

**Bildner v Cash on the Spot ATM, LLC**

2017 NY Slip Op 30445(U)

March 3, 2017

Supreme Court, New York County

Docket Number: 651724/2012

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

-----X  
ERLINDA I. BILDNER, as executrix of the  
estate of ALBERT BILDNER,

Plaintiffs

Index No. 651724/2012

v

CASH ON THE SPOT ATM, LLC, RONALD  
CARROCCIO, and COSMO CAMIA,

DECISION AND ORDER

Defendants.

MOT SEQ 003

-----X  
-----X

CASH ON THE SPOT ATM, LLC, and RONALD  
CARROCCIO,

Third-party plaintiffs

v

COSMO CAMIA,

Third-party defendant.

-----X

**NANCY M. BANNON, J.:**

**I. INTRODUCTION**

In this action to recover on four promissory notes, the defendants Cash on the Spot ATM, LLC (the LLC), and Ronald Carroccio (together the COTS defendants) move pursuant to CPLR 3215 for leave to enter a default judgment against the third-party defendant, Cosmo Camia, on the third-party complaint. The plaintiff cross-moves for summary judgment on the complaint against the COTS defendants. The motion for leave to enter a default judgment is denied, without prejudice to renewal. The cross motion is permitted to be withdrawn as academic, since, in

an order dated December 9, 2016, the action was permitted to be discontinued against the COTS defendants, based upon the stipulation of the plaintiff and the COTS defendants, and the third-party action was severed.

## II. BACKGROUND

On June 28, 2012, the COTS defendants commenced an action (the Richmond County action) against Camia, among others, in the Supreme Court, Richmond County, entitled Cash On The Spot, LLC, et al. v Camia, et al., Index No. 102307/12, to recover damages for fraud, conversion, misappropriation of the LLC's assets, and breach of a duty of trust. The Richmond County action is pending.

The plaintiff's decedent, Albert Bildner, commenced the instant action against the COTS defendants and Camia to recover on four promissory notes, alleging that the LLC failed to repay its obligations under the notes, and that LLC members Carroccio and Camia were liable since they personally guaranteed the LLC's obligations. The COTS defendants answered the complaint. On November 4, 2015, the COTS defendants commenced a third-party action against Camia, asserting causes of action for contribution, common-law indemnification, and implied indemnity, based on Camia's alleged fraud, conversion, misappropriation of the LLC's assets, and breach of a duty of trust. Camia did not

answer the third-party complaint. The COTS defendants now move for leave to enter a default judgment against Camia on the third-party complaint. Camia opposes the motion. After the death of the initial plaintiff, Albert Bildner, Erlinda Bildner, as executor of his estate, was substituted as the plaintiff. The plaintiff cross-moves for summary judgment on the complaint. While the cross motion was pending, however, the parties stipulated to discontinue the main action. By order dated December 9, 2016, this court directed that the complaint in the main action be dismissed, and simultaneously severed the third-party action.

### III. DISCUSSION

#### A. Motion for Leave to Enter Default Judgment

With respect to the COTS defendants' motion, CPLR 3215(f) requires a party moving for leave to enter a default judgment to submit to the court, among other things, "proof of the facts constituting the claim." "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action [see, 4 Weinstein-Korn-Miller, NY Civ Prac paras. 3215.22-3215.27]." Joosten v Gale, 129 AD2d 531, 535 (1<sup>st</sup> Dept. 1987); see Martinez v Reiner, 104 AD3d 477,

478 (1<sup>st</sup> Dept. 2013); Beltre v Babu, 32 AD3d 722, 723 (1<sup>st</sup> Dept. 2006); Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2<sup>nd</sup> Dept. 2011). While the "quantum of proof necessary to support an application for a default judgment is not exacting ... some firsthand confirmation of the facts forming the basis of the claim must be proffered." Guzetti v City of New York, 32 AD3d 234, 236 (1<sup>st</sup> Dept. 2006). The proof submitted must establish a prima facie case. See id.; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2<sup>nd</sup> Dept. 1983).

With respect to the causes of action alleged in the third-party complaint, the COTS defendants did not establish a prima facie case of contribution, common-law indemnification, or implied indemnity. In the first instance, since the plaintiff's claims were discontinued against the COTS defendants, the COTS defendants are no longer liable to the plaintiff for any damages, and their third-party causes of action against Camia are therefore no longer viable. See Sunbelt Rentals, Inc. v Tempest Windows, Inc., 94 AD3d 1088, 1090 (2<sup>nd</sup> Dept. 2012).

Even if the main action remained pending, the COTS defendants submitted no proof that the third-party causes of action for contribution, common-law indemnification, and implied indemnity are viable. "Although the impleader language of CPLR 1007 has been liberally construed and 'should not be read as allowing recovery solely for claims sounding in strict indemnity'

(George Cohen Agency v Donald S. Perlman Agency, 51 NY2d [358], 365 [1980]), the 'third-party claim must be sufficiently related to the main action to at least raise the question of whether the third-party defendant may be liable to defendant-third-party plaintiff, for whatever reason, for the damages for which the latter may be liable to plaintiff.'" Qosina Corp. v C & N Packaging, Inc., 96 AD3d 1032, 1034-1035 (2<sup>nd</sup> Dept. 2012), quoting Zurich Ins. Co. v White, 129 AD2d 388, 390 (3<sup>rd</sup> Dept. 1987) (some internal quotation marks omitted); see Rausch v Garland, 88 AD2d 1021, 1022 (3<sup>rd</sup> Dept. 1982). In other words, "[t]he liability to be imposed upon a third-party defendant in a third-party action commenced pursuant to CPLR 1007 should 'arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action.'" Lucci v Lucci, 150 AD2d 649, 650 (2<sup>nd</sup> Dept. 1989), quoting BBIG Realty Corp. v Ginsberg, 111 AD2d 91, 93 (1<sup>st</sup> Dept. 1985); see Galasso, Langione & Botter, LLP v Liotti, 81 AD3d 880, 883 (2<sup>nd</sup> Dept. 2011); Warner v Levinson, 188 AD2d 268, 268 (1<sup>st</sup> Dept. 1992).

Here, the third-party complaint is not permitted by CPLR 1007 since it fails to state any cause of action arising from or conditioned upon the liability asserted against the COTS defendants on the promissory notes in the main action. See Galasso, Langione & Botter, LLP v Liotti, supra, at 883; Sklar v Garrett, 195 AD2d 454, 454 (2<sup>nd</sup> Dept. 1993); Lucci v Lucci,

supra, at 650. More particularly, the third-party causes of action seeking contribution, common-law indemnification, and implied indemnity may not be asserted in the context of this action to recover on promissory notes.

Contribution is not available here. A cause of action to recover on a promissory note is a cause of action to recover on a contractual obligation. See generally Morrison v Zaglool, 88 AD3d 856, 858 (2<sup>nd</sup> Dept. 2011); Marshall v Marshall, 73 AD3d 870, 870 (2<sup>nd</sup> Dept. 2010). Claims for contribution are governed by CPLR 1401 which, by its terms, permits a defendant to seek contribution only in actions to recover damages for personal injury, injury to property, or wrongful death. Here, there was no personal injury, and a purely economic loss resulting from a breach of contract does not constitute an injury to property within the meaning of CPLR 1401. Hence, the cause of action for contribution is without merit. See Structure Tone, Inc. v Universal Servs. Group, Ltd., 87 AD3d 909, 911 (1<sup>st</sup> Dept. 2011).

Common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing plaintiff's injuries. See id. at 911-912; Hawthorne v South Bronx Community Corp., 78 NY2d 433 (1991); Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc., 59 AD3d 311, 312 (1<sup>st</sup> Dept. 2009). The COTS defendants seek recovery from Camia solely because of Camia's allegedly

independent wrongdoing, not because the COTS defendants are being held vicariously liable for that wrongdoing. Thus, there is no basis upon which the third-party claim for common-law indemnification may be sustained. See Structure Tone, Inc. v Universal Servs. Group, Ltd., supra, at 912.

"Implied indemnity is [a] restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other. Generally, it is available in favor of one who is held responsible solely by operation of law because of his [or her] relation to the actual wrongdoer." Mas v Two Bridges Assoc., 75 NY2d 680, 690 (1990) (citations omitted). Neither of the COTS defendants are liable to the plaintiff solely by operation of law or because of any relation to Camia. Rather, any such liability would be based on the LLC's execution of a promissory note in favor of the plaintiff's decedent, and Corracchio's personal guarantee of the LLC's obligation

To the extent that the third-party complaint states causes of action to recover damages for fraud, breach of duty of loyalty, conversion, and misappropriation of the COTS defendants' assets, they constitute proper grounds for an independent action. See Qosina Corp. v C & N Packaging, Inc., supra, at 1035. Indeed, in the order dated December 9, 2016, this court exercised its discretion to sever the third-party action from the main action.



Nonetheless, the COTS defendants failed to submit proof of the facts constituting these claims so as to permit them to recover damages for fraud, breach of duty of loyalty, conversion, or misappropriation of assets.

In support of their motion, the COTS defendants submit an affidavit from Carroccio who, as noted, was a member of the LLC. Carroccio states only that he invested his life savings in the LLC, and that Camia committed a fraud that was unknown to Carroccio until it was too late. Carroccio refers to the Richmond County action, and states that it sought recovery to remedy "the outright theft and conversion of COTS LLCs funds, assets and contracts by defendant Camia and other associated with him." However, neither the third-party complaint nor Carroccio's affidavit articulates, with any particularity, the nature of the fraud or breach of trust allegedly committed by Camia, when it was committed, or how much was involved. The COTS defendants thus fail to comport with CPLR 3016(b), which requires the circumstances constituting the wrongs in such actions to be "stated in detail." Nor does Carroccio allege what assets were stolen, converted, or misappropriated, when the theft, conversion, or misappropriation occurred, the extent of the theft, conversion, or misappropriation, or any other facts supporting these claims. Rather, he simply avers, without more, that Camia's wrongdoing constituted these allegedly tortious

acts. Since the COTS defendants fail to submit the quantum of proof necessary to support their motion for leave to enter a default judgment against Camia, and, in any event, they concede that a prior action remains pending against Camia for the same relief (see Kent Dev. Co. v Liccione, 37 NY2d 899, 901 [1975]; Montalvo v Air Dock Systems, 37 AD3d 567, 567 [2<sup>nd</sup> Dept. 2007]; Morgulas v J. Yudell Realty, 161 AD2d 211, 213 [1<sup>st</sup> Dept. 1990]), leave to enter a default judgment against Camia on the causes of action set forth in the complaint in the severed third-party action is not warranted at this juncture.

Although Camia did not cross-move for leave to compel the acceptance of a late answer, the court has discretion to entertain his request for that relief since he expressly requested it in his opposition papers. See Fried v Jacob Holding, Inc., 110 AD3d 56, 61-65 (2<sup>nd</sup> Dept. 2013). The court nonetheless denies his application, since Camia did not establish a reasonable excuse for failing to answer the third-party complaint or a potentially meritorious defense to the allegations of fraud, conversion, misappropriation, and breach of duty of trust. His contention that he was a pro se defendant and could not afford an attorney, even if deemed to be valid excuse for his default, is belied by the fact that his opposition here was solely in the form of an attorney's affirmation. His assertions that he did not actually sign the guarantees of the subject

promissory notes, and that the signatures that appeared thereon were not his, do not constitute potentially meritorious defenses to the allegations of fraud, conversion, misappropriation, and breach of trust.

B. The Plaintiff's Cross Motion for Summary Judgment

Inasmuch as the main action was discontinued, the plaintiff's cross motion for summary judgment on the complaint is permitted to be withdrawn as academic.

C. Compliance Conference

The court scheduled the parties for a compliance conference on February 23, 2017, at 9:30 a.m. However, Camia failed to appear. The parties shall appear for a compliance conference on May 25, 2017, at 9:30 a.m. Camia's counsel is cautioned that the failure to appear on May 25, 2017, at 9:30 a.m. will subject Camia to the entry of judgment by default pursuant to CPLR 3126 and 22 NYCRR 202.27, the latter of which provides that "[a]t any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order . . . grant[ing] judgment by default . . . [or] may make such order as appears just."

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the motion of Cash on the Spot ATM, LLC, and Ronald Carroccio for leave to enter a default judgment against Cosmo Camia is denied, without prejudice to renewal; and it is further,

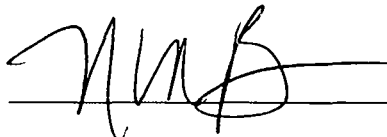
ORDERED that the plaintiff's cross motion for summary judgment on the complaint is permitted to be withdrawn as academic; and it is further,

ORDERED that Cash on the Spot ATM, LLC, Ronald Carroccio, and Cosmo Camia, or their attorneys, shall appear for a compliance conference on May 25, 2017, at 9:30 a.m.; and it is further,

ORDERED that Cash on the Spot ATM, LLC, and Ronald Carroccio shall serve a copy of this order with notice of entry upon Cosmo Camia within 20 days of this order.

This constitutes the Decision and Order of the court.

Dated: 3/3/17

ENTER:   
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J.S.C.