

**Rubin v Salters**

2009 NY Slip Op 32551(U)

October 22, 2009

Supreme Court, Nassau County

Docket Number: 011687/2007

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 9**

MARK RUBIN, individually and derivatively on behalf  
and in the right of PRODIGY HOMES, LLC, MJM  
REALTY CO., LLC, MJM SOUTH CAROLINA, INC.,  
MJM NORTH CAROLINA, INC., MJM LOUISIANA  
CORPORATION and MJM CAPITAL PARTNERS, INC.,

Plaintiffs,

INDEX NO.: 011687/2007  
MOTION DATE: 09/22/2009  
MOTION SEQUENCE: 023 and 024

-against-

JAMES SALTERS, DANISMINE CORP., CATALYST  
DEVELOPMENT CORP., SALTERS AND SALTERS,  
MARTIN J. BUSH, RICHARD BUCKHOLZ and, as  
nominal derivative defendants, PRODIGY HOMES, LLC,  
MJM REALTY CO., LLC, MJM SOUTH CAROLINA,  
INC., MJM NORTH CAROLINA, INC., MJM LOUISIANA  
CORPORATION and MJM CAPITAL PARTNERS, INC.,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmations, Affidavit & Exhibits Annexed .....	1
Memorandum of Law in Support of Plaintiffs' Motion to Strike the Answer with Counterclaims of Defendant James Salters Pursuant to CPLR § 3126 .....	2
Plaintiffs' Appendix of Exhibits A-JJ in Support of Motion to Strike the Answer with Counterclaims of Defendant James Salters Pursuant to CPLR § 3126 .....	3
Affidavit in Opposition to Motion to Strike Defendants' Pleadings of James Salters & Exhibits Annexed .....	4
Reply Affirmation in Further Support of Motion to Strike Pleadings of Kenneth E. Aneser & Affidavit of Mark Rubin .....	5
Joint Notice of Motion, Affirmations & Affidavit .....	6

Exhibits in Support of the Joint Motion to Strike the Pleadings and Enter Judgment against Defendant, James Salters, for Spoliation of Key Evidence, Book I — Exhibits A through J .....	7
Exhibits in Support of the Joint Motion to Strike the Pleadings and Enter Judgment against Defendant, James Salters, for Spoliation of Key Evidence, Book II — Exhibits K through P .....	8
Affidavit in Opposition to Joint Motion to Strike Pleadings Based on Spoliation of James Salters & Exhibits Annexed .....	9
Reply Affirmation in Support of Spoliation Motion of Kenneth E. Aneser .....	10
Reply Affidavits Submitted by the Defendant, Richard Buckholz, in Further Support of his Joint Motion to Strike the Pleadings of Defendant, James Salters, for his Spoliation of Key Evidence & Exhibits Annexed .....	11

This motion by the plaintiff Mark Rubin, individually and derivatively on behalf and in the right of Prodigy Homes, LLC, MJM Realty Co., LLC, MJM South Carolina, Inc., MJM North Carolina, Inc., MJM Louisiana Corporation and MJM Capital Partners, Inc. (“the plaintiff”) for an order pursuant to CPLR 3126 striking the defendant Salters’ Answer including his counterclaims and cross-claims with prejudice, declaring him liable for all of the plaintiffs’ claims and setting this matter down for an inquest; an order precluding Salters from presenting any evidence at the inquest as well as any other proceedings or related matters; and, an award of attorneys’ fees, costs and disbursements including accountant’s fees or, in the alternative, an order requiring Salters to post a bond in the amount of \$11,420,000, and this motion by the plaintiff and defendant Richard Buckholz for an order pursuant to CPLR 3126 striking defendant Salters’ pleadings and directing that judgment be entered in their favor with respect to liability based upon Salters’ spoliation of evidence and setting this matter down for an inquest on damages is granted as provided herein.

In this action commenced on or about July 6, 2007, the plaintiff alleges that he has invested thirteen million dollars with Salters in the various plaintiff entities and that even in discovery in this action, Salters has completely and utterly failed to account for that investment. The defendant Buckholz has advanced similar cross-claims against Salters. The plaintiff and Buckholz allege that they are victims of a Ponzi scheme orchestrated by Salters and his various entities.

In his complaint, the plaintiff alleges that Salters was instrumental in forming the plaintiff

entities in which he alleges he has invested over thirteen million dollars. Rubin alleges that he holds a 90% interest in the plaintiff entities and that Salters holds a 10% interest. The plaintiff entities allegedly own or owned, control or controlled or manage or managed real property in North Carolina, South Carolina, Alabama, Louisiana and Georgia. The plaintiff alleges that in concert with the other defendants, Salters has seized control of the plaintiff entities, frozen him out and acted to defraud him and prevent him from recouping his investments by, *inter alia*, converting, diverting, stealing and/or misappropriating the plaintiff entities' assets, revenues and profits and that Salters has otherwise engaged in self-dealing in violation of his contractual and fiduciary duties to the plaintiffs. The plaintiff alleges that some of the properties have been sold, alienated and/or encumbered and that the proceeds thereof have been averted by Salters to, *inter alia*, the defendant entities for the defendants Salters', Buckholz's and Bush's benefit. The plaintiff alleges that when he was informed by Salters that the projects were failing due to a lack of funding, their forensic accountant was unable to account for \$7,303,778.47 of the \$9,466,555.93 the plaintiff had invested with them. The plaintiff additionally alleges that Salters induced him to invest monies in the defendant entities as well and that he has received nothing back on those investments, either, owing again to Salters' fraudulent schemes.

By way of this action, the plaintiff seeks, *inter alia*, injunctive relief, an accounting and money damages. He advances causes of action sounding in breach of fiduciary duty against Salters (First, Sixteenth, Nineteenth and Twenty- Second Causes of Action); aiding and abetting Salters' breach of his fiduciary duty against Bush and Buckholz (Second, Tenth Causes of Action); conversion against Salters, Bush and Buckholz (Third, Eleventh Causes of Action); a violation of Section 720 of the Business Corporation Law against Salters (Fourth Cause of Action); corporate waste and mismanagement against Salters (Sixth, Fourteenth Causes of Action); breach of contract against Salters (Eighth Cause of Action), Danismine (Ninth Cause of Action), Salters and Danismine (Twenty-Fifth Cause of Action) and Salters and Catalyst (Twenty-Seventh Cause of Action); and, unjust enrichment against Salters and Danismine (Twenty-Sixth Cause of Action) and Salters and Catalyst (Twenty-Seventh Cause of Action). The plaintiff also seeks to impose a constructive trust (Seventh, Fifteenth Causes of Action); accountings (Twelfth, Seventeenth, Twentieth, Twenty-First, Twenty- Third Causes of Action) and injunctive relief (Fifth, Thirteenth, Eighteenth, Twenty-Fourth Causes of Action).

Clearly, at the crux of this case is what became of the plaintiff's and the other investors' investments which Howard Feilstein, the forensic accountant appointed by this court, found to be approximately \$11,420,000.

Buckholz similarly alleges that he invested substantial amounts of money in the defendant Danismine believing that he was investing in 400 single family homes and that the monies were not invested in homes but were instead used by Salters to pay phantom returns to other investors and were otherwise syphoned off through an elaborate network of family, friends and business associates.

By way of these motions, the plaintiff and defendant Buckholz seek, *inter alia*, dismissal of Salters' Answer in its entirety and summary judgment with respect to his liability based upon his failure to provide financial discovery. Alternatively, an order of preclusion is sought.

The documents sought fall into three categories: the defendants' as well as their affiliates' bank records; the defendants' as well as their affiliates' accounting records; and, the defendants' as well as their affiliates' tax returns. More specifically, the plaintiff alleges that Salters has failed to produce (1) all of the documents responsive to his First Notice for Discovery and Inspection as directed by this court's order of August 1, 2008 (Plaintiff's Exhibit J); (2) banking documents proving his and his entities' investments as directed by this court's orders dated October 10, 2008 and May 26, 2009 (Plaintiff's Exhibits E and H); (3) documents responsive to his Second and Third Notices for Discovery and Inspection including accounting records as directed by this court's May 26, 2009 order (Plaintiff's Exhibit E); (4) the documents demanded via the May 14, 2009 letter by the forensic Certified Public Accountant appointed by this court, Howard Feilstein, as directed by this court's May 26, 2009 order (Exhibit E); and, (5) accounting records of the defendant entities or entities affiliated with them as well as tax records in violation of this court's May 26, 2009 order (Exhibit E).

Salters has intermittently maintained that many of the records sought were irrelevant. In fact, early in September 2007, he sought to quash the subpoena for banking records. And, he has resisted the production of the defendants' affiliates' records despite his assertion that they invested millions of dollars in the plaintiff entities. Salters has also produced records which are not responsive to the demands. The frivolity of these positions is reflected not only by this court's repeated directives to produce the records but by the forensic accountant's opined need

for records which are yet to be produced.

When asked about the parties' investments at his deposition, Salters testified that they were reflected in a Quickbooks accounting program. He testified that all of his and his entities' financial records had been maintained at an office building owned by defendant Catalyst but that after this action was commenced, Catalyst conveyed that building to its mortgagee in lieu of foreclosure. Salters testified that he then moved the financial records consisting of approximately 20 boxes and crates of records, three to six filing cabinets and three computers including the Quickbooks program into storage at a garage at the property at 12 Beverly Street in Hempstead which was owned by his associate Malcolm Turner. He testified that only he had a key. He further testified that he subsequently learned that that property was being imminently foreclosed upon but admitted that he did not take any steps to obtain the financial records until he learned that a bank had obtained the house and that the contents were being disposed of. When he went to try to retrieve his financial records, everything was gone. This happened sometime after December 2008.

“A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that ‘a litigant, intentionally or negligently, dispose[d] of crucial items of evidence . . . before the adversary ha[d] an opportunity to inspect them, thus depriving the party seeking a sanction of the means of proving his claim or defense.’” Kirschen v Marino, 16 AD3d 555 (2<sup>nd</sup> Dept. 2005), citing Kirkland v New York City Housing Auth., 236 AD2d 170, 173 (1<sup>st</sup> Dept. 1997); Popfinger v Terminix Intern. Co. Ltd. Partnership, 251 AD2d 564 (2<sup>nd</sup> Dept. 1998); see also, Utica Mut. Ins. Co. v Berkoski Oil Co., 58 AD3d 717 (2<sup>nd</sup> Dept. 2009). Sanctions lie whether the loss of evidence is willful or negligent since either can be fatal to another party's claim or defense. Squitieri v City of New York, 248 AD2d 201, 202-203 (1<sup>st</sup> Dept. 1998); see also, Brown v Parfums Jacques Bogart, S.A., 12 Misc3d 1187(A), at p. 4 (Supreme Court, Kings County 2006). And neither notice, an order to produce nor even party status is a prerequisite for the imposition of sanctions, “so long as the party [was] on notice that the evidence might be needed for the future.” Brown v Parfums Jacques Bogart, S.A., *supra*, at p. 4, citing MetLife Auto & Home v Joe Basil Chevrolet, Inc., 1 NY3d 478, 483 (2004), citing DiDomenico v C & S Aeromatik Supplies, Inc., 252 AD2d 41, 53 (2<sup>nd</sup> Dept. 1998); Conderman v Rochester Gas & Elec. Corp., 262 AD2d 1068, 1070 (4<sup>th</sup> Dept. 1999). A sanction less drastic than dismissal is

appropriate when the affected party is not deprived of its ability to establish its claim or defense: Dismissal lies when the lost evidence is critical to establish a claim or defense and its loss is fatal. Utica Mut. Ins. Co. v Berkoski Oil Co., *supra*, at p. 718; Brown v Parfums Jacques Bogart, S.A., *supra* at p. 5, citing Marro v St. Vincent's Hosp., 294 AD2d 341, 342 (2<sup>nd</sup> Dept. 2002). Therefore, “[t]he party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence and ‘fatally compromised its ability to defend [or prosecute] the action.’ ” Utica Mut. Ins. Co. v Berkoski Oil Co., *supra*, at p. 718, quoting Lawson v Aspen Ford, Inc., 15 AD3d 628 (2<sup>nd</sup> Dept. 2005) , citing Kirschen v Marino, *supra*, at p. 555-556. Thus, prejudice to the party seeking severe sanctions based upon spoliation is required. Utica Mut. Ins. Co. v Berkoski Oil Co., *supra*, at p. 718, citing Iannucci v Rose, 8 AD3d 437, 438 (2<sup>nd</sup> Dept. 2004); *see also*, Kirschen v Marino, *supra*; Klein v Ford motor Co., 303 AD2d 376 (2<sup>nd</sup> Dept. 2003); Favish v Tepler, *supra*. When the trial will become a “rank swearing contest,” without the evidence, dismissal is warranted. Brown v Parfums Jacques Bogart, S.A., *supra*, at p. 5, citing DiDomenico v C & S Aeromatik Supplies, Inc., *supra*, at p. 53.

This action was commenced on or about July 7, 2007. Nassau County records establish that the property at 12 Beverly Street was foreclosed upon on October 23, 2007. Catalysts’ office building was not conveyed until ten months later, on August 6, 2008. Thus, the records clearly existed when this action was commenced. In fact, a letter to the court reflects that Salters still had access to the garage in December, 2008. Moreover, at his deposition Salters curiously could not explain how he was able to procure some of the documents he has produced. It is clear that Salters was responsible for the management of Rubin’s and the others’ investments. Both the plaintiff’s forensic accountant and the forensic accountant appointed by this court have established that the limited records which have been produced are woefully inadequate to track who all of the actual investors were as well as what became of the investments. In fact, Salters’ failure to maintain the sought after records may constitute a violation of Internal Revenue Service Regulation § 1.6001-1(a).

Salters and his entities’ books and records are crucial to establish who invested with them and how much, the amounts, if any, recouped by the investors, and most importantly, what Salters and his entities did with the investments as well as Salters and his entities’ gains and

losses. If not intentional, defendant Salters' loss of his and his entities' records was grossly negligent and provides grounds for sanctions. Furthermore, while the plaintiff and Buckholz may be able to prove their own investments without the defendants' records, they are nevertheless completely unable to fully prove their claims. They are left bereft of an appropriate means of proving their cases.

In opposition, Salters maintains that Buckholz maintained his entities' business records. This allegation is directly opposite to Salters' testimony at his examination-before-trial and is flatly rejected. Salters' allegation that he has fully accounted for Buckholz's investment is completely unsupported and is also flatly rejected.

Defendant Salters' Answer is stricken in its entirety and his liability is accordingly declared as well. See, Davydov v Zhuk, 23 Misc3d 1129(A) (Supreme Court Kings County 2009), citing Baglio v St. John's Queens Hosp., 303 AD2d 341, 342 (2<sup>nd</sup> Dept. 2003); New York Central Mutual Fire Ins. Co. v Turnerson's Elec., Inc., 280 AD2d 652 (2<sup>nd</sup> Dept. 2001). Manchinski v Caserta, 5 Misc3d 1007(A) (Supreme Court Nassau County 2009).

In addition, pursuant to CPLR 3126, the plaintiffs are awarded costs and attorney's fees attendant to these applications. Movant is directed to communicate with the Court to arrange for the reference of this issue, and an inquest on the issue of damages to a Court Attorney/Referee.

The matter is referred to Court Attorney/Referee Thomas Dana to hear and report on the issue of damages and reasonable attorney's fees. Said hearing shall take place on a date agreeable to all parties and Mr. Dana.

This constitutes the Decision and Order of the Court.

Dated: October 22, 2009



**ENTERED**  
OCT 26 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE