Segal v Komolov
2013 NY Slip Op 33399(U)
December 19, 2013
Supreme Court, New York County
Docket Number: 108814/11
Judge: Paul Wooten
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[* 1] SCANNED ON 1/2/2014

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

DAVID SEGAL and MOHAMED SERRY,
Plaintiffs,

INDEX NO. 108814/11

-against-

MOTION SEQ. NO. 001

ALEXANDER KOMOLOV and NICHOLAS MILANI,
Defendants.

The following papers were read on this motion by the plaintiffs to dismiss defendants counterclaims.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ☒ No

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

David Segal (Segal) commenced the herein action against Alexander Komolov (Komolov) to recover damages for the repayment of an alleged $100,000.00 loan. Mohamed Serry (Serry) commenced the herein action against Nicholas Milani (Milani) to recover damages for assault. Now before the Court is a motion by Segal and Serry (collectively, plaintiffs) for an order dismissing the five counterclaims asserted by Komolov and Milani (collectively, defendants), pursuant to CPLR 3211(a)(5) and (a)(7), for sanctions including attorney's fees, pursuant to §130-1.1 of the Rules of the Chief Administrator, costs and expenses, and for an order enjoining Komolov, his companies, or counsel, from initiating further litigation against plaintiffs. Defendants are in opposition to the motion.

BACKGROUND

Segal, Serry, and Komolov are all active in the business of art and antiques (Complaint for Index No. 652042/2010, *in passim*). In October of 2009, Segal alleges that he orally agreed

to loan Komolov, an art and antiquities broker (defendants' memorandum of law in opposition, p. 6), $100,000.00 if Komolov agreed to repay Segal within three months, to which Komolov orally agreed (Complaint at 6-7). On November 4, 2009, Segal claims he loaned Komolov $100,000.00, which Komolov has never repaid (*id.* at 9-10).

In November of 2010, Komolov, and two entities, filed a lawsuit (Index No. 652042/2010) (First Action) against Segal and Serry, among other parties, alleging 26 causes of action surrounding the sale of fake antiques and paintings, the "taking" of multiple items, and the purchase of a condominium (Aff. of Bedke in Support at 7; Aff. of Bedke in Support, Exhibit H). The First Action was dismissed on May 12, 2011 for failure to state a claim (Affirmation of Kathryn Bedke in Support at 2, 13, Exhibit A). Komolov and the other plaintiffs then filed a second lawsuit (Index No. 651626/2011) (Second Action)[1] against Segal and Serry, among other parties, which was dismissed in November of 2011 as repetitive of the First Action (Aff. of Bedke in Support at 3-4; Exhibit B). However, on appeal, the dismissal was reversed, the judgment vacated, and causes of action one through fifteen reinstated (*see* letter from Roman Popik, Esq., dated June 18, 2012 attaching order). The First Department found, on June 12, 2012, that the court's dismissal under *res judicata* and collateral estoppel of the Second Action was in error because the dismissal of the First Action should have been without prejudice (*id.*).

During a court appearance for the First Action, plaintiffs allege the Court ordered there be no contact or communication between the parties (Complaint at 11). However, on April 15, 2011, plaintiffs allege Milani assaulted Serry at a Sotheby's auction in New York, violating the no contact order (*id.* at 12-16). Serry alleges Milani screamed at him, threatened him with his physical presence, and threatened to "drop him" right there (*id.* at 16-17). Plaintiffs allege that

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1 Plaintiffs in the herein action allege the Second Action contained claims regarding the same incidents as the First Action, and one additional claim for the sale of another fake painting (Aff. of Bedke in Support at 16).

Komolov was present outside Sotheby's and drove Milani away after the incident (*id.* at 21, 24). Serry also alleges Milani arranged for others to make threatening phone calls to himself and a business partner threatening physical harm and business destruction (*id.* at 25-26).

In this action, commenced on or about December 5, 2011, Segal seeks damages for breach of an oral contract in the form of repayment of the $100,000.00 loan to Komolov plus additional pre-judgment interest and Serry seeks actual damages and punitive damages for the assault allegedly committed by Milani.

Defendants assert five counterclaims against plaintiffs in their amended verified answer regarding incidents occurring between Segal and Komolov. Counterclaims one, three, four, and five allege Segal gained access to High Value Trading LLC's[2] checkbook and forged Komolov's signature on four checks for the amounts of $287,500.00, $27,000.00, $18,500.00 and $352,000.00 on July 10, 2008, February 25, 2009, October 24, 2007 and May 2, 2007, respectively, therefore Segal was unjustly enriched. Counterclaim two is for conversion regarding Segal's alleged forged check for $27,000.00 from February 25, 2009.

Now before the Court is a motion by plaintiffs to dismiss Komolov's five counterclaims, for sanctions including attorney's fees, and to enjoin Komolov, his companies, and counsel from initiating further litigation against the plaintiffs. Plaintiffs assert, *inter alia*, that defendants have already tried twice to bring forward claims regarding "related actions" in the First Action and the Second Action, both which were dismissed. Since the counterclaims in the herein action involve incidents occurring during the same time period as the First Action and the Second Action (May 2007 through March 2010), plaintiffs aver that the counterclaims in the herein action are barred by *res judicata* since defendants were required to assert these claims in the

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[2] Komolov alleges he is the sole owner and member and the assignee of High Value (Amended Answer at 47-48).

First Action.[3] Moreover, plaintiffs claim defendants have not stated causes of action for conversion or unjust enrichment. In regards to the counterclaim of conversion, plaintiffs assert that defendants have not shown or explained their belief that Segal is in possession of said property, and the money at issue is not a proper subject for a cause of action for conversion. In regards to the four counterclaims for unjust enrichment, plaintiffs contend defendants have not shown how plaintiffs have benefitted from the use of the claimed forged checks. Plaintiffs argue Komolov is engaging in purposeful, bad faith, "frivolous and harassing litigation," and should be enjoined from filing further claims against the plaintiffs, as the doctrine of *res judicata* is meant to provide dispute finality and fairness in the form of an end to litigation. Last, plaintiffs request that if the Court finds the counterclaims were filed in bad faith, then they are entitled to attorney's fees, costs and expenses.

Defendants oppose the motion, claiming, *inter alia*, that Komolov did not have the information necessary to plead the counterclaims at an earlier date, the counterclaims were not part of any prior legal action and were not previously adjudicated on the merits, therefore they are not precluded by *res judicata*. Since Komolov did not have the information regarding the forged checks at the time of the earlier two actions, having confirmed the alleged forgery after the November of 2011 dismissal of the Second Action, defendants aver that Komolov could not have included these claims in the previous actions. Procedurally, defendants assert that since the First Action was dismissed on 3211(a)(7) grounds and was not adjudicated on the merits or with prejudice, *res judicata* did not apply to the Second Action.[4] Defendants contend that it has

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[3] Plaintiffs assert the alleged check forgeries are part of a "factual grouping" including the claims raised in the First and Second Action, are "related in time, space, origin or motivation," (pertaining to the theft, purchase, or sale of art and antiques) and "form a convenient trial unit."

[4] The First Department reversed the lower court's dismissal, stating that dismissal of the Section Action on the grounds of *res judicata* and collateral estoppel was in error, and the First Action should have been dismissed without prejudice, since the reasoning lied in pleading deficiencies.

been firmly established that a dismissal pursuant to CPLR 3211(a)(7) does not constitute a dismissal on the merits and does not receive *res judicata* effect. Moreover, because *res judicata* does not apply to the Second Action, neither the Second Action nor this action are "frivolous," nor are the counterclaims without merit, and therefore sanctions are inappropriate here. Furthermore, defendants claim they have viable conversion and unjust enrichment claims; having, *inter alia*, identified the specific amount converted by Segal, having hired a forensic document examiner who concluded Segal forged the checks, and having alleged that the unjust enrichment occurred through obtaining various items with the forged checks. Lastly, defendants assert an injunction against them is inappropriate and unsupported by case law.

In reply, plaintiffs claim, *inter alia*, that the defendants' counterclaims are barred by *res judicata*, that defendants had the necessary information to discover the forged checks sooner and could have pleaded the counterclaims in the Second Action or moved to renew or reargue Justice Kornreich's Order in the Second Action but did not. Plaintiffs attack defendants' statements and evidence, stating that the defendants' handwriting expert did not even conclude Segal forged Komolov's signature on the four checks, defendants' evidence is insufficient to support a claim for unjust enrichment or conversion, and defendants have fabricated and provided false information throughout this series of litigations.

STANDARD

CPLR 3211(a) provides that:

> "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> > [5] the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds...
> >
> > [7] the pleading fails to state a cause of action,..."

CPLR 3211(a) can be used "by any party against whom an affirmative claim is interposed. For this purpose, the one against whom the claim is pleaded, whether a co-defendant, plaintiff, third-party defendant, or any other party, may be deemed the defendant

and the one interposing the claim may be deemed the plaintiff for the purpose of applying CPLR 3211(a)" (CPLR 3211:4 Parties Who May Use Subdivision [a]).

On a motion to dismiss pursuant to CPLR 3211(a)(5), *res judicata* bars certain claims "where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). "Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *see also Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12-13 [2008]; *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999] ["Under *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action"]; *Serio v Town of Islip*, 87 AD3d 533, 534 [2d Dept 2011] ["although the plaintiff alleges in the instant action that the defendants engaged in fraud, this purported new claim or theory is grounded on the same transaction or series of transactions as the prior action"]). A "final conclusion" may be indicated by the court through the use of "on the merits" or "dismissal with prejudice" language, both interchangeably used to preclude further litigation on the matter (*Yonkers Contr. Co., Inc. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375, 380 [1999]). The party seeking dismissal on the grounds of *res judicata* must prove there was a prior judgment on the merits (*Miller Mfg. Co. v Zeiler*, 45 NY2d 956, 958 [1978]).

On a motion to dismiss pursuant to CPLR 3211(a)(7), a court must look to make sure the plaintiffs' statements can sustain a cause of action (*Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 306 [1st Dept 1995]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ["the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"]). In doing so, the Court must "accept as true the facts alleged...and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer*

Reality Co., 98 NY2d 144, 151-152 [2002]; *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]) as well as "accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 87-88; *see Guggenheimer*, 43 NY2d at 275 ["the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail"]; *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *511 W. 232 Owners Corp.*, 98 NY2d at 152; *Sokoloff*, 96 NY2d at 414; *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188, 189 [1st Dept 1999] ["The opposing party needs only to assert facts which 'fit within any cognizable legal theory'"]; *Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996]). "It is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence...are not presumed to be true on a motion to dismiss for legal insufficiency" (*O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 154 [1st Dept 1993]; *see also Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991]).

DISCUSSION

CPLR 3211(a)(5)

Plaintiffs assert, *inter alia*, that defendants have already tried twice to bring forward claims regarding "related actions" in the First Action and the Second Action, both which were dismissed. Since the counterclaims in the herein action involve incidents occurring during the same time period as the First Action and the Second Action (May 2007 through March 2010), plaintiffs aver that the counterclaims in the herein action are barred by *res judicata* since defendants were required to assert these claims in the First Action. However, The First Department reversed the lower court's dismissal, stating that dismissal of the Section Action on the grounds of *res judicata* and collateral estoppel was in error, and the First Action should

have been dismissed without prejudice, since the reasoning lied in pleading deficiencies (*see Komolov v Segal*, 96 AD3d 513 [1st Dept 2012]). In light of this decision by the First Department, this portion of plaintiff's motion is denied.

CPLR 3211(a)(7)

A. Unjust enrichment and Conversion

In order to prevail on a claim of unjust enrichment in New York, "the plaintiff must show that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173,182 [2011]); *see also Nakamura v Fujii,* 253 AD2d 387, 390 [1st Dept 1998]; *Corsello v Verizon New York, Inc.* 18 NY3d 777 [2012]). "It is available only in unusual situations when, through the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon New York, Inc.*, 18 NY3d 777 [2012]). Furthermore, the existence of a valid contract typically precludes the availability of quasi contractual remedies, such as quantum meruit and unjust enrichment, for events arising out of the same subject matter (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.,* 70 NY2d 382 [1987]; *IIG Capital LLC v Archipelago, L.L.C.,* 36 AD3d 401 [1st Dept 2007]). However, "where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit or unjust enrichment, and will not be required to elect his or her remedies" (*IIG Capital LLC*, 36 AD3d at 405).

The type of misconduct that is the essence of conversion is "the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*State v Seventh Regiment Fund, Inc.*, 98 NY2d 249, 259 [1st Dept 2002]). In order to state a claim for conversion a party must have exercised ownership,

possession or control of the property in the first place (*Soviero v Carroll Group Intl., Inc.*, 27 AD3d 276, 277 [2006], citing *City of New York v 611 W. 152nd St.*, 273 AD2d 125, 126-127 [2000]). The Court finds that defendants' counterclaims state cognizable causes of action for conversion and unjust enrichment. As such, this portion of the plaintiffs' motion is denied.

B. Sanctions and Attorney's Fees

For sanctions including attorney's fees, pursuant to § 130-1.1 of the Rules of the Chief Administrator, costs and expenses. Part 130 of the Rules of the Chief Administrator permits courts to sanction attorneys for engaging in frivolous conduct, which includes conduct: (1) "completely without merit in law"; (2) "undertaken primarily to... harass or maliciously injure another"; or (3) "assert[ing] material factual statements that are false" (*see* 22 NYCRR § 130-1.1; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). The Court finds that defendants' conduct in bringing the five counterclaims asserted in their answer was not frivolous within the meaning of 22 NYCRR § 130-1.1. Attorney's fees are considered incidents of litigation and are not generally available as damages in the absence of statutory or contractual authority (*see Hooper Assoc. v AGS Computers,* 74 NY2d 487, 491 [1989]). In this case, there is no evidence of the aforesaid authority, and the Court finds that plaintiffs are not entitled to such fees. Accordingly, the portion of plaintiffs' motion seeking sanctions and attorneys fees against the defendants is denied.

Turning to the portion of plaintiffs' motion seeking an order enjoining Komolov, his companies, or counsel from initiating further litigation against plaintiffs, the Court is in agreement with the Appellate Division that there is no evidence that plaintiffs engaged in a history of vexatious, frivolous litigation that warrants enjoining them from commencing further litigation on the instant claims without prior court approval (*Komolov*, 96 AD3d at 514, *citing Matter of Sud v. Sud,* 227 AD2d 319 [1st Dept 1996]).

CONCLUSION

Accordingly, it is

ORDERED that this motion by plaintiffs Segal and Serry for an order dismissing the five counterclaims asserted by Komolov and Milani (collectively, defendants), pursuant to CPLR 3211(a)(5) and (a)(7), for sanctions including attorney's fees, pursuant to §130-1.1 of the Rules of the Chief Administrator, costs and expenses, and for an order enjoining Komolov, his companies, or counsel, from initiating further litigation against plaintiffs is denied in its entirety; and it is further,

ORDERED that counsel for the defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiffs.

This constitutes the Decision and Order of the Court

FILED

DEC 20 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/19/13

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

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