Briarpatch Ltd., L.P. v Briarpatch Film Corp.

2013 NY Slip Op 31263(U)

June 13, 2013

Supreme Court, New York County

Docket Number: 603364/01

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

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BRIARPATCH LIMITED, L.P. and
GERARD F. RUBIN,

Plaintiffs,

-against-

Index No.: 603364/2001
Motion Date: 11/19/13
Motion Seq. No.: 36

BRIARPATCH FILM CORP., ROBERT GEISLER,, VERNER SIMON P.C., PAUL W. VERNER AND NIGHT HAWK LIMITED,

Defendants.

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The following papers, numbered 1 to 3, were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s). 1

Answering Affidavits - Exhibits No(s). 2

Replying Affidavits No(s). 3

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: June 13, 2013

Hon. Eileen Bransten J.S.C.

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

1. CHECK ONE: .....☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: Motion Is: ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .....X SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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BRIARPATCH LIMITED, L.P. and
GERARD F. RUBIN,

Plaintiffs,

-against-

Index No. 603364/01
Motion Date: 02/19/2013
Motion Seq. Nos.: 36 & 37

BRIARPATCH FILM CORP., ROBERT GEISLER,
VERNER SIMON P.C., PAUL W. VERNER AND
NIGHT HAWK LIMITED,

Defendants.

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BRANSTEN, J.

Motion sequence numbers 36 and 37 are consolidated for disposition. In motion sequence number 36, plaintiffs Briarpatch Limited, L.P. (the "Partnership") and Gerard F. Rubin ("Rubin") (collectively "Plaintiffs") move for summary judgment against defendants Verner Simon P.C. ("Verner Simon") and Paul W. Verner ("Verner") (collectively "Defendants") on their Fourth Amended Complaint's (the "Complaint") sixth cause of action for violation of a 2001 restraining notice (the "Restraining Notice"). Defendants oppose.

In motion sequence number 37, Defendants move for summary judgment dismissing the Complaint in its entirety. Plaintiffs oppose.

I. Background

The instant motions for summary judgment are the product of a long and tortured litigation in numerous courts, both state and federal, concerning the rights to produce several films. The details of each of the lawsuits related to this case, including bad faith bankruptcy

filings and a criminal conviction, need not be repeated here. The Court herein discusses only facts relevant to the instant summary judgment motions.

A. 1999 Bench Trial[1]

Following a five day bench trial in this Court in the action entitled *Briarpatch Limited, L.P. and Gerard F. Rubin v. Robert Geisler and John Roberdeau*, (Index No. 606156/1998) (the "Original Action"), the Hon. Harold Tompkins made the following findings of fact in his trial decision (the "Trial Decision"). *See* Affidavit of Barry Goldin in support of Plaintiffs' Motion for Summary Judgment ("Goldin Aff."), Ex. 11 (the "Trial Decision"). In 1994, the Partnership was formed pursuant to the terms of a Limited Partnership Agreement dated January 1, 1994 (the "Partnership Agreement"). Rubin was the sole limited partner and five corporations owned by defendants Robert Geisler ("Geisler") and John Roberdeau[2] ("Roberdeau") were the sole general partners. The Partnership was formed for the purpose of developing and producing certain films, including, inter alia, *The Thin Red Line* and *The White Hotel* (collectively the "Projects" or each individually a "Project").

Rubin invested over $6 million in the Partnership in order to finance the acquisition of the rights to the Projects. As a result, the Partnership Agreement acknowledged receipt of this investment and specified that the Projects were to be developed and exploited by the

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[1] The facts in this Section I(A) are taken from July 12, 1999 Trial Decision of Justice Harold Tompkins in *Briarpatch Limited, L.P. and Gerard F. Rubin v. Robert Geisler and John Roberdeau*, Index No. 606156/1998.

[2] Roberdeau is now deceased.

Partnership. Of the $6 million provided by Rubin, approximately $2 million was invested for the development of *The White Hotel* Project.

Despite the existence of the Partnership Agreement, Geisler and Roberdeau began to represent to third parties within the film industry that they themselves owned the exclusive rights to the Projects and commenced a pattern of diverting certain Partnership opportunities, property and monies to themselves. Significantly, Geisler and Roberdeau sold the rights to the *The Thin Red Line* and misappropriated all $1.5 million garnered therefrom to themselves, despite the fact that they were required to pay Rubin over $1 million pursuant to the Partnership Agreement.

In his Trial Decision, Justice Tompkins declared, in relevant part, that: (1) Rubin is the sole winding up partner in the Partnership; (2) the Partnership is the beneficial owner of all right, title and interest in the Projects, including *The Thin Red Line* and *The White Hotel*; (3) all remuneration received or receivable by Geisler and Roberdeau with respect to the Projects belongs to the Partnership; (4) Geisler and Roberdeau breached their fiduciary duties to the Partnership and Rubin by misappropriating and diverting funds; and (5) Plaintiffs are entitled to an accounting. In addition, Justice Tompkins entered a $1.5 million judgment against Geisler and Roberdeau, imposed a constructive trust on all of the Partnership Projects, enjoined Geisler and Roberdeau from transferring, pledging or disposing any right to or interest in the Projects or from doing anything which may mislead anyone into believing that Geisler and Roberdeau or any of their affiliates had any right or interest in any of the

Projects. Tompkins also ordered that Geisler and Roberdeau were to immediately turn over to Plaintiffs "all screenplays, stage plays, treatments, and agreements with respect to the Projects." (Trial Decision, p. 29)

Thereafter, in 2000, Justice Tompkins held Geisler and Roberdeau in contempt for refusing to turn over documents with respect to *The White Hotel* and other Projects. In 2002, Justice Moskowitz also held Geisler and Roberdeau in contempt for failing to turn over documents.

B. The Restraining Notice

In 2000, Geisler and Roberdeau hired Verner to appeal the Trial Decision. Verner's appeal was unsuccessful and the Trial Decision's injunctions and constructive trust therefore remained in full effect. Verner continued to serve as Geisler and Roberdeau's counsel even after the appeal was decided.

In June 2001, Plaintiffs learned that Geisler and Roberdeau were receiving and disbursing monies through Verner. On June 13, 2001, Verner admitted that his bank accounts were being used as a conduit through which funds were received, routed and transferred by Verner for Geisler and Roberdeau for their living expenses and trips. (Goldin Aff., Ex. 2, Tr. 34:7-35:22.)

Accordingly, pursuant to CPLR § 5222, on that same day, Plaintiffs served Verner with a restraining notice (the "Restraining Notice"). The Restraining Notice provided, in

pertinent part, that: (1) a $1,802,915.34 judgment[3] was entered jointly and severally against Geisler and Roberdeau; (2) it appeared Verner was in possession or custody of property in which Geisler and Roberdeau have an interest and (3) Verner was forbidden from selling, transferring or assigning any property in Verner's possession, or that would thereafter come into his possession, in which Geisler and Roberdeau had an interest. (Goldin Aff., Ex. 1.) The Restraining Notice was valid for one year from the date of service. *See Briarpatch Ltd., L.P. v. Briarpatch Film Corp.*, 89 A.D.3d 425 (1st Dep't 2011) (First Department's affirmance in this action of this Court's limiting Plaintiffs' claim for violation of restraining notice to a period of one year).

The day after having received the Restraining Notice, Verner, as Geisler and Robderdeau's agent, successfully bid for Geisler and Robderdeau's bankruptcy estate assets in the amount of $73,000, and then used third party funds in his possession to purchase the estate assets for Geisler and Roberdeau. *See* November 19, 2001 Decision and Order in *Briarpatch Ltd. and Gerald F. Rubin v. Paul W. Verner, Verner & Simon LLP*, Index No. 603232/2001 (Moskowitz, J.) (the "Notice Decision"), p. 2.

As a result of this transaction, Plaintiffs commenced a contempt proceeding against Verner and Verner Simon for violating the Restraining Notice. On November 19, 2001, Justice Moskowitz held Verner in contempt for violating the restraining notice by bidding on and purchasing $73,000 worth of property from Geisler and Roberdeau's bankruptcy estate assets for their benefit. *Id.* at p. 6.

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[3] This amount includes the pre-judgment interest awarded by Justice Tompkins.

Despite the contempt adjudication, Verner continued to receive and transfer funds for Geisler and Roberdeau. *See* Goldin Aff., Exs. 9(6), 9(7) & 10 (Plaintiffs' requests to admit and Verner's subsequent admissions to receipt and transfer of funds).

In July 2005, Plaintiffs served discovery requests on Verner with regard to Verner's funding and financing of Geisler, Roberdeau and Night Hawk. Verner responded to these requests in May 2006. (Rubin Aff., Exs. 35 & 36.) At a June 2006 hearing, Justice Moskowitz held that Verner's responses were inadequate and ordered Verner to fully respond to the requests. *Id.* at Ex. 37, Tr. 5:23-26. When Verner did not comply, in October 2007, Special Referee Samuel Wilkenfeld issued a decision requiring Verner to provide additional e-mails and other previously withheld discovery and to supplement Verner's incomplete discovery responses. *Id.* at Ex. 41. Verner failed to fully comply with Referee Wilkenfeld's order, and accordingly, in 2011, this Court ordered Verner to produce detailed schedules laying out when funds were received and transferred. *Id.* at Ex. 42, Tr. 53:18-54:13.

In April 2011, in response to this Court's 2011 order, Verner delivered revised schedules of receipts and transfers of funds which disclosed additional funds received and transferred by Verner allegedly in violation of the Restraining Notice. *See* Goldin Aff., Exs. 9(6) & 9(7). Based thereon, Plaintiffs prepared its September 2011 Notice to Admit. *Id.* at Ex. 9. Verner responded affirmatively to each of Plaintiffs' requests to admit. *Id.* at Ex. 10.

Based on Verner's admissions and deposition testimony, Plaintiffs contend that, during the period of the Restraining Notice (the "Notice Period"), Verner received and

transferred $231,500 for Geisler and Roberdeau.[4] Verner does not dispute that he received and transferred the funds at issue, but contends that: (1) some of the transferred funds fall outside of the Notice Period and (2) the funds were not subject to the Restraining Notice because they were either investments in a company called Night Hawk or gifts or loans to Geisler and Roberdeau for their living expenses and travel.

C. The Opinion Letter and Title to The White Hotel

The ownership of the rights to produce and distribute a motion picture version of *The White Hotel* written by D.M. Thomas ("Thomas") is at issue in this litigation. An opinion letter drafted by Verner in 2003 addressing title to *The White Hotel* is a discrete issue in the instant motions and is discussed by the Court in this section.

In March of 1986, Thomas granted Geisler and Roberdeau an option (the "WH Option Agreement") to produce and distribute *The White Hotel* in film. (Affirmation of A. Michael Furman in Support of Order to Show Cause Seeking Summary Judgment ("Furman Affirm."), Ex. A ("WH Option Agreement").) When the Partnership was formed in 1994, the Partnership Agreement acknowledged receipt of Rubin's investment and specified that the Projects, including *The White Hotel* were to be developed and exploited by the Partnership. *See* Trial Decision, p. 2.

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[4] Plaintiffs are not certain that the entire $231,500 was received and transferred during the Notice Period. Plaintiffs argue, however, that because Verner was unable to provide precise dates for all of the receipts/transfers, they should be presumed to have taken place during the Notice Period.

Throughout the term of the WH Option Agreement, and even after its eventual expiration, Geisler and Roberdeau transferred rights in *The White Hotel* and/or pledged it as collateral for certain loans without consulting Rubin. In his Trial Decision, Justice Tompkins made the following findings of fact, as paraphrased below, regarding Geisler and Roberdeau's various transfers of interest in *The White Hotel* and other Projects.

In 1994, Geisler and Roberdeau borrowed $200,000 from Monty Montgomery ("Montgomery") which was collateralized by the rights to *The White Hotel* Project. Geisler and Roberdeau subsequently allowed Montgomery to purchase *The White Hotel* Project for $1. On March 15, 1994, Geisler and Roberdeau arranged for their counsel, Samuel Myers ("Myers") to purchase the rights to *The White Hotel* Project from Montgomery. On the same day, Myers entered into an agreement to sell the rights to *The White Hotel* Project to Geisler and Roberdeau in exchange for $500,000.

Myers granted Geisler and Roberdeau an exclusive option to purchase the rights to *The White Hotel* Project back for a purported option period, and also agreed that, if the rights were instead sold by Myers, Myers would distribute a share of all proceeds received from the Project. Geisler and Roberdeau also agreed to pay Myers $125,000 for his "professional services" which were nowhere evidenced in Geisler and Roberdeau's balance sheets. Tompkins determined that the $125,000 was for Myers' services as a "straw" for Geisler and Roberdeau with respect to *The White Hotel* Project. Geisler and Roberdeau periodically

updated their arrangement with Myers to ensure that they retained their interest in *The White Hotel* Project. (Trial Decision, pp. 17-19.)

Despite Rubin's $2 million investment through the Partnership in *The White Hotel*, Geisler and Roberdeau chose to make these arrangements with Myers through their wholly-owned companies, not through the Partnership, thereby cutting the Partnership and Rubin out of any potential remuneration from The White Hotel Project, in contravention of the Partnership Agreement. *Id.* at p. 19.

The option to purchase the rights to *The White Hotel* Project from Myers expired without Geisler and Roberdeau having exercised it. Nonetheless, Geisler and Roberdeau continued their arrangement to acquire the rights from Myers and produce and profit from the Project. *Id.* Defendants never told Rubin that Myers had acquired an interest in *The White Hotel* Project. *Id.*

The WH Option Agreement contained a reversion provision which provided that:

> [i]f and only in the event that the [p]urchaser[s] [Geisler and Roberdeau] shall have failed to commence principle photography on any motion picture version or television production based upon the [w]ork as provided herein within that period which terminates on the tenth anniversary of the date of the [p]urchaser's exercise of the option contained in the[WH] Option Agreement . . . then, any and all rights of any nature in and to the [w]ork granted to [p]urchaser by [Thomas] hereunder shall revert automatically to [Thomas] for his sole use and disposition, without any further obligation of any kind to [p]urchaser.

(WH Option Agreement, Ex. A, ¶ 17.) It is undisputed that neither Geisler nor Roberdeau nor Rubin nor Myers commenced principle photography an any motion picture or television version of *The White Hotel*. Accordingly, under the WH Option Agreement, the rights to *The White Hotel* Project reverted back to Thomas on July 11, 2001.

However, as a result of Geisler and Roberdeau's adjudged fraud surrounding their pledging of rights to *The White Hotel* Project, among other things, Justice Tompkins declared that all beneficial right, title, and interest of Geisler and Roberdeau and their affiliates in and to the Projects, including *The White Hotel*, belonged to the Partnership. Justice Tompkins also imposed a constructive trust on all right, title and interest of Geisler and Roberdeau and their affiliates in and to the Projects, and enjoined Geisler and Roberdeau and anyone acting in concert, from transferring, pledging or otherwise disposing of any right to any Project or from misleading anyone into believing that Geisler and Roberdeau or any of their affiliates has any right, title or interest in any of the Projects. (Trial Decision, pp. 27-29.) The Trial Decision does not directly address the reversion provision in the WH Option Agreement.

On July 11, 2001, the date on which *The White Hotel* Project rights reverted back to Thomas pursuant to the WH Option Agreement, Thomas entered into a new book option agreement with Geisler's adjudged alter ego,[5] Night Hawk (the "Night Hawk Option Agreement"). (Furman Affirm., Ex. W.) Thomas granted Night Hawk *The White Hotel* film

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[5] *See* Rubin Aff., Ex. 33 (Judgment of Justice Moskowitz declaring that Night Hawk is Geisler's alter ego).

rights in exchange for $50,000. *Id.* In order to fund this book option payment, Verner arranged for, Jared Van Vleet, whom Verner testified was his law clerk, to fund $25,000. (Rubin Aff., Ex. 62; Furman Affirm., Ex. R, Tr. 131:17-139:20.) Verner provided an additional $25,500 of his own funds to satisfy the remaining book option payment.

For several years following July 11, 2001, Verner admittedly engaged in a series of actions which assisted Geisler in raising funds for *The White Hotel* and other Projects and in paying for his living and other expenses. *See* Plaintiffs' Opposition Memo[6], pp. 9-19. These actions, to the extent relevant to the instant motions, are further addressed in the Court's analysis herein. In May 2003, Verner further assisted with Geisler's goal of profiting from *The White Hotel* Project by issuing a title opinion letter regarding the ownership of *The White Hotel* film rights (the "Opinion Letter"). *See* Rubin Aff., Ex. 23.

Therein, Verner opined that Night Hawk was the only entity with legal title to an existing and current option to *The White Hotel*. Verner disclosed the existing legal claims to *The White Hotel Project*, but stated that "each of the[se] [claims] has no chance at success and cannot support any request for injunction against a current production by Night Hawk or its assigns." *Id.* The Opinion letter did not address the prior judgment's holding of *The White Hotel* in constructive trust or Plaintiffs' then existing complaint for extension of their option agreement with Thomas, which was granted by Thomas in 2004. (Rubin Aff., Ex. 26)

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[6] Plaintiffs Opposition Memorandum of Law of Plaintiffs/Judgment Creditors Briarpatch Limited, L.P. and Gerard F. Rubin to Summary Judgment Motion of Defendants Verner Simon P.C. and Paul W. Verner

After Thomas extended Plaintiffs' option rights in 2004, Plaintiffs granted options to exploit these rights first to producer PWH LLC/Susan Potter and later to MMR White Inc./Simon Monjack. If those producers had exercised the option rights Plaintiffs stood to earn $3 million. *Id.* at Exs. 26-28. Geisler, however, e-mailed those producers and the press, relying on and attaching Verner's earlier Opinion Letter in order to cloud title to Plaintiffs' rights in *The White Hotel*. See Rubin Aff., Exs. 95-99. Geisler testified that he attached the Opinion Letter to his e-mails because it "seemed to give credence" to his e-mails and letters. (Furman Affirm., Ex. S, Tr. 409:6-22). Geisler also testified that, to his knowledge, Verner never withdrew the Opinion Letter and that the letter "remained valid and effective." *Id.* at 419:10-16. Verner was carbon copied on some of Geisler's e-mails to producers and the press with Verner's Opinion Letter attached. Verner testified that he believes his opinion was correct and can be relied upon as of the date that it was published. (Furman Aff., Ex. R, Tr. 500:22-501:20.)

D. The Instant Summary Judgment Motions

Plaintiffs' Complaint contains seven causes of action. Plaintiffs assert that: (1) Verner aided and abetted Geisler and Roberdeau's breaches of fiduciary duty in misappropriating funds and other property belonging to the Partnership; (2) Verner aided and abetted Geisler and Roberdeau's fraud upon Plaintiffs in misappropriating and concealing Partnership assets; (3) Verner violated Judiciary Law § 387 by colluding with Geisler and Roberdeau to deceive Plaintiffs and deprive them of their rights under several of this Court's orders; (4) Verner was

unjustly enriched by virtue of his misappropriation of Plaintiffs' rights in *The White Hotel*; (5) Verner was unjustly enriched by virtue of his misappropriation of Plaintiffs' rights in other Projects; (6) Verner violated the Restraining Notice and is liable to Plaintiffs for the amounts he transferred in contravention thereof; and (7) Verner slandered Plaintiffs' title to *The White Hotel* by sending the Opinion Letter in 2003.

Defendants move for summary judgment dismissing the entirety of the Complaint. Plaintiffs move for summary judgment on the sixth cause of action for violation of the Restraining Notice.

II. Plaintiffs' Motion for Summary Judgment

A. Standard of Law

Summary judgment will be granted if it is clear that no triable issue of fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals v. Associated Fur Mfr.*, 46 N.Y.2d 1065, 1067 (1979). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact. *Alvarez*, 68 N.Y.2d at 324; *Zuckerman*, 49 N.Y.2d at 562. Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562; see also *Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't 1994) ("[it] is not enough that the party opposing summary

judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . .") (citations omitted)).

B. Plaintiffs' Summary Judgment Motion for Violation of the Restraining Notice

Plaintiffs move for summary judgment on their sixth cause of action for Verner's alleged violation of the Restraining Notice. Plaintiffs argue that Verner received and transferred at least $231,500 of funds which were subject to the Restraining Notice. (Plaintiffs' Memo[7], p. 1). Plaintiffs contend that Verner indisputably received and transferred $149,000 within the Notice Period. *Id.* Plaintiffs maintain that Verner admits receiving and transferring the other $82,500, but is unable to specify the transfer dates, and should thus be deemed to have transferred those funds within the Notice Period. *Id.* Accordingly, Plaintiffs move for (1) a judgment against Verner for $231,500; (2) statutory interest from the date of each wrongful transfer and (3) legal fees and costs incurred by Plaintiffs as a result of Verner's violation of and to enforce the Restraining Notice.

Defendants do not dispute that Verner received and transferred money to Geisler and Roberdeau or their related entities. Instead, Defendants raise several arguments as to why these transfers and receipts did not violate the Restraining Notice. Defendants claim that (1) some of the transfers fell outside of the Restraining Notice Period; and (2) Geisler and

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[7] Memorandum of Law of Plaintiffs/Judgment Creditors Briarpatch Limited, L.P. and Gerard F. Rubin in Support of Their Motion for Summary Judgment Against Defendants Verner Simon P.C. and Paul W. Verner ("Plaintiff's Memo")

Roberdeau did not have an interest in the funds transferred and received by Verner because the monies received and/or transferred through Verner were investments in or loans to Night Hawk. (Defendants' Opposition Memo,[8] pp. 8-13.)

On reply, Plaintiffs point out that Defendants failed to submit a Commercial Division Rule 19-a Counterstatement of Material Facts in response to Plaintiffs' Rule 19-a Statement. *See* Plaintiff's Reply Memo,[9] p. 2.

This Court's Practices for Part 3 require the parties to submit Rule 19-a Statements of Material Facts when moving for or opposing summary judgment. (Practices for Part 3, "Motion Practice", ¶ 7.) Commercial Division Rule 19-a provides that:

> (a) [u]pon any motion for summary judgment . . . the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. . . .
>
> (b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party[.] . . .
>
> (c) Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically

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[8] Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment on the Sixth Cause of Action for Violation of a Restraining Notice ("Defendants' Opposition Memo")

[9] Reply Memorandum of Law of Plaintiffs/Judgment Creditors Briarpatch Limited, L.P. and Gerard F. Rubin in Support of Their Motion for Summary Judgment Against Defendants Verner Simon P.C. and Paul W. Verner ("Plaintiffs' Reply Memo")

> controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

Commercial Division Rule 19-a. Defendants did not serve a response to Plaintiffs' June 18, 2012 Statement of Material Facts. The facts in Plaintiffs' Rule 19-a statement are therefore deemed admitted.

To the extent that Defendants submitted evidence that might conceivably create a disputed fact, the Court will herein consider it, despite the fact that Plaintiffs' facts may have been admitted under Commercial Division Rule 19-a. For that reason, the Court now analyzes each of the alleged receipts and transfers by Verner to determine whether or not Plaintiffs are entitled to summary judgment on their sixth cause of action.

CPLR Section 5222 (b) states in pertinent part:

> A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service . . . he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest . . ., or if the judgment creditor . . . has stated in the notice that . . . the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such person, including any specified in the notice, . . . shall be subject to the notice. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, . . . to any person other than the sheriff or pursuant to an order of the court[.]

Thus, the question here is, whether the funds received by Verner, as a garnishee,[10] and subsequently transferred to Geisler and Roberdeau and their companies were funds or other property in which Geisler or Roberdeau had "an interest." Based on the evidence in the record, the Court concludes that Plaintiffs' asserted transfers by Verner were of funds or other property in which Geisler or Roberdeau had "an interest."

In *Ray v. Jama Productions, Ind.*, 74 A.D.2d 845 (2d Dep't 1980), the court construed the CPLR 5222 (b) requirement that the judgment debtor have "an interest" in the property at issue. In that case, a judgment creditor served a restraining notice upon a garnishee that prohibited the garnishee from transferring any money to the judgment debtor or to any other entity having a relationship with the judgment debtor. Despite the restraining notice, the garnishee paid a third party $10,000 to satisfy the judgment debtor's debts and expenses. In that case, the court found that, even though the funds did not pass through the judgment debtor's hands, the judgment debtor derived a benefit from the funds and, thus, had an interest in the funds. The court in *Ray* stated:

> One may not circumvent the mandates of a restraining notice by claiming that the judgment debtor has no interest in the money merely because he will not acquire physical possession of such money. The fact that a judgment debtor will directly benefit from the payment of this sum is sufficient to require the party served with the restraining notice to comply with the provisions or be subject to the appropriate legal sanction.

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[10] *See BriarPatch Ltd. L.P.*, 89 A.D.3d at 426 (First Department holding that "Verner is a garnishee).

Ray, 74 A.D.2d at 845-46. A garnishee may be liable to an aggrieved judgment creditor where that garnishee fails to comply with a restraining notice that has been duly served upon him. *See Accounts Receivable Solutions, Inc. v. Tompkins Trustco Inc.*, 45 A.D.3d 612, 613 (2d Dep't 2007); see also *Nardone v. Long Island Trust Co.*, 40 A.D.2d 697, 697 (2d Dep't 1972) (a plaintiff judgment creditor is entitled to judgment as a matter of law where a defendant negligently violated a restraining notice) (bank liable for amount of funds which it permitted judgment debtor to withdraw after bank's receipt of restraining notice insofar as those funds would have been available to satisfy judgment creditor's judgment).

1. Nichols Transfer

At his deposition, Verner admitted depositing a $25,000 check dated July 26, 2001 from William and Regina Nichols to the order of Verner Simon LLP. Verner testified that he believed this check was specifically targeted as an investment in *The White Hotel* Project. (Goldin Reply Aff.,[11] Ex. 28, 190:20-194:6.). Plaintiffs thus argue that Verner violated the Restraining Notice by receiving and thereafter transferring these funds in which Geisler had an interest.

Defendants do not dispute the date of the transfer but argue that the $25,000 was an investment in Night Hawk, and Geisler accordingly did not have an interest in the funds. (Defendants' Opposition Memo, p. 11.) Defendants make this same argument for much of

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[11] October 2012 Affidavit of Barry L. Goldin in Further Support of the Motion of Plaintiffs/Judgment Creditors Briarpatch Limited L.P. and Gerard F. Rubin for Summary Judgment Against Defendants Verner Simon P.C. and Paul W. Verner ("Goldin Reply Aff.")

the received and transferred funds, however, Defendants completely ignore Justice Moskowitz's 2006 judgment declaring that Night Hawk is the alter ego of Geisler. *See* Rubin Aff., Ex. 33 (Judgment and Order dated May 9, 2006 stating that it is "[a]djudged that plaintiffs Briarpatch Limited, L.P. and Gerard F. Rubin are awarded damages against and recover from defendant Night Hawk Limited, alter ego of defendant Robert M. Geisler, the amount of $4,350,000[.])

Verner may not circumvent the Restraining Notice by claiming that Geisler had no interest in the funds merely because Geisler may not have acquired physical possession of such funds. The fact that Geisler ultimately benefitted from the funds, as the alter ego of Night Hawk, is sufficient to require Verner to comply with the Restraining Notice. Furthermore, Verner testified that he was aware that Geisler had arranged for himself to be appointed Night Hawk producer of *The White Hotel*. Verner also testified that Lozano, Night Hawk's attorney, was Geisler's Spanish attorney, and that he was unaware whether Night Hawk had any identified stockholders, office, telephone number or existence of its own. (Furman Affirm., Ex. R, Tr. 355:11-19, 476:10-24 & 479:18-481:13). Even taking all inferences in favor of the non-movant, as this Court must on a motion for summary judgment (*Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012)), if Verner did not know that Night Hawk was Geisler's alter ego, he certainly had a reason to believe that Geisler had an interest in the investments in Night Hawk. Accordingly, the Court rejects Defendants' argument that the remaining received/transferred funds were for an investment in Night

Hawk and does not address this argument with respect to the other transfers. See *Ray*, 74 A.D.2d at 845-46.

Plaintiffs' motion for summary judgment for Verner's violation of the Restraining Notice is granted with respect to Verner's receipt and transfer of the Nichols' $25,000 check. Verner admitted that he received this check and that these funds were invested in Night Hawk, Geisler's alter ego. These were thus funds that came into the possession of Verner after having been served the Restraining Notice, in which he knew or had reason to believe Geisler had an interest. *See* CPLR 5222(b). Plaintiffs have not explained why summary judgment should be granted as to Verner Simon, P.C. with regard to any of Verner's receipts/transfers. Plaintiffs' motion for summary judgment on its sixth cause of action is therefore denied in its entirety as to Verner Simon, P.C.

2. *Van Vleet Transfer*

Verner's receipt and disbursement schedules (Goldin Aff., Ex. 9(7)) reflect a $25,000 receipt during July 2001 from Jared Van Vleet and a subsequent disbursement of the funds. Plaintiffs argue that Geisler had "an interest" in this amount and Verner transferred it in violation of the Restraining Notice. Plaintiffs have met their burden on summary judgment of showing that Verner violated the Restraining Notice by receiving and transferring these funds. *Zuckerman*, 49 N.Y.2d at 562.

Although Verner now claims that this $25,000 was wired directly to Night Hawk's attorney, Jose A. Suaraz Lozano, and not through Verner's accounts (Defendants' Opposition

Memo, p. 12.), his schedules reflect otherwise, and he is deemed to have admitted to this receipt/transfer by failing to comply with Commercial Division Rule 19-a.

Furthermore, Defendants have failed to meet their burden on summary judgment because they have failed to produce evidentiary proof sufficient to establish the existence of a triable issue of fact with respect to the transfer of the Van Vleet funds. *Alvarez*, 68 N.Y.2d at 324. In support of their claim that the funds never passed through Verner, Defendants' cite to Verner's deposition testimony at Furman Affirm., Exhibit C, Tr. 134:2-5. Despite having cited to page 134 of the deposition transcript, Defendants' failed to include page 134 of the deposition in the record on this motion. Accordingly, Plaintiffs' motion for summary judgment against Verner for violation of the Restraining Notice is granted with respect to the Van Vleet transfer.

3. Weerndorf Transfer

Verner admits receiving a gift of $10,000 from Steve Weerndorf on September 1, 2001 and then disbursing those funds for judgment debtors' Geisler and Roberdeau's living expenses. *See* Goldin Aff., Ex. 9(6). Plaintiffs have met their burden on summary judgment of showing that Verner violated the Restraining Notice by receiving and transferring these funds. *Zuckerman*, 49 N.Y.2d at 562.

Defendants do not make any arguments specific to the Weerndorf transfer, but generally contend that gifts and/or loans to Geisler and/or Roberdeau do not constitute funds

in which the judgment debtors have "an interest." Defendants do not cite any case law in support of this contention, and the Court finds that it is without merit. The fact that Geisler or Roberdeau directly benefitted from the payment of this sum, in that it paid some of their expenses, was sufficient to require Verner to comply with the Restraining Notice or be subject to the appropriate legal sanction. *Ray*, 74 A.D.2d at 845-46. Accordingly, Plaintiffs' motion for summary judgment against Verner for violation of the Restraining Notice is granted with respect to the Weerndorf transfer.

4. Kaufman Transfer

Verner admitted receipt of $4,000 on September 28, 2001 from Susan Kaufman and subsequent disbursement for Geisler and/or Roberdeau's living expenses. *See* Goldin Aff., Ex. 9(6). Plaintiffs have met their burden on summary judgment of showing that Verner violated the Restraining Notice by receiving and transferring these funds. *Zuckerman*, 49 N.Y.2d at 562. Defendants again argue that Geisler and Roberdeau did not have "an interest" in these funds. The Court rejects this argument for the reasons stated *supra* at II(B)(1) & (3). Accordingly, Plaintiffs' motion for summary judgment against Verner for violation of the Restraining Notice is granted with respect to the Kaufman transfer.

5. Sandra Roberdeau Transfer

Verner admitted receipt of $10,000 from Roberdeau's sister-in-law Sandra Roberdeau on October 1, 2001, which was disbursed to pay for Roberdeau's living expenses. *See*

Goldin Aff., Ex. 9(6). Plaintiffs have met their burden on summary judgment of showing that Verner violated the Restraining Notice by receiving and transferring these funds. *Zuckerman*, 49 N.Y.2d at 562.

Defendants again argue that Geisler and Roberdeau did not have an interest in these funds. The Court rejects this argument for the reasons stated *supra* at II(B)(1) & (3). Accordingly, Plaintiffs' motion for summary judgment against Verner for violation of the Restraining Notice is granted with respect to the Sandra Roberdeau transfer.

6. Myers Transfer

Verner admitted receiving $5,000 from Samuel Myers on January 7, 2002, which he disbursed as a loan to Geisler. *See* Goldin Aff., Ex. 9(6). Plaintiffs have met their burden on summary judgment of showing that Verner violated the Restraining Notice by receiving and transferring these funds. *Zuckerman*, 49 N.Y.2d at 562.

Defendants again argue that Geisler and Roberdeau did not have "an interest" in these funds. The Court rejects this argument for the reasons stated supra at II(B)(1) &(3). Accordingly, Plaintiffs' motion for summary judgment against Verner for violation of the Restraining Notice is granted with respect to the Myers transfer.

7. Dawson Transfer

Verner admitted receiving $25,000 from Geisler's friend, Gene Dawson, on April 29, 2002, and that he used this money to pay Geisler's expenses. *See* Goldin Aff., Ex. 9(7); *see also* Goldin Aff., Ex. 28, Tr. 20:19-23, 28:7-11, 42:22-43:23. Plaintiffs have met their burden

on summary judgment of showing that Verner violated the Restraining Notice by receiving and transferring these funds. *Zuckerman*, 49 N.Y.2d at 562.

Defendants again argue that Geisler and Roberdeau did not have "an interest" in these funds. The Court rejects this argument for the reasons stated *supra* at II(B)(1) &(3). Accordingly, Plaintiffs' motion for summary judgment against Verner for violation of the Restraining Notice is granted with respect to the Dawson transfer.

8. Reedy Transfer

Verner admitted receiving and transferring $10,000 from Robert Reedy during the Notice Period to pay for Geisler's expenses. *See* Goldin Aff., Exs. 9(6) & 9(7); *see also* Goldin Aff., Ex. 28, Tr. 26:10-18. Plaintiffs have met their burden on summary judgment of showing that Verner violated the Restraining Notice by receiving and transferring these funds. *Zuckerman*, 49 N.Y.2d at 562.

Defendants again argue that Geisler and Roberdeau did not have "an interest" in these funds. The Court rejects this argument for the reasons stated *supra* at II(B)(1) &(3). Accordingly, Plaintiffs' motion for summary judgment against Verner for violation of the Restraining Notice is granted with respect to the Reedy transfer.

9. Cedillo Transfer

Verner admitted receiving $10,000 from friend of Geisler, Ricardo Cedillo, which he disbursed for Geisler's expenses on May 3, 2002. *See* Goldin Aff., Exs. 9(6) & 9(7); *see also* Goldin Aff., Ex. 28, Tr. 30:24-31:7. Plaintiffs have met their burden on summary judgment

of showing that Verner violated the Restraining Notice by receiving and transferring these funds. *Zuckerman*, 49 N.Y.2d at 562.

Defendants again argue that Geisler and Roberdeau did not have "an interest" in these funds. The Court rejects this argument for the reasons stated *supra* at II(B)(1) &(3). Accordingly, Plaintiffs' motion for summary judgment against Verner for violation of the Restraining Notice is granted with respect to the Cedillo transfer.

9. Knight Transfers

Verner admitted at his deposition that "Rick Knight put $100,000 into my hands as attorney for Geisler and Night Hawk at some point in time." (Goldin Aff., Ex. 28, Tr. 436:5-7.). It is unclear precisely when this $100,000 was disbursed, and thus whether or not the subsequent disbursements violated the Restraining Notice. Verner's bank accounts confirm that Verner received $10,000 from Knight on June 7, 2002. Verner Aff., Ex. I(B) (HSBC Statement of Account for May 23, 2002 - June 24, 2002). By June 10, 2002, Verner's HSBC account had a negative balance. *Id.* Therefore Verner transferred $10,000 of Knight's funds for Geisler's expenses by June 10, 2002 in contravention of the Restraining Notice. Plaintiffs have thus met their burden on summary judgment.

Defendants again argue that Geisler and Roberdeau did not have "an interest" in these funds. The Court rejects this argument for the reasons stated *supra* at II(B)(1) & (3). Accordingly, Plaintiffs' motion for summary judgment against Verner for violation of the Restraining Notice is granted with respect to the $10,000 Knight transfer.

Plaintiffs' have not met their burden on summary judgment with respect to their other two asserted Knight transfers. In their Rule 19-a Statement ¶ 21, Plaintiffs claim Verner admitted transferring $15,000 received from Knight for the benefit of Geisler on June 24, 2002. The Restraining Notice was in effect from June 13, 2001 until June 12, 2002. The $15,000 transfer of Knight's funds is outside of the Notice Period. Summary judgment as to the $15,000 Knight transfer is thus denied. As discussed further, *infra* at II(B)(10), Plaintiffs' motion for summary judgment with respect to an additional $65,000 received from Knight is also denied.

10. *Plaintiffs' Request for an Adverse Inference with Respect to Verner's Transfer of $82,500*

Plaintiffs seek spoliation sanctions. Plaintiffs argue that Verner was on notice that he should preserve records concerning his receipts and transfers as early as November 2001, when Justice Moskowitz held him in contempt for violation of the Restraining Notice. (Plaintiffs' Memo, pp. 15-16.) Plaintiffs contend that Verner did not preserve his records, and now Plaintiffs are unable to prove that $82,500 worth of funds received by Verner were received and transferred during the Notice Period. Accordingly, Plaintiffs seek an adverse inference that the $82,500 was transferred within the Notice Period and summary judgment for violation of the Restraining Notice with regard to those $82,500.

Defendants oppose and argue that a spoliation sanctions motion is inappropriate at this juncture.

"Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence ... before the adversary has an opportunity to inspect them." *Kirkland v New York City Housing Authority*, 236 A.D.2d 170, 175 (1st Dep't 1997). Moreover, sanctions for the spoliation of evidence have been held to be appropriate even where the evidence at issue was destroyed prior to the issuance of any discovery order seeking such evidence, and where the destruction of evidence has not been shown to be intentional or in bad faith. *Id.*; *see also Squitieri v. City of New York*, 248 AD2d 201, 669 N.Y.S.2d 589 (1st Dept 1998).

Under CPLR § 3126 if a court finds that a party has destroyed or refused to provide evidence that "ought to have been disclosed, ... the court may make such orders with regard to the failure or refusal as are just[.]" CPLR § 3126. Allowing for an adverse inference instruction to the jury at trial may be an appropriate spoliation sanction. *See Suazo v. Linden Plaza Assoc., L.P.*, 102 A.D.3d 570, 571 (1st Dep't 2013).

Courts may grant a party an adverse inference charge at trial based on another party's spoliation of evidence. *Id.* For the Court, however, to take an adverse inference on summary judgment and grant judgment in Plaintiffs' favor would be improper and would place the Court in the role of the fact finder.

New York Pattern Jury Instruction 1:77.1 permits, but does not require, the jury to take an adverse interference where it believes that a party has failed to produce evidence and has failed to offer a reasonable explanation for not producing the evidence. The Court is not

in a position, on this motion for summary judgment, to determine whether Verner has offered a reasonable explanation for failing to produce evidence of the dates of certain transfers, nor to decide that a jury would be required to take an adverse inference.

Plaintiffs' motion for spoliation sanctions is thus denied without prejudice for plaintiff to make a motion for an adverse inference instruction at trial. Accordingly, Plaintiffs' motion for summary judgment on the Nels Israelson $7,500 transfer, the Rick Knight $65,000 transfer and the Joe Roxe $10,000 transfer is denied.

11. Prejudgment Interest on the Restrained Funds

Plaintiffs move pursuant to CPLR § 5001 for statutory prejudgment interest on those funds that were transferred by Verner in violation of the Restraining Notice. Plaintiffs argue that Verner's misconduct deprived them of the benefit of the funds that should have been restrained by the Restraining Notice. Plaintiffs' Memo, p. 21. Defendants contend that prejudgment interest is here inappropriate because Verner did not receive any payment for the transfer of the funds, and that Verner should not be penalized for Plaintiffs' delays in prosecuting this action. (Defendants' Opposition Memo, p. 19.)

CPLR § 5001 provides that:

> [i]nterest shall be recovered upon a sum awarded because of. . . an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in action of equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

The First Department in *Doubet LLC v. The Trustees of Columbia Univ. in the City of New York*, 99 A.D.3d 433 (1st Dep't 2012) rejected the award of prejudgment interest in the context of damages for a garnishee's violation of a Restraining Notice. *Id.* at 435.

Although a violation of a restraining notice can subject the garnishee to liability, under *Doubet,* a party who has served a restraining notice on a garnishee is not entitled to prejudgment interest as a matter of right under CPLR § 5001(a). *Id* (citing to *Aspen Indus. v. Marine Midland Bank*, 52 N.Y.2d 575, 579-80 (1981). This is because service of a CPLR 5222 restraining notice confers no priority upon the judgment creditor in the form of a lien on the judgment debtor's property. *Id* (citing to *Aspen Indus. v. Marine Midland Bank*, 52 N.Y.2d 575, 579-80 (1981). Plaintiffs are thus not entitled to prejudgment interest as of right.

Even assuming that Plaintiffs' action for violation of the Restraining Notice is based on an equitable claim, the fact that Plaintiffs seek prejudgment interest based on Verner's status as a "repeat offender" underscores that they are seeking the interest as a penalty. "The purpose of interest is to require a person who owes money to pay compensation for the advantage received from the use of that money over a period of time." *Manufacturer's & Traders Trust Co. v. Reliance Ins. Co.,* 8 N.Y.3d 583, 589 (2007). Though it is likely that Verner received some remuneration for his services as Geisler and Roberdeau's "money manager," there is no evidence that he benefitted from the use of the precise funds that were

subject to the Restraining Notice. In fact, Verner transferred these funds out of his accounts for the benefit of Geisler and Roberdeau. Accordingly, Plaintiffs' motion for prejudgment interest is denied.

12. Attorneys' Fees

Plaintiffs move pursuant to CPLR § 5251 for attorneys' fees and costs on the ground that Verner's violation of the Restraining Notice constitutes contempt of the Court. (Plaintiffs' Memo, p. 21.) Plaintiffs contend that, despite being served with the Restraining Notice and thereafter being held in contempt for violation of the Restraining Notice in 2001, Verner continued to transfer funds for Geisler and Roberdeau. *Id.* at p. 22. Plaintiffs insist that Verner continuously disobeyed discovery requests and court orders to provide documentation related to Geisler and Roberdeau's funds and that Verner's conduct has cost plaintiffs a substantial amount in legal fees. *Id.*

Defendants counter that Plaintiffs are not entitled to legal fees and costs. (Defendants' Opposition Memo, p. 20.) Defendants maintain that "Attorney Verner has done everything in his power to recreate financial records in response to Plaintiffs' discovery demands and has not engaged in willful disobedience of Court orders warranting a finding that Plaintiffs are entitled to attorneys' fees with respect to this cause of action." *Id.* Defendants further argue that Plaintiffs have failed to cite to any cases whereby a court awards a plaintiff attorneys' fees in an action for a defendant's violation of a restraining notice. *Id.*

CPLR § 5251 provides that "[r]efusal or willful neglect of any person to obey a subpoena or restraining notice issued, or order granted, pursuant to this title . . . shall be punishable as a contempt of court."

Judiciary Law § 773 states, in pertinent part, that "[i]f an actual loss or injury has been caused to a party to an action . . . by reason of misconduct proved against the offender . . . a fine sufficient to indemnify the aggrieved party, must be imposed upon the offender." In certain cases, a party's "actual loss or injury' may include attorneys' fees and costs. *See Pace Advertising Agency v. Manhattan Pac. Mgmt. Co.*, 237 A.D.2d 131 (1st Dep't 1997) (in a turnover proceeding, where a garnishee failed on several occasions to provide accurate accountings, the court ordered that garnishee pay the sum of the debt owing plus judgment creditor's attorneys' fees and costs).

However, attorneys' fees are not recoverable for a garnishee's violation of a restraining notice. *Global Technology, Inc. v. Royal Bank of Can.*, 34 Misc. 3d 1209(A) *4 (N.Y. Sup. Ct. 2012) (citing to *Nardone*, 40 A.D.2d at 697 (2d Dep't 1972)).

Accordingly, Plaintiffs' request for attorneys' fees as a part of its damages for violation of the Restraining Notice is denied. However, the Court does not herein opine as to whether or not Plaintiffs may be able to ultimately recover attorneys' fees on any of Plaintiffs other claims in this action.

II. Defendants' Motion for Summary Judgment

Defendants move for summary judgment on Plaintiffs' Complaint. Because this Court has herein partially granted Plaintiffs' motion for summary judgment on its sixth cause of action, Defendants' motion for summary judgment dismissing Plaintiffs' sixth cause of action is denied.

A. Aiding and Abetting Geisler/Roberdeau's Breaches of Constructive Trust and Fiduciary Duties

Plaintiffs' first cause of action asserts that Verner aided and abetted Geisler and Roberdeau in their breach of the Trial Decision's constructive trust and fiduciary duties. (Compl. ¶¶ 124-31.)

"A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003). A person knowingly participates in a breach of fiduciary duty when he or she provides substantial assistance to the primary violator. *Id.*

Defendants argue that Verner did not knowingly participate or induce Geisler and Roberdeau's breach of fiduciary duties and constructive trust. (Defendants' Memo[12], p. 29.) Defendants also contend that Verner did not have actual knowledge of Geisler and

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[12] Memorandum of Law in Support of Defendants' Verner Simon P.C. & Paul W. Verner's Order to Show Cause Application Motion Seeking Summary Judgment ("Defendants' Memo")

Roberdeau's breaches of fiduciary duty and constructive trust. *Id.* In support of this contention, Defendants cite to cases holding that allegations of constructive knowledge, or that a defendant was on notice as to the tortious behavior of the wrongdoer, are insufficient to sustain a cause of action for aiding and abetting. *See e.g., Gray & Associates, LLC v. Speltz & Weis LLC*, 22 Misc.3d 1124(A) (quoting *Kaufman*, 307 A.D.2d at 125).

Plaintiffs argue that Verner did provide substantial assistance to Geisler and Roberdeau in repeatedly breaching their fiduciary duties owed to Plaintiffs. (Plaintiffs' Opposition Memo, p. 27.)

Plaintiffs contend that: (1) Verner assisted in hiding, transferring and selling documents related to *The White Hotel*; (2) Verner arranged for his law clerk to fund Geisler's acquisition through Night Hawk of the rights to produce *The White Hotel* Project and otherwise assisted in financing *The White Hotel* Project for Geisler and Roberdeau's benefit and in violation of the Trial Decision and fiduciary law; (3) Verner wired $25,500 of his own funds to Thomas' literary agent so that Night Hawk could acquire the film rights, and Geisler (as Night Hawk's producer) could produce *The White Hotel*; and (4) issued the May 2003 Opinion Letter stating that the rights to *The White Hotel* belonged to Night Hawk and that Plaintiffs had no rights therein, continues to permit Geisler to use that letter to cloud title to *The White Hotel* and refuses to withdraw the letter. Plaintiffs' Opposition Memo, pp. 27-29.

Plaintiffs also argue that Verner had actual knowledge of Geisler and Roberdeau's breaches of fiduciary duty and court orders. Plaintiffs contend that, as Geisler and Roberdeau's attorney, Verner was aware of the Trial Decision's imposition of a constructive trust on *The White Hotel* and that Geisler and Roberdeau were to turn over all screenplays and documents in connection with *The White Hotel*. *Id.* Plaintiffs contend that Verner was aware of the fiduciary relationship between Plaintiffs and Geisler and Roberdeau, and that Verner nonetheless assisted Geisler and Roberdeau with acquiring the rights to produce *The White Hotel*, through Geisler's alter-ego, Night Hawk, by arranging for financing and issuing the Opinion Letter. *Id.*

The Court finds that, at a minimum, there are triable issues of fact. First, there is an issue of fact with regard to whether or not Verner had actual knowledge of Geisler and Roberdeau's fiduciary duties, the breaches thereof, and their breaches of several court orders intended to protect Plaintiffs' Partnership interests. Verner certainly had knowledge of the Trial Decision's imposition of a constructive trust and the adjudication that the rights to *The White Hotel* Project belonged to the Partnership. Second, there is an issue of fact as to whether or not Verner provided substantial assistance with Geisler and Roberdeau's breaches. As detailed by the Court above, even apart from the Opinion Letter, Verner provided assistance with financing Geisler and Roberdeau's efforts to obtain the rights to *The White Hotel* Project. The level of that assistance is not ripe for determination on summary judgment.

Accordingly, Defendants' motion for summary judgment on Plaintiffs' first cause of action is denied.

B. Aiding and Abetting Fraud

Plaintiffs' second cause of action against Defendants is for aiding and abetting Geisler and Roberdeau's fraud/constructive fraud/fraudulent concealment. (Compl. ¶¶ 132-38.) Although Defendants seek summary judgment in their favor on the entirety of Plaintiffs' Complaint, they fail to address the merits of Plaintiffs' second cause of action in their submissions. Defendants have not met their burden on summary judgment, and their motion for summary judgment dismissing Plaintiffs' second cause of action is thus denied.

C. Deceit and Collusion pursuant to Judiciary Law Section 487

Plaintiffs' third cause of action is against Verner for engaging in deceit and collusion against Plaintiffs in violation of Judiciary Law § 487.

Section 487 of the Judiciary Law provides that an attorney or counselor who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" shall "forfeit to the party injured treble damages, to be recovered in a civil action." A cause of action for violation of Judiciary Law § 487 does not lie where defendants advocate a reasonable position of the facts in the case that is most favorable to their clients, even if that position is ultimately wrong. *See Curry v. Dollard*, 52 A.D.3d 642, 644 (2d Dep't 2008).

Defendants argue that Verner's conduct does not rise to the level of the deceit and collusion necessary to state a claim under Judiciary Law § 487. (Defendants' Memo, p. 36.) Defendants contend that, in his Opinion Letter, Verner was advocating a reasonable position that he believed was most favorable to his client. *Id.*

Plaintiffs argue that the Trial Decision, of which Verner was aware, required Geisler and Roberdeau to deliver to Plaintiffs all agreements and other documents related to *The White Hotel* Project. (Plaintiffs' Memo, p. 40.) Plaintiffs note that the Trial Decision also held *The White Hotel* Project in constructive trust. Notwithstanding Verner's awareness of the Trial Decision, Plaintiffs contend that Verner "devised, prepared, funded, and implemented documents intending to circumvent the Court's orders" and that Verner's conduct was intended to deceive the Court and Plaintiffs. *Id.* at p. 41.

Although this Court finds that Verner's conduct comes close to that sanctionable under Judiciary Law § 487, the Court grants Defendants' motion for summary judgment dismissing Plaintiffs' third cause of action. The Court does so because Plaintiffs do not make any particularized argument as to which documents were devised, prepared, funded and implemented by Verner which were intended to circumvent the Court's orders. Presumably, Plaintiffs take issue with Verner's Opinion Letter stating that Plaintiffs had no rights in *The White Hotel* Project.

The Trial Decision held *The White Hotel* in constructive trust, but did not address title to *The White Hotel* once the WH Option Agreement reverted back to Thomas in July of 2001.

Accordingly, though it may not have been prudent for Verner to advocate as he did on behalf of his clients, as discussed further by the Court *infra* at Part II(D), Verner's issuance of the Opinion Letter does not rise to the level of deceit and collusion required for this court to find a § 487 claim.

E. Unjust Enrichment

Plaintiffs fourth and fifth causes of action are for unjust enrichment against Verner with respect to certain of the Partnership Projects, including *The White Hotel.* (Compl.¶¶ 147-54.)

In order to state a claim for unjust enrichment, a plaintiff must allege that "it conferred a benefit upon defendants and that defendants will obtain such benefit without adequately compensating plaintiff." *Lake Eerie Distributors, Inc. v. Martlet Importing Co.*, 221 A.D.2d 954, 956 (4th Dep't 1995) (quoting *Tarrytown House Condominiums, Inc. v. Martlet Importing Co.*, 161 A.D.2d 310, 313 (1st Dep't 1990).

Although, Plaintiffs argue that Verner benefitted from the "misappropriation of [P]laintiff[s'] rights in the Projects through more than $200,000 of legal and other fees[,]" this Court fails to see how the legal fees and other remuneration from Geisler and Roberdeau constitute a benefit conferred by Plaintiffs. Accordingly, Defendants' motion for summary judgment on Plaintiffs' fifth cause of action is granted.

F. Slander of Title

Plaintiffs' seventh cause of action is for slander of title against Verner based on Verner's issuance of the Opinion Letter. (Compl. ¶¶ 161-177.)

The elements of a claim for slander of title are "(1) a communication falsely casting doubt on the validity of [the] complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages." *39 Coll. Point Corp. v. Transpac Capital Corp.*, 27 A.D.3d 454, 455 (2d Dep't 2006) (quoting from *Brown v. Bethlehem Terrace Associates*, 136 A.D.2d 222, 224 (3d Dep't 1988). Plaintiffs must allege that defendants made the false communications with malicious intent or with reckless disregard for their truth or falsity. *Volbrecht v. Jacobson*, 40 A.D.3d 1243, 1243 (3d Dep't 2007).

Defendants claim that Plaintiffs' cause of action for slander of title must be dismissed because the Opinion Letter was not false at the time it was made, was not reasonably calculated to cause harm, and Plaintiffs cannot prove that they suffered damages as a result of the letter. (Defendants' Memo, pp. 31-32.) Defendants also argue that Verner had no control over Geisler's republication of the letter. *Id.* at p. 33.

Plaintiffs counter that Verner's Opinion Letter was, in fact, false, calculated to cause harm and that the Opinion Letter deprived Plaintiffs of millions of dollars. Plaintiffs argue that, at the very least, Verner's Opinion Letter was issued with a reckless disregard for truth or falsity. (Plaintiffs' Opposition Memo, pp. 31-36.)

The Opinion letter did falsely cast doubt on the validity of Plaintiffs' title to *The White Hotel* Project, as the letter falsely stated that there was no chance that any of the claims asserting rights to the Project could be successful. Even though the Trial Decision did not explicitly address the then forthcoming reversion of rights to Thomas, Verner was aware at the time he issued the Opinion Letter, that Plaintiffs were seeking a judgment extending the term of their rights in *The White Hotel* Project as a result of Geisler and Roberdeau's fraud. *See* Rubin Aff., Ex. 17. Ultimately, Plaintiffs were indeed successful in extending their *White Hotel* option rights by way of settlement with Thomas and Justice Moskowitz ordered that Plaintiffs "may exercise, all right, title, and interest of defendant Night Hawk Limited under, the [Night Hawk Option Agreement]." Rubin Aff., Ex. 29.

An attorney is permitted to give honest advice, even if erroneous, and generally is not responsible for the motives of his clients, however, "admission to the bar does not create a license to act maliciously, fraudulently, or knowingly to tread upon the legal rights of others." *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1080 (2d Cir. 1977) (citing *Steinberg v. Guild*, 22 A.D.2d 775 (1st Dep't 1964).

There is therefore a material issue of fact with regard to Verner's intent when he published the Opinion Letter and whether not the letter was reasonably calculated to cause harm. Defendants submit opinions of purported experts in the film industry arguing that the Opinion Letter was correct at the time it was issued. *See* Affidavit of Steven Masur, Esq.; *see also* Affidavit of Matthew Weiner. These opinions do little to remove the material issue

of fact with regard to intent, particularly, in that they make legal conclusions and ignore many of the judgments and findings of fact in the long history of the litigation of this case.

Further, there is a material issue of fact with respect to damages suffered by Plaintiffs. Defendants claim that Plaintiffs cannot prove that they have suffered any damages as result of Verner's alleged slander of title. Defendants argue that Plaintiffs damages are based solely on fee quotes in one of Geisler/Roberdeau's agreements to option their purported rights in *The White Hotel*. *See* Furman Affirm., Ex. J.

Plaintiffs claim that they have suffered damages as a result of Verner's slander of title. Plaintiffs argue that, although they succeeded in attracting two producers to enter into option agreements for the production of *The White Hotel*, both producers allowed their options to lapse in light of Geisler's e-mails to the producers attaching Verner's Opinion Letter. Plaintiffs contend that the value of *The White Hotel* Project can be ascertained and that Justice Moskowitz entered judgment against Geisler and Night Hawk in the amount of $4.35 million based on Special Referee Crespo's findings with respect to *The White Hotel* Project's value. (Plaintiffs' Opposition Memo., p. 33.) Referee Crespo derived these damages from offering memoranda prepared by Verner referring to the value of the Projects and also Verner's testimony in hearings before Referee Crespo. *See* Rubin Aff., Exs. 18 & 21; Rubin Aff., Ex. 33, Finding Nos. 64-67. Although, Referee Crespo's findings as to the value of *The White Hotel* Project are not binding on the trier of fact in this case, the Court finds that, at a

minimum, the Crespo Report shows that there is a material issue of fact with respect to Plaintiffs' damages. Defendants' motion for summary judgment on Plaintiffs' seventh cause of action is thus denied.

[The Order of the Court follows on the next page.]

Order

Accordingly it is hereby

ORDERED that Plaintiffs' motion for summary judgment on its sixth cause of action for violation of the Restraining Notice is granted in the amount of $134,000; and it is further

ORDERED that Plaintiffs' motion for summary judgment on its sixth cause of action for the additional funds is otherwise denied; and it is further

ORDERED that Defendants' motion to dismiss Plaintiffs' Fourth Amended Complaint is granted in part, insofar as Plaintiffs' third cause of action for violation of Judiciary § 487 and Plaintiffs' fourth and fifth causes of action for unjust enrichment are dismissed; and it is further

ORDERED that Defendants' motion to dismiss Plaintiffs' first, second, sixth and seventh causes of action for aiding and abetting breach of fiduciary duty, aiding and abetting fraud and violation of the Restraining Notice, respectively, is denied.

Settle order.

This constitutes the decision and order of the court.

Dated: New York, New York
June 13, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.