

**Cadogan Mgt., LLC v Wright**

2009 NY Slip Op 32456(U)

October 19, 2009

Supreme Court, New York County

Docket Number: 102496/09

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 102496/2009  
CADOGAN MANAGEMENT, LLC  
vs.  
WRIGHT, ERIC  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2  
3  
4-6

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits & memos


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *to dismiss by defendant Frederick Pinkelacker is granted in accordance with the attached memorandums decisions.*  
*The remaining parties shall expeditiously complete discovery.*

**FILED**  
OCT 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

HON. DORIS LING-COHAN

Dated: 10/19/09

  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
CADOGAN MANAGEMENT, LLC,

Plaintiff,

Index No.: 102496/09

-against-

ERIC WRIGHT, BRYAN DINKELACKER, FRED  
DINKELACKER, IVY WALK, INC., ENGEL &  
VOLKERS, GREENWICH,

Defendants.

-----X  
DORIS LING-COHAN, J.:

Defendant Frederick Dinkelacker (sued ~~by~~ <sup>by</sup> Dinkelacker)  
moves, pursuant to CPLR 3211 (a) (1) and 3211 (a) (7), for an order  
dismissing the complaint.

The complaint asserts causes of action against Frederick  
Dinkelacker for conversion, unjust enrichment and money had and  
received.

Plaintiff retained defendant Ivy Walk, Inc. (Ivy Walk) as a  
general contractor to renovate its office space. After it began  
work, Ivy Walk submitted monthly requisitions to plaintiff for  
money to pay the subcontractors. Plaintiff claims that despite  
receiving approximately \$888,920 for that purpose, defendants Eric  
Wright and Bryan Dinkelacker, the principals of Ivy Walk, failed to  
pay the subcontractors, and diverted the money for their personal  
use, including the purchase and operation of Engel & Volkors,  
Greenwich (E&V), a real estate company in Connecticut. Plaintiff  
alleges that Frederick Dinkelacker has an actual or beneficial  
interest in E&V, and therefore, has benefitted from the monies  
plaintiff paid to Ivy Walk.

Frederick Dinkelacker denies any ownership interest in E&V and  
moves to dismiss the action as against him. There is no allegation

*Motion Seq. No: 001*  
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that Frederick has any interest in Ivy Walk.

On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 (2001); see also *Leon v Martinez*, 84 NY2d 83 (1994). A motion brought pursuant to CPLR 3211 (a) (1) may be granted where "'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'." *Beal Sav. Bank v Sommer*, 8 NY3d 318 (2007), quoting *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 (2005); see also *Held v Kaufman*, 91 NY2d 425, 430-431 (1998)

In support of the motion to dismiss under CPLR 3211 (a) (1), Fred Dinkelacker has submitted two documents, Exhibit B, dated May 21, 2007, and Exhibit C, dated August 12, 2008, each entitled "Affidavit of Ownership." These are copies of documents filed with the State of Connecticut Department of Consumer Protection, License Services Division. They list the Members/Officers of Engel & Volkers, Greenwich LLC. In Exhibit B, the owners of E&V were G. Thomas Thornton (51%), Eric Wright (24.5%) and Bryan Dinkelacker (24.5%). Exhibit C was filed after the death of G. Thomas Thornton and shows Colleen Polson as the new majority owner (51%). The other owners remained the same. Neither document includes the name of Frederick Dinkelacker. Frederick Dinkelacker contends that this is conclusive documentary evidence that he had no interest in E&V and therefore, could not have been the recipient of any ill-

[\* 4]  
gotten gains diverted from Ivy Walk and invested in E&V.

In opposition to the motion, plaintiff submits four exhibits, consisting of e-mails between Bryan Dinkelacker, Eric Wright and Frederick Dinkelacker. All four exhibits include draft agreements anticipating the formation of E&V as a partnership. None of the agreements are signed.

There is no evidence that a partnership which included Frederick Dinkelacker was ever formed. At best, the e-mails establish that there were preliminary discussions about structuring the formation of E&V as a partnership, but instead, Eric Wright, Bryan Dinkelacker, and a licensed real estate broker formed an LLC.

In addition, the plaintiff contends that the documents submitted by Frederick Dinkelacker are merely affidavits, and as such, cannot constitute documentary evidence sufficient to support a motion to dismiss pursuant to CPLR 3211 (a) (1).

The term "documentary evidence," as referred to in CPLR 3211 (a) (1), typically means judicial records such as judgments and orders, or out-of-court documents such as contracts, deeds, wills, and/or mortgages (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20, and includes "[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based." *Webster Estate of Webster v State of New York*, 2003 WL 728780 (Ct Cl, 2003).

Here, the "Affidavits of Ownership" are documentary evidence required by Connecticut in order for E&V to operate as a real estate broker. Such documents show that, during the time period

that Ivy Walk received payments from Cadogan, 100% of E&V was owned by three people, none of which was Frederick Dinkelacker. Therefore, defendant Frederick Dinkelacker has established his defense as a matter of law, and a determination in his favor is warranted. *Snyder v Voris, Martini & Moore, LLC*, 52 AD3d 811 (2d Dept. 2008).

Therefore, the motion to dismiss pursuant to CPLR 3211 (a) (1) is granted. In view of this determination, the court need not address the other ground of defendant's motion.

Accordingly, it is

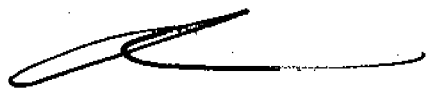
ORDERED that the motion to dismiss is granted and the complaint is severed and dismissed as against defendant Fred Dinkelacker, and the clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that within 30 days of entry of this order, defendant Frederick Dinkelacker shall serve a copy upon all parties with notice of entry.

Dated: 10/19/09

**FILED**  
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NEW YORK



Hon. Doris Ling-Cohan, J.S.C.