COMMERCIAL DIVISION ONLINE LAW REPORT

2021-2022

ST. JOHN'S UNIVERSITY SCHOOL OF LAW

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Lambro Indus., Inc. v. Chai Found., Inc.

612101/2018 2020 WL 7330548 (Sup. Ct. 2020)

Daniel A. Green

Associate Managing Editor

Plaintiff, Lambro Industries, Inc. ("Lambro") is a manufacturing company founded by Edwin Berger ("Berger"). *Lambro Indus., Inc. v. Chai Found., Inc*., 612101/2018, 2020 WL 7330548, at *1 (Sup. Ct. 2020). Before the death of Berger, the sole owner, he established an ESOP: an employee stock ownership program. *Id*. The ESOP "currently holds approximately 30% of the shares" of Lambro. *Id*. When Berger passed away in his 2008, his shares of Lambro were to be given to two charitable trusts to be used in the trusts' discretions, to certain charities chosen by Berger. *Id*. In 2015, Berger's 6,500 shares were transferred by the trust to Defendant, Chai Foundation, Inc. ("Chai"). *Id*.

In 2018, Lambro attempted to declare null and void the transfer of the 6,500 shares to Chai. *Id*. Lambro alleged that the transfer of the shares violated the by-laws of Lambro. *Id*. The by-laws cited by Lambro, in brief, describe three ways in which shares may be transferred: to an employee of Lambro, to an employee retirement plan trust, or an involuntary transfer upon death of a shareholder. *Id*. Lambro alleged that the transfer is not valid because Chai is not an employee of Lambro nor are they an employee retirement plan trust for Lambro's employees. *Id*. Chai countered for summary judgement, where they alleged that they are the rightful owner of the 6,500 shares. *Id*.

The Court begins its decision by stating that, in general, restrictions of how shareholders may transfer their shares are disfavored and will thus be strictly construed. *Id*. The restrictions can only apply to voluntary transfers, it also must be reasonable, and clearly expressed to bind the estate of a shareholder. *Id*. Further, when it comes to a "transfer" of shares, the restrictions have generally been held to not apply to transfers from a deceased shareholder, and if silent as to death, the clause will be invalid to such transfers through wills and intestacy, and they will be allowed. *Id*.

Here, the Court notes, Lambro's by-laws are silent as to wills and intestacy. *Id*. at *2. Further, as noted above, the third option by which the shares may be passed include the involuntary transfer upon the death of a shareholder. *Id*. The 6,500 shares by Berger to Chai fell directly within this allowance. *Id*.

Lambro alleged that that were two transfers: one to the trust and one from the trust to Chai; Lambro claimed this second transfer violates the by-laws as it was not done as per the will of Berger. *Id*. The Court held that the trust is merely a "vehicle" in which the will is executed, and the transfer to Chai is a transfer by the operation of law, to which no restrictions apply. *Id*. Lambro further contended that a later will in 2005 superseded the 2002 will. *Id*. The Court responded that the matter is not proper before the Court, as it should have been raised, and was not, at the probate of the 2002 will. *Id*.

Finally, Lambro alleged that Chai did not properly respond to Lambro's discovery requests and withheld crucial documents. *Id*. The Court ruled that contrary to Lambro's assertions, no additional discovery was, or is, needed, as the "mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during discovery is insufficient to deny the motion." *Id*. The Court held that the transfer of the shares to Chai was a valid operation of law, and there is no triable issue of fact. *Id*. Chai's motion of summary judgement was granted. *Id*. at *3.

Words Matter Media, LLC v. Café Studios, Inc.

656629/2020, 2021 WL 4696923 (N.Y. Sup. Ct. 2021)

Brennan O'Gorman

Editor for Diversity and Inclusion

Plaintiff Words Matter Media, LLC ("WMM") brought this action against Defendant Café Studios, Inc. ("Café") alleging claims for breach of contract, quantum meruit, and unjust enrichment. *See Words Matter Media, LLC v. Café Studios, Inc.*, 656629/2020, 2021 WL 4696923 at *1 (N.Y. Sup. Ct. 2021). Café moved to dismiss the case pursuant to CPLR 3211(a)(1) and 3211(a)(7), and WMM opposed the motion. *Id*. On October 6, 2021, the Court denied the motion to dismiss since it was not clear whether the allegedly breached provisions of the contract were intended to be binding, the alleged drafting error in the contract could not form a basis for dismissal at this stage in the case, and the "quasi contract claims were not duplicative." *Id.*

Plaintiff WMM and Defendant Café are digital media and entertainment companies registered in Delaware with principal places of business in New York, NY. *See* Compl. ¶¶ 1-4 (NYSCEF No. 1). WMM produces a podcast called "Words Matter Podcast" that discusses current events involving government and politics. *Id.* at ¶ 3. Café is a partnership created between former U.S. Attorney Preet Bharara and Some Spider Studios, which puts out podcasts such as "Stay Tuned with Preet" and "The Café Insider Podcast," along with other articles and events exploring the intersection of the law with areas like technology, politics, and business. *Id.* at ¶ 4. Around June of 2020, WMM and Café entered a revenue sharing agreement (the "Agreement"), commencing on June 22, 2020, with a one-year term. *Id.* at ¶ 5. With the Agreement, Café "agreed to produce, at its own expense, no less than forty (40) episodes of the Words Matter Podcast," and both parties agreed that the podcast would be "produced technically in a manner consistent with prior episodes and standard podcast production best practices," and that the "podcast content will be created in a manner consistent with prior episodes" of the Words Matter Podcast. *Id.* at ¶¶ 6-7. Café also agreed to pay WMM "70% of WMM's net advertising revenue sold by a third party and 85% of net advertising revenue sold directly by WMM" and "60% of any payments received from a new subscriber to the CAFE Insider product who joins at cafe.com/wordsmatter, capped at $30 per subscriber." *Id.* at ¶ 8.

Following the Agreement's execution, the Words Matter Podcast was placed in the Stay Tuned podcast feed and displayed on

the café.com website, and the partnership between WMM and Café was announced on various Twitter accounts related to Café. *Id.* at ¶¶ 10-12. Eight episodes of the podcast were produced pursuant to the Agreement, and WMM maintains that it "performed all production roles in a manner consistent with prior episodes," such as booking guests, determining episode topics, editing the episodes, working with the studio and audio engineers, ensuring that each episode was posted to the podcast feed, and other production requirements. *Id.* at ¶¶ 13-15. Café helped produce the episodes, participated in the weekly production meetings, attended the recordings of six out of the eight episodes of the podcast, and collected revenue from the podcast's listeners. *Id.* ¶¶ 16-17.

WMM alleged that Café breached its contractual obligation by failing "to pay for or reimburse WMM for the productions costs of the eight episodes," totaling around $115,720, and by failing to pay "WMM 70% of the net advertising revenue sold by third parties, 85% of the net advertising sold by WM directly, and 60% of new subscriber payments to the Café Insider product who joined at café.com/wordsmatter (capped at $30 per subscriber)." *Id.* at ¶¶28-30. Further, WMM alleged that Café refused to honor the Agreement's remaining obligations by failing to produce the remaining 32 episodes of the podcast. *Id.* at ¶ 29.

WMM brought a second cause of action for quantum meruit, alleging that it "provided all of the labor and paid the entirety of the costs and expenses of the production" for the eight podcast episodes that were released in reliance upon Café's obligation to pay for the work performed. *Id.* at ¶ 35. WMM's third cause of action for unjust enrichment was brought due to Café's alleged failure to pay the production costs and expenses and due to the revenue Café collected from listeners. *Id.* at ¶¶ 38-41. Café brought a motion to dismiss WMM's causes of action pursuant to CPLR 3211(a)(1) and 3211(a)(7) on the grounds that the Agreement's Term Sheet was not binding, and WMM opposed the motion.

The Court found that the Term Sheet "reflect[ed] a deal as to the allocation of costs, expenses, production and revenue sharing that was intended to be binding during the Option Period," rather than a mere "agreement to agree." *Words Matter Media, LLC v. Café Studios*, 2021 WL 4696923 at*1. Further, the Court held that the language included in Part One of the Term Sheet stating that the agreement was non-binding "was intended to convey that the terms of the potential acquisition contained in the Term Sheet were not binding until and unless a mutually agreed upon Purchase Agreement was executed." *Id*. Regarding Café's factual argument that the Term Sheet included "at least one scrivener's error," the Court found that the alleged error could not establish a basis for dismissal at this stage in the case. *Id*.

The Court also denied dismissal of the quasi-contract claims, holding that it was "equally inappropriate because Café dispute[d] the existence of a binding agreement." *Id*. The Court further held that the cause of action for unjust enrichment was not duplicative of the quantum meruit case of action, since the claim sought recovery for production expenses associated with the eight released podcast episodes. *Id*. Finally, the Court noted that it found Café's remaining arguments to be unavailing. *Id*. The Court denied Café's motion to dismiss and further directed Café "to serve an answer to the complaint within 20 days." *Id*. at *2.

New Wave Energy Corp. v. Energymark, LLC,

809968-2017 2021 WL 6753854 (N.Y. Sup. Ct. 2021)

Steven Buynitsky

Senior Staff Member

In *New Wave Energy Corp. v. EnergyMark LLC,* the Erie County Supreme Court refused Plaintiff New Wave Energy Corp.'s ("New Wave's") request to expand the scope of civil discovery in the trade defamation case against Defendant EnergyMark, LLC ("EnergyMark"). 809968-2017, 2021 WL 6753854, at *1 (N.Y. Sup. Ct. 2021). In January 2020, after granting, in part, New Wave's prior motion to compel discovery, the Court in 2021 rejected the Plaintiff's motion to compel discovery for "documents maintained by 12 custodians," and without opportunity for prior screening by EnergyMark, and granted the Defendant's cross-motion for protection. *Id*. at *1–2.

In the 2017 Erie Supreme Court case at the heart of this controversy, New Wave, an electricity and natural gas provider in three states alleged continued defamation by EnergyMark and eleven other defendants to New Wave customers. Second Am. Compl. at ¶¶ 1, 6, 8–16 (NYSCEF No. 114). EnergyMark allegedly made misstatements implying that it supplied New Wave with natural gas and that New Wave knowingly deceived its customers as to pricing. *Id*. at ¶¶ 8–16. New Wave also alleged that EnergyMark "sent fraudulent Form Cancellation letters," purportedly meant to induce New Wave customers into thinking their service was being terminated. *See id*. at ¶ 10. Importantly, Plaintiffs alleged an interlocking corporate structure and directorate as a basis for connecting the related conduct of various defendants and characterizing it as conspiracy. *See id*. at ¶¶ 3–5, 14–15, 22–23.

In April 2019, the Court dismissed the conspiracy charge and all defendants from the case, aside from EnergyMark and its employee, Kevin Clough, who allegedly sent the defamatory emails at issue, finding the allegations of interconnection imparticular. *See* Mem. Decision at 2–4, 7 (NYSCEF No. 138). Later in 2019, New Wave submitted discovery demands seeking information, including "information regarding the dismissed entities." Br. for Defs. at 2 (NYSCEF No. 9). New Wave's motion to compel discovery resulted in a production order after modifications and omissions of various requests by the Court. *Id*. Continued dispute over the proper scope of discovery precipitated another motion to compel discovery by New Wave. Br. for Pls. at 5–14 (NYSCEF No. 5).

The issue decided by the Supreme Court, Erie County, in April 2021, was whether to grant Plaintiff's motion to compel discovery and whether to grant the Defendants' cross-motion for a protective order. *New Wave Energy Corp.* 2021 WL 6753854, at *1. The Court began by restating the general standards to be applied in assessing discovery requests. *Id.* Despite the broad reading to be given to CPLR 3101(a), "[a] party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary'—i.e., relevant." *Id.* (quoting *Forman v Henkin*, 30 N.Y.3d 656, 661 (N.Y. 2018)). The Court recognized that statutory discovery exceptions in CPLR 3101(b & c) further qualified the broad disclosure obligations, and that also, "'competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party.'" *Id.* (quoting *Henkin* at 662).

The Court first rejected New Wave's request to compel production of documents maintained by nonparties, specifically members of the alleged conspiracy who had been prior dismissed from the case. *Id.* (referring to "documents maintained by 12 custodians."). The Court held the conclusory allegations of conspiracy alleged by the Plaintiff were "insufficient to justify [discovery that] is overly broad, unduly burdensome, and likely to be extremely expensive." *Id.* (discussing Plaintiff's request to expand the scope of the electronic document searches "based solely on the corporate structure and unspecified communications."). In light of the burden, the broad request was held not to satisfy the threshold relevancy requirement. *See id*. at *2. Next, the Court denied Plaintiff's request to receive all such search results without the opportunity for Defendants to "screen[ ] for relevance of privilege." *Id.* at *1. The Court found the broadly-worded searches "will return hundreds and likely thousands of documents that are completely irrelevant to this action." *Id.* Finally, the Court denied the Plaintiff's request for in-camera review, on the ground that the Plaintiffs did not sufficiently rebut the Defendants' assertion of attorney-client privilege as a basis for various redactions. *Id* . Thus, the Court denied Plaintiffs' motion to compel production and granted Defendants' cross-motion for a protective order. *Id.*

In re N.Y. Dep't of Health (Rusi Tech. Co., Ltd.)

907022/2022, 2022 WL 245454 (N.Y. Sup. Ct. 2022)

Sophie Copenhaver

Senior Staff Member

The New York State Department of Health ("DOH") brought this action to permanently stay arbitration commenced by Rusi Technology Company, Limited ("Rusi") before the China International Economic and Trade Arbitration Commission ("CIETAC") under CPLR 7503 (b). *See In re N.Y. Dep't of Health*, 907022/2022 2022 WL 245454, at *2 (N.Y. Sup. Ct. 2022). Rusi is a Chinese company headquartered in Hong Kong. *Id.* This case arose from the DOH entering into a contract to purchase two million KN-95 masks from Rusi. *Id.* The DOH contended that Rusi did not comply with the KN-95 standard specified within the purchase contract. *Id.* Subsequent to the execution of the Export Contract, Rusi tendered the masks. *Id.* However, DOH determined that "a large number where significantly defective and not in compliance with the KN-95 standards specified in the March 27 Contract" and rejected the masks. *Id.* The New York State Office of General Services then received a notice of arbitration issued by CIETAC based on the Chinese text of the Export Contract. *Id.*

The purchase contract consists of three written instruments: (1) an "Export Contract" executed by DOH on March 27, 2020; (2) a purchase order sent by DOH to Rusi dated March 27, 2020, which reduced the price of the masks from $11 million to $9.6 million and incorporated additional terms for New York State contracts and COVID-19 related transactions; and (3) a written amendment to the Export Contract executed by both parties on March 27, 2020, to conform the pricing terms of the Export Contract with the Purchase Order. *Id.* The Export Contract was drafted in both the English and Chinese languages, and provided in the English language that all disputes "shall be settled through friendly consultation" and that where there are discrepancies between the English and Chinese languages, the English text "shall prevail." *Id.* However, the Chinese text stated that where disputes are not resolved through friendly consultation, they shall be resolved through binding arbitration through the CIETAC and that in the event of discrepancies between the two languages, the Chinese text shall prevail. *Id.* Additionally, the Chinese text provided that the Export Contract shall be governed by the laws of China, and specifically the Convention for the International Sale of Goods ("CISG") does not apply. *Id.* The purchase order also addressed dispute resolution,

stating that all disputes concerning international sales transactions that cannot be resolved through friendly consultation shall be resolved through binding arbitration in New York through the International Chamber of Commerce ("ICC"); the purchase order also provided that the Export Contract and all Appendices "shall be governed by and construed in accordance with the laws of the State of New York, the United States, except where the Federal supremacy clause governs." *Id.*

CPLR 7503 (b) allows "a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration" to "apply to stay arbitration on the ground that a valid agreement [to arbitrate] was not made." *Id.* at *3 (quoting N.Y. CPLR 7503 (b)). DOH argued that the Export Contract did not show a meeting of the minds as required by the dispute resolution terms. *Id.* The Court first addressed the substantive law governing the contract, stating that there was no mutual intention of the parties to exclude the CISG from governing the contract. *Id.* at *4. The CISG applies to "the sale of goods between parties in different countries that are signatories to the convention" in absence of an agreement to the contrary. *Id.* at *3. Since the English text does not mention the CISG and the Chinese text expressly excludes the CISG, the Court stated that it was clear that there was no mutual intention to exclude the CISG. *Id.* at *4.

As for the dispute resolution, the Court concluded that there was no meeting of the minds, since the English and Chinese text differed as to the controlling law and arbitration terms. *Id.* The Court found that Rusi knew or should have known that DOH would form its subjective intentions as to the contract on the basis of the English text and therefore DOH's reliance on the English text was objectively reasonable under the circumstances. *Id.* Since there was no express agreement of the parties to arbitrate in front of CIETAC, the Court held that DOH's application to permanently stay the CIETAC arbitration must be granted. *Id.*

Real Estate Webmasters Inc. v. Rodeo Realty, Inc.

904779-18, 2022 WL 212495 (N.Y. Sup. Ct. 2022)

Eileen M. Creaser

Senior Staff Member

Plaintiff Real Estate Webmasters Inc. ("REW") commenced this action on July 25, 2018 claiming that Defendant Rodeo Realty ("Rodeo") had anticipatorily breached an agreement between them ("Agreement"). *Real Estate Webmasters Inc. v. Rodeo Realty, Inc*., 904779-18, 2022 WL 212495, at *1 (N.Y. Sup. Ct. 2022). The Agreement detailed a relationship between the parties wherein REW would create a custom website for Rodeo. *Id.* The complaint contained only the claim that Rodeo anticipatorily "repudiated the Service Agreement by advising REW in writing that Rodeo . . . did not intend to comply with its obligations." *Id.* REW moved for partial summary judgment on this claim as to liability and dismissal of Rodeo's affirmative defenses and counterclaims. *Id.*

In its 2020 Decision & Order, the Court found that REW established its entitlement to summary judgment as to liability and dismissal of the defenses and counterclaims, but further concluded that there existed triable issues of fact regarding Rodeo's affirmative defense alleging an "entitle[ment] to rescission and/or restitution due to [REW's] own fraud and/or misrepresentations." *Id.* The Court dismissed all other affirmative defenses and counterclaims. *Id.* After completion of discovery, REW requested a trial without a jury, and Rodeo served a jury demand. *Id.* CPLR 4101 provides that "issues of fact shall be tried by a jury unless a jury trial is waived . . ., except that equitable defenses and equitable counterclaims shall be tried by the court." *Id.* (quoting N.Y. CPLR 4101). This Court was tasked with determining whether Rodeo had waived its right to a jury trial by "interposing a defense and counterclaim of an equitable nature." *Id.*

The right to a jury trial is waived when a defendant brings forward counterclaims relating to or emanating from the same alleged "wrong" as the original claim. *Id.* Rodeo's defense and counterclaim at issue here detailed that Rodeo disaffirmed the contract by promptly rescinding the contract when it discovered REW's "false representations" and "lying." *Id.* at *2. Rescission, the Court noted, is an equitable claim. *Id.* Because Rodeo defended itself against REW's claims of anticipatory breach with an equitable defense of rescission, the Court reasoned that "Rodeo's counterclaim for fraudulent inducement also is equitable in nature." *Id.*

Importantly, because Rodeo disaffirmed the Agreement, it cannot continue with a claim for damages resulting from fraud. *Id.* at *3. Fraudulent inducement "proceeds upon an *affirmance* of the contract." *Id.* (collecting cases) (emphasis in original). Therefore, Rodeo can only pursue damages "incidental or collateral to its equitable defense of rescission, including the recovery of the funds necessary to . . . restore the parties to the *status quo*." *Id.* (emphasis in original). The Court then reaffirmed that there is no question the "primary character of the case itself is equitable in nature." *Id.* In conclusion, the Court decided that Rodeo waived its right to a jury trial when it raised defenses and counterclaims solely equitable in nature arising from the same factual circumstances as REW's original claim. *Id.*

Niagara BYG Cap., LLC v. Leatherstocking Coop. Ins. Co.

E173909/2021, 74 Misc. 3d 573 (N.Y. Sup. Ct. 2022)

Nikki Grover

Senior Staff Member

Plaintiff Niagara BYG Capital, LLC ("Plaintiff") commenced an action in January 2021 against Defendant Leatherstocking Cooperative Insurance Co. ("Defendant"). (NYSCEF No. 1). The Complaint alleged two causes of action: (1) breach of the underlying insurance contract and (2) breach of the insurance contract, for lost rent. *Niagara BYG Cap., LLC v. Leatherstocking Coop. Ins. Co.*, E173909/2021, 74 Misc. 3d 573 (N.Y. Sup. Ct. 2022) at *1 (citing NYSCEF No. 58). Plaintiff moved for summary judgment on both causes of action "on the basis that Defendant's denial of coverage violates the statutory standard fire insurance policy set forth in Insurance Law § 3404 and fails to grant Plaintiff the minimum standard of coverage required therein." *Id.* at *1–2 (citing NYSCEF No. 39). Defendant made a cross-motion for summary judgment and to dismiss the complaint. *Id.* at *1 (citing NYSCEF No. 1).

Plaintiff is the owner of the real property located at 1142 LaSalle Avenue, Niagara Falls, New York. *Id.* at *1–2. Defendant is the named insured on the property. *Id.* at *2. (citing NYSCEF No. 45, 75). Plaintiff hired a nonparty, Eyah Cohen, "to manage the Property and provide maintenance and renovation services." *Id.* (citing NYSCEF No. 75). In January 2020, Cohen hired a group of seven or eight workers, who are nonparties, "for certain construction projects." *Id.* (citing NYSCEF No. 75). Because the workers lived out of town, Plaintiff permitted them "to reside at the Property's first and second floor apartments while they were in town." *Id.* (citing NYSCEF No. 75).

On March 30, 2020, one of the workers intentionally set a fire at Plaintiff's property. The worker "pleaded guilty to a reduced charge of attempted second-degree arson." *Id.* (citing NYSCEF No. 75).

Defendant disclaimed coverage for the fire, citing the "dishonest or criminal acts" exclusion in the insurance policy issued to Plaintiff. *Id.* (citing NYSCEF No. 46). The policy excludes from coverage any loss caused by "any dishonest or criminal act by you . . . or anyone, to whom you entrust property for any purpose." *Id.* (citing NYSCEF No. 46). Defendant denied coverage for the fire because Plaintiff "knowingly 'entrusted'" the worker to reside at the property. *Id.* (citing NYSCEF No. 45).

"The Policy limit for damage to the property is $120,000." *Id.* (citing NYSCEF No. 45). However, Plaintiff contends that the "reasonable calculation of damage to the property exceeds the $120,000 policy limit." *Id.* Plaintiff retained an adjuster who calculated a replacement cost value for the property at $246,777.40, exceeding the policy limit. *Id.* (citing NYSCEF No. 53). Defendant retained its own independent adjuster, who calculated the replacement cost value for the property at $162,935.90 and the actual cash value for the property at $131,024.53, also exceeding the policy limit. *Id.* (citing NYSCEF No. 49).

New York Insurance Law § 3404 (e) requires that insurance policy for fires to incorporate " 'terms and provisions no less favorable to the insured than those contained in the [standard policy.]" *Id.* at *3 (citing *Lane v. Sec. Mut. Ins. Co.*, 96 N.Y.2d 1, 5 (N.Y. 2001)).

The Court held that Defendant's policy exclusion violates New York Insurance Law because it "'impermissibility restricts the coverage mandated by statute.'" *Id.* (citing *Lane*, 96 N.Y.2d at 5). Although the policy is clear on its face, the Court declined to enforce the policy exclusion because it is in violation of Insurance Law § 3404 (e). *Id.*

Based on the foregoing, the Court held that Plaintiff was entitled to judgment as a matter of law as to liability and with respect to the value of the damages from the fire. *Id.* The Court granted Plaintiff's motion for summary judgment and granted Plaintiff judgment against Defendant in the amount of $120,000. *Id.* Accordingly, the Court denied Defendant's cross-motion as moot. *Id.*

HK Cap. LLC v. Rise Dev. Partners LLC

512749/2021, 2022 WL 165209 (N.Y. Sup. Ct. 2022)

Ryan Maloney

Senior Staff Member

Plaintiff HK Capital LLC moved to hold Defendant's counsel, William Pager, Esq., in contempt for failure to comply with information subpoenas. *HK Cap. LLC v. Rise Dev. Partners LLC*, 512749/2021 2022 WL 165209, at *1 (N.Y. Sup. Ct. 2022). Prior to this motion, Plaintiff obtained judgments against Defendant totaling $1,474,785.10. *Id.* Pursuant to CPLR 5524, Plaintiff served Defendant's counsel with subpoenas seeking information pertaining to Defendant's assets, bank accounts, and asset transfers. *Id.* Mr. Pager did not answer the subpoenas, and after filing of this motion, cross-moved for a protective order on the grounds that the information is protected by attorney-client privilege. *Id.* The Court held that the information sought was not privileged. *Id.*

The issue is whether the subpoenaed information is protected by the attorney-client privilege. *Id.* The Court first stated the general rule that nonparties must provide the subpoenaed documents as long as the disclosure is relevant to the action. *Id.* The Court then explained that retainer agreements, client identities, invoices, and the payment of fees are not subject to privilege without special circumstances. *Id.* Further, the Court emphasized that communications that are not directly relevant to legal advice are not privileged, and that a client cannot assert attorney-client privilege for documents that were not prepared for litigation or for the purpose of legal advice. *Id.* (citing *Aurateq Sys. Int'l Inc.*, *v. Black-NYC LLC*, 880 N.Y.S.2d 222 (N.Y. Sup. Ct. 2008)). The Court elaborated that "[t]he mere circumstance that the documents were revealed in confidence to a lawyer does not of itself transform the papers into privileged communications," and that neither corporations nor individuals can "'funnel' [their] records and documents into the hands of [their] attorneys and then claim privilege." *Id.* (citing *Aurateq*, 880 N.Y.S.2d 222). Although Mr. Pager asserted that his law office's interactions with Defendant were strictly limited to legal advice, the Court held that the information sought under the subpoenas was not legal advice and therefore not privileged. *Id.*

Accordingly, the Court denied Mr. Pager's cross-motion seeking a protective order and held Plaintiff's motion to hold Mr. Pager in contempt in abeyance pending the Court's order that the subpoenaed information must be disclosed. *Id.*

Am. Universal Supply Inc., v. Gibson Air Mech. Inc.

617381-18, 2022 WL 109012 (N.Y. Sup. Ct. 2022).

Gabriel Rahme

Senior Staff Member

On September 5, 2018, Plaintiff American Universal Supply Inc. commenced an action against Defendants Gibson Air Mechanical, Inc. and Gibson W. White (collectively, the "Gibson Defendants"), seeking judgment in the amount of $208,264.26. Compl. (NYSCEF No. 1). On January 16, 2019, Plaintiff amended its complaint to seek recovery of a surety bond from Defendants Federal Insurance Company, Vigilant Insurance Company, and Pacific Indemnity Company (collectively, the "Insurance Defendants"). *See generally* Am. Compl. (NYSCEF No. 6). Prior to filing this action, on February 26, 2018, Plaintiff placed a mechanic's lien on property located in Westchester County (the "Property"). *Am. Universal Supply Inc., v. Gibson Air Mech. Inc*., 617381-18, 2022 WL 109012, at *1 (N.Y. Sup. Ct. 2022). Five months later, a discharge bond (the "Bond") was posted, which discharged the February 26 lien. *Id.*

This case arose from the mechanic's lien that was placed against the Property. *Id.* The lien was placed after Plaintiff did not receive a payment of $136,376.66 from the Gibson Defendants. *See id.* The general contractor on the real estate project discharged Plaintiff's lien through the Bond, which the Insurance Defendants issued. Mem. of Law in Supp. at 2 (NYSCEF No. 41). The Insurance Defendants alleged that Plaintiff did not file a mechanic's lien foreclosure action, did not extend the lien, and, thus, the lien expired by operation of law. *See Am. Universal Supply Inc.*, 2022 WL 109012, at *1. For those reasons, and because Plaintiff did not file a notice of pendency, the Insurance Defendants filed a motion to dismiss, arguing that there was no cause of action against them. *See id.;* Mem. of Law in Supp. (NYSCEF No. 41).

The Court held that Plaintiff successfully defeated Defendants' motion to dismiss. *Am. Universal Supply Inc.*, 2022 WL 109012. The Court reasoned that surety bonds, such as the Bond in this case, still allow a Plaintiff to "obtain a judgment as if the lien still existed." *Id.* at *1 (citing *Martirano Constr. Corp. v. Briar Constr. Corp.*, 104 A.D.2d 1028, 1031 (N.Y. App. Div. 1984)). Thus, such bonds remain subject to the original lien. *Id.* (citing *Morton v. Tucker*, 145 N.Y. 244, 249 (N.Y. 1895)). Therefore, "any action brought, whether before or after the filing of the undertaking, although ostensibly to foreclose the lien, in reality

is or becomes an action to test the validity of the lien had it not been discharged …." *Id.* at *2 (collecting cases).

Further, the Court held that Plaintiff sufficiently alleged that Defendants did not pay for goods and services, a mechanic's lien was filed on the property, and the lien was discharged through the Bond. *See id.* Plaintiff enforced the lien within the lien's one-year expiration, as the lien was filed on February 26, 2018, and the amended complaint sought recovery against the Insurance Defendants "for work performed and materials supplied at the job site subject to the bond" during that time. *Id.* Thus, "the lien did not expire by operation of law." *Id.* However, due to the Bond's discharge of the lien, the Court disposed of Plaintiff's interest in the Property since the relief Plaintiff was seeking would be rendered on the Bond. *Id.*

Lastly, the Court refused to dismiss the case because Plaintiff did not include other potential lienholders as necessary parties to the action. *Id.* The Court held that the proper remedy for failure to join necessary parties was to "direct[] the joinder of any other potential lienholders who have filed notices of claim prior to the date of the filing of the summons and complaint . . . ." *Id.*

In re Renren Inc. Derivative Litig.

653594/2018, 2021 WL 6327701 (N.Y. Sup. Ct. 2021)

Michelle G. Scanlon

Senior Staff Member

Plaintiffs Heng Ren Silk Road Investments LLC, Oasis Investments II Master Fund Ltd., and Jodi Arama (collectively, "Plaintiffs"), commenced this derivative action on behalf of Renren, Inc. against Renren's Chairman and Chief Executive Officer Joseph Chen and former director David K. Chao ("Director Defendants"). *See generally* Am. Compl. (NYSCEF No. 53). Plaintiffs are, generally, Renren shareholders and they "held such shares or a beneficial interest in such shares through Renren's ADSs at the time of the transaction." *Id.* at 9. Renren, Inc. "is an exempted company incorporated under the laws of the Cayman Islands." *Id.*

This is a derivative action alleging breach of fiduciary duty and a fraud on the minority by its controlling shareholders. *See In re Renren Inc.*, 653594/2018, 2021 WL 6327701, at *1 (N.Y. Sup. Ct. 2021). Plaintiff alleged that the "board of Renren was not independent and merely rubber stamped the spin-off based on a faulty valuation." *Id.* More specifically, this is a "derivative action arising out of a sham spin-off transaction through which Renren was stripped of all value by its controlling stockholders." Am. Compl. at 1. Director Defendants took advantage of the minority stockholders because Director Defendants were privy to details that the public investors were not. *Id.* at 3. "Rather than buy out Renren's minority stockholders or purchase Renren's investment portfolio outright, [Director Defendants] accomplished the same objective . . . through the guise of a purported spin-off transaction." *Id.* at 4. Notably, unlike a "normal" spin-off, here, "the Controlling Stockholders did not distribute . . . shares to all Renren stockholders." *Id.* The Director Defendants failed to act in Renren's best interests and thus breached their fiduciary duty. *Id.* at 8.

The Court issued this supplemental order to further clarify why the motion to approve the settlement must be denied and why leave is granted to the Director Defendants to file a motion to dismiss. *In re Renren Inc. Derivative Litig.*, 2021 WL 6327701, at *1. First, the Court explained which shareholders were eligible to bring a claim on behalf of the corporation. *Id.* In other words, which shareholders have standing to bring a derivative action. *Id.* "The shareholders [that were on the] record at the time of the alleged wrongdoing are eligible shareholders." *Id.* Here, the Court stated, "[t]he eligible shareholders in this case are the shareholders of

record immediately preceding the announcement of the spin-off which forms the basis of the lawsuit." *Id.* Because the date of the announcement of the spin-off was April 30, 2018, the day before the announcement, April 29, 2018, is the "Record Date." *Id.* Accordingly, any shareholder that purchased stock after the "Record Date" does not have standing because they "purchased with the knowledge of the spin-off transaction." *Id.* Thus, shareholders before the Record Date have standing to bring a derivative action alleging breach of fiduciary duty and fraud on the minority. *Id.* However, any shareholder who purchased after the Record Date lack standing as to the claim of fiduciary duty and fraud on the minority. *Id.*

Second, the Court further explained that shareholders that purchased after the Record Date are not eligible "to participate in a settlement structured as direct payments to them." *Id.* at *2. Here, the harm, or misappropriation, was to Renren's shareholders as of the Record Date. *Id.* Thus, "[s]ubsequent purchasers were aware of the transaction (so fraud as to their interests could not have taken place)." *Id.*

Castle Restoration, LLC v. Castle Restoration & Constr., Inc.

016349/2015, 2022 WL 402882 (N.Y. Sup. Ct. 2022)

Eric H. Silverstein

Staff Member

Plaintiff Castle Restoration, LLC ("Plaintiff") brought this action against Defendants Castle Restoration & Construction, Inc. ("Castle Inc."), Robert P. Castaldi, Diane Castaldi, Windy Osprey Construction Corp. and Euro Castle Construction Corp (collectively, "Defendants") in Suffolk County on June 10, 2015. *See Castle Restoration, LLC v. Castle Restoration & Constr., Inc.*, 016349/2015, 2022 WL 402882 at *1 (N.Y. Sup. Ct. 2022). Plaintiff sought damages for "breach of contract, fraud in the inducement, quantum meruit, unjust enrichment, and tortious interference with contract." *Id.* At the close of discovery Defendants filed a motion for summary judgment. *Id.* On July 8, 2020, the Court partially granted the motion for summary judgment, and dismissed all but the first and third causes of action. *Id.* "The case proceeded to trial on the first and third causes of action," and after two-day virtual trial, the court found "in favor of the [D]efendants on both causes of action." *Id.* at *2, 4.

Castle Inc. was a commercial restoration and waterproofing business. *Id.* at *1. "[D]efendant Robert Castaldi was [Castle Inc.'s] president . . . and his wife, the defendant Diane Castaldi, was its sole shareholder." *Id.* "In 2012 . . . the Castaldis agreed to sell their business to" Plaintiff. *Id.* The Castaldis entered into an agreement with Plaintiff on March 15, 2012, which provided for "the transfer of equipment and a list of clients from Castle Inc. to Castle LLC" for $1.2 million to be paid in monthly installments. *Id.* When Castle LLC failed to make their first payment, "Castle Inc. commenced an action to recover on the note by moving for summary judgment in lieu of complaint in the Supreme Court, Nassau County." *Id.* The motion was denied on November 14, 2013, and Castle Inc. appealed. *Id.* "On appeal, Castle LLC argued that it was not delinquent on the note because" a subsequent oral agreement between the parties "offset Castle LLC's obligation" under the agreement. *Id.* "The Appellate Division, Second Department, rejected that argument on the ground that the breach of a related contract cannot defeat a motion for summary judgment . . . unless the two are 'inextricably intertwined.'" *Id.* On November 19. 2014, the Appellate Division reversed the trial court order, "and granted Castle Inc.'s motion for summary judgment in lieu of complaint." *Id.* Following this order, on June 10, 2015, Castle LLC commenced the instant action. *Id.*

"The complaint contained ten causes of action," the first and third of which survived Defendant's motion for summary judgment, and proceeded to trial "on September 14 and 15, 2021." *Id.* at **1–2.

Because Plaintiff's third cause of action centered around Castle's Inc.'s breach of an alleged oral agreement between the parties, which purportedly modified the terms of the original agreement, the Court had to determine whether the alleged oral agreement was enforceable. *Id.* Under the terms of the alleged oral agreement, Castle LLC was required "to complete Castle Inc.'s work-in-progress in exchange for a reduction of Castle LLC's obligation under the promissory note." *Id.* at *2. Plaintiff further argued that it "completed Castle Inc.'s work-in-progress, and that Castle Inc. breached the purported oral agreement by failing to compensate Castle LLC for completing the work." *Id.* Because the original agreement contained a no oral modification clause, the Court examined the oral agreement within the framework of the statute of frauds, ultimately concluding that the oral agreement was unenforceable whether or not the statute of frauds was applicable. *Id.* at **2–3. "A party's admission of the existence and essential terms of an oral agreement is sufficient to take the agreement out of the statute of frauds. *Id.* But "[t]he statute of fraud[s] applies when, as here, the parties acknowledge an oral agreement, but dispute its terms and conditions." *Id.* While the parties in this case acknowledged that they entered into an oral agreement, their dispute centered on its terms, "specifically[,] how Castle LLC was to be compensated for its work," and thus the agreement was unenforceable. *Id.* Further, even if the statute of frauds did not apply, Plaintiff did not establish that there was a meeting of the minds as to one of the contract's material terms, "[t]he consideration to be paid under" the oral agreement. *Id.* at *3. Because "the parties clearly disagreed on how Castle LLC was to be paid for its work . . . a meeting of the minds on that material term" was never reached and "the alleged oral agreement [was] unenforceable." *Id.*

The Court then turned to Plaintiff's first cause of action, which alleged "that Castle Inc. breached the asset-sale agreement, *inter alia*, by failing to complete all of the work-in-progress that remained unfinished as of the closing date." *Id.* at *1. To determine whether Plaintiff's first cause of action could succeed, the Court had to determine whether the Plaintiff had "committed a material breach" of the agreement. *Id.* at *3. The Court found that Plaintiff's "failure to pay the purchase price constituted a material breach," which discharged "Castle Inc. of its duty to perform" and, "[a]ccordingly, Castle LLC, having failed to perform its side of the bargain [could not] prevail on its first cause of action." *Id.* Because the oral agreement was unenforceable, and Plaintiff's actions

constituted a material breach of the agreement's terms, the Court found in favor of the defendants on both causes of action." *Id.* at *4.

Tsunis Gasparis LLP v. Ring

614480-19, 2022 WL 289642 (N.Y. Sup. Ct. 2022)

Matthew Seymour

Senior Staff Member

Plaintiff Tsunis Gasparis LLP, initiated an action alleging multiple claims against Defendants Christopher Ring and Cheryl Bliss. Compl. (NYSCEF No. 6). The complaint alleged claims for breach of contract, breach of fiduciary duty, breach of duties of loyalty, tortious interference, misappropriation of confidential information, conversion, unfair competition, and fraud. *See id.* On October 22, 2022, Defendants made a motion to quash subpoenas and for the issuance of a protective order. Def. Mot. to Quash (NYSCEF No. 43). On January 26, 2022, the Court granted the motion as to three overly broad subpoenas, but otherwise denied the motion. *See Tsunis Gasparis LLP v. Ring*, 614480-19, 2022 WL 289642, at *1 (N.Y. Sup. Ct. 2022).

Tsunis Gasparis LLP is a law firm located in Suffolk County, New York. Compl. at ¶¶ 1-3 (NYSCEF No. 6). Plaintiff employed Ring from 2010 until 2016 when he voluntary resigned. *Id.* at ¶ 12. Plaintiff's claims derived from its belief that Ring redirected its business to himself. Def. Mem. of Law Supp. at 2 (NYSCEF No. 43). In support of its claims, Plaintiff issued over twenty subpoenas to entities that were not parties to this litigation. *Id.* This included Ring's "personal and business banks, personal and business accountants, personal and business acquaintances, and unrelated business entities." *Id.* Defendants then moved for a motion to quash and the issuance of a protective order. *Id.* at 3. Defendants claimed that Plaintiff failed to meet the notice requirement and that the subpoenas were overly broad and sought irrelevant information. *Id.* at 4. Additionally, Defendant requested the Court for a protective order that would deny and vacate the subpoenas, as well as prohibit Plaintiff from issuing additional subpoenas. *Id.* at 11. Plaintiff in its response, challenged Defendants standing to challenge the subpoenas. *See Tsunis Gasparis LLP*, 2022 WL 289642 at *1.

The Court handled these issues in turn and first found that per CPLR 3101(a)(4), Plaintiff met its notice requirement. *Id.* Second, the Court rejected Plaintiff's notion that Defendants lacked "standing to challenge the subpoenas." *Id.* The Court cited CPLR 3103(a), which allows for "any party or any person 'about whom discovery is sought' to move for a protective order." *Id.* (quoting Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3103:1 at 94). Additionally, the Court was not

persuaded by the fact that Plaintiff relied on a non-binding case and a case that was decided prior to CPLR 3103 being amended in 2013. *Id.* Further, the Court stated that Defendants had standing here because they "had a proprietary interest in the materials they sought." *Id.*

Lastly, the Court found certain subpoenas to be overly broad because Plaintiff failed to show how such information was "indispensable to its claims" and that it could not obtain the documents by another means. *Id.* at *2. To defy a motion to quash, Plaintiff must show that the documents are "material and necessary." *Id.* at *1. Further, subpoenas cannot not be used in the place of normal discovery, as their purpose is to produce specific and relevant materials. *Id.* Here, the Court held that Plaintiff's subpoenas were overly broad because they sought documents that were prior to the six-year statute of limitations, related to Ring's former law firm, and his tax returns. *Id.* at *2. The Court granted Defendant's motion to quash as to the overly broad subpoenas but denied the remainder of the motion. *Id.*

Nebari Nat. Res. Credit Fund I, LP v. Speyside Holdings LLC

616939/21, 2022 WL 610334, (N.Y. Sup. Ct. 2022)

Mary Kate Sherwood

Senior Staff Member

Plaintiff Nebari Natural Resources Credit Fund I, LP ("Nebari") alleged three causes of action against the Defendants, which included several LLCs and individual Defendants, arising from Nebari's mortgages on real property owned by the Defendants and its security interests in the Defendants' personal property. *See Nebari Nat. Res. Credit Fund I, LP v. Speyside Holdings LLC*, 616939/21, 2022 WL 610334, at *1 (N.Y. Sup. Ct. 2022). Nebari's claims against the Defendants were: (1) to foreclose mortgages it held on two of the Defendants' parcels of real property; (2) to foreclose on the security interests it held in the Defendants' personal property; and (3) to recover any deficiency from the individual Defendants pursuant to "bad boy" guarantees. *Id.* The Defendants moved to dismiss. *Id.* The Court, however, denied the Defendants' motion. *Id.*

The Defendants in this action consisted of several LLCs (Speyside Holdings LLC; Speyside Holdings II LLC; CEM III LLC; SRG Horseblock II LLC; SRG Horseblock IV LLC; SGD Group Holdings II LLC; and SGD Group Holdings III LLC), several individual Defendants (Eugene Fernandez, Anthony Williams, and Duncan Goldie-Morrison), and John Does 1-50 (fictitious parties "intended to designate parties" with subordinate liens on, or "tenants, lessees, or occupants" of, the mortgaged properties). *Id.* The Defendant LLCs owned two separate parcels of real property: the first, known as the "Quarry property," was a quarry in Highland Mills, New York, and the second, the "Yaphank property," was "vacant land" located in Yaphank, New York. *Id.* Nebari made a loan of $17 million to the Defendants on February 25, 2020. The $17 million loan was secured in several ways: (1) Nebari secured mortgages on both the Quarry and Yaphank properties; (2) the Defendant LLCs pledged all their assets; (3) the individual Defendants pledged their membership interests in the Defendant LLCs; and (4) the individual Defendants undertook "bad boy" guarantees, under which they "irrevocably, absolutely, and unconditionally guarantee[d] . . . the full and prompt payment and performance of" several "Guaranteed Obligations." *Id.*; Compl. at ¶¶ 51–55 (NYSCEF No. 1). As noted, when the Defendants defaulted on the loan, Nebari sought to foreclose on the mortgaged properties; it also sought to foreclose on the individual Defendants'

membership interests in the Defendant LLCs under UCC Article 9, since those membership interests were considered personal property under the UCC. *Nebari*, 2022 WL 610334, at *1. Prior to the instant action, the Defendants had moved for a preliminary injunction to enjoin the foreclosure sales, but the Court denied this relief; the Defendants then appealed. *Id.* (citing *Speyside Holdings LLC v. Nebari Nat. Res. Credit Fund LLP*, 604646/2021, (N.Y. Sup. Ct. 2021)). The Appellate Division, Second Department, stayed the sale of the Defendants' personal property "pending hearing and determination of the appeal." *Id.*

In their motion to dismiss Nebari's complaint, the Defendants primarily argued that Nebari's action violated the "one-action rule" of RPAPL 1301. *Id.* RPAPL § 1301 "requires the holder of a note and a mortgage to elect one of two alternate remedies: either proceed at law to recover on the note or proceed in equity to foreclose on the mortgage." *Id.* This statute, which prevents the bringing of more than one suit in an attempt to recover the same debt, is based on the equitable principle of fully exhausting a remedy at law before seeking a remedy in equity. *Id.* at **1–2.

The Court found, however, that RPAPL § 1301 did not bar Nebari's action. *Id.* at *2. First, the Court noted that foreclosure of the individual Defendants' membership interests in the LLCs was a disposition of collateral pursuant to UCC Article 9—not a judicial proceeding, nor an action on a note. *Id.* (citing *1258 Assoc. Mezz. II LLC v. 12E48 Mezz. II LLC*, 651812/20, (N.Y. Sup. Ct. 2020)). The Court also emphasized that in a situation such as this one, where a security agreement covers both real property and personal property, UCC § 9-604(a) permits a secured party to "proceed against the personal property"—here, the individual Defendants' membership interests in the LLC—"without prejudicing any of its rights with respect to the real property." *Id.*

Second, the Court also held that RPAPL § 1301 did not apply to Nebari's "prayer for a deficiency judgment" pursuant to the "bad boy guarantees," because such a demand "in a foreclosure complaint does not constitute a separate action for a money judgment in violation of the election-of-remedies doctrine," and RPAPL § 1371(2) permits a plaintiff to bring a motion for a deficiency judgment in a foreclosure action, since it "is incidental to the principal relief demanded." *Id.* (citing *Aurora Loan Servs., LLC v. Lopa*, 88 A.D.3d 929, 930 (N.Y. App. Div. 2011); *LibertyPointe Bank v. 7 Waterfront Prop*., *LLC*, 94 A.D.3d 1061, 1062 (N.Y. App. Div. 2012)).

The Defendants also argued that it was "necessary for the owners of the Yaphank property to have received a benefit" for the mortgage on the Yaphank property to be enforceable. *Id.* The Court rejected this argument, noting that the obligation secured by the

mortgage "may be that of the mortgagor or of some other person," and that consideration is not necessary to make a mortgage enforceable. *Id.* (citing Restatement [Third] of Property [Mortgages] § 1.3; *id.* at § 1.2). Therefore, "[a] mortgage securing the obligation of a person other than the mortgagor is valid, whether or not the mortgagor receives any identifiable benefit in return." *Id.* (citing Restatement [Third] of Property [Mortgages] § 1.3). The Court concluded that the mortgage was enforceable, because "[i]t was enough that the owners of the Quarry property received the proceeds of the loan." *Id.*

Finally, the Court turned to the Defendants' argument that General Obligations Law § 5-526(1) also applied to the loan. *Id.* The Court noted that the Defendants had raised this argument for the first time in their reply papers, and so the Court had not considered the issue. *Id.* The Court then noted that the rest of the Defendants' contentions were best resolved either "on a motion for summary judgment or at trial," since they raised factual issues. *Id.* The Court therefore denied the Defendants' motion to dismiss. *Id.*

Fritch v. Bron

605622-21 2022 WL 610335 (N.Y. Sup. Ct 2022)

Connor Winship

Senior Staff Member

This dispute arises out of an underlying operating agreement and accompanying amended agreement and whether its arbitration clause binds nonsignatories. *Fritch v. Bron*, 605622-21 2022 WL 610335 at *1 (N.Y. Sup. Ct. 2022). Plaintiff, Maureen Fritch (51%) and Defendant Igor Bron (49%) entered were owners of E. Electrical Contracting, LLC ("EEC") and "entered into an amended and restated operating agreement for EEC" on September 27, 2016. *Id.* at **1-2. The agreement had a clause that required the parties to arbitrate "any and all disputes relating to or arising under this Agreement." *Id.* (internal quotation marks omitted). On March 31, 2021, Maureen Fritch commenced an action "alleging Mr. Bron, aided and abetted by the [D]efendants Rita Bron, Richard Sajiun and Sajiun Electric, Inc. (collectively, the 'Sajiun [D]efendants") . . . diverted corporate assets and opportunities from EEC." *Id.* at *1. The causes of action were: (1) fraud; (2) aiding and abetting fraud; (3) breach of fiduciary duty; (4) "aiding and abetting breach of fiduciary duty;" and (5) unjust enrichment. *Id.* While both Plaintiff and Defendant Bron moved to compel arbitration and were subsequently directed to proceed to arbitration, the issue in this opinion was whether the Plaintiff could compel the Sajiun Defendants, who are nonsignatories, to arbitrate the claims. *Id.*

There are five theories that New York accepts to compel arbitration and overcome the presumption against compelling express arbitration clauses against nonsignatories. *Id.* (citing *Merrill Lynch Inv. Mgrs. v. Optibase, Ltd.,* 337 F.3d 125, 129 (2d Cir. 2003)) (stating the five theories were 1. incorporation by reference, 2. assumption, 3. agency, 4. veil-piercing/alter ego, and 5. estoppel). Plaintiff unsuccessfully argued the agency, veil-percing/alter ego, and estoppel theories. *Id.*

The Court found the agency theory unpersuasive because there was no evidence that Mr. Bron was an agent of the Sajiun Defendants. *Id. "*Agency is a fiduciary relation that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." *Id.* Plaintiff failed to show that Mr. Bron was an agent. *Id.* The Court further noted that "while an agent may bind its nonsignatory principal to an arbitration agreement" when seeking

to compel arbitration with a signatory, it does not work in the present case where the facts were inverted. *Id.* (citing *Matter of Kramer Levin Naftalis & Frankel LLP v. Cornell*, 148 A.D.3d 430, 431 (N.Y. App. Div. 2017)). Finally, the Court found Plaintiff's "silent partners" contention was insufficient because it is not possible in corporate law to create a partnership between two individuals while "holding the entity out to the general public as a corporation." *Id.* (citing *Zahr v. Wingate Creed Acquisition Corp.*, 237 F. Supp. 1061, 1068 (S.D.N.Y. 1993)).

Next the Court rejected the estoppel theory. *Id.* at *3. Under this theory, "a nonsingnatory may be compelled to arbitrate when the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause and receives benefits flowing directly form the agreement." *Id.* (citing *Matter of Belzberg v. Versus Invs. Holdings, Inc.*, 21 N.Y.3d 626, 631 (N.Y. 2013)). The theory requires a direct connection between the benefit and the agreement. *Id.* (classifying this as the direct-benefits doctrine). The Court noted that this is shown through situations where a nonsignatory brings an action based on the contract language or obtains "monetary benefits of a contract by taking over performance thereunder." *Id.* (citing *Matter of Kramer Levin Naftalis & Frankel LLP v. Cornell*, 653381/2016 2016 WL 11067269 at *4 (N.Y. Sup. Ct. 2016)). While there was potential evidence that the Sajiun Defendants could have exploited the contractual relationship of the agreements, there was no evidence that they exploited the agreement itself. *Id.* Therefore, the Court rejected the Plaintiff's argument. *Id.*

Finally, the Court addressed the alter-ego theory. *Id.* Plaintiff claimed that the Sajiun Defendants were "alter-egos" of Mr. Bron. *Id.* To succeed, the Plaintiff must prove "(i) that the owner exercised complete domination of the corporation with respect to the transaction attacked and (ii) that such domination was used to commit a fraud or wrong against the [P]laintiff which resulted in [P]laintiff's injury." *Id.* (citing *Morris v. N.Y. Dep't of Tax. and Fin.*, 82 N.Y.2d 135, 141 (N.Y. 1993)). First, "[n]either Richard Sajiun nor Sajiun Electric ha[d] an ownership interest in EEC." *Id.* Next, the agreement was not signed by EEC, but only by Plaintiff and Mr. Bron, thus EEC is not a party of the agreement and cannot be pierced. *Id.* at *4. Furthermore, the reverse-veil-piercing argument failed regardless of Mr. Bron's position as principal of Sajiun Electric. *Id.* Therefore, Sajiun Electric is "accountable for the actions of its shareholders." *Id.* However, the Court rejected this argument because there was a lack of domination. *Id.* ("[T]he record does not establish that Mr. Bron so dominated or controlled Sajiun Electric that it was an alter ego of himself.").

As a result of Plaintiff's failure to prove any of its exception theories, the Court refused to compel arbitration of the Sajiun

Defendants absent a written agreement. *Id.* (citing CPLR 7501). The Court directed Plaintiff to proceed with her arbitration claims against Mr. Bron. *Id.* The Court stayed the current action and advised Plaintiff to move to stay the accompanying matters under those index numbers. *Id.*

Galasso v. Cobleskill Stone Prods., Inc.

908716-21, 2021 WL 5914752 (N.Y. Sup. Ct. 2021)

Gabriella Carnazza

Staff Member

Petitioner Mark A. Galasso brought this proceeding as the personal representative of Martin A. Galasso's Estate. *Galasso v. Cobleskill Stone Prods., Inc.*, 908716-21, 2021 WL 5914752, at *1 (N.Y. Sup. Ct. Dec. 2021). Petitioner, as a minority shareholder, sued Respondent Cobleskill Stone Products, Inc. ("CSP"), seeking an order to compel CSP to allow the inspection of its financial statements and income tax returns for 2019 through 2021. *Id.* CSP moved to dismiss, and Petitioner opposed the motion. *Id.* at *1–2. The Court denied CSP's motion to dismiss in part, specifically to the extent that the Petition requested access to CSP's financial statements. *Id.* at *3. However, the Court granted the motion to dismiss with respect to the Petitioner's demand to inspect CSP's books and records under the common-law right of inspection. *Id.* at *3–4. Finally, the Court ordered CSP to serve an answer to the petition by January 7, 2022, and Petitioner had until January 14, 2022 to reply. *Id.* at *4. The Court stated that the dispute would be re-noticed for a hearing on January 18, 2022. *Id.*

Martin A. Galasso owned 38.78% of CSP's outstanding shares when he passed away on January 1, 2014. *Id.* at *1. At the time of this action, the parties had two other cases pending in the Court: a shareholder's derivative suit commenced by Petitioner on behalf of CSP on December 9, 2015, and a case in which Petitioner sued for the judicial dissolution of CSP under Business Corporation Law ("BCL") §§ 1104(c) and 1104-a on January 25, 2019. *Id.* On March 28, 2019, CSP decided to purchase petitioner's shares in the Dissolution Proceeding. *Id.* Expert discovery to discern the value of CSP was in its final stages, and the parties had not agreed to the value of Petitioner's shares at the time of this action. *Id.*

On August 11, 2021, Petitioner gave CSP a written demand to inspect CSP's financial statements and income tax returns for the fiscal years ending in 2019, 2020, and 2021. *Id.* CSP claimed that Petitioner was not entitled to its financial records after the January 24, 2019 valuation date in the Dissolution Proceeding. *Id.* CSP's motion to dismiss claimed that Petitioner lacked a proper purpose for inspecting their records and claimed he acted in bad faith. *Id.*

The Court began its discussion citing BCL § 624(e), which states that a corporation shall, "[u]pon the written request of any shareholder . . . give or mail to such shareholder an annual balance

sheet and profit and loss statement for the preceding fiscal year." *Id.* The Court stated that nothing in this law explicitly required shareholders to show that they were acting in good faith or for a proper purpose. *Id.* at *2. It continued its analysis with BCL § 624(b), which discusses "access to the minutes of shareholder meetings and shareholder lists" and requires a showing of good faith or proper purpose. *Id.* The Court held that this limitation in part (b) of 624 did not apply to part (e) of 624, relying on a persuasive decision in *Apple v. Careerco, Inc.*, 82 Misc. 2d 468, 469 (N.Y. Sup. Ct. 1974). *Id.* The Court also cited the Appellate Division, Third Department, which ruled that "any question of shareholder 'bad faith was not relevant or material . . . and [the shareholder] was entitled to [financial] statements once the statutory procedural requirements were met." ' *Id.* (quoting *Matter of Lewis v. J & K Plumbing & Heating Co.*, 71 A.D. 2d 708, 708–09 (N.Y. App. Div. 1979)).

Finally, the Court relied on *Lewis* as binding precedent to hold that CSP's challenge to Petitioner's request for financial statements based on relevance and his "alleged bad faith in making the request" did not affect "Petitioner's right under BCL § 624(e) to obtain [CSP's] financial statements for the fiscal year preceding [the] demand." *Id.*

Next, while Petitioner admittedly had no statutory basis to review CSP's tax returns, he invoked the common-law right of inspection in demanding access to CSP's books and records. *Id.* For the common-law right of inspection to be asserted, the shareholder must be acting in good faith and must establish "'that inspection is for a proper purpose.'" *Id.* (quoting *Matter of Crane Co. v. Anaconda Co.*, 39 N.Y.2d 14, 18 (N.Y. 1976)). Furthermore, "the common-law remedy 'lies in the discretion of the court in light of equitable principles.'" *Id.* (quoting *Crane*, 39 N.Y.2d at 18). The Court reasoned that the Petition did not state a "purpose for the inspection of CSP's tax returns," but rather alleged that access to the tax returns was appropriate because Petitioner's affidavit had no improper purpose. *Id.* The Court held that "[P]etitioner [did not] meet his burden of pleading and proving a proper purpose by attesting to his lack of an improper purpose." *Id.* at *3. The Court referenced Petitioner's second affidavit, which claimed that CSP had always produced their tax returns and financial statements, but again the Court decided that this did not constitute pleading a proper purpose for inspecting CSP's tax returns. *Id.* at *3.

Finally, Petitioner's memorandum of law in opposition stated that using the tax returns for the Dissolution Proceeding constituted a proper purpose. *Id.* at *3. Essentially, Petitioner argued that the requested material predated the January 24, 2019 valuation date and was needed "to 'confirm what a hypothetical

buyer [would] have forecasted as of [that date.]'" *Id.* The Court however held that the Petitioner using the tax returns in the Valuation Proceeding was not a proper purpose, and the Court declined to grant the common-law remedy of inspection. *Id.*

In deciding this, the Court stated that Petitioner had the chance to obtain information relevant to the value of the Estate's shares during the Dissolution Proceeding, the only disclosure remaining being the depositions of the two "lead" experts. *Id.* Fact discovery was completed roughly 18 months before this published decision, many expert depositions were conducted, and expert reports were exchanged. *Id.* The Court stated that "[t]he common-law right of inspection cannot be used to circumvent limitations on the scope or timing of disclosure in pending litigation." *Id.* The Court concluded that Petitioner did not plead or prove that he had a proper purpose for retrieving CSP's tax returns. *Id.*

Ultimately, the Court denied CSP's motion as to the part of the Petition that sought access to CSP's "financial statements for the fiscal year preceding the Demand under BCL § 624(e)" and granted the motion as to the part of the Petition that sought inspection of CSP's books and records under the common-law right of inspection. *Id.* at *4.

Wythe Berry Fee Owner LLC v Wythe Berry LLC

514152/2021, 2021 WL 5780049 (N.Y. Sup. Ct. 2021)

Giuseppe Chiara

Staff Member

Plaintiff Wythe Berry Fee Owner ("Fee Owner") commenced an action on June 11, 2021 against Defendant Wythe Berry LLC ("Wythe Berry"). *See Wythe Berry Fee Owner LLC v Wythe Berry LLC,* 514152/2021, 2021 WL 5780049, at* 1 (N.Y. Sup. Ct. 2021). Fee Owner sought three remedies: (1) a monetary judgment against Wythe Berry; (2) a judgment declaring that the lease between Wythe Berry and Fee Owner had been terminated; and (3) an order to return the disputed property to Fee Owner and eject and enjoin Wythe Berry from the premises. *Id.* Fee Owner's commenced action resulted in five motions pending before the Court. *Id.* The first motion ("MS 1") was the "[P]laintiff's order to show cause seeking use and occupancy." *Id.* at *2. The second motion ("MS 3") was the Plaintiff's motion for an injunction preventing the "[D]efendants from entering into leases on any unleased or vacant portion of the [disputed] premises." *Id.* The third motion ("MS 4") was the Defendant's motion to dismiss due to lack of standing. *Id.* The last two motions ("MS 5" & "MS 6") were the Plaintiffs' motions to compel their subpoena, and the Defendant's motion to quash the subpoenas. *Id.* After reviewing the facts of the case, the Court granted MS 1, denied MS 3 & 4, and adjourned MS 5 & 6 to a future date. *Id.* at *8.

Fee Owner's commenced action stemmed from a property dispute with Wythe Berry. *Id.* at *1. Fee Owner owns the William Vale Hotel, office space and other retail and parking space located on 55 Wythe Avenue, Brooklyn, New York, Block 2283, Lot 1. *Id.* Through an executed lease agreement, Fee Owner agreed for Wythe Berry to become the lessor in possession of the premises for fifteen years. *Id.* Pursuant to this lease, Wythe Berry's manager, Zelig Weiss, oversaw all of the land. *Id.* Fee Owner alleged that Weiss profited from various subtenants at the William Vale Hotel and "is required to pass along a portion of such revenue to Fee Owner in the form of rent payments pursuant to the lease." *Id.* Specifically, Fee Owner claims that Wythe Berry has failed to make semi-annual rent payments, has failed to cure NYC DOB violations, and has breached other provisions of the lease agreement. *Id.* Due to Wythe Berry's failure to pay rent, Fee Owner has defaulted on a loan from Mishmeret Trust Company. *Id.* Thus, Fee Owner commenced an action against Wythe Berry. *Id.*

First, the Court dealt with the Wythe Berry's motion to dismiss. *Id.* at *2. The Court laid out the judicial standard for a motion to dismiss, stating that when evaluating motions to dismiss, the Court should give a pleading a "liberal construction" and must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.* Then the Court explained that for motions to dismiss due to lack of standing, the burden falls on the defendant to establish prima facie that the plaintiff does not have standing. *Id.* If a plaintiff's submission raises a question of fact as to its standing, the motion to dismiss will fail. *Id.*

When Fee Owner executed the lease, they also refinanced a debt with their lender All Year. *Id.* Subsequently, All Year transferred the debt to Mishmeret, and Mishmeret became the new lender to Fee Owner. *Id.* Pursuant to section 3 of the Lease Agreement, Wythe Berry argued that when Fee Owner defaulted on their loan with Mishmeret, Fee Owner's license to the disputed property terminated and thus Fee Owner had no legal standing to maintain the lawsuit. *Id.* On the contrary, Fee Owner argued that Mishmeret had given consent to Fee Owner to continue to act as the Landlord and bring this action against Wythe Berry. *Id*. at *3. Fee Owner furthered contended that if the Court did not find evidence of this consent by Mishmeret, the Court should find that the parties through their implied conduct "have chosen to continue as if such revocation had not occurred." *Id.* Furthermore, Fee Owner argued that the Wythe Berry failed to meet their burden of proof by arguing that "the Court could take judicial notice of documents [filed] on ACRIS" and not attaching the loan documents. *Id.*

In denying Wythe Berry's motion to dismiss, the Court first stated that it could not take judicial notice of loan documents recorded on ACRIS. *Id*. The Court stated that there are only two circumstances when a court can take notice of judicial documents. *Id*. The first circumstance is "when information 'rests upon knowledge . . . [that is] widely accepted.'" *Id.* The second circumstance "rest[s] upon . . . sources [that are] widely accepted and unimpeachable such as reliable uncontested governmental records." *Id.* The Court found that the loan documents on ACRIS fell into neither category, and thus the Court could not take judicial notice of the documents. *Id.* The Court further stated that a motion to dismiss that is barred by documentary evidence could still be granted if "evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Id.* at *4. Since the defendants were not able to refute the ejectment claim, the Court denied the motion to dismiss. *Id.*

Next, the Court addressed Fee Owner's motion to show cause. In particular, the court addressed Fee Owner asking for payment of rent of pendente lite use and occupancy (U & O) of the subject premise. *Id.* at *5. The Court stated that the grant of an order for U&O for immediate payment of rent is discretionary and can be granted if it "accommodates the competing interests of the parties in affording necessary and fair protection." *Id.* Here, Fee Owner argued that this would accommodate the competing interests of both parties because it would help Fee Owner in its vicarious position with their lender, and help defendants demonstrate merit in their claims of financial hardship. *Id.* The Court found this argument convincing and granted Fee Owner's request. *Id.* Additionally, the Court granted Fee Owner's request for expedited discovery regarding Wythe Berry's books and records. *Id.*

Finally, the Court addressed Fee Owner's motion for a preliminary injunction for ejectment. *Id.* The Court stated that in order to receive a preliminary injunction, Fee Owner must be able to show that there is real danger of irreparable injury and that justice requires the injunction. *Id.* The Court stated that that irreparable injury "does not refer to economic loss . . . but rather refers to an injury for which money damages are insufficient." *Id.* at *6. The Court stated that Fee Owner must show the irreparable injury that would occur would be more burdensome to Fee Owner than the harm that would occur to Wythe Berry. *Id.* Fee Owner argued that it would receive irreparable harm if Wythe Berry would continue to sublease with new tenants. *Id.* at *5. Fee Owner argued that Wythe Berry would change the premises to accommodate these subtenants, harming Fee Owner. *Id.* Wythe Berry argued that the injunction should not be granted because Fee Owner's success on the ejectment case has not been demonstrated and would deprive Wythe Berry of substantial income to help pay future rent. *Id.* at *6. The Court agreed with Wythe Berry, stating that an injunction should not be granted because Fee Owner was not able to demonstrate a likelihood of success in their claim and that Fee Owner did not meet its burden in presenting irreparable injury. *Id.*

Thus, Fee Owner survived a motion to dismiss, and the Court allowed them to recover late rental payments from Wythe Berry. However, Fee Owner's motion for an injunction was denied, and the other motions were adjourned for a later date.

Estate of Collins v. Tabs Motors of Valley Stream Corp.

160529/2019, 2021 WL 5751874 (N.Y. Sup. Ct. 2021)

Perry Chresomales

Staff Member

On November 23, 2021, the New York Supreme Court of New York County decided a motion for summary judgment on Tabs Motors of Valley Stream Corporation's counterclaim against petitioner Michael Louros, and its third-party claim against the co-executors of the Estate of Connie Collins, Stella-Collins Geneva and Nicholas Collins. *See Estate of Collins v. Tabs Motors of Valley Stream Corp.*, 160529/2019, 2021 WL 5751874 at *1 (N.Y. Sup. Ct. 2021). In this action, the Estate of Connie Collins and Michael Louros, as petitioners, brought suit against Tabs Motors of Valley Stream, ("Tabs"), Steven Louros, and Rose Louros. *Id.* Tabs, as a third-party plaintiff, brought a third-party claim against the co-executors of the Estate of Connie Collins, Stella-Collins Geneva and Nicholas Collins. *Id.* Tabs filed its counterclaim against Michael Louros and its third-party claim to enforce a shareholders agreement through specific performance. *Id.*

Tabs is an automotive repair business that is owned in equal percentages by Michael Louros, Rose Louros, Bellerose Automatic Transmissions (owned by Steven Louros), and the Estate of Connie Collins. *Id.* Each owner owns 50 shares in Tabs. *Id.* In 2012, Steven Louros proposed that the shareholders enter a shareholders agreement. *Id.* After a July 2012 meeting in which the shareholders discussed the proposed agreement, the shareholders adjourned the meeting to discuss the agreement with their own counsel. *Id.* In December 2013, all shareholders signed the Shareholders Agreement. *Id.* Approximately six years later, in October 2019, the Estate of Connie Collins, together with Michael Louros, filed a petition for dissolution of Tabs. *Id.* As a result of the filing, a buy-sell provision in the Shareholders Agreement was triggered. *Id.* The buy-sell provision states "if any shareholder files a petition to dissolve the Corporation; . . . the Corporation, firstly, and then the other Shareholders shall have the option to purchase a, but not part of the shares owned by such Shareholder." *Id.* The Shareholders Agreement sets the value of each share at $5,250. *Id.* Tabs can exercise its option to purchase the shares by a vote at a shareholders meeting. *Id.* at *2. The selling shareholders cannot participate in the vote. *Id.* The quorum required for the vote is 75 percent of the shareholders who are entitled to vote. *Id.* At a December 2019 shareholders meeting, the remaining shareholders voted to exercises

Tabs' option to purchase the shares. *Id.* at *1. The closing date for the sale was scheduled for February 11, 2020, but Michael Louros and the Estate of Connie Collins indicated that they would not voluntarily give up their shares. *Id.* As a result, Tabs brought its counterclaim against Michael Louros and its third-party claim against the executors of the Estate of Connie Collins for specific performance. *Id.*

The issue in this case was whether specific performance should be granted to enforce the Shareholders Agreement. *Id.* at *2. Michael Louros and the executors of the Estate of Connie Collins argued that the Court should not enforce the shareholders agreement because it was unconscionable, there was a breach of fiduciary duty, and issues with the quorum requirement. *Id.* First, the Court considered whether the shareholders agreement was unconscionable. *Id.* To prove that the shareholders agreement was procedurally unconscionable, "a party must show certain elements during the transaction such as deceptive or high-pressured tactics, the use of fine print in the contract, a lack of experience and education and a disparity in bargaining power." *Id.* (quoting *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10 (N.Y. 1988)). Petitioner Michael Louros and the third-party defendants argued that the Shareholders Agreement was procedurally unconscionable because Steven Louros acted deceptively by "withholding or not fully disclosing relevant information" and the difference in sophistication between the parties, since Steven Louros is a lawyer. *Id.* However, the Court rejected these arguments because the parties had 18 months to have an attorney review the terms of the shareholders agreement. *Id.* Further, the Court also considered whether the Shareholders Agreement was substantively unconscionable. *Id.* A contract is substantively unconscionable if the terms are unreasonable favorable to one party. *Id.* The Court determined the Agreement was not substantively unconscionable because the Agreement "applies equally to any shareholder who petitions for dissolution." *Id.* In addition, the price of the shares was fair. *Id.* at *3.

Next, the Court considered whether there was a breach of fiduciary duty by Steven Louros. *Id.* Petitioner Michael Louros and the third-party defendants argued that Steven Louros breached his fiduciary duty by "looting, waste, and withheld distributions." *Id.* Michael Louros and the third-party defendants, however, already filed a petition in Nassau County Supreme Court making identical allegations and their claims were dismissed. *Id.* Ultimately, the Court rejected the argument for breach of fiduciary duty, but noted that even if the claims were true, the buy-sell provision would still not be invalidated. *Id.* Finally, the Court considered whether there was an issue with quorum. *Id.* The Shareholders Agreement

specified that for Tabs to exercise its option to purchase the share, quorum would be satisfied with 75 percent of the shareholders that were entitled to vote. *Id.* Thus, the presence of Michael Louros and the executors of the Estate of Connie Collins did not count towards the quorum requirement. *Id.* Both Rose Louros and Bellerose Automatic Transmissions were present at the meeting and voted in favoring of exercising Tabs's option, thus the quorum requirement was satisfied. *Id.*

The Court rejected each of the petitioners' and the third-party defendants' arguments. *Id.* "Awarding specific performance is left to the discretion of the trial court." *Id.* Specific performance should be awarded "where a contract concerns items that are unique such that monetary damages would be insufficient to compensate for the breach . . . ." *Id.* The Court granted specific performance because the shareholders agreement is enforceable, fundamentally fair, and monetary damages would be an insufficient remedy. *Id.*

Lanaras v. Premium Ocean, LLC

655585/2020, 2021 WL 5751890 (N.Y. Sup. Ct. 2021)

Maria Jelda Doria

Staff Member

Maria Lanaras ("Plaintiff" or "Lanaras") commenced an action in New York County alleging "breach of contract, unjust enrichment, fraudulent conveyance, breaches of fiduciary duties, fraudulent inducement, equitable lien, and constructive trust." *Lanaras v. Premium Ocean, LLC*, 655585/2020, 2021 WL 5751890, at *1 (N.Y. Sup. Ct. 2021). Laranas named as defendants Juliana Paparizou ("Paparizou"), Paparizou's business—Premium Ocean, LLC, Out of the Blue Wholesale, LLC, and Out of the Blue Seafood, LLC—, Paparizou's business partner Efraim Bason ("Bason"), Bason's ex-wife Ronit Bason, and Paparizou's husband Alexander Sarrigeorgiou ("Sarrigeorgiou"). *Id.* This decision only concerned the causes of action for unjust enrichment, fraudulent conveyance, and constructive trust that Plaintiff asserted against Sarrigeorgiou. *See id.* at *2. Sarrigeorgiou "move[d] to dismiss the claims against him for failure to state a cause of action." *Id.* On December 2, 2021, the Court granted Sarrigeorgiou's motion to dismiss and ordered that the complaint against him be dismissed in its entirety. *Id.* at *4. The Court also ordered that "the action [be] severed and continued against the remaining defendants." *Id.*

Between 2013 and 2017, Plaintiff loaned $3.4 million to Juliana Paparizou—Sarrigeorgiou's wife. *Id.* at *1. Paparizou was starting the business venture Premium Ocean LLC in New York. *Id.* Once established, the business was managed by Paparizou, Efraim Bason, and Ronit Bason. *Id.* Paparizou and the Basons then used the loan to fund two related companies, Out of the Blue Wholesale, LLC and Out of the Blue Seafood, LLC. Paparizou. *Id.* When Laranas instituted this lawsuit, the loan had not yet been repaid. *Id.* Sarrrigeorgiou allegedly was the beneficiary of "fraudulent conveyances by virtue of his and his wife's joint property holdings and . . . their joint bank accounts." *Id.* at *2. After Plaintiff asserted causes of action for unjust enrichment, fraudulent conveyance, and constructive trust against him, Sarrigeorgiou argued that the cause of action for unjust enrichment was time-barred, and that Plaintiff failed to adequately state a claim regarding all the three causes of action. *Id.* at *2–3.

First, the Court held that a six-year statute of limitations should apply to the cause of action for unjust enrichment. *Id.* at *2 (citing *Deutsche Bank v. Vik*, 142 A.D.3d 829, 829 (N.Y. App. Div.

2016)). Here, Lanaras made the "last alleged transfer" to Paparizou on February 21, 2017. *Id.* Thus, the Court found that the transfer was within the six-year statute of limitation, and the action for unjust enrichment was not time-barred. *Id.*

Second, the Court dismissed the cause of action for unjust enrichment because Plaintiff failed to state a claim. *Id.* A party adequately pleads a cause of action for unjust enrichment by establishing that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Id.* (citing *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (N.Y. 2012)). Although the plaintiff does not need to establish that the parties are in privity, she must "assert a connection between the parties that [is] not too attenuated." *Id.* (citing *Georgia Malone & Co.*, 19 N.Y.3d at 517). The relationship between the parties needs to be of a kind that "could have caused reliance or inducement." *Id.* (citing *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (N.Y. 2011)). Here, Sarrigeorgiou and Lanaras knew each other because Sarrigeorgiou is the husband of a long-time friend of Lanaras. *Id.* However, Plaintiff does not allege any direct relationship between Sarrigeogiou and Lanaras that "could have caused reliance or inducement." *Id.* Thus, Plaintiff did not adequately plead a claim for unjust enrichment. *Id.*

Third, the Court dismissed the cause of action for fraudulent conveyance under DCL § 273 because Plaintiff failed to adequately plead the claim. *Id.* at *3. To satisfy the standard for constructive fraudulent conveyance, a plaintiff needs to allege that "the debtors made a conveyance, that they were insolvent prior to the conveyance or rendered insolvent thereby, and that the conveyance was made without consideration." *Id.* (citing *Wall St. Assocs. v. Brodsky*, 257 A.D.2d 526, 528 (N.Y. App. Div. 1999)). Moreover, the Court clarified that it accepts allegations based upon the lower standard of "information and belief" in this case, without requiring the plaintiff to plead "with particularity." *Id.* Here, Plaintiff submitted a bank account statement showing that Paparizou deposited distributions of her company assets and revenues into personal accounts and joint accounts with her husband Sarrigeorgiou. *Id.* Also, money from the joint bank account was used to "maintain shared property and make mortgage payments." *Id.* Yet, the Court found that Plaintiff failed to plead facts or provide evidence to show that there was no fair consideration and that, by admitting that Sarrigeorgiou had previously loaned money to Paparizou's business, Plaintiff "undercut[ ] the claim that there was no fair consideration." *Id.* Additionally, the Court noted that, since Sarrigeorgiou is not an officer and does not have any role in his wife's corporations, the transfer was not presumptively fraudulent. *Id.* Thus, the Court

found that, even under the lower standard of "information and belief," Plaintiff failed to adequately plead an element of fraudulent conveyance. *Id.*

Finally, the Court dismissed the cause of action for constructive trust because Plaintiff failed to adequately plead a claim. *Id.* To adequately plead constructive trust, a plaintiff must allege "a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment." *Id.* (citing *Abacus Fed. Sav. Bank v. Lim*, 75 A.D.3d 472, 473 (N.Y. App. Div. 2010)). Here, Plaintiff alleged that there was a "family friend" relationship between Lanaras and Sarrigeorgiou. *Id.* The Court found that this allegation is insufficient to plead the existence of a "confidential or fiduciary relationship," even under the liberal standard for constructive trust accepted by the Court. *Id.* Moreover, the Court found that Plaintiff failed to make any "allegations that Sarrigeorgiou promised her anything." *Id.* Thus, Plaintiff failed to adequately plead the constructive trust claim. *Id.*

In sum, the Court granted Defendant Sarrigeorgiou's motion to dismiss the complaint. *Id.* at *4. Specifically, the Court dismissed the causes of action for unjust enrichment, fraudulent conveyance, and constructive trust because Plaintiff failed to state a claim. *Id.* at *1–4.

Stolper v. Burbacki

65352/2018, 2021 WL 550350 (N.Y. Sup Ct. 2021)

Ilayna Guevrekian

Staff Member

Plaintiff ("Stolper") filed a motion to compel Yonathan Shimrony ("Shimrony"), a previously dismissed co-defendant, to comply with the subpoena *duces tecum* and *ad testificandum*. *Stolper v. Burbacki*, 652352/2018, 2021 WL 5501350, at *1 (NY Sup. Ct. 2021). Defendant ("Burbacki") filed a motion to strike Stolper's pleadings because of tampered evidence, or to otherwise compel forensic examination of Stolper's phone. *Id.*

The two parties engaged in a prior business relationship in which Stolper hired Burbacki to be in-house counsel for Stolper's management and product company. *Wikked Entertainment, Inc. v. Burbacki*, 652352/2018, 2020 WL 4059153, at *1 (NY Sup. Ct. 2020). Several months after, Burbacki and Shimrony created a competing company which sparked litigation between Stolper and Burbacki on a number of claims including conversion and breach of duty. *Id.* After the Court granted Stolper's motion and Burbacki's cross-motion to compel discovery, Stolper specifically sought to compel Shimrony's compliance with the subpoena *duces tecum* and *ad testificandum*. *Stolper*, 2021 WL 5501350, at *1. In response, Burbacki sought to strike Stolper's complaint because of evidence tampering, or alternatively to compel examination of Stolper's phone. *Id.*

As a first matter, the Court granted Stolper's motion to compel Shimrony's compliance with each subpoena. *Id.* After reviewing each party's submissions, the Court found that there was proper service. *Id.* Previously, Jonathan Neuman ("Neuman"), Shimrony's attorney, agreed to accept service on behalf of his client. *Id.* (citing NYSCEF Doc. No. 127). Neuman argued that because this was done in the context of rescheduling Shimrony's prior deposition contingent on the then pending motion, there was understanding that future subpoenas would only be for depositions, and not documents. *Id.* (citing NYSCEF Doc. No. 128). Because there had not been any objection to the subpoena *duces tecum* "for the [past] two years that it had been outstanding," the Court found Neuman's argument to be meritless and deemed service of both subpoenas proper. *Id.*

Additionally, the Court reasoned that Shimrony's "testimony is material and necessary to the prosecution of this case." *Id.* at *2 (citing *Matter of Kapon v. Koch*, 23 N.Y.3d 32, 36 (N.Y.

2014)). Although Shimrony and Burbacki are legally married, marital privilege did not protect Shimrony from compliance because the deposition was sought "on ordinary business matters that were not induced by the marital relation itself." *Id.* at *1 (citing CPLR 4502(b); *People v. Melski*, 10 N.Y.2d 78, 80 (N.Y. 1961)).

As a second matter, the Court denied Burbacki's motion to strike Stolper's pleadings because of tampered evidence, or otherwise compel forensic examination of Stolper's phone. *Id.* at *2. The submitted evidence of an "unsent draft text message" was not substantiated to show how it may have harmed review of other evidence. *Id.* Without evidence of "spoliation or similar conduct," the Court was required to find that the unsent text message did not amount to tampered evidence and remedy was not warranted. *Id.* (citing *Melcher v. Apollo Med. Fund. Mgmt. L.L.C.*, 105 A.D.3d 15 (N.Y. App. Div. 2013)). Instead, the Court advised that Stolper may be cross-examined regarding the argued evidence. *Id*.

Knowyourmeme.com Network, Inc. v. Elraviv

650667/2021, 2021 WL 5501355 (N.Y. Sup. Ct. 2021)

Robert Ibraham

Staff Member

On September 17, 2018, Liveleak Global Internet Inc. ("Liveleak") drafted and sent a letter of intent to Literally Media Ltd. ("Literally Media") that addressed Liveleak's potential acquisition of Literally Media through a merger of Literally Media and Knowyourmeme.com Network, Inc. ("KYM"). *Knowyourmeme.com Network v. Nizri*, 2021 WL 4441523, at *1 (S.D.N.Y. Sept. 28, 2021). Liveleak and KYM informed Literally Media that the transaction must be structured as a merger, rather than a share purchase agreement, because of the economic and tax benefits that a merger would provide to investors. Compl. ¶ 10 (NYSCEF No. 1). The Chairman of Literally Media, Jacob Nizri, confirmed that a merger structure would be acceptable to Literally Media. *Nizri*, 2021 WL 4441523, at *1. The letter of intent was amended three times, each amendment reflecting that the acquisition would be structured as a merger. Compl. ¶¶ 14, 17–18 (NYSCEF No. 1).

On March 12, 2019, Literally Media notified KYM that the acquisition could only be completed if it were structured as a share purchase agreement because Literally Media, as an Israeli corporation, was prohibited from merging with a Delaware entity under Israeli law. *Knowyourmeme.com Network v. Nizri* (*Nizri Report*), 2021 WL 3855490, at *2–3 (S.D.N.Y. Aug. 30, 2021). KYM offered to form an Israeli entity to complete the merger agreement, but Literally Media insisted on a share purchase agreement. *Id.* at *3. Liveleak assigned all rights related to the letter of intent to KYM, and KYM sought to pursue legal action against Literally Media. *Id.* at *2–3. The letter of intent, however, contained a forum selection clause that required any action brought against Literally Media arising out of the letter to occur "exclusively in the courts of the State of Israel." *Id.* at *2.

KYM filed its first lawsuit against Nizri and Literally Media in New York Supreme Court on October 7, 2020, alleging "seven causes of actions: (1) breach of contract, (2) specific performance, (3) fraudulent inducement or fraudulent misrepresentation, (4) negligent misrepresentation, (5) interference with contractual relationship, (6) intentional interference with prospective business advantage, and (7) unjust enrichment." *Nizri Report*, 2021 WL 3855490, at *1, 3. The case was then removed to the Southern

District of New York, where Defendants moved to dismiss. *Nizri*, 2021 WL 4441523, at *1. The Court enforced the forum selection clause and dismissed KYM's first two causes of action. *Id.* at *3–5. KYM argued that its remaining claims were not subject to the forum selection clause because the claims did not arise out of the letter of intent. *Id.* at *3–4. The Court disagreed. *Id.* at *4. The Court stated that a "contractually-based forum selection clause also covers tort claims . . . if the tort claims ultimately depend on the existence of a contractual relationship between the signatory parties." *Id.* (quoting *Magi XXI, Inc. v. Stato della Citta del Vaticano*, 714 F.3d 714, 724 (2d Cir. 2013)). The Court found that each of KYM's remaining claims were dependent upon the existence of the proposed merger between KYM and Literally Media. *Id.* at *5. Accordingly, in an opinion dated September 28, 2021, the Court dismissed the complaint under the doctrine of *forum non conveniens*. *Id.*

On January 21, 2021, prior to the dismissal of KYM's first complaint, KYM filed a second lawsuit against Defendants Ori Elraviv, Mindad Inc. ("MIN"), and Mindad Digital LTD ("MID") in New York Supreme Court alleging seven causes of action: (1) fraudulent inducement or fraudulent misrepresentation, (2) negligent misrepresentation, (3) interference with contractual relationship, (4) intentional interference with prospective business advantage, (5) unjust enrichment, (6) declaratory relief under GBS § 130, and (7) declaratory relief under GBS § 133. *See generally* Compl. (NYSCEF No. 1). Defendant MIN is a wholly-owned subsidiary of Literally Media. *Id.* ¶ 10. In turn, Literally Media is a subsidiary of Defendant MID. *Id.* Defendant Elraviv is the CEO of Literally Media and MIN. *Id.* In this case, the Court dismissed KYM's complaint under the doctrine of *res judicata*. *Knowyourmeme.com Network, Inc. v. Elraviv*, 650667/2021, 2021 WL 5501355, at *1 (N.Y. Sup. Ct. Nov. 22, 2021). The Court held that although these Defendants were not present in the previous case, KYM already had a "full and fair opportunity to litigate" the forum selection clause issue because KYM's claims are "in sum and substance, the same claims asserted in the Prior Action." *Id.* Finally, as to the declaratory relief claims, which were not asserted in the first case, the Court held that KYM lacked standing because KYM's alleged harm was not caused by the Defendants' alleged violation of GBS § 130 or GBS § 133. *Id.* Accordingly, KYM's complaint was dismissed. *Id.* The Court stated that KYM may only litigate its claims in Israel. *Id.*

Travelers Cas. & Sur. Co. of Am. v. Erie Canal Harbor Dev. Corp.

803777-2013, 2019 WL 13099377 (N.Y. Sup. Ct. 2019)

Peter Klensch

Staff Member

On September 18, 2018, the Court granted Defendant-Respondent Erie Canal Harbor Development Corporation's ("Erie") motion for partial summary judgment against Plaintiff-Petitioner Travelers Casualty and Surety Company of America ("Travelers"), and its predecessor in interest DiPizio Construction Company, Inc. ("DiPizio"), for failure to comply with notice requirements specified in their Owner/Contractor Agreement ("Contract"). *Travelers Cas. & Sur. Co. of Am. v. Erie Canal Harbor Dev. Corp.*, 803777-2013, 2019 WL 13099377 at *1 (N.Y. Sup. Ct. 2019). In response, Travelers commenced this action to renew and reargue that motion. *Id.*

On April 25, 2012, Erie hired DiPizio to work as general contractor for Erie's Buffalo Inner Harbor Redevelopment Project ("Project"). *Id.* The Contract stipulated that DiPizio had to provide Erie with "specific notice for requests of extensions of time to complete work." *Id.* Specifically, §§ 3.4 and 3.5 of the Contract provided that if DiPizio expected delays, it had to explain in detail the issues threatening disruption to the Project, identify the contract milestones that would be affected, and estimate the delay's duration. *Id.* at *2. Erie argued that DiPizio failed to comply with the notice requirements for nine extension requests. *Id.* at *1. In this appeal, Travelers contested six of the nine requests. *Id.*

On its motion to reargue, Travelers made four contentions that the Court either "overlooked or misapprehended." *Id.* First, Travelers argued that "contemporaneous communications between the parties" are sufficient to meet actual or substantial compliance with § 3.4. *Id.* However, the Court determined that such correspondence did not meet the Contract's notice requirements. *Id.* at *2. While "various conditions" were discussed, Travelers did not lay out any of the specifics as required under § 3.4. *Id.* The Court also made it clear that even if the design changes were from Erie, Travelers should still know the specific contractual milestones and should have analyzed the effects of the changes. *Id.* Next, Travelers disputed that less rigorous notice provisions within the Contract should apply over § 3.4. *Id.* Expeditiously, the Court explained that because these arguments were not presented in the original motion, the party cannot bring forth a new claim on reargument. *Id.*

Third, Travelers contends that it was unaware of spalling concrete caused by an Erie design flaw until November 2013. *Id.* In response, Erie argued that a witness testified that he was aware of the spalling concrete issue as early as July or August 2013. *Id.* Thus, Travelers alerting Erie of the problem in November was too late. *Id.* Although an issue of fact could exist as to when Travelers knew of the issue, the Court denied Traveler's reargument motion because the party failed to adequately communicate the specific details of the issue in November, as required by § 3.4. *Id.*

In its final contention for reargument, Travelers claimed that it "was under no legal duty to provide notice to [Erie] of delays suffered by DiPizio." *Id.* at *1. In a September 2013 Takeover Agreement, the parties agreed that Travelers "reserved the right" to provide Erie with notice regarding "previous denials of time extensions [that] caused additional delays" or improper termination of DiPizio. *Id.* at *3. In the original motion, the Court excluded such arguments from its determination that Travelers failed to comply with the notice requirements. *Id.* Because the September 2018 order granted Erie's motion in full without consideration of such contentions, the Court denied Erie's "motion for summary judgment to limit Travelers' arguments concerning improper termination." *Id.*

On its motion to renew, Travelers needed to "demonstrate that there has been a change in the law that would change the prior determination." N.Y. C.P.L.R. § 2221(e)(2). In support of its motion, Travelers contended that the Appellate Division, First Department's decision in *Danco Elec. Contractors, Inc. v. Dormitory Auth. of State* sets forth new precedent "that would change the [C]ourt's determination." *Id.* at *2. However, the Court did not find that *Danco* changed the law because its central holding used near identical language to previous cases and the Second Restatement of Contracts § 229. *Id.* Additionally, the Court held that the facts between *Danco* and the case at hand were distinguishable. *Id.* Specifically, *Danco* had to do with the verification of statements made by the plaintiff, while this case centered around the submission of "timely and adequate notice" in line with the Contract's notice requirements for time extensions. *Id.*

Thus, the Court denied three of Travelers' contentions on the motion to reargue, but denied Erie's motion for summary judgment limiting Travelers' arguments regarding improper termination. *Id.* The Court also denied Travelers' motion to renew. *Id.*

Roxx Alison Ltd v. Shutle Inc.,

656596/2019, 2021 WL 5471130 (N.Y. Sup. Ct. 2021)

Kimberly Lee

Staff Member

Plaintiff, Roxx Alison LTD, commenced an action against Shutle, Inc., ("Shutle"), Spectrum by Roxx Ltd ("Spectrum"), and Egor Israelov ("Israelov") in New York County. *Roxx Alison Ltd v. Shutle Inc*., 656596/2019, 2021 WL 5471130, at *1 (N.Y. Sup. Ct. 2021). Plaintiff brought several causes of action against Defendants; however, only the first, second, fifth, sixth, and ninth causes of actions are in dispute. *Id.* The first cause of action alleged unjust enrichment against Shutle and Israelov. *Id.* The second cause of action alleged conversion against Shutle and Israelov. *Id.* The fifth cause of action claims unjust enrichment against Israelov and Spectrum. *Id.* at *2. The sixth cause of action alleged conversion by Israelov and Spectrum. *Id.* Finally, the ninth cause of action alleged aiding and abetting a conversion by a non-party, Val Katayev. *Id.* Defendants collectively moved to dismiss these causes of actions and Plaintiff opposed the motion. *Id.* at *1. The Court granted the motion to dismiss the first and fifth causes of action; however, denied dismissing the second, sixth, and ninth cause of actions. *Id.* at *3.

Plaintiff was a wholesaler for diamonds and other jewelry. *Id.* at *1. Defendants, Shutle and Spectrum were jewelry manufacturers and sellers. *Id.* Defendant, Israelov was "a shareholder, director, officer, or employee of both Shutle and Spectrum." *Id.* Plaintiff hired Shutle and Spectrum to manufacture jewelry. *Id.* Plaintiff delivered pieces of jewelry and loose diamonds to Shutle and Spectrum. *Id.* Shutle "was to make molds and copies of [Plaintiff's] jewelry. . . mount the loose diamonds in pieces of jewelry and return any unused loose diamonds to plaintiff." *Id.* Similarly, Spectrum was to "copy the jewelry styles and mount the looks diamonds on the manufactured pieces." *Id.* Additionally, Plaintiff noted that there was a mutual understanding that Shutle and Spectrum were to return any loose diamonds and jewelry to Plaintiff. *Id.* However, neither Shutle nor Spectrum provided the models and molds nor returned the jewelry and loose diamonds to Plaintiff. *Id.* Further, Plaintiff alleged that Israelov "transferred some or all the jewelry, loose diamonds, models, and molds to himself, his other companies, or third parties, or that Shutle, [Spectrum], and Israelov continue to possess those items." *Id.* at *1–2. Finally, Israelov introduced Plaintiff to his brother-in-

law, Katayev who owned the company, Spectrum Blue, LLC. *Id.* at *2. Spectrum Blue provided Plaintiff with funding. In exchange, Plaintiff kept jewelry and loose diamonds in a safe at its office as collateral for its debt. *Id.* Only Israelov and one of Plaintiff's owners had access to the safe. *Id.* Plaintiff alleged that Israelov prevented Plaintiff's owner from accessing the safe and "either removed all the jewelry and loose diamonds and delivered them to Katayev or provided Katayev with access to [P]laintiff's safe, allowing Katayev to remove the jewelry and loose diamonds from the safe." *Id.* The amount removed from the safe was less than one-third of the debt owed to Spectrum Blue; however, Plaintiff never received any compensation for the portion that exceeded Plaintiff's debt. *Id.*

The first issue is whether the first and fifth causes of action for unjust enrichment should be dismissed because they are duplicative of the conversion claims. *Id.* at *3. Unjust enrichment claims are cases where "the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled." *Id.* Generally, these claims are not available when it "duplicates, or replaces, a conventional contract or tort claim." *Id.* (quoting *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (N.Y. 2012)). Here, the Court held that both the first and fifth causes of action were dismissed because they are "based on the same facts as the conversion claims." *Id.*

The second issue revolves around the conversion claims and whether Israelov can be individually responsible for these claims. *Id.* Defendants argued that Israelov cannot be individually liable for the conversion claims because "the compliant [did] not establish a cause of action against Israelov under a theory of veil piercing." *Id.* However, "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the corporate veil is pierced." *Id.* (quoting *Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 49 (N.Y. App. Div. 2012)). Additionally, "a director may be held individually liable to third parties for a corporate tort if he either participated in the tort or else directed, control, approved, or ratified the decision that led to the plaintiff's injury." *Id.* Here, Israelov may be held individually liable because the Court took the Plaintiff's allegations as true, and stated that Israelov personally participated in the tort and "[was] the controlling shareholder, director officer and/or employee of both Shutle and Spectrum." *Id.* Therefore, the second and sixth causes of actions were not dismissed. *Id.*

The final issue deals with the ninth cause of action and whether Israelov either directly converted Plaintiff's jewelry by taking them from the safe and giving them to Katayev or aided and abetted Katayev's conversion of the jewelry and loose diamonds by

providing Katayev with access to the safe. *Id.* Aiding and abetting conversion requires a plaintiff to prove "the existence of a conversion by the primary tortfeasor, actual knowledge, and substantial assistance." *Id.* (quoting *William Doyle Gallerien Stettner*, 167 A.D.3d 501, 505 (N.Y. App. Div. 2018)). At this point in the motion-to-dismiss stage it was unclear what Israelov's exact involvement was, which required a factual inquiry to determine more. *Id.* Therefore, the Court held that the ninth cause of action was not dismissed. *Id.*

ACM MCC VI LLC v. Able Liquidation Three

657261/2019, 2021 WL 5408071 (N.Y. Sup. Ct. 2021).

Chloe Lucatuorto

Staff Member

The Plaintiff in this case, ACM MCC VI LLC ("ACM"), commenced an action on December 6, 2019, against Defendant Able Liquidation Three ("Able"), Defendant Thomas Rossi, and Defendants John Does 1 to 5. *See generally* Complaint (NYSCEF No. 1). In the complaint, Plaintiff asserted five causes of action: "(1) breach of fiduciary duty and aiding and abetting breach of fiduciary duty; (2) breach of contract; (3) unjust enrichment; (4) conversion; and (5) an accounting." *ACM MCC VI LLC v. Able Liquidation Three*, 657261/2019, 2021 WL 5408071, at *1 (N.Y. Sup. Ct. 2021).

Plaintiff moved for default judgment against the Defendants on June 30, 2020. *See generally* Notice of Mot. for Default J. (NYSCEF No. 13). Plaintiff's motion for default was denied without prejudice. *ACM*, 2021 WL 5408071, at *1. There were two reasons given for its denial: (1) insufficient proof of facts; and (2) "lacked proof of additional service of the summons and complaint." *Id.* Plaintiff then moved for default judgment again, to which Defendants did not submit any opposition. *Id.*

Merchant Cash and Capital, LLC ("MCC") was a finance company whose business was proffering cash advances to merchants to obtain future revenue. *Id.* Defendants Able and Rossi were hired by MCC as collections agents to recover revenue from merchants who were in default. *Id.* Plaintiff ACM was a secured lender for the secured credit facility that oversaw collections on the revenue owed to MCC, the company Defendants were collection agents for. *Id.* When Defendants collected revenue on behalf of MCC, they were obligated to send that revenue over to Specialty Asset Servicing, LLC ("SAS"). *Id.*

In acting on behalf of Plaintiff ACM or MCC, Defendants entered into nine settlement agreements for which they collected $841,665. *Id.* However, Defendants only sent $34,000 of that amount to SAS, despite its obligation to send over the entirety of it. *Id.* Plaintiff alleges that this discrepancy in revenue sent to SAS is due to both Defendants furnishing revenue to its own investors and paying themselves a portion of it. *Id.*

For a default judgment to be entered, the Plaintiff needs to establish: (1) proof Defendant was served the summons and

complaint; (2) proof of the necessary facts to establish the asserted claim; and (3) that the Defendant defaulted. *Id.* at *2 (quoting CPLR 3215(f)). In terms of the evidence needed to satisfy these requirements, an affidavit from a person with personal knowledge of the contentions is sufficient evidence. *Id.* (quoting *Beltre v. Babu*, 32 A.D.3d 722, 723 (N.Y. App. Div. 2006)). Regarding proof of service, Plaintiff furnished two affidavits to show that Defendants Able and Rossi were delivered the summons and complaint to this suit on December 13, 2019. *Id.* Service of Able was made to Rossi, who was the registered agent designated by Able to receive such service. *Id.*

For a default judgment to be entered, the Plaintiff next needs to establish there is a sufficient factual basis for the asserted claims. *See id.* Breach of contract is established when the Plaintiff pleads to show that a contract existed, the Plaintiff performed under the contract, and the Defendant breached the contract. *Id.* at *2. Unjust enrichment is established when the Plaintiff pleads to show one party was enriched, at the expense of the other party, and "it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Id.* (quoting *Kramer v. Greene*, 142 A.D.3d 438, 442 (N.Y. App. Div. 2016)). Lastly, conversion is established when Plaintiff pleads that Plaintiff has a possessory right over personal property, Defendant interfered with that property, and Defendant's interference was "in derogation of" Plaintiff's right to it. *Id.*

Regarding proof of facts, Plaintiff relies on an affidavit and deposition testimony as evidence to establish prima facie cases were met for the causes of action for breach of contract, unjust enrichment, and conversion. *See id.* at *3. The deposition testimony Plaintiff relies upon was taken by Joseph R. Boninfante, who was a former employee of MCC and SAS. *Id.* Boninfante managed financial documents for MCC for five months in 2017, and he performed the same tasks for SAS for the rest of 2017 until September2018. *Id.* Boninfante prepared a spreadsheet when he worked for SAS that contained information pertaining to settlements the defendants negotiated. *Id.*

Boninfante testified that many transactions between MCC and Defendants for settlements were not documented in written agreements, but instead existed in emails. *Id.* One such settlement, which was for $300,000, did not go onto the spreadsheet. *Id.* Boninfante testified he did not discuss paying fees to Rossi for the settlements and that he was under the impression Rossi collected money and then forwarded it, as the funds should have been forwarded to Plaintiff, MCC, or SAS. *Id.* Boninfante also asserted "he would not have released a merchant from its obligation to MCC" unless MCC or SAS received the funds owed to MCC in accordance

with the agreed upon settlement. *Id.* Based on the testimony and affidavit establishing these facts, the Court deemed that the Plaintiff established the necessary facts to establish the claims of breach of contract, unjust enrichment, and conversion. *Id.*

Lastly, for a default judgment to be entered, Plaintiff needs to show the Defendant defaulted. *Id.* at *2. In this case, Plaintiffs demonstrated that the Defendants defaulted due to their failure to appear in the action in the necessary time frame, and so the Court entered a default judgment against Defendant Able. *Id.* at *3. However, the Court did not enter a default judgment against Defendant Rossi because Plaintiff did not comply with the statutory requirements of CPLR 3215(g)(3)(i). *Id.* In accordance with this statute, the Plaintiff needs to give Defendant Rossi, as a natural person, additional notice twenty days before entry of a default judgment by mailing the summons to Rossi at his residence. *Id.* Thus, the Court granted Plaintiff's motion for entry of default judgment against Defendant Able, and the Court denied without prejudice Plaintiff's motion for entry of default judgment against Rossi. *Id.* at *4.

Nat'l Credit Union Admin. Bd. v. Ahmed

657142/2020, 2021 WL 5408151(N.Y. Sup. Ct. 2021)

Joseph Mottola

Staff Member

On December 18, 2020, Plaintiff National Credit Union Administration Board ("NCUA"), acting as liquidating agent for First Jersey Credit Union ("First Jersey"), commenced an action against Defendant, Shahzad Ahmed ("Ahmed") to recover on a promissory note following Defendant's default. *See Nat'l Credit Union Admin. Bd. v. Ahmed*, 2021 WL 5408151 at *1–2 (N.Y. Sup. Ct. 2021). In the complaint, NCUA asserted five causes of action: (1) breach of contract; (2) an account stated; (3) unjust enrichment; (4) replevin; and (5) attorney's fees, costs, and disbursements. Compl. at ¶¶ 14–37 (NYSCEF No. 2). After Ahmed failed to respond to the Complaint, on September 13, 2021, NCUA moved for default judgment on the breach of contract and replevin claims, waiving its other causes of action upon the entry of a judgment in its favor. Affirmation in Supp. of Pl.'s Mot. for a Default J. at ¶¶ 3, 7. Ahmed submitted no opposition to this motion, and on November 16, 2021, the Court granted the motion and entered a judgment in favor of NCUA for the entirety of the sum due under the promissory note plus accrued interest. *Nat'l Credit Union Admin. Bd*, 2021 WL 5408151 at *1, 3–4.

In May 2013, Ahmed executed a promissory note in favor of First Jersey for $800,800.00 with interest of 3.40% payable per year. *Id.* at *1. Ahmed also executed a security agreement pledging as collateral his interest in a New York City Taxi Medallion, along with taxicab vehicles, meters, and other property connected with his operation of taxicabs. *Id.* Under the terms of the note, Ahmed agreed to pay the interest and principal in consecutive installments until the maturity date on June 1, 2016, at which time the unpaid balance on the note was due in full. *Id.* The note and security agreement specified that a default would result from any failure to pay an installment of principal or interest. *Id.* at *2. In the event of default, the note and security agreement specified that First Jersey would have the right to take possession of, sell, or assign Ahmed's collateral. *Id.* Ahmed also agreed to be held liable for attorney's fees and other enforcement costs incurred by the lender in the event of a default. *Id.*

Ahmed executed a loan extension agreement on December 23, 2016, extending the maturity date of the note to November 1, 2017, at which time the unpaid principal and accrued interest on the

loan would be due. *Id.* at *3. At this time, the unpaid principal balance was approximately $742,726.88. *Id.* On November 1, 2017, Ahmed failed to make the required payment and defaulted on the loan. *Id.* On February 28, 2018, First Jersey was liquidated by the New Jersey Department of Banking and Insurance due to insolvency.[1] NCUA was appointed as liquidating agent, acquiring all of First Jersey's rights and privileges. Compl. at ¶ 1 (NYSCEF No. 2). On behalf of First Jersey, NCUA notified Ahmed of his default and its intent to foreclose on December 7, 2020. *Nat'l Credit Union Admin. Bd.*, 2021 WL 5408151 at *3. Ahmed failed to respond. *Id.*

In holding for NCUA, the Court found that NCUA had met its burden of providing proof of service of the summons and complaint. *Id.* NCUA served Ahmed under CPLR 308(2) "by delivering the summons and complaint to his nephew…" and then mailing the pleadings to Defendant's "usual place of abode." *Id*. The Court then found that NCUA had adequately pled its cause of action for breach of contract by submitting evidence of the existence of the contract, NCUA's performance, and Ahmed's breach of contract and damages, thus "establish[ing] the merits of [the breach of contract] claim". *Id.* In granting judgment for the NCUA's cause of action for replevin, the Court found that NCUA adequately demonstrated that it was lawfully entitled to the property Ahmed pledged as security through its filing of a UCC-1 statement, perfecting this interest, and that Ahmed had unlawfully withheld the collateral following default. *Id.* This therefore established NCUA's "right to possession and delivery of the collateral described in the security agreement and the UCC-1 statement." *Id*.

The Court ultimately entered a judgment in favor of NCUA in the sum of $693,490.06. *Id.* at *4. The Court ordered NCUA to serve Ahmed with a copy of the order within twenty days of entry and ordered Ahmed to deliver the collateral pledged under the security agreement to NCUA within twenty days of receipt of the order. *Id.*

[1] This information was not in the Complaint or Opinion but was important to provide context. *See First Jersey Credit Union Closes; USALLIANCE Assumes Shares and Loans*, NAT'L CREDIT UNION ADMIN. (Feb. 28, 2018), https://www.ncua.gov/newsroom/news/2018/first-jersey-credit-union-closes-usalliance-assumes-shares-and-loans.

Forest Rd. Co. LLC v Garbo Holdings LLC,

651477/2021 2021 WL 5272402 (N.Y. Sup. Ct. 2021)

Matthew Pate

Staff Member

The Forest Road Company LLC ("Plaintiff") brought suit against Garbo Holdings LLC, Vitality Visual Effects LLC, David Glenn Strause, and Linda Liddell Strause (collectively "Defendants") seeking enforcement of a personal guarantee of a promissory note. *Forest Rd. Co. LLC v Garbo Holdings LLC,* 651477/2021 2021 WL 5272402 at *1 (N.Y. Sup. Ct. 2021). Plaintiff moved for default judgment against the Defendant. *Id*. Judge Robert R. Reed of the New York County Supreme Court granted Plaintiff's motion for default judgment and held the Defendant liable for a total of $1,396,061 for principal and interest incurred through May 12, 2021, plus contractual interest for dates May 13, 2021 through November 10, 2021, and costs so long as the Plaintiff filed proper proof of reasonable attorneys' fees within sixty days of the date of the Order. *Id.* at *4.

Plaintiff contracted with Skyline, who was not a party to this lawsuit, to loan $1,000,000 in exchange for repayment in the amount of 114% interest on the maturity date of the loan, plus default interest should Skyline fail to pay on the maturity date. *Id*. at *1. Defendants guaranteed for the benefit of Skyline for the entirety of this loan thereafter. *Id*. at *2. Shani, an authorized agent for Plaintiff stated in an affidavit that Plaintiff advanced $1,000,000 on these terms and that as of November 12, 2020, Skyline never made any payments. *Id.* at *3. Despite being served with the Summons and Complaint on March 16, 2021, and being served with this motion on June 22, 2021, Defendants never responded in any way to the Plaintiff. *Id.* at *3.

First, the Court found that complied fully with the governing procedural requirements. *See Id.* CPLR 3215(f) states that "an application for a default judgment must be supported with proof of service of the summons and the complaint[,] proof of the facts constituting the claim, [and] the default." *Id.* (internal quotation marks omitted). Plaintiff satisfied this requirement through affidavits of service of the summons, complaint, and motion for default judgment, as well as through affidavits from Shani, agent for Plaintiff, which served as proof of the facts constituting the claim and the default. *See id.* at *3-4. Furthermore, under 50 U.S.C. § 3931, "a plaintiff moving for entry of a default judgment must furnish proof that the defendant is not active in the military," and

Plaintiff proved this procedural requirement was satisfied through an affidavit from the process server that stated Defendant told the process server that Defendant was not active in the military. *Id.* at *3.

Next, the Court found that Plaintiff prevailed on the merits of the case. *Id*. Under New York Law, "a party seeking to enforce a written guarantee need only prove an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." *Id*. (quoting *Gansevoort 69 Realty LLC v. Laba*, 130 A.D.3d 521, 521 (N.Y. App. Div. 2015)). Furthermore, facially clear and unambiguous guarantees that are absolute and unconditional conclusively bind parties to the terms absent fraud, duress, or other wrongful act in inducement. *Id*. at *3 (citing *Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 A.D.3d 444, 446-447 (N.Y. App. Div. 2012)). Here, both rules were satisfied by Shani's affidavit, which stated the Plaintiff advanced $1,000,000 to Skyline for the aforementioned terms of payment, no payments were made, Defendant never responded to pleadings, and that a total of $1,396,061 in principal and interest had accrued by May 19, 2021. *Id*. at **3-4.

The Court thus ordered the Defendant to pay a total of $1,396,061 for principal and interest incurred through May 12, 2021, plus contractual interest for dates May 13, 2021 through November 10, 2021, and costs so long as the Plaintiff filed proper proof of reasonable attorneys' fees within sixty days of the date of the Order. *Id.* at *4.

Tina Turner Musical LLC v. Chubb Ins. Co. of Europe SE,

651607/2021, 2021 WL 5818352 (N.Y. Sup. Ct. 2021)

Kassandra Pugliese

Staff Member

On March 10, 2021, Tina Turner Musical LLC ("TTM") brought this litigation against Chubb Insurance Company of Europe SE ("Chubb") on the grounds of breach of contract. *Tina Turner Musical LLC v. Chubb Ins. Co. of Europe SE*, 651607/2021, 2021 WL 5818352 (N.Y. Sup. Ct. 2021); (NYSCEF No. 02). Chubb filed a motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7), based on documentary evidence and failure to state a cause of action, respectively. (NYSCEF No. 35, at 1). TTM is the company responsible for producing the Broadway musical: Tina The Tina Turner Musical, in which it had performances at the Lunt-Fontanne Theatre in New York City. (NYSCEF No. 2, at ¶ 1). Chubb was the insurer that provided TTM with their event cancelation insurance coverage. *Id.* at ¶ 15.

Chubb and TTM entered into their event cancellation policy ("The Policy") on July 10, 2019, in which coverage was effective from July 24, 2019, to October 13, 2020. *Id.* On March 16, 2020, TTM provided a notice of claim regarding their losses because of the New York State and City COVID-19 shutdown orders. *Id.* at ¶ 29. As a result of the quarantine orders, TTM had cancelled all future showings, and thus believed that coverage under The Policy was triggered and filed an insurance claim with Chubb. *Id.* ¶¶ 29–30. TTM believed that their closure losses were covered under The Policy's language in which the theaters closure was the "[i]nsured's business [being] interrupted by result of civil authority." *Id.* at ¶ 30.

Chubb however denied coverage to TTM pointing to The Policy's exclusion of coverage for the following:

> 7.21 -- any communicable disease or threat or fear of communicable disease (whether actual or perceived) which leads to: 7.21.1 -- the imposition of quarantine or restriction in movement of people or animals by any national or international body or agency 7.21.2 -- any travel advisory or warning being issued by a national or international body or agency.

Tina Turner Musical LLC, 2021 WL 5818352, at *1–2 (quoting NYSCEF Doc. No. 8, § 7). Chubb denied TTM's claim on April 2, 2020, and TTM responded that day that the denial of their claim

was incorrect and alleged that Chubb did not investigate the merits of their claim. (NYSCEF No. 2. at ¶¶ 32–33). Further, when TTM tried to reason that their theater closure was due to a state and local order not a national government closure order, Chubb pivoted and offered a different explanation for the refusal of their coverage. *Id.* at ¶¶ 34–38. Chubb asserted that the fear of COVID-19 itself, a communicable disease, was enough to satisfy the communicable disease exclusion and that merely having a national or international quarantine advisory in relation to said communicable disease sufficed the exclusion. (NYSCEF No. 35 at 14-15). Chubb stated in its motion to dismiss that The Policy did not state that the national or international quarantine needed to directly cause the closure of the insured, and that is why the communicable disease exclusion applies. *Id.* at 15.

The Court however agreed with TTM's reading of The Policy, that for the communicable disease exclusion to apply, an international or national order would have needed to be the direct reason for the closure. *Id.* at *1. Thus, on December 6, 2021, the Court denied Chubb's motion to dismiss under both CPLR 3211(a)(7) and (a)(1). *Id.* Further, the Court stated that TTM had adequately pled their claim "because [The] [P]olicy exclusion was for restrictions imposed by national or international body or agency and not state government which [was] what caused loss." *Id.*

Cowley Holdings Servs. Inc. v. Prodigy Network, LLC

652617/2020, 2021 WL 5272424 (N.Y. Sup. Ct 2021)

Ezra Rash

Staff Member

Plaintiffs Cowley Holdings Services Inc., Jailineli Ltd., Excel Group Corporation, Alapaha View Ltd. and Sharina Mobin Chowdhury (collectively, "Plaintiffs") first commenced an action in New York County alleging "breach of contract, conversion, fraud and unjust enrichment" against Prodigy Network, LLC ("Prodigy"). *Cowley Holdings Servs. Inc. v. Prodigy Network, LLC*, 652617/2020, 2021 WL 5272424, at *2 (N.Y. Sup. Ct 2021). This complaint was amended to add Defendants 85 W Broadway NewCo, Inc. ("NewCo"), Prodigy Sherwood Master REP Fund, LLC ("Shorewood Master"), Prodigy Shorewood Investment Management LLC and Prodigy Shorewood New York Fund, LP ("Shorewood"). *Id.* at *1*2.

In the motion before the Court, Plaintiffs sought a default judgment against Prodigy, NewCo, and Shorewood Master. *Id.* at *1. On November 10, 2021, the Court denied the Plaintiffs' motion for default judgment "without prejudice to renewal" because the Plaintiffs' failed to support the application "by either an affidavit of a person with knowledge, or a verified complaint." *Id.* at *3.

Plaintiffs made real estate investments in a hotel project ("the Project") at 85 West Broadway, New York, New York. *Id.* at *1. Prodigy led the Project, forming NewCo to accept foreign investments. *Id.* In "Side Letter Agreements" executed by Prodigy and Plaintiffs, Prodigy "agreed to provide [P]laintiffs with the right to voluntarily redeem their investments." *Id.* at *2. Later, Plaintiffs learned that the Project was experiencing "financial difficulties," as were other projects under Prodigy's control. *Id.* Plaintiffs then sought to redeem their investments per the Side Letter Agreements, but were informed that Prodigy Shorewood Domestic Feeder REP Fund, LLC, Shorewood and NewCo did not have funds for the redemption request. *Id.*

Subsequently, Plaintiffs filed a complaint with the Court. *Id.* On July 7, 2020, according to an affidavit of service, Plaintiffs served Prodigy. *Id.* at *3. The summons and complaint were personally delivered to an "intake specialist," Sean Ohara. *Id.* On October 9, 2020, according to two affidavits of service, Plaintiffs served NewCo and Shorewood Master by personal delivery of the summons and complaint to Kamesha James and "the deponent knew said corporation so served to be the corporation described, and knew

said individual to be *Authorized* thereof." *Id.* (emphasis in original). There were two questions before the Court: (1) a procedural question of whether Plaintiffs properly supported their application for a default judgment pursuant to CPLR 311 and CPLR 311-a; and (2) whether the motion survived on the merits under CPLR 3215 (f). *See id.*

First, pursuant to CPLR 311-a, personal service on a foreign corporation must be made by delivering the summons "to an officer, director, managing or general agent, or cashier or assistant cashier or to any agent authorized by appointment or by law to receive service." *Id.* The Court noted that "strict compliance is required to obtain jurisdiction over a corporation or limited liability company." *Id.* at *3 (citing *Persaud v. Teaneck Nursing Ctr.*, 290 A.D.2d 350, 351 (N.Y. App. Div. 2002)).

The Court found that the service of process on Prodigy was insufficient. *Id.* The intake specialist Sean Ohara was not identified in the affidavit as "a member, manager or an agent authorized to accept service for Prodigy." *Id.* Therefore, the affidavit was insufficient to prove proper service of process on Prodigy. *See id.* However, the Court found that the affidavits detailing service of process on NewCo and Shorewood Master were in accordance with CPLR 311 and CPLR 311-a. *Id.*

Second, according to CPLR 3215 (f), plaintiffs seeking a default judgment must provide "proof of service of the summons and the complaint, proof of the facts constituting the claim, [and] the default." *Id.* at *2. Moreover, the courts noted, "an 'application for default must be supported by either an affidavit of a person with knowledge, or a verified complaint." *Id.* (quoting *Ostroy v. Six Sq. LLC*, 74 A.D.3d 693, 693 (N.Y. App. Div. 2010)). In this case, the Court found the application for default was "deficient" on the merits for three reasons. *Id.* First, Plaintiffs did not submit a copy of the complaint of the amended complaint that had been verified by a person with knowledge. *Id.* Second, Plaintiffs also failed to submit an affidavit from a person with personal knowledge. *Id.* (citing *Mejia-Ortiz v. Inoa*, 71 A.D.3d 517, 517 (N.Y. App. Div. 2010)). Finally, the only Side Letter Agreement submitted to the Court was the one executed by Cowley Holdings Services—the Side Letter Agreements executed by other Plaintiffs were not provided. *Id.*

In conclusion, the Court denied the Plaintiffs' motion for a default judgment on the complaint alleging breach of contract, conversion, fraud and unjust enrichment. *Id.* The Court denied the motion because it was not supported by either an affidavit from a person with knowledge, or by a verified complaint. *Id.* at *3.

Bright & Prudent Invs. Ltd. v. Horowitz,

651291/2020, 2021 WL 5272439 (N.Y. Sup. Ct. 2021).

Astrid Roe

Staff Member

Plaintiff Bright & Prudent Investments Limited ("Plaintiff") commenced an action to enforce a personal guaranty against Defendants Kenneth Horowitz ("Horowitz") and Ping Kei Wilson Chan ("Chan") (collectively "Defendants"). *See generally*, *Bright & Prudent Invs. Ltd. v. Horowitz*, 651291/2020, 2021 WL 5272439, at *1 (N.Y. Sup. Ct. 2021). The complaint alleged claims for breach of contract, unjust enrichment, and an account stated. *Id.* Plaintiff was awarded summary judgment against Horowitz on Plaintiff's causes of action for breach of contract and account stated. *Id.* Plaintiff then moved for leave to enter a default judgment against Chan. *Id.* The Court granted Plaintiff's motion, entering a judgment in favor of Plaintiff because it had shown proper service of its summons and complaint upon Chan and submitted evidence supporting the merits of its claim. *Id.* at **2–3.

On October 26, 2017, Plaintiff entered into a loan agreement ("Agreement") with nonparty Bag Studio LLC ("Bag Studio"). *Id.* at *1. Per the terms of the Agreement, Plaintiff loaned Bag Studio $250,000, with 8% interest accruing per year. *Id.* Bag Studio agreed to pay Plaintiff the principal in monthly installments until October 26, 2020, when Bag Studio would pay the interest and the remaining principal in full. *Id.* Bag Studio would also be responsible for a late charge of $160 for every monthly payment that was more than seven days late. *Id.* Defendants "unconditionally guaranteed Bag Studio's obligations under the Agreement." *Id.* On December 12, 2019, Bag Studio failed to pay any of the principal and late charges as per the Agreement. *Id.* at *1, *2. Plaintiff immediately accelerated the loan and subsequently brought this action against Defendants. *Id.*

Under CPLR 3215(f), for a plaintiff to succeed in an application for default judgment against a defendant, it must show "proof of service of the summons and the complaint, proof of the facts constituting the claim, and the default." *Id.* at *1 (quoting N.Y. C.P.L.R. 3215(f) (McKinney 2019)).

The Court began by evaluating the service of the summons and complaint upon Chan. *Bright & Prudent Invs. Ltd.*, 2021 WL 5272439 at *2. CPLR 313 allows a plaintiff to use all forms of service available under the CPLR upon a defendant who is located in a foreign territory and subject to the jurisdiction of the courts of New York. *Id.* (citing N.Y. C.P.L.R. 313 (McKinney 1962)). Here,

because Chan was a resident of Hong Kong, service of process was performed in accordance with the Hauge Convention. *See Bright & Prudent Invs. Ltd.*, 2021 WL 5272439 at *2; *see also* Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361. Plaintiff produced an affirmation of service from the Bailiffs' Assistant of the High Court of Hong Kong, stating that the summons and complaint was personally served upon Chan at the Bailiff Office in the Kwun Tong Law Courts Building in Kowloon, China. *Bright & Prudent Invs. Ltd.*, 2021 WL 5272439 at *2. Additionally, Plaintiff provided proof that additional notice of the summons and complaint had been served to Chan at his place of employment. *Id*. The Court concluded, based on the evidence, that service of process upon Chan was proper. *Id.*

The Court next turned to the merits of Plaintiff's breach of contract claim. *Id.* To prove a claim for breach of contract, a plaintiff must show "the existence of a contract, the plaintiff's performance, the defendant's breach, and damages." *Id.* In the case of a written guaranty, the plaintiff must prove "an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." *Id.* (quoting *Gansevoort 69 Realty LLC v. Laba*, 12 N.Y.S.3d 543, 543 (N.Y. 2015)).

To prove the merits of its claim, the Plaintiff submitted a copy of the Agreement and an affirmation from Plaintiff's owner, Ying Kit Mak ("Affirmation"). *Id.* The Agreement provided that Chan unconditionally guaranteed all obligations of Bag Studio under the Agreement. *Id.* In a "Notice to Co-Signer" accompanying the Agreement, "Chan [further] agreed to guarantee Bag Studio's debt" and gave Plaintiff the right to collect the debt from Chan before trying to collect from Bag Studio. *Id.* The Affirmation stated that while Bag Studio consistently sent Plaintiff interest payments, it failed to pay back any of the principal and had eleven instances of outstanding late fees. *Id.* The Court determined that the evidence provided in the Agreement and Affirmation was sufficient to prove the merits of Plaintiff's claim for breach of contract. *Id.*

Because the Court found that service of process upon Chan was proper and Plaintiff was able to prove the merits of its claim, the Court granted Plaintiff's motion for leave to enter a default judgment against Chan. *Id.* at *3. Furthermore, the Court ordered a judgment be entered against Chan in the amount of $251,760 with a statutory interest rate commencing December 26, 2019, together with costs and disbursements. *Id.*

Rosenthal & Rosenthal, Inc. v. Brody

51060/2021, 2021 WL 5272453 (N.Y. Sup. Ct. 2021)

Alexa Schimp

Staff Member

Rosenthal & Rosenthal, Inc. ("Plaintiff") commenced an action against Defendant, Gary Brody ("Defendant") on February 12, 2021, in the New York County Supreme Court, seeking indemnification pursuant to a Guarantee and a Factoring Agreement ("Agreement") entered into by the parties. *Rosenthal & Rosenthal, Inc. v. Brody*, 51060/2021, 2021 WL 5272453, at *1 (N.Y. Sup. Ct. 2021). Plaintiff sought $1 million in damages, which was the maximum amount under the Guarantee, for the default of the non-party, Marcraft Clothing, Inc.'s ("Marcraft"), under the Agreement entered into by Plaintiff and Marcraft and guaranteed for by the Defendant. *Id.* Plaintiff served Defendant the Summons and Complaint pursuant to CPLR 308(4) three times and pursuant to CPLR 3215(g)(3)(i) once. *Id.* at *2. Defendant failed to appear in the action. *Id.* Plaintiff moved for entry of a default judgment against Defendant. *Id.* at *1. For the reasons set forth below, the Court granted Plaintiff's motion for a default judgment and issued an order directing Defendant to pay Plaintiff $1,000,000.00 with interest. *Id.*

Marcraft, a clothing wholesaler, entered into the Agreement with Plaintiff on May 15, 2017. *Id.* at *1. Pursuant to the Agreement, Plaintiff agreed to advance funds to Marcraft in exchange for accounts receivable which Marcraft would be liable for regardless of the amount Plaintiff collected on it. *Id.* To induce Plaintiff to enter into the Agreement, Defendant executed the Guarantee and guaranteed "irrevocably, absolutely and unconditionally" to pay Plaintiff should Defendant defaults on its obligations. *Id.* Defendant also promised to "indemnify Rosenthal against any loss, damage, or liability because of wrongful acts or fraud of the Obligor [Marcraft]." *Id.* Additionally, the indemnification provision had a cap of $1 million. *Id.* Marcraft defaulted in its performance of its obligations under the Agreement in 2020, which prompted the commencement of this action, and Defendant's failure to respond prompted the entry for a default judgment. *Id.*

The Court found that Plaintiff met its procedural burden under CPLR 3215 for a default judgment. *Id.* Plaintiff submitted to the Court three affidavits describing its service on February 18, 2021, on February 27, 2021, and on March 1, 2021, to Defendant's

two residences. *Id.* at *2. The Court held Plaintiff satisfied its burden by sending an additional service on June 3, 2021, with the copies of the previous summons and complaints to both residences. *Id.* at *2. The Court reasoned that, consistent with CPLR 3125(f), Plaintiff demonstrated the default judgment was supported by proof of service, the facts supporting the claim, and the default. *Id.* at *1.

As to the merits of Plaintiff's claim, the Court reasoned that Plaintiff had to prove only "'an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty.'" *Id.* at *2 (quoting *Gansevoort 69 Realty LLC v. Laba,* 130 A.D.3d 521, 521 (N.Y. App. Div. 2015)). The Court held Plaintiff proved the merits through its affidavit of Spagnuolo, Plaintiff's Vice President, that Marcraft defaulted on its obligations under the Agreement, and that Plaintiff served Defendant timely notice of the default on January 26, 2021. *Id.* At the time of default, Plaintiff demanded by letter the full $1 million amount be paid, but Defendant made no payment. *Id.* Through Spagnuolo's affidavit, Plaintiff has claimed to have collected and liquidated Marcraft collateral and will continue to do so until the payment is met. *Id.* The Court consequently entered default judgment in favor of Plaintiff against Defendant for the $1 million payment amount. *Id.*

Sinderbrand v. Wells Fargo Advisors, LLC

656129/2019, 2021 WL 5272481 (N.Y. Sup. Ct. 2021)

Jagjot Singh

Staff Member

In *Sinderbrand v. Wells Fargo Advisors, LLC*, the Petitioner was Gary Sinderbrand ("Petitioner Sinderbrand") and the Respondents were Steven Sinderbrand ("Respondent Sinderbrand") and Wells Fargo Advisors, LLC ("WFA"). *See generally* 656129/2019, 2021 WL 5272481 (N.Y. Sup. Ct. 2021). Petitioner Sinderbrand filed claims in the Superior Court of New Jersey in September 2016 against Respondent Sinderbrand for defamation and tortious interference with prospective economic advantage. (NYSCEF No. 3, p. 2). In April 2017, Petitioner Sinderbrand filed different claims in New York against Respondent Sinderbrand and WFA for defamation and breach of a settlement agreement. *Id.* On May 19, 2017, WFA moved to compel arbitration in the New York action, "arguing that all claims between the parties must be brought before FINRA." *Id.* Following an unfavorable decision in arbitration, Petitioner Sinderbrand sought to vacate the award in the Supreme Court of New York County on October 10, 2019. (NYSCEF No. 1, p. 1).

Petitioner Sinderbrand and Respondent Sinderbrand are brothers who worked as financial advisors at WFA as equal partners. (NYSCEF No. 3, p. 1). Petitioner Sinderbrand took a two-year sabbatical from WFA in 2013. *Id.* Respondent Sinderbrand verbally agreed to compensate Petitioner Sinderbrand during this time away because Respondent Sinderbrand would be receiving the full compensation that the business generated. *Id.* Respondent Sinderbrand stopped paying Petitioner Sinderbrand in 2015 and breached the verbal agreement. *Id.* Petitioner Sinderbrand tried to return to WFA but Respondent Sinderbrand allegedly defamed Petitioner Sinderbrand to WFA, which led to WFA not re-hiring Petitioner Sinderbrand. *Id.* at 1–2. Petitioner Sinderbrand claimed a loss of "$925,000 in deferred compensation by the failure to be re-hired by WFA in addition to the loss of his job and income." *Id.* at 2. Petitioner Sinderbrand also owed $1.5 million to WFA "on a promissory note that became due upon" WFA's decision to not re-hire Petitioner Sinderbrand. *Id.* After receiving a third-party subpoena in the New Jersey action, WFA sent Petitioner Sinderbrand a data disc that mistakenly included personal information that violated the privacy of thousands of customers and financial advisors, which constituted a data breach. *Id.* Petitioner

Sinderbrand claimed that WFA misrepresented and failed to properly report this data breach to FINRA. *Id.* at 3. WFA submitted a counterclaim against Petitioner Sinderbrand for a violation under FINRA Rule 2010 for improperly disclosing the data breach to the New York Times. *Id.* at 7. On June 20, 2019, Petitioner Sinderbrand moved to compel a viewing of the data disc by the arbitration panel, but this motion was denied without explanation. *Id.* at 11. The arbitration panel eventually entered an award that was favorable to WFA. *Id.* at 12.

Petitioner Sinderbrand sought to vacate the award, arguing that the arbitration panel engaged in misconduct by refusing to hear material evidence. (NYSCEF No. 1, p. 1). Specifically, the panel refused to allow discovery for two new causes of action compelled into the case by the Superior Court of New Jersey and did not allow Petitioner Sinderbrand to show the data disc to the panel, which would have proven that WFA failed to properly disclose the data breach to FINRA. *Id.* Petitioner Sinderbrand argued that the arbitration award was a product of fraud and the panel wrongfully ignored the relevant law on previously issued injunctions. *Id.* at 1–2.

The Supreme Court of New York County stated that "judicial review of arbitration awards under the FAA is 'extremely limited' and an award will be upheld if there is even 'a barely colorable justification' for the result, regardless of any errors of law or fact committed by the arbitrators." *Sinderbrand*, 2021 WL 5272481, at *1 (citing *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479–80 (N.Y. 2006); *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 73 A.D.3d 497, 498 (N.Y. App. Div. 2010)). Ultimately, the Court held that Petitioner Sinderbrand's arguments for vacating the arbitration award failed because they either misstated the law or had already been raised at arbitration and were therefore barred. *Id.*

With respect to Petitioner Sinderbrand's argument that the panel had refused to hear material evidence, the Court held that the FAA does not require the panel to look into every piece of evidence. *Id.* Furthermore, the Court held that the panel had not disregarded relevant law. *Id.* at *2. The Court stated that to vacate an award under this argument, a party must show that the arbitrators "(1) knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Id.* (citing *Wien*, 6 N.Y.3d at 481). The Court held that the law in question, FINRA Rule 13804, was not clearly applicable here. *Id.* Finally, the Court held that the award was not a product of fraud. *Id*. Although a WFA employee allegedly committed perjury on the

stand, the Court held that this argument was rejected in arbitration, and therefore, there was no proof of fraud. *Id.*

The Court denied and dismissed Petitioner Sinderbrand's motion to vacate the arbitration award and confirmed the award. *Id.*

Arco Acquisitions, LLC v. Tiffany Plaza LLC

607246-21 2021 WL 5184234 (N.Y. Sup. Ct. 2021)

Jessica Serviss

Staff Member

Arco Acquisitions, LLC (the "Purchaser") brought suit against Tiffany Plaza LLC and 1075 Farmingville LLC (the "Sellers") alleging fraud, aiding and abetting fraud, and piercing the corporate veil. *Arco Acquisitions, LLC v. Tiffany Plaza LLC*, 607246-21 2021 WL 5184234 at *1 (N.Y. Sup. Ct. 2021). In response, Sellers filed a motion to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), (7), and (10). *Id.* The Court granted the Sellers' motion and dismissed the complaint. *Id.* at *2.

On October 4, 2017, the parties entered into an agreement whereby Purchaser would receive a parcel of commercial real property from the Sellers in exchange for $10.5 million. *Id.* at *1. The Sellers provided the Purchaser with "tenant-estoppel certificates and a certified rent roll 'detailing all rents, security deposits, taxes and arrears if any per the leases.'" *Id.* The documents did not disclose that any tenants were in arrears; however, after closing on the property the Purchaser was made aware that two tenants could pay the monthly rent. *Id.* The Purchaser then filed this action claiming that the Sellers provided fraudulent rent roll and estoppel certificates; that the two tenants had been in arrears; and that the Sellers misrepresented the rent roll and obtained the false estoppel certificates so that they could inflate the rent roll and increase the property's value. *Id.*

The Court analogizes this case with *Danan Realty Corp. v. Harris*, whereby the Court of Appeals held that the plaintiff's fraud claim was "barred by its express disclaimer in the contract of any reliance on the specific representation…." *Id.* (referring to *Dannan Realty Corp. v. Harris*, 2 N.Y.2d 317 (N.Y. 1959)). The Court of Appeals has found that when parties to an agreement have expressly allocated risks, it shall not intrude into their contractual relationship. *Id.* (citing *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729 (2d Cir. 1984)). Furthermore, where the parties to a contract are "sophisticated business people" and the disclaimer clause is a product of negotiation between them, the specificity requirement is more relaxed. *Id.*

Both the Purchaser and the Sellers are sophisticated business people, and the purchase agreement was the result of negotiations between them. *Id.* The disclaimer language used in the contract specifically included "leases" and "tenancies." *Id.* Thus, the

language here is sufficient under *Dannan* to estop the Purchaser from claiming it entered into the agreement based on the Sellers' misrepresentations of the tenants in arrears. *Id.* The Purchaser had the means to determine the accuracy and truth of the Sellers' representations. *Id.* at *2. Therefore, the Court dismissed the Purchaser's allegation of fraud. *Id.*

The Court found that with the absence of a viable fraud claim, the second cause of action for aiding and abetting must also be dismissed. *Id.* Finally, piercing the corporate veil is not a legitimate cause of action, so such a claim must also be dismissed. *Id.*

JRAP Enters., Inc. v. Zucaro Constr., LLC

607796-20, 2021 WL 4768472 (N.Y. Sup. Ct. 2021)

Michael A. Solimani

Staff Member

Plaintiffs JRAP Enterprises, Inc. ("JRAP") and Joseph Rapaport (collectively, "Plaintiffs") commenced an action against Defendants Zucaro Construction, LLC ("ZCL") and Zucaro House Lifters, Inc. ("ZHL") (collectively, "Defendants") in Suffolk County on August 20, 2020. *See generally* Compl. (NYSCEF No. 6). The complaint alleged claims for breach of contract, breach of fiduciary duty, an accounting, breach of the implied covenant of good faith and fair dealing, quantum meruit, and unjust enrichment. *Id.* at ¶¶ 19–41. Defendants brought a motion to dismiss Plaintiffs' claims for breach of fiduciary duty, an accounting, and breach of the implied covenant of good faith and fair dealing, and Plaintiffs subsequently cross-moved to amend the complaint. *See JRAP Enters., Inc. v. Zucaro Constr., LLC*, 607796-20, 2021 WL 4768472, at *1 (N.Y. Sup. Ct. 2021). On October 7, 2021, the Court granted Defendants' motion to dismiss and denied Plaintiffs' cross-motion to amend the complaint. *Id.*

ZCL, "is a general contractor, which specializes in commercial construction in the City of New York and Long Island." Compl. at ¶ 6 (NYSCEF No. 6). After Hurricane Sandy devastated the tri-state area, the State of New York (the "State") altered building regulations to require that all buildings located in flood zones be raised a minimum of two feet above the ground. *Id.* at ¶ 10. To facilitate the raising of the affected buildings, the State created programs through which contractors could bid on contracts and subcontracts to "remov[e], lift[], and reconstruct[] homes in the flood zones." *Id.* at ¶ 11–13. To compete for these contracts, ZCL created a wholly owned subsidiary, ZHL, which would specialize in the work done under the programs administered by the State. *Id.* at ¶¶ 7–9. Defendants then contacted Plaintiffs, a New York-based construction consulting firm that advises customers on, amongst other things, house lifting. *Id.* at ¶¶ 5, 15. Plaintiffs allege that after Defendants approached them, the parties entered into a joint venture under which Plaintiffs were to receive "[ten percent] of the gross payments received by the [D]efendants" under the contracts and subcontracts in return for their assistance with Defendant's house lifting operations. *JRAP Enters., Inc.*, 2021 WL 4768472, at *1. Plaintiffs further allege that they "performed all services agreed to be performed . . . with respect to house lifting contracts and

subcontracts[,]" but have still not received compensation for over forty different subcontracts. Compl. at ¶ 18. In response, Defendants moved to dismiss Plaintiff's causes of action for breach of fiduciary duty, an accounting, and breach of the implied covenant of good faith and fair dealing. *JRAP Enters., Inc.*, 2021 WL 4768472, at *1. Plaintiffs did not oppose the dismissal of their claim for breach of the implied covenant of good faith and fair dealing but did cross-move for leave to amend the complaint. *Id.* at *2.

The Court first addressed Plaintiffs' claim for breach of fiduciary duty. *Id.* To establish a claim for breach of fiduciary duty, Plaintiffs needed to show the existence of a joint venture, which requires "a mutual promise or undertaking [between] the parties to share in the profits of the business and submit to the burden of making good the losses." *Id.* (citing *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 317 (N.Y. 1958)). In the absence of such an agreement, the parties have merely formed a contractual relationship, and "parties engaged in an arms-length business transaction are not fiduciaries." *JRAP Enters., Inc.*, 2021 WL 4768472, at *2 (citing *OppenheimerFunds, Inc. v. TD Bank N.A.*, 653299/2011, 2014 WL 514653, at *11 (N.Y. Sup. Ct. 2014)). Here, the Court found that the parties were not in a joint venture but merely a contractual relationship. *Id.* The Court explained that this was because Plaintiffs had only agreed "to accept the loss of being denied any compensation for the multitude of hours of uncompensated time and expenses incurred by them in performing the work" and not share the losses with Defendants as required by a joint venture. *Id*. at *1. Thus, because Plaintiffs could not show the existence of a joint venture, their claim for breach of fiduciary duty was dismissed. *Id.* at *2.

Next, the Court analyzed Plaintiffs' cause of action for an accounting. *Id.* In lieu of a finding that a fiduciary relationship exists between the parties, a plaintiff cannot bring forth a claim for an accounting. *Id.* (citing *Saunders v. AOL Time Warner, Inc.*, 18 A.D.3d 216, 217 (N.Y. App. Div. 2005)). Here, the Court dismissed Plaintiffs' claim for an accounting because the parties were only in contractual privity and not a fiduciary relationship. *Id.*

Lastly, the Court denied Plaintiffs leave to amend their complaint as the proposed amended complaint would not cure the original complaint's deficiencies. *Id.*