First Department Index No. 3989/2018
New York County Index No. 654584/2017

Court of Appeals
State of New York

THE MOORE CHARITABLE FOUNDATION AND KENDALL JMAC, LLC

Plaintiffs-Appellants-Cross-Respondents,

—against—

PJT PARTNERS, INC., PARK HILL GROUP, LLC,

Defendants-Respondents-Cross-Appellants,

—and—

ANDREW W.W. CASPERSEN,

Defendant.

DEFENDANTS-RESPONDENTS' OPPOSITION TO PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

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Defendants-Respondents Park Hill Group LLC ("Park Hill") and PJT Partners Inc. ("PJT") respectfully submit this opposition to the motion for leave to appeal ("Mot.") filed by Plaintiffs-Appellants The Moore Charitable Foundation ("Moore Charitable") and Kendall JMAC, LLC ("Kendall").

Preliminary Statement

There is no basis to grant Plaintiffs leave to appeal from the First Department's unanimous decision affirming the dismissal, on two independent grounds, of Plaintiffs' negligent supervision claim by the Commercial Division of the Supreme Court, New York County. Leave to appeal has already been denied by the First Department. (Mot. 4; Ex. B.)

The claim on which Plaintiffs seek further review would impose negligent supervision liability on an employer (Park Hill) and its parent company (PJT) for an intentional tort committed by a rogue employee (Andrew W.W. Caspersen). Caspersen defrauded his close friend, an investment manager for Plaintiffs, who was a stranger to Park Hill and PJT. It was part of a series of frauds Caspersen perpetrated against his family members and close friends, without Park Hill's or PJT's knowledge. Caspersen's targets were those close to him because his pitch—a "risk-free" 15% return on a secured loan—was obviously too good to be true. It is no longer in dispute that Caspersen acted solely for his own personal benefit and not as an agent of Park Hill or PJT; Plaintiffs do not seek review of the

First Department's dismissal of their *respondeat superior* and apparent authority claims.

Plaintiffs' motion principally disagrees with the First Department's alternative ground for affirmance. Plaintiffs ask this Court to establish an unprecedented and unwarranted rule that employers owe a duty to *all* so-called "legitimate *potential* customers" to prevent employees from committing intentional torts, including those outside the scope of their employment. (Mot. 10 (emphasis added).) Such a rule would contradict decades of decisions from the Appellate Divisions, which have consistently required such plaintiffs to allege that defendants owed them a "special duty," typically as a result of an existing customer relationship. That prevailing rule is sound. For good reason, Plaintiffs can find no support for a broader duty in any decision by a court in this state. Nor do the out-of-state decisions cited by Plaintiffs support it.

This case is also a poor vehicle to address the issue for three reasons. *First*, Plaintiffs' "Question Presented" (Mot. 5–6) is not actually presented. The Complaint nowhere alleges that Plaintiffs were "legitimate potential customers" of Park Hill or PJT. *Second*, Plaintiffs allege purely economic harm, requiring them to allege a "special duty." A decision in this case would not govern most negligent supervision cases, which more typically allege physical injuries such as from

battery or sexual assault. And, *third*, there was an independent ground for the First Department's dismissal.

That alternative ground does not warrant review. There is no dispute about the governing law: Plaintiffs were required to allege Defendants' knowledge of a prior fraud committed by Caspersen to establish that Defendants should have known his propensity to commit fraud. Plaintiffs simply disagree with two lower courts' readings of Plaintiffs' allegations. Plaintiffs are wrong, but this deficiency in Plaintiffs' pleading has no significance to anyone other than the parties here. And, unless this Court agrees to review the propensity issue as well, an opinion on the duty issue would be impermissibly advisory.

Because Plaintiffs' motion does not present any issue that is novel or of public importance, and because the First Department's decision does not conflict with any decision of this Court or of another Appellate Division, Plaintiffs' motion for leave to appeal should be denied. *See* 22 NYCRR 500.22(b)(4).

I. The Standard for Leave to Appeal.

The purpose of review by the Court of Appeals is "uniformly to settle the law for the entire State and finally to determine its principles." *In re Miller's Will*, 257 N.Y. 349, 357–58 (1931). For that reason, motions for leave to appeal are required to explain why "the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the

departments of the Appellate Division." 22 NYCRR 500.22(b)(4). Plaintiffs fail to make any of those showings.

II. Leave to Appeal Is Not Warranted to Address the First Department's Alternative Ground for Affirmance or to Expand Negligent Supervision Liability By Creating a New Duty Owed to All "Potential" Customers.

Plaintiffs' primary argument is that this Court should grant leave to appeal to address the First Department's alternative ground for affirmance and, in so doing, to expand the tort of negligent supervision by imposing on employers a new duty, owed to all "legitimate potential customers" (Mot. 10) to prevent employees from committing intentional torts. (Mot. 1–2, 6–12.) There is no conflict of authority on this issue, the existing requirement that Plaintiffs allege a "special duty" is sound, and this case is a poor vehicle to address the question.[1]

A. There Is No Conflict of Authority on the Duty of Supervision.

Plaintiffs do not contend that the First Department's decision that Plaintiffs were owed no duty conflicts with any decision of this Court or any Appellate Division. To the contrary, the First Department's decision is supported by the only two New York opinions that Plaintiffs cite: *Heffernan* v. *Marine*

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[1] As Plaintiffs note, the trial court did not address this argument because it was first raised in the reply brief on Defendants' motion to dismiss. (Mot. 2.) We did so because Plaintiffs filed the Supreme Court's unpublished opinion in *Heffernan* as an exhibit to their opposition to the motion to dismiss and that opinion—proffered to the trial court by Plaintiffs themselves—squarely raised the issue. (First Department Record ("R") at 83.) The First Department held that it could consider the argument because it is a "question of law that can be resolved on the face of the existing record." (Ex. A at 4 (citing *Chateau D'If Corp.* v *City of New York*, 219 A.D.2d 205, 209 (1st Dep't 1996)).) That discretionary decision is not suitable for review in this Court. The question was fully briefed in the First Department.

Midland Bank, 267 A.D.2d 83 (1st Dep't 1999) (Mot. 12 n.2); and *Gottlieb* v. *Sullivan & Cromwell*, 203 A.D.2d 241 (2d Dep't 1994) (Mot. 11–12). The First Department cited both decisions with approval. (Ex. A at 4.) Plaintiffs are simply wrong to say that the First Department announced a "new" rule, for "the first time," in this case. (Mot. 5, 10.)

Heffernan is an indistinguishable case in which a rogue bank employee defrauded persons, who were not customers of the bank, by selling them fake investments and personally pocketing their money. The First Department affirmed the dismissal of that negligent supervision claim on the ground that plaintiffs failed to allege "a special duty running from the bank to them." 267 A.D.2d at 84. *Gottlieb* likewise affirmed the dismissal of a negligent supervision claim, by a plaintiff who was "not a client" of the defendant law firm, because of an "absence of any privity between the parties." 203 A.D.2d at 241–42. Plaintiffs cite no New York case advocating the creation of a broader duty owed to all "potential" customers. Nor are the facts of either *Heffernan* or *Gottlieb* compatible with any such a rule.[2]

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[2] Plaintiffs in those cases would have been able to make stronger allegations they were "potential" customers than Plaintiffs here. On Plaintiffs' logic, persons with money to deposit would be potential customers of a bank like Marine Midland Bank just as a market maker on a stock exchange would be a potential customer of a full-service law firm like Sullivan & Cromwell.

Nor do the out-of-state cases cited by Plaintiffs support such a duty. To the contrary, *Keller* v. *Koca*, 111 P.3d 445 (Colo. 2005) (Mot. 10–11), held that defendant dry cleaner was not liable to a plaintiff who was sexually assaulted by an employee (Uzan) on its premises because "[s]he was neither an employee nor a customer." *Id.* at 450.[3] (Notably, in *Keller* as here, there was a personal connection between plaintiff and the employee. Plaintiff was "the daughter of Uzan's friends." *Id.* at 446.) Likewise, in *Doe* v. *Coe*, 135 N.E.3d 1 (Ill. 2019) (Mot. 10), the sexual assault victim was a member of the church youth group led by the perpetrator. As for *McLean* v. *Kirby Co.*, 490 N.W.2d 229 (N.D. 1992) (Mot. 10), that case did not even involve negligent supervision, but rather liability under the "peculiar risk doctrine," *see* Restatement (Second) of Torts § 413 (1965), which is not at issue in this case. Moreover, Plaintiffs did not cite any of these out-of-state cases to the First Department in either of their merits briefs or in their motion for reargument.

B. The Existing Requirement of a "Special Duty" Is Sound.

The requirement of a special duty—as applied by the Appellate Divisions in this case, *Heffernan*, and *Gottlieb*—is sound. Negligence liability for intentional torts committed by another is strongly disfavored and appropriate only

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[3] Plaintiffs quote language from the prior paragraph in *Keller* summarizing evidence that the perpetrator posed a risk to "potential customers." (Mot. 10–11 (quoting 111 P.3d at 450).) But the court in *Keller* nowhere held that a duty is owed to all potential customers. Indeed, anyone who wears clothes could presumably be a potential customer of a dry cleaner.

in limited cases. *See, e.g.*, *532 Madison Ave. Gourmet Foods, Inc.* v. *Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 289 (2001) (noting that a duty to protect from "criminal conduct of others" requires a "special relationship"). The elastic concept of a "potential" customer fails to provide any meaningful limit on such liability. Many businesses are capable of doing business with almost anyone, and holding them liable to such an indeterminate class would be paralyzing. *See, e.g.*, *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 179–81 (1931) (rejecting the creation of "liability in an indeterminate amount for an indeterminate time to an indeterminate class").

Drawing the line at actual, existing customers makes sense. Being a customer is not just "happenstance." (Mot. 9.) Existing customers are known to the employer. They confer benefits on the employer. The employer can negotiate its liability to them by contract. And they pay, indirectly, the cost of the supervision that the employer undertakes. None of these factors is present with a "potential" customer. Instead, a "potential" customer will often be, as here, a stranger. Employers are not fairly charged with protecting such persons from intentional torts. That is particularly the case when—as here and in *Keller*—the plaintiff is a personal associate of the rogue employee.

The concerns that Plaintiffs raise about a rogue employee's use of the "trappings and resources" of employment (Mot. 9) are better addressed by other doctrines, such as *respondeat superior* and apparent authority. The First

Department dismissed those claims here, and Plaintiffs do not seek review of those dismissals. The First Department considered all of Park Hill's and PJT's statements concerning Caspersen's job description, and determined that the transaction that Caspersen offered to Plaintiffs did not fit within that description. (Ex. A at 5.) As such, Plaintiffs' assertions that Caspersen's conduct was "indisputably authorized" and that Plaintiffs "reasonably believed [they were] being invited to become a client" (Mot. 10) are false and barred by the First Department's now-final holdings.

Indeed, Plaintiffs were in a far better position to uncover this fraud than Park Hill or PJT. Despite his hidden character flaws, Plaintiffs admit that Caspersen was a successful and high-performing employee. (R34 ¶24.) Plaintiffs, not Park Hill or PJT, were the ones offered the "opportunity" to earn a "risk-free" 15% rate of return. (R39 ¶41.) Caspersen promised his long-time, personal friend, Plaintiffs' investment manager, "well above market" "private equity returns (15% net) but without the risk or unpredictable cash flow." (R78.) Prior to parting with their money, Plaintiffs do not allege that they asked to speak with anyone other than Caspersen—whether at the borrower, Park Hill, or PJT. (R39–40 ¶¶41–46.) Plaintiffs did not, for example, speak to "John Nelson," the fictitious person whose name appeared on the signature page of their supposed investment agreement with the supposed borrower. (R40 ¶¶44–45.) Plaintiffs asked to speak to John Nelson

only months later, after Caspersen offered them an opportunity to invest $20 million more on similar terms. (R42 ¶52.) When Plaintiffs asked to speak to Nelson, Caspersen played the part himself, first over the phone and then in an email from a domain he had registered that same day. (R42–43 ¶¶53–56.) "[T]he moment the Foundation asked for more information, the fraud began to unravel . . . ." (Ex. C at 12.)

