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| Cohen v Jacoby & Meyers & Assoc., L.L.P. |
| 2015 NY Slip Op 32029(U) |
| September 22, 2015 |
| Supreme Court, New York County |
| Docket Number: 153928/15 |
| Judge: Geoffrey D. Wright |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: GEOFFREY D.S. WRIGHT PART 47

Justice

RICHARD B. COHEN,

INDEX NO. 153928/15

Plaintiff/Petitioner(s),

MOTION DATE _____

- v -

JACOBY & MEYERS AND ASSOCIATES, LLP.
and ERWIN I. ABALOS,

MOTION SEQ. NO. 001
MOTION CAL. NO. _____


Defendant/Respondent(s)

The following papers, numbered 1 to 3 were read on this motion to/for dismiss the complaint

| | <u>PAPERS NUMBERED</u> |
|---|------------------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | <u>1</u> |
| Answering Affidavits — Exhibits _____ | <u>2</u> |
| Replying Affidavits _____ | <u>3</u> |

Cross-Motion: Yes X No
Memorandum

Upon the foregoing papers, it is ordered that this motion by the Defendant, to dismiss the complaint is denied, a/p/o.


GEOFFREY D. WRIGHT
AJSC

Dated: Sept. 22, 2015

J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 47

-----X
RICHARD B. COHEN,

Plaintiff-Petitioner(s),

-against-

JACOBY & MEYERS AND ASSOCIATES, L.L.P.
and ERWIN I. ABALOS,

Defendants.
-----X

Index #153928/15
Motion Cal. #
Motion Seq. #
DECISION/ORDER
Pursuant To Present:
Hon. Geoffrey Wright
Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: dismiss the complaint

| PAPERS | NUMBERED |
|--|----------|
| Notice of Petition/Motion, Affidavits & Exhibits Annexed | 1 |
| Order to Show Cause, Affidavits & Exhibits | |
| Answering Affidavits & Exhibits Annex | 2 |
| Replying Affidavits & Exhibits Annexed | 3 |
| Cross-motion & Exhibits Annexed | |

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

The Plaintiff hired an attorney named Teplen in connection with a loan he wanted. The loan was arranged. However, Teplen diverted the loan, \$2,500,000.00, to his own use, and has admitted as much. The complaint alleges, and seeks the return of funds paid by or through Teplen to the Defendant law firm.

The Defendants move to dismiss the complaint for unjust enrichment, arguing that there is not a sufficient relation between the Plaintiff, on one side, and the funds in question and the Defendants on the other.

In making this argument, I think that the Defendants misapprehend the Court of Appeals decision in the case of *MANDARIN TRADING LTD. v WILDENSTEIN*, 201116 N.Y.3d 173944 N.E.2d 1104919 N.Y.S.2d 4652011 N.Y. Slip Op. 00741. In that case, the Court of Appeals said: "The essential inquiry in an action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Here, the Defendants do little, if anything to gainsay the provenance of the funds in question. They have been traced to a specific bank account, and are alleged to be from a specific

source, which would make them amenable to replevin [**HECKL v. WALSH**, 122 A.D.3d 1252, 996 N.Y.S.2d 413, 2014 N.Y. Slip Op. 07787 “[o]rdinary currency, as a rule, is not subject to replevin” (Matter of Equitable Life Assur. Socy. of U.S. v. Branch, 32 A.D.2d 959, 960, 302 N.Y.S.2d 958). Unless the currency can be specifically identified.”]. Put simply, Teplen is an admitted thief, and a thief cannot successfully convey title [**ALEXANDER v. SPANIERMAN GALLERY, LLC**, 64 A.D.3d 487, 883 N.Y.S.2d 492, 2009 N.Y. Slip Op. 05912]. Therefore, the Defendants would have no claim to stolen funds.

The next basis for summary judgment is the claim of *res judicata*. This argument must fail. The Plaintiff was not a party to any prior legal proceeding with the Defendants involving a claim to the funds. The other proceeding only established the priority between the Plaintiff and Teplen, and determined the true owner of the funds in question. This set the stage for this litigation, rather than cut it off.

The motion to dismiss the complaint is denied. This constitutes the decision and order of the court.

Dated: September 22, 2015


GEOFFREY D. WRIGHT
A.J.S.C.
