Metropolitan Lofts of NY LLC v JZ Capital Partners
2022 NY Slip Op 33737(U)
November 1, 2022
Supreme Court, Kings County
Docket Number: Index No. 521103/2020
Judge: Richard Velasquez
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At an IAS Term, Part 66, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of November, 2022.

P R E S E N T:

RICHARD VELASQUEZ,
Justice.

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METROPOLITAN LOFTS OF NY LLC,

Plaintiff,

-against-

Index No. 521103/2020

JZ CAPITAL PARTNERS, BEN BERNSTEIN, BEN STOKES, REDSKY JZ ROEBLING LLC, ROEBLING INVESTORS, LLC, ROEBLING HOLDINGS, LLC, REDSKY CAPITAL LLC, FIRST AMERICAN TITLE INSURANCE COMPANY, US REAL ESTATE CREDIT HOLDINGS III-A, LP and U.S. REAL ESTATE CREDIT HOLDINGS III-A GP LIMITED,

Defendants.

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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	3-4,14-15,30,34,48-49,56-57, 85-86,92,115
Opposing Affidavits (Affirmations)	129-132,144-145
Affidavits/Affirmations in Support	36,91,94, 108-11, 117, 129-132

Upon the foregoing papers, defendants U.S. Real Estate Credit Holdings III-A, LP (USRECH LP) and U.S. Real Estate Credit Holdings III-A GP Limited (USRECH GP) (collectively, USRECH) move (in motion [mot.] sequence [seq.] number [no.] 1) for an order, pursuant to CPLR 3211 (a) (7), dismissing with prejudice the sixth and eighth causes of action in the complaint of plaintiff Metropolitan Lofts of NY, LLC as against

USRECH. Defendant First American Title Insurance Company (First American) moves (in mot. seq. no. 2) for an order, pursuant to CPLR 3211 (a) (1), (5), and (7), dismissing with prejudice the sixth and seventh causes of action in plaintiff's complaint as against First American. Lonuzzi & Woodland, LLP move by order to show cause (in mot. seq. no. 3) for an order, pursuant to CPLR 321 (b) (2), permitting it to withdraw as counsel for plaintiff and retain a charging lien against the file pursuant to Judiciary Law § 475 for legal services performed to date, as well as allowable disbursements. First American moves (in mot. seq. no. 4) for an order, pursuant to CPLR 3211 (a) (1), (5), and (7), dismissing with prejudice plaintiff's amended complaint as against First American. USRECH moves (in mot. seq. no. 5) for an order, (a) pursuant to CPLR 3211 (a) (7), dismissing with prejudice the sixth and eighth causes of action alleged against USRECH in plaintiff's amended complaint, (b) pursuant to CPLR 3211 (a) (7) dismissing with prejudice the ninth cause of action against USRECH GP and (c) pursuant to 22 NYCRR § 130-1.1, sanctioning plaintiff and its attorneys for filing a frivolous amended complaint. USRECH moves (in mot. seq. no. 6) for an order, pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing with prejudice the ninth cause of action in the amended complaint. Plaintiff moves (in mot. seq. no. 7) for an order granting a default judgment against defendants RedSky Capital, LLC (RedSky Capital), RedSky JZ Roebling, LLC, (RedSky Roebling) JZ Capital Partners (JZCP), and Roebling Investors, LLC[1] and imposing a constructive trust on the subject property. Defendants Benjamin Bernstein (Bernstein),

[1] According to the amended complaint, Roebling Investors, LLC is the sole member of RedSky Roebling.

Benjamin Stokes (Stokes), RedSky Roebling, Roebling Investors, LLC, Roebling Holdings, LLC[2] and RedSky Capital (collectively, "RedSky defendants") and JZCP move (in mot. seq. no. 8) for an order, pursuant to CPLR 3211 (a) (1), (5), (7), and (8) and CPLR 306-b, dismissing the amended complaint as against the RedSky defendants and JZCP. The RedSky defendants cross-move (in mot. seq. no. 9) for an order, pursuant to CPLR 2004, 2215 and 3012 (d), compelling plaintiff to accept the RedSky defendants' and JZCP's motion to dismiss and/or extending the RedSky defendants' and JZCP's time to appear.

Factual Background

Plaintiff commenced this action seeking damages in relation to the sale and conveyance of the subject property at 143-157 Roebling Street in Brooklyn. The property was formerly owned by Metroeb Realty 1 LLC (Metroeb). On May 4, 2012, plaintiff entered into a contract with Metroeb to purchase the property for $30 million. After Metroeb entered into the contract with the plaintiff, Metroeb entered into another contract to sell the subject property to RedSky Capital for an increased purchase price, resulting in a lawsuit by plaintiff against Metroeb and RedSky Capital (*Metropolitan Lofts of NY, LLC v Metroeb Realty 1, LLC, et ano.*, Kings County index No. 503441/12) (2012 action). In the 2012 action, a bench trial was held whereby the court (Hon. Ann T. Pfau) issued a decision determining that plaintiff and Metroeb had not come to a sufficient meeting of the minds to create a binding contract. Accordingly, by judgment

[2] According to the amended complaint, RedSky Holdings, LLC is the sole member of RedSky Investors, LLC

dated June 6, 2014, the court (Hon. Lawrence Knipel, J.) dismissed the complaint and declared that the May 4, 2012 contract between the plaintiff and Metroeb was not valid and enforceable. Plaintiff thereafter appealed the decision and judgment to the Appellate Division, Second Department. Plaintiff was denied requests to stay the decision and judgment pending appeal from both the trial court and the Appellate Division. Consequently, RedSky Capital assigned the contract of sale to RedSky Roebling,[3] and by deed dated July 30, 2014, Metroeb conveyed the property to RedSky Roebling. First American issued a title insurance policy in conjunction with the closing.

By order dated April 4, 2018, the Appellate Division, Second Department reversed the decision and judgment and remitted the matter to Supreme Court for further proceedings (*Metropolitan Lofts of NY, LLC v Metroeb Realty 1, LLC*, 160 AD3d 632 [2d Dept 2018]). On or about April 24, 2018, plaintiff moved in the 2012 action for leave to amend its complaint to add RedSky Roebling as a defendant and add a claim for a judgment declaring that the deed to RedSky Roebling is null and void and restoring title to Metroeb so that plaintiff's specific performance claim may be enforced. Plaintiff's motion to amend the complaint in the 2012 action was granted by order dated December 12, 2018. Metroeb subsequently moved to dismiss the amended complaint. In a decision and order dated May 22, 2019, Metroeb's motion to dismiss the amended complaint was granted to the extent of the claims seeking to void the deed to RedSky Roebling. Following the appeals of the December 12, 2018 and May 22, 2019 orders, the Appellate

[3] RedSky Roebling is alleged to have been formed as a joint venture between RedSky Capital and JZCP for the purpose of taking title to the subject property.

Division Second Department reversed the December 18, 2018 order granting leave to amend the complaint (*Metropolitan Lofts of NY, LLC v Metroeb Realty 1, LLC*, 189 AD3d 1024 [2d Dept 2020]) and dismissed the appeal of the May 22, 2019 order dismissing the amended complaint as academic (*Metropolitan Lofts of NY, LLC v Metroeb Realty 1, LLC*, 189 AD3d 1026 [2d Dept 2020]). The Appellate Division stated:

> "Here, the proposed causes of action the plaintiff sought to add were palpably insufficient and patently devoid of merit since RedSky [Capital] was a good faith purchaser of the property and entitled to the protections afforded by CPLR 5523. RedSky [Capital] paid valuable consideration for the property and justifiably relied on the judgment of the Supreme Court declaring that the May 4, 2012 contract between the plaintiff and Metroeb was not valid and enforceable and directing that Metroeb convey the property to RedSky [Capital] within 90 days. Notwithstanding this Court's decision and order on the prior appeal, the plaintiff cannot now avail itself of the remedy of specific performance and must content itself with other potential remedies" (*Metropolitan Lofts of NY, LLC*, 189 AD3d at 1025-1026 [internal citations omitted]).

On or about August 30, 2019, while the aforesaid appeals were pending, USRECH LP issued a refinancing loan to RedSky Roebling, which in turn executed a consolidated mortgage against the property in favor of USRECH LP. In conjunction with the mortgage loan transaction, First American issued a title insurance policy to USRECH LP.

On October 29, 2020, plaintiff commenced the instant action against the RedSky defendants, JZCP, USRECH and First American. In the original complaint, plaintiff set forth causes of action against the RedSky defendants and JZCP for tortious interference with a contract, against all defendants for conspiracy to tortiously interfere with a contract and against First American and USRECH for aiding and abetting tortious

interference with a contract. On May 7, 2021, after the CPLR 3211 dismissal motions were filed by USRECH and First American (mot. seq. nos. 1 & 2), plaintiff filed an amended complaint which added allegations of conversations between plaintiff's agent and Metroeb regarding the contract with RedSky Capital, as well as a new cause of action seeking the imposition of a constructive trust on the property.

Discussion

As a preliminary matter, "a motion to dismiss which is addressed to the merits may not be defeated by an amended pleading (*Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 370 [2d Dept 2003]; *see Treano v Fine*, 17 AD3d 449 [2d Dept 2005]). A defendant whose motion is addressed to the merits of the original pleading retains the option of applying the motion to the amended pleading, which supersedes the original pleading (*see Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169, 1170 [2d Dept 2017]; *Sobel v Ansanelli*, 98 AD3d 1020, 1022 [2d Dept 2012]; *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35 *revd on other grounds*, 91 NY2d 30 [1997]; *DiPasquale v Security Mut. Life Ins. Co. of NY*, 293 AD2d 394 [1st Dept 2002]). As USRECH and First American brought new dismissal motions (mot. seq. nos. 4, 5 & 6) directed toward the amended complaint, mot. seq. nos. 1 & 2 will be applied to the amended complaint.

In considering a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Meyer v North Shore–Long Is. Jewish Health Sys., Inc.*, 137 AD3d 880, 880–881

[2d Dept 2016]; *Cecal v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). However, bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference (*see Doria v Masucci*, 230 AD2d 764 [2d Dept 1996]), nor are factual claims which are "inherently incredible," flatly contradicted by documentary evidence, or "patently untrue" (*O'Donnell Fox & Gartner, P.C. v R–2000 Corp.*, 198 AD2d 154 [1st Dept 1993]; *Mark Hampton, Inc. v Bergreen*, 173 AD2d 220 [1st Dept 1991], *lv denied* 80 NY2d 788 [1992]).

In the amended complaint, the sixth cause of action, asserted against all defendants, alleges conspiracy to tortiously interfere with a contract. The seventh cause of action in the amended complaint alleges that First American aided and abetted tortious interference with a contract. The eighth cause of action in the amended complaint alleges that USRECH aided and abetted tortious interference with a contract. The ninth cause of action, asserted against all defendants, seeks the imposition of a constructive trust on the property.

Conspiracy

"New York does not recognize civil conspiracy to commit a tort as an independent cause of action" (*McSpedon v Levine*, 158 AD3d 618, 621 [2d Dept 2018]). "However, 'a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme'" (*Blanco v Polanco*, 116 AD3d 892, 896 [2d Dept 2014], quoting *Litras v Litras*, 254 AD2d 395, 396 [2d Dept 1998]). "In order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a

cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement" (*Perez v Lopez*, 97 AD3d 558, 560 [2d Dept 2012]). To plead a cause of action for tortious interference with existing contracts, a plaintiff must plead the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third party's breach of the contract without justification, actual breach of the contract, and damages (*see Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 594 [2012]). Further, the plaintiff must specifically allege that the contract would not have been breached but for the defendant's conduct (*see White Knight of Flatbush, LLC v Deacons of the Dutch Congregation of Flatbush*, 159 AD3d 939, 941 [2d Dept 2018]). "'Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim a plaintiff must support his [or her] claim with more than mere speculation'" (*Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035, 1036 [2d Dept 2011], quoting *Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]).

Assuming, for the sake of determining the merits of the conspiracy claim, that plaintiff sufficiently pleaded a cause of action for tortious interference with a contract against the RedSky defendants and JZCP, there are no allegations that First American and/or USRECH had any agreement with the RedSky defendants and/or JZCP regarding Metroeb's contract of sale with RedSky Capital. It is alleged only that First American issued title policies and USRECH provided a refinancing mortgage loan to RedSky Roebling. The amended complaint does not elaborate how these actions furthered any

agreement between the other defendants to induce Metroeb to breach its contract with plaintiff. In fact, even though the sixth cause of action is directed toward "all defendants," the allegations within the body of the claim refer only to conduct perpetrated by Bernstein, Stokes and JZCP.

As a result, those parts of the motions of First American and USRECH seeking dismissal of the sixth cause of action as against First American and USRECH pursuant to CPLR 3211 (a) (7) are granted.

Aiding and Abetting

To recover damages for aiding and abetting tortious conduct, a plaintiff must allege knowledge of the alleged tortious conduct by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the tortious conduct (*see Markowits v Friedman*, 144 AD3d 993, 996 [2d Dept 2016]; *Matter of Woodson*, 136 AD3d 691, 693 [2d Dept 2016]; *Winkler v Battery Trading, Inc.*, 89 AD3d 1016, 1017 [2d Dept 2011]). "Substantial assistance requires an affirmative act on the defendant's part; mere inaction can constitute substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" (*Baron v Galasso*, 83 AD3d 626, 629 [2d Dept 2011] [internal quotation marks omitted]; *see First Keystone Consultants, Inc. v DDR Constr. Servs.*, 74 AD3d 1135, 1137-1138 [2d Dept 2010]; *Monaghan v Ford Motor Co.*, 71 AD3d 848, 850 [2d Dept 2010]). According to the amended complaint, the alleged acts constituting "substantial assistance" are the issuance of title policies by First American in the 2014 closing and 2019 refinancing, and the issuance by USRECH of the 2019 refinancing loan. With respect to First American, accepting the allegations of the

amended complaint as true, plaintiff has not shown that First American had knowledge of any tortious conduct since, at the time the first title policy was issued (July 31, 2014, according to the amended complaint), the contract between plaintiff and Metroeb was adjudged to be unenforceable, while the contract between Metroeb and RedSky Capital was adjudged to be enforceable. To the extent that First American is alleged to have had knowledge of the Appellate Division order holding the May 4, 2012 contract enforceable when First American issued the refinancing loan title policy in 2019, such act clearly could not have "assisted" the inducement of Metroeb's breach of contract with plaintiff seven years earlier. Similarly, even if USRECH had knowledge of the Appellate Division order, its issuance of a refinancing mortgage loan in 2019 could not have assisted the alleged tortious interference in 2012.

Accordingly, those parts of the motions of USRECH seeking dismissal of the eighth cause of action as against USRECH are granted.

Constructive Trust

"The elements of a constructive trust are (1) a fiduciary or confidential relationship; (2) an express or implied promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment" (*Fakiris v Fakiris*, 192 AD3d 993, 994 [2d Dept 2021] [internal quotation marks omitted]; *see Bekas v Valiotis*, 191 AD3d 937, 938 [2d Dept 2021]). "To establish that there was a transfer in reliance on the promise, it must be shown that the party seeking to impose the constructive trust had some interest in the property prior to obtaining the promise that the property would be conveyed, and that this interest was parted with in reliance on the promise. No constructive trust will be imposed

by one who has no interest in the property prior to obtaining a promise that such an interest will be given to him" (*Edwards v Walsh*, 169 AD3d 865, 868 [2d Dept 2019] [citations and internal quotation marks and brackets omitted]).

In its ninth cause of action for a constructive trust, plaintiff alleges that it was in a confidential, fiduciary relationship with Metroeb, which had promised plaintiff the property; that plaintiff relied on this promise to its detriment, expending substantial sums to purchase the property, including millions in legal fees and costs; and that "defendants colluded in breaching this relationship of trust by conspiring with Metroeb to wrest the property in violation of Metroeb's promise and knowing that plaintiff was in a relationship of trust with Metroeb." Plaintiff's constructive trust claim fails because the allegations cast plaintiff "as only a potential buyer" (*Kaufman v Torkan*, 51 AD3d 977, 980 [2d Dept 2008]) at the time of Metroeb's alleged promise to convey. There are no allegations that plaintiff possessed any interest in the subject property prior to obtaining Metroeb's promise.

Accordingly, those parts of the motions of First American and USRECH to dismiss the ninth cause of action as against First American and USRECH are granted.

As there are no remaining claims in the amended complaint interposed against First American and USRECH, the amended complaint is hereby dismissed as against First American and USRECH.

Default

Following the RedSky defendants' and JZCP's failure to answer the original or amended complaint, or otherwise appear, plaintiff moved for a default judgment. The RedSky defendants and JZCP thereafter moved to dismiss the amended complaint on grounds which included lack of personal jurisdiction. As the motion to dismiss was untimely, a further cross motion was filed seeking, in substance, an extension of time to move for dismissal pursuant to CPLR 2004 and CPLR 3012 (d).

Generally, to successfully oppose a motion for leave to enter a default judgment based on failure to appear or timely serve an answer, the defendants were required to demonstrate a reasonable excuse for their delay and the existence of a potentially meritorious defense to the action (*see Gomez v Gomez-Trimarchi*, 137 AD3d 972, 973 [2d Dept 2016]; *Blake v United States of Am.*, 109 AD3d 504, 505 [2d Dept 2013]; *Wassertheil v Elburg, LLC*, 94 AD3d 753 [2d Dept 2012]; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 566-567 [2d Dept 2011]). The determination of whether a reasonable excuse has been established is a matter addressed to the broad discretion of the trial court based upon the circumstances of the particular case (*see Yuxi Li v Caruso*, 161 AD3d 1132, 1133-1134 [2d Dept 2018]; *Matter of Haberman v Zoning Bd. of Appeals of the City of Long Beach*, 152 AD3d 683, 684 [2d Dept 2017]; *Duprat v BMW Fin. Servs., NA, LLC*, 142 AD3d 946, 947 [2d Dept 2016]; *Gershman v Ahmad*, 131 AD3d 1104, 1105 [2d Dept 2015]). However, "[w]here there is 'a defense of lack of personal jurisdiction, a defendant need not show a reasonable excuse and meritorious defense'" (*Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 523 [1st Dept 2016] [citation

omitted]). If the court finds that it did not have personal jurisdiction over defendant, not only would the default judgment be vacated, but the action would also be dismissed for lack of personal jurisdiction (*see Avis Rent A Car Sys., LLC v Scaramellino*, 161 AD3d 572, 573 [1st Dept 2018]; *Wells Fargo Bank, N.A.*, 139 AD3d at 523).

"A process server's affidavit of service gives rise to a presumption of proper service" (*Machovec v Svoboda*, 120 AD3d 772, 773 [2d Dept 2014]). "Although bare and unsubstantiated denials are insufficient to rebut the presumption of service, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the affidavit of service and necessitates a hearing" (*U.S. Bank, N.A. v Tauber*, 140 AD3d 1154, 1155 [2d Dept 2016] [citation omitted]; *see FV-1, Inc. v Reid*, 138 AD3d 922 [2d Dept 2016]).

Under CPLR 311-a, service upon a limited liability company may be made, among other methods,

> "by delivering a copy personally to (i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant"

Service upon a natural person may be made by delivering the summons to within the state to the person to be served (CPLR 308 [1]) or by delivering the summons within the state to a person of suitable age and discretion at the actual place of business,

dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business (CPLR 308 [2]).

According to the several affidavits of plaintiff's process server, on December 16, 2020 at 2:15 PM at 9 West 87th Street, Lobby, New York, NY 10019, the summons and complaint were served on JZCP and each of the corporate RedSky defendants "c/o" JZCP by delivering thereat a true copy of the summons and complaint to Amy Wu, who the process server averred was "authorized to accept service" on behalf of each defendant. Bernstein and Stokes were also purportedly served at said address, date and time by service upon Amy Wu, a person of suitable age and discretion, at Bernstein's and Stokes' actual place of business.

In opposition to the motion for a default judgment, affidavits were submitted by Bernstein, Stokes, David MacFarlane, identified as Chairman of JZCP's Board of Directors, and David W. Zalaznick, identified as Chairman and CEO of nonparty Jordan/Zalaznick Advisers, Inc. (Jordan). In their affidavits, Bernstein and Stokes, who identify themselves as principals of the RedSky defendants, state that the address where service was purportedly effectuated, "9 West 57th Street, Lobby, New York, NY 10019." is the location of the offices of Jordan and that the individual who purportedly received process, Amy Wu, is an employee of Jordan. Bernstein and Stokes aver that they have never been employed by Jordan or JZCP (which the process server stated received service on behalf of the RedSky defendants), nor have they ever maintained an actual

place of business, dwelling place, or usual place of abode at 9 West 57th Street, New York, NY 10019. Bernstein and Stokes further state that none of the remaining RedSky defendants ever maintained offices at 9 West 57th Street, New York, NY and that Amy Wu, the individual to whom process was purportedly served, is not and has never been a member, officer, director or employee of any of the RedSky defendants, nor has she ever served as a registered agent for service of process for any of the RedSky defendants, nor been designated or authorized by any of the RedSky defendants to accept service of process on their behalf as general agent or otherwise in connection with this action. Finally, Bernstein and Stokes state that, similarly, neither Jordan nor JZCP has ever been a manager or member of any of the RedSky defendants, nor has Jordan or JZCP ever served as a registered agent for service of process for any of the RedSky defendants, nor been designated or authorized by any of the RedSky defendants to accept service of process on their behalf as general agent or otherwise in connection with this action.

In his affidavit, MacFarlane states that JZCP is a company limited by shares registered in the Bailiwick of Guernsey, a British Crown Dependency located in the Channel Islands, with its principal office located in Saint Peter Port, Guernsey and that Amy Wu is an employee of Jordan, which is retained as contractual investment advisor to JZCP but is a separate entity distinct from JZCP. MacFarlane avers that JZCP itself has no offices in the State of New York and that Amy Wu is not an officer, director or employee of JZCP.

Zalaznick states in his affidavit that although Jordan serves as the contractual investment advisor to JZCP, they are distinct entities; that Jordan has no ownership

interest in JZCP, and JZCP has no ownership interest in Jordan; that Jordan is not a department or division of JZCP, and JZCP is not a department or division of Jordan; and that Jordan has never served as JZCP's registered agent for service of process, nor has Jordan been designated or authorized by JZCP to accept service of process on its behalf as its general agent or otherwise in connection with this action.

The court finds that the foregoing affidavits, which set forth specific facts, are sufficient to rebut the presumption of proper service established by the affidavits of plaintiff's process server.

As a result, this matter shall be set down for a traverse hearing on the validity of service upon the RedSky defendants and JZCP. Plaintiff's motion for a default judgment (mot. seq. no. 7) and the motion and cross motion of the RedSky defendants and JZCP (mot. seq. nos. 8 & 9) shall be held in abeyance pending the hearing.

Accordingly, it is hereby

ORDERED, that mot. seq. nos. 1, 2, 4, 5 & 6 are granted to the extent that the amended complaint is dismissed as against First American and USRECH, and it is further

ORDERED that that part of mot. seq. no. 5 seeking sanctions against plaintiff is denied, and it is further

ORDERED that mot. seq. no. 3 is granted without opposition, and it is further

ORDERED that this matter shall be set down for a traverse hearing on the issue of the validity of service upon the RedSky defendants and JZCP, and it is further

ORDERED that mot. seq. nos. 7, 8 & 9 are hereby held in abeyance pending the outcome of the traverse hearing.

The foregoing constitutes the decision and order of the court.

ENTER FORTHWITH"

HON. RICHARD VELASQUEZ.

Hon. Richard Velasquez, JSC

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