

**Washington Tit. Ins. Co. v Sand Lane Tit. Agency,  
LLC**

2011 NY Slip Op 30451(U)

February 15, 2011

Sup Ct, Nassau County

Docket Number: 021167/2009

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 7**

\_\_\_\_\_  
WASHINGTON TITLE INSURANCE COMPANY,

Plaintiff,

-against-

INDEX NO.: 021167/2009  
MOTION DATE: 12/6/10  
SEQUENCE NO.: 03

SAND LANE TITLE AGENCY, LLC, ALEKSANDR  
POLYAKOV, and YANA SHTINDLER,

Defendants.  
\_\_\_\_\_

The following papers were read on this matter:

Motion for Default Judgment against Defendants .....	1
Affirmation in Opposition .....	2
Reply Affirmation .....	3

**PRELIMINARY STATEMENT**

Washington Title Insurance Company ("Washington Title") moves for default judgment against defendants Sand Title Agency, LLC ("Sand Title") and Aleksandr Polyakov (collectively "defendants") pursuant to CPLR 3215. Plaintiff alleges that defendants defalcated and breached the Underwriting Agreement ("Agreement"). Plaintiff seeks an inquest for an assessment of damages, interest, costs and disbursements, equitable accounting, attorneys fees incurred during the underlying action, punitive damages, imposition of a constructive trust and assets acquired with trust funds by defendants, and injunctive relief against defendants.

## BACKGROUND

On January 14, 2005, plaintiff, a title insurance company, and defendant Sand Lane entered into an agreement, pursuant to which Sand Lane agreed to issue policies of title insurance on behalf of plaintiff to purchasers and lenders in connection with real estate closings and mortgage loans. Defendant Polyakov is the manager and an officer of Sand Lane. Pursuant to the agreement, defendants collected payments for fees and insurance premiums earned, and took custody, in escrow, of deeds, mortgages, and other documents and instruments for recording with the applicable City or County land records office.

Plaintiff contends that it made demands upon Sand Lane to review title policies, backup policies already issued by Sand Lane, and to turn over documents required to be recorded in the applicable recording offices. It further contends that Sand Lane provided it with requested title policies representing that required documents were recorded, all taxes and recording fees paid. However, Plaintiff states that numerous deeds, mortgages and other recordable documents issued by defendants at the closings remain unrecorded, contrary to the Agreement. In addition, trust funds required to be held in escrow by Sand Lane have gone unaccounted for.

Plaintiff also asserts that Polyakov has exercised total dominion and control over Sand Lane and has forfeited the right to proceed under the guise of a limited liability company. For this reason, plaintiff seeks to pierce the company veil.

Plaintiff annexes a copy of the summons and complaint as Exhibit 8. It also attaches an affidavit of service upon the defendant Polyakov at his actual dwelling place upon a person of suitable age and discretion. It also produces evidence of service upon Sand Lane by personal service of two copies of the papers upon an authorized agent in the office of the New York State Secretary of State, as well as additional notice to Sand Lane pursuant to CPLR 3215 (g). Counsel for plaintiff asserts that the defendants have neither appeared nor moved in response to the summons and complaint and are in default.

## DISCUSSION

Plaintiff has adequately established entitlement to a default judgment against defendants on the basis of an affidavit by a person with personal knowledge and supporting documents. Plaintiff is entitled to the following forms of relief:

### Claim for Attorneys' Fees

Pursuant to Paragraph 8 of the Agreement, defendants failed to comply with the terms of the Agreement when they wrongfully diverted certain trust funds which were required to be held in escrow, and failed to record documents in connection with closings which they attended and mortgage loans given that were required to be recorded. They (plaintiff) are a "successful party" under the terms of paragraph 13, thereby requiring that defendants "shall pay court costs and reasonable attorneys' fees of the successful party".

### Breach of Contract

The relationship between plaintiff and Sand Lane was that of principal and agent. Failure of an agent to perform duties gives the principal a cause of action for breach of contract. (*American Express Co. v. Paonessa*, 57 A.D.2d 1079, 1080 [4<sup>th</sup> Dept. 1977]). The complaint adequately states a cause of action for breach of contract against defendant Sand Lane.

### Breach of Fiduciary Duty

The relationship of principal and agent imposes a fiduciary relationship. (*IBE Trade Corp. V. Litvinenko*, 298 A.D.2d 285 [1 Dept. 2002]). The complaint adequately states a cause of action for breach of fiduciary duty against Sand Lane.

### Conversion

A claim of conversion cannot be predicated "on a mere breach of contract" (*Kopel v. Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [1 Dept.2008] ). Where there are no independent facts alleged that constitute a separate taking which could give rise to tort liability, apart from an alleged breach of contract, a cause of action for conversion must be dismissed.

( see *Tornheim v. Blue & White Food Prods. Corp.*, 56 AD3d 761, 761 [3d Dept.2008]; *Hochman v. LaRea*, 14 AD3d 653, 655 [2d Dept.2005]; *Fesseha v. TD Waterhouse Inv. Servs.*, 305 A.D.2d 268, 269 [1 Dept.2003]; *Wolf v. National Council of Young Israel*, 264 A.D.2d 416, 417 [2d Dept.1999]; *Priolo Communications v. MCI Telecom. Corp.*, 248 A.D.2d 453, 454 [2d Dept.1998]; *MBL Life Assur. Corp. v. 555 Realty Co.*, 240 A.D.2d 375, 376 [2d Dept.1997] ).

### Negligence

An agent may be held liable based upon negligence for his failure to exercise due care in the performance of his duties. (*Bedessee Imports, Inc. V. Cook, Hall & Hyde, Inc.*, 45 A.D.3d 792, 794 [2d Dept. 2007]). Plaintiff has adequately stated a cause of action for negligence against Sand Lane.

### Fraud

In order to sustain a cause of action for actual fraud, plaintiff must prove:

- defendant made a representation , as to a material fact;
- the representation was false;
- the representation was known to be false by defendant;
- it was made to induce the other party to rely upon it;
- the other party rightfully relied upon the representation;
- the party relying upon the representation was ignorant of its falsity;
- the party suffered injury or damage based on its reliance. (*Otto Roth & Co. Inc., v. Gourmet Pasta, Inc.* 277 A.D.2d 293 [2d Dept. 2000]).

Liability can also be premised upon representations which are recklessly made. (*Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112 [1969]).

Plaintiff has failed to allege fraud against defendants with the specificity required by CPLR 3016.

### Contractual Indemnification

Plaintiff alleges entitlement to contractual indemnification as the Sixth Cause of Action. According to the Paragraph 8 of the Agreement ( Exhibit "8"), " Underwriter [Washington Title] shall be responsible for all loss, cost or damage, including attorney's fees, however Company [Sand Lane] shall be responsible to Underwriter for such loss, cost . . . ." Such language does not provide that defendants agreed to indemnify, defend and hold Plaintiff harmless for any loss, cost or damage. Therefore, a cause of action for contractual indemnification must be dismissed.

### Equitable Accounting

This is an equitable remedy which relies upon the existence of a fiduciary relationship. The parties were in such a relationship as principal and agent, and the complaint adequately asserts a confidential relationship. Plaintiff has adequately stated entitlement to relief in the form of an accounting. (*Roni, LLC v. Arfa*, 74 A.D.3d 442 (1 Dept. 2010); *Schantz v. Oakman*, 163 N.Y. 148 [1900]; *Chalasani v. State Bank of India, New York Branch*, 235 A.D.2d 449 [2d Dept. 1997]).

### Constructive Trust

Plaintiff alleges entitlement to a constructive trust in the Fifth Cause of Action. In order to establish a constructive trust plaintiff must satisfy four elements: "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment. (*Sharp v. Komalski*, 40 N.Y.2d 119, 123 [1976]). While these constitute guidelines, and rigid application is not required, (*Johnson v. Lih*, 216 A.D.2d 821, 823 [3d Dept. 1995]). The fundamental purpose of the creation of a constructive trust is the avoidance of unjust enrichment. In this case, the claim for constructive trust are duplicative of the breach of contract claim, and is not necessary to satisfy the demands of justice.

### Injunction

"To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction." (*De Fabio v.*

*Omnipoint Communications, et al.*, 2009 WL 3210142 [N.Y.A.D. 2d Dept., 2009]); citing, CPLR 3201, *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988), *W.T. Grant v. Srogi*, 52 N.Y.2d 496, 517 (1981); See also, *Automated Waste Disposal, Inc., v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072 — 1073 (2d Dept. 2008).

“Irreparable injuries for the purpose of equity, has been held to mean any injury for which money damages are insufficient”. (*Walsh v. Design Concepts*, 221 A.D.2d 454, 455 (2d Dept. 1995). On the contrary, “(e)conomic loss, which is compensable by money damages, does not constitute irreparable harm”. (*EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 (2d Dept. 2007). Failure to enunciate non-economic loss constitutes a failure to demonstrate irreparable harm so as to warrant equitable relief in the form of an injunction (*Automated Waste Disposal* at 1073.

Likelihood of ultimate success on the merits does not import a predetermination of the issues, and does not constitute a certainty of success. The requirement is a protection against the exercise of a court’s formidable equity power in cases where the moving party’s position, no matter how emotionally compelling, is without legal foundation (*Tucker v. Toia*, 54 A.D.2d 322, 326 [4<sup>th</sup> Dept. 1976]).

In balancing the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief. (*Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.*, 47 A.D.3d 806 [2d Dept. 2008]). This is, by definition, a fact-sensitive inquiry.

Plaintiff has adequately states entitlement to the injunctive relief against defendants restraining them from destroying records and books, from holding themselves as an agent or representative of the plaintiff, and from transferring trust funds.

### *Piercing the Corporate Veil*

The law permits the creation of corporations for the conduct of business so as to shield its proprietors from personal liability. But this privilege is not without its limits, and the courts will disregard the corporate form, or “pierce the corporate veil”, whenever necessary “to prevent fraud or achieve equity”. *Walkovszky v. Carlton* (18 N.Y.2d 414, 417 [1966]). The party seeking to pierce the corporate veil must establish “that the owner exercised complete domination of the corporation with respect to the transaction in question and said

domination was used to commit a fraud or wrong against the plaintiff resulting in plaintiff's injury" (*Morris v. New York State Dept. of Taxation and Fin.*, 82 N.Y.2d 135, 142 [1993]). Factors to be considered in determining whether or not there has been such abuse include whether there was a "failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use." (*Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016 — 1017 [2d Dept. 2007]).

As the sole shareholder, officer and director of Sand Lane, defendant Polyakov exclusively and completely controlled operation of Sand Lane with respect to the business conducted with the plaintiff. By failing to maintain necessary Trust Funds in the escrow, to provide plaintiff with the requested accounting, and return unaccounted and misappropriated funds, Polyakov committed a wrong against the plaintiff that resulted in its injury. Therefore, it is sufficient to warrant a determination that defendant Polyakov has so abused the company as to have forfeited the right to conduct business in the form of a limited liability company. The application to pierce the company veil of Sand Lane is granted.

#### Account Stated

In order to sustain a cause of action for account stated, plaintiff must prove that the rendering of an account and the failure of the responsible party to object within a reasonable period of time. (*Bonamassa v. Estate of Bakos*, 2011 WL 346715 [2011]; citing E. F. Badway *Encycl. N.Y. Causes of Action: Elements and Defenses*, sec. 5-2 [2010]; see, e.g. *Nebraskaland, Inc. v. Best Selections*, 303 A.D.3d 662 [2d Dept. 2003]; *Bay Ridge Lumber Co., Inc. v. Summit Renovation Corp.*, 271 A.D.2d 559 [2d Dept. 2000]). An account stated refers to an agreement between parties to account between them with respect to the correctness of the account items and balance due. (*Jim-Mar Corp. v. Aquatic Const., Ltd.* 195 A.D.2d 868 [3d Dept. 1993]). Plaintiff has failed to provide an evidence of rendering accounts with a balance due to the defendants. Therefore, a cause of action for an account stated must be denied.

Plaintiff is entitled to judgment against Sand Lane Title Agency, LLC and Aleksandr Polyakov as follows:

Against defendants on the First Cause of Action (Breach of Contract);

Against defendants on the Second Cause of Action (Breach of Fiduciary Duty)

Against defendants on the Fourth Cause of Action (Negligence)

Against defendants on the Seventh Cause of Action (Equitable Accounting)

Against defendants on the Eleventh Cause of Action (Attorney's fees)

Plaintiff has failed to assert any legally cognizable claims against defendant Yana Shtindler, and the action against her is in all respects dismissed.

Plaintiff is to file a Note of Issue and serve a Notice of Inquest, upon Notice, for an assessment of damages, attorney's fees and costs.

This constitutes the Decision and Order of the Court.

Dated: February 15, 2011

  
J.S.C.

**ENTERED**  
FEB 18 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE