

**DMAS Fin. Servs., Inc. v Rapaglia**

2010 NY Slip Op 30872(U)

April 12, 2010

Supreme Court, Richmond County

Docket Number: 132038/09

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3

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Index. 132038/09  
Motion No.: 001

DMAS FINANCIAL SERVICES, INC.,

*Plaintiff*

*against*

SANDY RAPAGLIA, ANNA RAPAGLIA, SLOMINS, INC.,  
NEW YORK COMMUNITY BANK,  
NEW YORK CITY PARKING VIOLATIONS BUREAU,  
PEOPLE OF THE STATE OF NEW YORK,  
NEW YORK STATE COMMISSIONER OF TAXATION  
AND FINANCE, UNITED STATES OF AMERICA, and  
JOHN DOE #1 through JANE DOE #10,

*Defendants*

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**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

SANDY RAPAGLIA and ANNA RAPAGLIA,

*Third-Party Plaintiffs*

*against*

DENNIS GRIMALDI and EVA D. REININGER,

*Third-Party Defendants*

**Third-Party Index No.:**  
**A132038/09**

The following items were considered in the review of the following: (1) motion to amend third-party complaint; and (2) motion to dismiss.

<u>Papers</u>	<u>Numbered</u>
Grimaldi Notice of Motion and Affidavits Annexed	1
Rapaglia Answering Affidavits	2
Grimaldi Replying Affidavits	3
Rapaglia Sur-Replying Affidavits	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Third-Party Defendant Dennis Grimaldi's ("Grimaldi") motion for an Order to strike Grimaldi's name from the caption of Third-Party Plaintiffs Sandy Rapaglia and Anna Rapaglia's

(together, the “Rapaglias”) third-party complaint pursuant to CPLR 1003 is denied.

Third-Party Defendant Grimaldi’s motion for an Order dismissing the Rapaglias’ complaint pursuant to CPLR 3211(a)(7) is denied.

## **FACTS**

Grimaldi is President of DMAS Financial Services (“DMAS”). Grimaldi twice loaned money, allegedly on behalf of DMAS, on a short-term basis to the Rapaglias for the purpose of allowing the Rapaglias to expand their existing business, Sports Management Solutions, Inc. (“SMS”). The first loan was made to the Rapaglias using a check from DMAS on August 20<sup>th</sup>, 2004 in the amount of \$52,090.00. The second loan to the Rapaglias was made using a check from the personal account of Grimaldi on August 31, 2004 in the amount of \$31,500.00. Both loans are evidenced by a promissory note.

Soon after, the Rapaglias defaulted on both loans. Through Grimaldi, the Rapaglias arranged to refinance the existing debt to DMAS with a mortgage on their home. The mortgage was entered into on May 10, 2007, had a term of three years, and had a principal amount of \$145,600, which reflected the principal balance on the promissory notes, accrued interest and late payments, and closing costs.

## **DISCUSSION**

### **Motion to Dismiss**

Grimaldi moves to dismiss the Rapaglias’ complaint due to the Rapaglias’ alleged failure to have stated a cause of action for fraud, conversion, and violations of numerous state and federal acts.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court will "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit

within any cognizable legal theory".<sup>1</sup> In assessing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one".<sup>2</sup> While affidavits may be considered, if the motion has not been converted to a CPLR 3212 motion for summary judgment, they are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims. Similarly, defendant's affidavits will seldom warrant relief unless they conclusively establish that the plaintiff has no cause of action.<sup>3</sup> By contrast, a motion for summary judgment, which seeks a determination that there are no material issues of fact for trial, assumes a complete evidentiary record.<sup>4</sup>

The Rapaglias have presented allegations sufficient to withstand Grimaldi's motion to dismiss. As discussed above, the sufficiency of evidence to ultimately prevail at trial is immaterial. According to the Rapaglias all favorable inferences, there are many inconsistencies in the parties' factual accounts that must be resolved, including whether Grimaldi initiated the dialogue regarding the loans, the reasons why Grimaldi used a personal check to distribute loan proceeds, and the circumstances surrounding the mortgage recorded by DMAS. The Rapaglias also assert that they never made an application to DMAS for any loan and only dealt with Grimaldi, which may indicate that Grimaldi misrepresented himself.

Grimaldi's self-serving affidavit that he acted at all times in his capacity as an agent of DMAS is also insufficient to indicate that the Rapaglias have failed to state a cause of action. Grimaldi's affidavit fails to resolve the issues created by his use of a personal check and, therefore, does not conclusively establish the absence of a cause of action against him as an individual.<sup>5</sup>

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<sup>1</sup> *Leon v Martinez*, 84 NY2d 83, 87-88, [1994]

<sup>2</sup> *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 [1977]

<sup>3</sup> *Rovello v Orfino Realty, Co.*, 40 NY2d 633, 635-636, [1979]

<sup>4</sup> *Nonnon v. City of New York*, 2007 NY Slip Op 5578, 2 [2007]

<sup>5</sup> *Rovello*, supra

## Misjoinder

Grimaldi moves for an Order to strike his name from the caption of the Rapaglias' third-party complaint because he was misjoined, having acted at all times as a representative of DMAS and never in an individual capacity.

Misjoinder of parties is not a ground for dismissal of the action under CPLR 1003, which states in part:

...Misjoinder of parties is not a ground for dismissal of an action. Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it. Parties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just. The court may order any claim against a party severed and proceeded with separately.

It should be noted that the court's power to order severance or a separate trial under CPLR 407 and 603 is sufficiently broad to cover situations where the joinder of parties was perfectly proper if such action by the court will further "convenience" or "avoid prejudice."<sup>6</sup>

To determine if a defendant has been misjoined in an action, CPLR 1002(b) is determinative. Since Grimaldi is asserting that he has been misjoined as a third-party defendant in this action, CPLR 1002(b) applies and states:

Persons against whom there is asserted any right to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences, may be joined in one action as defendants if any common question of law or fact would arise.

In order to show that joinder was proper, the Rapaglias must establish that the claims against Grimaldi arise from the same series of transactions and involve a common question of law or fact

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<sup>6</sup> *Dolce v. Jones*, 145 A.D.2d 594 [2d Dept 1988]

as those present in DMAS's claims against the Rapaglias and the Rapaglias' counter-claims against DMAS.<sup>7</sup>

The Rapaglias' counter-claims against DMAS and the third-party complaint against Grimaldi allegedly raise multiple causes of action including fraud, conversion, and violations of the Truth-in-Lending Act, Deceptive Practices Act, and Door-to-Door Sales Protection Act. Each of these claims arise from the same series of transactions, including Grimaldi's solicitation of the Rapaglias to take out loans, as well as the refinancing of the loans through a mortgage with DMAS.

The allegations contained in the counter-claims and third-party complaint also raise common questions of law and fact, namely, that Grimaldi, either individually or in his capacity as an agent of DMAS, committed fraud and violated several state and federal acts in the process of making the loans. The documentary evidence in the form of a personal check from Grimaldi's personal bank account in the amount of \$31,500<sup>8</sup> indicates that at least one of the loans may have been a personal loan from Grimaldi to the Rapaglias, without the involvement of DMAS. This lends credence to the Rapaglias' arguments that Grimaldi may have been working in an individual capacity in addition to his role as DMAS's agent. Grimaldi's affidavit stating that he acted, at all times, as a representative of DMAS and not an individual capacity is insufficient to negate the appearance of a common question of law or fact, which is bolstered by the documentary evidence mentioned above.

Since virtually all issues of law and fact will be identical as presented by the Rapaglias against DMAS and Grimaldi, joinder of the parties will also be of great convenience to the court and the parties.

## CONCLUSION

Grimaldi was not misjoined in the instant action since the Rapaglias have presented sufficient

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<sup>7</sup> *Great Northern Tel. Co. v Yokohama Specie Bank, Ltd.*, 297 NY 135 [1948]

<sup>8</sup> Exhibit 1, Third-Party Defendant's Notice of Motion

evidence to indicate that their claims against Grimaldi flow from the same series of transactions that are at issue in the primary action, and involve several common issues of law and fact. The Rapaglias have also sufficiently stated a cause of action against Grimaldi to withstand Grimaldi's motion to dismiss their third-party complaint.

Accordingly, it is hereby:

ORDERED, that Third-Party Defendant Grimaldi's motion to strike his name from the caption of Defendants and Third-Party Plaintiffs Rapaglias' third-party complaint is denied; and it is further

ORDERED, that Third-Party Defendant Grimaldi's motion to dismiss Defendants and Third-Party Plaintiffs Rapaglias' third-party complaint is denied; and it is further

ORDERED, that the parties return to DCM Part 3 on Tuesday, May 4, 2010 at 9:30a.m. for a preliminary conference.

ENTER,

DATED: April 12, 2010

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Joseph J. Maltese  
Justice of the Supreme Court