

SAM GLASSCOCK III  
VICE CHANCELLOR

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE  
34 THE CIRCLE  
GEORGETOWN, DELAWARE 19947

Submitted: March 6, 2012

Decided: April 20, 2012

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Parkowski Guerke & Swayze, P.A.  
116 West Water Street  
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David Dolan  
Merit West, SBI #618418  
Sussex Correctional Institution  
P.O. Box 500  
Georgetown, DE 19947

Re: *Wagamon v. Dolan*  
C.A. No. 5594-VCG (Consolidated)

Dear Counsel and Mr. Dolan:

This letter represents my opinion on Defendant William Krieg's Motion for Summary Judgment. For the reasons that follow, that Motion is denied.

This matter involves the winding up of a joint venture, Internet Working Technologies, Inc. ("INT") owned by Allan Wagamon and David B. Dolan. Initially, Wagamon sought dissolution of the Corporation under 8 *Del.C.* § 273. In a separate action, since consolidated, Dolan complained about Wagamon's actions in purportedly looting INT to Dolan's detriment. Specifically, Dolan alleges that Wagamon diverted assets belonging to INT to his solely-owned business, Wagamon Technology Group LLC ("WTG"). Dolan is incarcerated and is appearing *pro se*.

Krieg is a CPA and an employee of Orth and Kowalick P.A. (“O & K”). O & K was hired to provide accounting services to INT. According to Dolan’s Complaint, Krieg is the accountant who provided those services on behalf of O & K. An earlier Master’s Report in this case, which is law of the case, denied Wagamon’s Motion to Dismiss with respect to allegations in the Complaint of conversion and breach of duty. I specifically exempted Krieg from the examination of whether the Complaint stated a cause of action against him.<sup>1</sup>

The allegations of the Complaint that survived the Motion to Dismiss are that Wagamon breached duties to Dolan in not allowing him to participate in the business of INT and in not providing his share of corporate distributions; that Wagamon and Krieg improperly valued INT to further Wagamon’s attempt to purchase it from Dolan; and that Wagamon and Krieg converted assets of INT to WTG and encumbered INT with debt to reduce its value. Krieg now seeks summary judgment, alleging that Dolan has failed to plead a cause of action against him and that no evidence of record, viewed in the light most favorable to Dolan, can establish the liability of Krieg to Dolan.

Wagamon, as a joint venturer, owed fiduciary duties to Dolan as well as to INT. Krieg is an employee of the accounting firm hired by INT. The Complaint does not state what duty, if any, the accounting firm, or Krieg individually, owed

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<sup>1</sup> See *Wagamon v. Dolan*, 2011 WL 684615, at \*3 n.2 (Del. Ch. Feb. 17, 2011).

to Dolan as an individual, nor does it state, assuming that such a duty exists, Krieg has breached it. Even if not a fiduciary, however, Krieg could be liable for aiding and abetting a breach of fiduciary duty.

The standard for an aiding and abetting claim is a stringent one, one that turns on proof of scienter of the alleged abettor. In order to establish a valid aiding and abetting claim, the Plaintiff must plead facts that would show (1) the existence of a fiduciary duty; (2) that the fiduciary breached its duty; (3) that a defendant who is not a fiduciary knowingly participated in the breach; and (4) damages<sup>2</sup>

Because the Complaint states that Wagamon was a fiduciary for Dolan, that he breached his fiduciary duties, that Krieg knowingly participated in those breaches, and that damages resulted, the aiding and abetting claim would withstand a motion to dismiss.

This matter, however, is before me on Krieg's motion for summary judgment. The summary judgment standard is well known: summary judgment will be entered only where the moving party demonstrates the absence of issues of material fact and that it is entitled to a judgment as a matter of law. The summary judgment standard puts the initial burden on the moving party to demonstrate "the absence of a material factual dispute."<sup>3</sup> It is only after the moving party has satisfied this initial burden that "the burden shifts to the nonmovant to present

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<sup>2</sup> *Binks v. DSL.Net, Inc.*, 2010 WL 1713629, at \*10 (Del. Ch. Apr. 29, 2010).

<sup>3</sup> *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 356 (Del. Ch. 2008) (quoting *Levy v. HLI Operating Co.*, 924 A.2d 210, 219 (Del. Ch. 2007)).

some specific, admissible evidence that there is a genuine issue of fact for a trial.”<sup>4</sup> At that point the nonmoving party “may not rest upon the mere allegations or denials of [its] pleading” and summary judgment will be denied only “if both sides put forth conflicting evidence such that there is an issue of material fact.”<sup>5</sup> Otherwise, summary judgment will be entered against the nonmoving party.

Here, Krieg, as the movant, attempted to meet the summary judgment standard only by reiterating what he perceived as deficiencies in Dolan’s initial pleading. But as I have found, the complaint is legally sufficient to plead an aiding and abetting claim against Krieg. Krieg’s real point is that Dolan can point to no evidence in the record supporting the allegations of the complaint. He has filed no affidavit of his own to demonstrate the lack of an issue of fact here. I note that, heretofore, no scheduling order has been put in place in this matter, and discovery may be ongoing. Mr. Dolan’s incarceration and *pro se* status make case management difficult. This matter has been pending since July 6, 2010.

Given the forgoing, I find the following to be the appropriate way to proceed. All discovery requests shall be filed by May 15, 2012. Any additional case dispositive motions shall be filed by June 20, 2012. A trial will be scheduled at a convenient date thereafter. Consideration of the instant motion is deferred

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<sup>4</sup> *Transkaryotic*, 954 A.2d at 356 (internal quotation marks removed).

<sup>5</sup> *Id.*

until the close of the discovery period. Mr. Krieg may renounce the motion at that time, accompanied by affidavits to the extent he finds appropriate.

To the extent the forgoing requires an order to take effect, IT IS SO ORDERED.

Sincerely,

*/s/ Sam Glasscock III*

Sam Glasscock III