

<b>Bongiorno v DiFrisco</b>
2019 NY Slip Op 33089(U)
September 24, 2019
Supreme Court, Suffolk County
Docket Number: 016895-2015
Judge: John H. Rouse
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 12 - SUFFOLK COUNTY

**PRESENT:**

Hon. John H. Rouse  
Acting Supreme Court Justice

MOTION DATE: 05/22/2019  
ADJ. DATE:  
Mot. Seq. 006-MD  
CASEDISP

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SAM A. BONGIORNO,

Plaintiff

-against-

JO ANNE DI FRISCO,

Defendant

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**DECISION & ORDER**

**TO:**

WEINSTEIN, KAPLAN & COHEN, PC  
ATTORNEY FOR PLAINTIFF  
1325 FRANKLIN AVENUE, STE 210  
GARDEN CITY, NY 11530  
516-877-2525

POLIN, PRISCO & VILLAFANE  
ATTORNEY FOR DEFENDANT  
400 POST AVENUE, STE 209  
WESTBURY, NY 11590

DIVINS & DIVINS, PC  
ATTORNEY FOR NON-PARTY VICTOR DIFRISCO  
600 OLD COUNTRY ROAD, STE 300  
GARDEN CITY, NY 11530

Upon the reading and filing of the following papers in this matter: (1) Plaintiff's Motion made by Order to Show Cause granted on April 24, 2019, to reargue prior motion by Plaintiff to hold Victor DiFrisco in contempt of a subpoena served upon him for the purpose of conducting a non-party deposition with Exhibits 1-32 attached thereto; (2) Affidavit in Opposition by Defendant, Jo Anne DiFrisco dated May 20, 2019, Affirmation of Armand J. Prisco, Esq. affirmed on May 20, 2019 with Exhibits A-R attached thereto; (3) Affidavit of Victor DiFrisco sworn on May 22, 2019 with Exhibits A and B attached thereto; (4) Memorandum of Law in Response to June 26, 2019 Order of the Court; and (5) all of the papers filed in this proceeding to date as have been reviewed by the court upon this motion; it is

**ORDERED** that the motion (Seq. #006) by Plaintiff for permission to renew and reargue his motion to have Victor DiFrisco held in contempt is denied; and it is further

**ORDERED** that Plaintiff's action is dismissed with prejudice; and it is further

**ORDERED** that Defendant shall promptly serve a copy of this decision and order with notice of entry upon Plaintiff.

#### **SUMMARY**

By decision dated June 26, 2019 this court ordered Plaintiff to show cause why this action should not be dismissed under the doctrine of *in pari delicto*. The gravamen of the Court's concern arises in this action from the following facts:

Plaintiff, an accountant, initially alleged in this action that he had loaned money to Defendant Jo Anne DiFrisco. However, when this fact was disputed, Plaintiff later asserted that in truth he had loaned cash to Victor DiFrisco and took a note and security interest in a home that he knew had been fraudulently transferred to Jo Anne DiFrisco for little or no consideration. Plaintiff states he knew the purpose of the fraudulent conveyance was to evade the creditors of Victor DiFrisco who had been convicted in the Eastern District of New York and incarcerated for his role in a boiler room scheme to defraud investors.

The Court directed Plaintiff to file with the Court such affidavits, affirmations and memoranda of law to explain: Why an action brought by the Plaintiff, an accountant, should be permitted to continue to utilize the resources of this court and ultimately a jury to determine whether cash payments he now alleges he made to Victor DiFrisco are enforceable as a debt of JoAnn DiFrisco who holds title to certain real property through a fraudulent conveyance which the Plaintiff knew was fraudulent.

