

<b>Airmont Assoc., LLC v Mueller</b>
2021 NY Slip Op 32299(U)
October 21, 2021
Supreme Court, New York County
Docket Number: Index No. 654858/2017
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 57

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AIRMONT ASSOCIATES, LLC,	INDEX NO. <u>654858/2017</u>
Plaintiff,	MOTION DATE <u>01/17/2019</u>
- v -	MOTION SEQ. NO. <u>001</u>
MARC MUELLER AS ADMINISTRATOR OF THE ESTATE OF THERESA GUSS, THE CITY OF NEW YORK, MONACO & MONACO, LLP, LAW BUCKS, LLC,	<b>DECISION + ORDER ON MOTION</b>
Defendant.	
-----X	

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is

Plaintiff Airmont Associates, LLC (hereinafter "Plaintiff"), moves for an Order pursuant to CPLR §3213, granting Plaintiff summary judgment in lieu of complaint against Defendant Theresa Guss ("Ms. Guss")<sup>1</sup> for \$1,000,000 allegedly due under a Contingent Proceeds Purchase Agreement; and for an Order directing Defendant City of New York and/or Defendant Monaco & Monaco, LLP, to make payment to Plaintiff from certain settlement proceeds in the amount of \$1,000,000. Plaintiff contends that Ms. Guss has breached the Contingent Proceeds Purchase Agreement by refusing to pay Airmont \$1,000,000 upon settlement of her claim as assignee of all rights, title, and interest under the agreement, and/or by failing to direct Monaco and/or the City to make payment to Airmont.

<sup>1</sup> Ms. Guss passed away on January 18, 2018 and Marc Mueller as Administrator of the Estate of Theresa Guss, has been substituted as defendant for Ms. Guss.

Defendants Theresa Guss and Monaco & Monaco, LLP (collectively “Defendants”) cross move pursuant to CPLR §602 to consolidate for a joint trial and pursuant to CPLR §§510 and 602 to change venue to the Supreme Court Kings County where a lien action is already pending.

### **Background**

The Attorney General has raised concerns that companies that specialize in providing cash advances - generally \$1,000 to \$7,000 - to consumers with pending personal injury litigation could exploit consumers due to the complex nature of the transaction (*see* [ag.ny.gov/press-release/2005](http://ag.ny.gov/press-release/2005), “Personal Injury Cash Advance Firms Agree To Reforms”). In exchange for the funds, these companies obtain the right to receive a share of the claim proceeds, an amount that significantly exceeds the advance. The Attorney General and these personal injury cash advance firms have agreed to specific requirements that must be present in all documents to protect consumers (*see also* NYSCEF Doc. No. 32).

### **Factual Allegations**

On November 5, 2005 Ms. Guss was seriously injured when she stepped in a large, rectangular, deep hole while exiting a taxicab in front of 116 and 118 Ainslie Street, Brooklyn. New York City Department of Environmental Protection had excavated in the area approximately six weeks prior to Ms. Guss’s injury. Ms. Guss sustained a fractured hip as a result of the fall. The case was tried before a Kings County Jury, and on June 11, 2013, a jury verdict was rendered in favor of Ms. Guss and against the City of New York in the amount of \$2,798,500.00, of which \$2,025,600.00 was for future medical costs. Due to her poor health, Ms. Guss was unable to testify or appear at the trial. On February 1, 2017, liability was upheld on appeal to the Second Department, but future medical costs were reduced to \$681,600.00. On

March 15, 2017, Ms. Guss and the City of New York orally settled the case for \$2,100,000.00 with a reduction of the Medicaid lien to \$137,426.00.

On or about February 19, 2017, PIF Portfolio Acquisition I, LLC d/b/a MFL CaseFunding (herein “CaseFunding”) contacted Defendants’ counsel claiming a lien in the amount of \$2,838,487.65 for two loans of \$1500.00 and \$2500.00 allegedly made on February 3, 2006 and February 21, 2006. Ms. Guss was represented by another attorney at that time. On May 18, 2017, Defendants’ counsel was notified by CaseFunding that it was assigning any rights it had to the nominal defendant, Airmont. Ms. Guss became bedridden in 2012 and resided in a nursing home until entering hospice and passing away on January 18, 2018.

#### Bruno De Vinck Affidavit

Plaintiff submits the affidavit of Bruno De Vinck, manager of Airmont Associates, LLC. (NYSCEF Doc. No. 3). Mr. De Vinck states that his “knowledge of the facts set forth in this Affidavit [are] based upon [his] review of the exhibits affixed to this Affidavit and publicly available information.” (*id.*). Mr. De Vinck does not provide any evidence relating to the existence of the original Contingent Proceeds Purchase Agreement, nor does he have any firsthand knowledge surrounding the alleged signing of the agreement.

