

**Gregoretti v Joseph A. Maria, P.C.**

2023 NY Slip Op 32033(U)

June 16, 2023

Supreme Court, New York County

Docket Number: Index No. 652650/2017

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

*Justice*

-----X

JAMES GREGORETTI,

Plaintiff,

- v -

JOSEPH A. MARIA, P.C., JOSEPH A. MARIA, ANTHONY  
SCHETTINO

Defendants.

-----X

INDEX NO. 652650/2017

MOTION DATE 07/07/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 50, 51, 54, 55, 56, 57

were read on this motion to/for JUDGMENT - SUMMARY.

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting him summary judgment. Defendants Joseph A. Maria, P.C. (P.C.) and Joseph A. Maria, individually (Maria) (collectively, Maria defendants) oppose.

**FACTUAL AND PROCEDURAL BACKGROUND**

This action involves a disputed interest in a business which owned and operated, as a franchisee, a gym in Rego Park, Queens named World Gym of Queens, Inc. Plaintiff owned one-third of the shares in the business, while the other two-thirds were owned by defendant Anthony Schettino and/or non-party Rosemary Schettino. This arrangement dated back to the early 1990s (NYSCEF 1).

In 2010, plaintiff commenced two actions alleging shareholder oppression, and both were settled pursuant to a mediated Settlement Agreement dated September 14, 2011, which provided for the redemption of plaintiff's shares for payments totaling \$142,000, payable as follows:

A. \$25,000 as a down payment, payable on or before October 15, 2011;

- B. Payments of \$1,625 per month, from October 15, 2011 through September 15, 2013, totaling \$39,000; and
- C. Payments of \$1,500 per month, from October 15, 2013 for the next 52 months (i.e., through January 15, 2018), totaling \$78,000.

(NSYCEF 2).

Paragraph 4 of the Settlement Agreement required the Schettinos to escrow their shares with Maria to secure these obligations:

- 4. Security. Simultaneous with the execution of this Agreement, Rosemary and/or Anthony Schettino shall tender all their shares (“Defendants’ Shares”) in the Company to Joseph Maria, Esq., as Escrow Agent, to secure the payment obligations set forth in Paragraph 2 and 3 above. Upon receipt of the share certificates, Joseph Maria shall provide counsel for Gregoretti with confirmation in writing, fax, or email that he has received them.

In the event of default, “[Maria] shall forthwith forward to Gregoretti the shares of stock he holds in escrow,” and that:

Defendants also hereby pledge, assign and grant to Gregoretti, and hereby create a continuing first priority lien and security interest in favor of Gregoretti in Defendants’ Shares to secure the payments reflected in Paragraph 2 and 3.

The Settlement Agreement also provides:

Because Gregoretti and Defendants represent that the original share certificates have been lost or misplaced, World Gym shall reissue original share certificates which reflect Gregoretti’s ownership of 1/3 of the shares and that the remaining 2/3 of the shares are owned by Anthony Schettino and/or Rosemary Schettino. The original share certificates belonging to Anthony and/or Rosemary Schettino shall be held in escrow by [Maria] as set forth in Paragraph 4 herein. With respect to Gregoretti’s shares, [Maria] shall provide a copy of the newly issued certificate for Gregoretti’s shares, which shall say “redeemed” on them, and provide a copy to Gregoretti’s counsel.

(NYSCEF 2).

On February 15, 2016, after Rosemary Schettino died, Anthony Schettino allegedly defaulted. By then, \$106,000 in payments had been made. A year later, on February 1, 2017,

plaintiff sent a notice of default, and on March 16, 2017, he sent a demand to Maria demanding delivery of the Schettino shares. This suit was filed on May 17, 2017, and plaintiff asserts claims for replevin, breach of contract/specific performance, breach of fiduciary duty, conversion, and the imposition of a constructive trust (NYSCEF 1). In January 2018, the Maria defendants filed an answer, and Anthony Schettino filed his answer with a counterclaim (NYSCEF 35).

Plaintiff moved for summary judgment on July 18, 2018, and the Maria defendants cross-moved to dismiss on October 8, 2018. By stipulation, the cross-motion to dismiss was withdrawn but was to be considered as opposition to plaintiff's motion (NYSCEF 44). Before the motion was decided, on February 19, 2019, Anthony Schettino filed a Chapter 13 bankruptcy petition, which stayed this case pursuant to Section 362 of the Bankruptcy Code (NYSCEF 43).

On October 21, 2022, the bankruptcy case was dismissed, and following correspondence dated December 29, 2022, this case was restored to the court's active docket (NYSCEF 55-57).

By letter dated August 17, 2021, and a stipulation of discontinuance filed on August 4, 2022, plaintiff's counsel advised the court of a settlement with Anthony Schettino in the bankruptcy case, resulting in the discontinuance of this action against him (NYSCEF 52-54). Thus, the Maria defendants are the only remaining defendants.

### **LEGAL ANALYSIS**

Plaintiff's claims asserted against the Maria defendants are as follows:

- (1) Replevin pursuant to CPLR 7101, based on their possession of the shares and failure to deliver them to plaintiff;
- (2) Breach of contract based on the Maria defendants' failure to act as escrow agents, pursuant to the settlement agreement, and failure to deliver the shares to plaintiff;

- (3) Breach of fiduciary duty, based on their failure to act as fiduciaries and deliver the shares;
- (4) Conversion based on the Maria defendants' continued possession of the shares, which interfered with plaintiff's possession of them; and
- (5) The imposition of a constructive trust, requiring the Maria defendants to deliver the shares.

Thus, all of plaintiff's claims involve the Maria defendants' alleged possession of the shares and failure to give them to plaintiff. However, it is undisputed that no share certificates were ever re-issued, and therefore none was delivered to the Maria defendants to hold in escrow. While plaintiff characterizes this as "utterly shocking," it does not appear that he took any steps to ensure that the missing share certificates, including his own, were ever re-issued, let alone delivered into escrow.

While the Maria defendants represented the Schettinos in the original 2010 actions and at the resulting mediation and Settlement Agreement that resolved them, he was not a party to the Settlement Agreement, and an actual escrow agreement imposing obligations on the Maria defendants was never created.

Plaintiff appears to be arguing that the Maria defendants should have themselves obtained the share certificates and placed them in escrow. However, he cites no agreement or law or rule that required them to do so, and in general, a lawyer owes no duty to a non-client (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 46 AD3d 400 [1st Dept 2007], *affd* 12 NY3d 553 [2009]; *DeMartino v Abrams, Feinstein, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP*, 189 AD3d 774 [2d Dept 2020]; *Ginther v Jones*, 35 AD3d 1224 [4th Dept 2006], *lv denied* 8 NY3d 810 [2007]). Moreover, the settlement agreement required the World Gym to issue the

certificates, and plaintiff does not explain how the Maria defendants would have been able to either issue them themselves or force the Gym to do so.

As the Maria defendants never had possession of the certificates, plaintiff has no claim against them for replevin, conversion, or a constructive trust (*see e.g., Westbury Recycling, Inc. v Westbury Transfer & Recycling, LLC*, 209 AD3d 929 [2d Dept 2022] [replevin claim must be based on defendant's possession of property of which plaintiff claims to have a superior right]; *Lynn v Maida*, 170 AD3d 573 [1st Dept 2019] [conversion claim properly dismissed as defendants never exercised ownership, possession, or control of money at issue]).

The breach of contract claim cannot be maintained against the Maria defendants as they were not parties to any contract with plaintiff, and as the escrow was never created, they could not have breached a fiduciary duty to him (*see Muscara v Lamberti*, 133 AD2d 362, 362 [2d Dept 1987] [without delivery of subject of escrow, "no escrow is created, and the fiduciary duty of the designated escrow agent does not come into existence"; as funds at issue were never delivered to defendant, he never became fiduciary] [citations omitted]).

In addition, no fiduciary relationship arose between the Maria defendants and plaintiff as they were not his attorneys (*see Cusack v Greenberg Traurig, LLP*, 109 AD3d 747 [1st Dept 2013] [breach of fiduciary claim dismissed absent attorney-client relationship between the parties or any other alleged fiduciary duty between them]; *Rosenberg v Rosenberg*, 180 AD2d 607 [1st Dept 1992] [modification to separation agreement did not create escrow or fiduciary relationship between plaintiff and attorney as no funds were deposited with attorney pursuant to agreement]).

Finally, to the extent that plaintiff argued that the Maria defendants may be held liable for their clients' alleged failure to comply with the settlement agreement, he cites no supporting

caselaw. Thus, in sum, plaintiff does not demonstrate his prima facie entitlement to summary judgment on any of his claims against the Maria defendants.

Given the above, and in the exercise of my discretion, I hereby search the record and grant summary judgment to defendants, dismissing the action as against them (see CPLR 3212[b] [court may grant summary judgment to non-moving party if it appears that it is entitled thereto]; *BSI, LLC v Raimo*, 195 AD3d 590 [2d Dept 2021] [pursuant to CPLR 3212(b), court has authority to search record and award summary judgment to non-moving party as to issue that was subject of motion]; *Atiencia v MBBCO II, LLC*, 75 AD3d 424 [1st Dept 2010] [court has power to search record and award summary judgment to non-moving party]).

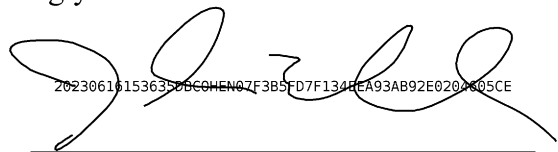
**CONCLUSION**

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied; and it is further

ORDERED, that summary judgment in favor of defendants Joseph A. Maria, P.C. and Joseph A. Maria, individually is granted upon searching the record (CPLR 3212[b]), and the complaint is dismissed in its entirety; and it is further

ORDERED, that the clerk enter judgment accordingly.



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6/16/2023

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE