B.D. Estate Planning Corp. v Trachtenberg
2016 NY Slip Op 32153(U)
October 26, 2016
Supreme Court, New York County
Docket Number: 651006/2011
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

B.D. ESTATE PLANNING CORP.,

Index No.: 651006/2011

Plaintiff,

DECISION & ORDER

-against-

MARCY TRACHTENBERG, as Trustee of the Ellis Limquee Family Insurance Trust, and CAROLYN LIMQUEE,

Defendants.

---X

SHIRLEY WERNER KORNREICH, J.:

Motions sequence numbers 009, 011, 012, 013, and 014 are consolidated for disposition.

In Motion 9, defendant Carolyn Limquee (Carolyn) moves by order to show cause to vacate the November 2, 2015 judgment (the Judgment), entered after a bench trial, based on a post-Judgment ruling by the Appellate Division on an interlocutory appeal. Plaintiff B.D. Estate Planning Corp. opposes the motion. After oral argument, the court held the motion in abeyance pending the reference discussed below. *See* Dkt. 200 (3/17/16 Tr.).[1]

Motions 11 and 12 are the parties' competing motions for summary judgment on Carolyn's remaining affirmative defenses. In Motion 13, plaintiff moves to (1) confirm the May 26, 2016 report (the Report) (Dkt. 252) of Special Referee Jeffery A. Helewitz (the Referee); and (2) hold Carolyn in civil contempt for violating two court orders – violations the Referee found to be willful. Carolyn opposes that motion and asks the court to reject the Report. The court reserved on these motions after oral argument. *See* Dkt. 305 (8/4/16 Tr.).

Finally, in Motion 14, plaintiff moves for an order directing the Department of Finance (DOF) to remit to it the funds ($1,995,435.31) the Trust paid into court pending adjudication of

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

the parties' motions regarding the validity of the Judgment. Carolyn opposes this motion and cross-moves to extend the stay of enforcement of the Judgment.

For the reasons that follow: (1) the Report is confirmed; (2) Carolyn is held in civil contempt; (3) Carolyn's summary judgment motion is denied; (4) plaintiff's summary judgment motion is granted in part and denied in part; (5) Carolyn's motion to vacate the Judgment is denied; (6) plaintiff's motion to direct DOF to release the funds is denied; and (7) Carolyn's cross-motion to extend the stay of enforcement is granted.

I. Procedural History & Factual Background

Familiarity with the extensive history of this 2011 action and the numerous decisions of this court and the Appellate Division is presumed.[2] The background provided herein is limited to that necessary to understand this decision and developments post-dating this court's last written opinion – the October 30, 2015 post-trial decision. *See* Dkt. 116 (the Trial Decision).[3]

On November 2, 2015, after a bench trial, the Judgment was entered in favor of plaintiff and against the Trust in the amount of $3,075,043.19. *See* Dkt. 120. On November 9, 2015, plaintiff moved for an order, pursuant to CPLR 5225, directing Carolyn, the trustee, to "turnover and deliver to [plaintiff] the corpus of the trust not to exceed the sum of $3,075,043.19 with interest at 9% per annum from November 2, 2015." *See* Dkt. 122. Previously, by order dated April 11, 2013, Carolyn, who is both the trustee and beneficiary of the Trust, was ordered not to "further invade the corpus of the trust during the pendency of this action." *See* Dkt. 78 (the April 2013 Order). On November 24, 2015, Carolyn opposed the motion and cross-moved to reargue

[2] *See B.D. Estate Planning Corp. v Trachtenberg*, 2013 WL 839779 (Sup Ct, NY County 2013) (summary judgment decision), *aff'd* 114 AD3d 477 (1st Dept 2014); *B.D. Estate Planning Corp. v Trachtenberg*, 2015 WL 1158566 (Sup Ct, NY County 2015) (decision denying Carolyn's motion for leave to amend her answer), *mod* 134 AD3d 650 (1st Dept 2015).

[3] Capitalized terms not defined herein have the same meaning as in this court's prior decisions.

the Trial Decision. *See* Dkt. 136. By order dated December 15, 2015, the court granted plaintiff's turnover motion and denied Carolyn' cross-motion for reargument. *See* Dkt. 155 (the December 15 Order). Specifically, Carolyn was ordered to "turn over and deliver to [plaintiff] the corpus of the trust not to exceed the sum of $3,075,043.19 with interest at 9% per annum from November 2, 2015 and [e-file] proof of compliance" within 10 days. *See id.* at 3.[4] Carolyn did not comply with this order.

Four days after the deadline elapsed, and nearly two months after the Judgment was entered, on December 29, 2015, the Appellate Division issued an order modifying this court's March 13, 2015 decision (Dkt. 106), which had denied Carolyn's motion, on the eve of trial, for leave to amend her answer to assert five new affirmative defenses. *See B.D. Estate Planning Corp. v Trachtenberg*, 134 AD3d 650 (1st Dept 2015) (the December AD Decision). The Appellate Division held that Carolyn should have been granted leave to assert three of her five proposed affirmative defenses: (1) bribery and corruption; (2) recovery of fruits of crimes; and (3) *in pari delicto*. *See id.* at 650. The Appellate Division wrote:

> The record reflects that plaintiff's sole owner, principal and employee [Michael Binday] was convicted, after a jury trial, of conspiracy to commit mail and wire fraud, and substantive mail fraud and substantive wire fraud in connection with **a scheme to defraud insurance companies**. Nevertheless, plaintiff seeks to enforce the provisions of a promissory note providing that it receive 50% of the death benefits payable under a policy on the life of [Carolyn's] late husband [Ellis]. The record indicates that this policy **may have been part** of the scheme to defraud that resulted in the criminal conviction of plaintiff's principal.

See id. at 650-51 (emphasis added). The Appellate Division did not explain what part of the record "indicates" that the Policy "may have been part" of the "scheme" for which Binday was indicted and convicted. As discussed below, a close review of the record in the federal criminal

[4] As the December 15 Order provides, prior to being ordered to turn over the funds, Carolyn was given an opportunity to post a bond pending appeal; she declined to do so. *See* Dkt. 155 at 3.

proceeding makes clear that the subject policy (the Policy) and note (the Second Note) were not "part" of the criminal conduct for which Binday was convicted. Rather, a brief mention of the policy can be found in a *post-sentencing* report. As the court will explain, committing insurance fraud is a sufficiently serious crime that could justify a court refusing to enforce a contract on the ground of illegality. However, the parties dispute whether there is sufficient evidence in the record to warrant a trial to resolve the question of whether the Policy was procured by Binday through the commission of insurance fraud.[5] The fact that the Policy was a "stranger-oriented life insurance" (STOLI) policy is not, on its own, grounds to deny plaintiff the right to enforce the Second Note.[6]

In the December AD Decision, the Appellate Division explained:

> As the Court of Appeals stated in [*McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 469 (1960)], "[P]ublic policy closes the doors of our courts to those who sue to collect the rewards of corruption." The court improperly denied [Carolyn] leave to amend her answer to assert the affirmative defenses of "bribery and corruption" and recovery of fruits of crimes barred. Although the promissory note at issue is not illegal on its face, [Carolyn] demonstrated prima facie that there was a **direct connection** between the scheme to defraud of plaintiff's principal and the promissory note plaintiff seeks to enforce, and that the scheme was more than a "small illegality" [(*see McConnell*, 7 NY2d at 471)]. Although it appears that [Carolyn] may have benefitted from the scheme, the court should not intervene to enable the wrongdoer to obtain additional fruits of its crime.
>
> The proposed eighth affirmative defense of in pari delicto was also permissible as an alternative or hypothetical pleading.

December AD Decision, 134 AD3d at 651 (emphasis added). The Appellate Division did not explain what "direct connection" it was referring to or why *in pari delicto* was permissible as an

---

[5] The Policy was originally procured by another party. Plaintiff, a corporation of which Binday was the principal, purchased the Policy after that party stopped making premium payments and after the Limquees declined to fund the Policy themselves.

[6] STOLI polices are explained below. It should be noted that the "O" in STOLI is sometimes used to mean "owned" or "originated". The court adopts the nomenclature in the Second Circuit's decision, which is extensively addressed herein.

alternative or hypothetical pleading.[7] Nor did the Appellate Division explain the basis for the "bribery and corruption" defense, which, as explained below, is different from the defense based on the fraud allegedly committed in procuring the Policy.

On January 14, 2016, Carolyn moved by order to show cause to vacate the Judgment in light of the December AD Decision. *See* Dkt. 158. The court issued a temporary restraining order prohibiting the Judgment from being enforced and ordered Carolyn to provide plaintiff with a bank statement evidencing the Policy proceeds in the Trust's account. *See* Dkt. 167 (the January 14 Order). As noted earlier, in the April 2013 Order, Carolyn was ordered not to "further invade the corpus of the trust during the pendency of this action." *See* Dkt. 78. By letter dated January 21, 2016, plaintiff raised the issue of Carolyn's noncompliance with the December 15 and January 14 Orders. *See* Dkt. 168. Plaintiff contended that Carolyn transferred nearly $2 million from the Trust. *See id.* at 2. Carolyn responded by letter dated January 27, 2016. *See* Dkt. 169. By order dated January 28, 2016, the court ordered Carolyn to provide plaintiff with the Trust's bank statements from April 1, 2012 to the present. *See* Dkt. 170 (the January 28 Order). Carolyn was required to provide these records by February 10, 2016 if she had them readily available and was given until February 24, 2016 if she needed to obtain them from the bank. *See id.*

As noted earlier, after oral argument, the court reserved on Carolyn's motion to vacate the Judgment. *See* Dkt. 200 (3/17/16 Tr.). In addition, it became apparent to the court that Carolyn violated the orders discussed herein and that her violations may have been willful. In other words, it appeared Carolyn may have been in contempt of court. Mindful of the need for a

[7] The court's March 13, 2015 decision held that Carolyn's *in pari delicto* defense is not legally viable. The Appellate Division never explained why this court's analysis was erroneous, but stated that CPLR 3014 permits alternative pleadings. Again, this defense in this 2011 case was raised in a motion to amend on the eve of the 2015 trial.

clear record, the court referred the case to a Special Referee to hear and determine what happened to the money in the Trust's account and to hear and report on whether the April 2013, December 15, and January 14 Orders were violated "and, if violated, by what conduct and by whom." *See* Dkt. 198. At oral argument, the court was clear that the purpose of the hearing was to develop a factual record so the court could determine if Carolyn should be held in contempt. *See* Dkt. 200 (3/17/16 Tr. at 2) ("These are allegation that [Carolyn] violated my order[s] which is a **contempt** issue"); *see id.* at 9 ("THE COURT: ... And I want the JHO to make findings as to whether or not those orders were violated and **whether there should be a contempt** in this case" ... MR. WOLFE [Carolyn's counsel]: I have no dispute. THE COURT: Okay. So, this is going to happen. All of the bank records ... will be turned over to plaintiff. **This is going to a hearing as a contempt hearing.**") (emphasis added); *see also* Report at 13 ("Basically, the order of reference seeks to ascertain whether [Carolyn] **is in contempt** of Justice Kornreich's orders.") (emphasis added). Prior to the hearing, on April 29, 2016, the parties filed their respective summary judgment motions, which are discussed further below.

A hearing before the Referee was conducted on May 23, 2016. *See* Dkt. 259 (5/23/16 Tr.). Carolyn was the only witness that testified.[8] During the hearing, after the Referee consulted with the court, the scope of the reference was expanded only to the extent that the Referee's determination of what happened to the Trust's funds was to include the period of May 7, 2012 through April 11, 2013. *See* 5/23/16 Tr. at 24. Neither party objected to the expansion of the reference.

[8] Carolyn did not appear in court; she testified by live video conference.

The Referee issued his Report on May 26, 2016. *See* Dkt. 252.[9] It begins by setting forth the scope of the reference.[10] *See id.* at 1-2. The Report then summarizes the May 23 hearing.[11] The Referee explained:

> Limquee was able to demonstrate, by documentary evidence, that on May 7, 2012, $2,445,134.14 was transferred to the trust from Kantor Davidoff in the form of a wire transfer that established a JP Morgan Chase Bank savings account entitled "Ellis Limquee Family Insurance Trust." On that same day, Kantor Davidoff transferred $1,400,056.78 to a JP Morgan Chase Bank checking account entitled "Ellis Limquee Family Insurance Trust." Both accounts listed Limquee as the trustee. Previously, $20,000.00 was paid from the trust fund as a commission to Marcy Trachtenberg (Trachtenberg), the former trustee. In addition, on May 7, 2012, **the trust paid $63,513.26 to Kantor Davidoff in legal fees**. This accounts for all of the trust funds transferred to Kantor Davidoff on April 25, 2012.
>
> On January 24, 2013, Limquee transferred $443,356.75 from the savings account to the checking account. According to Limquee, she had been issued an oral order to segregate $2 million for the trust, and she transferred the excess to the checking account, which she considered to be her own personal checking account. **It is**

[9] Rather than summarize the Report, the court quotes extensively from it given the detailed nature of the inquiry and the fact that the Report is being confirmed in its entirety.

[10] It should be noted that the Report refers to Carolyn as "Limquee" while the court, in its decisions thus far, has referred to her as "Carolyn" to avoid ambiguity with her late husband, Ellis.

[11] In addition to reviewing the Report, the court carefully reviewed the entirety of the hearing transcript and the documents entered into evidence. The court commends the Referee for his exemplary efforts. He ensured a thorough hearing and asked important, thorough questions so that the funds and Carolyn's actions could be precisely accounted for. Based on his account of Carolyn's testimony in the Report, the Referee's credibility determinations (which, as discussed herein, are entitled to deference), are well founded. The hearing revealed Carolyn's serial violations of this court's orders, which are particularly troublesome given her status as a fiduciary and her representation by multiple counsel, who, it should be noted, were paid with the very funds that were enjoined. Below, the court issues a *sua sponte* order to show cause for Carolyn's counsel to explain why they should not be held in contempt. The court is dismayed by the conduct here. That being said, as discussed herein and proven by the court's citations to the March 17, 2016 transcript, Carolyn's objection that she lacked proper notice of her contempt hearing is baseless.

noted that no evidence of such oral order was provided to the Special Referee and plaintiff disputes its existence.[12]

Limquee's belief that the checking account was her personal account was based on the fact that the blank checks issued to her by JP Morgan Chase had her name and address imprinted thereon as the payor; however, **the account number on the checks was that of the Ellis Limquee Family Insurance Trust account, where she is listed as the trustee, and the funds were taken out of that account**. Limquee received monthly statements from the bank for both accounts since the time that the accounts were opened, **and the account names appearing on the statements are that of the insurance trusts with Limquee as "Trustee."** In addition, the later checks are imprinted with the name of the insurance trust as the payor.

On May 9, 2012, Limquee withdrew $1,100,045 from the checking account, one withdrawal for $1 million and the other for $100,045.00. Limquee averred that the $1 million withdrawal was a repayment of a [$1 million] loan that she received from her daughter, and the reason for the $100,000 withdrawal, as well as where the funds went, escaped her memory at present. When questioned, Limquee said that the $1 million that she borrowed from her daughter represented life insurance proceeds that her daughter received[13] and that she, Limquee, used the money to buy a new house, a new car, and pay some bills. Limquee presented no evidence, other than her testimony, of the existence of such loan or a life insurance policy naming her daughter as the beneficiary. Also, **as noted below, after Limquee said that she repaid the loan to her daughter and after she purchased a $350,000 house with the $1 million loaned funds, she made payments of over $80,000 to HFC, which impacts on her credibility**.

On April 11, 2013, when Justice Kornreich issued her order prohibiting Limquee from invading the trust corpus, the checking account had a total of $493,544.35,

[12] No such order is in the record, nor can the court recall issuing such an order. The court's practice is to ensure all orders are either in writing or made orally on the record. Regardless, even if such an order was issued off the record, and even if such order was enforceable, the April 2013 Order – a written order that was entered on NYSCEF – clearly would have superseded the alleged oral order. The court, therefore, concurs with the Referee's conclusion that Carolyn's reliance on the alleged oral order was baseless and does not excuse her conduct. She was represented by counsel throughout and could have sought advice if there was any confusion and, to the extent counsel was uncertain, he could have sought guidance from the court. It should be noted that if Carolyn's counsel believes off the record remarks to be significant, the court recalls counsel repeatedly representing to the court that the corpus of the Trust was not invaded. That, as we now know, was not true. Moreover, even if the alleged oral order was in place, as explained in the Report, Carolyn would have violated it as well by causing the balance in the Trust's accounts to fall below $2 million.

[13] Apparently, as discussed herein, there were other STOLI policies on Ellis' life.

and as of December 18, 2015, the last date for which bank records were produced, that account had a balance of $3,129.03. **It is Limquee's position that the checking account was her personal account, not part of the trust corpus, and, consequently, she was not violating the order when she issued checks from that account.**

Limquee admitted that she was aware of Justice Kornreich's order of April 11, 2013, and that she was also under the impression that there was an oral order mandating that $2 million of trust funds be segregated; however, in 2015, Limquee transferred $55,000 in three transfers from funds in the savings account to her daughter, allegedly as a loan that the daughter has repaid. **This transfer of $55,000 reduced the funds in the savings account to less than $2 million** until the funds were restored.

According to Limquee, she used some of the funds in the checking account to pay legal fees on behalf of the trust.

When questioned on cross examination as to why she did not turn over the funds to the court as mandated by Justice Kornreich's order of December 15, [2015], Limquee stated that the order, which required turning over the corpus of the trust "*not to exceed* $3,075,043.19 [emphasis added],"[14] could not be complied with because the trust only had $2 million. The $2 million was eventually turned over four months after the date specified in the order, which was one month after the issuance of the instant order of reference. **The Special Referee finds it incredible that a woman who spent her entire working life as a teacher could not understand that the words of the order indicated a maximum amount to be turned over, not an exact amount, and also finds it suspicious that the funds were only turned over after the instant hearing was ordered by Justice Kornreich.**

Limquee was asked when she requested statements from the bank, but she said that she could not remember. The Special Referee allowed her two weeks to contact the mailing office that she used to send the documents to her lawyer, and the receipts were emailed to the Special Referee by Limquee's counsel the day after the hearing. The mailing receipts, which are not in evidence, indicate that one package was mailed on February 8, 2016, one was mailed on March 10, 2016 and the third was mailed on March 26, 2016.

See Report at 2-6 (bold added for emphasis; citations omitted).

[14] The bracketed words "emphasis added" are in the Report; the italics are the Referee's.

The Referee then sets forth his findings regarding what happened to the Trust's funds based on the bank records submitted into evidence. He begins with the savings account:[15]

> On May 7, 2012, the savings account was opened with a wire transfer from Kantor Davidoff of $2,445,134.14. On January 24, 2013, Limquee transferred $443,356.75 from this account to the checking account, allegedly under the impression that there was an oral order to segregate $2 million of the trust funds.
>
> On April 11, 2013, Justice Kornreich ordered Limquee not to invade the corpus of the trust. During the instant hearing, Limquee admitted that she was aware of this order, as well as the alleged oral order noted above. However, **despite the prohibition on invading the corpus, Limquee continued to transfer funds from this savings account**: 1. On December 16, 2013, Limquee withdrew $3,442.15; 2. In 2014, Limquee made two withdrawals totaling $2,168.00; 3. On February 18, 2015, Limquee transferred $40,000 to the checking account and another $5,000 to an account that she believed belonged to her daughter; 4. On June 9, 2015, Limquee made two transfers totaling $55,000 to a checking account that she identified as belonging to her daughter; 5. On October 22, 2015, Limquee withdrew $868.58; 6. On November 4, 2015, Limquee transferred $1,550.00 to the checking account; 7. On November 17, 2015, Limquee transferred $28,000 to the checking account; 8. During the remainder of 2015 and in January 2016, Limquee transferred a total of $37,157.45 to a checking account that she identified as belonging to her daughter; **$17,857.45 of this total was transferred after Justice Kornreich's turnover order was in effect**;
>
> As of January 8, 2016, the savings account had a total balance of $2,000,091.35; however, this only occurred after Limquee's daughter repaid the alleged $55,000 loan. **During November and December of 2015 the balance in this account fell below $2 million, despite Limquee's testimony that she believed that $2 million had to be segregated as trust funds.**

See Report at 7-8 (some paragraph breaks omitted; bold added for emphasis).

---

[15] As indicated above, both the savings and checking accounts were in the name of the Trust and were the Trust's property. The court concurs with the Referee that Carolyn's position that the money in the checking account was her personal funds is not justifiable. The court, in fact, finds Carolyn's position to be frivolous, particularly since she had multiple attorneys representing her throughout. As the Referee noted, and as discussed further herein, Carolyn had a fiduciary duty to the Trust (notwithstanding her being the Trust's sole beneficiary) and that she treated the Trust's money as her own, in violation of the April 2013 Order, is highly problematic. It should be noted that transfers made by Carolyn prior to the April 2013 Order may also be problematic, but such transfers are not at issue on the instant motions since there was no court order in place restricting the money. Nothing herein should be construed as the court opining on whether pre-April 11, 2013 transfers amount to breaches of fiduciary duty or fraudulent transfers.

The Referee then discusses the checking account:

At the outset, it is noted that it is Limquee's position that the funds in the checking account were her own personal funds and not that of the trust. This portion of the order of reference only requires the Special Referee to determine what happened to the funds after they were deposited in the bank from Kantor Davidoff, not to determine whether all of the funds were trust funds (discussed below).

The following information is derived from Exhibits E and G. In making these findings, **small checks issued for Limquee's personal expenses are not specifically identified, but these amounts are deducted from the total indicated for the account balances.**

The checking account was opened on May 7, 2012, with a wire transfer of $1,400,056.78 from Kantor Davidoff. On May 9, 2012, Limquee transferred $1.1 million, presumably to her daughter. On May 14, 2012, Limquee sent $11,000 to a Vivian Sharpe, with a note saying "Happy Mother's Day." This left a balance in the checking account as of the end of May 2012 of $289,011.78.

In June of 2012, a check for $24,783.63 was made out to Lowndes Drosnick Doster (LDD)[16] for work performed on behalf of "beneficiary matters." Limquee also issued a check to HFC for $72,000. This left a balance in the account of $190,308.48 at the end of June 2012.

In July 2012, another check was issued to LDD for $1,308.61 for expenses and a check for [] $21,500.00 was issued to LDD (now also identified as Gallanty, P.C.) for legal work; a check was issued to Kantor & Reed for legal work in the amount of $6,713.67, leaving a balance at the end of the month of $160,787.73. ...

In August 2012, a check for $3,931.37 was issued to Kantor & Reed and one for $10,948.75 was issued to Gallanty. Limquee also made a payment of $9,183.49 to HFC. At the end of this month the checking account had a balance of $135,175.22. In September 2012, Limquee paid Gallanty $8,591.25, paid Kantor & Reed $1,099.60 that October, and made out a check to herself for $5,000. Also in October, Limquee paid a total of $1,772.81 in taxes. In November 2012 Limquee paid $5,898.23 in taxes and $5,615.35 to Gallanty, leaving a total in the checking account as of the end of November 2012 of $103,242.40. In December 2012 Limquee paid Gallanty $10,177.50, leaving $93,065.66 in the account as of the end of the year.

In January 2013, Limquee paid Kantor & Reed $2,172.00, made a $500 charitable donation, gave her daughter $900, and transferred another $1,000 to her daughter's checking account. In this month, Limquee transferred $443,356.75 to

[16] One of Carolyn's counsel.

this account from the savings account, noted above. Limquee also paid Gallanty $7,608.75. At the end of January 2013 the checking account had a balance of $517,834.37, the increase due to the transfer from the savings account.

In February of 2013 another tax payment of $2,184.86 was made by two checks, and a missing check (#274) for $7,941.43 was issued. In March 2013, a donation of $5,000 was made to St. Mark's AMEC, Gallanty was paid a total of $6,634.09, and Kantor & Reed was paid $1,883.00, leaving a balance of $494,144.71 in the account. **On April 16, 2013, after Justice Kornreich issued her order, Limquee paid Gallanty $27,652.53, leaving a balance in the account of $465,535.16.**

In May 2013, Limquee wrote a check to herself in the amount of $5,000 and one to her daughter for $10,000. Limquee also issued a check to "Berdon" for $20,485.00 and one to Gallanty for $20,485.00. Another check to Gallanty was also issued in the sum of $609.81. From August through December 2013, Limquee issued checks for $31,090.66 to Gallanty, $1,690.77 to Kantor & Reed, $6,128.41 to LLD, **$40,178.35 to Eaton & Van Winkle LLP,**[17] $35,000 to her daughter, $2,000 to herself, $7,000 in a missing check, $1,309.50 for court reporters, $5,028.49 for taxes, and $1,200 to a scholarship fund. At the end of 2013, the checking account had a balance of $248,025.01.

In the first six months of 2014, Limquee issued the following checks: $20,000 to her daughter; $13,000 to herself; **$46,760.16 to Eaton & Van Winkle**; and $1,511.25 on behalf of the "Limquee Trust." At the start of July 2014, the checking account had a balance of $161,306.23, From July 1 through December 31, 2014, Limquee issued the following checks or made the following withdrawals: **$70,657.10 to Eaton & Van Winkle**; $51,500 to her daughter, indicated as loans; $11,100 to herself; $134.00 to Kantor & Reed; and $1,500 to the Negro Spiritual Scholarship Fund. 2015 started with a balance of $20,359.14.

From January through June of 2015, Limquee issued the following checks or made the following withdrawals; $7,850 to her daughter, indicated as loans; **$64,806.46 to Eaton & Van Winkle**; $6,914.22 in taxes; and $7,500 to herself, leaving a balance as of July 1, 2015 of $72,797.11. It is noted that in April of 2015 a deposit of $110,000 was made, presumably from Limquee's daughter.

From July through December 2015, Limquee issued the following checks or made the following withdrawals: **$79,216.54 to Eaton & Van Winkle**; $30,000 to LDD; $688.35 to Kantor & Reed; and $25,000 to her daughter. At the end of 2015, the checking account had a balance of $3,129.03. It is noted that in January of 2016 Limquee wrote a $7,000 check to herself, leaving the account with a negative balance.

---

[17] Eaton & Van Winkle LLP is Carolyn's counsel of record in this action. The implications of the funds paid to it while the April 2013 Order was in place is addressed herein.

See Report at 8-12 (some paragraph breaks omitted; bold added for emphasis).

The Referee concludes:

> Based on the foregoing, the undersigned Special Referee determines that on May 7, 2012, a total of $3,845,134.14 was transferred from Kantor Davidoff to JP Morgan Chase, divided into two accounts (a savings account of $2,445,134.14 and a checking account of $1,400,000.00) and that, as of February 2016 the savings account had a balance of $2,000,091.31 and as of January 2016 the checking account had a [negative] balance of ($4,465.79), so that the total of the funds remaining as of the beginning of 2016 was $1,995,625.52.

See Report at 12-13.

The Referee then turns to the issue of Carolyn's violations of the subject orders. He begins:

> At the hearing, **Limquee affirmed that she was aware of the three orders that are the subject of the order of reference**, and the undersigned Special Referee finds that all of the orders expressed an unequivocal mandate. **Limquee did not deny that the orders were violated, but claims that the violations were based on her incorrect reading of them**. Hence, the issue is whether the violations were willful.

See Report at 14 (emphasis added).

He first addresses the April 2013 Order:

> **This order mandated that Limquee, as guardian of the trust, not invade the trust corpus**. Limquee's arguments are: (1) the funds in the checking account were her personal funds, not part of the trust corpus, so that she was free to use these funds; and (2) although the savings account balance did go below $2 million, it was only for a brief period of time and the funds loaned to Limquee's daughter were returned. **The undersigned Special Referee finds that these arguments lack merit.**
>
> Limquee points out that, pursuant to the trust agreement, the trustee was granted the discretion to distribute the entire corpus to the beneficiary (paragraph IV of the trust agreement). It is noted that the trust agreement itself was never produced into evidence at the hearing, but was considered by the Special Referee as being e-filed as part of the court records in this matter.

On April 25, 2012, by agreement with Trachtenberg, Limquee became the trustee of the trust, thereby entitling herself to distribute to herself as much of the trust corpus as she would desire. However, **this change in position from beneficiary to trustee engendered different legal and ethical obligations**.

> "A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty [internal quotation marks and citations omitted]."

Matter of Wallens, 9 NY3d 117, 122 (2007).

One of the fiduciary obligations imposed on trustees is to see that the trust's debts are paid. *See generally Lange v Kooper*, 28 AD3d 24 0 (1st Dept 2006).

At the time that Limquee took over as trustee of the trust, the instant proceeding had already been instituted, a fact of which she was well aware. The underlying claim in this action is that plaintiff is a creditor of the trust and is seeking to have the debt owed by the trust paid to it. **As a consequence, any action taken by Limquee to the derogation of plaintiff's debt is a breach of her obligations as a trustee and is prejudicial to plaintiff**. *See* EPTL § 11-1.1 (13) (a trustee must contest, compromise or settle any claim against the trust). **Hence, she could not, on her own volition, decide to take $1,400,000 of the trust funds for her own benefit while the instant lawsuit was pending to determine plaintiff's rights**. Further, Limquee cannot even argue that she was acting on the advice of counsel, since **she testified at the hearing that she made this decision on her own and did not consult with anyone prior to establishing the checking account**.

It is noted that, after the checking account was established, Limquee paid out in legal fees and costs a total of $445,356.47, begging the question as to why she did not seek legal counsel on this particular issue.

Consequently, **the undersigned Special Referee recommends that the checking account be considered part of the trust corpus and Limquee's use of that account be considered a willful violation of the court's order**.

Even if one were to believe that there was an oral order requiring Limquee to maintain only $2 million as trust corpus, **Limquee violated this order in 2015 when she voluntarily "loaned" her daughter over $55,000, thereby depleting**

> **the savings account to a balance of $1,944,008.88 in January of 2016.** Only later in January did Limquee's daughter "repay" the loan so as to bring the total balance in the savings account to just over $2 million. It is noted that in November of 2015 Limquee "loaned" her daughter another $25,000 from the checking account.
>
> Therefore, **the undersigned Special Referee recommends that, even if one were to agree that there was an oral order in effect requiring Limquee to maintain only $2 million as the trust corpus, Limquee be found to have willfully violated this alleged oral order not to diminish the trust corpus.**

See Report at 14-17 (citations omitted; bold added for emphasis). The court agrees with these findings.

The Referee then addresses the December 15 Order:

> This order required Limquee to turn over the trust corpus, in an amount not to exceed $3,075,043.19, with interest from November 2, 2015, within 10 days after service of a copy of the order with notice of entry. As noted above, **as of the date of this order Limquee did not even have $2 million in the savings account.**
>
> Limquee argued that she understood this order to mean that she had to turn over $3,075,043.19, which the savings account did not have, so she averred that it was impossible for her to comply. It is noted that, by this date, **the entire balance of the funds originally turned over by Kantor Davidoff was depleted to less than $2 million. Only four months later did Limquee turn over the funds in the savings account to the court, which occurred only after the instant order of reference was issued.**
>
> **The undersigned Special Referee does not find Limquee's argument regarding her interpretation of the clear language of Justice Kornreich's order to be credible.**
>
> **Limquee spent her entire professional life as a school teacher, so her claimed inability to understand the language of the order is found not to be believable by the Special Referee. Further, Limquee asserted that she did not seek a legal opinion as to her obligations pursuant to this order, even though one week earlier she paid a legal fee of $40,000 to Eaton & Van Winkle and, therefore, had legal counsel readily available to her.**
>
> Moreover, the undersigned Special Referee's assessment of Limquee' s credibility is based not only on her actual testimony, **but also on her body language and general demeanor during the course of the hearing.**

. . .

> Based on the foregoing, the undersigned Special Referee **recommends that Limquee be found to have wilfully violated the court's order of December 15, 2015.**

See Report at 17-19 (citations omitted; bold added for emphasis). The court, as explained more fully below, agrees with the Referee.

Finally, the Referee concluded that Carolyn did not willfully violate the January 14 and January 28 Orders. *See* Report at 19-20. Plaintiff does not challenge this finding and, therefore, the court will not address it. In conclusion, the Referee found "that by violating the [April 2013 and December 15 Orders], the financial rights of plaintiff to recover the funds allegedly owed have been severely prejudiced." *See id.* at 20.[18]

---

[18] The Referee summarized his findings and recommendations as follows:

> Based on the foregoing, the undersigned Special Referee makes the following determination with respect to the tracing of the funds turned over by Kantor Davidoff on May 7, 2012:
>
> On May 7, 2012, a total of $3,845,134.14 was transferred from Kantor Davidoff to JP Morgan Chase, divided into two accounts (a savings account of $2,445,134.14 and a checking account of $1,400,000.00) and that, as of February 2016 the savings account had a balance of $2,000,091.31 and as of January 2016 the checking account had a balance of ($4,465.79), so that the total of the funds remaining as of the beginning of 2016 was $1,995,625.52.
>
> Based on the foregoing, the undersigned Special Referee makes the following recommendations:
>
> 1. Carolyn Limquee be found to have wilfully violated the court orders of April 11, 2013 and December 15, 2015; and
>
> 2. Carolyn Limquee be found not to have wilfully violated the court order of January 28, 2016.

See Report at 20.

On June 9, 2016, plaintiff moved, pursuant to CPLR 4403, to confirm the Report. Carolyn opposed the motion. The court heard argument on the motion along with the parties' summary judgment motions. *See* Dkt. 305 (8/4/16 Tr.). While those three motions were *sub judice*, on August 11, 2016, plaintiff moved for an order directing DOF to release the money Carolyn paid into court to satisfy the Judgment. Carolyn opposed the motion on the ground that the Judgment should not be enforced until her remaining affirmative defenses are adjudicated.

II. Discussion

A. Motion to Confirm the Report & Hold Carolyn in Contempt (Seq. 013).

It is well settled that "New York courts will look with favor upon a Referee's report, inasmuch as the Referee, as trier of fact, is considered to be in the best position to determine the issues presented." *Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705 (1st Dept 1985), quoting *Holy Spirit Assn. v Tax Comm'n of the City of New York*, 81 AD2d 64, 70-71 (1st Dept 1981). Thus, "a court will not disturb the findings of a special referee where those findings are supported by the record." *Atlantic Aviation Inv. LLC v Varig Logistica, S.A.*, 73 AD3d 467, 468 (1st Dept 2010); *see Thomas v Thomas*, 21 AD3d 949 (2d Dept 2005) ("The report of a Referee should be confirmed whenever the findings are substantially supported by the record, and the Referee has clearly defined the issues and resolved matters of credibility"). Moreover, "[a] referee's credibility determinations are entitled to great weight because, as the trier of fact, he or she has the opportunity to see and hear the witnesses and to observe their demeanor." *Last Time Beverage Corp. v F & V Distribution Co.*, 98 AD3d 947, 950 (2d Dept 2012); *see Chigusa Hosono D. v Jason George D.*, 137 AD3d 631, 632 (1st Dept 2016) ("The Referee's credibility determinations are supported by the record, and there is no basis to disturb them"); *Suffolk P.E.T.*

Mgmt., LLC v Anand, 105 AD3d 462 (1st Dept 2013) (confirming report where "[t]here exists no basis to disturb the credibility determinations made by the Special Referee").

The court confirms the Report in its entirety. A close review of the hearing transcript and the evidence submitted reveals that the Referee's conclusions were well founded. His detailed, well-reasoned report persuasively demonstrates that Carolyn knowingly and intentionally violated the April 2013 and December 15 Orders. The court concurs with the Referee that the excuses Carolyn proffers for her noncompliance are not credible or justified. Leaving aside the question of whether Carolyn's use of the Trust's money during the pendency of this action (including the period between May 7, 2012 and April 11, 2013) is a breach of fiduciary duty (an issue not before the court), there is no question of fact that Carolyn's use of the Trust's money after April 11, 2013 amounted to an invasion of the corpus of the Trust. This constitutes a blatant violation of the April 2013 Order, which did not permit Carolyn to use the Trust's money for any reason. As the Referee explained, Carolyn's contention that she understood the money in *the Trust's* checking account to be her own, personal funds, is not credible.

For this willful violation, Carolyn is held in civil contempt. "Civil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate." *McCain v Dinkins*, 84 NY2d 216, 226 (1994), citing *McCormick v Axelrod*, 59 NY2d 574, 583 (1983).[19] A party may be held in civil contempt when there is "clear

[19] Judiciary Law § 753(A)(3) provides:

> A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases: ... A party to the action ... for any other disobedience to a lawful mandate of the court.

and convincing evidence that defendant knowingly disobeyed clear and unequivocal orders of the court." *Simens v Darwish*, 104 AD3d 465, 466 (1st Dept 2013), citing *McCormick*, 59 NY2d at 582-83. A hearing is not required to hold a party in civil contempt when there is no question of fact that a court order was knowingly violated. *See Yonamine v New York City Police Dep't*, 121 AD3d 598 (1st Dept 2014), citing *Cashman v Rosenthal*, 261 AD2d 287 (1st Dept 1999) ("Supreme Court properly held defendant in civil contempt without holding a hearing, since it was clear from the papers submitted to the court that there was no issue of fact to be resolved"); *see also Gryphon Domestic VI, LLC v APP Int'l Fin. Co.*, 58 AD3d 498, 499 (1st Dept 2009) ("To sustain a finding of civil contempt based on alleged violation of a court order, it is necessary to establish that a lawful order of the court was in effect, clearly expressing an unequivocal mandate. It must also appear with reasonable certainty that the order has been disobeyed and that the party had knowledge of its mandate").[20]

Judiciary Law § 773 provides that the contemnor may be obligated to pay damages or a fine "sufficient to indemnify the aggrieved party." *See Gottlieb v Gottlieb*, 137 AD3d 614 (1st Dept 2016) ("Legal fees that constitute actual loss or injury as a result of a contempt are routinely awarded as part of the fine. These may include the legal fees incurred in bringing the contempt motion") (internal citations omitted). Here, the appropriate sanction is an order compelling Carolyn to repay all amounts taken from the Trust's savings and checking accounts

---

(emphasis added).

[20] As noted earlier, the notion that Carolyn was unaware that the purpose of the hearing was to determine if she should be held in contempt is baseless. Moreover, a hearing is not required where, as here, there is no question of fact that the court's orders were violated. Nonetheless, an extensive hearing was conducted, followed by briefing and oral argument. Moreover, plaintiff's notice of motion for contempt contains the statutorily required contempt notice. *See* Dkt. 253 at 1. The court, therefore, rejects Carolyn's argument that her due process rights have been violated.

after April 11, 2013 plus the reasonable attorneys' fees incurred by plaintiff in connection with the reference and the motion practice to confirm the Report.

On April 11, 2013, the checking account had a balance of $493,544.35. *See* Report at 4-5. As of January 2016, that account had a *negative* balance of -$4,465.79. *See id.* at 20. Carolyn must return the $493,544.35 she depleted from the checking account and repay the bank the additional $4,465.79 (plus any overdraft fees charged by the bank). On April 11, 2013, the savings account had a balance of $2,001,777.39 ($2,445,134.14, the original amount transferred by Kantor Davidoff on May 7, 2012, minus the $443,356.75 transferred to the checking account on January 24, 2013). *See* Report at 8. As of February 2016, the savings account had a balance of $2,000,091.31. *See id.* at 20. This means that $1,686.08 must be repaid. In total, $495,230.43 ($493,544.35 + $1,686.08) must be deposited into court along with the previously deposited Trust funds, and $4,465.79 must be returned to the bank plus any fees charged by the bank. A monetary judgment will be docketed against Carolyn if this order is not complied with. Additionally, a second reference on plaintiff's attorneys' fees is directed below.

That being said, the court will not impose a separate sanction for Carolyn's violation of the December 15 Order since no separate harm was ultimately suffered, apart from the violation of the April 2013 Order, that the attorneys' fees award will not remedy. However, the forthcoming contempt motion against Carolyn's counsel may provide for disgorgement of its fees paid from the Trust account if Carolyn does not have the means to pay that money back into court. The court, moreover, may also impose a punitive sanction on Carolyn's counsel if it is determined that they, while acting as officers of the court and attorneys of record in this action, accepted payment of their legal bills from an account they knew to be restrained by the April

2013 Order. Surely, if an attorney knowingly accepts fees from a bank account it knows is restrained by court order, there shall be consequences.[21] Given the seriousness of this matter, and the requisite due process rights, counsel is afforded the notice and process set forth herein before any adjudication of contempt against it is made.[22]

B. Summary Judgment Motions (Seq. 011 & 012)

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment

[21] It does not matter whether the fees were for legal services provided to Carolyn individually or in her capacity as trustee. Under the April 2013 Order, the Trust's money could not be used for any purpose. If Carolyn wished to use the Trust's money to pay her lawyers, she, through one of her counsel, should have made a motion for leave to do so instead of unilaterally deciding she was entitled to use the funds.

