

SH575 Holdings LLC v Richmond Stuyvesant Holdings, LLC

2023 NY Slip Op 34525(U)

December 22, 2023

Supreme Court, New York County

Docket Number: Index No. 651246/2019

Judge: Margaret A. Chan

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

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SH575 HOLDINGS LLC,	INDEX NO.	<u>651246/2019</u>
Plaintiff,		05/01/2023,
- v -	MOTION DATE	<u>05/15/2023,</u>
		<u>08/28/2023</u>
RICHMOND STUYVESANT HOLDINGS, LLC, CARL CALLER, THE MARCAL GROUP LLC, and MARK CALLER,	MOTION SEQ. NO.	<u>MS 007 008</u> <u>009</u>
Defendants.	DECISION + ORDER ON MOTIONS	

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 303, 305, 306, 307, 308, 309, 310, 311, 312, 313, 318, 320, 321, 322, 323, 324

were read on this motion to/for SANCTIONS

The following e-filed documents, listed by NYSCEF document number (Motion 008) 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 304, 314, 315, 316, 317, 319, 325, 326, 327, 328, 329, 331, 333

were read on this motion to/for SANCTIONS/STRIKE PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 009) 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355

were read on this motion to/for DISMISS

This action arises out of a "Ponzi scheme" administrated by defendant Pincus Carlebach, a disbarred bankruptcy attorney convicted for embezzling client funds. Plaintiff SH575 Holdings, LLC (SH575) deposited \$1,000,000 into Carlebach's escrow account pursuant to a sale/purchase agreement to purchase certain real estate. Upon the cancellation of the purchase agreement, plaintiff demanded its deposit, but Carlebach had misappropriated the escrowed money and transferred various amounts to the above-captioned defendants. Plaintiff commenced this action asserting claims for conversion, aiding and abetting conversion, actual and constructive fraudulent conveyance, quasi-contract/unjust enrichment/money had

and received, and negligence. Plaintiff now moves for discovery sanctions including attorney's fees and striking the pleadings of defendants Mark Caller and his company, The Marcal Group LLC (MS 007) and of defendants Carl Caller and his company, Richmond Stuyvesant Holdings, LLC (MS 008). These four defendants (collectively, the Caller Defendants) in turn, move to dismiss the amended verified complaint or for leave to amend their answer (MS 009).

For the reasons below, the joint motion to dismiss by defendants Mark Caller and The Marcal Group, LLC (together, the Marcal Defendants) and Carl Caller and Richmond Stuyvesant Holdings, LLC (together, the Carl Caller Defendants) is granted, and plaintiff's motion to the extent it requests reasonable attorney fees and costs is also granted.

BACKGROUND

On August 16, 2016, in connection with a bankruptcy proceeding, Liberty Towers Realty LLC (Liberty), a client of attorney Pincus Carlebach (now disbarred), entered into an agreement for the sale of certain real property (the Property) with Mark Caller, through Carl Caller's¹ company, Richmond Stuyvesant Holdings, LLC (Richmond) (NYSCEF # 48 – Amended Verified Complaint – ¶¶ 109-111). Mark Caller and Richmond caused Reliable Abstract Co., LLC (Reliable), which is owned by Mark Caller's brother-in-law Yakov/Jacob Deckelbaum (Reliable and Deckelbaum together, the Reliable Defendants) to transfer \$500,000 to Carlebach's attorney escrow account as part of the purchase agreement (*id.* ¶¶ 96-98, 105, 110, 111). If the agreement were cancelled, "Carlebach was required to return the \$500,000 deposit the next day, by 5:00pm" (*id.* ¶ 114). Plaintiff alleges upon information and belief that Reliable was also an investor in the purchase agreement (*id.* ¶ 112).

The purchase agreement was cancelled on January 13, 2017, but Carlebach did not return the \$500,000 because his account was in shortfall (*id.* ¶¶ 118-119). Plaintiff alleges upon information and belief that Carlebach told Mark Caller, Richmond and the Reliable Defendants about the shortfall, and that "rather than immediately report Carlebach to the authorities, . . . [they] worked with Carlebach to either still acquire the Property or receive \$500,000 upon Carlebach obtaining further deposits into his attorney escrow account" (*id.* ¶¶ 121-125).²

That deposit came on March 10, 2017, by way of plaintiff when plaintiff entered into an agreement with Liberty to purchase the Property, transferring \$1,000,000 into Carlebach's escrow account as part of the agreement (*id.* ¶¶ 23-24).

¹ Carl Caller is Mark Caller's father.

² Plaintiff does not allege, as it does in its opposition to the motion to dismiss, that "any sophisticated real estate investor would have immediately recognized Carlebach's failure to return the deposit as an escrow shortfall" (NYSCEF # 347 – Pltf's MOL in Opp at 4).

Ten days later, Carl Caller asked Carlebach to return Reliable's \$500,000 (*id.* ¶¶ 126-127). Carlebach transferred the \$500,000 as requested (*id.* ¶ 130).

On June 27, 2017, plaintiff's purchase agreement for the Property was canceled. When the escrowed \$1,000,000 in Carlebach's escrow account was not returned to plaintiff, plaintiff reported Carlebach to the authorities (*id.* ¶¶ 29, 43). Plaintiff submits Carlebach's escrow account statements from Citibank which show \$500,000 was transferred to the Caller Defendants (*id.*, ¶¶ 35-44, 126-131). Plaintiff seeks to recover the \$500,000 that the Caller Defendants received from Carlebach.

Procedural History

Pertinent to the Caller Defendants' motions to dismiss, plaintiff's amended verified complaint alleged separate but identical causes of action against the Reliable Defendants and the Caller Defendants: conversion, aiding and abetting conversion, actual and constructive fraudulent conveyance, quasi-contract/unjust enrichment/money had and received, and negligence. The Reliable Defendants moved to dismiss the amended verified complaint pursuant to CPLR 3211(a)(1) and (7) on July 12, 2019 (NYSCEF # 66 - MS 005). By Decision and Order dated April 15, 2020, Hon. O. Peter Sherwood (ret.) granted that motion (NYSCEF # 125), and the Appellate Division affirmed (*SH575 Holdings LLC v Reliable Abstract Co., LLC*, 195 AD3d 429 [1st Dept 2021]) (NYSCEF # 138).

All other defendants have been dismissed, discontinued, or are in default. At this stage, the only claims being pursued are against the Caller Defendants to recover the \$500,000 of plaintiff's \$1,000,000 deposit. The Caller Defendants filed answers (NYSCEF #s 114, 132 - Caller Defts' Amended Answers), and the discovery process began.

While discovery ensued, the Caller Defendants engaged new counsel on August 14, 2023. Two weeks later, in MS 009, the Caller Defendants filed their joint motion to dismiss pursuant to CPLR 3211(a)(7) asserting that the First Department's 2021 decision dismissing the Reliable Defendants applies equally to the Caller Defendants under the Law of the Case doctrine (NYSCEF # 346 - Caller Defts' MOL).

Sanctions (MS 007 and MS 008)

This is not the first time plaintiff seeks sanctions against the Caller Defendants. Since the start of discovery with the preliminary discovery order dated July 22, 2021, the Caller Defendants failed three times in a row to comply with document discovery deadlines between June 2021 and April 2022, producing only 102 pages of hard copy documents and no electronically stored information (ESI). The defendants were cautioned to comply with discovery orders or face possible sanctions (NYSCEF # 142, # 143). However, their non-compliance continued, hence,

they were sanctioned by order dated November 18, 2022 (NYSCEF # 181). The court awarded plaintiff reasonable attorneys' fees and cautioned the Caller Defendants that their "failure to timely comply with [the discovery requests within 30 days in] this order shall result in the imposition of further discovery sanctions absent further order of the court" (*id.* at 5).

But despite the sanctions order, the defendants continued to miss court-imposed deadlines and otherwise confounded plaintiff's discovery efforts (NYSCEF # 188 - Heinze Aff of Dec. 16, 2022; NYSCEF # 256, ¶ 12 - Proman Sanctions Aff). The court extended the deadline to early January 2023, but again nothing was produced (NYSCEF # 195 - Order dated Dec. 22, 2022; NYSCEF # 237 - Proman Aff Ex. 30; NYSCEF # 238 - Proman Aff, Exhibit 31; NYSCEF # 256 ¶ 12). Then, after the parties informed the court that the defendants may have accidentally deleted relevant ESI, the defendants failed to file an interim report from their ESI expert by March 21, 2023, or finish investigating both ESI and potential deletions by April 3, 2023, as ordered (NYSCEF # 204 - Mar. 2, 2023 Conference Order; NYSCEF # 305 ¶¶ 39, 48 - Heinze Aff Jun. 21, 2023).

The court again warned the defendants at an April 12, 2023 status conference that "future noncompliance with discovery obligations may result in significant sanctions against the Caller Defendants, including but not limited to the striking of their answer under CPLR 3126" (NYSCEF # 205, ¶ 1 - Order dated Apr. 12, 2023 [emphasis omitted]). The court also extended three more deadlines, all of which the defendants failed to meet.

Plaintiff brought the current sanctions motion against the Marcal Defendants on April 18, 2023 (NYSCEF # 206 - MS 007), and against the Carl Caller Defendants on May 15, 2023 (NYSCEF # 255 - MS 008). These defendants together filed an untimely omnibus opposition asserting that striking their pleadings is not warranted because they have not "willfully" or "contumaciously" violated the court's discovery orders: they have already produced 1200+ pages of discovery, they "have been consistently and continuously working since January 2023 to accomplish the e-discovery process," (NYSCEF # 312 at 2 - Caller Defts' Opp). The defendants ask the court to either deny the motion or to grant a conditional order striking their answer if discovery is not completed in 120 days (*id.*).

Plaintiff replies that "every Caller Defendant assertion is baseless" (NYSCEF # 324 at 1 - Plt's Reply). First, the defendants' 1200 pages of discovery were already ruled incomplete in the original sanctions decision because they do not contain ESI or any documents from Mark Caller, and the court had repeatedly ordered the defendants to finish the e-discovery process much earlier than January 2023; the defendants are essentially using their own delays to justify further delays (*id.* at 1-4). Finally, plaintiff argues that the Marcal Defendants in particular have attempted to thwart the parties' e-discovery vendor and the court's orders by failing to produce any discovery at all (*id.* at 5-6).

Defendants' Motion to Dismiss (MS 009)

After briefing on both sanctions motions was submitted, the Caller Defendants hired new lawyers (NYSCEF # 330 - Consent to Change Attorney), who soon after, brought the present motion to dismiss pursuant to CPLR 3211(a)(7). Defendants assert that the Appellate Division's now-two-year-old decision dismissing the Reliable Defendants applies equally to the Caller Defendants as "law of the case" (NYSCEF # 346 - Caller Defts' MOL).

Plaintiff argues that the law of the case doctrine does not apply because the doctrine only binds the direct parties to the rulings, not other parties, and that in any event law of the case is a discretionary doctrine (NYSCEF # 347 at 11). Plaintiff also argues that this court should treat the motion as one for summary judgment rather than as a motion to dismiss, and therefore deny summary judgment because the Caller Defendants have not cooperated in discovery (*id.* at 11-12). Plaintiff also argues that it properly pled its claims (*id.* at 7-10, 12-14).

The Caller Defendants disagree, pointing out that the scope of the law of the case doctrine can apply beyond the direct parties. Further, because the prior decision came from a court of higher authority like the Appellate Division application of the law of the case is not discretionary (NYSCEF # 355 – Caller Defts' Reply – at 1-5). The Caller Defendants also argue that the motion should not be treated as one for summary judgment, but even if it were, plaintiff has not explained "what facts are exclusively in the Caller Defendants' possession related to the law of the case defense" (*id.* at 10-11).

DISCUSSION

The Caller Defendants' dispositive motion (MS 009) will be addressed first followed by plaintiff's sanctions motions (MS 007 and MS 008).

I. Motion to Dismiss

On a motion pursuant to CPLR 3211 (a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff...can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]).

As a threshold matter, the parties disagree on the legal standard applicable to this motion. The Caller Defendants move to dismiss for failure to state a claim pursuant to CPLR 3211(a)(7) (NYSCEF # 346 at 1) based on the law of the case doctrine. Plaintiff argues that because the Caller Defendants moved to dismiss *after*

filing an answer, this motion should be treated as a motion for summary judgment pursuant to CPLR 3212 and denied due to the Caller Defendants' failure to comply with discovery obligations (NYSCEF # 347 at 11-12). Plaintiff cites to *Rich v Lefkovits*, 56 NY2d 276, 278 [1982] and *JP Morgan Chase Bank v Johnson*, 129 AD3d 914, 914 [2d Dept 2015] in support, but these cases do not help plaintiff as the dismissal in these cases were based on different grounds. *Lefkovits* was dismissed for lack of personal jurisdiction (56 NY2d at 278), and *Johnson* was dismissed for lack of standing (129 AD3d at 914). In any event, "[a] motion to dismiss for failure to state a cause of action may be entertained at any time" (*Herman v Greenberg*, 221 AD2d 251, 251 [1st Dept 1995] [citing CPLR 3211(e)]). Therefore, plaintiff's request to treat this motion as a motion for summary judgment is denied.

Law of the Case Doctrine

The Caller Defendants argue that dismissal is warranted under the law of the case doctrine because the allegations against them are "identical" to the allegations the Appellate Division found lacking against the Reliable Defendants.

"[T]he doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes*, 31 NY2d 162, 165 [1975]). The law of the case doctrine only applies to "legal determinations that were necessarily resolved on the merits in the prior decision" (*Sudarsky v City of New York*, 247 AD2d 206 [1st Dept 1998]).

The law of the case doctrine applies here. The Appellate Division's June 2021 decision affirmed Justice Sherwood's finding that the amended verified complaint failed to state a claim against the Reliable Defendants. The decision was a merits determination against the same Amended Verified Complaint. The allegations against the Caller Defendants mirrors those against the Reliable Defendants, and there are no allegations against the Caller Defendants that *do not* apply to the Reliable Defendants (*see* NYSCEF # 48 ¶¶ 93-134). Indeed, the relevant section of the Amended Verified Complaint is subtitled "\$500,000 of SH575 Holdings's Funds Taken by Reliable Abstract Co., LLC., Richmond Stuyvesant Holdings, LLC, and The Marcal Group LLC" (*id.* § H). And as shown below, the specific causes of action against the Caller Defendants – conversion (Count 2); actual fraudulent conveyance (Count 7); constructive fraudulent conveyance (Count 12); aiding and abetting conversion (Count 16); quasi contract, unjust enrichment, and money had and received (Count 17); and negligence (Count 18) – are the same as those against the dismissed co-defendants.

Conversion (Count 2)

The allegation against the Caller Defendants on the conversion cause of action centers on the Reliable Defendants' wrongful transfer of plaintiff's \$500,000 to the Caller Defendants (NYSCEF # 48 ¶¶ 145, 146). The allegation against the Reliable Defendants asserts that plaintiff's money that was held in Carlebach's escrow account was wrongfully possessed by the Reliable Defendants (*id.* ¶¶ 137, 138). On the Reliable Defendants' motion to dismiss, the Appellate Division ruled that plaintiff's monies were deposited into an unsegregated IOLA account and thus became commingled and not specifically identifiable (*SH575 Holdings LLC*, 195 AD3d at 430). As plaintiff's allegations of commingling are identical against all the parties, the issue of commingling was decided on facts common to all defendants (*see Engel v Eichler*, 300 AD2d 622, 623 [2d Dept 2002] (allegations in complaint were "identical against all the parties" and therefore law of the case applied).

Plaintiff argues that the Appellate Division's opinion does not apply because subsequent cases have changed the law (NYSCEF # 347 at 7–9). However, the subsequent decisions in question have only distinguished the Appellate Division's decision, not overruled it (*see, e.g., Family Health Mgt., LLC v Rohan Developments, LLC*, 207 AD3d 136, 146 [1st Dept 2022] ["Thus, we now **clarify** . . . our prior decision in *SH575 Holdings* . . ."] [emphasis added]). The Appellate Division's opinion remains good law and binding on this court.

The Appellate Division also ruled that even if plaintiff's funds were specific and identifiable, plaintiff did not demand return of the funds from the Caller Defendants (*SH575 Holdings LLC*, 195 AD3d at 430–431). To the extent plaintiff argues that it cured this defect by demanding its money back from the Caller Defendants in 2020 (NYSCEF # 347 at 13; NYSCEF # 353), this fact is not pled in the Amended Verified Complaint and is therefore not germane to the issues. Given the identical allegations on the conversion claims, and as plaintiff had a full and fair opportunity to litigate this issue, the conversion claim is dismissed as barred by the law of the case doctrine.

Actual Fraudulent Conveyance, Constructive Fraudulent Conveyance, and Aiding & Abetting Conversion (Counts 7, 12, 16)

The fraudulent conveyance and aiding and abetting conversion claims against the Caller Defendants are based on these defendants' knowledge of Carlebach's wrongdoing and these defendants' part in the conversion (NYSCEF # 48 ¶¶ 163, 164). On these claims against the Reliable Defendants—which also allege their knowledge and participation in the fraudulent conveyance and conversion (*id.* ¶¶ 159, 160)—the Appellate Division found that the allegations do not properly plead knowledge because they rely on conclusory allegations and rest upon information and belief (*SH575 Holdings LLC*, 195 AD3d at 431). Given the identical

allegations against both the Caller Defendants and the Reliable Defendants, the law of the case applies, and Counts 7, 12, and 16 are likewise dismissed.

Quasi Contract/Unjust Enrichment/Money Had and Received (Count 17)

Count 17 was alleged against all defendants except Carlebach. The Appellate Division found that plaintiff failed to allege “a relationship between [the Reliable Defendants and plaintiff] that could have caused reliance or inducement” (*SH575 Holdings LLC*, 195 AD3d at 431). Because the same allegations apply to the Caller Defendants, and because plaintiff did not allege that it ever interacted with the Caller or Reliable Defendants prior to depositing \$1 million into Carlebach’s IOLA account, plaintiff fails to state a claim against the Caller Defendants.

Moreover, the Appellate Division’s finding that the Reliable Defendants “were also victims of Carlebach’s scheme[] and received their funds in good faith” applies with equal force to the Caller Defendants based on the allegations in the Amended Verified Complaint. This court must hold to the law of the case here.

Negligence (Count 18)

The Appellate Division ruled that “[p]laintiff has not pleaded that the moving defendants owed a duty to it, and there is no basis to impose one here” (NYSCEF # 135). Plaintiff does not dispute that the same is true here.

In sum, as the prior decision comes from an appellate court, the law of the case doctrine “bind[s] a trial court (and subsequent appellate courts of coordinate jurisdiction) to follow the mandate of [the] appellate court, absent new evidence or a change in the law” (*In re Part 60 RMBS Put - Back Litig.*, 195 AD3d 40, 48 [1st Dept 2021]; see also *People v Evans*, 94 NY2d 499, 503 [2000] (“the lower court must apply the rule laid down by the appellate court.”)). Hence, applying the Appellate Division’s prior decision to this motion to dismiss, the law of the case doctrine mandates dismissal of the complaint as against the Caller Defendants.

II. Motions for Sanctions (MS 007 and MS 008)

Dismissing the complaint does not resolve plaintiff’s sanctions motions. CPLR 3126 (3) provides that if a party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just,” including “an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

While striking the pleading is the remedy in plaintiff's motions for sanctions, given that the complaint against the Caller defendants is dismissed, plaintiff's motions to strike are denied. However, this is not to say that the Caller Defendants' repeated failures to comply with court orders should be condoned. The court has previously sanctioned the Caller Defendants for violating court orders by missing discovery deadlines thrice and failing to produce any ESI, offering no excuse until *after* plaintiff filed for sanctions (NYSCEF # 181 at 4–5). Yet even after sanctions and the court's repeated warnings that further violations could lead to further sanctions, the Caller Defendants have continued their pattern of ignoring court orders. "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kilh v Pheffer*, 94 NY2d 118, 123 [1999]). Accordingly, the court therefore finds good cause to award reasonable attorneys fees and costs. A monetary sanction of an award of reasonable attorneys' fees and costs is appropriate under CPLR 3126 to compensate counsel for time expended related to a failure to provided discovery (*Maxim, Inc. v Feifer*, 161 AD3d 551, 554 [1st Dept 2018]).

CONCLUSION

Based on the foregoing, it is

ORDERED that the motion by defendants Richmond Stuyvesant Holdings, LLC, Carl Caller, The Marcal Group, LLC, and Mark Caller (the Caller Defendants) to dismiss the Amended Verified Complaint is granted (MS 009); and it is further

ORDERED that plaintiff SH575 Holdings LLC's motions for sanctions (MS007 and MS 008) are granted only to the extent that plaintiff is awarded reasonable attorneys fees and costs incurred by plaintiff in connection with the sanctions motions as against Richmond Stuyvesant Holdings, LLC, Carl Caller, The Marcal Group, LLC, and Mark Caller with an amount to be determined by the court upon plaintiff's submission of invoices and an affirmation(s) from counsel regarding the basis for the fee charged and its reasonableness; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing accordingly in favor of defendants Richmond Stuyvesant Holdings, LLC, Carl Caller, The Marcal Group, LLC, and Mark Caller; and it is further

ORDERED that the Caller Defendants shall serve a copy of this Decision and Order with notice of entry on the Clerk of the Court in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page and on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the Decision and Order of the court.

12/22/2023

DATE


MARGARET CHAN, J.S.

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