



189 A.D.3d 402, 137 N.Y.S.3d  
10, 2020 N.Y. Slip Op. 07128

**\*\*1** Bankers Conseco Life Insurance  
Company et al., Appellants,  
v  
KPMG LLP, Respondent.

Supreme Court, Appellate Division,  
First Department, New York  
12503, 2020-02387, 653765/19  
December 1, 2020

CITE TITLE AS: Bankers Conseco  
Life Ins. Co. v KPMG LLP

#### HEADNOTE

#### Pleading

#### Sufficiency of Pleading

Aiding and Abetting Fraud—Underlying Fraud, Actual Knowledge, and Substantial Assistance Adequately Alleged

Sills Cummis & Gross P.C., New York (Richard H. Epstein of counsel), for appellants.

Foley Hoag LLP, New York (Lisa C. Wood of counsel), for respondent.

Orders, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 21 and 22, 2020, which, to the extent appealed from as limited by the briefs, granted defendant's motion pursuant to [CPLR 3211 \(a\) \(7\)](#) to dismiss the claim for aiding and abetting fraud, unanimously reversed, on the law, without costs, and the motion denied.

We find that the motion court erred in dismissing plaintiffs' claim for aiding and abetting fraud. The complaint adequately

alleged an underlying fraud, actual knowledge of the fraud and, substantial assistance (*see* [Oster v Kirschner](#), 77 AD3d 51, 55 [1st Dept 2010]). The complaint adequately alleges that defendant had actual knowledge of the fraudulent scheme of nonparties Beechwood Re, Ltd., the Platinum hedge fund, and the individuals associated therewith (*see Gansett One, LLC v Husch Blackwell, LLP*, 168 AD3d 579, 580 [1st Dept 2019]; *William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 504 [1st Dept 2018]; [Weinberg v Mendelow](#), 113 AD3d 485, 488 [1st Dept 2014]; *AIG Fin. Prods. Corp. v ICP Asset Mgt., LLC*, 108 AD3d 444, 446 [1st Dept 2013]).

The complaint adequately alleges substantial assistance by alleging that defendant enabled the fraud to proceed by coming up with the demand note scheme and providing a letter about **\*403** Beechwood Re's capitalization and that plaintiffs would not have entered into transactions with Beechwood Re if defendant had not lent it credibility (*see William Doyle*, 167 AD3d at 504; *Weinberg*, 113 AD3d at 488).

The motion court ruled that defendant's valuation letter did not amount to substantial assistance because it lacked “information sufficient for reliance by plaintiff.” Assuming, arguendo, that reliance is required for aiding and abetting (as opposed to fraud), the question of what constitutes reasonable reliance is not generally to be resolved as a matter of law on a motion to dismiss (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015]). Unlike *Churchill Fin. Cayman, Ltd. v BNP Paribas* (95 AD3d 614 [1st Dept 2012]), relied upon by defendant, this is not a case where defendant was merely silent and there is no indication that Beechwood Re's capitalization was a matter of public record. Finally, in *Churchill*, the plaintiff was specifically advised in the Confidential Information Memorandum of certain unspecified litigation. There was no similar red flag here. Concur—Gische, J.P., Webber, Oing, Mendez, JJ.


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## Filings (5)

Title	PDF	Court	Date	Type
<b>1. Complaint</b> BANKERS CONSECO LIFE INSURANCE COMPANY and Washington National Insurance Company, v. KPMG LLP. 2019 WL 8631409	—	N.Y.Sup.	June 28, 2019	Pleading
<b>2. Bankers Consec Life Insurance Company's and Washington National Insurance Company's Memorandum of Law in Opposition to KPMG LLP's Motion to Dismiss</b> BANKERS CONSECO LIFE INSURANCE COMPANY and Washington National Insurance Company, v. KPMG LLP. 2019 WL 8631412	—	N.Y.Sup.	Oct. 30, 2019	Motion
<b>3. Memorandum in Support of Motion to Dismiss</b> BANKERS CONSECO LIFE INSURANCE COMPANY and Washington National Insurance Company, v. KPMG LLP. 2019 WL 8631411	—	N.Y.Sup.	Oct. 10, 2019	Motion
<b>4. Reply Memorandum in Support of KPMG LLP's Motion to Dismiss</b> BANKERS CONSECO LIFE INSURANCE COMPANY and Washington National Insurance Company, v. KPMG LLP. 2019 WL 8631410	—	N.Y.Sup.	Sep. 19, 2019	Motion
<b>5. Memorandum in Support of Motion to Dismiss</b> BANKERS CONSECO LIFE INSURANCE COMPANY and Washington National Insurance Company, v. KPMG LLP. 2019 WL 8631407	—	N.Y.Sup.	Aug. 08, 2019	Motion

## History (2)


### Direct History (2)

 1. [Bankers Conseco Life Ins. Co. v. KPMG LLP](#)  
2020 WL 2213310 , N.Y.Sup. , Apr. 01, 2020

*Reversed by*

2. [Bankers Conseco Life Insurance Company v. KPMG LLP](#)  
189 A.D.3d 402 , N.Y.A.D. 1 Dept. , Dec. 01, 2020

## Citing References (2)

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	<p>1. <b>Bullen v. CohnReznick, LLP</b> 2021 WL 2148739, *1, N.Y.A.D. 1 Dept.</p> <p>TORTS — Fraud. Investors sufficiently alleged fraud with particularity against accounting firm that provided audit and other services for now defunct hedge fund.</p>	May 27, 2021	Case		<p>1</p> <p>A.D.3d</p>
—	<p>2. <b>N.Y. Jur. 2d Fraud and Deceit s 17, § 17. Relationship of parties; breach of duty or abuse of confidential or fiduciary relationship—What constitutes confidential or fiduciary relationship</b> N.Y. Jur. 2d Fraud and Deceit</p> <p>While the principle that fraud will reside in the abuse of a confidential or fiduciary relationship is most strictly applied in cases involving the familiar relationships of parent...</p>	2021	Other Secondary Source	—	<p>1</p> <p>A.D.3d</p>