[22] Counsel should not assume the court has determined any wrongdoing on their part has occurred (the court has not), only that sufficient cause exists to warrant an explanation.

motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978). Importantly, once the movant has made a prima facie showing and the burden shifts to the non-moving party, the non-moving party cannot raise a question of fact based *solely* on hearsay evidence. *See Arnold v New York City Hous. Auth.*, 296 AD2d 355, 356 (1st Dept 2002) ("Although hearsay evidence may be considered in opposition to a motion for summary judgment, **it is insufficient to bar summary judgment if it is the only evidence submitted**") (emphasis added), citing *Narvaez v NYRAC*, 290 AD2d 400 (1st Dept 2002); *see also King v N. Shore Long Island Jewish Hosp. at Plainview*, 127 AD3d 928 (2d Dept 2015) (same).

Carolyn's three remaining affirmative defenses are: (1) bribery and corruption; (2) recovery of fruits of crimes; and (3) *in pari delicto*.[23]

To begin, Carolyn contends, and plaintiff does not dispute, that if plaintiff (or its principal, Binday) actually bribed Trachtenberg to procure unfavorable terms for the Trust on the Second Note, that would be a violation of Penal Law § 180.03 and could defeat plaintiff's claim. *See McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 470 (1960) (courts are forbidden "to honor claims founded on commercial bribery"). However, there is no evidence that

[23] Contrary to Carolyn's protestations, as a conceptual matter, granting plaintiff summary judgment on these defenses would not contravene the December AD Decision. The standard on a motion for leave to amend is very different than the standard on summary judgment. Compare *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) ("Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law.") (citations and quotation marks omitted), with *Alvarez*, 68 NY2d at 324 ("the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ... Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action") (citations omitted).

Trachtenberg was bribed. To oppose plaintiff's summary judgment motion, Carolyn is obligated to "assemble, lay bare, and reveal [her] proofs in order to show [her] defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions." *Genger v Genger*, 123 AD3d 445, 447 (1st Dept 2014), quoting *Schiraldi v U.S. Mineral Prods.*, 194 AD2d 482, 483 (1st Dept 1993).

Carolyn avers that "[i]t is **undisputed** that the [Second Note] was the consequence of a 'reward' or bribe to [Trachtenberg] by Binday and his criminal Co-Defendants." *See* Dkt. 225 at 14 (emphasis added).[24] She relies on a payment of $1,328,300 that was deposited in November 2010 into a joint bank account owned by Trachtenberg and her husband, Greg. *See* Dkt. 217. That payment, however, was related to a different life insurance policy, which is not at issue in this case, did not involve the Limquees, and was not invested in by plaintiff or, more importantly, Binday. As Carolyn discusses ad nauseam, Binday, not plaintiff, was convicted for committing insurance fraud in connection with myriad policies. Hence, Binday and his business associates invested in many polices not at issue here.[25] The opportunity to invest in the policy where the $1,328,300 payment was made was offered to Greg by non-party Mark Resnick, the same person who solicited Ellis to sign up for the Policy. *See* Dkt. 74 at 2.[26] Yet, there is no

---

[24] Even if Carolyn were correct (and she is not) that there is a question of fact about Trachtenberg being bribed, it borders on the frivolous for Carolyn to contend that this issue is "undisputed."

[25] As noted below, the Second Circuit found that Binday was involved in at least 74 polices.

[26] Resnick is Trachtenberg's brother-in-law and was convicted along with Binday and non-party Kevin Kergil. Resnick was responsible for the original lender, Brown, issuing the Financing Agreement, which was the first of the three loan agreements that funded the Policy. It was Resnick that offered Binday the opportunity to purchase the right to fund the Policy. Plaintiff, a corporation owned by Binday, purchased those rights and funded the Policy with the First and Second Notes (only the latter of which is at issue). Indeed, in the very email chain submitted as supposed proof that the payment was a bribe, it is apparent that the money was an investment in

evidence in the record that the payment the Trachtenbergs received on their investment in an unrelated policy – which, as noted, neither plaintiff nor Binday invested in – was a bribe for anything, let alone for Trachtenberg's conduct with respect to the Second Note. That payment may constitute the fruits of a crime (e.g., the fraud for which Binday and Resnick were convicted), but that fact is of no moment. At best, it indicates the Trachtenbergs' involvement in other illegal STOLI schemes. But even Carolyn does not contend that the Trachtenbergs' participation in that scheme, on its own, suffices to establish that Marcy Trachtenberg was bribed for her conduct with respect to the instant Policy and the Second Note. There simply is no evidence in the record that suggests the $1,328,300 payment had anything to do with the contracts and Policy in this case.

In fact, Carolyn appears to concede that no such evidence exists. She, nevertheless, claims there is at least a question of fact about whether Trachtenberg was bribed, averring that "[t]he context of the [$1,328,300] payment ... clearly establishes that the payment was a *quid pro quo* for Trachtenberg's 'cooperation' with Binday and his confederates on several trusts, including the Ellis Limquee Family Trust at issue in the instant case." *See* Dkt. 248 at 11. This is speculative. *See Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 52 (2015) (argument that are "speculative and unsupported by any evidence ... cannot be the basis for denying summary judgment"); *Fasano v Euclid Hall Assocs., L.P.*, 136 AD3d 478, 479 (1st Dept 2016) (question of fact cannot be based on evince that is "speculative and conclusory [] and lacke[s] evidentiary foundation"). None of the witnesses testified that

---

a policy, not a bribe. *See* Dkt. 218. That email was sent by Resnick on August 25, 2010, approximately two months before the payment to the Trachtenbergs. The other disclosed investor was Kergil.

Trachtenberg was bribed, and Trachtenberg denied the allegation at her deposition. *See* Dkt. 244 at 7.

Carolyn presents no evidence that Trachtenberg was bribed. The only person who suggested Trachtenberg was bribed is Carolyn's lawyer, and he does so based solely on speculation. On this record, no reasonable finder of fact could conclude that the $1,328,300 payment was a bribe, let alone a bribe for the specific contract at issue here.[27] Summary judgment, therefore, is granted to plaintiff on this defense.[28]

Next, Carolyn contends that the illegal nature of the Policy renders the Note unenforceable. She relies on *McConnell*, 7 NY2d 465, and its progeny, for the proposition that illegal contracts are unenforceable. However, as the Appellate Division noted, not all illegality may constitute a defense. December AD Decision, 134 AD3d at 651; *see McConnell*, 7 NY2d at 471 (it is not the case that "any small illegality in the performance of an otherwise lawful contract will deprive the doer of all rights, with the result that the other party will get a windfall and there will be great injustice."). Hence, "not every minor wrongdoing in the course of contract performance [] will insulate the other party from liability for work done or goods furnished. **There must at least be a direct connection between the illegal transaction and the obligation sued upon**. Connection is a matter of degree. Some illegalities are merely incidental

[27] There is no authority to support the proposition the commission of an illegal act can be proffered as a defense to the enforcement of a contract unrelated to that illegal act. For instance, just because a banker defrauds one client does not mean every client was necessarily defrauded; those other clients will have to prove they also were wronged, not merely that another was wronged.

[28] It should be noted that, aside from the alleged $1,328,300 bribe, there is no other basis for Carolyn's bribery defense. To the extent her briefs suggest that Trachtenberg's conduct amounted to a breach of fiduciary duty or that the terms of the Second Note are unconscionable, both of those claims were previously dismissed by this court and affirmed by the Appellate Division.

to the contract sued on." *See id.* (emphasis added). The rule set forth in *McConnell* is that the illegality must be directly connected to the contract and that the illegality amounts to "**gravely immoral** and illegal conduct." *See id* (emphasis added).

Recently, in *Castellotti v Free*, 138 AD3d 198 (1st Dept 2016), the Appellate Division provided examples of circumstances where an illegality defense was upheld. *See id.* at 206, citing *McConnell*, 7 NY2d at 470 (money plaintiff sued for was fruit of **admitted** crime) (emphasis added);[29] *Anonymous v Anonymous*, 293 AD2d 406, 407 (1st Dept 2002) ("an agreement for financial support in exchange for illicit sexual relations is violative of public policy and thus unenforceable"); *Abright v Shapiro*, 214 AD2d 496 (1st Dept 1995) (denying recovery where parties were engaged in scheme in violation of rent stabilization laws and zoning regulations); *United Calendar Mfg. Corp. v Huang*, 94 AD2d 176, 180 (2d Dept 1983) (fee-splitting arrangement was, on its face, violative of state's Education Law); *Braunstein v Jason Tarantella, Inc.*, 87 AD2d 203 (2d Dept 1982) (dismissing claims with respect to distribution of film that was produced in violation of obscenity statutes).

Additionally, in elucidating the requirement that the illegal conduct must be sufficiently severe, the Court of Appeals has held "the violation of a statute that is merely *malum prohibitum* will not necessarily render a contract illegal and unenforceable." *Benjamin v Koeppel*, 85 NY2d 549, 553 (1995). "This is particularly true where there are issues as to whether appellants were attempting to utilize the illegality defense as a 'sword' for personal gain rather than a 'shield' for the public good." *Chirra v Bommareddy*, 22 AD3d 223, 224 (1st Dept 2005), citing *Lloyd Capital Corp. v Pat Henchar, Inc.*, 80 NY2d 124, 127 (1992) ("[w]here contracts which violate statutory provisions are merely *malum prohibitum*, the general rule does not always apply. **If the**

[29] As discussed below, Binday neither admitted nor was convicted for his fraudulent procurement of the instant Policy.

statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy the right to recover will not be denied.") (emphasis added), quoting *John E. Rosasco Creameries v Cohen*, 276 NY 274, 277 (1937) (*Rosasco*); *see also Ader v Guzman*, 135 AD3d 671, 674 (2d Dept 2016); *FCI Group, Inc. v City of New York*, 54 AD3d 171, 177 (1st Dept 2008).

Lloyd Capital's discussion of *Rosasco* is instructive:

> In *Rosasco*, plaintiff milk dealer sought recovery for the reasonable value of milk sold to other dealers, who asserted that plaintiff could not recover because it had violated a statute requiring that milk dealers be licensed. Significantly, the statute imposed criminal penalties but did not specify that contracts made by unlicensed milk dealers were unenforceable. We concluded that since the primary purpose of the statute was to protect producers and the consuming public, not milk dealers such as defendants, and since the wrong committed by the violation of the statute did not endanger health or morals, the contract should be enforced. Since *Rosasco*, we have refused on public policy grounds to enforce agreements entered into in violation of statutes that were enacted to protect public health and safety.

Lloyd Capital, 80 NY2d at 127-28.

The *Lloyd Capital* Court then rejected the defendant's illegality defense, explaining:

> [F]orfeitures by operation of law are disfavored, particularly where a defaulting party seeks to raise illegality as a sword for personal gain rather than a shield for the public good. Allowing parties to avoid their contractual obligation is especially inappropriate where there are regulatory sanctions and statutory penalties in place to redress violations of the law.
>
> Applying these principles to the facts at hand, we conclude that the Appellate Division properly rejected defendants' illegality defense. As in *Rosasco*, **the violation at issue was not *malum in se*, or evil in itself. The violation was *malum prohibitum* due to Federal law, which does not provide for borrowers to interpose illegality as a defense to repayment of their loans**. Therefore, unless public policy dictates otherwise, the contract should be enforced.

See id. at 128 (citations and quotation marks omitted; italicss in original; bold added for emphasis).

In order to evaluate Carolyn's illegality defense, based on the authority cited above, it is necessary to discuss the nature of the alleged illegal conduct – Binday's misrepresentations to the insurance company about the STOLI nature of the Policy. STOLI policies, by definition, defraud the insurance company, not the beneficiary. *See United States v Carpenter*, 2016 WL 3351906, at *1 (D Conn 2016); *see also* December AD Decision, 134 AD3d at 650 (Binday "was convicted ... [for] wire fraud in connection with **a scheme to defraud insurance companies**") (emphasis added). Indeed, as this court and the Appellate Division have noted, Carolyn cannot be considered the victim; she, unquestionably, benefited from the illegal conduct of which she now complains. *See B.D. Estate*, 114 AD3d at 478 ("Since the trust executed the note, it received $4 million after Ellis died, but it will have to give plaintiff approximately half of that amount if the note is enforced. A decision to get $2 million, as opposed to nothing, is not a bargain that only a delusional trustee would make."), *aff'g* 2013 WL 839779, at *4 ("If [plaintiff] ultimately prevails on the merits, Carolyn will still be left with almost $2 million, a large sum of money for which she expended no effort and took no financial risk. Her fortuitous financial situation would not have been possible were it not for [plaintiff's] actions."). Nonetheless, the Appellate Division held that this does not matter. *See* December AD Decision, 134 AD3d at 651 ("Although it appears that Limquee may have benefitted from the scheme, the court should not intervene to enable the wrongdoer to obtain additional fruits of its crime.").

In *United States v Binday*, 804 F3d 558, 565 (2d Cir 2015), the decision affirming the convictions of Binday, Resnick, and Kergil, the Second Circuit provided a detailed explanation

of STOLI polices, the ways in which such policies are used to defraud insurance companies, and the specifics of the scheme that resulted in Binday's conviction:

> Defendants-appellants are insurance brokers who participated in an insurance fraud scheme involving "stranger-oriented life insurance" ("STOLI") policies. A STOLI policy is one obtained by the insured for the purpose of resale to an investor with no insurable interest in the life of the insured—essentially, it is a bet on a stranger's life. Notably, every relevant state's law provides that, after a life insurance policy has been issued, an insured may resell that policy to an investor, who would become the policy's beneficiary and assume payment of the premiums. Thus, with respect to transferability, the difference between non-STOLI and STOLI policies is simply one of timing and certainty; whereas a non-STOLI policy might someday be resold to an investor, a STOLI policy is intended for resale from before its issuance. While life insurers are required by law to permit resale of policies originally obtained for estate planning purposes, they are not obligated to issue policies intended for resale from the outset.
>
> STOLI policies became a popular investment in the mid 2000s for hedge funds and others eager to bet that the value of a policy's death benefits would exceed the value of the required premium payments. In response, many insurance companies—including those that issued the policies relevant here—adopted rules against issuing STOLI policies and took steps to detect them. But insurance brokers such as the defendants—who received commissions from insurers for new policies that they brokered—had a financial incentive to place STOLI policies by disguising them to the insurer as non-STOLI policies. By matching a potential insured with a STOLI investor, a broker could generate a commission on a policy that would not have been issued had the insurer known the policy's true purpose.
>
> In 2006, defendant Michael Binday assembled a network of independent brokers to assist his company, Advocate Brokerage, Inc. ("Advocate Brokerage"), in placing STOLI policies through such deceit. The team included defendant Mark Resnick, who worked as a field agent, and defendant James Kergil, who supervised a group of field agents. Under Binday's direction, field agents recruited older persons of modest means to act as "straw buyers" of the STOLI policies. The straw buyers were enticed to participate by promises of six-figure payments once the policies were sold to third-party investors—promises which defendants in some cases honored and in others did not. Binday explained to the field agents that he sought straw buyers should who were "between 69 and 85 years' old," and "in good enough health to get preferred health or standard health [premium] rates," but who would not live "too long, to the point where the investors ... would be paying the premium too long."
>
> After securing a straw buyer, defendants arranged for the necessary medical tests and submitted the results to multiple insurers for a preliminary assessment of the

"risk class" in which the straw buyer would fall. (It is not alleged that the medical records were falsified.) Defendants also submitted those medical records to companies that used them to prepare reports predicting the straw buyer's life expectancy. Based on those reports and the insurance companies' preliminary assessments, Binday generated "illustrations" for prospective STOLI investors that projected the expected premium payments necessary to fund a given value of policy until the straw buyer's death. The investors could then select from among the different straw buyers and policies, and the defendants would proceed to apply for the policy.

Defendants typically sought policies worth between $3 million and $4 million: large enough to yield a lucrative commission, but, as Kergil explained to one witness, small enough to "stay under the radar" because "anything over three to four million would require excessive documentation such as tax returns, stock reports, bank statements, that type of thing." "[E]xcessive documentation" would be fatal to defendants' scheme, which depended on vastly inflating the straw buyer's wealth without detection. Such inflation would cause the insurer to believe that the straw buyer was capable of paying the substantial premiums (typically more than $100,000 annually) herself—of course, if she was not, that would suggest that payment actually would be made by a third-party investor. After having the straw buyer sign a blank application, defendants supplied false financial information, supported by fraudulent documents prepared by an accountant relative of Binday's and supposedly verified by an independent third-party inspector, who in reality simply "assumed [that the information] was correct."

Along with falsifying the straw insured's financial information, defendants lied in response to the insurers' questions aimed at detecting STOLI policies, including the purpose of the policy, how the premiums would be paid, and whether the applicant had discussed selling the policy. Defendants also lied to the insurers by providing required certifications that, to their knowledge, the policies were not STOLI. For example, each defendant certified to Lincoln Life Insurance Company that the premiums would not be paid by financing from third parties, that there was no agreement to transfer ownership of the policy, and that the policy "does not violate the stated intent and spirit of the Lincoln Policy Regarding Investor Owned Life Insurance."

Over the course of the scheme, defendants submitted at least 92 fraudulent applications, resulting in the issuance of 74 policies with a total face value of over $100 million. These policies generated for defendants a total of roughly $11.7 million in commissions, which ranged from 50-100% of the first year's premium payments and typically surpassed $100,000 on any given policy.

Binday, 804 F3d at 565-67 (citations omitted).

The Second Circuit then explained the wrongdoing for which Binday and Resnick were indicted:

> The indictment alleged that **defendants defrauded insurers by causing them to issue STOLI policies through misrepresentations** regarding: the applicants' financial information; the purpose of procuring the policy and the intent to resell the policy; the fact that the premiums would be financed by third parties; and the existence of other policies or applications for the same applicant. According to the indictment, these misrepresentations "concerned essential elements of the agreements"—both the agreements between the insurers and the straw buyers with respect to the policies, and those between the insurers and Binday "with respect to commissions" received by the defendants—because the representations "significantly informed the [insurers'] financial expectations with respect to universal life policies." Consequently, **deceiving the insurers into issuing STOLI policies, when they believed they were issuing non-STOLI policies, "harmed [the insurers]** in several ways" by "caus[ing] a discrepancy between the benefits reasonably anticipated by the [companies] and the actual benefits received."
>
> Four specific discrepancies or harms to the insurers were alleged in the indictment. First, by inflating the straw insured's financial resources, the defendants caused the insurers to expect greater premium payments than they were likely to actually receive before the applicant's death because it was "a standard assumption" among the insurers that "an individual with a net worth of millions of dollars [will] ... live longer than an individual with minimal net worth." Second, the insurers would receive less income from premium payments than expected, because non-STOLI policyholders for tax reasons often pay in excess of the minimum required premium, whereas STOLI policies "typically would be funded at or near the minimum amount necessary to sustain the policy." Third, insurers "built into their pricing" an assumption that a certain percentage of policies would lapse from nonpayment, but they "could not accurately assess the voluntary termination rate" for STOLI policies, whose holders "typically did not allow policies to lapse," thereby "undermin[ing] [the insurers'] actuarial assumptions." Fourth, STOLI policyholders were more likely to avail themselves of "grace periods and other features that permitted late payment of premiums," reducing the cash flow from premium payments available to the insurers. The indictment also alleged that, to prevent these harms, the insurers "incurred significant additional underwriting, investigation and litigation expenses in attempting to detect and prevent the issuance and maintenance of STOLI policies.

Binday, 804 F3d at 567-68 (citations omitted; emphasis added).[30]

The Second Circuit then explained the defendants' principal defense:

> **Defendants did not dispute that they had submitted applications with misrepresentations in order to generate commissions by inducing the insurers to issue STOLI policies.** Instead, they argued that that conduct was not fraudulent because the insurers in fact happily issued STOLI policies, while paying lip service to weeding out STOLI policies for public relations reasons.

Binday, 804 F3d at 568 (emphasis added). This defense, among other arguments about whether the elements of the charged crimes were proven, was rejected by the jury, the district court, and the Second Circuit.[31]

What is clear, therefore, is that Binday was not convicted merely for procuring STOLI policies. Rather, he was convicted for defrauding the insurance companies into thinking that the policies were not STOLI policies. *See Binday*, 804 F3d at 564 ("The convictions arise from **an insurance fraud scheme** whereby defendants, who were insurance brokers, induced insurers to issue life insurance policies that defendants sold to third-party investors, by **submitting**

---

[30] To the extent this court has previously suggested that the insurance company's payment of the $4 million to the Trust without challenge is evidence of the lack of illegality, the court now repudiates that suggestion. *See, e.g.*, Dkt. 106 at 6. As the Second Circuit noted:

> Some investors agreed to purchase the STOLI policies as soon as they were issued, while others funded the premium payments immediately but did not purchase the policies until the two-year "contestability period" had run, **after which an insurer cannot deny benefits or rescind a policy on the basis of misstatements in the application.**

See Binday, 804 F3d at 566 n.4 (emphasis added). Here, Binday's company purchased the Policy two years after it was issued. *See* Dkt. 74 at 3. Hence, the fact that the insurance company paid on the Policy is not probative of whether the Policy was fraudulently procured.

[31] Plaintiff initially argued that this court should not consider Binday's conviction because he filed a petition for a writ of certiorari in the United States Supreme Court. On June 20, 2016, that petition, along with those filed by his co-defendants, was denied. *See Binday v United States*, 136 SCt 2487 (2016); *see also Resnick v United States*, 136 SCt 2488 (2016); *Kergil v United States*, 136 SCt 2488 (2016).

fraudulent applications indicating that the policies were for the applicants' personal estate planning.") (emphasis added).[32] At the time the Policy was issued, STOLI policies were legal in New York.[33] While the State of Florida has a particularly dim view of STOLI policies (perhaps due to it being a state with a substantial elderly population),[34] reasonable minds can disagree about whether the benefits of STOLI policies outweigh their supposed social costs.[35] Hence, the issuance of a STOLI policy, even in a jurisdiction where doing so is statutorily prohibited, cannot be considered a *malum in se* offense. Rather, the only *malum in se* offense is the defrauding of the insurance companies. Consequently, for Carolyn to prevail on her illegality

[32] The district court (McMahon, J.) also explained that the crime was a scheme to defraud the insurance companies. *See United States v Binday*, 908 FSupp2d 485, 488-89 (SDNY 2012).

[33] "Effective November 19, 2009, the New York Insurance Law ("NYIL") was amended to make STOLI arrangements unlawful." *Berck v Principal Life Ins. Co.*, 40 Misc3d 1207(A), at *2 (Sup Ct, NY County 2013) (Kapnick, J.), citing NYIL § 7815(c); *see also Dukes Bridge LLC v Sec. Life of Denver Ins. Co.*, 2015 WL 3755945, at *5 n.2 (EDNY 2015) ("In New York, it was lawful to buy life insurance for one's self with the intent to transfer it to an entity that had no interest in the insured's life until May 18, 2010"). Prior to NYIL § 7815 going into effect, "in its wisdom, the New York Court of Appeals [] declared that STOLI transactions are legal in New York." *U.S. Bank Nat. Ass'n v PHL Variable Life Ins. Co.*, 112 FSupp3d 122, 139 (SDNY 2015), citing *Kramer v Phoenix Life Ins. Co.*, 15 NY3d 539, 545 (2010) (holding "that New York law permits a person to procure an insurance policy on his or her own life and immediately transfer it to one without an insurable interest in that life, even where the policy was obtained for just such a purpose"); *see also ADB Net Corp. v Columbian Mut. Life Ins. Co.*, 137 AD3d 445, 445 (1st Dept 2016) ("Life insurance proceeds are freely assignable in New York"). That being said, the Court of Appeals in *Kramer* made a point to note that its holding was not based on NYIL § 7815 because the then operative version of that statute did not apply to the policy at issue. *See Kramer*, 15 NY3d at 548 n.5 ("Because these provisions did not go into effect until May 18, 2010, they do not govern this appeal"); *see also PHL Variable Ins. Co. v Price Dawe 2006 Ins. Trust*, 28 A3d 1059, 1075 (Del 2011) (Notably, after *Kramer* the New York legislature revised the state's insurance laws to prohibit STOLI transactions, limiting the precedential value of *Kramer*, even in New York.").

[34] *See Sun Life Assurance Co. of Canada v U.S. Bank Nat'l Ass'n*, 2016 WL 161598, at *13 (SD Fla 2016).

[35] Judge McMahon has particularly strong views on STOLI policies (set forth in *PHL Variable* and the sentencing record, discussed below), which are understandable given her extensive experience presiding over STOLI cases.

defense, she must prove that the Policy at issue in this case was procured by the same type of fraud found in *Binday* – insurance fraud.

As an initial matter, the court agrees with Carolyn that the way in which the Policy was pitched to Ellis by Resnick and later sold to Binday's company tracks Binday's *modus opperandi* as described by the Second Circuit.[36] That much is beyond dispute. However, the solicitation of a STOLI policy, without actually lying to the insurance company, is not a grave moral offense.[37] Insurance fraud, on the other hand, is not only illegal, but patently *malum in se*.[38]

It is undisputed that the Policy at issue in this case was not specifically mentioned in the indictment or at trial. Indeed, the plaintiff in this action, B.D. Estate Planning Corp., was neither indicted nor implicated at trial. It could have been; corporations can be criminally charged in both state and federal court. *See People v John Galt Corp.*, 113 AD3d 537 (1st Dept 2014); *United States v HSBC Bank USA, N.A.*, 2016 WL 2593925, at *1 (EDNY 2016). The Second Circuit saw fit to mention involvement of Binday's brokerage (Advocate Brokerage), but never, in its extensive description of the illegal scheme, was Binday's policy financing company, (B.D.

[36] The Second Circuit also noted: "To disguise the source of the funds used to pay the premiums, the brokers and investors typically held the policies and paid the premiums through trust funds established in the straw buyer's name but funded by the investor. The brokers' friends and family members often served as trustees of the trusts, and received a fee for ensuring that the trust's funds were used to meet the premium payments." *See Binday*, 804 F3d at 566 n.5.

[37] Since the Second Note is governed by New York law, the court is only permitted to rely on New York law (and not the law of Florida, where Ellis and Carolyn resided), when determining the parties' rights under that contract. *See Ministers & Missionaries Ben. Bd. v Snow*, 26 NY3d 466, 474 (2015). As noted, when the Policy was issued in 2007 and Second Note was entered into in 2009, STOLI policies were legal in New York. Hence, New York law is not offended merely by the Policy being a STOLI policy. While Florida law may be different (an issue on which this court will not opine), any differences merely affect *malum prohibitum* offenses. Hence, that the Policy was a STOLI policy, without more, is not a basis to set aside the Second Note on the ground of illegality.

[38] Plaintiff does not argue otherwise. Fraud is a common law tort, suggesting that society does not need a statute to recognize that fraud is a moral wrong and should be illegal.

Estate Planning Corp.) mentioned. The plaintiff in this action, which has never been suggested to be a sham entity, has a corporate veil that makes it distinct from its principal. *See Morris v N.Y. State Dep't of Taxation & Finance*, 82 NY2d 135, 141 (1993). However, the only faithful reading of the December AD Decision is that plaintiff's receipt of the fruits of Binday's crimes can, as a matter of law, justify precluding plaintiff from recovering the Policy proceeds. If that were not the case, the Appellate Division would not have permitted this defense.[39]

With these considerations in mind, the court finds the relevant inquiry on the instant motions to be whether Carolyn has raised a question of fact about the Policy being procured in the illegal manner at issue in the federal criminal case. In other words, the issue is whether Carolyn presented evidence that insurance fraud was committed in procuring the Policy. Based on a review of the extensive record on the instant motions, the court cannot dismiss the possibility that insurance fraud was committed in procuring the Policy. To be sure, Carolyn, who bears the ultimate burden of proof on her affirmative defense and the burden on this motion of raising a question of fact to rebut plaintiff's prima facie showing, did not proffer any definitive evidence that the Policy was *actually* procured by fraud. She, instead, asks the court to infer that the Policy must have been procured by fraud because all of the polices that Binday procured in the federal action were fraudulently procured. While this quantum of proof might eventually fail to persuade the finder of fact, the court must deny plaintiff summary judgment on this defense because there is a genuine question of fact about whether the Policy, like those in the federal criminal action, was procured by fraud.

[39] The implications of this rule, especially if applied to a company with many passive investors that did not participate in any wrongdoing (as opposed to a wholly owned company), are somewhat troubling.

A review of the record in the criminal proceedings makes clear that the government believed Binday was involved in other schemes. Nonetheless, as the government admitted, it chose not to charge Binday except for the 74 STOLI polices mentioned in the Second Circuit's decision. *See, e.g.*, Dkt. 211 at 43 n.18 (July 8, 2014 sentencing report [the Sentencing Report], noting that "Binday was never charged with that separate scheme, and the Government did not present proof of it at trial"); *see also id.* at 7 n.2 ("Although defendants submitted fraudulent applications to other insurers as well, the Government informed defendants before trial that it would limit its proof to this subset"). It is undisputed that the subject Policy was not one of the policies the government relied on at trial and, thus, was not the basis of Binday's conviction. The government acknowledges this on page 40 of the Sentencing Report. *See id.* at 45. There, the government provides three examples of how Binday made money by "reaping" death benefits on STOLI policies. The government notes that "two of these cases **were the subject of evidence admitted at trial**: the case of Hanni Lennard ... [and] Doris Riviere." *See id.* (emphasis added). However, "[a] third case— that of Ellis LimQuee, ... was the subject of civil litigation in which Binday was deposed." *See id.* Hence, the Policy at issue in this case was mentioned in the Sentencing Report, but was not part of the indictment or the basis for Binday's conviction.

The Policy is further discussed on pages 43-44 of the Sentencing Report:

> A third instance in which a defendant reaped death benefit proceeds on a policy fraudulently procured as part of **the charged scheme** involved the $4 million AIG policy on the life of Ellis LimQuee, a Resnick recruit. This was one of three STOLI policies on LimQuee for which Binday had found investors, and **for which he had helped submit false applications to Insurers**. When the investor in the AIG policy could no longer pay premiums, Binday, through a company called B.D. Estate Planning, stepped in to take over control of the policy and the corresponding entitlement to any death benefit paid, at a total cost of approximately $11,000. Shortly thereafter, LimQuee died, and AIG paid out the

> $4 million in death benefit proceeds to a trust that Binday controlled. Binday had invested a mere $50,000 to $60,000 in premiums into the policy when he received this windfall.
>
> To fortify his claim to the LimQuee AIG death benefit proceeds, Binday, through his company, filed a lawsuit [i.e., the instant action] in New York State Supreme Court against Marcy Trachtenberg, Resnick's sister and the "trustee" of the "trust" Binday had helped create to hold the LimQuee AIG proceeds. When LimQuee's widow [i.e., Carolyn] intervened in the lawsuit, Binday feigned ignorance of the fraudulent representations that had been made to procure the policy, and prosecuted the suit by — under oath— accusing the family of fraud.

See Dkt. 211 at 48-49 (emphasis added; citations omitted).[40]

While the government accused Binday of committing insurance fraud in procuring the Policy, it neither charged Binday for that fraud nor presented any proof. All the government did to support its contention that the Policy was procured by Binday's fraud is cite this lawsuit. In the more than five years since this lawsuit was commenced, no direct proof or testimony has been submitting proving the Policy were procured by fraud by Binday. However, Carolyn correctly avers that Binday being charged or convicted for fraudulently procuring the Policy is not a necessary predicate to maintain her illegality defense. Plaintiff does not contend otherwise. Hence, that the Policy was not at issue in the criminal trial is not dispositive. Nonetheless, Carolyn must proffer some evidence that the Policy, as opposed to the other polices at issue in the criminal trial, was actually procured by fraud by Binday.

In addition to the Sentencing Report, Carolyn relies on a chart attached to a July 23, 2014 supplemental declaration of F.B.I. Special Agent Thomas W. McDonald, which was submitted

---

[40] The government also noted that "[i]n addition to [the Policy], Binday secured two $4 million policies on LimQuee's life from Security Mutual and Union Central, respectively. Union Central paid out the death benefit on its policy. The claim for the death benefit proceeds against Security Mutual remains pending." *See* Dkt. 211 at 49 n.24 (emphasis added; citations omitted). Ergo, this case is not the only instance of the Carolyn benefitting from the illegal conduct of which she now complains.

approximately two weeks after the Sentencing Report. *See* Dkt. 213 at 10.[41] That chart includes the Policy, which Special Agent McDonald and the government refer to as one of the "Scheme Policies" from which Binday procured "Scheme Commissions". *See id.* at 7. While the Policy unquestionably appears on the chart, it was never proven that the Policy was actually procured by Binday's fraud. *See Nevco Contracting Inc. v R.P. Brennan Gen. Contractors & Builders, Inc.*, 139 AD3d 515, 516 (1st Dept 2016) ("Although defendant's president submitted an affidavit stating that the owner has not paid defendant because the owner is dissatisfied with plaintiff's work, **his statement is supported only by an unsworn spreadsheet which, as hearsay, is alone insufficient to defeat summary judgment**") (emphasis added), citing *Rugova v Davis*, 112 AD3d 404 (1st Dept 2013) ("Although ... hearsay may be used to defeat summary judgment as long **as it is not the only evidence submitted in opposition** ... plaintiff failed to raise a triable issue of fact, since **she submitted no other admissible evidence** as to the happening of the accident in opposition to defendant's motion for summary judgment") (emphasis added).

Carolyn takes the position that, even though it was not proven that the Policy was actually procured by fraud, it was procured as part of the "charged scheme", and, therefore, Carolyn may use Binday's conviction for this scheme as proof (or to at least raise a question of fact) of the direct connection between the alleged illegality and the Second Note. She point to Judge McMahon's statement that she accepts and adopts the "entirely correct description of the

[41] Special Agent McDonald's original declaration, dated July 8, 2014, was submitted with the Sentencing Report. *See* Dkt. 212.

scheme perpetrated by the defendants as set forth in the government's principal sentencing memorandum". *See* Dkt. 215 (7/30/15 Tr. at 36).[42]

In considering the record in the criminal action, the similarities between how the Policy was procured and sold by a company controlled by Resnick to a company controlled by Binday, and the information in Ellis' life insurance application,[43] the court finds there to be a question of fact about whether the Policy was procured by Binday's fraud. While Carolyn will bear the burden of proof on this defense at trial, where she will have to do more than merely rely on

[42] It should be noted that the $4 million Policy proceeds at issue in the action (but not the commission on the Policy) were omitted from the forfeiture order because Binday has not yet received that money, not because the court found there to be no basis to believe that the Policy was procured by fraud. *See* Dkt. 215 (7/30/15 Tr. at 32-33). This court has no occasion to opine on whether any recovery by plaintiff in this action (whether transmitted to Binday or not) would be subject to forfeiture, and that fact has no bearing on the outcome of this case. Indeed, that such funds might be subject to forfeiture, arguably, cuts against Carolyn, as she, like Binday, seeks the fruits of an alleged crime.

It also should be noted that Judge McMahon, like the Second Circuit, stated that the victims were the insurance companies (i.e., not the beneficiaries, such as Carolyn) and that "[t]hese are fraudulent inducement cases" because the policies "would not have been issued absent the fraud." *See* Dkt. 215 (7/30/15 Tr. at 37). But, as she explained, insurance fraud ought not be viewed as a victimless crime; the public are "the ultimate victims" because "we pay to cover the losses," that is, insurance fraud causes premiums to rise. *See id.* at 43. Moreover, as the court previously explained, even if the issuance of a STOLI policy is legal, that "does not mean that you can commit some other crime" in procuring a STOLI policy. *See id.* at 44. Indeed, the sentencing hearing transcript is a worthwhile read, as Judge McMahon eloquently sets forth the heinous nature of Binday's fraud and why "the guy who steals money while committing fraud and wearing a suit is no better than the guy who steals it, and a whole lot less of it, while wearing a hoodie." *See id.* at 45. Judge McMahon explains that the defendants in the criminal action did not simply lie about the STOLI nature of the policies, but participated a massive fraudulent scheme that involved falsifying documents and destroying evidence. *See id.* at 42. Simply put, Binday's crimes cannot be said to amount to a mere, small illegality. That said, as noted herein, if Carolyn cannot prove that the Policy was fraudulently procured by Binday, she will lose, regardless of the many other illegal policies procured by Binday.

[43] *See* Dkt. 44-18 at 10 (indicating Ellis had a net worth of $4 million). It should be noted that Dkt. "44-18" was e-filed in June 2012, when NYSCEF still permitted documents to be numbered as "document-exhibit number." That is no longer the case.

evidence in the criminal proceedings, if she does prove that the Policy was procured by Binday's fraud, the Judgment issued in plaintiff's favor will be set aside.

Finally, while the Appellate Division permitted Carolyn to assert an *in pari delicto* defense in the alternative, the court, at the summary judgment stage, dismisses such defense as duplicative. The wrongdoing for which plaintiff and the Trust are allegedly in *in pari delicto* is the very wrongdoing which is the subject of Carolyn's illegality defense. Since her *in pari delicto* defense rises and falls with the illegality defense and cannot afford her additional relief, it is unnecessarily duplicative.

III. Conclusion and Resolution of Motions 9 & 14.

In sum, a trial is required on Carolyn's illegality defense. If she prevails, plaintiff will not be permitted to recover on the Second Note because plaintiff cannot recover the fruits of Binday's crimes, regardless of any possible wrongdoing on the part of Carolyn. There is no need to retry the issues decided in the Trial Decision (e.g., interpretation of the Second Note) because they do not overlap with or turn on the illegality defense. Rather, the illegality defense will determine if the contract claim Judgment may stand.

Consequently, DOF will retain the funds in its possession along with the additional funds to be remitted based on the court's contempt finding against Carolyn. The Judgment will not be vacated, but enforcement will be enjoined until after a trial decision is issued. The court will schedule a pre-trial conference after the remaining contempt issues are resolved. Accordingly, it is

ORDERED that Carolyn's motion to vacate the Judgment is denied, Carolyn's cross-motion to extend the stay of enforcement of the Judgment is granted, and plaintiff is hereby

enjoined from taking any action to collect on or enforce the Judgment unless and until the court rules in plaintiff's favor after a trial on the illegality defense, and plaintiff's motion to have DOF release the funds paid into court by Carolyn is denied; and it is further

ORDERED that Carolyn's motion for summary judgment on her three remaining affirmative defenses is denied; plaintiff's motion for summary judgment is granted with respect to the defenses of bribery and corruption and *in pari delicto*, which are hereby dismissed, and denied with respect to the defense of recovery of fruits of crimes (i.e., illegality); and it is further

ORDERED that plaintiff's motion to confirm the Report is granted, and the Report is hereby confirmed in its entirety; and it is further

ORDERED that plaintiff's motion to hold Carolyn in civil contempt for her violation of the April 2013 and December 15 Orders is granted; and it is further

ORDERED that as a sanction for her contempt, Carolyn must pay plaintiff the reasonable attorneys' fees it incurred in connection with the hearing before the Referee and the motion practice to confirm the Report, the calculation of which is referred to a Special Referee to hear and Report; and it is further

ORDERED that within 7 days of the entry of this order on the NYSCEF system, plaintiff shall serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date; and it is further

ORDERED that within 14 days of the entry of this order on the NYSCEF system, Carolyn must (1) pay into the court the sum of $495,230.43, the amount she took from the

Trust's accounts in violation of the April 2013 Order; (2) repay the bank any negative balance on the checking account plus any outstanding fees charged by the bank; and (3) e-file an affidavit of compliance along with proof of compliance; and it is further

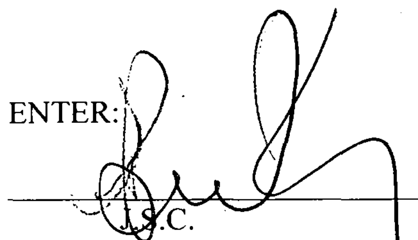
ORDERED that that if the directives in the preceding paragraph are not strictly complied with, plaintiff shall promptly submit a proposed judgment to be entered against Carolyn personally for any amounts not remitted; and it is further

ORDERED that Carolyn's counsel – Adam J. Rader and Steven W. Wolfe of Eaton & VanWinkle LLP – must show cause as to why an order should not be issued holding them in civil contempt of court for violating the April 2013 Order by accepting payment of legal fees from the Trust's bank accounts by e-filing separate affirmations and a joint memorandum of law within 14 days of the entry of this order on the NYSCEF system; plaintiff may e-file a brief in response within 14 days thereafter; hard copies of the parties' submissions shall be delivered to the court room within 2 days of the papers being e-filed; and the parties shall jointly call the court within 10 days after plaintiff's submission (or its submission deadline if plaintiff makes no submission) to schedule a contempt hearing; and it is further

ORDERED that a pre-trial conference will be scheduled after the contempt issues are resolved.

Dated: October 26, 2016

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C