

**Wells Fargo Trade Capital Servs. v Wells Fargo
Trade Capital Servs., Inc.**

2015 NY Slip Op 30003(U)

January 6, 2015

Supreme Court, New York County

Docket Number: 654126/2013

Judge: Shirley Werner Kornreich

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 54

-----X
 WELLS FARGO TRADE CAPITAL SERVICES, INC.
 F/K/A WELLS FARGO CENTURY, INC.,

Index No.: 654126/2013

DECISION & ORDER

Plaintiff,

-against-

ELLEN SINETOS and JOHN SINETOS,

Defendants.

-----X
 SHIRLEY WERNER KORNREICH, J.:

Plaintiff Wells Fargo Trade Capital Services, Inc. (Wells Fargo) moves: (1) to dismiss the second, third, and fourth counterclaims and the fifth, sixth, and eighth affirmative defenses asserted by defendants Ellen Sinetos (Ellen) and John Sinetos (John); and (2) for sanctions against defendants. Defendants oppose and cross-move: (1) for summary judgment on their first counterclaim and for dismissal of the complaint; and (2) to stay discovery. For the reasons that follow, plaintiff's motion is granted in part and denied in part and defendants' cross motion is denied.

I. Procedural History & Factual Background

Unless otherwise indicated, the facts recited are undisputed.

This action has its genesis in a case styled *Wells Fargo Trade Capital Services, Inc. v Panagiotis Sinetos*, Index No. 652371/2010 (the Prior Action), in which Wells Fargo sued Panagiotis Sinetos (Panagiotis) to enforce his obligations under a written guaranty agreement (the Guaranty), pursuant to which Panagiotis personally guaranteed a loan to a company called Inteco International Trade, LLC (Inteco). Inteco defaulted on its loan, and Wells Fargo peacefully seized and liquidated Inteco's collateral. However, the liquidation did not provide funds sufficient to satisfy the full amount of the loan.

On December 20, 2010, Wells Fargo commenced the Prior Action to collect the deficiency amount from Panagiotis under the Guaranty. In an order dated December 19, 2012, the court granted summary judgment to Wells Fargo. *See* Index No. 652371/2010, Dkt. 17. On April 11, 2013, judgment was entered against Panagiotis in the amount of \$1,727,330.57 (the Judgment).

On November 27, 2013, Wells Fargo commenced the instant action against Ellen and John Panagiotis. Ellen is Panagiotis' wife and John is their son. The Complaint asserts three causes of action under New York Debtor and Creditor Law (DCL) §§ 273-a and 276 to set aside allegedly fraudulent conveyances made by Panagiotis to Ellen and John. The conveyances, made in January 2012, were transfers of Panagiotis' equity in three companies – 1800 Preowned LLC, Sunrise Planet LLC, and J JEPS LLC (collectively, the Companies). Ellen and John do not dispute that the conveyances occurred. Rather, in their answer, filed on January 17, 2014 (Dkt. 6), they deny these transfers lacked fair consideration because the transfers were supposedly made in accordance with a Post-Nuptial Agreement that Ellen and Panagiotis executed on March 1, 2007. *See* Dkt. 27. Ellen and John also assert four counterclaims: (1) a declaratory judgment that the transfers were made with fair consideration; (2) a third-party beneficiary claim under the loan and security agreement between Wells Fargo and Inteco; (3) tortious interference with the Companies; and (4) malicious prosecution.

Wells Fargo filed the instant motion to dismiss on February 6, 2014. Wells Fargo seeks dismissal of the second, third, and fourth counterclaims under CPLR 3211 for failure to state a claim. Wells Fargo does not move to dismiss the first counterclaim which, like Wells Fargo's own DCL claims, requires discovery to adjudicate. Issue has not yet been joined on the

counterclaims because Wells Fargo's motion to dismiss was filed in lieu of answering the counterclaims.

On March 4, 2014, defendants filed an opposition and a cross-motion for summary judgment. Defendants' papers are primarily devoted to the merits of the parties' DCL claims. Defendants do not meaningfully rebut Wells Fargo's arguments about why the second, third, and fourth counterclaims and corresponding affirmative defenses are not legally viable.¹ As set forth below, not only are these counterclaims legally deficient, they border on the frivolous. The court, however, denies plaintiffs' sanctions motion. Defendants are cautioned that future attempts to invoke collateral and unrelated matters, such as attempting to relitigate the Prior Action to distract or delay this case, will not be tolerated.

Moreover, defendants' cross-motion for summary judgment is procedurally defective. Defendants are not entitled to seek summary judgment on their counterclaims because issue has not yet been joined. *Myung Chun v N. Am. Mtg. Co.*, 285 AD2d 42, 45 (1st Dept 2001) (court is "without power to grant summary judgment before joinder of issue"); *see Westchester Exp., Inc. v State Ins. Fund*, 151 AD2d 357 (1st Dept 1989) ("summary judgment under CPLR 3212(a) would not lie, because issue had not been joined on the counterclaim, properly treated by the court as a complaint"), citing *Edelman v Edelman*, 88 Misc2d 156, 159 (Sup Ct, Nassau County 1976) (under CPLR 3019, "[a] cause of action contained in a counterclaim ... shall be treated, as far as practicable, as if it were contained in a complaint").

The court, therefore, limits its discussion to Wells Fargo's motion to dismiss.

¹ Defendants' counsel did not submit a memorandum of law. His attorneys' affirmation contains conclusory statements about the viability of defendants' counterclaims which, aside from being legally inaccurate, are not supported by any legal authority.

II. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); see also *Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

III. Discussion

Wells Fargo moves to dismiss defendants’ second (third-party beneficiary), third (tortious interference), and fourth (malicious prosecution) counterclaims.

Defendants aver they have standing to sue Wells Fargo as third-party beneficiaries of the loan agreement between Wells Fargo and Inteco. “A party asserting rights as a third-party

beneficiary must establish ‘(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost.’” *State of California Pub. Employees’ Ret. Sys. v Shearman & Sterling*, 95 NY2d 427, 434-35 (2000), quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 (1983); see generally *Saska v Met. Museum of Art*, 42 Misc3d 548, 559 (Sup Ct, NY County 2013) (collecting cases). If the parties do not express clear intent to confer third-party beneficiary status onto the claimant, and if such intent is not evident from the face of the contract, a third-party beneficiary claim does not lie. See *LaSalle Nat’l Bank v Ernst & Young LLP*, 285 AD2d 101, 108-09 (1st Dept 2001). Moreover, even if third-party beneficiary status is established, a third-party beneficiary “has no greater rights or remedies than the direct parties to [the contract].” See *AMBAC Assurance Corp. v EMC Mortg. LLC*, 39 Misc3d 1240(A), at *4-6 (Sup Ct, NY County 2013) (Ramos, J.); *BAll Banking Corp. v UPG, Inc.*, 985 F2d 685, 697 (2d Cir 1993), citing *Dunning v Leavitt*, 85 NY 30, 35 (1881) (“it would be contrary to justice or good sense to hold that [a third-party beneficiary] should acquire a better right against the promisor than the promisee himself had”).

Defendants cannot maintain a third-party beneficiary claim under the Loan Agreement because that contract does not evidence an intent to grant them third-party beneficiary rights. Additionally, the supposed alleged breach – Wells Fargo’s failure to audit Inteco’s inventory – has no basis in the express language of the contract. Though Wells Fargo was given the right, as lender, to inspect the collateral, it had no contractual obligation to do so.² Regardless, even if

² Basically, defendants are arguing that Wells Fargo should have discovered that Panagiotis was defrauding it. Such a claim, aside from the myriad reasons why defendants cannot assert it, might also implicate the *in pari delicto* doctrine (i.e., Inteco committed the fraud; defendants, if

such a duty existed and was breached and even assuming defendants could maintain a third-party beneficiary claim, such claim would still be dismissed because it is encompassed by the claims released by Panagiotis and Inteco in the agreement governing the peaceful possession of Inteco's collateral. *See* Dkt. 11 at 3-4. Further, the disposition of the Prior Action collaterally estops the assertion of the claim in this action. *See Lot 1555 Corp. v Nahzi*, 79 AD3d 580 (1st Dept 2010) (“judgment in one action is conclusive in a later one, not only as to any matters actually litigated therein, but also as to any that might have been so litigated”); *see AMBAC Assurance Corp. v EMC Mortg. LLC, supra*.

Next, defendants claim Wells Fargo tortiously interfered with the Companies' contracts and business relationships.

In a contract interference case ... the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages. In response to such a claim, a defendant may raise the economic interest defense--that it acted to protect its own legal or financial stake in the breaching party's business.

White Plains Coat & Apron Co., v Cintas Corp., 8 NY3d 422, 426 (2007). A creditor who takes proceeds to protect its secured interest is protected by the economic interest defense. *Ultramar Energy, Ltd. v Chase Manhattan Bank, N.A.*, 179 AD2d 592, 593 (1st Dept 1992).

Here defendants' answer does not identify what contracts or business relations were interfered with nor explain what Wells Fargo did that amounts to tortious interference. It is well established that such conclusory allegations cannot survive a motion to dismiss. *See Ferrandino & Son, Inc. v Wheaton Builders, Inc.*, 82 AD3d 1035, 1036 (2d Dept 2011) (dismissing tortious interference claim because “plaintiff merely asserted, in a conclusory manner and without the

they were intended to benefit from Inteco, benefited from Inteco's continued access to credit by virtue of the fraud; ergo, they cannot sue Wells Fargo for the fraud). *See generally Kirschner v KPMG LLP*, 15 NY3d 446, 464 (2010); *see Mosionzhnik v Chowaiki*, 41 Misc3d 822, 830-31 (Sup Ct, NY County 2013).

support of relevant factual allegations, that [defendant's] actions caused [a breach of contract]"); *see M.J. & K. Co. v Matthew Bender & Co.*, 220 AD2d 488, 490 (2d Dept 1995) ("plaintiffs' mere contentions that third parties cancelled contracts with them ... offered with no factual basis to support the allegations [is] insufficient to state a cause of action for tortious interference"); *Intellect Art Multimedia, Inc. v Milewski*, 24 Misc3d 1248(A), at *9-10 (Sup Ct, NY County 2009) (tortious interference claim requires pleading of "specific contracts" or "specific business relationships"). Moreover, Wells Fargo is protected by the economic interest defense. *White Plains, supra*. In any event, as such harms allegedly befell the Companies, not defendants individually, defendants lack standing to assert these tortious interference claims. *O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281 (1st Dept 2007); *see Serino v Lipper*, 123 AD3d 34 (1st Dept 2014) ("The lost value of an investment in a corporation is quintessentially a derivative claim by a shareholder").

Finally, the malicious prosecution counterclaim is wholly without merit. Defendants have not (and cannot) allege that a prior proceeding was terminated in their favor. *See Rockwell Global Capital, LLC v Soreide Law Group, PLLC*, 100 AD3d 448, 449 (1st Dept 2012) ("The counterclaim for malicious prosecution must also be dismissed, since defendants failed to allege the termination of a **prior** proceeding in their favor, a required element of the claim") (emphasis added), accord *Broughton v State*, 37 NY2d 451, 457 (1975). To wit, the Prior Action was terminated in Wells Fargo's favor. Indeed, it is defendants' own discussed counterclaims that are frivolous. As noted earlier, the court, in its discretion, declines to sanction defendants, but they and their counsel are warned that future frivolous claims and arguments will not be tolerated. Accordingly, it is

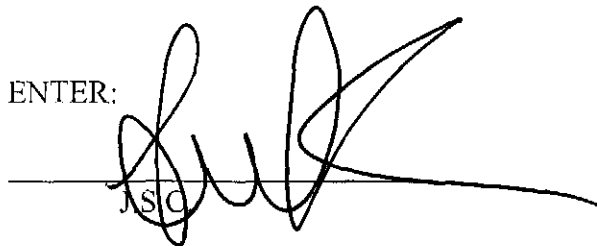
ORDERED that the motion by plaintiff Wells Fargo Trade Capital Services, Inc. to dismiss the second, third, and fourth counterclaims and the fifth, sixth, and eighth affirmative defenses asserted by defendants Ellen Sinetos and John Sinetos is granted, said counterclaims and affirmative defenses are dismissed with prejudice, plaintiff's motion for sanctions is denied, and defendants' cross-motion for partial summary judgment and for a stay of discovery is denied; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on January 29, 2015 at 10:30 in the forenoon; and it further

ORDERED that before the preliminary conference, the parties must read and comply with the court's rules, and the joint status letter discussed therein must be e-filed and faxed to Chambers (212-952-2777) no later than January 22, 2015 at 5:00 pm.

Dated: January 6, 2015

ENTER:

A handwritten signature in black ink, appearing to be "JSC", is written over a horizontal line. The signature is stylized and cursive.