

<b>Cash on the Spot ATM Servs., LLC v Camia</b>
2013 NY Slip Op 34117(U)
November 13, 2013
Supreme Court, Richmond County
Docket Number: 102307/12
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3

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Index No.: 102307/12  
Motion No.: 005,  
006,007

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

*Plaintiffs*

DECISION & ORDER

HON. JOSEPH J. MALTESE

*against*

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

*Defendants*

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RICHMOND COUNTY CLERK  
FILED COURT DESK

The following items were considered in the review of the following motion to amend the complaint and cross-motions for sanctions.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support	2
Affirmation in Opposition	3
Notice of Cross-Motion and Affidavits Annexed	4
Notice of Cross-Motion and Affidavits Annexed	5
Affirmation in Opposition to Cross-Motions	6
Memorandum of Law in Opposition to Cross-Motions	7
Reply Memorandum of Law	8
Reply Affirmation	9
Reply Memorandum of Law	10
Exhibits	Attached to Papers

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

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The plaintiffs move pursuant to CPLR § 3025 for leave to amend the complaint which was previously dismissed by this court; and moves for a default judgment against the defendants: Alliance ATM, Inc., Eclipse Transactions, LLC, Eclipse ATM Holdings, LLC and Barry Abrams. The defendants E-Z Money ATM Services, Corp., Frank Ercole and Payment Alliance International, Inc. move for an order assessing plaintiffs with monetary sanctions pursuant to 22 NYCRR 130-1.1(a). The plaintiffs' motion is granted. The cross-motions by the defendants are denied.

#### Facts

By decision and order dated January 17, 2013 this court granted the motion to dismiss made by the defendants, EZ-Money ATM Services, Corp. and Frank Ercole. This court found that the "... complaint as currently drafted, fail[ed] to allege any of the aforementioned causes of action against the moving defendants." Similarly, by decision and order dated March 8, 2013 this court found that:

The plaintiffs have failed to allege any facts which would demonstrate the existence of a fiduciary or confidential relationship with PAI. Consequently, counts 9 and 11 concerning PAI's alleged failure to account and breach of fiduciary duty must be dismissed.<sup>1</sup> Similarly, count 12 alleging commercial bad faith must be dismissed. New York law does not recognize a cause of action for commercial bad faith unless the institution itself acted dishonestly by becoming a participant in a fraudulent scheme.<sup>2</sup> Here, there are no allegations that PAI participated directly in any fraudulent scheme. The same is true with respect to plaintiffs' allegations concerning Conspiracy to Defraud, Count 13. The complaint fails to allege, in detail, the elements of fraud and therefore must be dismissed.<sup>3</sup> Count 14, Unjust Enrichment must be dismissed

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<sup>1</sup> *Goldberg v. Rudnicki*, 94 AD3d 1047 [2d Dep't. 2012] (No facts alleged that would constitute a fiduciary relationship.); see also, *Ctr. for Rehabilitation & Nursing at Birchwood, LLC v. S&L Birchwood, LLC*, 92 AD3d 711 [2d Dep't. 2012].

<sup>2</sup> See, *LPI Mortgage, Ltd. v. The Card Corp.*, 17 AD3d 103 [1<sup>st</sup> Dep't 2005].

<sup>3</sup> See, *McGovern v. Nassau County Dep't of Social Serv.*, 60 AD3d 1016 [2d Dep't 2009].

because there is no allegation that PAI obtained any benefit that in equity and good conscience should be paid to plaintiff.<sup>4</sup> Finally Count 15 alleging fraudulent transfer must be dismissed as there are no allegations that could support this claim.<sup>5</sup> Therefore, the complaint is dismissed in its entirety as against PAI.

The two prior orders of this court dismissed the plaintiffs' complaint pursuant to a motion made under CPLR § 3211(n)(7), which was never converted into one for summary judgment. The plaintiff now moves to amend the complaint. Moreover, the complaint was not dismissed as against the Camia defendants.

In this motion the plaintiffs state that their original attorney, Peter Till, Esq. was not admitted to practice law in the State of New York and that this fact was not disclosed to the plaintiffs. The plaintiffs' new attorney recognized that the "[t]he original Complaint, as prepared by Till, is repetitive, incoherent, contains claims which are not cognizable in New York, and is prepared in the format of a New Jersey Complaint." Therefore, the plaintiffs have annexed a proposed amended complaint. The proposed amended complaint alleges the following: First Cause of Action against Frank Ercole and E-Z Money ATM Services, Corp. (Fraudulent Conveyance); Second Cause of Action against Frank Ercole and E-Z Money ATM Services, Corp. (Tortious Interference with Contractual Relations); First Cause of Action against Payment Alliance International, Inc. (Breach of Fiduciary Duty); First Cause of Action against the Camia Defendants (Breach of Covenant of Good Faith and Fair Dealing); Second Cause of Action against the Camia Defendants (Breach of Fiduciary Duty); Third Cause of Action Against the Camia Defendants (Breach of the Duty of Loyalty); Fourth Cause of Action against the Camia Defendants (Unfair Competition); Fifth Cause of Action against the Camia Defendant (Material Misrepresentation/Fraud); Sixth Cause of Action against the Camia Defendants (Conversion); Seventh Cause of Action against the Camia Defendants (Failure to Account); and the Eighth Cause of Action against the Camia Defendants (Fraudulent Transfer).

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<sup>4</sup> See, *Corsello v. Verizon New York, Inc.*, 18 NY3d 777 [2012].

<sup>5</sup> See, *Grace Plaza of Great Neck, Inc. v. Heitzler*, 2 AD3d 780 [2d Dep't 2003].

The defendants, E-Z Money ATM Services, Corp., Frank Ercole and Payment Alliance International, Inc., cross-moved to deny the plaintiffs' motion and to assess monetary sanctions against the plaintiffs. The defendants argue, 1) there is nothing to amend because the complaint has been dismissed; 2) the amendment is barred by the principles of res judicata; 3) the motion offers no reasonable explanation as to why the plaintiffs did not assert these allegations in the first place; 4) the amended complaint did not correct the original defects found in the initial complaint; and 5) that the allegations made by the plaintiffs as against E-Z Money ATM Services, Corp. and Frank Ercole are legally insufficient. Moreover, the moving defendants seek monetary sanctions against the plaintiff for interposing what they consider as a legally deficient motion.

#### Discussion

In this case the judgments dismissing the plaintiffs' complaint pursuant CPLR § 3211(a)(7) is not res judicata because the original motions were never treated as motions for summary judgment. Professor Siegel in his treatise *New York Practice* states as follows:

A judgment resulting from the grant of a CPLR 3211 motion is not res judicata of the entire merits of the case (unless the motion was treated as one for summary judgment). But it is res judicata of whatever it determined, and that can some times have the same effect. Where, for example, the first action is dismissed as barred by the statute of limitations, a second New York action that attempts to duplicate the claim will be dismissed: it is res judicata that the claim is time barred. If the first-round dismissal was under subdivision (a)(7) for a mere pleading deficiency in the cause of action, a new action with a complaint identical to the first will be barred by res judicata, but a new action with a complaint that remedies the deficiency will be sustained.<sup>6</sup>

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<sup>6</sup> Siegel, *NY Prac* § 276 (5<sup>th</sup> ed.), citing *Spindell v. Brooklyn Jewish Hosp.*, 35 AD2d 962 [2d Dept. 1970], aff'd 29 NY2d 888 [1972], *Flynn v. Sinclair Oil Corp.*, 20 AD2d 636 [1<sup>st</sup> Dept. 1964] aff'd 14 NY2d 853 [1964].

Here, the court granted three defendants' motion to dismiss pursuant to CPLR § 3211(a)(7) and found that the original complaint failed to allege facts to support the claims made against the moving defendants. Consequently, the plaintiffs' motion is not per se procedurally defective. In fact, the Court of Appeals held in *Kelly v. Overseas Investors, Inc.* that where a complaint has been dismissed for failure to state a valid cause of action, leave to amend should be granted if it appears that a "... plaintiff might be able to state a cause of action ..."

While the plaintiffs initially sought amendment pursuant to CPLR § 3025(e), this court may consider this motion pursuant to the proper provision, CPLR § 3025(b). This portion of the CPLR states in pertinent part that:

... A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.<sup>7</sup>

The determination of whether to grant leave to amend a pleading is within the sound discretion of the trial court.<sup>8</sup> Leave to serve an amended complaint is to be liberally granted unless the proposed amendment contains prejudice or surprise resulting from the delay in interposing the new claim.<sup>9</sup>

Here, the plaintiff completely revised the prior complaint to put it into the proper New York State format. Moreover, the proposed amended complaint contains allegations that support

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<sup>7</sup> 18 NY2d 622 [1966].

<sup>8</sup> CPLR 3025

<sup>9</sup> *Sewkarran v. Debellis*, 11 AD3d 445 [2d Dept. 2004].

<sup>10</sup> *USA Nutritionals, Inc. v. Pharnalife, Inc.*, 293 AD2d 526 [2d Dept. 2002].

the causes of action contained in the complaint. Consequently, the plaintiffs' motion to amend the complaint is granted. The cross-motions made by the defendants are denied.

There being no opposition to the plaintiffs' motion for a default against the defendants Alliance ATM, Inc., Eclipse Transactions, LLC, Eclipse ATM Holdings, LLC and Barry Abrams, the motion is granted.

Accordingly, it is hereby:

ORDERED, that the plaintiffs' motion to amend the complaint is granted, and it is further

ORDERED, that the plaintiff shall serve the defendants with the amended complaint forthwith; and it is further

ORDERED, that the Clerk shall enter a judgment as against Alliance ATM, Inc., Eclipse Transactions, LLC, Eclipse ATM Holdings, LLC and Barry Abrams; and it is further

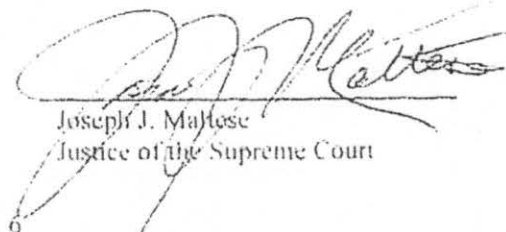
ORDERED, that an assessment of damages against Alliance ATM, Inc., Eclipse Transactions, LLC, Eclipse ATM Holdings, LLC and Barry Abrams shall take place during the trial against the remaining defendants; and it is further

ORDERED, that the cross-motions made by the defendants are denied; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3<sup>rd</sup> Floor, on Tuesday, January 7, 2014 at 9:30 a.m.

ENTER,

DATED: November 13, 2013

  
Joseph J. Maltese  
Justice of the Supreme Court