#### Contingent Proceeds Purchase Agreement

The Contingent Proceeds Purchase Agreement (the “Contingent Agreement”) sets forth in the first paragraph that it is “entered into 2/21/2006”, and it was executed by Ms. Guss on February 22, 2006 before a Notary Public. (NYSCEF Doc. No. 7). As submitted by Plaintiff, the document is barely legible and some text appears to be missing altogether. The summary indicates that there were two sums that were provided to Ms. Guss: \$1,750 provided on February 3, 2006; and \$2,750 provided on February 21, 2006 (*id.*). Plaintiff is only seeking relief as to the

second funding in the amount of \$2,750. With regard to the second funding, the summary sets forth that the monthly rate is 4.99%, the annualized rate is 79.38%, the purchase price was \$2,750, and the net amount to Ms. Guss was \$2,500. (*id.*).

Specifically, the Contingent Agreement states,

Purchaser shall pay the sum of \$2750.00 (hereinafter referred to as the "Purchase Price") to Seller, without recourse or other obligation of Seller to repay it except as expressly set forth herein. This is a second advance of which incorporates the previous advance of \$1750.00 pursuant to the Contingent Proceeds Agreement dated February 3, 2017 by reference (see Exhibit A).

(*id.*). However, the document does not indicate what the previous Contingent Proceeds Agreement dated February 3, 2017 is, nor is that agreement submitted.

The Contingent Agreement contains a series of "whereas" clauses including,

WHEREAS, Purchaser shall be paid from the proceeds recovered from the Claim should there be any recovery. The proceeds shall be the entire amount of the settlement or award payable pursuant to the Claim less legal fees, liens, costs and disbursements payable to the Attorney (hereinafter referred to as "Proceeds");

WHEREAS, Purchaser invests in claims and lawsuits by purchasing the right to receive a portion of the Proceeds should there be any recovery from the settlement of the claim, lawsuit and/or judgment; and

WHEREAS, Seller desires to sell, and Purchaser desires to purchase, a portion of the contingent proceeds from the recovery of the Claim (hereinafter referred to as "Share" or "Purchaser's Share").

(NYSCEF Doc. No. 7)

Exhibit "A" to the Contingent Agreement is a schedule that sets forth the funding date, the monthly rate (4.99%), the annualized rate (79.38%), the purchase price, and a list of the amounts due for a period of two years (*id.*). The following language is contained at the bottom of

the schedule: “After the period shown Purchaser’s Share of Proceeds continues to increase by the Monthly Rate, compounded monthly, until paid. Please call for an extended schedule” (*id.*).

The final page of the Contingent Agreement titled “Funding Instructions” is signed by Ms. Guss, but is not notarized. It has handwritten notations under the wire instructions for “North Fork Bank” and “Dorene Roche.” Additionally, Ms. Guss’s affidavit states that she never had an account at North Fork Bank, nor does she know anyone by the name of Dorene Roche (NYSCEF Doc. No. 34). Ms. Guss further stated that she did not sign or initial the Contingent Agreement or the Disclosure Statement, nor did she have any recollection of receiving any money under the funding agreement.

Contingent Proceeds Purchase Agreement Consumer Disclosure Statement

The Contingent Proceeds Purchase Agreement Consumer Disclosure Statement (the “Disclosure Statement”), is a one-page document that provides an overview of the operative terms of the Contingent Agreement. (NYSCEF Doc. No. 6). As submitted by Plaintiff, the document is barely legible. In part, it states:

Pursuant to the Agreement, the Purchaser is buying a portion of the Proceeds for \$2,750.00 (the “Purchase Price”). Purchaser shall pay you the Purchase Price less a processing fee of \$250.00 and other possible costs as outlined in the Agreement. The Purchaser’s share of the Proceeds shall increase by 4.99% per month, compounded monthly, pursuant to the schedule on the attached Exhibit “A” until the Purchaser receives payment (the “Purchaser’s Share”).

...

You have been advised and understand that the cost of selling a portion of the Proceeds to Purchaser is potentially expensive and should only be used as a last resort and that Purchaser may make a substantial profit from its investment by the terms of the Agreement. Other sources of funding, including loans, may be available at more favorable rates, payment schedules, terms and conditions. You recognize that the Purchase Price is at risk and that Purchaser may lose its entire investment if there is no recovery with respect to the Claim.

(NYSCEF Doc. No. 6)

The Disclosure Statement is signed by Theresa Guss and dated February 22, 2006. The Disclosure Statement contains an Exhibit "A", which is identical to the Exhibit "A" affixed to the Contingent Agreement described above.

Extended Schedule for Exhibit "A"

Plaintiff additionally submits a spreadsheet that starts on March 1, 2009 (the last period shown on Exhibit "A" of the Contingent Agreement and Disclosure Statement), and purportedly shows that the total amount due as of June 1, 2016, was \$1,141,424.67. (NYSCEF Doc. No. 9). Plaintiff contends that the figures on the spreadsheet were arrived at by taking the amount due as of March 1, 2009, and increasing it by the rate of 4.99%, which is compounded monthly, per the terms of the Contingent Agreement.

**Analysis**

On a motion for summary judgment in lieu of complaint, Plaintiff establishes *prima facie* entitlement to judgment as a matter of law by demonstrating the existence of an instrument for the payment of money only, executed by the party to be charged, containing an unequivocal and unconditional obligation to repay, and the failure by the Defendant to pay in accordance with the instrument's terms (*see* CPLR §3213; *Gard v Entertainment, Inc. v Country in New York, LLC*, 96 AD3d 683 [1st Dept 2012]; *Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136 [1st Dept 1968]; *Gateway State Bank v. Shangri-La Private Club for Women*, 113 AD2d 791 [2d Dept 1985]).

