

**Space Race, LLC v Alabama Space Science Exhibit
Commn.**

2020 NY Slip Op 31299(U)

April 23, 2020

Supreme Court, New York County

Docket Number: Index No. 651742/2019

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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SPACE RACE, LLC,

Plaintiff,

- v -

ALABAMA SPACE SCIENCE EXHIBIT COMMISSION
D/B/A U.S. SPACE & ROCKET CENTER, MAYNARD
COOPER & GALE P.C., BRADLEY ARANT BOULT
CUMMINGS LLP, DEBORAH BARNHART, LOUIE
RAMIREZ, U.S. SPACE & ROCKET CENTER
EDUCATION FOUNDATION

Defendants.

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INDEX NO. 651742/2019
MOTION DATE 08/01/2019, 09/20/2019, 09/20/2019
MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 80, 81, 83, 85, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 112, 117

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 86, 109, 110, 111

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 87, 105, 107, 108

were read on this motion to/for DISMISSAL

This dispute began with a straightforward arbitration between Plaintiff Space Race, LLC ("Space Race") and Defendant Alabama Space Science Exhibit Commission ("ASSEC") concerning ASSEC's alleged breach of contract. It has now spiraled into three largely duplicative lawsuits in two different states.

This Court (Masley, J.) confirmed the arbitrators' monetary award in Space Race's favor, rejecting, among other things, ASSEC's contention - which it had expressly disclaimed during

the arbitration – that it was protected by sovereign immunity as an agency of the State of Alabama. In opposing ASSEC’s appeal of Justice Masley’s decision, which is pending before the First Department, Space Race seeks monetary sanctions to “end ASSEC’s sovereign immunity charade once and for all” and to address ASSEC’s “vexatious litigation” strategies.

With that appeal still pending, Space Race initiated this largely duplicative lawsuit against ASSEC and its executives, arbitration counsel, and litigation counsel. Boiled down to its essentials, Space Race claims that ASSEC and its counsel committed fraud by falsely representing during the arbitration that ASSEC would “never” assert a defense of sovereign immunity against Space Race, “knowing” that if ASSEC lost the arbitration it would raise that defense “in as many courts as possible,” which in turn drove up Space Race’s litigation expenses.

Defendants’ motion to dismiss the Complaint is granted. ASSEC’s litigation tactics may give rise to waiver and judicial estoppel (precluding ASSEC from asserting sovereign immunity) and/or typical litigation sanctions, but they do not give rise to a viable claim of fraud. The law firm defendants (Bradley Arent and Maynard Cooper), moreover, are not liable for making colorable legal arguments on behalf of their client.¹

¹ The Court also dismisses Space Race’s declaratory judgment claim regarding Space Race’s efforts to enforce its judgment because, among other things, it does not present a live controversy that is ripe for decision.

FACTS

Taking Space Race's factual allegations as true for purposes of this motion, supplemented by the undisputed record of the arbitration and subsequent litigation, the basic facts are as follows.²

Space Race is a global production company specializing in children's programming and educational entertainment. Space Race and ASSEC entered into a Memorandum of Agreement ("Agreement," NYSCEF Doc. No. 64.) in 2016 under which ASSEC agreed to act as an intermediary for certain grant payments from NASA to fund production of Space Race's animated show *Space Racers*. Because NASA could not make payments to a for-profit entity, ASSEC (a non-profit entity) acted as a pass-through of funds to Space Race. NASA pledged a total of \$4.5 million over three years.

The Agreement is governed by Alabama law. Under the Agreement, if the parties were unable to resolve disputes in good faith through negotiation or mediation, such disputes were to be "settled by arbitration, in accordance with the Commercial Arbitration Rules of the American Arbitration Association..." *Id.* ¶ 6.

The Arbitration

Space Race initiated arbitration against ASSEC on January 2, 2018. It alleged that ASSEC failed to make the final installment payment to Space Race of roughly \$1.3 million that was due under the Agreement. It also alleged that ASSEC breached the Agreement by failing to provide NASA with required reports and by agreeing with NASA to terminate the third year of

² The Court has not considered the statement of facts contained in defense counsel's affidavit or other defense affidavits that dispute facts in the Complaint on issues other than personal jurisdiction. For all other issues, the Court has considered the factual allegations in the Complaint, documents referenced in the Complaint (e.g., contracts), and undisputed court and arbitration records.

funding. In its Answer to Space Race's Statement of Claim, ASSEC asserted among other things that Space Race was precluded from obtaining an arbitration award because ASSEC is an "agency of the State of Alabama." The arbitration hearing was held in New York, over ASSEC's objection that it should be held in Alabama or Washington DC.

During opening statements in the arbitration hearing, Space Race detailed the history of ASSEC's unsuccessful assertions of sovereign immunity in numerous other lawsuits. Space Race's counsel "challenge[d] [ASSEC's counsel] to stand up and say we agree to that finding, because that is Alabama law." ASSEC's counsel (Defendant Bradley Arent) did not respond. Later, during the presentation of evidence, ASSEC objected to testimony from Space Race's Chief Legal Officer about ASSEC's unsuccessful assertions of sovereign immunity in Alabama courts, asserting that such testimony was irrelevant. Space Race's counsel challenged ASSEC's counsel to concede that ASSEC was not asserting sovereign immunity. The response from was equivocal. At that point, the arbitrators entered the fray and asked ASSEC's counsel point blank to confirm that ASSEC was *not* "asserting a sovereign immunity defense *in this case*." ASSEC's counsel replied with an unqualified "Yes." NYSCEF Doc. No. 68 at 574-75 (emphasis added).

In its Final Award, the arbitration panel determined that ASSEC "materially breached its obligations to Space Race under the [Agreement], materially breached the CAN, and caused Space Race to fail to receive the third year of funding from NASA." NYSCEF Doc. No. 42, at 15. The panel further stated: "At the hearing, [ASSEC's] counsel confirmed to the Arbitrators that [ASSEC] was not and would not be asserting a sovereign immunity defense. The Arbitrators therefore hold that [ASSEC] has waived its right to assert such defense, either: in this proceeding; in any judicial review of this award; and in any action by [ASSEC] to vacate this award." *Id.* (citation omitted).

The arbitrators awarded Space Race \$1,313,902 plus statutory interest of 6% under Alabama law.

Litigation to Confirm the Arbitration Award

Shortly after the arbitration award was issued, Space Race brought a proceeding in this Court to confirm the award. In opposing confirmation, ASSEC (through its counsel, Defendant Maynard) reversed course and asserted that it was entitled to sovereign immunity. In support of that argument, ASSEC cited *Barnhart v Engels*, 275 So.3d 1112 (Ala. 2018), which was decided eight days after the arbitrator's award. ASSEC also argued that it was not subject to personal jurisdiction.

This Court (Masley, J.) rejected both arguments and confirmed the award under the standards set forth in the Federal Arbitration Act. *Space Race, LLC v. Alabama Space Science Exh. Comm'n*, No. 655649/2018 ("Confirmation Decision"), NYSCEF Doc. No. 64 (Sup. Ct. N.Y. Cty Mar. 29, 2019) (transcript so-ordered). With respect to sovereign immunity, the Court held that ASSEC is not an agency of the State of Alabama and thus was not entitled to sovereign immunity. In reaching that conclusion, Justice Masley relied upon several prior decisions by courts in Alabama and Florida, and independently applied the relevant factors applicable to questions of sovereign immunity. She found that the *Barnhart* case was inapposite because ASSEC was not a party to that case and thus the question of whether it is a state agency for purposes of applying sovereign immunity was not before the Alabama court. *Id.* at 4-5, 9. Separately, Justice Masley rejected ASSEC's contention that it was not subject to personal jurisdiction in New York.

ASSEC appealed the Court's decision, asserting that ASSEC was entitled to sovereign immunity and that it was not subject to jurisdiction in New York courts. *See Space Race, LLC v.*

Alabama Space Science Exh. Comm'n, Appeal No. 2019-3829 (App. NYSCEF Doc. No. 1 (Notice of Appeal); Doc. No. 7 (Brief for Respondent-Appellant). In response, Space Race requested that the Appellate Division impose sanctions upon ASSEC to “end ASSEC’s sovereign immunity charade once and for all” and to address ASSEC’s “vexatious litigation” strategies. By that motion, Space Race seeks, as it does in this case, to recover its “attorneys’ fees incurred in the underlying arbitration and in the New York and Alabama Courts.” (Brief for Petitioner-Appellee at 39-41, App. NYSCEF Doc. No. 9).) The appeal is pending.

The Alabama Litigation

In February 2019, shortly before oral argument on Space Race’s motion to confirm the arbitration award, ASSEC initiated its own action in Alabama state court seeking to vacate the arbitration award. In support of that relief, ASSEC asserted that it has sovereign immunity and thus cannot be held liable for Space Race’s arbitration award. ASSEC also sought to have the Alabama court stay the litigation before Justice Masley, though ASSEC (through Maynard) denied that it sought such relief. Compl. ¶¶ 32-33.

Justice Masley temporarily enjoined ASSEC from taking any steps in the Alabama action to stay, vacate or modify the arbitration award or to stay the New York action pending before her. *Id.* ¶ 35. The stay expired when she issued judgment in Space Race’s favor.

Counsel have advised that the Alabama court has stayed the action pending resolution of the New York litigation.

The Present Litigation

In this case, Space Race asserts four claims for relief that are based on the same core factual allegation: ASSEC, with the assistance of counsel and the consent of its officers, fraudulently represented to Space Race during the arbitration that ASSEC would “never” raise

sovereign immunity as a defense against Space Race, “knowing that if ASSEC lost the arbitration, ASSEC... would assert sovereign immunity against Space Race in as many courts as possible.” *E.g.*, Compl. ¶¶ 56, 62.

The First Cause of Action (against ASSEC and its officers Barnhart and Ramirez) is for fraud. The Second Cause of Action (against the law firm defendants Bradley Arent and Maynard Cooper) is for aiding and abetting that fraud. The Third Cause of Action (also against Bradley Arent and Maynard Cooper) is for violation of Judiciary Law § 487 because they allegedly took part in “deceit or collusion.” The Fourth Cause of Action (against all Defendants) seeks a declaratory judgment that Space Race’s satisfaction of judgment was just, proper and must remain undisturbed.

ANALYSIS

“When deciding a ... motion to dismiss, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court determines only whether the facts as alleged fit within any cognizable legal theory.” *Grassi & Co. v. Honka*, 180 A.D.3d 564 (1st Dep’t 2020). However, the Court need not credit allegations that “constitute legal conclusions or are inherently incredible or [are] unequivocally contradicted by documentary evidence.”

Landmark Ventures, Inc. v. InSightsec, Ltd., 179 A.D.3d 493 (1st Dep’t 2020); *see also Franklin v. Winard*, 199 A.D.2d 220, 220 (1st Dep’t 1993).

Failure to State a Claim of Fraud (First Cause of Action)

To state a claim for fraud against ASSEC, Barnhart and Ramirez, Space Race must plead, with particularity, facts indicating that those defendants made a material misrepresentation of fact, with knowledge of its falsity, with an intent to induce reliance, reliance by Space Race on

the misrepresentation, and damages. *E.g., Euryclea P'ship LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553 (2009). Conclusory allegations do not suffice.

Space Race's fraud claims are premised on the allegation that ASSEC (through counsel) represented during the arbitration that it would "*never*" (emphasis in original) raise sovereign immunity in future proceedings. But that is not what counsel said at the arbitration hearing. To be sure, counsel responded "Yes" when asked to confirm that ASSEC was not asserting a defense of sovereign immunity "in this case." That was accurate, and the arbitration proceeded without such a defense being raised. Counsel did not say that ASSEC would "never" do so, and obviously did not address what position ASSEC might take in the event of a change in applicable law.³

Space Race's claim is also based on the peculiar allegation that Defendants purposely abandoned the sovereign immunity defense during the arbitration as part of a pre-conceived plan to assert the defense in other forums, in which Defendants would not only have to overcome a waiver argument but also the substantial deference given to arbitration awards. Even assuming those factual allegations are not "inherently incredible," they are conclusory. Space Race fails to plead facts with the specificity required to sustain a fraud claim in these circumstances.

The fact that ASSEC had aggressively pursued a sovereign immunity defenses in the past was well known and was described to the arbitrators. Thus, it is hardly surprising or suspicious that ASSEC sought to assert a sovereign immunity defense based on the Alabama Supreme Court's post-arbitration decision in *Barnhart*. That case involved an assertion of sovereign

³ The Court notes that the arbitrators' Final Award concluded that ASSEC waived the ability to assert sovereign immunity in future legal proceedings. While arbitrators' rulings resolving the dispute before them are entitled to substantial deference under the Federal Arbitration Act, this Court is not bound to accept the arbitrators' conclusions with respect to what legal arguments can be considered by the Court in a proceeding to confirm the award.

immunity by officers of ASSEC (who happen to be defendants in this case) and included language about ASSEC being an “agency” of the State of Alabama that any competent lawyer representing ASSEC would have brought to the court’s attention in subsequent litigation. The fact that Justice Masley concluded that *Barnhart* was not dispositive, that the court’s reference to ASSEC was dicta, and that the defense was waived, does not mean that ASSEC’s legal position was frivolous or asserted in bad faith.⁴

In sum, Space Race’s attempt to elevate ASSEC’s change in legal position into a claim of fraud is not supported by the undisputed record of the arbitration proceedings or the law. To the extent Space Race seeks compensation for legal costs based on ASSEC’s assertion of sovereign immunity in the first New York action, it can seek sanctions in that action, as it is doing before the First Department.

Failure to State a Claim for Aiding and Abetting Fraud

To plead a viable claim of “aiding and abetting” against Bradley Arent and Maynard Cooper, Space Race must further allege that defendants knew about the underlying fraud and provided “substantial assistance” in furtherance of the fraud. “Where liability for fraud is to be extended beyond the principal actors, to those who, although not participants in the fraudulent scheme, are said to have aided in and encouraged its commission, it is especially important that the command of CPLR 3016(b) be strictly adhered to.” *Nat’l Westminster Bank USA v. Weksel*, 124 A.D.2d 144, 149 (1st Dep’t 1987).

The Court’s finding that Space Race has failed to plead a predicate fraud disposes of any claim for aiding and abetting against the law firm defendants.

⁴ Given the Court’s decision that Space Race has not stated a viable fraud claim in this case, it need not reach Defendants’ broader argument that counsel’s statements of its client’s current and future legal position can *never* be fodder for a viable fraud claim.

Moreover, allegations that a law firm provided routine professional services to a primary fraudster is not sufficient to establish a claim for aiding and abetting. *See, e.g., Learning Annex, LLP v. Blank Rome LLP*, 106 A.D.3d 663, 663 (1st Dep't 2013); *cf. CRT Invs., Ltd. v. BDO Seidman, LLP*, 85 A.D.3d 470, 472 (1st Dep't 2011). As noted above, the legal position asserted by counsel in opposing confirmation of the arbitration award – *i.e.*, that the *Barnhart* decision warranted a renewed attempt to assert sovereign immunity – was by no means frivolous. Indeed, it likely would be counsel's professional *obligation* as a zealous advocate to raise a potentially dispositive defense based on a change in the law, leaving for the court to decide if her or his client is entitled to the benefit of such a change. *See Grady v. Artuz*, 931 F. Supp. 1048, 20713 (S.D.N.Y. 1996).

Failure to State a Claim Under Judiciary Law § 487 (Third Cause of Action)

Space Race's allegation that Bradley Arent and Maynard Cooper are liable for a violation of Judiciary Law § 487 is meritless. That statute, which creates criminal and civil liability for lawyers, provides in pertinent part that: "An attorney or counselor who: 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party ... is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

First of all, the purported "deceit" (*i.e.*, the alleged representation that ASSEC would "never" assert a sovereign immunity defense) occurred during an arbitration, not during a court proceeding. *See Doscher v. Mannatt, Phelps & Phillios, LLP*, 148 AD.3d 523, 524 (1st Dep't 2017) ("the statute does not apply to attorney conduct during an arbitral proceeding"). Space Race's argument that the purportedly deceitful behavior "continued into the courtrooms in New

York and Alabama” is not persuasive. There is no suggestion that the law firm defendants were in any way deceitful in New York courts.

More broadly, for the same reasons that warrant dismissal of the fraud claim, the factual allegations in this case do not come close to pleading a “chronic and extreme pattern of legal delinquency.” *Solow Mgmt. Corp. v. Seltzer*, 18 A.D.3d 399, 399 (1st Dep’t 2005); *Freeman v. Brecher*, 155 A.D.3d 453, 454 (1st Dep’t 2017).

Accordingly, Space Race’s claim for relief under Judiciary Law § 487 is dismissed.

Failure to State a Justiciable Claim for Declaratory Judgment (Fourth Cause of Action)

Finally, Space Race’s attempt to obtain a declaratory judgment as to the validity of its enforcement of the judgment must be dismissed because it does not present an actual controversy. Any future challenge to Space Race’s enforcement efforts can be addressed, if and when ASSEC (or Defendant U.S. Space & Rocket Center Education Foundation) challenges those efforts on specific grounds. *See, e.g., New York Pub. Interest Research Group v. N.Y. State Dept. of Motor Vehicles*, 42 N.Y.2d 527 (1977); *Fragoso v. Romano*, 268 A.D.2d 457 (2d Dep’t 2000)

Personal Jurisdiction and Sovereign Immunity

As noted above, Justice Masley decided in a closely related case that ASSEC is subject to personal jurisdiction in this Court and that it is not protected by sovereign immunity. Her decision is persuasive authority on the same or similar facts, and the Court will follow it here. Judicial efficiency supports awaiting a decision from the Appellate Division that will likely determine the resolution of both issues.

Justice Masley did not address jurisdiction or immunity with respect to Mr. Barnhart or Mr. Ramirez, who were not parties in the case before her. That said, her analysis would be relevant to addressing those issues as to those defendants, who are being sued for allegedly directing the activities of ASSEC. Based on the record presented, the Court finds that dismissal is not warranted at this stage as to Defendants Barnhart or Ramirez on the grounds of personal jurisdiction or sovereign immunity. This denial is without prejudice to filing a new motion based on a more fully developed record, including the results of the appeal of Justice Masley’s decision in the first New York action.

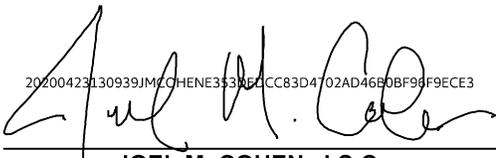
The Court has considered Space Race’s remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that Defendants’ motions to dismiss are **granted** and Plaintiff’s Verified Complaint is dismissed in its entirety. The Clerk is directed to enter judgment in favor of Defendants.

This constitutes the decision and order of the Court.

4/23/2020
DATE


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JOEL M. COHEN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
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