

**Bank of Am., N.A. v Merzlyakov**

2011 NY Slip Op 33935(U)

November 28, 2011

Sup Ct, NY County

Docket Number: 106529/10

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

BANK OF AMERICA, N.A.,  
Plaintiff,

Index No.: 106529/10

Motion Date: 05/31/11

- v -

Motion Seq. No.: 01

ALEXANDER MERZLYAKOV and MICHAEL KOZIAKOV,  
Defendants.

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 2 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED

1

2

**FILED**

DEC 01 2011

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers,

Plaintiff trustee sues defendants to recover for rent it paid on behalf of one of the trust's beneficiaries on the grounds that the beneficiary had vacated the subject apartment and was not a lessee during the period in question. The complaint alleges that Alexander Merzlyakov was the owner/landlord of the rented apartment and that movant Michael Koziakov was his "agent and attorney-in-fact." The current motion seeks to dismiss the action pursuant to CPLR 3211 against Michael Koziakov only.

The complaint alleges three causes of action against the

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

defendants for (1) money had and received, (2) unjust enrichment and (3) restitution. Movant Michael Koziakov argues that he did not personally enter into any lease with plaintiff's beneficiary nor did he receive any money from plaintiff.

The court shall grant the motion. The complaint alleges that the movant was acting as an agent for the landlord. The complaint further alleges that money was paid and deposited in the account of defendant Alexander Merzlyakov. There is no allegation that the movant misrepresented his authority to plaintiff's beneficiary or that movant entered into any separate agreement with plaintiff's beneficiary.

As stated by the Court "the predicate, settled for this court in Mencher v. Weiss (306 NY 1, 4), [is] that an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal". Savoy Record Co. v Cardinal Export Corp., 15 NY2d 1, 4 (1964). "[W]e recognize as well settled the proposition that an agent assumes no personal liability in executing a contract for a disclosed principal, unless it is clear that the agent intends to be bound personally." Memorial Hosp. v Baumann, 100 AD2d 701 (1984).

There is no allegation in the current complaint that the movant committed or omitted any act that would subject him to

liability to the plaintiff. The complaint does not allege that the movant misstated that his actions were on behalf of a disclosed principal. Therefore on the facts as currently asserted in the complaint there can be no claim of tortious misrepresentation or breach implied warranty of authority against this movant. See DePetris & Bachrach, LLP v Srour, 71 AD3d 460, 462 (1<sup>st</sup> Dept 2010).

To the extent that plaintiff argues in opposition that there may exist facts suggesting that the movant should be treated as a principal and not an agent, such an assertion is in direct contradiction to the allegations in the current complaint and the submission of such facts on this motion is not supported by an affidavit. Contrast Cron v Hargro Fabrics, Inc., 91 NY2d 362, 366 (1998) ("a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims").

Accordingly, it is

ORDERED that the motion is GRANTED and the complaint is DISMISSED as against defendant MICHAEL KOZIAKOV only; and it is further

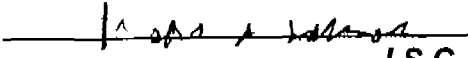
ORDERED that the parties shall appear at a preliminary

[\* 4]  
conference on February 28, 2012, at 9:30 A.M, in IAS Part 59,  
Room 103, 71 Thomas Street, New York, NY 10013.

This is the decision and order of the court.

**Dated:** November 28, 2011

ENTER:

  
**DEBRA A. JAMES** J.S.C.

**FILED**

DEC 01 2011

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