

<b>Cash on the Spot ATM Servs., LLC v Camia</b>
2013 NY Slip Op 30125(U)
January 17, 2013
Sup Ct, Richmond County
Docket Number: 102307/12
Judge: Joseph J. Maltese
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

---

**Index No.:102307/12  
Motion No.:001, 002**

**CASH ON THE SPOT ATM SERVICES, LLC. and  
RONALD P. CARROCCIOI,**

*Plaintiffs*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

**COSMO CAMIA,  
PHILIP CAMIA,  
SAVERIA CAMIA,  
PAYMENT ALLIANCE INTERNATIONAL, INC.,,  
ALLIANCE ATM, INC.,  
E-Z MONEY ATM SERVICES, CORP.,  
ECLIPSE TRANSACTIONS, LLC,  
ELCIPSE ATM HOLDINGS, LLC,  
FRANK ERCOLE,  
BARRY ABRAMS,  
JOHN DOES 1 through 10,  
JOHN DOE CORPORATIONS 1 through 10, AND  
OTHER JOHN DOE ENTITIES 1 through 10, all whose true  
names are unknown,**

*Defendants*

---

The following items were considered in the review of the following order to show cause for a preliminary injunction, placement of corporate and LLC defendants into receivership and an order of attachment; and a motion to dismiss the plaintiff's complaint.

<u>Papers</u>	<u>Numbered</u>
<b>Order to Show Cause and Affidavits Annexed</b>	<b>1</b>
<b>Memorandum of Law in Support</b>	<b>2</b>
<b>Answering Affidavits</b>	<b>3</b>
<b>Affirmation in Opposition</b>	<b>4</b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>5</b>
<b>Memorandum of Law in Support</b>	<b>6</b>
<b>Affidavits of Ronald P. Carroccio in Opposition</b>	<b>7</b>
<b>Certification of Gerald Uvari</b>	<b>8</b>
<b>Replying Affirmation</b>	<b>9</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

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

The plaintiffs move by order to show cause for an order granting them a preliminary injunction enjoining E-Z Money ATM Services, Corp., Eclipse Transactions, LLC, and Eclipse ATM Holdings, LLC from paying out any sums of money; placing those defendants into receivership and issuing an order of attachment pending the final disposition of this action. The defendants, EZ-Money ATM Services, Corp. and Frank Ercole move to dismiss the complaint as against them. The order to show cause is denied. The motion to dismiss is granted with respect to EZ-Money ATM Services, Corp. and Frank Ercole.

### **Facts**

The plaintiff Ronald P. Carroccio is the 70% shareholder of Cash On The Spot ATM Services, LLC (“COTS”) a Nevada LLC that has its primary place of business on Staten Island, New York. The defendants Cosmo Camia and Philip Camia (“the Camias”) were the managing member and an employee respectively. The business operates independent automated teller machines (ATMs) throughout Staten Island, New York. The plaintiff Carroccio alleges that the Camias maintained exclusive control of the entities bank accounts and vault account. The vault account contained those monies which were distributed through the ATM machines in the network maintained by COTS. The plaintiff alleges that the Camias embezzled approximately \$1,600,000 from the COTS bank accounts, inclusive of the vault account.

In addition, evidence submitted to this court shows that Cosmo Camia sold and transferred “. . . my ATM route known as Cash On the Spot ATM Services, LLC, to: E-Z Money ATM Services Corp., 1273 Bay Ridge Ave., Brooklyn, NY. . .” for \$105,000. Also included in the sale document is the following clause:

I, Cosmo Camia, further warrant that I shall defend, protect, indemnify, and save harmless the Buyer, Frank Ercole, the owner of E-Z Money ATM Services Corp. and E-Z Money ATM Services Corp and its successors and assigns from any and all adverse claim[s] that may be made by any party against said assets and goods.

The plaintiffs now move by order to show cause for an order granting them a preliminary injunction enjoining E-Z Money ATM Services, Corp., Eclipse Transactions, LLC, and Eclipse ATM Holdings, LLC from paying out any sums of money; placing those defendants into receivership and issuing an order of attachment pending the final disposition of this action. The defendants, EZ-Money ATM Services, Corp. and Frank Ercole move to dismiss the complaint pursuant to CPLR § 3211(a)(7) as against them.

### **Discussion**

#### *Order to Show Cause*

A party seeking a preliminary injunction must demonstrate a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and a balance of the equities in its favor.<sup>1</sup> A preliminary injunction is a drastic remedy, the right to which must be established clearly under the law and the undisputed facts. The purpose of any preliminary injunction is to maintain the status quo between the parties, not to determine their ultimate rights.<sup>2</sup>

Here, the moving plaintiffs have failed to demonstrate irreparable harm. The damages alleged in the plaintiffs order to show cause are all capable of calculation in an award of money damages. Consequently, the plaintiffs' order to show cause seeking injunctive relief is denied.<sup>3</sup>

#### *Motion to Dismiss*

The defendants, EZ-Money ATM Services, Corp. and Frank Ercole, move to dismiss the

---

<sup>1</sup> *Board of Managers of Wharfside Condominium v. Nehrich*, 73 AD3d 822 [2d Dep't. 2010].

<sup>2</sup> *Putter v. Singer*, 73 AD3d 1147 [2d Dep't. 2010].

<sup>3</sup> *Trump on the Ocean, LLC v. Ash*, 81 AD3d 713 [2d Dep't. 2011].

plaintiffs complaint as against them pursuant to CPLR § 3211(a)(7) arguing that the complaint fails to state a cause of action. When assessing the adequacy of a complaint in light of a CPLR 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff the benefit of every possible favorable inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining the motion to dismiss. Further, any deficiency in the complaint may be amplified by supplemental pleadings or other evidence.<sup>4</sup> Although on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the narrow question is whether the complaint states a cognizable cause of action, the allegations in the complaint cannot be vague and conclusory. Allegations in support of a cause of action which are devoid of factual basis and are vague and conclusory are properly dismissed.<sup>5</sup>

Here, while the plaintiffs complaint is 64 pages long and contains approximately 257 paragraphs the substance of the allegations against EZ-Money ATM Services, Corp. and Frank Ercole are conclusory at best. The plaintiffs allege twelve separate causes of action against all defendants which are enumerated as follows: Breach of the Covenant of Good Faith and Fair Dealing; Breach of Fiduciary Duty; Breach of the Duty of Loyalty; Unfair Competition; Material Misrepresentation/Fraud; Conversion; Embezzlement; Constructive Trust; Failure to Account; Conspiracy to Defraud; Unjust Enrichment; and Fraudulent Transfer. The complaint, as currently drafted, fails to allege any of the aforementioned causes of action against the moving defendants. Furthermore, the plaintiffs' allege a cause of action for civil conspiracy which is not recognized in New York State.<sup>6</sup> Consequently, the complaint is dismissed as against the moving defendants.

---

<sup>4</sup> *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 NY3d 582 [2005].

<sup>5</sup> *Stoianoff v. Gahona*, 248 AD2d 525 [2d Dep't. 1998].

<sup>6</sup> *Zarabi v. Incorporated Village of Roselin Harbor*, 90 AD3d 1037 [2d Dep't. 2011].

Accordingly, it is hereby:

ORDERED, that the plaintiffs' order to show cause is denied; and it is further

ORDERED, that the motion to dismiss the complaint made by the defendants, EZ-Money ATM Services, Corp. and Frank Ercole, is granted and complaint is severed and dismissed as to those defendants; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the remaining parties shall return to DCM Part 3, 130 Stuyvesant Place, 3<sup>rd</sup> Floor; on **February, 8, 2013 at 9:30 a.m.**

ENTER,

DATED: January 17, 2013

---

Joseph J. Maltese  
Justice of the Supreme Court