#### **PROCEDURAL BACKGROUND**

On September 25, 2015 Plaintiff commenced this action on a promissory note in 2015 against Defendant Jo Anne Di Frisco. On March 9, 2016 Plaintiff moved for summary judgment (Seq. 001) upon an alleged default in repayment of a promissory note. In opposition to this motion the Defendant, Joanne DiFrisco, alleged that Plaintiff was her accountant and that the note was executed upon her understanding that in return for the promissory note Plaintiff was making payments on a preexisting note and mortgage at a higher rate and that this was to her advantage because Plaintiff-accountant's note was at a lower rate, but that Plaintiff never made any such payments and she had been under the belief that under these circumstances the note and mortgage were to have been destroyed. Plaintiff in reply alleged that Joanne DiFrisco's contentions were complete fabrications and that:

*"Quite simply, the \$75,000.00 indebtedness was incurred not by my paying any monies to Defendant's pre-existing mortgage bank but by my depositing personal*

*funds into Defendant's personal bank account by the 15<sup>th</sup> of each month so that she could make the payments on her pre-existing mortgage."*

*Affidavit in "Opposition" of Plaintiff sworn to on March 23, 2016 and filed with this court on March 30, 2019*

The Court denied the Plaintiff's motion for summary judgment but with leave to renew upon submission of additional proof demonstrating that the principal of the loan was paid to the defendant as alleged in his reply. *Decision and Order of this Court dated April 21, 2016.*

On July 29, 2016 a related foreclosure action was commenced. *Deutsche Bank National Trust Company as Trustee for Ameriquest Mortgage Securities, Inc., Asset-backed Pass-through Certificates, Series 2003-5 v. Joanne DiFrisco, Bank Of America, N.A., Sam A. Bongiorno.* This related action has been transferred to this court by Administrative Order 54-19.

On August 23, 2016 Plaintiff filed a motion to renew/reargue (Seq. 003) his prior motion for summary judgment. In support of the motion to reargue/renew Plaintiff submitted correspondence consisting of: an unauthenticated e-mail that was inadmissible as one part of some settlement negotiation between Plaintiff and counsel for Defendant, *see Exhibit D to Plaintiff's Motion to Reargue*; copies of text messages between Defendant's brother, Victor DiFrisco, and Plaintiff with no facts alleged that Victor DiFrisco had speaking authority for Joanne DiFrisco and were similarly comprised of settlement negotiations. *See Exhibit E to Plaintiff's Motion to Reargue.* Plaintiff offered no proof of the deposits he described to the court in his reply affidavit of March 23, 2016. Further, on this motion to renew/reargue Plaintiff in his Reply Affidavit sworn on October 12, 2016 again alleged:

*"The fact is that I loaned the Defendant \$75,000.00 by making monthly payments to her totaling said sum in order to allow the Defendant to pay her monthly mortgage obligations."*

On December 21, 2016 Defendant moved for summary judgment but failed to resolve questions of fact, as had the Plaintiff. Plaintiff, in his Affidavit in Opposition, sworn on December 16, 2016 told the court:

*"I am certain that in the course of discovery, depositions and demands for Plaintiffs [sic] banking records, it will be documented that the monies were paid and deposited in Defendant's banking account."*

and further

*"There is no doubt in my mind that when Defendant produces her banking records for the time period in question (2008-2010) my withdrawals and her deposits will be synced up leaving one only to conclude that the deposits (totaling approximately \$75,000.00)*

*were, in fact, the monies loaned and secured by the promissory note.”*

and further

*“What actually happened here is relatively simple, an example of how ‘no good deed goes unpunished.’ The Defendant Jo Anne DiFisco and her family were friends as well as clients. I served for many years as their family accountant. The rental property owned by the Defendant located at 750 Shore Walk, Lindenhurst, NY was a rental property occupied by the Defendant’s brother, Victor Di Frisco and his wife, as tenants. When her brother could not pay the rent, Defendant’s mortgages on the said rental property were in default. In order to avoid losing the property on a possible foreclosure action, **Defendant prevailed upon me to help her out** which, I agreed to do (to my detriment).”*

This Court denied Defendant’s motion by the decision of the Court on January 5, 2017 as there remained questions of fact. On March 15, 2017 a preliminary conference was held and the parties stipulated that all discovery would be completed by January 1, 2018. This stipulation was submitted to the court and so ordered.

On May 10, 2017 Plaintiff filed a consent to change attorneys bringing present counsel into the case for the first time. Compliance conferences were scheduled for August 2, 2017; October 18, 2017; and February 21, 2018. On April 5, 2018 Defendant filed a consent to change attorneys. Additional compliance conferences were scheduled for June 6, 2018; August 8, 2018; September 19, 2018; December 5, 2018; and January 30, 2019. This Court does *not* require *any* pre-motion conferences prior to filing discovery motions. Counsel are encouraged to proceed collegially and to immediately move for any relief required where there is a dispute or failure to provide discovery requiring court intervention.

On February 20, 2019 Plaintiff, by motion (Seq. 005) made by Order to Show Cause, demanded that nonparty Victor DiFrisco show cause why he should not be held in contempt for his failure to appear at nonparty deposition upon the subpoena of Plaintiff’s counsel. In support of this motion Plaintiff supplied proof of service of the subpoena, but the form affidavit of service while providing a check box that the requisite witness fee had been tendered did *not* aver that the required witness fee had been tendered. The box was not checked. In opposition to this motion Victor DiFrisco, in addition to engaging in arguments about the merits of the Plaintiff’s case, swore that the required witness fee was never tendered.

It was upon this contempt motion (Seq. 005) as made: three and one-half years after the action had been commenced; after Plaintiff made two motions for summary judgment; after Plaintiff opposed the Defendant’s motion for summary judgment; and more than one year after the parties had agreed discovery was to be concluded; that Plaintiff, for the first time, disclosed to this court

facts which he claimed to have known from the outset. ***Plaintiff now claimed for the first time that he had actually loaned money, in cash, to Victor DiFrisco.***

Plaintiff, for the first time, alleged that he had secured this cash loan to Victor DiFrisco by a note and mortgage on property that Victor DiFrisco had transferred first to one sister, Ann Razzano, who then conveyed it to another sister, Defendant Jo Anne DiFrisco. Plaintiff now advised the court that Victor DiFrisco had been convicted in federal court and had been sentenced to prison.<sup>1</sup> Plaintiff, the accountant for Victor DiFrisco and JoAnne DiFrisco, now alleged the property transfer was made from Victor DiFrisco with little or no consideration paid to Victor DiFrisco for the sale of his residence “so that *[Victor DiFrisco's residence]* would not be sold as restitution for the victim's of Victor's crimes and so that Victor's family did not become homeless....”

The Court by Decision and Order dated March 18, 2019 denied the Plaintiff's motion to hold Victor DiFrisco in contempt of court, and directed the Clerk to serve a 90 Day Demand that Plaintiff complete discovery and file a note of issue within 90 days as provided by CPLR § 3216. The Court further restricted discovery by the parties to the parties themselves, as a foray into nonparty accounts and records as now proposed more than three and one-half years after this action was commenced and more than a year after the end date for discovery, as stipulated by the parties and ordered by the court, would do little to illuminate the issue of whether Plaintiff handed cash to Victor DiFrisco in a case where Plaintiff had already told the court it was Plaintiff that had deposited loan disbursements directly into the Defendant JoAnne DiFrisco's bank account. *See e.g. Red Apple Supermarkets, Inc. v. Malone & Hyde, Inc., 251 A.D.2d 78(1st Dept. 1998) it is within the court's discretion to restrict continued discovery for failure to request discovery from nonparties before the end date of discovery.*

The Court held a compliance conference on April 10, 2019, and Plaintiff, by counsel, advised the Court he would make a motion to renew and reargue. This motion was filed on April 25, 2019 and returnable May 24, 2019. The Court upon reviewing this motion notes the stark contrast in facts alleged at the beginning of the case as compared those made now before the court. Upon this motion to reargue Plaintiff told the court:

*"Victor agreed to give me a mortgage against his house, which made sense at the time as the house was valued at around \$700,000.00 and he only owed around \$300,000.00 on the existing mortgages. As his house was in Jo Anne's name, he spoke with Jo Anne and Jo Anne had her attorney draft up the Mortgage and the Note."*

*Plaintiff's Affidavit sworn to on April 23, 2019.*

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<sup>1</sup>See *USA v. Tacher, et al. CR-99-0697, United States District Court in the Eastern District of New York, where Victor DiFrisco was convicted and ordered on July 26, 2002 to pay \$308,395.00 in restitution.*

At the outset of this case Plaintiff alleged he lent money directly to Jo Anne DiFrisco, that he made monthly payments to Jo Anne DiFrisco, that Plaintiff had deposited money into Jo Anne DiFrisco's account, and Plaintiff referred to Victor DiFrisco as a mere tenant in Jo Anne DiFrisco's home. *See supra*.

Upon Plaintiff's motion (Seq. 006) to renew and reargue his prior motion (Seq. 005) to hold Victor DiFrisco in contempt and to further argue that Plaintiff has the right to embark upon substantial discovery as described in the Affirmation in Support by Plaintiff's counsel at page 24, paragraphs 26(a)-(f) the court adjourned this motion and requested Plaintiff present such affirmation, affidavits and memoranda of law as would demonstrate why this court should not dismiss this action under the doctrine of *in pari delicto*.

The doctrine of *in pari delicto* mandates that courts will not intercede to resolve a dispute between two wrongdoers. *See Kirschner v. KPMG LLP, 15 N.Y.3d 446 (2010)*. Here the Plaintiff, an accountant, alleges he made cash payments to one party, took a note and mortgage interest in property he knew had been fraudulently conveyed to a second party for the purpose of defrauding the other creditors of the first party, and then brought this action against the second party while falsely swearing before this court that he had made loan disbursements directly into to the second party's bank account.

Plaintiff's self-described actions were not done with ignorance or by mistake but by design. Plaintiff alleges now that he and Victor DiFrisco agreed to this plan to further effectuate the purposes of the earlier fraudulent transfer of real property from Victor DiFrisco to his sister, the Defendant, to hide Victor DiFrisco's assets from creditors who were the victims of Victor DiFrisco's crimes.

#### **Plaintiff's Memorandum**

Plaintiff has submitted a memorandum of law in which he argues that he did nothing wrong when he: commenced this action against JoAnne DiFrisco; did not name Victor DiFrisco as a defendant; and only now alleges he actually made cash payments to Victor DiFrisco, took a note and mortgage from JoAnn DiFrisco that was secured by real property Plaintiff knew had been fraudulently conveyed to avoid other legitimate creditors.

Plaintiff is not a naif in financial matters but rather an experienced accountant. It was wrong for Plaintiff come before the court upon a charade that money had been paid to the named Defendant when in fact Plaintiff withheld from the court his true contention that the money was paid to another, in cash, and secured with real property Plaintiff knew had been fraudulently transferred to the named Defendant.

This is not a case in which the Court harbors a suspicion or only surmises that there has been misconduct by a party before the court. It has been laid bare by the Plaintiff himself. Plaintiff became complicit in the scheme to defraud Victor DiFrisco's creditors when he took a security interest in property Plaintiff tells the court he knew had been fraudulently conveyed. This was

further compounded when Plaintiff brought an action in this court to recover on the note that was secured by the fraudulent conveyance. Plaintiff withheld these material facts from the court for years and compounded this by making false allegations of fact before the court on his original motions for summary judgment and against the Defendant's motion for summary judgment. *See supra*. Plaintiff practiced a deceit upon this court and wasted its time and resources. If this action were to proceed it would result in the further waste of time and resources of a jury and a trial judge as each would be impressed into the service of untangling Plaintiff's web of contradictory allegations of fact. Plaintiff, an experienced accountant, could have avoided such difficulties by eschewing large cash transactions entirely and by hewing closely to the truth in his dealings with the court.

Plaintiff was personally aware of the facts he belatedly alleges now to advance his case. Plaintiff's earlier contradictory allegations of fact were not based upon information and belief and cannot be excused. Plaintiff made the original assertions to this court expressly upon his own personal knowledge. Plaintiff's action in this case combined with the origin of this dispute: a loan allegedly made by Plaintiff-accountant, made in cash to a convicted felon for the purposes of evading the felon's lawful creditors, and securing this loan with the felon's fraudulently conveyed property mandates dismissal of the action. The court will not be called upon to resolve disputes among wrongdoers. Accordingly, this action is dismissed.

The foregoing shall constitute the decision and order of the court.

Dated: September 24, 2019



JOHN H. ROUSE, Acting J.S.C.

FINAL DISPOSITION