

**Merrill Lynch Bus. Fin. Servs., Inc. v East Coast  
Athletic Club, Inc.**

2007 NY Slip Op 33561(U)

October 24, 2007

Supreme Court, Nassau County

Docket Number: 6586-07/

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,**  
**Justice.**

**TRIAL/IAS PART 12**

MERRILL LYNCH BUSINESS FINANCIAL  
SERVICES, INC.,

Plaintiff,

INDEX NO.: 006586/2007  
MOTION DATE: 09/14/2007  
MOTION SEQUENCE: 001

-against-

EAST COAST ATHLETIC CLUB, INC.,  
PEAK HEALTH CLUB, INC. and  
DENNIS PILOTTI, JR.,

Defendants.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed.....	1
Affirmation of Thomas G. Sherwood in Opposition, Affidavit & Exhibits Annexed.....	2
Reply Affidavit of Arnold Marshel & Exhibits Annexed.....	3

This motion by defendants, East Coast Athletic Club, Inc. and Peak Health Club, Inc., for an order pursuant to CPLR § 3212 granting partial summary judgment dismissing the thirteenth cause of action which alleges a conspiracy between the moving defendants to defraud future creditors of Peak Health Club, Inc. and East Coast Athletic Club, Inc. by misrepresenting the credit worthiness of the aforesaid corporations is determined as follows.

A preliminary matter requiring attention to promote clarity is that the named corporate defendants, Peak and East Coast, at the times most relevant to this lawsuit, exhibit a dichotomous existence; they were personified by the Pilottis and their corporation, Paragon, but in the

complaint and the motion subjudice Arnold Marshel is the person behind the corporate structure. The issue to be determined is whether Marshel schemed with the Paragon and the Pilottis to defraud the plaintiff as a conspirator and either a former owner, or just as an owner. For, if title did not pass to them, they were sufficiently recognized as owners to pass muster as owners, inter alia, with the plaintiff lending institution to obtain a mortgage loan.

In brief summary, Marshel owned and controlled East Coast and Peak until the time when the Pilottis and Paragon contracted to buy all of the shares of stock, and, then, closed on May 17, 2001. At the closing the stock was placed in escrow and the purchase price was taken care of with a promissory note. In 2004, Marshel took back possession of the corporations.

The record compiled heretofore does not establish that the moving defendants, by their principal Arnold Marshel, partook of a conspiracy to unreasonably, excessively burden with debt the real property or the health club, Peak and East Coast respectively. Certain of the questions of fact argued by plaintiff have been litigated and decided in earlier motions in other cases involving the same parties and the same circumstances, in differing contexts. To the extent that either party supposes that there can no longer be a question on that issue because of prior decisions of this court, they are in error. What it comes down to is whether Marshel knowingly and purposefully took advantage of Chicago Title's failure to record the Peak to East Coast deed and the Dime mortgage to divest himself of ownership of both corporations and to recover his investment in them. To the view of the court, defendants have established on the record now before me a prima facie case of failure to conspire with Paragon and the Pilottis to defraud Merrill Lynch into lending money secured by a mortgage on the Peak property, and, thus, for dismissal of the thirteenth cause of action.

Plaintiff contends that the original, allegedly *former* owner of East Coast and Paragon, (the Seller, a/k/a Marshel), after it was sold to Paragon, Pilotti, Pilotti and Kelly, (the Buyers) schemed with the Buyers to defraud Merrill Lynch, or any source of lending, by concealing an existing mortgage loan to the Dime, an unrecorded deed from Peak to East Coast and an unsecured debt of 9 million dollars from the Buyers to the Seller.

Plaintiff contends that the Seller and the Buyers schemed to defraud future creditors in general by concealing: the fact that the Buyers were not creditworthy since they could not pay

the Seller for the property and health club, but instead gave him an unsecured 9.8 million dollar note; the fact that the deed conveying the real property owned by Peak to East Coast had not been recorded; and the fact that the Buyers were essentially impecunious, had not paid for the property and were not vested with title.

Plaintiff argues that as a result of the conspiracy East Coast and Peak concealed facts from the Dime, Chicago Title and the financial world at large which they had a duty to disclose. Albion Fund v State Bank, 8 Misc 3d 264, 269 (Sup NY Cty 2003). A duty to disclose usually arises in the context of direct negotiations to a business transaction, but in a case such as this a duty arises where the party is a co-conspirer with another business person to effect a fraudulent transaction with a third person. The information must be correct at the time it was not disclosed.

Before analyzing what the Seller did it would be prudent to state some basic principles of conspiracy law. “Conspiracy to commit an actionable wrong is not in itself a cause of action. \* \* The liability is for damages in the commission of a wrongful act, or of a legal act by wrongful means, and not for the agreement to commit it.’ Rhodes v. Ocean Accident & Guarantee Corporation, Lim., 235 App. Div. 340, 341, 257 N.Y.S. 214, 215. Strictly, the only maintainable civil action for conspiracy is one in which a person ‘suffers injury as the result of a conspiracy forbidden by the criminal law, to recover the damages which he has sustained at the hands of the parties to the combination. Kellogg v. Sowerby, 190 N.Y. 370, 373, 83 N.E. 47.

The gravamen of the civil action of conspiracy is the acts of the defendants and consequent damage, and not the conspiracy itself. ... The only purpose of alleging the conspiracy is to connect all the defendants with the transaction and to charge them all with the acts and declarations of their coconspirators. But the allegation of conspiracy may be disregarded and a recovery may be had irrespective of such allegation. The plaintiff may prove his charges against the defendants whether the acts originally arose from a conspiracy or not and he is not hindered in such proof by the omission of an allegation of conspiracy. Brackett v. Griswold, 112 N.Y. 454, 466, 467, 20 N.E. 376. ‘Where the conspiracy results in the commission of that which would be an actionable tort, whether committed by one or by many, then the cause of action is the tort, not the conspiracy.’ Green v. Davies, 182 N.Y. 499, 505, 75 N.E. 536, 537, 3 Ann.Cas. 310.” Loewinthan v Beth David Hospital, 9 N.Y.S.2d 367 (N.Y.Sup 1938).

The argument, broken down, is made up of three events:

- the unrecorded mortgage to Dime, later Wamu;
- the unrecorded deed from Peak to East Coast;
- the unsecured purchase money note of the Buyer to the Seller and the placing of the stock in escrow.

Without doubt if there were uncontroverted evidence that the Seller and the Buyer decided, in a unity of interest, to hide the foregoing facts from the financial world so as to go forth and dupe someone into lending them more money it would constitute a conspiracy to defraud. A picture of the Buyers and the property they putatively owned, at least that of which they had possession without any assistance from Marshel, would reveal a property owner and business person without debt, a property owned free and clear, and a business raring to go. That is what this case looks like. However, defendants challenge by reasoning and with sworn statements the proof that they worked for a common purpose with the Buyers of inducing a bank to lend the money on the false pretenses displayed in that picture.

Marshel concedes that he hid, to the extent that he did not record, the Peak to East Coast deed and the Dime-Wamu mortgage. But, he disclaims any secrecy or subterfuge about the fact that the Buyers gave him no money when he handed over the property and business to them. He denies hiding the fact that he conveyed the stock in the defendant corporations and placed the stock in escrow. He acknowledges that he knew the Sellers were trying to borrow money; he alleges that if they borrowed they would give him funds to satisfy the Dime mortgage and pay him for the business, but he denies any knowledge what so ever that the Buyers went to Merrill Lynch for money and obtained it, inter alia, on bogus financial records - which he had nothing to do with.

As with any motion for summary judgment once Marshel has shown by competent proof that there is no material question of fact, the burden shifts to plaintiff to show that there is one. Here, Marshel has established on these facts that he did not participate in any intentional, knowing misrepresent of material fact to Merrill Lynch, to induce the bank to make the loan which it did to its possible detriment. It was at the least a non performing loan. At the farthest extreme it is void and unenforceable. He has shown that he did not know what mischief the

Buyers would resort to.

As the burden shifts, the plaintiff makes a significant claim. That is that Marshel, who is, to repeat, in this lawsuit the defendant East Coast and the defendant Peak, knew of the Buyer's application to plaintiff for a mortgage loan, condoned it, and perceiving it to be to his benefit kept his silence about the Buyers solicitation on falsified financial information. Thus, two material questions of fact arise. Were the Buyers the owners of Peak and or East Coast? Did Marshel know that the Buyers had applied to plaintiff to borrow money supported by the Peak Property?

Although the claims of defendants are made by the sworn affidavit of Marshel, clearly a person with knowledge, the opposition by plaintiff is only supported by an affidavit of counsel who cannot speak to or know what Marshel or the Pilotis knew or said. However, plaintiff has included and relied upon affidavits of the parties in other proceedings and decisions of the courts reflecting contradictory versions of Marshel's averments. Summary judgment cannot be granted in the presence of those contradictory material facts. In the face of these outstanding factual questions, a trial is necessary to ascertain the truth. A pretrial conference will be held on November 29, 2007, at 9:30 A.M.

Dated: October 24, 2007

  
**ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE