

**Brienza v Masi**

2013 NY Slip Op 33378(U)

May 17, 2013

Sup Ct, Richmond County

Docket Number: 150037/2013

Judge: Joseph J. Maltese

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This opinion is uncorrected and not selected for official publication.

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

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**Index No.:150037/13  
Motion No.: 001**

**MICHAEL J. BRIENZA,**

*Plaintiff*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

**MARIA MASI,  
JOSEPH P. VERRIOTTO, JR.,  
JP MORGAN CHASE BANK, N.A., and  
PAYMENTECH, LLC,**

*Defendants*

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The following items were considered in the review of the following motion to dismiss.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support	2
Answering Affidavit and Attorney Affirmation	3
Memorandum of Law in Reply	4
Exhibits	Attached to Papers

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

The defendants, JP Morgan Chase Bank, N.A. and Paymentech, LLC, move to dismiss the plaintiff's complaint and to impose sanctions against the plaintiff and his counsel. The motion is granted to the extent that complaint is severed and dismissed as to the moving defendants only.

**Facts**

The plaintiff alleges that the defendants Maria Masi ("Masi") and Joseph Verriotto, Jr. ("Verriotto") held themselves out as employees or agents of the defendants, JP Morgan Chase Bank, N.A. ("JP Morgan Chase") and/or Paymentech, LLC ("Paymentech"). Paymentech is an entity that is owned by JP Morgan Chase. It is alleged that Verriotto informed the plaintiff that

Masi handled investments for JP Morgan Chase. Moreover, on or about March 15, 2007 the plaintiff wrote a check in the sum of \$40,000 made payable to Masi. On or about March 19, 2007 Masi cashed the check and deposit the funds into her personal account. Based on this transaction the plaintiff alleges the following causes of action against all defendants: Breach of Contract; Breach of Fiduciary Duty; Fraudulent Misrepresentation; Negligent Misrepresentation; Conversion; Fraudulent Concealment; and Unjust Enrichment.

In support of their motion to dismiss the defendants, JP Morgan and Paymentech, submit the affidavit of Luke Bailey, a paralegal in the Law Department at JP Morgan. This affidavit states that Mr. Bailey reviewed the checking account maintained by the co-defendant Maria Masi. He found that this account is a personal checking account with one signatory, Maria Masi. Earlier communication between counsel indicated that Ms. Masi is employed by JP Morgan Chase as a secretary, and not as an investment executive or counselor. In that same communication it was stated that Verriotto is not engaged as an employee or agent of either business concern.

The moving defendants now seek to dismiss the plaintiff's complaint pre-answer; and for this court to sanction the plaintiff and his attorney for purported frivolous conduct.

### **Discussion**

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>1</sup> Although on a motion to dismiss a complaint

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<sup>1</sup> *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 NY3d 582 [2005].

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>2</sup>

Here, the claims made against JP Morgan Chase and Paymentech must be dismissed. While Masi was in fact employed by JP Morgan Chase, the check was made out her in an individual capacity. The plaintiff fails to allege that he entered into any type of agreement, or had any involvement with JP Morgan Chase and Paymentech apart from conversations with Verriotto, who was not employed with either entity. Consequently, the complaint is severed and dismissed as to the moving parties.

The imposition of costs and sanctions are within the discretion of the court. In this instance the court does not feel that the conduct in this action merits the imposition of costs and sanctions. Consequently, that branch of the defendants' motion is denied.

Accordingly, it is hereby:

ORDERED, that the defendants' motion is granted to the extent that the complaint is severed and dismissed as to JP Morgan Chase Bank, N.A. and Paymentech, LLC, and it is further

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

ORDERED, that the remaining parties, Maria Masi and Joeph P. Verriotto, Jr. shall answer the complaint by June 2, 2013, and the remaining parties, or their counsel, shall return to

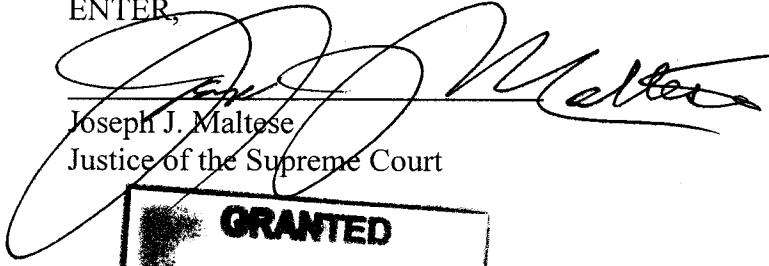
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<sup>2</sup> *Stoianoff v. Gahona*, 248 AD2d 525 [2d Dep't. 1998].

DCM Part 3, 130 Stuyvesant Place, 3<sup>rd</sup> Floor, on **Tuesday, June 25, 2013 at 9:30 a.m.** for a Preliminary Conference.

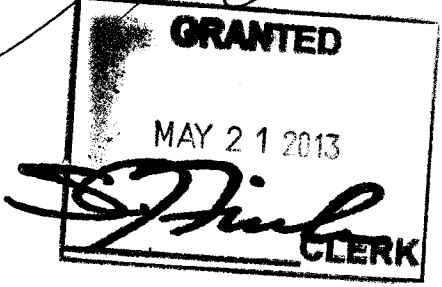
DATED: May 17, 2013

ENTER,



Handwritten signature of Joseph J. Maltese in black ink, written over a horizontal line.

Joseph J. Maltese  
Justice of the Supreme Court



A rectangular stamp with a black border. At the top, the word "GRANTED" is printed in bold. Below it, the date "MAY 21 2013" is stamped. A handwritten signature in black ink is written across the middle of the stamp. At the bottom right, the word "CLERK" is printed in bold.