

Avail Holding LLC v ICM Funding LLC

2024 NY Slip Op 33815(U)

October 9, 2024

Supreme Court, New York County

Docket Number: Index No. 656431/2022

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NANCY M. BANNON PART 61M

Justice

-----X

AVAIL HOLDING LLC,

Plaintiff,

- v -

ICM FUNDING LLC, SONNI SABAHI, ICM CAPITAL
MARKETS INC.

Defendants.

-----X

INDEX NO. 656431/2022

MOTION DATE 06/21/2024

MOTION SEQ. NO. 003 005

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 128, 131, 136, 145, 146, 147, 148, 149, 150, 151

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 121, 122, 123, 124, 125, 126, 127, 132, 137, 138, 139, 140, 141, 142, 143, 144, 152, 153, 154, 155, 156, 157, 158

were read on this motion to/for PRECLUDE.

I. INTRODUCTION

In this breach of contract action, the plaintiff Avail Holdings LLC (Avail) moves pursuant to CPLR 3211(a)(7) and (a)(1) to dismiss the affirmative defenses and counterclaims asserted in the joint amended answer of defendants' ICM Funding LLC (ICM-F), Sonni Sabahi, and ICM Capital Markets Inc. (ICM-C), as well as for sanctions against the defendants for asserting frivolous counterclaims. (MOT SEQ 003). Avail moves separately to preclude the defendants from offering into evidence any material concerning the subject matter of Avail's Second Notice of Discovery and Inspection, as well as a protective order against the defendants from enforcing any obligations of their discovery demands, and to quash a subpoena served by the defendants on non-parties (MOT SEQ 005). The defendants oppose these motions and cross-move in MOT SEQ 005 to, *inter alia*, vacate the Note of Issue filed on May 20, 2024. Avail's motions are granted to the extent provided herein, and the defendants' cross-motion is denied.

II. BACKGROUND

This matter was commenced by the Avail against ICM-F and Sonni Sabahi, alleging that the defendants breached two agreements between Avail and ICM-F, (i) the ICM-Avail Agreement, and (ii) the Holdback Agreement, (collectively, “the Agreements”). Under the ICM-Avail Agreement, ICM-F agreed to sell 59 mortgage loans to Avail in exchange for \$7,750,150.45, by November 11, 2021. Under the Holdback Agreement, Avail agreed to pay \$1,188,794.30 to an escrow agent. This amount was to be paid to ICM-F if it delivered the Outstanding Items, a collection of loans that ICM-F was unable to deliver to Avail under the ICM-Avail Agreement. ICM-F had until December 11, 2021, to deliver the Outstanding Items, and if it failed to do so, the funds would be transferred back to Avail. Avail alleges that the Outstanding Items were actually owned by nonparty LNREPO 2021 LLC, who in turn sold them to nonparty Fortuna 888, LLC. Avail alleged four causes of action in (i) breach of contract against ICM-F, (ii) fraudulent inducement against ICM-F and Sabahi, (iii) fraud against ICM-F and Sabahi, and (iv) indemnification against ICM-F. Sabahi and ICM-F filed separate answers.

On September 6, 2022, the court (Ostrager, J. [Ret]), issued a preliminary conference order, setting the note of issue deadline for May 6, 2024. On August 18, 2023, Avail moved to amend its complaint, seeking to add ICM-C as a defendant to this action, and asserting three new causes of action sounding in voidable transfers. (MOT SEQ 001). Three days earlier, Avail also served the defendants its Second Notice of Discovery and Inspection (“Avail’s Supplemental Demands”), seeking documents relevant to the new allegations of the proposed amended complaint. The court granted MOT SEQ 001, ordering the defendants to respond in thirty days after Avail filed the amended complaint on NYSCEF.

Avail filed its amended complaint on November 28, 2023, and the defendants filed a motion to dismiss and to stay discovery (MOT SEQ 002). This court denied MOT SEQ 002. On April 3, 2024, the defendants’ filed a joint amended answer, asserting ten affirmative defense and four counterclaims. These counterclaims, asserted only by “ICM Funding” include: (i) breach of the Agreements due to Avail’s failure to remit \$1,188,794.30 after ICM-F delivered the Outstanding Items; (ii) breach of the confidentiality portions of the ICM-Avail Agreement; (iii) unjust enrichment, and (iv) to pierce Avail’s corporate veil to reach James Fratangelo, Avail’s principal.

On or about April 17, 2024, the defendants served five non-party subpoenas on (i) Rachele Rosenberg/Rosenberg & Steinmetz PC, (ii) Ritter Zaretsky, Lieber & Jaime LLP, (iii) Vincent Assini/Fortuna 888 LLC, (iv) Fratangelo, and (v) Matias Dorta Law. On April 18, 2024, the defendants served their second demand for production and inspection, second set of interrogatories, and bill of particulars on Avail (collectively, “the Defendants’ Supplemental Discovery Demands”).

On April 25, 2024, the court issued its final status conference order, noting that document discovery remained outstanding, without reasonable excuse. The court ordered all document discovery to be completed by May 13, 2024, and for the note of issue to be filed on or before May 20, 2024. The instant motions ensued. Avail moved for summary judgment on July 19, 2024 (MOT SEQ 006).

III. DISCUSSION

A. MOT SEQ 003

i. Dismissal of Counterclaims

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court’s role is “to determine whether [the] pleadings state a cause of action.” 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a claim adequately states a cause of action, the court must “liberally construe” it, accept the facts alleged in it as true, accord it “the benefit of every possible favorable inference” (*id.* at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts as alleged fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). A complaint alleging breach of a confidentiality agreement must be dismissed if it contains “only boilerplate allegation of damage”. Gordon v. Dino De Laurentiis Corp., 141 AD2d 435, 436 (1st Dept. 1988).

Under CPLR 3211(a)(1), dismissal is warranted when the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the [defendants’] claim[s].” Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383

(1st Dept. 2002); see Amsterdam Hospitality Group, LLC v MarshallAlan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014).

In support of its motion, Avail submits, *inter alia*: an attorney affirmation of Nathan Cohen; deposition testimony of Thomas Frank the transaction attorney of ICM-F and ICM-C; the deposition testimony of defendant Sabahi; and email communications between the parties' counsel.

As an initial matter, the court notes that the four counterclaims in the joint amended answer are seemingly alleged only by ICM-F, as Sabahi and ICM-C are not mentioned. Therefore, the court considers these counterclaims to be solely pleaded by ICM-F.

The defendants' second counterclaim, alleging that Avail breached the confidentiality clause contained in Section 6.02 of the ICM-Avail Agreement by divulging its terms to several unauthorized persons and entities, must be dismissed under CPLR 3211(a)(7). The amended answer does not establish how Avail's alleged breach of Section 6.02 caused any damages to the defendants, beyond boilerplate damages allegations that damages are at least \$1,188,794.30 "upon information and belief". See Gordon v. Dino De Laurentiis Corp., *supra*.

The first counterclaim, alleging that Avail breached the Agreements by failing to remit to ICM-F the remaining \$1,188,794.30 balance of the purchase price, must also be dismissed. First, under CPLR 3211(a)(7), the joint amended answer fails to establish on what basis ICM-F is entitled to the remaining \$1,188,794.30. Under the Holdback Agreement, Avail paid this amount to the Escrow Agent, who would hold these funds until ICM-F delivered the Outstanding Items by December 11, 2021. In opposition to this motion, the defendants argue in their memorandum of law that ICM-F timely delivered the Outstanding Items on November 15, 2021, and attaches emails from nonparty LNREPO to ICM-F, purporting to show that the Outstanding Items were transferred from LNREPO to ICM-F, and in turn to Avail. However, this information is not alleged in the joint amended answer and is alleged for the first time in this motion. This information is not supported by an affidavit or affirmation submitted by the defendants. While a court may, on a motion to dismiss under CPLR 3211(a)(7), consider affidavits from a party with

knowledge of the facts submitted by the defendants to remedy defects in the answer (see Leon v Martinez, supra at 88), this new evidence is cited solely by the memorandum of law.

Furthermore, the first counterclaim must also be dismissed under the documentary evidence submitted by Avail, showing that the defendants and their counsel repeatedly stated that ICM-F never delivered the Outstanding Items, and thus, are not entitled to the \$1,188,794.30 held in escrow. In his deposition, Thomas Frank, a transactional attorney for the ICM Parties, testified that under the ICM-Avail Agreement, it was ICM-F's obligation to deliver the Outstanding Items, but that ICM-F did not do so. Avail also points to an email from Thomas Frank dated April 7, 2022, where he states that ICM-F does not have the loans at issue. Furthermore, Sabahi testified in his deposition that ICM-F never paid LNREPO for the Outstanding Items, as ICM-F never received the documents needed. Thus, based on the evidence submitted by Avail, which the defendants do not dispute, ICM-F fails to establish its entitlement to the \$1,188,794.30 held in escrow under the Holdback Agreement.

The third counterclaim, alleging that Avail unjustly enriched itself by keeping the \$1,188,794.30 that should have been paid to ICM-F, is dismissed for similar reasons as the first counterclaim. Furthermore, where, as here, a party seeks to recover under an express agreement, no counterclaim lies to recover for unjust enrichment. See Pappas v Tzolis, 20 NY3d 228 (2012); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012).

The fourth counterclaim, purportedly seeking to "pierce [Avail's] corporate veil to reach Fratangelo and hold him personally responsible for the damages asserted [in the amended answer]" must be dismissed under CPLR 3211(a)(7) for failure to state a cause of action, as an attempt to pierce the corporate veil does not constitute an independent claim. See Cortlandt St. Recovery Corp. v Bonderman, 31 NY3d 30, 47 (2018), Matter of Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 141 (1993).

Finally, the court notes that Avail's Notice of Motion states that Avail also seeks to dismiss the affirmative defenses in the defendants' joint amended answer. However, Avail's motion papers focus exclusively on the defendants' counterclaims, and do not include any

specific arguments as to the affirmative defenses. As such, Avail's motion is denied to the extent that it seeks to dismiss the defendants' affirmative defenses in the joint amended answer.

ii. Sanctions

Avail also seeks sanctions pursuant to 22 NYCRR 130-1.1 and CPLR 3126 against the defendants for filing a frivolous joint amended answer with counterclaims, and for their refusal to comply with discovery obligations.

22 NYCRR 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false.

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" and that "a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatatory and obstructive, and thus contumacious, conduct warranting the striking of the [pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st Dept. 2004). The court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1st Dept. 2012); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012).

Applying these standards, the court concludes that the complained of conduct of the defendants does not presently merit the imposition of sanctions. While it is concerning that the defendants delayed their response to Avail's Supplemental Demands for almost eight months after they were initially served on August 18, 2023, and asserted counterclaims which are flatly

contradicted by documentary evidence, the court denies the branch of Avail's motion seeking sanctions without prejudice.

B. MOT SEQ 005

i. Motion to Preclude

Avail moves pursuant to CPLR 3126 to preclude the defendants from introducing evidence related to Avail's Supplemental Demands served on August 18, 2023, as the defendants provided an allegedly inadequate response on April 16, 2024, and an inadequate supplemental response on May 15, 2024. As stated above, while the defendants' late response to Avail's Supplemental Demands is concerning, the court does not find the defendants' conduct to be contumacious enough worthy to warrant the sanction of preclusion. Furthermore, there are no orders that specifically direct the defendants to serve responses to these specific supplemental requests. First, the court's October 5, 2023, status conference order simply states on this issue that "Avail is not precluded from seeking this discovery". Second, in its decision on MOT SEQ 002, the court simply denied the defendants' request for a stay in discovery and kept the note of issue deadline as May 6, 2024. Finally, the court's last status conference order dated April 25, 2024, simply directed document discovery to be completed by May 13, 2024, and extended the note of issue to May 20, 2024. Avail had nine months to seek the defendants' compliance with its Supplemental Demands through a motion to compel but failed to do so. As such, an order for preclusion against the defendants is not warranted. Avail's request for costs pursuant to 22 NYCRR 202.20-e is also denied. As Avail's motion is denied to the extent that it seeks to preclude the defendants from relying on certain evidence, logic dictates that Avail is not entitled to costs pursuant to 22 NYCRR 202.20-e.

ii. Motion for a Protective Order and Cross-Motion to Vacate Note of Issue

Avail moves pursuant to CPLR 2308 to quash subpoenas served on various nonparties, including (i) Rachele Rosenberg/Rosenberg & Steinmetz PC, (ii) Ritter Zaretsky, Lieber & Jaime LLP, (iii) Vincent Assini/Fortuna 888 LLC, (iv) Fratangelo, and (v) Matias Dorta Law.

A subpoena may not be used as a tool of harassment or for a proverbial "fishing expedition to ascertain the existence of evidence." Reuters Ltd. v Dow Jones Telerate, Inc., 231 AD2d 337, 342 (1st Dept. 1997); see Law Firm of Ravi Batra, P.C. v Rabinowich, 77 AD3d 532

(1st Dept. 2010). Moreover, “[w]here disclosure is sought against a nonparty, more stringent requirements are imposed on the party seeking disclosure.” Velez v Hunts Point Multi-Serv. Ctr., Inc., 29 AD3d 104, 108 (1st Dept. 2006); see generally Kapon v Koch, 23 NY3d 32 (2014). These standards require that the instant motion be granted.

Subpoena (i) seeks compliance well short of the 20-day minimum requirement of CPLR 3120(2), as it was served on May 2, 2024, and demands compliance by May 10, 2024. Subpoenas (ii), and (iii) were untimely served, as subpoena (ii) was served on May 13, 2024 (the deadline for fact discovery), while subpoena (iv) was served on May 29, 2024. Subpoenas (iv) and (v) were never served on Fratangelo and Matias Dorta Law, and the defendants provide no explanation other than conclusory allegations that these nonparties “misled and willfully resisted effectuation of process service”. That motion is granted as to all subpoenas.

The branch of Avail’s motion seeking a protective order pursuant to CPLR 3103 in regard to defendants’ supplemental demands, interrogatories, and bill of particulars, which were served on April 18, 2024, is also granted. The court’s April 25, 2024, status conference order set document discovery to completed by May 13, 2024, giving the parties three weeks to complete document discovery. These demands, which include 42 discovery requests, 13 interrogatories, and 47 bill of particulars, are untimely at this juncture. The defendants contend that they need to conduct additional discovery because Avail’s amended complaint added a new defendant in IMC-C. This argument is meritless, however, as the defendants had six months to seek this additional discovery when ICM-C was added as a defendant to this action, and only chose to do so one month prior to the note of issue deadline. Furthermore, the defendants’ argument that ICM-C had no opportunity to conduct discovery is unavailing, considering that the counterclaims in the joint amended answer are only alleged by ICM-F, who was a party to this action from commencement.

The defendants’ cross-motion, seeking to vacate the note of issue, permit post-note discovery, is denied for similar reasons. The defendants provide no reasonable excuse for not timely seeking this discovery. See Tewari v Tsoutsouras, 75 NY2d 1,12 (1989); Grant v City of New York, 17 AD3d 215, 217 (1st Dept. 2005). Any additional discovery sought by any party is

precluded upon the filing of a mote of issue absent unusual or unanticipated circumstances, not shown here. See 22 NYCRR 202.21(d).

Any relief not expressly granted herein is denied.

IV. CONCLUSION

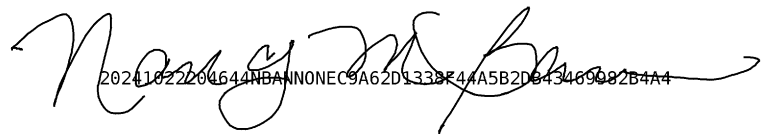
Accordingly, upon the foregoing papers it is,

ORDERED that the plaintiff’s motion (MOT SEQ 003) is granted to the extent that the counterclaims alleged in the defendants’ joint amended answer are dismissed, and the motion is otherwise denied, and it is further,

ORDERED that the plaintiff’s motion (MOT SEQ 005) is granted to the extent it seeks to (A) quash the subpoenas served by the defendants on non-parties (i) Rachelle Rosenberg/Rosenberg & Steinmetz PC, (ii) Ritter Zaretsky, Lieber & Jaime LLP, (iii) Vincent Assini/Fortuna 888 LLC, (iv) Fratangelo, and (v) Matias Dorta Law, those subpoenas are quashed and the subpoenaed parties need not produce any documents in response; and (B) and for a protective order regarding demands served on April 18, 2024; and the plaintiff need not respond to those demands, and the motion is otherwise denied and it is further,

ORDERED that the defendants’ cross-motion (MOT SEQ 005) is denied in its entirety, and it is further,

ORDERED that the Clerk shall mark the file accordingly.


20241022204644NBANNONEC9A62D1338F44A5B2D643469082B4A4

10/9/2024
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE