

**Convermat Corporation v JP Morgan Chase & Co.**

2006 NY Slip Op 30567(U)

December 7, 2006

Supreme Court, New York County

Docket Number: 107247/06

Judge: Herman Cahn

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SCANNED ON 12/14/2006  
SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: **HERMAN CAHN**  
*Justice*

PART 49

Index Number : 107247/2006

CONVERMAT

vs  
JP MORGAN CHASE

Sequence Number : 001

DISMISS ACTION

C

INDEX NO. \_\_\_\_\_

MOTION DATE 10/16/06

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

s motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DISPOSITION IN MOTION SEQUENCE .....**

**FILED**  
DEC 14 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/7/06 Herman Cahn  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

INDIVIDUAL IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X

CONVERMAT CORPORATION, FARZAD SHAHERY  
and SHAW SHAHERY,

Plaintiffs,

Index No. 107247/06

-against-

JP MORGAN CHASE & CO., CHASE INSURANCE  
AGENCY d/b/a CHASE/USI INSURANCE  
BROKERAGE AND CONSULTING, and LANCE  
REMBAR,

Defendants.

-----X

**HERMAN CAHN, J.:**

Defendants JP Morgan Chase & Co., Chase Insurance Agency  
d/b/a Chase/USI Insurance Brokerage and Consulting (collectively,  
JP Morgan Chase) and Lance Rembar (Rembar) move to dismiss the  
complaint based upon a defense founded upon documentary evidence,  
CPLR 3211 (a) (1).

FACTS

Individual plaintiffs Farzad Shahery and Shaw Shahery (the  
Shaherys) are the principals of the corporate plaintiff  
Convermat Corporation (Convermat). Plaintiffs enrolled in  
welfare benefits plan, through the sales efforts of Rembar, an  
employee of JP Morgan Chase, which provided life insurance  
coverage for the Shaherys. Convermat paid the premiums on the  
policy and claimed them as a tax deduction. The Shaherys did not

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report those premium payments as income on their individual returns. In 2003, the Internal Revenue Service audited their tax returns, and assessed the Shaherys additional taxes on the basis of imputed income for the premiums. The Shaherys were required to pay approximately \$500,000 in taxes. Plaintiffs maintain that Rembar and JP Morgan Chase had advised them that they would not have to report the premiums paid as income, and that they relied upon such advice, inasmuch as JP Morgan Chase had been advising them regarding financial matters concerning their business for many years.

Although the complaint states that plaintiffs purchased the plan from JP Morgan Chase, the documentary evidence as well as defendants' assertions establish that JP Morgan Chase was not the seller, but the agent. The benefits plan was offered by its sponsor, Designs for Finance. JP Morgan Chase introduced the plan to plaintiffs through Rembar. According to plaintiffs, Rembar suggested that plaintiffs get an opinion letter from the law firm Morritt, Hock, Hamoff & Horowitz, LLP (MHH&H), because it is a firm that deals with these types of issues. Plaintiffs contend that Rembar failed to advise them that MHH&H is the firm that wrote the opinion letter for the plan. Consequently, plaintiffs unknowingly obtained an opinion letter that was not a second opinion, but merely a reiteration of the plan's opinion letter.

Plaintiffs plead three causes of action in the complaint. The first is for fraud and misrepresentation; the second is for deceptive acts in violation of General Business Law § 349, in which plaintiffs seek treble damages; and the third is for unjust enrichment.

#### DISCUSSION

##### Fraud and Misrepresentation

Defendants contend that plaintiffs' claim for fraud and misrepresentation must be dismissed because plaintiffs signed documents with specific disclaimers that destroy any claim of reasonable reliance on defendants' alleged representations. Defendants point out that the disclaimers state that the buyers relied on their own knowledge, experience and judgment, or that of their professional tax advisor. Defendants further note that the opinion letter left open a significant possibility that a deduction would be disallowed.

Plaintiffs argue that the documents containing the disclaimers are not between plaintiffs and defendants. Defendants were the brokers, not the seller, and the disclaimers protect only the seller. Plaintiffs also point out that they had relied on JP Morgan Chase for financial advice for their business on many prior occasions.

On a motion to dismiss pursuant to CPLR 3211, every benefit of the doubt must be given to the plaintiff. *Leon v Martinez*, 84

NY2d 83, 87 (1994). If a cause of action exists, even if inartfully drawn, the complaint should not be dismissed. *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 (1976).

Here, defendants attempt to cast themselves as beneficiaries of the disclaimers because those disclaimers do not specifically limit their application to the sponsor, record keeper or trustee of the plan. However, the disclaimers do not include any other entities, either. Thus, the documentary evidence does not require dismissal of the complaint. Any question of whether plaintiffs' reliance on JP Morgan Chase's representations was reasonable is not at issue on this motion, because it is not a matter which can be determined based upon the documents. Therefore, the documentary evidence does not require dismissal of the complaint.

Further, plaintiffs' affidavit in opposition to this motion set forth the history of plaintiffs' reliance on JP Morgan Chase for financial advice. Under these conditions, the professional advice that plaintiffs relied upon could well have been that of JP Morgan Chase, in which case it cannot disclaim responsibility. The record, at this early stage of the litigation, is too scant to determine the exact position or responsibility of each of the parties.

General Business Law § 349

The second cause of action asserts a claim for deceptive

practice under General Business Law § 349. Defendants contend that this cause of action must be dismissed because the conduct complained of does not involve the type of consumer-oriented activity that section 349 is meant to address. Further, section 349 has a statute of limitations of three years. The last payment that plaintiffs made was in 2002, and they did not commence this action until July 2006.

Plaintiffs do not address the statute of limitations issue.

The statute of limitations for an action pursuant to General Business Law § 349 is three years, and the date of discovery rule does not apply to extend the limitation period. *Wender v Gilberg Agency*, 276 AD2d 311 (1<sup>st</sup> Dept 2000). Plaintiffs brought this action more than three years after the last payment was made, which is the last date upon which the cause of action could have accrued. Therefore, the second cause of action is dismissed.

Even if the statute of limitations did not preclude this cause of action, the transaction involving these parties is not the type of transaction that General Business Law § 349 is intended to address. General Business Law § 349 is intended to address deception involving the consuming public. *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20 (1995). As noted by defendants, the type of benefit plan involved here is not a consumer-oriented plan, nor have plaintiffs alleged that it has a broad impact on the public at

large. Further, it does not fit in with the type of modest amounts that section 349 addresses. *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 321 (1995). There is also no allegation of unequal bargaining power which is the norm when dealing with section 349. *Id.* Thus, on the merits as well, the second cause of action must be dismissed.

#### Unjust Enrichment

Defendants maintain that the cause of action for unjust enrichment should be dismissed with respect to the individual plaintiffs because there is no allegation that either of them paid anything to JP Morgan Chase or to anyone else. They contend that the claim by Convermat should be dismissed because the transaction is covered by a written agreement, and is therefore not subject to an unjust enrichment claim. Finally, they assert that it would be inequitable to allow Convermat to recover when it acknowledged relying upon an independent tax professional advisor.

Plaintiffs do not address the issue of whether the individual plaintiffs ever paid any monies which would be the basis of an unjust enrichment claim. There are no allegations in the complaint or in the opposing papers that assert that the individual plaintiffs ever paid any premiums, or otherwise conferred any benefit on any entity regarding the benefits plan. Therefore, insofar as the individual plaintiffs assert the unjust

enrichment claim, it is dismissed.

Plaintiffs assert that there is no document in the record that covers this as a transaction between JP Morgan Chase and plaintiffs. The documents were between Convermat and the sponsor. While this is true, there is also no allegation that plaintiffs paid anyone other than the seller for the product. Although the complaint states that the plan was purchased from JP Morgan Chase, there does not seem to be any question that this assertion is incorrect, and that the plan was actually purchased from Designs for Finance, the sponsor.

In order to state a cause of action for unjust enrichment, a plaintiff must allege that it bestowed a benefit on the defendant, for which benefit the defendant did not adequately compensate the plaintiff. *Korff v Corbett*, 18 AD3d 248 (1<sup>st</sup> Dept 2005). In the absence of any allegation that JP Morgan Chase was paid by plaintiffs, plaintiffs cannot show that they bestowed a benefit on JP Morgan Chase. Consequently, they have no cause of action for unjust enrichment against JP Morgan Chase.

#### CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the action is granted only to the extent that the second and third causes of action are dismissed, and is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: December , 2006

ENTER:

  
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J.S.C.

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