

**Stewart Title Ins. Co. v Timoney**

2013 NY Slip Op 33821(U)

December 10, 2013

Supreme Court, Nassau County

Docket Number: 011742-10

Judge: Timothy S. Driscoll

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SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER

Present:

HON. TIMOTHY S. DRISCOLL  
Justice Supreme Court

-----X  
STEWART TITLE INSURANCE COMPANY,

TRIAL/IAS PART: 16  
NASSAU COUNTY

Plaintiff,

Index No: 011742-10

Motion Seq. No: 4

- against -

Submission Date: 9/10/11

GERARD P. TIMONEY, CARMELLA STUART,  
GPT SERVICES INC. d/b/a TITLEGUARD AGENCY,  
GPT/288 INC. d/b/a TITLEGUARD AGENCY,  
TITLEGUARD AGENCY LAND SERVICES,  
TITLEGUARD LAND SERVICES, TITLE GUARD  
LAND SERVICES, TITLEGUARD AGENCY LAND  
SERVICES, INC., GREENHOUSE STRATEGICS LLC,  
VIKING TITLE AGENCY CORP., GPT CAPITAL  
INC., DEVIN'S OFFICE SERVICES INC., 50 GRAND  
AVENUE CORPORATION, and 25 OSBORNE PLACE  
CORP.,

Defendants.

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Papers Read on this motion:

- Notice of Motion, Affirmation in Support, Affidavit in Support,  
and Volume 1 of Plaintiff's Exhibits.....X
- Volume 2 of Plaintiff's Exhibits.....X
- Volume 3 of Plaintiff's Exhibits.....X
- Volume 4 of Plaintiff's Exhibits.....X
- Plaintiff's Statement of Material Facts.....X
- Memorandum of Law in Support.....X
- Defendant's Affirmation in Opposition/Support.....X
- Plaintiff's Reply Affirmation.....X

This matter is before the court on the motion filed by Plaintiff Stewart Title Insurance Company ("Stewart Title" or "Plaintiff") on June 19, 2013 and submitted on September 10, 2013. In addition, although Defendant Carmella Stuart ("Stuart"), who is proceeding *pro se*, has

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not filed a formal notice of cross motion, her responsive papers reflect that she is moving for an Order 1) granting her summary judgment dismissing the Complaint as asserted against her; and 2) modifying or lifting an injunctive Order previously issued against her by the Court. In consideration of Stewart's *pro se* status, the Court has considered her applications notwithstanding the absence of a formal notice of motion.

For the reasons set forth below, the Court denies Plaintiff's motion. With respect to Defendant Stuart's applications, the Court 1) denies Stuart's motion for summary judgment dismissing the Complaint against Stuart; and 2) grants Stuart's motion to modify the Court's prior August 2010 temporary restraining order ("TRO") (Ex. 18 to Truit Aff. in Supp.) and subsequent decision dated November 1, 2010 ("PI Order") (*id.* at Ex. 19) in which the Court granted Plaintiff's motion for injunctive relief and enjoined Defendants, *inter alia*, from transferring certain funds and assets from Titleguard's accounts, including "any account on which [Gerard P. Timoney] or Stuart is an authorized signatory." The Court hereby directs that, absent proof that stated proceeds obtained by Stuart following the issuance of the TRO and PI Order are attributable to, or the product of, the specific defalcations identified in the Complaint, those assets shall not be subject to the constraints and prohibitions contained in the TRO and PI Order. **The Court directs counsel for Plaintiff, and Defendant Stuart, to appear before the Court for a conference on January 14, 2014 at 9:30 a.m., at which time the Court will schedule this matter for trial. The Court reminds Stuart of her continuing obligation to comply with the TRO and PI Order, as modified herein.**

#### BACKGROUND

##### A. Relief Sought

Plaintiff moves for an Order 1) pursuant to CPLR § 3212, granting summary judgment in favor of Plaintiff against Stuart on Plaintiff's third, seventh, ninth, and eleventh causes of action, and directing entry of a money judgment against Stuart in favor of Plaintiff in the amount of \$691,497.41, and severing and preserving the unliquidated portions of those causes of action, and severing and preserving Plaintiff's remaining causes of action against Stuart and all other Defendants; 2) granting judgment in favor of Plaintiff against Defendant GPT/288 Inc., d/b/a Titleguard Agency, Titleguard Agency Land Services, Titleguard Land Services, Title Guard

Land Services, and Titleguard Agency Land Services, Inc. on Plaintiff's seventh cause of action; 3) pursuant to Judiciary Law § 753, a) directing that Stuart be held in contempt of court for failing to comply with the TRO and PI Order which, *inter alia*, enjoined and restrained Stuart from making any transfers or payments of money or other assets to any person or entity; and b) directing that Stuart comply with the PI Order pending further court order; and 4) awarding Plaintiff the costs and disbursements of this action.

**B. The Parties' History**

The parties' history is set forth in detail in the PI Order, and in a May 24, 2011 decision of the Court ("2011 Decision") ("Prior Decisions"). As noted in the Prior Decisions, Plaintiff is a title insurance underwriter, licensed by the New York State Department of Insurance to issue policies insuring the titles of real property owners and the mortgages of secured lenders. Plaintiff and certain Defendant entities referred to as "Titleguard," who were engaged in the title abstract business, entered into an Underwriting Agreement. Defendant Gerard Timoney ("Timoney") was an officer and /or shareholder of the Defendant entities, and Stuart, at all relevant times, was the bookkeeper and manager of Titleguard who was responsible for the financial and banking operations of Titleguard.

This action arises from Defendants' alleged fraudulent and criminal conduct between 2008 and 2010 ("Defalcation Period") which included, but was not limited to 1) the conversion by Timoney and Stuart ("Individual Defendants") of trust funds entrusted to them at real estate closings ("Trust Funds"), in violation of their fiduciary and contractual obligations and to the detriment of Plaintiff and innocent property owners and mortgage holders, and 2) Defendants' misappropriation of their customers' Trust Funds by expending the Trust Funds on debts and operational expenses of the Defendant entities, and using the Trust Funds for personal expenses and other improper purposes. Plaintiff asks the Court to pierce the corporate veils of Defendant entities and hold the Individual Defendants personally liable for Plaintiff's losses suffered as a result of the misconduct of those companies.<sup>1</sup>

In the 2011 Decision, the Court *inter alia* 1) granted Plaintiff's prior motion for judgment

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<sup>1</sup> Timoney has confessed judgment in favor of Plaintiff in the amount of \$716,399.37, plus interest, and a money judgment was entered in favor of Plaintiff against Timoney in the amount of \$748,955.54 (Truitt Aff. in Supp. at n. 2).

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against the Titleguard entities, except that the Court declined to award Plaintiff judgment on the seventh cause of action alleging breach of fiduciary duty in light of questions regarding whether there exists a fiduciary duty between Plaintiff and Titleguard; and 2) denied Stuart's motion to dismiss the Complaint against her. The Court denied Stuart's prior motion to dismiss the Complaint based on the Court's conclusion that the causes of action against her are viable in light of 1) her position in and involvement in the daily business operations of Titleguard, 2) her issuance of numerous checks on Titleguard's accounts for apparently improper purposes, and 3) her admissions to her involvement in the scheme to convert the Trust Funds.

In the motion now before the Court, Plaintiff moves for summary judgment against Stuart on its third, seventh, ninth and eleventh causes of action which allege, respectively, conversion, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and fraud. Plaintiff also submits that Stuart has violated the PI Order by, *inter alia*, 1) having unemployment benefits credited to a state-issued debit card, presumably to avoid having those benefits deposited into an account covered by the PI Order; and 2) receiving monthly living expenses and other contributions and gifts from her family and boyfriend, which sums were deposited into, and then removed from, accounts that she maintained with her boyfriend.

In opposition to the motion, Stuart submits an unsworn Affirmation in Opposition. With respect to Plaintiff's application to hold Stuart in contempt, Stuart states *inter alia* that 1) she understood the PI Order to forbid her from selling or transferring any of her personal properties; 2) she did not understand the PI Order to prohibit her from using unemployment benefits to help make mortgage payments on her home, or help with monthly living expenses, which would have resulted in her becoming homeless and unable to provide for herself; 3) she believed that the PI Order was intended to protect monies in her possession at the time that the PI Order and TRO were issued from being used pending the Court's determination whether those monies were improperly obtained; and 4) any unemployment benefits, or part-time employment income that Stuart has received, were spent "on the most basic and necessary living expenses" (Stuart Aff. at ¶ 5). Stuart asked the Court to lift the TRO and PI Order so that, going forward, she may use monies earned or collected from friends and family to pay her living expenses, and continue to defend herself in this litigation.

With respect to Plaintiff's motion for summary judgment against her, Stuart states *inter alia* that 1) she denies being a corporate officer of Titleguard, and contends that she was only a Secretary/Office Manager, as evidenced by the fact, *e.g.*, that she was first hired at Titleguard as a receptionist with no prior title insurance experience, she did not hold any office title at Titleguard, and her signature did not appear in an official capacity on the Underwriting Agreement; 2) she denies Plaintiff's contention that she controlled Titleguard's banking and financial operations, and contends that it was Timoney who issued instructions and directives regarding the manner in which the office was to be operated; 3) the checks payable to cash, on which Plaintiff relies in support of its motion, were made payable to cash for the sole purpose of purchasing bank checks, which were payable to various County Clerk's offices for the purpose of recording documents, because the county clerks would no longer accept Titleguard's checks which had previously been returned for insufficient funds; and 4) she did not have a fiduciary relationship with Plaintiff in light of the fact that a) Plaintiff was a client of Timoney prior to Stuart's employment with Titleguard; b) Timoney negotiated and executed the Underwriting Agreements with Plaintiff; c) Timoney, often in consultation with accountants and attorneys, made all business decisions regarding Titleguard; and d) Timoney had access to all Titleguard's accounts, and other employees were provided with the passwords to those accounts when needed.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to summary judgment by establishing that 1) the Court should pierce the corporate veil, and hold Stuart personally liable for Titleguard's misconduct, in light of evidence demonstrating that Stuart dominated and controlled Titleguard in connection with its conversion of the Trust Funds, which evidence includes but is not limited to the fact that a) Stuart was the only full-time employee who worked at Titleguard from its inception in 1997 through its dissolution in 2010; b) Stuart was the only employee other than Timoney to have check-writing authority, access to Titleguard's online banking passwords and a corporate credit card, which she used for both business and personal expenses; and c) Stuart admitted at her deposition that she performed all functions at Titleguard, including but not limited to paying rent, calling in Titleguard's payroll, and transferring Trust Funds and other funds from Titleguard's clearing account into its operating, recording, premium and trust

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accounts; 2) Plaintiff is entitled to judgment against Stuart on its claim for breach of fiduciary duty by virtue of Stuart's abuse of control over the Trust Funds and Titleguard's bank accounts, and conversion of Trust Funds for the unauthorized purposes of paying Titleguard's operating expenses and Timoney's personal expenses; 3) Plaintiff is entitled to judgment against Stuart on its claim for fraud in light of Stuart's intentional concealment from Plaintiff and its policy holders of her abuses of Titleguard's banking operations and misuse of Trust Funds based on her belief that Timoney would eventually replenish the Trust Funds before Plaintiff, or its policy holders, discovered the thefts; 4) Plaintiff is entitled to judgment against Stuart on its claim for conversion, in consideration of the provisions in the Underwriting Agreement which obligated Titleguard to segregate Trust Funds and use them only for designated purposes, and in light of evidence that Stuart misappropriated the Trust Funds, and covered up her thefts by using Trust Funds from newer closings to record unrecorded documents from older closings, "similar to a Ponzi scheme" (P's Memo. of Law in Supp. at p. 16); 5) Stuart is liable for aiding and abetting Titleguard's breach of its fiduciary duties to Plaintiff in light of evidence demonstrating that she aided and abetted Titleguard's breach of its fiduciary duties to Plaintiff by knowingly participating in the conversion of Trust Funds; and 6) the Court should hold Stuart in contempt of court in light of her May 1, 2013 deposition testimony (Ex. 8 to Truitt Aff. in Supp.) and supporting documentation which establish Stuart's violation of the PI Order by demonstrating *inter alia* that Stuart a) has been unemployed since Titleguard's demise in June 2010 and received New York State unemployment benefits from June 20, 2010 through July 16, 2012; b) had the unemployment benefits credited to a debit card, instead of deposited into her checking account, presumably to circumvent the asset restraint provisions in the PI Order; c) has been receiving monthly contributions from her boyfriend Matthew Connolly ("Connolly") and family members since she began receiving unemployment benefits in 2010; d) used her unemployment benefits and contributions from Connolly and family members to make payments towards her condominium in Howard Beach, New York and other living expenses; and e) transferred funds from her joint account with Connolly in violation of the PI Order.

Stuart opposes Plaintiff's motion, and asks the Court to dismiss the Complaint against her based on her contentions that 1) she did not understand the PI Order to limit her ability to use

unemployment benefits and other income to pay her living expenses, and submits that such a limitation would have resulted in her becoming homeless and unable to provide for herself; and 2) she is entitled to dismissal of the Complaint against her because the evidence produced by Plaintiff does not establish her liability for the causes of action asserted against her.

In reply, Plaintiff submits *inter alia* that 1) the Court should not consider Stuart's unsworn affidavit, which has no probative value and is insufficient to raise a triable issue of fact; 2) Stuart has offered no evidence to refute Plaintiff's showing that she actively participated in the thefts of Trust Funds; 3) Stuart's claimed status as a mere employee of Titleguard does not shield her from personal liability for Titleguard's wrongdoing in light of evidence demonstrating that she and Timoney controlled Titleguard and its financial operations; and 4) the Court should hold Stuart in contempt in light of the evidence presented which establishes that she transferred, and continues to transfer, her assets to third parties in violation of the TRO and PI Order.

#### RULING OF THE COURT

##### A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

##### B. Relevant Causes of Action

The Court incorporates by reference the legal principles set forth in the 2011 Decision regarding conversion, breach of fiduciary duty, fraud and piercing the corporate veil.

A cause of action for aiding and abetting a breach of fiduciary duty requires a showing of a fiduciary duty owed to plaintiff by another, a breach of that duty, defendant's substantial assistance in effecting the breach, together with resulting damages. *Keystone Int'l v. Suzuki*, 57 A.D.3d 205, 208 (1st Dept. 2008). Although a plaintiff is not required to allege that the aider and

abettor had an intent to harm, there must be an allegation that the defendant had actual knowledge of the breach of duty. *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003).

#### C. Contempt

Where a party seeks an adjudication of civil contempt based on a violation of a court order, he must establish a willful and deliberate violation of a lawful court order expressing a clear and unequivocal mandate. *Collins v. Telcoa International Corp.*, 86 A.D.3d 549 (2d Dept. 2011), citing, *inter alia*, Judiciary Law § 753; *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994). The burden of proof is on the party seeking the contempt adjudication, and the facts constituting the basis of the contempt must be proved by clear and convincing evidence. *Collins v. Telcoa International Corp.*, 86 A.D.3d at 550, citing, *inter alia*, *Miller v. Miller*, 61 A.D.3d 651, 652 (2d Dept. 2009). The question of whether to then grant a civil contempt motion and, if so, the fixing of the appropriate remedy, is addressed to the sound discretion of the motion court upon consideration of the surrounding circumstances. *Collins v. Telcoa International Corp.*, 86 A.D.3d at 550, citing, *inter alia*, *Matter of Philie v. Singer*, 79 A.D.3d 1041, 1042 (2d Dept. 2010).

#### D. Modification of Injunction

A motion to vacate or modify a preliminary injunction is addressed to the sound discretion of the court and may be granted upon compelling or changed circumstances that render continuation of the injunction inequitable. *Thompson v. 76 Corp.*, 54 A.D.3d 844, 846 (2d Dept. 2008), quoting *Wellbilt Equip. Corp. v. Red Eye Grill*, 308 A.D.2d 411 (1<sup>st</sup> Dept. 2003) (internal quotation marks omitted), and citing CPLR § 6314 and *Thompson v. 76 Corp.*, 37 A.D.3d 450, 452-453 (2d Dept. 2007).

#### E. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion for summary judgment against Stuart. The Court concludes that Plaintiff has failed to establish its *prima facie* entitlement to judgment on its veil-piercing theory of liability as against Stuart in light of evidence supporting the conclusion that Timoney was Titleguard's sole owner, and was the architect and originator of the alleged scheme by which the defalcations at issue. The fact that Stuart possessed the functional authority to execute the impermissible practices adopted by Timoney and/or may have unwisely or even knowingly elected to comply with Timoney's ill-advised directives does not establish as a matter

of law that she therefore exercised complete dominion and control over the corporation. The evidence in this respect is conflicting and inconclusive, thereby generating factual issues as to whether Stuart exercised such control over Titleguard that it would be appropriate to hold her personally liable for its misdeeds.

The Court also denies the branch of Plaintiff's motion seeking judgment on its seventh cause of action as against Titleguard, alleging a breach of fiduciary duty. The Court has already held, in its 2011 Decision, that Plaintiff has failed to establish the existence of a fiduciary duty as between it and Titleguard and there is nothing of an evidentiary nature in the current record that would support a departure from the Court's prior ruling on this issue. This determination also warrants the denial of Plaintiff's motion for judgment against Stuart for breach of fiduciary duty, and aiding and abetting fiduciary duty.

The Court also denies Plaintiff's motion for judgment with respect to its third cause of action, alleging conversion. The relevant evidence with respect to the sourcing and status of the disputed proceeds suggests that the funds collected were owned and then remitted to Titleguard by Plaintiff's customers. Plaintiff has not identified provisions in the underwriting agreement (to which Stuart was not a party) which, as a matter of law, confer upon Plaintiff an immediate or subsequently coalescing legal ownership or equivalent possessory right in the customer fee and expense proceeds collected by Titleguard. Additionally, and apart from the question of Plaintiff's ownership of the funds in question, factual issues exist with respect to whether Stuart, in her individual and/or personal capacity, exercised the requisite, intentional and unauthorized dominion over the funds. Notably, the funds in question were maintained in corporate accounts and then allegedly disbursed at the direction and behest of Timoney, the corporation's principal and owner. Under these circumstances, there are factual issues making summary judgment inappropriate. In light of the factual issues regarding the level of Stuart's participation and her intent, the Court also denies Plaintiff's motion for summary judgment on its cause of action for fraud.

Finally, the Court denies the branch of Plaintiff's motion which is for an order of contempt as against Stuart. The Court notes that, while Plaintiff is moving to hold Stuart in contempt, Plaintiff affirms that it is not seeking incarceration at this time, in part because Stuart

is caring for her ill, elderly father (Truitt Aff. in Supp. at ¶ 21). Plaintiff has failed to establish through clear and convincing evidence that Stuart, who is proceeding *pro se* in this action, willfully violated the Court's Orders by, *inter alia*, using money received after the TRO and PI Orders were issued to pay for living and mortgage expenses and/or because she received unemployment benefits through a state-issued debit card, rather than having those sums deposited into an account frozen by the Order. The Court notes that the TRO and PI Order do not require Stuart to deposit gifts or public benefits she may have received post-Order from third-party sources, into one of the covered accounts. Rather, the record supports the conclusion that the primary purpose of the provisional relief sought and granted was to maintain the *status quo* by securing assets in the accounts which arguably constituted converted Trust Funds entrusted to Defendants, not to effectively create a pre-judgment security. Under these circumstances, Plaintiff has failed to sustain its burden of demonstrating that Stuart's conduct was willful so as to warrant a finding of contempt.

The Court will exercise its discretion and consider Stuart's purported cross motion, notwithstanding the fact that she did not serve a notice of cross motion, in consideration of the nature of the relief requested and its relationship to Plaintiff's motion. With respect to that cross motion, the Court agrees that a modification/clarification of the TRO and PI Order is appropriate. Accordingly, and absent proof that stated proceeds obtained by Stuart post-Order can be viewed as attributable to, or the product of, the specific defalcations identified in the Complaint, those assets shall not be subject to the constraints and prohibitions contained in the Court's Orders.

The Court, however, denies the branch of Stuart's cross motion seeking summary judgment dismissing the Complaint. That application is supported by an unsworn, *pro se* affidavit, which cannot serve as the basis for Stuart's right to summary judgment. *See, e.g., Niagara Frontier Transp. Auth. v. Anthony*, 202 A.D.2d 964 (4th Dept. 1994) (trial court should not have considered unsworn letter of contractor and unsworn report of consulting engineers in determining plaintiff's motion for partial summary judgment). Moreover, as outlined in the 2011 Decision, there are issues of fact with respect to Plaintiff's claims that make summary judgment inappropriate.

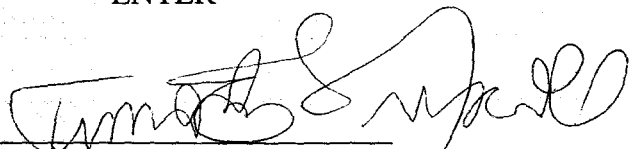
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

**The Court directs counsel for Plaintiff, and Defendant Stuart, to appear before the Court for a conference on January 14, 2014 at 9:30 a.m., at which time the Court will schedule this matter for trial. The Court reminds Stuart of her continuing obligation to comply with the TRO and PI Order, as modified herein.**

DATED: Mineola, NY  
December 10, 2013

ENTER

  
HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
DEC 12 2013  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE