SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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ROBERT TASINARI and SURVIVORS TRUST UNDER THE TASINARI FAMILY TRUST 02/23/1995,

Plaintiffs,

- v -

TODD M. DEMATTEO and BCI FINANCIAL HOLDINGS, LLC,

Defendants.

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INDEX NO.	451467/2023
MOTION DATE	08/08/2023, 12/15/2023
MOTION SEQ. NO.	001, 002

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 56, 57, 58
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53
were read on this motion to/for JUDGMENT - DEFAULT.

Plaintiffs Robert Tasinari and Survivors Trust Under the Tasinari Family Trust 02/23/1995 (the Trust, and together with Tasinari, plaintiffs), bring this action against defendants Todd M. DeMatteo and BCI Financial Holdings (BCI, and together with DeMatteo, defendants) asserting various claims for conversion. Presently before the court are two motions: MS 002[1]—defendants' motion for an order dismissing the complaint pursuant to CPLR 3211(a)(1), (5), and (7) and for sanctions; and MS 001—plaintiffs' motion for default judgment. For the following reasons, defendants' motion to dismiss the complaint is granted, and plaintiffs' motion for a defaulis denied.

Background

The following facts are drawn from the complaint (NYSCEF # 2 - compl), as well as the affidavits and accompanying exhibits submitted in connection with defendants' motion to dismiss.

[1] MS002 was originally filed as MS 10001 in the Supreme Court, Suffolk County on December 27, 2022. The motion filed as MS 10001 had also requested a transfer of venue to New York County, as an alternate relief.

The RT2 Action

The instant lawsuit against defendants is the second lawsuit plaintiff or his company filed in this dispute[2]. The first lawsuit captioned *RT Two, LLC v Todd DeMatteo*, Index No. 156012/2020 (NYSCEF # 10 - the RT2 Action) was filed on August 3, 2020, in Supreme Court, New York County. In its verified complaint, RT2 alleged that it provided over two million dollars to defendant DeMatteo for an investment vehicle he was establishing for several broker-dealer transactions (RT2 Action ¶¶ 5-7). This investment transaction was memorialized in an operating agreement, which formed a new Delaware entity to serve as the vehicle consummating the broker-dealer transactions (*id.* ¶¶ 8-15). RT2 further alleged that, after forming this entity, DeMatteo informed RT2 that he needed to "shore up his assets" and asked that RT2 transfer some of its assets to BCI (*id.* ¶ 16). RT2 accordingly transferred 250,000 shares of "CLEV" (i.e., Concrete Leveling Systems Inc. or CLS) and 597,000 shares of "QEBR" (i.e., Virtual Medical International, Inc. or VMI) to DeMatteo (*see id.* ¶¶ 16-17). Although RT2 would later demand the immediate return of the shares, DeMatteo allegedly refused to do so (*id.* ¶¶ 28-33). As is relevant here, RT2 repeatedly represented in support of its conversion claim that it was the owner of the VMI and CLS shares and that these shares were its "property" (*see id.* ¶¶ 16-17, 29-30, 35).

After RT2 filed the RT2 Action, DeMatteo moved to dismiss and submitted an affidavit in support of his motion (NYSCEF # 24). DeMatteo began by representing that he was the managing member of BCI, and explained that RT2, whose sole principals and agents in fact were Tasinari and his brother, Ronald J. Tasinari, was a member in BCI (*id.* ¶¶ 1, 4-5). DeMatteo's affidavit then set forth additional details of the relevant transaction, explaining that RT2 was required to make capital contributions of $250,000 and $1.75 million, respectively (*id.* ¶ 12). DeMatteo averred that, after making the initial $250,000 contribution, RT2 allegedly failed to make its second capital commitment, which forced BCI to request that RT2 pledge its shares in CLS (*id.* ¶¶ 13-14). And when RT2 requested return of the CLS shares, DeMatteo required RT2 to replace that security with something else, which resulted in the transfer of the VMI shares for BCI's benefit (*id.* ¶ 15). DeMatteo averred that neither the CLS nor VMI shares were registered to DeMatteo or for his benefit, and he attached copies of transfer documents indicating that BCI was the beneficial owner of the shares (*id.* ¶ 16 & Exs. D& E).

RT2 opposed DeMatteo's motion, and in support, it submitted an affidavit by Tasinari. Through that submission, Tasinari attested that he was "an agent in fact" of RT2 (NYSCEF # 25 ¶ 2). Tasinari then affirmed that DeMatteo caused RT2 to deposit sums of money in DeMatteo's bank account, and that, upon DeMatteo requesting that RT2 transfer some of its assets to BCI, he and Ron Tasinari

[2] Plaintiffs initially filed the instant lawsuit in Supreme Court, Suffolk County in 2022 under Index No. 202047/2022. The Suffolk County lawsuit was subsequently transferred to New York County.

effectuated the transfer of the CLS and VMI shares to BCI's control (*id.* ¶¶ 7-8). Tasinari concluded by reiterating RT2's allegations that DeMatteo had refused to return the shares despite several demands for their return (*id.* ¶ 10).

On June 4, 2021, this court granted DeMatteo's motion to dismiss (NYSCEF # 13). In dismissing RT2's conversion claim, the court held that RT2's allegations that DeMatteo converted the shares of CLS and VMI stocks were flatly contradicted by documentary evidence (*id.* at 9). Specifically, the court observed that the documentary evidence established that DeMatteo did not possess the shares of stock provided by RT2 (*id.*). The court further concluded that RT2 failed to establish a basis to pierce the corporate veil and hold DeMatteo personally liable for BCI's alleged conversion (*id.*).

The Instant Action

On October 3, 2022—just under a year and a half after the court dismissed the RT2 Action—plaintiffs commenced this action against defendants in the New York State Supreme Court, Suffolk County (NYSCEF #s 1-2). The complaint sets forth four causes of action, all of which sound in conversion and relate to the transfer of the same VMI and CLS shares at issue in the RT2 Action. The first transfer alleged in the complaint relates to the 597,0000 shares of VMI, which plaintiffs now allege were owned by Tasinari (compl ¶ 6). According to the complaint, in or around November 2019, Tasinari directed VMI's transfer agent to transfer the VMI shares to BCI as a purported loan to be returned on demand (*id.* ¶¶ 7-8). Tasinari later demanded that BCI return the shares in November 2019, but BCI allegedly failed and refused to do so (*id.* ¶¶ 10-13). Tasinari further alleges that DeMatteo received those same VMI shares and misrepresented that he was borrowing those shares when he never intended to return them (*id.* ¶¶ 23-24).

The second transfer addressed in the complaint relates to the 250,000 shares of CLS, which plaintiffs now allege were owned by the Trust (compl ¶ 15). According to the complaint, in or around April 2019, the Trust directed CLS's transfer agent to transfer the CLS shares to BCI as a purported loan to be returned on demand (compl ¶¶ 16-17). Like Tasinari, the Trust purportedly demanded that BCI return the shares in November 2019, but BCI allegedly failed and refused to do so (*id.* ¶¶ 18-20). The Trust further alleges that BCI misrepresented that it was borrowing the shares when, in fact, it never intended to return them to the Trust (*id.* ¶¶ 27-28).

On December 27, 2022, defendants moved to dismiss the complaint, or in the alternative, to transfer the action to New York County (NYSCEF # 7). On June 15, 2023, the Suffolk County Supreme Court granted the transfer motion, directed that the action be transferred to New York County, and denied the motion to dismiss without prejudice (NYSCEF # 28). The transfer was effectuated on June 23, 2023 (NYSCEF # 31).

Shortly after this action was transferred to New York County, plaintiffs moved for default judgment against defendants (NYSCEF # 44). In so moving, plaintiffs argued that defendants failed to move to dismiss or answer the complaint after the case was transferred from Suffolk County to New York County (NYSCEF # 45 ¶¶ 3-5). Following a conference at which both parties appeared, this court declined to enter a briefing schedule on either plaintiffs' motion for default judgment or defendants' new, contemplated motion to dismiss because it deemed defendants' original motion to dismiss as already transferred to and pending before the court (NYSCEF #s 54 & 55). On December 15, 2023, for administrative purposes, the court instructed defendants to file a new notice of motion to dismiss for the instant motion to dismiss for the purpose of obtaining a motion sequence number assigned by the Clerk's Office for the Supreme Court, New York County (NYSCEF # 60).

Legal Standard

CPLR 3211(a)(7) provides that a party may move for judgment dismissing one or more causes of action when a pleading "fails to state a cause of action." On a motion to dismiss pursuant to CPLR 3211(a)(7), the court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]; *accord Pavich v Pavich*, 189 AD3d 548, 549 [1st Dept 2020]).

A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted if "the documentary evidence 'utterly refutes plaintiff's factual allegations' . . . and 'conclusively establishes a defense to the asserted claims as a matter of law'" (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 103 [1st Dept 2014] [internal citations omitted]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). In "those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" (*Morgenthow & Latham v Bank of N.Y. Co., Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal quotations omitted]).

Finally, CPLR 3211(a)(5) provides for dismissal if a "cause of action may not be maintained because of . . . collateral estoppel." Under New York law, "[c]ollateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . ., whether or not the tribunals or causes of action are the same'" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999], quoting *Ryan v N.Y. Tel. Co.*, 62 NY2d 494, 500 [1984]). The doctrine applies "where there is 'an identity of issue which has necessarily been decided in the prior action and is decisive of the present action' and 'a full and fair opportunity to contest the decision

now said to be controlling'" (*Epic W14 LLC v Malter*, 212 AD3d 575, 576 [1st Dept 2023], quoting *Buechel v Bain*, 97 NY2d 295, 303-304 [2001]).

Discussion

I. Defendants' Motion to Dismiss

Defendants advance two grounds for dismissal with prejudice (NYSCEF # 8 – Defts MOL; NYSCEF # 26 – Defts Reply). To start, defendants argue that the claims against DeMatteo are barred by collateral estoppel because the allegations that DeMatteo converted the VMI and CLS shares at issue in this action have already been conclusively litigated and dismissed with prejudice (Defts MOL at 8-10; Defts Reply at 6-8). Addressing the issue of privity, defendants aver that, although plaintiffs were not specifically parties to the RT2 action, they should be barred from litigating this issue because they are in privity with RT2 (Defts MOL at 9; Defts Reply at 6-7). As for Tasinari, defendants note that he is the alleged 50% owner of RT2, has represented himself as an "agent in fact" for that entity, and has affirmed in the past that he caused RT2 to transfer the VMI and CLS shares (Defts MOL at 9). And regarding the Trust, defendants point to allegations in a separate complaint filed by BCI,[3] which alleged that Tasinari represented that the Trust would fund a $2 million capital contribution through RT2 (*id.*, citing NYSCEF # 15 ¶ 19). In the alternative, defendants contend that, even if collateral estoppel did not apply, documentary evidence again defeats plaintiffs' conversion claims against DeMatteo (*id.* at 10).

Defendants next argue that plaintiffs fail to state a claim for conversion against BCI. Defendants first posit that plaintiffs are unable to establish that they have legal ownership or an immediate right of possession over identifiable funds because RT2 has already claimed to be the legal owner of the VMI and CLS shares in the RT2 Action (Defts MOL at 11; Defts Reply 2-4). Defendants otherwise contend that plaintiffs are unable to show that BCI exercised unauthorized dominion over the shares because they have acknowledged in both this litigation and in the RT2 Action that the shares were voluntarily transferred, rather than loaned (Defts MOL at 12; NYSCEF # 9 – DeMatteo aff ¶¶ 11-14). Finally, defendants aver that plaintiffs' allegations that BCI refused to return the shares on demand are false because DeMatteo would return the shares back to RT2 if Tasinari agreed to pay certain third-party administrative costs (Defts MOL at 12; DeMatteo aff ¶¶ 16-17).

In opposition, plaintiffs submit only an affidavit of Robert Tasinari (NYSCEF # 23). Tasinari's affidavit largely just reiterates the allegations in the complaint that (1) he loaned 597,000 shares of VMI to defendants in November 2019, (2) the Trust loaned 250,000 shares of CLS to BCI in April 2019, and (3) defendants did not

[3] That action, captioned *BCI Financial Holdings LLC v RT Two LLC*, No. 653394/20202, remains pending before this court.

return the loaned shares (*id.* ¶¶ 3, 6). Tasinari then responds to defendants' arguments for dismissal in what is effectively a legal argument improperly raised through a fact affidavit (*see generally* 22 NYCRR 208.11 [b] [1] ["Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law"]).

Plaintiffs' conversion claims against DeMatteo are addressed first, followed by plaintiffs' conversion claims against BCI.

Plaintiffs' Conversion Claims against DeMatteo

At the outset, there is no real dispute that the RT2 Action involved identical claims regarding a purported conversion of the VMI and CLS shares by DeMatteo (*compare* RT2 Action ¶¶ 5-17, 27-33 *with* compl ¶¶ 5-28). Nor is there any real dispute that this issue was fully litigated before and dismissed by the court, and that RT2 had a full and fair opportunity to contest the issue (NYSCEF # 13 at 9; NYSCEF # 25 ¶¶ 2, 7-8, 10). Instead, the key question here is whether plaintiffs are in privity with RT2.

"[A] judgment in a prior action is binding not only on the parties to that action, but on those in privity with them" (*Castellano v City of New York*, 251 AD2d 194, 194 [1st Dept 1998] [internal quotations omitted]). "[T]o establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding" (*Green v Santa Fe Indus., Inc.*, 70 NY2d 244, 253 [1987]). This "amorphous concept" is neither "easy of application" (*Matter of Juan C. v Cortines*, 89 NY2d 659, 667 [1997]), nor susceptible to a "single well-defined meaning" (*Buechel*, 97 NY2d at 304). Nevertheless, privity typically extends to "those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action" (*Matter of Juan C.* 89 NY2d at 667-668; *Bayer v City of New York*, 115 AD3d 897, 898 [2d Dept 2014] ["persons in privity include those whose interests are represented by a party to the previous action and those 'whose own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation'"] [alterations omitted]). When addressing this issue, courts must "carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion" (*Buechel*, 97 NY2d at 304-305).

Here, defendants have sufficiently established that Tasinari was in privity to RT2 in the RT2 Action. To start, Tasinari affirmed in his affidavit submitted in connection with opposing DeMatteo's motion to dismiss the RT2 Action that he is an "agent in fact" of RT2 (NYSCEF # 25 ¶ 2). Tasinari also affirmed that, upon DeMatteo allegedly requesting that RT2 transfer some of its assets to BCI, he and

his brother, Ron Tasinari, effectuated RT2's purported transfer of share certificates of CLS and VMI to the "investment vehicle under [DeMatteo's] sole control" (i.e., BCI) (*see id.* ¶¶ 7-8, 10). These informal judicial admissions by Tasinari—which this court may consider as part of defendants' motion (*see Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009] [concluding that admission made in affidavit submitted in prior action "constituted an informal judicial admission that was properly considered by the court"])—plainly support a conclusion that Tasinari maintained a notable degree of control over RT2 in the RT2 Action. For that reason, the record supports a conclusion that Tasinari's interests were represented by RT2 in the RT2 Action, and hence, he had privity with RT2 as a matter of law (*see e.g.*, *Specialty Rest. Corp. v Barry*, 236 AD2d 754, 756 [3d Dept 1997] [concluding that defendant who was president, shareholder, and director of a company with "[c]ontrolling status" was in privity with company]; *Karali v Araujo*, 48 Misc 3d 1043, 1047 [Sup Ct, Suffolk Cty, 2015] [concluding that president and sole shareholder's "[c]ontrolling status over a corporation" constituted privity with the corporation as a matter of law]; *Broadway 36th Realty, LLC v London*, 29 Misc 3d 1238[A], at *7 [Sup Ct, NY County, Dec. 14, 2010] [concluding that principal of a tenant had privity with tenant and was bound by judgment against the tenant]).

This conclusion, however, does not apply to defendants' argument that any claims by the Trust against DeMatteo are barred by collateral estoppel. Indeed, the only evidence offered by defendants in support of a finding privity between RT2 and the Trust is a stray allegation *by BCI* in a prior complaint that RT2 has held out the Trust as an alleged funding source for it (NYSCEF # 15 ¶ 19). Although this allegation, if proven true, may suggest a relationship between RT2 and the Trust, there is no indication from this relationship alone that the Trust's interests were necessarily represented in the RT2 Action (*see Bravo v Atlas Capital Group, LLC*, 196 AD3d 627, 629 [2d Dept 2021] [explaining that "relationship alone is not sufficient to support preclusion"]).

That said, the Trust's claims against DeMatteo should be dismissed based on the same reasons supporting dismissal of RT2's claims against DeMatteo in the RT2 Action. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v N.Y. Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). To maintain a conversion claim, a plaintiff must establish that (1) its "possessory right or interest in the property," and (2) "defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Core Dev. Group LLC v Spaho*, 199 AD3d 447, 448 [1st Dept 2021]). Here, plaintiffs' allegations that DeMatteo converted the 597,000 shares of VMI and/or the 250,000 shares of CLS are flatly contradicted by the documentary evidence. Specifically, defendants' evidence again establishes that DeMatteo did not possess control over the shares that were purportedly transferred by the Trust (*see* NYSCEF # 24 ¶¶ 14-16 & Exs. D & E). Dismissal of the Trust's claims against DeMatteo are therefore warranted under CPLR 3211(a)(1).

In view of the above, plaintiffs' claims against DeMatteo is dismissed with prejudice.

Plaintiffs' Conversion Claims against BCI

As noted above, for a conversion claim to be actionable, a plaintiff must establish a possessory right or interest in the allegedly converted property (*Spaho*, 199 AD3d at 448). But here, the documentary evidence flatly refutes any alleged possessory rights or interests by plaintiffs in the VMI and CLS shares. For instance, RT2 clearly alleged in its verified complaint in the RT2 Action that it owned the VMI and CLS shares, and that these shares were its "property" (RT2 Action ¶¶ 16-17, 29-30, 35). Those verified allegations were then buttressed in RT2's opposition to DeMatteo's motion to dismiss when Tasinari, on behalf of RT2, affirmed it was RT2—not Tasinari or the Trust—who were the owners of the VMI and CLS shares that were transferred to, and converted by, BCI (*see* NYSCEF # 25 ¶¶ 8, 10). With documentary evidence indicating that it was RT2 who held possessory rights and interests in the VMI and CLS shares,[4] plaintiffs' conversion claim against BCI necessarily fails (*see McBride v KPMG Intl.*, 135 AD3d 576, 580 [1st Dept 2016] [concluding that plaintiffs had no possessory right or interest bank accounts that were held in name of a nonparty entity]).

Even if, however, plaintiffs did have a possessory right or interest in the VMI and CLS shares, their allegations that BCI wrongfully retained dominion over the VMI or CLS are conclusory in nature and largely amount to bare legal conclusions. Plaintiffs therefore have also failed to sufficiently plead a claim for conversion to the extent it is not refuted by documentary evidence (*see Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016] [explaining that courts need not credit factual allegations that "consist of bare legal conclusions" and are "conclusory"]).

In sum, plaintiffs' conversion claims against BCI are dismissed, with prejudice.

II. Plaintiffs' Motion for Default Judgment

Plaintiffs' motion for default judgment is denied for a multitude of reasons. To start, since defendants' motion to dismiss the complaint in its entirety is granted, plaintiffs' pending motion for default judgment is deemed academic. Moreover, plaintiffs' motion is improper. CPLR 3215 only permits plaintiffs to seek default judgment when defendants had "failed to appear, plead or proceed to trial of an action" (CPLR 3215 [a]). As the record establishes, defendants did repeatedly

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[4] As recognized by the First Department, "prior statements or averments of parties or their agents in the course of litigation that refute an essential element of a plaintiff's present claim may constitute documentary evidence within the meaning of CPLR 3211(a)(1)" (*Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 106 AD3d 536, 537 [1st Dept 2013] [internal quotations and citations omitted]).

appear in this action, including by filing a motion to dismiss on December 27, 2022 (NYSCEF # 7), pursuing renewal of that motion on July 31, 2023 (NSYCEF # 39), and appearing at a conference held by the court on August 9, 2023 (NYSCEF # 54). Put simply, plaintiffs' motion for default judgment should not have been filed.

At any rate, plaintiffs' motion also fails for the independent reason that it does not comply with the requirements of CPLR 3215. A movant seeking default judgment must submit the following materials: (1) proof of service of the summons and complaint or summons with notice; (2) proof of the facts constituting the claim and the amount due; and (3) an affidavit showing the default in answering or appearing (CPLR 3215[f]; *see also Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003]). "[P]roof of the facts constituting the claim" under CPLR 3215(f) must be set forth in an "affidavit made by the party" (CPLR 3215[f]). An affirmation by counsel without personal knowledge of the facts will not suffice (*see Mullins v DiLorenzo*, 199 AD2d 218, 219-220 [1st Dept 1993] ["a complaint verified by counsel amounts to no more than an attorney's affidavit and is therefore insufficient to support entry of judgment pursuant to CPLR 3215"]; *Wolf v 3540 Rochambeau Assocs.*, 234 AD2d 6, 6-7 [1st Dept 1996] [holding that default judgment was improper when plaintiff "failed to provide a complaint verified by the party plaintiffs, rather than plaintiffs' attorney, or an affidavit in support of the motion executed by a party with personal knowledge of the merits of plaintiffs' claims"]). Here, plaintiffs fail to submit any affidavit or affirmation constituting the proof of its claim. Rather, they merely submit a copy of their complaint, affidavits of service, and various filings and correspondence with defendants (all of which, tellingly, further confirm that defendants did not "fail to appear, plead or proceed" on this action) (*see* NYSCEF #s 44-53). Denial of plaintiffs' motion would consequently have been warranted on this ground as well.

III. Defendants' Motion for Sanctions

Defendants argue that there was no merit to plaintiffs' claims, which had already been dismissed as against DeMatteo and were plainly lacking as against BCI, and, as a result, plaintiffs' lawsuit is frivolous as a matter of law (Defts MOL at 15). Defendants accordingly seek sanctions in the form of an award of their costs and attorneys' fees incurred in making their motion to dismiss (*id.* at 15-16).

Pursuant to 22 NYCRR 130-1.1, courts may award a party reasonable attorneys' fees and impose financial sanctions for "frivolous conduct." Conduct is frivolous if it (i) "is completely without merit in law," (ii) "is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another," or (iii) "asserts material factual statements that are false" (22 NYCRR 130-1.1). In determining whether conduct is frivolous, courts shall consider "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should

have been apparent, or was brought to the attention of counsel" (*Borstein v Henneberry*, 132 AD3d 447, 450 [1st Dept 2015]).

Here, plaintiffs' lawsuit was patently frivolous when filed. The allegations in the complaint were nearly identical to those asserted and fully litigated in the RT2 Action, with the only details changing between lawsuits being the alleged identity of the owners of the VMI and CLS shares, and the recipient of the alleged transfer. Plaintiffs were surely aware, or should have been aware, of the allegations set forth in the RT2 Action, the sworn representations made by Tasinari in that action, and the court's reasoning for dismissing the RT2 Action. Yet they proceed with filing this lawsuit anyway. Under these circumstances, sanctions in the form of reasonable attorneys' fees and costs are appropriate and warranted.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted; and it is further

ORDERED that plaintiffs' motion for default judgment is denied; and it is further

ORDERED that defendants' motion for sanctions is granted, and defendants shall have judgment against plaintiffs as to liability for reasonable attorneys' fees and expenses incurred in connection with the motion to dismiss, with an amount to be determined by the court upon a submission by defendants, with service to plaintiffs, within thirty (30) days of this order, providing invoices and affirmation(s) from counsel regarding the basis for the fees charged and their reasonableness; plaintiffs shall submit their opposition, if any, to the amount, within ten (10) days of defendants' submission, and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in defendants' favor.

This constitutes the Decision and Order of the court.

12/20/2023
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE