

**North Fork Bank v Meunkle**

2007 NY Slip Op 31466(U)

May 31, 2007

Supreme Court, Suffolk County

Docket Number: 0018094/2005

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XXXVI SUFFOLK COUNTY

**COPY**

**PRESENT:**

**HON. PAUL J. BAISLEY, JR., J.S.C.**

-----X  
NORTH FORK BANK,

Plaintiff,

-against-

JOHN L. MEUNKLE, AGOVINO & ASSELTA, LLP, THOMAS V. MARINO, WELLS FARGO HOME MORTGAGE, INC., ALLISON BURKE, ASTORIA FEDERAL SAVINGS & LOAN, BANKERS TRUST COMPANY n/k/a DEUTSCHE BANK TRUST COMPANY AMERICAS, THE BANK OF NEW YORK, JP MORGAN CHASE BANK, CITIBANK, N.A., CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, DREYFUS CORPORATION, JASON L. MADFES, JOYCE E. WELLER, KEVON MORIN, MARYANN O. MORIN, MICHAEL A. COCCARO, CATHERINE C. COCCARO, MICHAEL P. CONLON, SERGE P. LOZACH, WESTERN UNION, ANN BLUESTONE, ROBERT A. EBBESEN, MERNA O. EBBESEN, VIRGINA MORIN, WASTE MANAGEMENT, TIFFANY MANUFACTURING, CROWN CONTAINER CO. and ABSTRACTS INC.,

Defendants.  
-----X

**PLAINTIFF'S ATTORNEY:**

ZAVATSKY, MENDELSON, GROSS, SAVINO & LEVY, L.L.P.

By: Joseph C. Savino, Esq.  
33 Queens Street, P.O. Box 510  
Syosset, New York 11791

INDEX NO.: 18094/2005

MOTION DATE: 12/21/2006

MOT. NO.: 002 MG  
003 MD  
004 MD  
005 MG

**DEFENDANTS' ATTORNEYS:**  
DURKIN & DURKIN

By: Stephen M. Knudsen, Esq.  
Attys. for Deft. Waste Management  
111 Broadway, 4<sup>th</sup> Floor  
New York, New York 10006

PHILLIPS NIZER, LLP

By: Richard F. Harrison, Esq.  
Attys. for Deft. Wells Fargo Home Mortgage, Inc.  
600 Old Country Road  
Garden City, New York 11530

BRYAN CAVE LLP

Attys. for Deft. Citibank, N.A.  
1290 Avenue of the Americas  
New York, New York 11747

LAZARE POTTER GIACOVAS & KRANJAC LLP

Atty. for Deft. Dreyfus Corporation  
950 Third Avenue  
New York, New York 10022

O'REILLY, MARSH & CORTESELLI P.C.

Attys. for Deft. Astoria Federal Savings & Loan  
1000 Franklin Avenue, Third Floor  
Garden City, New York 11530

IVARS BERZINS, P.C.

Attys. for Deft. The Bank of New York  
484 West Main Street  
Babylon, New York 11702

SULLIVAN GARDNER PC

Attys. for Deft. Crown Container  
475 Park Avenue South, 30<sup>th</sup> Floor  
New York, New York 10016

**DEFENDANTS PRO SE:**

AGOVINO & ASSELTA, LLP  
170 Old Country Road  
Suite 608  
Mineola, New York 11501

CONGDON, FLAHERTY, O'CALLAGHAN, REID,  
DONLON, TRAVIS & FISHLINGER  
333 Earle Ovington Boulevard, 5<sup>th</sup> Floor  
Uniondale, New York 11553

THOMAS V. MARINO  
128 Hook Road  
Bedford, New York 10506

JOHN L. MEUNKLE  
7 Beacon Hill Drive  
Stony Brook, New York 11790

P.O. Box 245  
Island Park, New York 11558

WESTERN UNION  
1450 3<sup>rd</sup> Avenue  
New York, New York 10028

BANKERS TRUST COMPANY  
60 Wall Street  
New York, New York 10006

JP MORGAN CHASE BANK  
270 Park Avenue  
New York, New York 10017

JASON L. MADFES  
304 Park Avenue South, 7<sup>th</sup> Floor  
New York, New York 10010

JOYCE E. WELLER  
87 Green Lane  
Levittown, New York 11758

MICHAEL P. CONLON  
3116 Boxley Court  
Fayetteville, North Carolina 28306

20 Oakridge Drive  
Milton, Delaware 19968

SERGE P. LOZACH  
546 E. 11<sup>TH</sup> Street, Apt. 5A  
New York, New York 10009

KEVON MORIN  
377 Horse Pond Road  
Madison, Connecticut 06533

MARYANN O. MORIN  
24 Hawthorne Avenue  
Falmouth, Massachusetts 02540

MICHAEL A. COCCARO  
CATHERINE C. COCCARO  
5 Beacon Hill Drive  
Stony Brook, New York 11790

Upon the following papers numbered 1 to 10 read on this motion for leave to amend complaint and motions and cross-motions for summary judgment: Notice of Motion and Affirmation 1 and supporting papers; Notice of Cross-motion and Affidavit in Support 2 and supporting papers; Memorandum in Support and In Opposition 2a; Reply Affirmation 3; Affirmation in Opposition 4; Reply Affidavit 5; Affirmation In Opposition (Sur Reply) 6 and supporting papers; Notice of Cross-Motion and Affirmations 7 and supporting papers; Affidavit in Opposition to Cross-motion 8; Affidavit in Opposition to Cross-motion 9; Notice of Motion for Summary Judgment and Affidavit 10 and supporting papers; it is;

**ORDERED** that the following motions and cross-motions are consolidated for purposes of this decision and, as so consolidated, are determined as follows:

1. The motion of plaintiff North Fork Bank (motion sequence no. 002) for an order granting plaintiff leave to serve and file a second supplemental summons and second amended complaint is granted.
2. The cross-motion of defendant John L. Meunkle (motion sequence no. 003) for an order granting summary judgment to defendant pursuant to CPLR R. 3212 and severing all cross-claims and counterclaims interposed by co-defendants is denied with leave to renew.

3. The cross-motion (motion sequence no. 004) of defendant Waste Management of New York, L.L.C. for an order amending the cross-claim of such defendant is denied.

4. The motion of defendant Agovino & Asselta, LLP (motion sequence no. 005) for an order pursuant to CPLR R. 3212 granting summary judgment dismissing the cross-claim of defendant Waste Management of New York, L.L.C. as against such defendant is granted.

The submissions establish that this interpleader action was commenced by North Fork Bank ("North Fork") as stakeholder in order to determine competing claims to funds totaling \$66,012.72 presently on deposit at North Fork Bank in an attorney trust account maintained by "John L. Meunkle, P.C." (the "Meunkle account"). Plaintiff alleges that defendant John L. Meunkle ("Meunkle"), while associated as an attorney with defendant law firm Agovino & Asselta, LLP (Agovino"), fraudulently endorsed checks totaling \$545,812.81 drawn on the law firm's escrow account with Fleet Bank, making the checks payable to defendant Wells Fargo Home Mortgage, Inc. and depositing them into the Meunkle account.

The submissions reflect that after commencement of the action, plaintiff amended the complaint as of right to add additional defendants with a potential interest in the funds in the Meunkle account.

Plaintiff now seeks leave to serve a second supplemental summons and second amended complaint adding "John L. Meunkle, P.C." as an additional party defendant and asserting a cause of action against such defendant for unjust enrichment. The corporation that owns the account that is the subject of this interpleader action would appear to be a necessary party. CPLR §1006(a); *Friedman v. Friedman*, 125 A.D.2d 539, 509 N.Y.S.2d 617 (2d Dept. 1986). Moreover, in light of the interposition by Meunkle of counterclaims arising out of plaintiff's allegedly improper payment of \$7,138.72 from the Meunkle account to the New York State Department of Labor, Unemployment Insurance Division, pursuant to a levy served upon plaintiff, plaintiff's interposition of a second cause of action against the corporate defendant for unjust enrichment in the event plaintiff is required to repay the sum of \$7,138.72 to any other person or entity is not patently without merit, notwithstanding the purported withdrawal of the counterclaims by Meunkle. Moreover, the submissions of Meunkle in opposition to the motion do not demonstrate prejudice if the amendment were permitted, and no other party has submitted opposition to the motion. *Trataros Constr., Inc. v. New York City Hous. Auth.*, 34 A.D.3d 451, 823 N.Y.S.2d 534 (2d Dept. 2006). In light of the foregoing, plaintiff's motion is granted.

The cross-motion of Meunkle for summary judgment on his claim to entitlement to the entire balance in the Meunkle account is denied, with leave to renew after service of the second supplemental summons and second amended complaint and the service of responsive pleadings, if any.

With respect to the cross-motion of Waste Management for leave to amend its answer to assert the full amount of its cross-claim against defendants Agovino and Meunkle and to assert additional causes of action against such co-defendants for legal malpractice and fraudulent conversion, the cross-motion is denied. The Court notes in the first instance that movant has

failed to annex to its motion papers a copy of the pleading which it seeks leave to amend. (That defect is mitigated by the fact that a copy of the pleading is annexed to the cross-motion of Agovino.) In addition, the motion is supported only by the affirmation of counsel, and there is no affidavit of merit from any person with knowledge of the facts underlying Waste Management's proposed claims, which is fatal to a motion to amend. *Morgan v. Prospect Park Assocs. Holdings, L.P.*, 251 A.D.2d 306, 674 N.Y.S.2d 62 (2d Dept. 1998).

Moreover, the submissions establish that the additional legal malpractice and fraudulent conversion claims that Waste Management seeks to interpose in the instant interpleader action, arising out of Agovino and Meunkle's representation of Waste Management in a collections action and enforcement of the resulting judgment, which was subsequently reversed on appeal, were the subject of a separate action in the Supreme Court, New York County, commenced after the instant action. Waste Management's claims in the New York County action were dismissed pursuant to CPLR R. 3211(a)(4) pursuant to an order (DIAMOND, J.) dated August 17, 2006 and entered August 25, 2006. The submissions reflect that the movant has filed a notice of appeal regarding the dismissal of its claims as well as a motion to renew and reargue the dismissal of the claims. In light of the pendency of the foregoing, the motion to interpose those claims in this interpleader action is denied as premature. *Douglas v. Douglas*, 262 A.D.2d 29, 690 N.Y.S.2d 588 (1st Dept. 1999).

The cross-motion of defendant Agovino for summary judgment dismissing the cross-claim of Waste Management is granted. The cross-claim is predicated upon Agovino's alleged conversion of the sum of \$90,739.36 collected by Agovino in enforcement of a judgment obtained in favor of Waste Management. Defendant's submissions establish, *prima facie*, that \$50,000.00 of the monies claimed to have been wrongfully converted by Agovino was in fact turned over to Waste Management by Agovino, \$15,788.99 was properly retained by Agovino and applied toward outstanding legal fees, and \$19,287.75 that was misappropriated by Meunkel was subsequently repaid. Defendant's submissions further establish that Waste Management never made a demand for a return of the allegedly wrongfully retained funds. Moreover, the submissions establish that Waste ratified the retention by Agovino of a portion of the amounts collected on the judgment and its application toward outstanding attorney's fees by accepting the balance remitted to it and failing to object to Agovino's invoices which plainly showed the application of the disputed amount toward legal fees. *King v. Fox*, 7 N.Y.3d 181, 818 N.Y.S.2d 833 (2006). In light of the foregoing, Agovino's submissions establish that Waste Management's cross-claim fails to state a cause of action for conversion. *Hoffman v. Unterberg*, 9 A.D.3d 386, 780 N.Y.S.2d 617 (2d Dept. 2004).

Waste Management's submissions in opposition fail to raise a triable issue of fact. The affirmation of its counsel reflects Waste Management's acknowledgment that Meunkle reimbursed Waste Management for the \$19,287.75 that he misappropriated. Although the affidavit of Waste Management's "Group Counsel" reflects that Waste Management never authorized Agovino to retain \$15,788.99 of monies collected on the judgment to be applied to legal fees, Waste Management does not deny that the legal fees were owed to Agovino, does not deny that it accepted without protest the balance of monies collected on the judgment as well as Agovino's invoices reflecting application of the retained monies toward outstanding legal fees,

Agovino's invoices reflecting application of the retained monies toward outstanding legal fees, and has proffered no proof that it made a demand for the return of the money retained by Agovino and that such demand was refused. In light of the foregoing, the motion of Agovino for summary judgment dismissing the cross-claim is granted.

The parties are directed to appear for a preliminary conference at the Courthouse located at One Court Street, Riverhead, New York, Room 203-A, on June 28, 2007 at 9:30 a.m.

Plaintiff is directed to serve a copy of this order, with notice of entry thereof, on all other parties.

Dated: May 31, 2007

HON. PAUL J. BAISLEY, JR.  
J.S.C.