

**JPMorgan Chase Bank, N.A. v Queens Blvd.**

2011 NY Slip Op 33391(U)

November 28, 2011

Sup Ct, Queens County

Docket Number: 5265/2010

Judge: Augustus C. Agate

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24  
Justice

JPMorgan Chase Bank, N.A.,  Plaintiff,  -against-  Queens Boulevard, etc., et al.,  <u>Defendants.</u>	x          x	Index Number <u>5265</u> 2010  Motion Date <u>September 20,</u> 2011  Motion Cal. Number <u>17</u>  Motion Seq. No. <u>4</u>
--	--	---

The following papers numbered 1 to 5 read on this motion by defendant Dorothy Giorgianni for an order pursuant to CPLR 3016(b), 3211(a)(1), and CPLR 3211(a)(7) dismissing the complaint against her

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-3
Answering Affidavits - Exhibits .....	4
Reply Affidavits .....	5

Upon the foregoing papers it is ordered that the motion is denied.

I. The Allegations of the Complaint

Defendant Queens Boulevard Lincoln- Mercury, Inc. (QBLM) has its principal place of business at 139-40 Queens Blvd., Jamaica, New York. Defendant Anthony Giorgianni (AG) and his wife, defendant Dorothy Giorgianni (DG), are both 50% shareholders, directors, and officers of the company. Defendant Auto Palace, Inc. (AP), whose principals are defendant Fereshteh Kohanano (FK) and defendant Hooshmand

Kohanano (HK), has its principal place of business at 53-21 Northern Blvd, Woodside, New York.

On August 29, 2005, defendant QBLM and plaintiff JP Morgan Chase Bank (Chase) entered into a retail sales financing agreement pursuant to which the latter accepted assignments of retail installment contracts from the former and advanced money to finance the purchase of vehicles. Plaintiff Chase did not enter into an agreement with defendant AP which did not have the right to finance the purchase of vehicles through the bank. However, beginning in 2007 AP began to surreptitiously finance the purchase of vehicles through Chase with QBLM's cooperation. Defendant QBLM violated various provisions of its financing agreement with Chase, including paragraph 3(d) wherein QBLM warranted that "[t]he vehicle is being sold only for the Dealer's benefit \*\*\*."

Defendant AP fraudulently sold certain vehicles to its customers on the false representation that AP would finance the purchase of the vehicles and with the concealment of the loan made instead by Chase. AP, acting in conspiracy with the other defendants, had some of its customers unknowingly execute Chase retail installment contracts, or AP altered retail installment contracts without the customers' consent, or AP forged its customers' signatures on altered Chase retail installment contracts. Moreover, after the customers executed the retail installment contracts, the dealers did not perfect Chase's security interest in the vehicles, but instead perfected the security interest for different financing companies such as the Teacher's Federal Credit Union and American Suzuki Financial Services.

The defendant dealers also engaged in a scheme of "double selling" certain vehicles. The defendant dealers falsely informed customers that Chase had declined to finance their purchases, and when the customers returned the vehicles, the defendant dealers resold them to new customers. The defendant dealers did not deliver to customers certain vehicles financed by Chase, and, when the customers complained, the dealers refunded their deposits and promised to cancel their finance contracts. Instead, the defendants did not cancel the contracts, retained the advances, and in many cases even kept the vehicles. The defendants then resold the vehicles to new customers, obtaining new financing from different lenders.

The plaintiff sustained damages from unpaid retail installment contracts in the amount of \$220,640.40.

## II. The Allegations of Defendant DG

Defendant DG alleges that she is a 72 year old grandmother, who, although the secretary of defendant QBLM, did not participate in the daily operations of the company and

did not have control of its books and records. Defendant DG alleges that during the relevant time period she “was involved in the day to day operations of an unrelated auto repair shop having nothing to do with QBLM.” She further alleges that she did not sign the Retail Installment Agreement with plaintiff Chase and that she did not sign any of the retail installment contracts with automobile customers because she did not deal with them.. She allegedly did not engage in any business transactions with defendant AP or its principals. She allegedly was completely ignorant of any fraud perpetrated by the other defendants.

### III. CPLR 3211(a)(7)

#### A. Standards

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference\*\*\*." (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see, Stukuls v. State of New York*, 42 NY2d 272; *Jacobs v. Macy's East Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. ( *See, Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (*See, Rovello v. Orofino Realty Co., Inc. supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159.) As a general rule, where a CPLR 3211(a)(7) motion is not converted into one for summary judgment, the court may only "consider affidavits for the limited purpose of remedying any defects in the complaint \*\*\*." (*One Acre, Inc. v. Town of Hempstead* 215 AD2d 359; *see, Nonnon v. City of New York*, 9 NY3d 825.)

#### B. Grounds for Liability

##### 1. Participation in Tortious Conduct

A corporate officer is not liable for the torts of a corporation merely because of his official relationship to it, but he is liable if he participated in the wrongful conduct. (*See, Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp.*, 64 AD3d 85; *Aguirre v. Paul*, 54 AD3d 302; *Clark v. Pine Hill Homes*, 112 AD2d 755.) In the case at bar, the plaintiff’s allegations that (1)defendant DG is a 50% owner of defendant

QBLM, a close corporation,(2) that defendant DG is married to defendant AG, apparently the main perpetrator of the alleged fraud, (3) that defendant DG has business experience and participates in the day to day operations of another company, (4) that defendant DG serves as a director and corporate officer of defendant QBLM, and (5) that there was an on-going scheme to defraud the bank, not just one isolated instance of wrong doing, suffice to permit a jury to infer that she participated in the alleged tortious conduct. The complaint does not seek to fasten liability upon defendant DG merely because she holds corporate office. Moreover, “[a]n individual's degree of participation in business affairs is probative of knowledge,” (*F.T.C. v. Medical Billers Network, Inc.* 543 F.Supp.2d 283, 320 [S.D.N.Y]), and, on the present state of the record, there is an issue of fact concerning defendant DG’s degree of participation in the affairs of defendant QBLM.

## 2. Conspiracy

“Once a conspiracy is established, every act and declaration of each member of the confederacy in pursuance of the original concerted plan is, in law, the act and declaration of them all so that all the conspirators are equally liable, jointly and severally, as tortfeasors.” ( 20 N.Y. Jur. 2d Conspiracy—Civil Aspects § 10.) In the case at bar, the plaintiff did not have to allege that defendant DG committed every element of every tort personally. Allegations of conspiracy connect the actions of separate defendants with an actionable tort. (*Alexander & Alexander of New York, Inc. v. Fritzen*, 68 NY2d 968.)

## C. The Third Cause of Action

The third cause of action is for fraud. A plaintiff who asserts a cause of action for fraud must allege (1) that the defendant made material representations that were false or concealed a material existing fact, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff was deceived, (4) that the plaintiff justifiably relied on the defendant's representations, and (5) that the plaintiff was injured as a result of the defendant's representations. (*See, Lama Holding Co. v. Smith Barney*, 88 NY2d 413; *New York Univ. v. Continental Ins. Co.*, 87 NY2d 308; *Watson v. Pascal*, 27 AD3d 459; *Cerabono v. Price*, 7 AD3d 479; *New York City Transit Authority v. Morris J. Eisen, P.C.*, 276 AD2d 78; *American Home Assur. Co. v. Gemma Const. Co., Inc.*, 275 AD2d 616; *Swersky v. Dreyer & Traub*, 219 AD2d 321.) Plaintiff Chase has adequately alleged facts supporting each of these elements. The complaint charges that defendant DG participated in or had knowledge of a conspiracy, and the plaintiff did not have to allege that DG committed every element of fraud. (*See, Snyder v. Puente De Brooklyn Realty Corp.*, 297 AD2d 432.) The court notes with respect to the element of scienter that the complaint alleges that “upon information and belief, Defendants AG, DG, FK and HK, by virtue of

their management and supervision roles in the respective businesses, had actual knowledge of the fraudulent activity described in the complaint.”

“In actions for fraud, corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud \*\*\*.” ( *Polonetsky v. Better Homes Depot, Inc.*, 97 NY2d 46, 55; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486.) Although defendant DG denies knowledge of the fraud, the complaint alleges sufficient facts which permit the inference of her knowledge.( *See, Polonetsky v Better Homes Depot, supra; High Tides, LLC v. DeMichele*, 88 AD3d 954.) She is the wife of defendant AG, who appears to be the main perpetrator of the fraudulent scheme, if there was one, and she is also the secretary of defendant QBLM, a close corporation. Although defendant DG claims to be a grandmother who took no interest in the daily affairs of QBLM, she admits that she was a business woman involved in the day to day operations of another company. As a business woman she presumably had concerns about the affairs of defendant QBLM, a company in which she had a one-half interest. Finally, the complaint does not allege just one isolated act of fraud, but rather an on-going fraudulent scheme. (See, *Pludeman v Northern Leasing Sys., Inc., supra.*)

The court notes that under the circumstances the plaintiff has met the heightened pleading standards of CPLR 3016(b). The facts of defendant DG’s awareness of and/or participation in the alleged conspiracy to defraud are peculiarly within her knowledge (*see, Paolucci v Mauro*, 74 AD3d 1517) and pleading defects, if any, may be cured after discovery for which the plaintiff has established a need. (*See, Pludeman v Northern Leasing Sys., Inc., supra.*)

#### D. The Fourth Cause of Action

The fourth cause of action alleges that the “[d]efendants have been unjustly enriched in the amount of the unpaid balances for the retail installment contracts for the vehicles identified in Exhibit 2 \*\*\*.” "A cause of action for unjust enrichment arises when one party possesses money or obtains a benefit that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to another \*\*\*." (*Mente v. Wenzel*, 178 AD2d 705, 706; *see, Strong v. Strong*, 277 AD2d 533.) The fourth cause of action is adequately stated.

#### E. The Fifth Cause of Action

The fifth cause of action alleges that the defendants “have converted property or monies advanced under the retail installment contracts.” Conversion is the unauthorized

assumption and exercise of the right of ownership over property belonging to another to the exclusion of the owner's rights. (See, *State v. Seventh Regiment Fund, Inc.*, 98 NY2d 249, 259.) The complaint adequately alleges that the defendants were not entitled to keep funds advanced by Chase after failing to deliver vehicles to customers or repossessing the vehicles.

#### F. The Sixth Cause of Action

The elements of a cause of action under General Business Law §349 include consumer-oriented conduct directed at the public at large that is materially deceptive and causes injury to the plaintiff. ( See, *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20; *Shou Fong Tam v. Metropolitan Life Ins. Co.* , 79 AD3d 484, 486, ) The complaint adequately states a cause of action based on General Business Law §349. The court notes that a business competitor has standing to assert a cause of action under the statute. (See, *North State Autobahn, Inc. v Progressive Ins. Group*, 32 Misc3d 798; *Securitron Magnalock Corp. v. Schnablock*, 65 F3d 256.)

#### G. The Seventh Cause of Action

The seventh cause of action alleges that the defendants sold and then cancelled warranties covering certain vehicles, that plaintiff Chase financed the customer's purchase of the warranties, and that the defendants kept the money advanced by the bank for themselves. The seventh cause of action adequately asserts a claim for conversion against defendant DG.

#### H. The Eighth Cause of Action

The eighth cause of action adequately alleges that the defendants were unjustly enriched by the amount of the cancelled warranties.

### IV. CPLR 3211(a)(1)

In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted “ must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim\*\*\*.” ( *Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702; see, *Galvan v. 9519 Third Avenue Restaurant Corp, supra*; *Vanderminden v.Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v.Webster Town Center Partnership*, 221 AD2d 248.) The documentary evidence submitted by defendant DG does not dispose of the claims asserted against her. Although the retail financing agreement with Chase and the retail installment contracts signed by customers of QBLM may not carry defendant DG's signature, under all

of the circumstances of this case, issues of fact remain concerning her participation, if any, in the torts allegedly committed against plaintiff Chase. The court notes that although affidavits may be used on a CPLR 3211(a)(1) motion as “connecting links,” affidavits may not be used as proof in themselves of a fact in issue. (*See, Realty Investors of USA Inc. v. Bhaidaswala*, 254 AD2d 603; . *Standard Chartered Bank v. D. Chabbott, Inc.*, 178 AD2d 112; 7 Weinstein-Korn-Miller, *NY Civ. Prac.* ¶ 3211.06.)

Dated: November 28, 2011

---

AUGUSTUS C. AGATE, J.S.C.