

**Philadelphia Indem. Ins. Co. v Zinn**

2016 NY Slip Op 32276(U)

November 2, 2016

Supreme Court, New York County

Docket Number: 654266/15

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Plaintiff,

-against-

RICKY ZINN, MORRIS ZINN, LSQ FUNDING GROUP L.C.,  
and EPK FINANCIAL CORP. d/b/a KING TRADE CAPITAL,

Defendants,

-and-

LORRIE JOY MARKMAN,

Additional Defendant.  
-----X

BARBARA JAFFE, J.:

**For plaintiff:**

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By notice of motion, the Zinn defendants (defendants) move pursuant to CPLR 3211(a)(1), (3), and (7) for an order dismissing the amended complaint. Plaintiff opposes.

**I. UNDISPUTED FACTS**

By agreement dated June 29, 2015, additional defendant Markman agreed that in exchange for \$107,000, she would release her former employer, nonparty Adorn Fashions, Inc., from all pending and future claims she had against it, and Adorn agreed that within 30 days of its

attorney's receipt of the agreement executed by Markman, it would pay her \$107,000. (NYSCEF 39). Plaintiff, Adorn's liability insurer, agreed to indemnify Adorn for the settlement, and on or about June 30, 2015, sent a check for \$107,000, made payable to Adorn, to the attorney representing Adorn in the Markman matter. (NYSCEF 60). On July 17, 2015, that attorney forwarded the check to Ricky Zinn, then an officer of Adorn, with a written instruction that he deposit the check, use the proceeds to pay Markman, but that once she receives the executed agreement from Markman, she will give him directions as to how to make the payment to Markman. (NYSCEF 55).

On July 22, 2015, defendants deposited the \$107,000 settlement check into Adorn's general operating account, commingling it with other funds. (NYSCEF 56). On or about August 12, 2015, plaintiff received the executed settlement agreement. Adorn became insolvent sometime in August 2015. (NYSCEF 51, 60).

By letter to Adorn's counsel in this case, dated September 25, 2015, plaintiff's attorney set forth his understanding that plaintiff's check had been sent to Adorn to be held in trust to fund the settlement, but was deposited into an Adorn account, and that Adorn thereafter, on September 3, 2015, forwarded checks to defense counsel but would not authorize payment to Markman. Rather, counsel continued to hold the checks pending "sufficient assets to cover them." Plaintiff's attorney thus advised that it was seeking to reopen the case and vacate the settlement. (NYSCEF 65)

By letter dated September 29, 2015, addressed to counsel for defendant LSQ Funding Group LC, Adorn's attorney acknowledged that LSQ and EPK Financial Corp., among others, were secured creditors of Adorn with security interests in Adorn's current and thereafter obtained

receivables, cash, and deposits, as evidenced by UCC-1 financing statements filed in 2005 and 2006. He also advised that Adorn had received numerous demands from other creditors to satisfy its debts. (NYSCEF 41-42).

In October 2015, LSQ and EPK each noticed Adorn that they would dispose of its collateral later that month. (NYSCEF 43). On October 29, 2015, Adorn's attorney unsuccessfully sought LSQ's consent to release the \$107,000 settlement proceeds to Markman. (NYSCEF 44).

By letter to plaintiff dated November 3, 2015, Markman's attorney complained that although she had forwarded the required original executed agreement to Adorn on August 12, Adorn had not released the funds to Markman, even though the settlement agreement required that Adorn pay Markman within 30 days of receipt of the original agreement. Having subsequently learned that the proceeds had been given directly to Adorn by plaintiff, she demanded payment to her firm and Markman by November 13, or Markman would commence a declaratory judgment action against plaintiff. (NYSCEF 64).

On December 18, 2015, plaintiff commenced this action against Adorn and its principals, the Zinn defendants. (NYSCEF 1). On January 18, 2016, Adorn filed for chapter seven relief and this action was discontinued as against it. (NYSCEF 34, 49). On February 4, plaintiff filed an amended complaint, naming LSQ and EPK as defendants, asserting causes of action for conversion, breach of fiduciary duty, unjust enrichment, and for an injunction to prevent the disposition of the funds. In support of its claim for conversion, plaintiff alleges that it "may be exposed to additional claims and damages through its contractual obligation to defend and indemnify Adorn." (NYSCEF 38).

By email dated March 10, 2016, EPK unsuccessfully sought plaintiff's discontinuance of the action as against it, claiming that absent any evidence that it took or received funds from Adorn, there was no valid claim against it. (NYSCEF 68). LSQ also denied being paid. (NYSCEF 67).

## II. DISCUSSION

Pursuant to CPLR 3211(a)(3), a party may move to dismiss a cause of action based on the plaintiff's lack of standing. It is the defendant's burden to establish, *prima facie*, the plaintiff's lack of standing as a matter of law. (*US Bank NA v Guy*, 125 AD3d 845, 847 [2d Dept 2015]). If the defendant satisfies its burden, the plaintiff may defeat the motion if it raises a question of fact regarding its standing. (*New York Community Bank v McClendon*, 138 AD3d 805, 806 [2d Dept 2016]).

“Whether a person seeking relief from a court is a proper party to request an adjudication is an aspect of justiciability which must be considered at the outset of any litigation.” (*Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 318 [1<sup>st</sup> Dept 2011], *lv denied* 17 NY3d 717, citing *Matter of Dairylea Cooperative, Inc. v Walkley*, 38 NY2d 6, 9 [1975] [internal quotation marks omitted]). Generally, one has standing to advance claims on behalf of himself, but not on behalf of others. (*Cardo v Bd. of Mgrs., Jefferson Vil. Condo 3*, 67 AD3d 945, 946 [2d Dept 2009]; *Caprer v Nussbaum*, 36 AD3d 176, 182 [2d Dept 2006]). One has standing to sue in a given dispute by demonstrating “an injury in fact that falls within the relevant zone of interests sought to be protected by law.” (*Vil. of Elmsford v Knollwood Country Club, Inc.*, 60 AD3d 934, 934 [2d Dept 2009]; *Matter of Sheldon v Vermonty*, 36 AD3d 619, 620 [2d Dept 2007]).

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a

cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Leon*, 84 NY2d at 87-88; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1<sup>st</sup> Dept 2013]).

### A. Conversion

#### 1. Contentions

In support of their motion, defendants argue that once plaintiff sent the check to Adorn's attorney, it relinquished ownership and possession of the funds, and that the right to possess them then vested in Markman. Thus, they claim that plaintiff lacks standing to bring a cause of action for conversion, and maintain that once Adorn deposited the check into its general operating account, the funds ceased to be identifiable and could not be converted. They moreover assert that as they lawfully obtained the funds pursuant to the settlement agreement, and absent plaintiff's explanation of how or when it sought release of the funds to Markman, plaintiff fails to advance a cause of action for conversion, that the claim for damages is speculative absent any claim asserted by Markman against plaintiff, and that in any event, Markman has no legal ground for bringing a claim against plaintiff. (NYSCEF 51, 58).

In opposition, plaintiff observes that nothing in the agreement provides that a right to the funds exclusively vests in Markman upon receipt of the executed agreement, and thus it did not relinquish its possessory interest in the funds as they were never turned over to Markman, which

was the alleged purpose for sending it to Adorn. Plaintiff alleges that it repeatedly but unsuccessfully demanded that Adorn release or return the settlement funds, and that defendants “interfered with Markman’s right” to the funds. Moreover, as the funds constitute a sum certain, earmarked for a particular purpose, it contends, their commingling is immaterial, and it denies that its damages are speculative. (NYSCEF 60).

In reply, defendants assert that plaintiff improperly conflates its claim to ownership of the funds with Markman’s, and absent an affirmative obligation to keep the funds segregated, their commingling rendered them indiscernible from Adorn’s general operating funds. They reiterate their previous contentions. (NYSCEF 70).

## 2. Analysis

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession.” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). To establish a claim for conversion, the plaintiff must demonstrate his or her possessory interest in the property, and defendant’s dominion over or interference with it in derogation of the plaintiff’s rights. (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012]; *Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 885 [1<sup>st</sup> Dept 2009], *lv dismissed* 14 NY3d 785 [2010]). A cause of action may be advanced based on the conversion of money “where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question.” (*Thys v Fortis Sec. LLC*, 74 AD3d 546, 547 [1<sup>st</sup> Dept 2010]; *Mfrs. Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124 [1<sup>st</sup> Dept 1990], *lv denied* 77 NY2d 803 [1991]).

In *B & C Realty, Co. v 159 Emmut Properties LLC*, the parties had agreed to the sale and

transfer of real property, whereby the plaintiff paid \$2 million in exchange for a seven percent interest in the property, and upon closing, would pay for and receive the remaining balance. After discovering that the defendants had misrepresented the property, the plaintiff attempted to rescind the sale and recover its initial payment. (106 AD3d 653, 654-655 [1<sup>st</sup> Dept 2013]). The Appellate Division granted the defendants' motion to dismiss the plaintiff's cause of action for conversion, reasoning that, having alleged that it had agreed to transfer the funds for a share in the property, the plaintiff thereby conceded that the defendants' possession of the funds was authorized, and thus, could not assert that the defendants interfered with its ownership of the funds. (*Id.* at 656).

Here, as plaintiff does not submit the indemnity agreement with Adorn, it may only be found that sending the check to Adorn's attorney constituted the performance of its obligation to Adorn. Thus, defendants establish that their possession of the funds was authorized. To the extent that plaintiff alleges that Adorn acted inappropriately in failing to pay Markman, as Adorn was instructed by its lawyer to deposit the funds and await further instruction from her before paying Markman, Adorn's conduct is not contrary to plaintiff's interests absent any indication that plaintiff retained a right to possess the funds. (*Cf. Thys*, 74 AD3d at 546 [funds allegedly converted constituted employment bonus due plaintiff]; *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 385 [1<sup>st</sup> Dept 1992] [funds allegedly converted were proceeds of lawsuit, and were assigned to plaintiff]).

Moreover, to the extent that the settlement agreement imposed any obligations, plaintiff may not enforce an agreement for which it was not an intended beneficiary. (*See generally Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006] [absent allegation of valid

contract between other parties, that contract was intended to benefit plaintiff, and that benefit was more than incidental, no standing to assert rights as third-party beneficiary)).

Accordingly, plaintiff has no cognizable claim of conversion, and thus I need not address defendants' remaining contentions.

## B. Breach of fiduciary duty

### 1. Contentions

Defendants contend that plaintiff also lacks standing to assert a claim for a breach of fiduciary duty, as they owed plaintiff no duty to protect Adorn's assets in insolvency because plaintiff was not a creditor, and that in any event, they owed a duty first and foremost to Adorn's secured creditors, who had perfected security interests in the funds. (NYSCEF 58).

Plaintiff asserts that as an unsecured creditor of Adorn, defendants owed it a fiduciary duty to protect its assets in insolvency, and that defendants breached their duty by refusing to release the funds to Markman. It also observes that as LSQ and EPK deny that they had access to Adorn's accounts upon its defaults or otherwise recovered the subject funds, a question of fact is presented as to whether LSQ and EPK ever recovered the funds. (NYSCEF 60).

In reply, defendants clarify that while LSQ and EPK did not take the funds in issue, they nonetheless had liens on Adorn's cash collateral, including the commingled \$107,000, and thus Adorn would not and could not use the funds for its own benefit without harming its secured creditors. In any event, they contend, Adorn's secured creditors had priority over the collateral notwithstanding its fiduciary duties to all creditors. (NYSCEF 70).

### 2. Analysis

The elements of a cause of action for a breach of fiduciary duty are "the existence of a

fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct." (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1<sup>st</sup> Dept 2014]; *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]). The officers and directors of an insolvent corporation may, in certain circumstances, owe a fiduciary duty to their creditors "to hold the remaining corporate assets in trust for [their] benefit . . . ." (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 549 [2000]; *MRI Enter., Inc. v Hausknecht*, 142 AD3d 1078, 2016 NY Slip Op 06081, \*2 [2d Dept 2016]). Officers and directors owe no duty, however, to creditors "having no cognizable interest in the debtor's property." (*Credit Agricole Indosuez, supra* at 550; *Aldoro, Inc. v Gold Force Intl. Ltd.*, 52 AD3d 223, 224 [1<sup>st</sup> Dept 2008]).

Here, defendants establish, *prima facie*, that plaintiff had no cognizable interest in Adorn's assets which would give rise to a duty to safeguard the settlement funds upon Adorn's insolvency, and that even if it did, they establish that LSQ and EPK held superior, perfected security interests in the funds. (*See* UCC § 9-322[a][1] ["Conflicting perfected security interests . . . rank according to the priority of filing or perfection."]). Even assuming plaintiff's status as an unsecured contract creditor, having failed to produce the pertinent policy or contract, it offers no factual basis for finding that it retained an interest in the proceeds it released to Adorn, or any other basis for imposing on Adorn or its principals a duty to protect the funds. (*See Batas v Prudential Ins. Co. of Am.*, 281 AD2d 260, 264 [1<sup>st</sup> Dept 2001] [no special relationship of trust or confidence arises from insurance contract between insured and insurer; relationship is legal not equitable]; *see also Trustees of Princeton Univ. v Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 15 Misc 3d 1118[A], 2007 NY Slip Op 50753[U], \*7 [Sup Ct, New York County 2007], *affd* 52 AD3d 247 [1<sup>st</sup> Dept 2008], *lv dismissed* 11 NY3d 847 [same]).

Thus, plaintiff either lacks standing as a noncreditor outside the zone of interests to be protected, or fails to state a cause of action given the absence of a duty owed.

### III. CONCLUSION

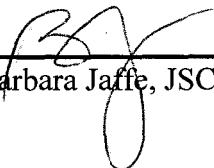
Accordingly, it is hereby

ORDERED, that the Zinn defendants' motion to dismiss plaintiff's causes of action sounding in conversion and a breach of fiduciary duty is granted (first and third causes of action in the amended complaint), and those causes of action are dismissed as against them; it is further

ORDERED, that the caption be amended to reflect the dismissal as against the Zinn defendants and that all future papers filed with the court bear the amended caption; and it is further

ORDERED, that the remaining causes of action are severed and shall continue as against the remaining defendants.

ENTER:

  
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Barbara Jaffe, JSC

DATED: November 2, 2016  
New York, New York