above stated "Statement of the Case," the following facts are respectfully submitted:

1) In 1998, Raymond Joao was introduced to Messrs. Bernstein and Lamont by a Co-Defendant (who was not affiliated with MLGB) as an attorney with the Proskauer firm (Opp Paragraph 2)[2], [3],

2) In or about 1999, Raymond Joao purportedly surreptitiously altered Messrs. Bernstein and Lamont's patent applications (Opp Paragraph 10);

3) In or about 1999, Raymond Joao purportedly stole design data from Messrs. Bernstein and Lamont to obtain his own patents (Opp; Paragraph 22, therein incorporating Paragraph 306 of the proposed Amended Complaint);

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[2] / Parenthetical references beginning with the work Opp refer to the paragraph of Plaintiffs' Opposition to the Cross Motion to Dismiss of Meltzer, Lippe, Goldstein & Breitstone, LLP and Lewis Meltzer.

[3]/ Raymond Joao worked at MLGB from 2/22/99-3/31/00. Consequently, when introduced in 1998, he may well have been associated with the Proskauer firm.

4) In or about 1999, Raymond Joao purportedly intentionally withheld data from Messrs. Bernstein and Lamont's patent applications (Opp Paragraph 17);

5) The alleged liability of Lewis and MLG stems from their failure to supervise Joao, solely in the nature of *respondeat superior* or vicarious liability (Opp. Paragraph 5); and

6) Messrs. Bernstein and Lamont acknowledge that, absent some tolling of the statute of limitations, their claims (dating back to 1999) are time barred (Opp. Paragraphs 53-56).

SUMMARY OF THE ARGUMENT

The statute of limitations for fraud in New York State is the greater of six (6) years or two (2) years from the time the fraud was or should have been discovered, CPLR § 213 (8). Here, Plaintiffs acknowledged the immediate discovery and rectifying of the alleged fraud in 1999 and more than six (6) years passed from such time until the Subject Action was commenced. The assertions of equitable tolling of the statute of limitations are unavailing as nothing stopped Messrs. Bernstein and Lamont from commencing an action upon discovery of the alleged fraud.

Further, it is well settled that vicarious liability cannot attach to *ultra vires* acts, Bouchard v. New York Archdiocese, 2006 WL 3025883, 8 (S.D.N.Y. 2006), Barone v. Marone, 2007 WL 4458118, 5 (S.D.N.Y. 2007).

POINT I

THE STATUTE OF LIMITATIONS EXPIRED AGAINST MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP AND LEWIS MELTZER PRIOR TO THE COMMENCEMENT OF THE SUBJECT ACTION

Messrs. Bernstein and Lamont acknowledged that the statute of limitations expired as against Meltzer, Lippe, Goldstein & Breitstone, LLP and Lewis S. Meltzer, absent some tolling of the statute. Between their two briefs submitted in support of the instant appeal, they have discussed their argument in support of equitable tolling in a total of three (3) conclusory paragraphs. As Messrs. Bernstein and Lamont were fully aware of and allegedly corrected Mr. Joao's alleged improprieties back in 1999, they could have commenced suit at said time. They chose not to do so until eight (8) years later in 2007and therefore the equitable tolling doctrine does not apply.

In order to be entitled to equitable tolling, Messrs. Bernstein and Lamont must establish that they have been diligently pursuing their rights and some

extraordinary circumstance stopped them from suing sooner, Rodney v. Breslin 2008 WL 2331455, 4 (E.D.N.Y.,2008), stating, "In order to warrant equitable tolling, a petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005);" *See Also*, Tamayo v. U.S. 2008 WL 417674, 3 (S.D.N.Y. 2008), which specifically quoted Fennell v. Artuz, 14 F.Supp.2d 374, 377 (S.D .N.Y.1998) (holding that a lack of education and unfamiliarity with legal research do not warrant equitable tolling).

Here, no such extraordinary circumstances stopped Messrs. Bernstein and Lamont from commencing an action against Mr. Joao back in 1999, when he purportedly altered their patent application and purportedly stole data to obtain his own patents. Messrs. Bernstein and Lamont did not take any action to prosecute the Subject Claims against Mr. Joao, Lewis and MLGB until some eight (8) years after the fact, which is hardly the diligent pursuit of their rights. Consequently, there is no basis for an equitable toll and no meaningful response to the absolute defense of the lapse of the applicable statutes of limitations. The Subject Action was therefore properly dismissed in its entirety, with prejudice.

POINT II

MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP AND LEWIS S. MELTZER CANNOT BE VICARIOUSLY LIABLE FOR THE ALLEGED *ULTRA VIRES* ACTS OF RAYMOND JOAO

Plaintiffs' claims against Lewis and MLGB sound solely in vicarious liability, as acknowledged by Messrs. Bernstein and Lamont at Paragraph 5 of their Opposition to the Cross Motion to Dismiss of Lewis S. Meltzer and Meltzer, Lippe, Goldstein & Breitstone, LLP. It is well settled, however, that claims of *respondeat superior* do not apply to *ultra vires* acts. *See*, Bouchard v. New York Archdiocese, 2006 WL 3025883, 8 (S.D.N.Y. 2006), Barone v. Marone, 2007 WL 4458118, 5 (S.D.N.Y. 2007).

Messrs. Bernstein and Lamont assert that Mr. Joao's improprieties consisted of the alleged theft of their data, as well as the alleged intentional delay and alteration of their patent application(s). Such alleged intentional acts were not within the scope of Mr. Joao's authority as an attorney with Meltzer, Lippe, Goldstein & Breitstone, LLP.

Acts outside the scope of a person's real or apparent authority on the part of a company are *ultra vires*. As stated in *Bosco v. Arrowhead by Lake Ass'n, Inc.* 2008 WL 2168922, 2 (Conn.Super. 2008):

> According to Black's Law Dictionary, ultra vires is defined as "[u]nauthorized [acts]; beyond the scope of power allowed or granted by a corporate charter or by law." Black's Law Dictionary (8th Ed.2004). "The expression 'ultra vires' is one of broad application. [Courts] have designated as ultra vires a corporate act which is not within the power of the corporation to perform ... The term has been applied to transactions prohibited by law as well as those in excess of powers granted." (Citations omitted.) *Community Credit Union v. Connors*, 141 Conn. 301, 305, 105 A.2d 772 (1954).

See Also, Rare Earth, Inc. v. Hoorelbeke 401 F.Supp. 26, 31 (S.D.N.Y. 1975), *Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co.*174 U.S. 552, 572, 19 S.Ct. 817, 824 (U.S.1899)

In the case at bar, Messrs. Bernstein and Lamont allege that Mr. Joao intentionally altered and delayed their patent application so that he could steal data therefrom. These unauthorized acts are well beyond the power granted any attorney in a law firm and are therefore *ultra vires.* Companies are not vicariously liable for the *ultra vires* acts of their employees, members, etc., *see, e.g.,* Schussel v. New York City Transit Authority 70 A.D.2d 527, 528, 416 N.Y.S.2d 9, 10 (N.Y.A.D., 1979) wherein the Court specifically stated:

> The fifth and sixth causes of action which allege physical threats and harassment by defendant's agents cannot withstand scrutiny. As alleged and shown by a review of the record, **these acts were clearly ultra vires and the doctrine of respondeat superior does not apply.** (Emphasis added.)

Accord, Bouchard v. New York Archdiocese, 2006 WL 3025883, 8 (S.D.N.Y.

2006) ("The Appellate Division affirmed the holding of the trial court that the priest's conduct "did not fall within the scope of his employment and therefore the [Diocese] is not vicariously liable for his conduct under the theory of *respondeat superior.*" 229 A.D.2d at 161 (citations omitted)." *See also* Barone v. Marone 2007 WL 4458118, 5 (S.D.N.Y. 2007)

In case Messrs. Bernstein and Lamont intended to include Lewis S. Meltzer and Meltzer, Lippe, Goldstein & Breitstone, LLP as Defendants in their Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 ("RICO") claims, it should be noted that the absence of vicarious liability is particularly true of RICO claims. In Kovian v. Fulton County Nat. Bank and Trust Co. 100 F.Supp.2d 129, 132 (N.D.N.Y. 2000) the Court stated:

> "vicarious liability has been held to be at odds with Congressional intent in enacting RICO [because] the statute was designed to protect corporations from criminal infiltration rather than hold them liable." *Qatar Nat'l. Navigation & Transp. Co. Ltd. v. Citibank, N.A.*, No. 89 Civ. 0464(CSH), 1992 WL 276565, at *7 (S.D.N.Y. Sep.29, 1992) (citations omitted); see also *Schmidt v. Fleet Bank*, 16 F.Supp.2d 340, 351 (S.D.N.Y.1998). Accordingly, courts in this circuit generally have been adverse to claims of vicarious liability under RICO, *id.*, and these courts hold that *respondeat superior* is available under RICO only when the defendant corporation can be characterized as the "central" or "controlling" figure in the RICO enterprise. *See Amendolare v. Schenkers Intern. Forwarders, Inc.*, 747 F.Supp. 162, 168 (E.D.N.Y.1990).FN2

Inasmuch as Messrs. Bernstein and Lamont do not assert direct action by Lewis S. Meltzer or Meltzer, Lippe, Goldstein & Breitstone, LLP (See Paragraph 5 of their Opposition to the Cross Motion to Dismiss of Lewis S. Meltzer and Meltzer, Lippe, Goldstein & Breitstone, LLP) and vicarious liability cannot be imposed upon either for Mr. Joao's *ultra vires* acts, for the reasons set forth above, all claims against Lewis S. Meltzer and Meltzer, Lippe, Goldstein & Breitstone, LLP were properly dismissed in their entirety, with prejudice.

POINT III

DISMISSAL OF THE FEDERAL CLAIMS PROPERLY RESULTED IN DISMISSAL OF THE STATE CLAIMS

Regardless of the absence of a valid claim against Lewis S. Meltzer and Meltzer, Lippe, Goldstein & Breitstone, LLP (for the reasons set forth above, including, *inter alia*, the passing of the applicable statutes of limitations and the absence of a cognizable claim for vicarious liability based upon the *utra vires* acts of Mr. Joao), the absence of a valid federal claim properly resulted in state law claims being dismissed as well, United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139 (U.S.Tenn. 1966), " Certainly, if the federal

claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."

CONCLUSION

WHEREFORE, it is respectfully requested that the Subject Appeal be denied in its entirety and that Lewis S. Meltzer and Meltzer, Lippe, Goldstein & Breitstone, LLP be awarded such other and further relief as this Court deems just and proper.

Dated: Mineola, New York
March 10, 2009

MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP

By: _____

RICHARD M. HOWARD (RMH-2932)
Attorneys for Appellees
LEWIS S. MELTZER AND MELTZER LIPPE
GOLDSTEIN & BREITSTONE, LLP
190 Willis Avenue – Suite 120
Mineola, New York 11501
(516) 747-0300

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

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DOCKET NUMBER: 08-4873-CV

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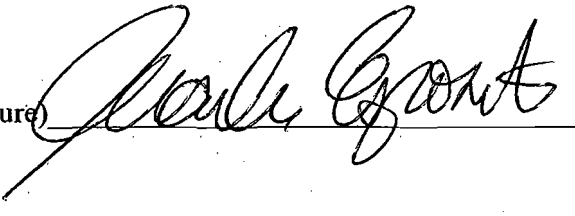
(Your Signature) 

Date: 03/18/2009

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STATE OF NEW YORK
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EDWIN RIOS, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to this action, and resides at 2828 West 15th Street, Brooklyn, New York 11224.

That on March 18, 2009, he served 2 copies of Brief Submitted on Behalf of Defendants-Appellees, Meltzer, Lippe, Goldstein & Breitstone, LLP and Lewis S. Meltzer (Bernstein, et al. v. Appellate Division, First Department, et al.) on:

Joanna F. Smith, Esq.
Gregg M. Mashberg, Esq.
Proskauer Rose LLP
1585 Broadway
New York, NY 10036-8200
jfsmith@proskauer.com
gmashberg@proskauer.com

Kent K. Anker, Esq.
Friedman Kaplan Seiler & Adelman LLP
1633 Broadway
New York, NY 10019-6708
kanker@fklaw.com

John W. Fried, Esq.
Fried & Epstein LLP
350 5th Avenue, Suite 7612
New York, NY 10118
johnwfried@fried-epstein.com

Patrick J. Walsh, Esq.
Office of the NY State Attorney General
120 Broadway, 25th Floor
New York, NY 10271-0002
patrick.walsh@oag.state.ny.us

Monica Anne Connell
Office of the NY State Attorney General
120 Broadway, 24th Floor
New York, NY 10271-0002
monica.connell@oag.state.ny.us

Glenn T. Burhans, Jr., Esq.
Greenberg Traurig
101 East College Avenue
Tallahassee, FL 32302
burhansg@gtlaw.com

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF NEW YORK, ss.:

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That on March 18, 2009, he served 2 copies of Brief Submitted on Behalf of Defendants-Appellees, Meltzer, Lippe, Goldstein & Breitstone, LLP and Lewis S. Meltzer (Bernstein, et al. v. Appellate Division, First Department, et al.) on:

Stephen M. Hall, Esq.
Office of the Virginia State Attorney General
900 East Main Street
Richmond, VA 23219
shall@oag.state.va.us

Eliot J. Bernstein, Pro Se
Plaintiff-Appellant
39 Little Avenue
Red Bluff, CA 96080

P. Stephen Lamont, Pro Se
Plaintiff-Appellant
35 Locust Avenue
Rye, NY 10580

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a mail depository regularly maintained by the United States Postal Service in the Borough of Manhattan, City of New York, addressed as shown above.

Sworn to before me on
March 18, 2009

CHARLES J. ESPOSITO
NOTARY PUBLIC, STATE OF NEW YORK
No. 01ES1132025
QUALIFIED IN NASSAU COUNTY
COMMISSION EXPIRES OCTOBER 31, 2009