Plaintiff contends that it has set forth a *prima facie* case of right to judgment as Ms. Guss executed a valid instrument in the form of the Contingent Agreement, and that despite settling

her claim against the City, she has failed to make payment per the terms of the instrument<sup>2</sup>. In opposition, Defendants argue that the Contingent Agreement submitted violates the Best Evidence Rule, is unconscionable, impossible as a matter of law, and ambiguous.

### Best Evidence Rule

The best evidence rule “requires the production of an original writing where its contents are in dispute and sought to be proven.” (*Schozer v William Penn Life Ins. Co. of NY*, 84 NY2d 639, 643 [1994]). Under an exception to the best evidence rule, “secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith.” (*Id.* at 644; *134 W. 119th St., Inc. v Hart*, 22 Misc3d 1123(A) [2009]). While loss of an original document can be established by “a showing of a diligent search in the location where the document was last known to have been kept and through the testimony of the person who last had custody of the original,” the court also said “the more important the document to the ultimate issue in the case, the stricter becomes the requirement of the evidentiary foundation [establishing loss] for the admission of secondary evidence.” (*Schozer*, 84 NY2d at 644 [quoting *Harmon v Matthews*, 27 NYS2d 656, 662 [1941]). “In other words, the court should give careful consideration to the possible motivation for the nonproduction of the original in determining whether the foundational proof of loss was sufficient.” (*Id.*). Furthermore, the proponent of any secondary evidence must meet “the heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original.” (*Id.* at 645; *see also Abildgaard v Van*

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<sup>2</sup> Plaintiff contends that it is entitled to summary judgment regardless of whether the court applies New York law or Delaware Law as required under the Contingent Agreement.

*Den Brulle*, 45 Misc 3d 1214(A), 999 NYS2d 796 [Civ Ct 2014], *aff'd*, 49 Misc 3d 155(A), 29 NYS3d 846 (NY App Term 2015)).

There is heavy burden required to qualify for an exception to the best evidence rule in order to admit a photocopy of the document as secondary evidence. Defendants have challenged the authenticity of the Contingent Agreement since the start of this litigation. Whether the photocopy of the Contingent Agreement is “a reliable and accurate portrayal of the original” cannot be ascertained because the original document has not been produced, nor has any rationale been provided for the missing original document (*see Schozer*, 84 NY2d at 645). Plaintiff attempts to avoid this burden by submitting the affidavit of Andrew Anastasio, the purported notary who notarized Ms. Guss’s signature on the Contingent Agreement and the Disclosure Statement. However, Mr. Anastasio does not speak to the lack of notarization of the Funding Agreement. In conjunction with Ms. Guss’s affidavit, it is unclear whether the Contingent Agreement was ever funded as there has been no proof submitted that the \$2500 (\$2750 minus application fees) was ever provided to Ms. Guss.

Plaintiff has not met its *prima facie* burden on summary judgment. Airmont’s papers fail to submit a legible, clear copy of the Contingent Agreement, and fail to provide any reasonable explanation as to why the original document cannot be produced. As Plaintiff’s have not met their initial burden, the court will not address Defendants’ unconscionability and usury arguments.

#### Cross Motion

Defendants Theresa Guss and Monaco & Monaco, LLP cross move pursuant to CPLR §602 to consolidate for a joint trial and pursuant to CPLR §§510 and 602 to change venue to the Supreme Court Kings County where a lien action is already pending.

CPLR §602(a) gives the trial court discretion to consolidate actions involving common questions of law or fact. “[T]here must be at least some important rules of law and some substantial issues of fact to be determined that are in common to both actions” (*Gibbons v Groat*, 22 AD2d 996 [3d Dept 1964]). The Kings County action is a personal injury action that is currently in the post-judgment stage and in which the only remaining issue is a dispute over legal fees. Defendants have not demonstrated a sufficient reason to consolidate these matters.

“[T]o prevail on a motion pursuant to CPLR §510(1) to change venue, a defendant must show that the plaintiff’s choice of venue is improper, and also that the defendant’s choice of venue is proper” (*Deas v Ahmed*, 120 AD3d 750, 750, 991 NYS2d 661 [2014]; see CPLR §511[b]; *Kidd v 22-11 Realty, LLC*, 142 AD3d 488, 489 [2016]). Defendants have not demonstrated that venue is improper. Defendants’ cross motion is denied.

Accordingly, it is hereby


ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the cross motion for consolidation and change of venue is denied; and it is further

ORDERED that plaintiff shall serve a formal complaint upon defendant’s attorney within 20 days of service on plaintiff’s counsel of a copy of this order with notice of entry and defendant shall answer or otherwise respond to the complaint within 20 days after service thereof.

10/21/2021

DATE

  
SHAWN KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

REFERENCE

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

654858/2017 AIRMONT ASSOCIATES, LLC vs. MONACO & MONACO  
Motion No. 001

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