C. This Case Is a Poor Vehicle.

This case is a poor vehicle to address this question for three reasons.

First, the Complaint does not allege that Plaintiffs were potential customers of Caspersen in his role at Park Hill. To the contrary, it alleges that Caspersen specialized in representing a specific type of customer that did not include Plaintiffs. He "represent[ed] private equity fund managers" who needed advice on fund recapitalization transactions. (R32 ¶18.) Plaintiffs are not private equity fund managers; they are a non-profit organization and an investment vehicle through which that organization invested. Caspersen was responsible for raising new capital for private equity fund managers; Plaintiffs entered into a purported loan transaction, and did not make a capital investment. Plaintiffs thus have no basis to say they are the "kind of customer the tortfeasor employee was authorized to recruit." (Mot. 5.) Only by generalizing the category of Caspersen's potential customers to all persons with money to invest (Mot. 8.)—in effect, the whole

world—can plaintiffs suggest that they fall within that group. Plaintiffs have no more connection to Park Hill and PJT than anyone else that Caspersen might have attempted to defraud.

Second, there is an additional reason for requiring a "special duty" in this kind of case, even if one were not required in other negligent supervision cases. Plaintiffs allege only economic losses, and there is no general duty to protect others from purely economic losses. *532 Madison Ave.*, 96 N.Y.2d at 290–92. Thus, a decision by this Court would provide little guidance for other negligent supervision cases. Most such cases involve personal injury, such as from a battery or sexual assault. Indeed, all three out-of-state cases cited by Plaintiffs (*Keller*, *Doe*, and *McLean*) involve sexual assault. *See supra*, p. 6.

Third, as discussed below, the requirement of a special duty was only one of two independent reasons for the First Department's decision.

III. Leave to Appeal Is Not Warranted to Consider Whether, Under Settled Law, Plaintiffs' Pleading of Park Hill and PJT's Knowledge of Caspersen's Propensity Was Sufficient.

Plaintiffs also ask this Court to grant leave to appeal so that they can reargue a separate pleading deficiency identified by both courts below: whether Park Hill and PJT should have known that Caspersen had a propensity to commit fraud. (Mot. 12–15.) Plaintiffs are forced to raise this second issue because it

provides an independent basis for the dismissal of their negligent supervision claim. But they do not and cannot contend that it is novel or important.

There is no conflict of authority regarding the requirement that a negligent supervision plaintiff allege that defendants were "aware of specific prior acts or allegations" against the employee. *See, e.g.*, *Doe* v. *Alsaud*, 12 F. Supp. 3d 674, 680 (S.D.N.Y. 2014) (cited Ex. A at 4). Plaintiffs disputed this requirement below, but they do not press that point here. Instead, they argue that they can satisfy that standard, which they cannot.

The First Department rightly held that the Complaint "does not allege that defendants were aware of the facts that plaintiff contends would have put them on notice of the employee's criminal propensity." (Ex. A at 2.) The Supreme Court held the same. (Ex. C at 13.) The facts that purportedly should have put Park Hill and PJT on notice were: (i) Caspersen's embezzlement of a deal fee; (ii) his alcoholism; and (iii) his speculative personal trading. But the Complaint alleges, and Plaintiffs argued to the First Department, that Defendants did not know about any of those behaviors. (*See, e.g.*, R36 ¶29; PB2, 5, 6, 19.)[4] The First

[4] *See, e.g.*, R36 ¶29 ("PJT *failed to detect* Caspersen's obsessive and dangerous behavior . . . ." (emphasis added)); PB2 ("PJT *never noticed*" Caspersen's drinking (emphasis added)); *id.* at 5 ("Defendants *failed to notice*" Caspersen's trading (emphasis added)); *id.* at 6 ("PJT *never noticed*" Caspersen's fee diversion (emphasis added)); *id.* at 19 ("PJT *failed to detect*" Caspersen's drinking (emphasis added)). Citations to "PB" are to Plaintiffs' opening brief in the First Department.

Department did not permit Plaintiffs to retract that concession on their motion for reargument. This Court should not permit it either.

Nor can plaintiffs re-rewrite the Complaint's "knew or should have known" allegations as unequivocal allegations of what Park Hill and PJT "knew." An allegation that Defendants "knew or should have known" is equivalent to an allegation that Defendants "either knew or did not know." It amounts to an (incorrect) legal conclusion about what Defendants had a duty to know. It is not a permissible example of alternative pleading (*see* Mot. 13 n.3.), which "to be sufficient requires support in the pleading for both theories of recovery." *Day* v. *Dworman*, 18 A.D.2d 989, 989 (1st Dep't 1963).

Plaintiffs point to their allegations that Park Hill knew (or should have known) that Caspersen's "explanation" for a missing deal fee was false and that Park Hill knew (or should have known) that it received funds from the "wrong" account. (Mot. 3, 13–14 (citing R37 ¶35, R41 ¶47).) The Complaint alleges no basis for concluding that Park Hill or PJT *knew* those things, but even if they did, that would not be the same as knowing that Caspersen had embezzled the deal fee, which the Complaint does not allege. In fact, the Complaint alleges the opposite. It says that Caspersen replaced the fee before Defendants were "likely [to] insist on receiving" it (R38 ¶40) and that, when replacing it, he "ma[de] it appear that Irving Place was finally paying PJT's deal fee" (R41 ¶47). Indeed, the account at issue,

ostensibly in the name of Irving Place, which owed PJT the fee, was the *same account* into which Plaintiffs wired their money. (R39–41 ¶¶43, 47.) If Plaintiffs did not find the account name suspicious before *sending* funds, then they can hardly fault Park Hill for not suspecting it when *receiving* funds—in the exact amount of a legitimate deal fee that it was owed by Irving Place.

Plaintiffs also point to their allegations about Caspersen's drinking and personal securities trading. (Mot. 14–15.) But, in addition to the fact that Park Hill and PJT did not know about these behaviors, Plaintiffs no longer challenge the Supreme Court's holding that alcoholism and speculative trading are insufficient to allege a propensity to commit fraud. (Ex. C at 13.) So an allegation that Park Hill and PJT knew of these two behaviors would not help Plaintiffs.

Conclusion

Plaintiffs' motion should be denied.

Dated: New York, New York
May 15, 2020

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Corporate Disclosure Statement
Pursuant to Rule 500.1(f)

PJT Partners Inc. is a publicly traded corporation and has no parent corporation. Park Hill Group LLC is indirectly wholly-owned by PJT Partners Holding LP, the general partner of which is PJT Partners Inc.

Affidavit of Service by Federal Express

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK) - SIGNATORY
COUNTY OF QUEENS) - NOTARY PUBLIC

JOSEPH A. CASSAR being duly sworn, deposes and says:

1. I am not a party to this action, am over 18 years of age and am employed by Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, New York 10019.

2. On May 15, 2020, I served a true copy of the foregoing DEFENDANTS-RESPONDENTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO APPEAL upon the following:

Stephen Shackelford, Jr.
SUSMAN GODFREY LLP
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019

3. I made such service by placing two true and correct copies of the aforementioned document in properly addressed prepaid wrappers and delivering them to a Federal Express office for PRIORITY OVERNIGHT DELIVERY, within the State of New York.

JOSEPH A. CASSAR

Sworn to before me this
15th day of May, 2020

Notary Public*

*This notarization was made pursuant to Executive Order 202.7