

Cartier Saada, S.A. v Northwest Bank
2023 NY Slip Op 30084(U)
January 9, 2023
Supreme Court, New York County
Docket Number: Index No. 160662-2021
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Cartier Saada, S.A., et. al.

INDEX NO. 160662-2021

- v -

MOT. DATE

Northwest Bank, et. al.

MOT. SEQ. NO. 001

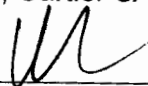
The following papers were read on this motion to/for dismiss

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

This is an action for negligence and conspiracy arising from an alleged fraud perpetrated against the plaintiffs. Plaintiffs are Cartier Saada, S.A. ("Cartier SA") and Cartier Saada US LLC ("Saada US"; together the "plaintiffs"). Defendants are Northwest Bank ("NW"), Castleway Financial Inc. ("Castleway"), Eric Iwu ("Iwu") and Demetrice T. Tisdale ("Tisdale"). Plaintiffs assert seven causes of action in their complaint: three against NW, three against Castleway and one against Iwu and Tisdale. In the first, second and third causes of action, plaintiffs claim that: 1) NW negligently failed to comply with the Customer Due Diligence ("CDD") requirements of the Financial Crimes Enforcement Network ("FinCEN") when it permitted nonparty, Dorothea Annette Daniels ("Daniels"), to open a bank account at NW without gathering personal information from her and other beneficial owners; 2) NW was negligent when it failed to properly instruct its employees as to those CDD requirements; and 3) NW or an employee of NW conspired to open the account with the purpose of fraudulently laundering money. Plaintiffs' make similar claims against Castleway. In the fourth, fifth and sixth causes of action, they claim that 1) Castleway was negligent when it failed to follow the anti-money laundering provisions of the Department of Financial Services Regulations (3 NYCRR § 416) when it cashed the checks; 2) such negligence caused financial losses for plaintiffs; and 3) Castleway or an employee of Castleway conspired to cash the checks with the purpose of fraudulently laundering money. Finally, in plaintiffs' seventh cause of action, they assert a claim against Iwu and Tisdale for fraud. Plaintiffs seek money damages in the sum of \$203,000.00 plus interest and disbursements from this action. Castleway filed an answer to the complaint in which it asserted a crossclaim against NW, stating that any damages that the plaintiffs sustained were a result of the conduct of NW and that Castleway is entitled to indemnification or contribution from NW for any damages asserted against it.

The following facts are asserted in the complaint as follows. Plaintiff Cartier SA is a foreign corporation organized and existing under the laws of Morocco. Plaintiff Saada US is a New York LLC that is a wholly owned subsidiary of Cartier SA. In January and February of 2019, Cartier SA shipped

Dated: 1/9/23



 HON. LYNN R. KOTLER, J.S.C.

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
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several containers of olives from Morocco to nonparty, Omega Foods, Inc. ("Omega"). Meanwhile, on March 15, 2019, a New York LLC named "Cartier Saada SA LLC" ("NY Cartier 1") was formed which named Daniels as Chief Executive Officer and Organizer. Daniels claims that this LLC was set up by Iwu and Tisdale, who used her name. On the same day, NY Cartier 1 successfully opened a business bank account at NW upon Daniels' application. Following the creation of NY Cartier 1, Iwu, or an associate of Iwu, upon information and belief, hacked into the email account of Mr. Hassan Debbarh ("Debbarh"), the Chief Executive Officer of Cartier SA. He then sent an email to Omega instructing it to wire payment for the olive shipment to the newly formed NW business bank account of NY Cartier 1. Omega, not knowing that this account was not actually associated with Cartier SA, heeded the email and sent two payments totaling \$119,300.00 to the NY Cartier 1 NW business bank account. Between March 15, 2019 and March 28, 2019, Daniels made 3 withdrawals totaling \$118,000.00 in the form of cashier's checks. Daniels brought these cashier's checks to EZ Check Cashing, the d/b/a of Castleway, where they were cashed. NW paid out these cashier's checks.

On April 21, 2019, a second New York LLC named "Cartier Saada LLC" ("NY Cartier 2") was formed which named nonparty David C. Agu ("Agu") as the Chief Executive Officer and Organizer. Agu similarly claims that Iwu and Tisdale opened this LLC under his name. NY Cartier 2 then opened a business bank account upon the application of Agu with Bank of America ("BoA"). Subsequently, Iwu, or an associate of Iwu sent another email to Omega from Debbarh's email account, directing it to send its next payment to the NY Cartier 2 BoA business bank account. Again, Omega, not knowing that the account was not associated with Cartier SA, made a payment of \$98,784.00 to the NY Cartier 2 BoA account. Agu made a withdrawal totalling \$85,000.00 in the form of a single cashier's check that he cashed at EZ Check Cashing. BoA paid out the check.

In separate actions, the plaintiffs brought claims against both Agu (index no. 150024/2020) and Daniels (index no. 150006/2020) in the Supreme Court of the State New York. In the discovery stage of those actions, plaintiffs subpoenaed bank records from BoA and NW. The information garnered in the subpoenas included records that demonstrated that both banks failed to collect personal identifying information from Daniels and Agu such as names, dates of birth and Social Security numbers. This led to two separate actions: this action against NW, Castleway, Iwu and Tisdale, and a second action against BoA which was removed to federal court. On January 21, 2022, U.S. District Judge Denise Cote of the Southern District of New York issued a decision dismissing plaintiffs' claims against Bank of America in their entirety finding, as a matter of law, there were no reasonable claims against BoA (*See Cartier Saada S.A. v. Bank of Am., N.A.*, 2022 U.S. Dist. LEXIS 11441 [S.D.N.Y. Jan. 21, 2022]).

NW now moves for an order dismissing the action in its entirety with prejudice as to NW, and dismissing the cross claim asserted against it by Castleway pursuant to CPLR § 3211(a)(5) and (7). NW argues that plaintiff's first and second causes of action for negligence based in NW's alleged failure to comply with the CDD requirements when it permitted Daniels to open a bank account without gathering personal information and its alleged failure to properly instruct its employees as to those CDD requirements should be dismissed because NW owed no duty to plaintiffs and because no private cause of action exists under FinCEN rules. NW also asserts that plaintiffs' third cause of action alleging that NW or an employee of NW conspired to open the account with the purpose of fraudulently laundering money should be dismissed because the state of New York does not recognize an independent cause of action for civil conspiracy without a valid underlying tort, and because the claims are based on legal conclusions rather than sufficiently pled facts. NW then argues that all the causes of action should be dismissed because these issues were already decided in the *Cartier Saada S.A. v. Bank of America SDNY* case (the "SDNY case"), and thus, collateral estoppel should apply. Finally, NW argues that the crossclaim against it should be dismissed because the claim is for indemnification or contribution, and NW owed no duties to the plaintiff upon which indemnification could be based.

In response to the motion, Castleway cross moves for an order dismissing the plaintiffs' action in its entirety with prejudice as to Castleway pursuant to CPLR § 3211(a)(5) and (7). Castleway's arguments are similar to those of NW in its respective motion. Castleway argues that plaintiff's fourth and fifth causes of action for negligence based in its alleged failure to follow the state anti-money laundering provisions of 3 NYRR § 416 when it cashed the checks should be dismissed because Castleway owed no duty to plaintiffs and because no private cause of action exists under FinCEN rules; nor under the state anti-money laundering rules. It also argues that the negligence claims should be dismissed because the elements of negligence are not properly alleged in the complaint. Castleway next asserts that plaintiffs' sixth cause of action alleging that Castleway or an employee of Castleway conspired to cash the checks with the purpose of fraudulently laundering money should be dismissed because the state of New York does not recognize an independent cause of action for civil conspiracy without a valid underlying tort. It then argues that all the causes of action should be dismissed because these issues were already decided in the SDNY case, and thus, collateral estoppel should apply. As part of this argument, Castleway asserts that the state regulation, 3 NYRR § 416, does nothing more than establish a parallel compliance with federal anti-money laundering regulations created by the FinCEN rules. Therefore, Castleway argues, a finding that a negligence claim is untenable pursuant to FinCEN anti-money laundering regulations should logically preclude a finding that a negligence claim is tenable pursuant to NY state anti-money laundering regulations. Finally, it argues that any request on the part of plaintiffs for leave to amend the complaint should be denied because no cause of action has been demonstrated and an amended complaint would be futile.

Plaintiffs reply that their first, second, fourth and fifth causes of action against NW and Castleway should not be dismissed. They argue that these negligence claims are proper. Plaintiffs state that the new FinCEN rules were adopted to change the pattern of bank complicity in fraud and that both NW and Castleway owed them a duty codified in 31 CFR Parts 1010, 1020, 1023, 1024, and 1026, to prevent fraud by collecting personal identifying information from Daniels when she opened the business entity account and when she attempted to cash the checks at EZ Check Cashing. Significantly, plaintiffs make no effort to differentiate the 3 NYRR § 416 state regulations from the federal FinCEN regulations, and only make arguments against the federal regulations in their reply papers to the Castleway cross motion. Therefore, plaintiffs have effectively admitted that a finding that a negligence claim is untenable pursuant to FinCEN regulations should logically preclude a finding that a negligence claim is tenable pursuant to NY state anti-money laundering regulations.

Plaintiffs also assert that, although a private cause of action has not traditionally existed under FinCEN record-keeping rules, this is not a record-keeping issue, and that such a private cause of action has been permitted by courts before. Plaintiffs do not respond to NW and Castleway's arguments for dismissal of the third and sixth conspiracy causes of action. Finally, they argue that collateral estoppel does not apply in this case because the NW case and the Castleway case come from different facts, different records and different witnesses than the SDNY case, and therefore, the issues are separate. They also argue that ruling in favor of plaintiffs in this case would not prejudice any parties in the BoA case.

NW responds by re-asserting that it owed no duty to plaintiffs. It argues that the case that plaintiffs use to demonstrate that a private cause of action has been permitted under FinCEN rules is a very limited exception under Florida law that does not apply to the instant case. It also claims that collateral estoppel is applicable here because the issues are identical and because the plaintiffs had a full and fair opportunity to litigate the issues in the SDNY case.

Castleway responds by reasserting that nowhere in plaintiff's papers do they cite any federal or New York state law that allows a private cause of action to be asserted pursuant to anti-money laundering statutes. Castleway also argues that a collateral estoppel argument can be made here because collateral estoppel can be applied even with different parties, and even with different causes of action, where the facts arise out of the same transactional occurrences (*See Gramatan Home Investors v. Lopez*, 46 NY2d 481 [1979]; *Ryan v. New York Tel. Co.*, 62 NY2d 494 [1984]). The court's decision follows.

DISCUSSION

At the outset, the third and sixth causes of action for conspiracy against NW and Castleway are dismissed. NW and Castleway put forth arguments that these causes of action should be dismissed because the state of New York does not recognize independent causes of action for civil conspiracy and no valid underlying tort exists here. NW and Castleway also argue that plaintiffs have failed to plead any of the required conspiracy elements in their pleadings, do not sufficiently allege adequate facts supporting that there was any agreement to commit a tort or that there was any participation in furtherance of a plan or purpose, and that merely using the word “conspiracy” in their pleadings is insufficient (*See Cohen & Lombardo, P.C. v. Connors*, 169 AD3d 1399 [4th Dept 2019]). Plaintiffs failed to address any of these arguments in their opposition to the motion. Thus, since those portions of Northwest’s motion and Castleway’s cross motion are unopposed, the claims are deemed abandoned and dismissed by the Court (see *Cassell v. City of N.Y.*, 159 AD3d 603 [1st Dept 2018]). Therefore, the third and sixth cause of action for conspiracy against NW and Castleway are severed and dismissed.

Next, NW and Castleway argue that the negligence causes of action against them should be dismissed because these issues were already decided in the SDNY case and collateral estoppel precludes the arguments from being asserted again in a new forum. Under CPLR § 3211(a)(5), “a party may move for judgment dismissing one or more causes of action asserted against him or her on the ground that the cause of action may not be maintained because of collateral estoppel” (*Karimian v. Time Equities, Inc.*, 164 AD3d 486 (2d Dept 2018); CPLR § 3211[a][5]). Collateral estoppel allows “the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided” (*Ryan v. N.Y. Tel. Co.*, 62 NY2d 494 [1984] quoting *Gramatan Home Investors Corp. v. Lopez*, 46 NY2d 481 [1979]). Specifically, defensive use of collateral estoppel “precludes a plaintiff from relitigating identical issues by merely switching adversaries.” (*Shaid v. Consol. Edison Co.*, 95 AD2d 610 [2d Dept 1983]). For the doctrine to apply, the issues raised must be identical and must have been decided in the prior action and be decisive to the present action; and the party that is precluded must have had a full and fair opportunity to contest the prior determination (*Hughes v. Farrey*, 30 AD3d 244 [1st Dept 2006]; see *Kaufman v Eli Lilly & Co.*, 65 NY2d 449 [1985]).

NW and Castleway argue that collateral estoppel applies here because plaintiffs asserted the same claims against Bank of America under the same facts in the SDNY case, and those claims were dismissed as being without merit. Both NW and Castleway argue that in both this case and the SDNY case, plaintiffs alleged that the email address of Cartier Morocco’s CEO was hacked and banking information was changed. In both cases, plaintiffs alleged that named individual defendants used “associates” to open bank accounts and arrange for the deposit of diverted payments, and in both cases those payment were made, causing damages to the plaintiffs.

Plaintiffs respond that collateral estoppel does not apply to this case because there is no privity between NW and BoA, nor between Castleway and BoA, and the facts between this case and the SDNY case are different. Plaintiffs state that the acts of BoA in opening a business bank account with Agu were disclosed as the result of a subpoena of BoA, whereas here, the acts of NW in opening the account with Daniels were disclosed as the result of a subpoena served upon it. Plaintiffs argue that each bank provided its own set of facts or lack thereof as a result of the separate subpoenas, and therefore, the cases are built on separate factual records. They argue that collateral estoppel cannot apply because each case must be judged on its own unique facts.

Firstly, the argument that collateral estoppel cannot apply because there is no privity between NW and BoA, nor between Castleway and BoA fails because for collateral estoppel to be used as an affirmative defense, there does not need to be privity between the defendants in the two cases. There only needs to be privity between the party that is being precluded from trying the same issues again

and the plaintiff in the first case (*See Ryan v. New York Tel. Co.*, 62 NY2d 494 [1984]). Here, Cartier SA and Saada US were plaintiffs in both actions, so privity exists. Next, the argument that collateral estoppel cannot apply because the two cases are built on separate factual records fails because two cases do not need to arise from the exact same facts for collateral estoppel to apply so long as the material facts and the issues are the same (*see Fleischer v. Uccelini*, 81 Misc.2d 22 [Sup. Ct. Nassau Cty]).

Here, the facts as set forth by the complaint state that both Agu and Daniels were straw men, and that Tisdale and Iwu were the masterminds of the fraudulent scheme. In both cases, Iwu hacked into Debbbarh's email account, and directed Omega to send payment to the newly opened business bank accounts. In both cases, that money was then withdrawn through cashier's checks that were cashed by Castleway. In both the SDNY case and this case, plaintiffs put forth causes of action against NW, Castleway and BoA for negligence for failing "to comply with the CDD requirements of the FinCEN rules" or comparable state anti-money laundering regulations when they allowed Daniels and Agu to open bank accounts or cash cashiers' checks "without providing any of the required information." In both cases, plaintiffs put forth causes of action against NW, Castleway and BoA for failing "to properly instruct its employee[s]... as to the CDD requirements set forth in the FinCEN rules." The language used in the BoA complaint and the language used in this complaint are almost identical. Both cases have the same material facts and involve the same players, even if the information was revealed by separate subpoenas. Both cases involve the legal issues of negligence for failure to follow anti-money laundering regulations. Therefore, the issues and material facts in this case and the SDNY case are identical.

Next, the issues in this case were decided in the SDNY action. In that action, Judge Cote dismissed the negligence claims against BoA as a matter of law, stating that the bank owed no duty to Cartier SA or Saada US because "a general duty to non-customers would 'unreasonably expand banks' orbit of duty', and 'be the equivalent of making New York banks liable to the world's banking public'" (*Cartier Saada S.A. v. Bank of Am., N.A.*, 2022 U.S. Dist. Lexis 11441 [SDNY 2022] quoting *Lerner v. Fleet Bank, N.A.*, 459 F3d 273 [2d Cir. 2006]). Judge Cote also stated, as a matter of law, that the negligence claims could not survive because the CDD regulations were part of the Bank Secrecy Act which "does not provide a private right of action" (*Cartier Saada S.A. v. Bank of Am., N.A.*, 2022 U.S. Dist. Lexis 11441 [SDNY 2022]). Therefore, all the issues contemplated in the negligence causes of action against NW and the negligence claims against Castleway were decided, as a matter of law, in the SDNY case.

Additionally, in this case, the parties that are precluded had a full and fair opportunity to contest the prior determination. A full and fair opportunity to contest a determination is present when there has been vigorous litigation established by a "practical inquiry into the realities of litigation" (*See Feingberg v. Boros*, 99 AD3d 219 [1st Dept 2012]). Both Cartier SA and Saada US were plaintiffs in the SDNY action. That action was disposed upon BoA's motion to dismiss. Plaintiffs had a full and fair opportunity to oppose the motion, and do not allege otherwise in their response papers to this motion. Therefore, both plaintiffs had a full and fair opportunity to contest the SDNY action and collateral estoppel is applicable to this case.

Accordingly, the first and second causes of action for negligence against NW are severed and dismissed, and the fourth and fifth causes of action for negligence against Castleway are severed and dismissed. Since all causes of action against Castleway have been severed and dismissed, the Castleway crossclaim against NW for indemnification or contribution must also be dismissed.

Based on the foregoing, the remaining arguments put forth by NW under CPLR § 3211(a)(7) are hereby denied as moot. NW has established that all causes of action asserted against it by plaintiffs and the crossclaim asserted against it by Castleway should be dismissed pursuant to CPLR § 3211. Castleway has also established that all causes of action asserted against it by plaintiffs should be dismissed pursuant to CPLR § 3211. Consequently, the motion and the cross motion must be granted.

Accordingly, it is hereby

ORDERED that the motion is granted in its entirety; and it is further

ORDERED that the cross motion is granted in its entirety; and it is further

ORDERED that the first, second, fourth, and fifth causes of action for negligence against Northwest Bank and Castleway Financial, Inc. are severed and dismissed; and it is further

ORDERED that Castleway Financial, Inc.'s crossclaim for indemnification or contribution against Northwest Bank is dismissed; and it is further

ORDERED that the third and sixth causes of action for conspiracy against Northwest Bank and Castleway Financial, Inc. are severed and dismissed; and it is further

ORDERED that the seventh cause of action for fraud against Eric Iwu and Demetrice T. Tisdale continues.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

1/9/23
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.