

Cash on the Spot ATM Servs., LLC v Camia
2014 NY Slip Op 33819(U)
April 29, 2014
Supreme Court, Richmond County
Docket Number: 102307/12
Judge: Philip S. Stranieri
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 19

Index No.: 102307/12
Motion No.: 008,

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

Plaintiffs

DECISION & ORDER

HON. PHILIP S. STRANIERE

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

RICHMOND COUNTY CLERK
2014 MAY -5 P 4:55
DIVISION OF LAW & EQUITY

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

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affirmation Annexed	1
Memorandum of Law in Support	2
Affirmation in Opposition	3
Memorandum of Law in Opposition to Motion	4
Reply Affirmation	5
Defendants Reply Memorandum of Law	6
Exhibits	Attached to Papers

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

The defendants, E-Z Money ATM Services, Corp., and Frank Ercole move pursuant to CPLR §3211(a)(7) to dismiss the first and second causes of action of plaintiffs' amended complaint against them for failure to state a cause of action.

By decision and order dated January 17, 2013 Justice Maltese granted a motion to dismiss made by the same defendants, EZ-Money ATM Services, Corp. and Frank Ercole. The court found that the "... complaint as currently drafted, fail[ed] to allege any of the aforementioned causes of action against the moving defendants." Subsequently, the plaintiff moved to amend the complaint which was granted by order of Justice Maltese dated November 13, 2013. The court found that, ... "the proposed amended complaint contains allegations that support the causes of action contained in the complaint."

On January 29, 2014 this matter was transferred to DCM Part 19.

The facts of the matter as set forth in Justice Maltese's January 17, 2013 order are as follows:

The plaintiff Ronald P. Carroccio is the 70% shareholder of Cash On The Spot ATM Services, LLC ("COTS") a Nevada LLC that has its primary place of business on Staten Island, New York. The defendants Cosmo Camia and Philip Camia ("the Camias") were the managing member and an employee respectively. The business operates independent automated teller machines (ATMs) throughout Staten Island, New York. The plaintiff Carroccio alleges that the Camias maintained exclusive control of the entities bank accounts and vault account. The vault account contained those monies which were distributed through the ATM machines in the network maintained by COTS. The plaintiff alleges that the Camias embezzled approximately \$1,600,000 from the COTS bank accounts, inclusive of the vault account.

In addition, exhibits submitted to this court shows that Cosmo Camia sold and transferred "... my ATM route known as Cash On the Spot ATM Services, LLC, to: E-Z Money ATM Services Corp., 1273 Bay Ridge Ave., Brooklyn, NY..." for \$105,000. Also included in the sale document is the following clause:

I, Cosmo Camia, further warrant that I shall defend, protect, indemnify, and save harmless the Buyer, Frank Ercole, the owner of E-Z Money ATM Services Corp. and E-Z Money ATM Services Corp and its successors and assigns from any and all adverse claim[s] that may be made by any party against said assets and goods.

The amended complaint alleges the following as to the moving defendants: 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).

The first cause of action in plaintiff's amended complaint alleges that the "defendant Cosmo Camia did not have the authority to sell the corporate assets." (See amended complaint para. 157) The amended complaint does not identify the applicable debtor and creditor statutes plaintiff is relying/proceeding under but is merely labeled "fraudulent conveyance."

The defendants argue the plaintiff did not plead its fraudulent conveyance claim in accordance with the Debtor and Creditor Law §273-a¹. In failing to comply with the pleading requirements of Debtor and Creditor Law §273-a the fraudulent conveyance claim must be dismissed. Plaintiff, in its opposition, cites Debtor and Creditor Laws §273², §275³ and §276⁴ for the first time. Plaintiff believes it has alleged sufficient facts in its amended complaint to satisfy the elements of a cause of action for fraudulent conveyance and states that the issue is whether the transfer of property was made without fair consideration at the time the transferor was insolvent is a question of fact. The Court of Appeals has held that it is necessary to allege, as the statute itself states, that the conveyance resulted in the debtor's insolvency (*ABN AMRO Bank N.V. v MBLA Inc.*, 17 NY3d 208, 228 [2011]). The element of insolvency was never addressed or pleaded in the complaint. Furthermore §275 requires the plaintiff plead that debtor will "incur debts beyond his ability to pay." In fact in the case plaintiff cites in opposition, *Zamani v. Meisels*, 78 AD3d 823 (2nd Dept. 2010), the complaint was dismissed as any alleged fraudulent conveyance between the parties failed to render the debtor insolvent as required by Debtor and Creditor Law §273.

Failure to plead and address the issues of insolvency and debt along with the plaintiff's failure to identify any statute it is proceeding upon is basis for dismissal of plaintiff's first cause of action.

The Court will now address the tortious interference with contract claim. A claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages (*Foster v. Churchill*, 87 N.Y.2d 744, 749-750 [1996]).

Defendants argue that the claim must be dismissed because it is entirely conclusory and offers no details. In opposition plaintiff argues it has clearly set forth sufficient facts to state a cause of action for tortious interference with contract. The court agrees. The factual allegations contained in the body of the amended complaint offers sufficient details to maintain this cause of action.

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 considerations in determining the motion to dismiss. Further, any deficiency in the complaint may be amplified by supplemental pleadings or other evidence⁵. Although on a motion to dismiss a complaint 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.⁶ Plaintiff's allegations are sufficient to establish a cause of action.

Accordingly, it is hereby:


ORDERED, that the defendants motion to dismiss the first cause of action is granted, and the defendants motion to dismiss the second cause of action is denied and it is further

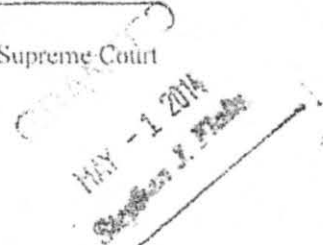
ORDERED, that the parties shall return to DCM Part 19, 927 Castleton Ave. on Monday, June 2, 2014 at 2:15 p.m.

ENTER.

DATED:

4/29/14


Philip S. Straniere
Acting Justice of the Supreme Court



1. § 273-a. Conveyances by defendants Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.