

**Palestine Monetary Auth. v Bank of New York Mellon Corp.**

2012 NY Slip Op 30012(U)

January 6, 2012

Supreme Court, New York County

Docket Number: 600841/10

Judge: Shirley Werner Kornreich

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

PRESENT: Kornreich  
Justice

PART 54

PMA

INDEX NO. 600841/10

MOTION DATE 3/22/11

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

BONY

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

| PAPERS NUMBERED |
|-----------------|
| <u>1-5</u>      |
| <u>6-7</u>      |
| <u>8-9</u>      |

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is granted in accordance with the amended decision

**FILED**

JAN 09 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/6/12

JUSTICE SHIRLEY WERNER KORNBEICH  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
PALESTINE MONETARY AUTHORITY,

Plaintiffs,

- against -

THE BANK OF NEW YORK MELLON  
CORPORATION,

Defendant.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

INDEX No.: 600841/2010

DECISION & ORDER

**FILED**

**JAN 09 2012**

Plaintiff, the Palestine Monetary Authority (PMA), seeks money damages against defendant, THE BANK OF NEW YORK MELLON CORPORATION (BONY), for conversion (First Cause of Action), tortious interference with business relationships (Second Cause of Action), and unjust enrichment (Third Cause of Action), and equitable relief in the form of an order to release approximately \$17.6 Million in seized funds. BONY, now, moves to dismiss the Complaint on grounds of *res judicata*, judicial estoppel and failure to state a claim. CPLR 3211(a)(5) &(7). For the reasons which follow, the motion is granted.

*I. Background*

The current action has its genesis in a 2005 litigation which sought to collect on a \$116 Million default judgment rendered by the United States District Court, District of Rhode Island, in an action styled, *The Estate of Yaron Ungar et al. v The Palestinian Authority et al.*, C.A. No. 00105L (the *Strachman* matter).<sup>1</sup> The Federal court (Hon. Ronald R. Lagueux) issued a May 5, 2005

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<sup>1</sup>The Administrator of the *Ungar* estate is David Strachman. The court will refer to the plaintiffs in the Federal matter in Rhode Island and subsequent State court litigation as the "Strachman plaintiffs."

Injunction restraining the alienation of assets of, *inter alia*, the PA and “their officers, agents, servants, employees, attorneys, partners, fiduciaries, and any natural or legal person in privity with them and/or acting in active concert and participation with them” located within the jurisdiction of the United States.<sup>2</sup> PMA was not named as a defendant in the *Strachman* matter, and no judgment was rendered against it.

BONY was served with the Federal Injunction and a Notice of Injunction naming the PMA, as well as an April 21, 2005 State Restraining Notice with an information subpoena naming the PMA, among other entities. BONY placed PMA wire transfer funds (the disputed funds) in a non-interest bearing “suspense” account. PMA then brought suit against BONY and the *Strachman* plaintiffs in this court, seeking release of the funds by BONY, a declaration that PMA is not an agent or alter ego of the PLO or PA, and damages from BONY for conversion and tortious interference with business relations. The *Strachman* parties cross-claimed against BONY for turnover of the disputed funds. On submission of an order to show cause to determine whether PMA had been correctly named in the Notice of Injunction, the court (Fried, J.) suggested that the parties return to Federal court in Rhode Island for clarification of its order.

Thereafter, PMA filed an order to show cause in Federal Court in Rhode Island, seeking a preliminary injunction and a temporary restraining order precluding BONY’s restraint of the Seized Funds. The Federal Court denied the TRO and at the argument on the preliminary injunction, set a date for an evidentiary hearing as to whether PMA was an agent of, or any of the Seized Funds were funds of, the PA or PLO. The Federal Court noted on the record that: BONY was an indispensable

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<sup>2</sup>The Federal Judgment in *Strachman* was domesticated in New York County under Index No. 105521/2005, which was joined with this matter (Index No. 107777/2005).

party but it had not been named in the action before him; it appeared from the papers that PMA was an agent and held assets of the PA and the PLO; and factual issues would be better adjudicated by the New York State Supreme Court where identical litigation was pending and where the judgment would be enforced. PMA , then, voluntarily discontinued the Federal preliminary injunction action.

Subsequently, this court granted PMA's motion for a preliminary injunction in the State action (10/14/05 Decision and Order, Index No. 107777/05), finding, among other things, that the State Restraining Notice served on BONY violated Article 4A of the UCC. Nonetheless, the court noted that the funds remained restrained pursuant to the Rhode Island Federal Injunction. Lynch Affirm., ¶¶ 42-45, referring to Exh. 6, Bialo Affirm. (6/16/05 Transcript). The court also considered PMA's preliminary injunction motion as to the scope of the Federal Injunction, but held the motion in abeyance pending discovery on the dispositive issues.

PMA stipulated to dismiss with prejudice its claims against BONY in the State action (Index No. 107777/2005), which the court approved, and the claims were dismissed. The parties agreed that BONY would remain a party solely as a stakeholder in the underlying litigation. That litigation, a turnover proceeding, required determination of issues, which included: whether PMA was a separate juridical entity, whether any portion of the suspended PMA money belonged to the PA or PLO, and whether the money held by BONY belonged to non-party entities. The court assumes familiarity with the Federal and State proceedings prior to its October 14, 2005 order, as well as the details of that order and the stipulation subsequently so ordered by the court on November 3, 2005.

PMA bases its current claims on the court's April 2, 2007 Decision and Order (Index No, No.107777/2005) granting its motion for summary judgment. There, the court held that "the Palestinian Monetary Authority is a separate juridical entity from the Palestinian Authority and the

money in its name, restrained by the Bank of New York, should be released.”<sup>3</sup> PMA construes this language as having required BONY to release the disputed funds as of April 6, 2007, when BONY received notice of the decision, or on April 10, 2007, the date the order was formally entered by the court. In its April 2 order, the court also found that: PMA’s status as a separate juridical entity was a nonjusticiable issue preempted by a Treasury Department determination; even if it was a justiciable question, the Seized Funds would have to be released because UCC 4-A prohibits restraint by an intermediary bank and as a result, title to the funds had passed from PMA; and the court was precluded from ordering a turnover of PA funds held by PMA in the Palestinian Territories.

Complaint, Exh. B.<sup>4</sup>

BONY contends that it was acting in good faith as a stakeholder faced with conflicting court orders. In so contending, BONY is referring to a Writ of Execution in a matter styled *Leslye Knox, et al v The Palestine Liberation Organization, et al*, 03 civ. 4466 (the *Knox* matter). The Writ was issued on February 14, 2007 for collection of a \$192,740,660.13 Default Judgment entered on September 2007, in the United States District Court for the Southern District of New York. Again, PMA was not specifically named as a defendant in the *Knox* matter. The Writ of Execution was served on BONY on or about February 20, 2007, the date of the U.S. Marshals Service cover letter, prior to this Court’s April 2 Order.

A. *The Complaint*

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<sup>3</sup>BONY had not been served with any of the papers supporting or opposing the PMA’s summary judgment motion.

The court did not determine whether the PMA was an agent of the PA or the PLO, or the amount of the Seized Funds that were funds of the PA or the PLO. The Rhode Island Injunction remained in force.

\* 6]

The complaint, affidavits and additional documents submitted by PMA, set forth the details of the prior proceedings and orders involving the parties. They allege the following. On Friday April 6, 2007, at 2:23 P.M., counsel for PMA faxed a copy of this court's April 2, 2007 order to BONY's counsel, and stated in the cover sheet that the order required release of the "PMA clearance transaction funds." On Sunday April 8, 2007, at 10:59 A.M., counsel for plaintiffs in both the *Strachman* and the *Knox* matters and for the *Strachman* defendants and cross-claimants in this matter, informed PMA's counsel that:

I note . . . that the PMA funds at BNY remain restrained by an execution/restraining notice served on BNY recently in the matter of Knox v. Palestinian Authority, 03 Civ. 4466 (VM)(THK) (S.D.N.Y.).

In light of Justice Kornreich's decision, we will need to conduct some consultations regarding whether the Knox plaintiffs intend to stand on their execution/restraining notice, and to proceed against these funds.

I expect to be able to inform you of the position of the Knox plaintiffs by no later than Monday, April 16, 2007.<sup>5</sup>

On April 10, 2007, PMA served the April 2, 2007 order with Notice of Entry on BONY's counsel. On April 11, 2007, counsel for PMA called BONY's counsel and requested that BONY release the Seized Funds in compliance with the April 2007 Order. On April 12, 2007, PMA's counsel again urged BONY's counsel to release the Seized Funds. On April 18, 2007, counsel for the plaintiffs in the *Knox* matter informed PMA's counsel that the plaintiffs in the *Knox* action intended to bring an action in Federal Court for turnover of the Seized Funds. Counsel for PMA brought an emergency motion, by order to show cause, seeking, *inter alia*, to compel BONY to "immediately release the [Seized Funds] pursuant to UCC Article 4 and per the [April 2007 Order], .

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<sup>5</sup>The court notes that PMA fails either to mention in the Complaint that this email was sent simultaneously to BONY's counsel, or to attach the email as an exhibit. BONY attaches the email as Exhibit 16 to the Affirmation of Kenneth M. Bialo.

\* 7]  
." Complaint Exhibit D.

At the April 19, 2007 hearing in this court on the motion, the *Knox* plaintiffs argued that the Writ of Execution in the *Knox* Action applied to the Seized Funds. BONY's counsel stated that: After BONY received the April 2, 2007 order, it received an email from the *Strachman (Ungar)* parties' counsel and a call from PMA's counsel indicating that *the Knox* parties would clarify their position as to their Injunction on April 16; on April 17, BONY learned that the *Strachman (Ungar)* parties would "have their position the next day" (Complaint, Exh. E at 21); and the next day, BONY learned that the *Knox* parties' contended that the Writ foreclosed release of the money.

The court denied PMA's motion and directed it to go to Federal Court for a ruling as to whether the Writ of Execution applied to the money. Although the Complaint alleges that the court declined to rule on the application of the Writ, there is no mention of the court's denial of PMA's motion.<sup>6</sup> The next day, counsel for PMA faxed a letter to BONY's counsel demanding that BONY comply with the April 2007 order. Complaint, Exhibit F.

On or about April 26, 2007, plaintiffs in the *Knox* Action commenced a turnover proceeding with respect to the Seized Funds: *Knox v Bank of New York*, No. 07 Civ. 3349 (VM). PMA intervened and sought to vacate the Writ of Execution as applied to them. The Federal Court rejected the application, ruling that issues existed as to whether State or Federal law applied and as to the relationship between PMA and the PA. The Court restrained the funds and stayed the action pending a decision by the New York Appellate Division, First Department, of PMA's appeal from this court's April 2, 2007 decision and order. 508 FSupp2d 249 (EDNY 2007). On February 17,

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<sup>6</sup> The court declined to interpret the Writ or to opine as to the Federal Court's intent, but noted, "[i]n front of me there is nothing holding this money." Exhibit E:34-35.

2009, the April 2, 2007 order in the *Strachman (Ungar)* Action was reversed by the Appellate Division, First Department, and the Seized Funds once again became subject to the restraining notices in the *Strachman* Action. *Palestine Monetary Authority v Strachman*, 62 AD3d 213 (1st Dept 2009). The funds were restrained by the turnover proceeding until the case was resolved and dismissed on or about January 26, 2010.

*B. BONY's Motion*

BONY, in support of its motion to dismiss, includes copies of emails and facsimiles that PMA did not mention in its Complaint or attach. Exhibits 18 - 23, Bialo Aff. Briefly, in an April 12, 2007 fax to BONY's counsel, PMA's counsel stated that, "should BNY maintain the position that it is now bound by the *Knox* restraining notice, . . . the PMA will pursue all available legal remedies to ensure that the funds are released and to recompense the PMA for all damages suffered as a result of the improper restraint." That same day, PMA's counsel emailed counsel for the *Knox* plaintiffs that he would "wait for you to get back to us [on whether the Knoxes would file a turnover proceeding or withdraw the restraining notice] by close of business on the 16th."

Thereafter, counsel for the *Knox* plaintiffs stated by email to PMA's counsel that communication of his clients' decision would be delayed. PMA's counsel responded by email that he would "afford you until 12 pm ESR tomorrow, April 17, 2007, to provide us with a response," and that he would seek emergent relief from this court if the restraining notice were not withdrawn.<sup>7</sup> By email, on April 17, counsel for the *Knox* plaintiffs agreed to modify the Writ to allow PMA to resume its dollar clearance activities. He also conveyed that he would have an answer later that day

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<sup>7</sup>BONY's counsel avers that he spoke with the PMA's counsel on April 16 and told him it was unlikely that BONY would take any steps until counsel for the *Knox* plaintiffs responded.

as to the Seized Funds. Early the next day, counsel emailed PMA's and BONY's counsel that the *Knox* plaintiffs would be seeking turnover of the Seized Funds. PMA's order to show cause was filed in this court later that day.

## II. Discussion and Legal Rulings

On a motion to dismiss pursuant to CPLR 3211(a)(7) (failure to state a claim), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone*, 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d 250. "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Rovello, supra*, 40 NY2d at 636. A court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello* at 635-636. On the other hand, "[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211[(a)(7)] unless they 'establish conclusively that [petitioner] has no [claim or] cause of action.'" *Lawrence v Miller*, 11 NY3d 588, 595 (2008), quoting *Rovello*, 40 NY2d at 635-636.

The pleadings should give adequate notice to the court and the adverse party of the transactions or occurrences intended to be proved. *Two Clinton Sq. Corp. v Friedler*, 91 AD2d 1193, 1194 (4th Dept 1983); see *Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 (1st Dept 1993). Finally, under CPLR 3211(e), "[a]ny objection or defense based upon a ground set forth in

paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading.”

A. *CPLR 3211(a)(7)*

PMA’s claims are based on allegations that: As of April 6, 2007 or, at a minimum, April 10, 2007, BONY had notice of the court’s April 2, 2007 order releasing the Seized Funds; the *Knox* Writ of Execution previously served on BONY did not name PMA; BONY refused to release the Seized Funds; and the *Knox* Court did not explicitly restrain the Seized Funds until June 1, 2007, when it ordered the restraint on the record.

BONY is an intermediate bank and, therefore, is protected from liability where it relies on court orders to restrain wire-fund transfers, the funds at issue here. *See e.g. Manufacturas Intl., LTDA v Manufacturers Hanover Trust Co.*, 792 F Supp 180 (EDNY), *affd* 47 F3d 1159 (1995), *cert denied* 515 US 1132 (1995) (no liability where intermediary bank agreed to seize funds in response to court order). The Federal Court in *Manufacturas*, discussing New York’s UCC 4-A 503, noted that the statute “recognizes that banks have an obligation to respond to court orders.” *Id.* at 194. The Court also found that an intermediary bank does not violate any duty to beneficiaries who are not their customers by following court orders and, in the case before it, instructions from the United States Attorney because, “[t]hey do not have all the relevant information and cannot make an independent determination of merit.” *Id.* at 196. The Appellate Division, First Department quoted the *Manufacturas* decision in reversing this court’s April 2, 2007 order. 62 AD3d at 227-228.

The allegations in the Complaint and the documents submitted with it, as supplemented by the emails and attorney’s affirmation relied on by PMA, establish that BONY continued to restrain the Seized Funds in reliance on the *Knox* Writ of Attachment. PMA claims that BONY was

precluded by this court's April 2, 2007 Order from relying on the Writ to continue the restraint, because the Writ did not explicitly name PMA. The court disagrees. The Writ and its application were not before the court when it issued its April 2 order. Two weeks later, when the Writ was brought to the court's attention, it declined to find the restraint of the Seized Funds pursuant to the Writ, improper and directed the parties to seek clarification of the Writ in Federal Court. The District Court was not bound by the April 2 order and was free to decide whether the Writ applied to PMA.

PMA's claim that BONY knew the Writ did not apply to the Seized Funds because it "did not name PMA or order the restraint of any PMA funds" (Complaint, ¶41) is without merit. This court's decision was not based on that ground. Furthermore, even drawing reasonable inferences in PMA's favor, the history of the parties' dispute and the multiple court orders from two Federal courts and this court establish that in continuing the restraint, BONY reasonably relied on the Writ and the fact that the *Knox* plaintiffs might claim that it applied to the Seized Funds. Communications to this effect were ongoing and involved PMA. Whether their claim would be successful is not the point. BONY, as a stakeholder, was not in a position to decide the merits. BONY was aware that the Rhode Island injunction did not name PMA, yet it spawned years of litigation over the same issues raised by the *Knox* Writ. PMA's current position, that BONY knew the Writ did not apply to the Seized Funds, is not only contrary to the facts, it is disingenuous. While the *Knox* plaintiffs considered their position on the Writ, PMA delayed coming back to this court to seek enforcement of its order for nearly two weeks and negotiated with the *Knox* plaintiffs. PMA knew that litigation over the Writ in the District Court could result in a conflicting order and further restraint, as it ultimately did.

Then too, the April 2 order was silent as to when the funds should be released. As BONY notes in support of the motion, “Even if PMA had sought contempt on April 9 – the first business day after PMA sent Justice Kornreich’s April 2 Decision and Order to BONY Mellon – for not releasing the PMA Funds, such a motion would have surely failed because that Decision and Order . . . ‘did not express a clear and unequivocal mandate’ to release the Funds ‘immediately or by a specific deadline.’” Reply Memo of Law at 4, fn. 2, quoting *Chambers v Old Stone Hill Road Assocs.*, 66 AD3d 944, 946 (2d Dept), *app dismissed* 14 NY3d 747 (2009). *Accord Rienzi v Rienzi*, 23 AD3d 447, 449 (2d Dept 2005) (no contempt where order to pay \$60,000 did not include time for payment).

BONY was an innocent stakeholder, as PMA previously acknowledged when it dismissed its State damages claims against BONY in 2005. This alone is sufficient to require dismissal of the Complaint.

In addition, the conversion, unjust enrichment and tortious interference claims must be dismissed as insufficient. A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *State of New York v Seventh Regiment Fund*, 98 NY2d 249 (2002). For the reasons already discussed, the Complaint fails to establish that BONY was unauthorized to further restrain the Seized Funds.

As to unjust enrichment, that claim requires proof of the receipt by one party of a benefit to which it is not entitled, at the expense of another. *See McGrath v Hilding*, 41 NY2d 625, 629 (1977). The Complaint fails to allege facts sufficient to establish that BONY received any benefit from its continued restraint of the Seized Funds, or that such a benefit would have been unjust. *Id.*

Finally, PMA's claim for tortious interference with business relationships fails because the allegations do not establish that BONY was "culpable." *NBT Bancorp v. Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 (1996) (finding "culpable conduct" requires proof of crime or independent tort; accord *Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 (2004)).

*B. Res Judicata and Collateral Estoppel*

*Res Judicata* and collateral estoppel do not apply here. Under *res judicata*, or claim preclusion, a final judgment on the merits bars the same parties, or those in privity with them, from relitigating the same cause of action. *Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8 (2008); *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 (1999). Collateral estoppel, or issue preclusion, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party." *Parker, id.* at 349. Although BONY is correct that preclusive effect can be applied to issues and judgments obtained on stipulation of the parties, here neither applies.

In *Singleton Mgmt. v Compere*, 243 AD2d 213 (1st Dept 1998), the Court addressed the issue:

Collateral estoppel effect will only be given to matters "actually litigated and determined" in a prior action. Preclusive effect will not be given if the particular issue--in this case, the validity of the underlying contract between plaintiff and S.W.V.--was not "actually litigated, squarely addressed and specifically decided" (*Ross v Medical Liab. Mut. Ins. Co.*, 75 NY2d 825, 826; *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, *supra*). "An issue is not actually litigated if, for example, there has been a default, a confession of liability, [or] a failure to place a matter in issue by proper pleading or *even because of a stipulation*" (*Kaufman v Eli Lilly & Co.*, *supra*, at 456-457 [emphasis added]). In refusing to give collateral estoppel effect to an in-court stipulation settling a prior action, it has aptly been noted that "it can only be assumed that the terms of the settlement became sufficiently attractive to all of the parties in the original action that they decided to forego issue determination by the court" (*Dunleavy v First Am. Tit. Ins. Co.*, 117 AD2d 952, 953) and that " 'settlement

of the previous case prior to the entry of judgment operated to finalize the action without regard to the validity of the original claim' " (*Morrison-Knudsen Co. v Continental Cas. Co.*, 181 AD2d 500, 501, quoting *Peterson v Forkey*, 50 AD2d 774, 775; see also, *Whitman & Ransom v Revson*, 220 AD2d 321; *Ott v Barash*, 109 AD2d 254, 262-263).

*Id.* at 217 (finding no collateral estoppel where plaintiff's participation in settlement and discontinuance of action could "in no way be construed to be the kind of determination after a full and fair opportunity to litigate the issue that would be necessary in order to collaterally estop plaintiff").

Here, the parties' stipulation expressly recognized that the merits of the underlying issues would be adjudicated later in the continuing turnover proceeding and that BONY would remain a party solely as a stakeholder. The merits were never reached. Moreover, PMA's damage claims, now, are grounded on this court's subsequent April 2 order and a subsequent Writ of Attachment served on BONY -- issues and facts which differed from those settled by the stipulation.

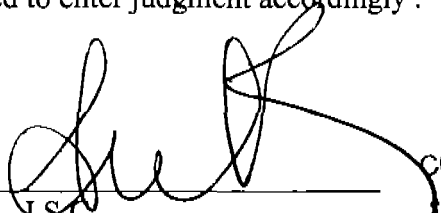
The court finds that the parties' remaining arguments do not merit discussion. Accordingly, it is

ORDERED that the motion to dismiss the Complaint is granted and the Complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly .

Date: January 6, 2012

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**

**JAN 09 2012**

NEW YORK  
COUNTY CLERK'S OFFICE