

Smith Gold & Diamond, Inc. v Towne

2011 NY Slip Op 32486(U)

September 15, 2011

Supreme Court, Nassau County

Docket Number: 007494-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**SMITHTOWN GOLD & DIAMOND, INC., d/b/a
NASSAU GOLD BUYER'S; CASH MY STUFF, INC. &
VIJAY VERMA,**

Plaintiff,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

-against-

**Index No: 007494-11
Motion Seq. Nos. 1 and 2
Submission Date: 9/7/11**

ALICIA TOWNE a/k/a ALICIA KEATING,

Defendant.

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The following papers having been read on these motions:

- Order to Show Cause, Affidavit in Support,
Affirmation in Support and Exhibits.....X**
- Affidavit in Opposition and Exhibits.....X**

Notice of Cross Motion, Affirmation in Support, Affidavit and Exhibits.....X

This matter is before the Court for decision on 1) the Order to Show Cause filed by Plaintiffs Smithtown Gold & Diamond, Inc., d/b/a Nassau Gold Buyers ("Nassau"), Cash My Stuff, Inc. ("Cash") and Vijay K. Verma ("Vijay") (collectively "Plaintiffs") on May 20, 2011, and 2) the cross motion filed by non-party JPMorgan Chase Bank ("Chase") on September 2, 2011.

By Order dated July 25, 2011 ("Prior Order"), the Court directed Plaintiffs' Counsel to serve Chase with a copy of its Order to Show Cause, in light of the fact that the relief sought by Plaintiffs relates to funds and property located at a Chase bank. Plaintiffs' Counsel served Chase with the Order to Show Cause, as directed by the Court, and Chase filed a cross motion seeking leave to intervene, and other relief.

For the reasons set forth below, the Court grants Plaintiffs' motion and 1) directs Chase to liquidate immediately the currently frozen account ("Account") of Alicia A. Towne ("Towne"

or "Defendant") ending in the numbers "4249," and deliver the liquidated funds to Karina E. Alomar, Esq., counsel for Plaintiffs ("Plaintiffs' Counsel"); 2) directs Defendant Alicia Towne a/k/a Alicia Keating to appear at the Chase branch located at 42 West Main Street, Smithtown, New York ("Smithtown Branch") on **October 5, 2011 at 10:00 a.m.**, for the purpose of inventorying the merchandise located in the safe deposit box maintained by Towne, where the merchandise of Cash is currently located; 3) directs that the contents of the safe deposit box, after being inventoried against the daily cash sheets for the respective days represented by the Merchandise, shall be delivered to Plaintiffs' Counsel; and 4) **directs that, if Defendant Alicia Towne a/k/a Alicia Keating does not appear at the Smithtown Branch of Chase on October 5, 2011 at 10:00 a.m. as directed herein, Plaintiffs' Counsel shall conduct the inventory in her absence.**

The Court denies Chase's cross motion.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order 1) directing JP Morgan Chase ("Chase") to liquidate the currently frozen account ("Account") of Alicia A. Towne ("Towne" or "Defendant") ending in the numbers "4249", and deliver the liquidated funds to Plaintiffs' Counsel; 2) directing Towne to appear at the Chase Smithtown Branch on a date certain for the purpose of inventorying the merchandise located in the safe deposit box maintained by Towne, where the merchandise of Cash ("Merchandise") is currently located; and 3) directing that the contents of the safe deposit box, after being inventoried against the daily cash sheets for the respective days represented by the Merchandise, be delivered to counsel for Plaintiffs.

Chase, a non-party, cross moves for relief including an Order permitting Chase to intervene and discharging Chase from any liability to the parties to this action.

B. The Parties' History

The Court presided over a prior lawsuit between these parties, titled *Alicia A. Towne v. Vijay K. Verma, Cash My Stuff, Inc., Smithtown Gold & Diamond, Inc., d/b/a Nassau Gold Buyers, Amit Verma, Suraj Kumar, Ashu K. Vaid, Smithtown Associates, LLC and JP Morgan Chase Bank, N.A., d/b/a Chase Bank*, Nassau County Index Number 13935-10 ("Related Action"). By decision dated November 19, 2010 ("Related Decision"), the Court 1) granted the motion of defendant Amit Verma and dismissed the complaint against him; and 2) granted the motion of defendants Vijay K. Verma, Cash My Stuff, Inc. and Smithtown Gold & Diamond,

Inc., d/b/a Nassau Gold Buyers and dismisses the complaint against them.¹ In so ruling, the Court held as follows:

The Court grants the motion of Amit Verma to dismiss the Complaint against him based on the Court's conclusion that the factual allegations in the Complaint do not establish a cause of action cognizable at law as to Amit. The Court considered numerous factors in reaching this conclusion, including the fact that Amit was not a party to the Agreement and is not alleged to have made any misrepresentations to Plaintiff.

In ruling on the motion of Defendants Vijay, Cash and Nassau, the Court must address, at the outset, the fact that Plaintiff alleged in the Complaint that Defendant Vijay was knowingly in possession of, and used to his advantage, a stock certificate that contained the forged signature of Plaintiff. This is, of course, a very serious allegation. Plaintiff now concedes that the signature on that certificate is, in fact, hers. She further provides a rather cavalier, scattered affidavit that demonstrates little appreciation for the seriousness of her initial allegation, and makes allegations of other forgeries by Vijay. Tellingly, Plaintiff does not, however, provide an affidavit of the expert who, she alleges, is prepared to testify as to these other forgeries.

The Court concludes that Defendants Vijay, Cash and Nassau are entitled to dismissal of the Complaint based on the Court's determination that Plaintiff has not alleged facts that would support the causes of action in the Complaint, which are fundamentally premised on Plaintiff's theory that Vijay promised to make her a partner. The Court considered numerous factors in reaching that conclusion, including 1) the fact that Plaintiff received a salary and bonus, consistent with her being an employee rather than an owner, 2) the numerous affidavits of employees attesting to the fact that they received their paychecks from Vijay, and Vijay made all the final decisions with respect to the business, 3) the absence of any documentation corroborating Plaintiff's claim that Vijay promised to make her a partner, 4) Vijay's execution and personal guarantee of the Lease, 5) the Court's conclusion that a) the Agreement cannot serve as documentation supporting the existence of a partnership, as the Agreement presumes that there was an agreement of a partnership, a proposition that the Court has rejected; and b) relying on the Agreement as proof of the alleged agreement to make Plaintiff a partner would be improper bootstrapping, 6) the Court's skepticism regarding the Transcript, given the lack of details regarding the circumstances under which the Transcript was prepared, 7) the Court's conclusion that the Transcript, assuming that it is reliable and accurate, does not support Plaintiff's position in light, *e.g.*, of Vijay's statement that "I am the owner - 100% owner here" (Tr. at p. 3), and Vijay's continual denials of Plaintiff's claims regarding her position in the companies and her accusations of forgeries and other improper conduct by Defendants, 8) Plaintiff's failure to demonstrate that, even assuming *arguendo* that Vijay made false representations to her, she relied on those representations to her detriment, and 9) Plaintiff's failure to allege facts that would warrant the finding of a fiduciary relationship between her and Defendants.

In light of the foregoing, the Court concludes that the Complaint does not state a cause of action against Vijay. Moreover, Plaintiff has failed to allege facts demonstrating that the owners of Nassau and Cash exercised complete domination over those entities in the transaction at issue or that they abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that caused injury to plaintiff. Accordingly, even assuming that the Complaint did

¹ Plaintiffs' Counsel affirms that Towne previously discontinued the causes of action against defendants Smithtown Associates, LLC and JP Morgan Chase in the Related Action.

contain viable causes of action against Vijay for breach of contract, fraud and the other substantive claims, dismissal of those causes of action against Nassau and Cash would be appropriate.

Prior Decision at pp. 16-17.

In support of the motion *sub judice*, Verma affirms that the funds in the Account consist of money belonging to Cash, which Verma wrongfully took from Defendants, based on Verma's unsupportable claim that she had an ownership interest in Cash. Verma makes reference to Towne's affidavit in the Related Case (Ex. B to Verma Aff. in Opp.) in which Towne admitted to transferring Cash funds to her personal account to prevent its removal by Vijay (*id.* at ¶ 47). In addition, the Merchandise in Verma's safe deposit box is property belonging to Cash.

On August 4, 2010, Verma and Towne entered into a stipulation ("Stipulation") (Ex. C to Alomar Aff. in Supp.) which the Court so-ordered on August 16, 2010. Pursuant to the Stipulation, the parties agreed that 1) designated Towne Chase Accounts would be unfrozen, liquidated and then closed; 2) the liquidated proceeds would be deposited into an escrow account ("Escrow Account") of Plaintiffs' Counsel; 3) Towne and counsel for the parties would report to the Chase Smithtown Branch to inventory the Merchandise, and Towne would deliver any other merchandise of Cash in her possession to Plaintiffs; 4) the Merchandise would be inventoried against the daily Cash "cash sheets;" 5) the Merchandise would then be weighed, analyzed and sorted; and 6) the Merchandise would then be delivered to a refinery company where it would be refined, and payment received from the refinery company would be added to the funds in the Escrow Account. Verma alleges that Towne refused to sign the necessary documents to effectuate the Stipulation and, accordingly, is seeking the Court's directive that Towne comply with the terms of the Stipulation.

Plaintiffs' Counsel confirms that Towne has refused to sign the necessary consent forms to liquidate the Accounts. Plaintiffs' Counsel affirms that the Accounts have a balance of \$38,481.12 and the Merchandise in Towne's safe deposit box is believed to have a value of over \$111,000. Plaintiffs' Counsel submits that, in light of the Related Decision, Towne has no ownership interest in the funds in the Accounts.

In opposition, Towne, *inter alia*, 1) disputes that she has failed to sign the necessary consent forms, and asserts that she reported to the Chase Smithtown Branch at a designated time but Plaintiffs did not appear; and 2) reaffirms her contention, as alleged in the Related Action, that she has an ownership interest in Cash.

RULING OF THE COURT

A person may intervene as of right in an action involving the disposition of property where that person may be adversely affected by the Judgment. *Wells Fargo Bank v. McLean*, 70 A.D.3d 676 (2d Dept. 2010), citing, *inter alia*, CPLR § 1012(a)(3) and *Velazquez v. Decaudin*, 49 A.D.3d 712, 717 (2d Dept. 2008). In addition, a court may permit a person to intervene, *inter alia*, when the person's claim or defense and the main action have a common question of law or fact. *Id.* at 676-677, citing CPLR § 1013. Whether intervention is sought as a matter of right or a matter of discretion is of little practical significance, as a motion for leave to intervene should be granted where the intervenor has a real and substantial interest in the outcome of the proceedings. *Id.* at 677, citing, *inter alia*, *Berkoski v. Board of Trustees of Inc. Vill. of Southampton*, 67 A.D.3d 840 (2d Dept. 2009). In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party. *Id.*, citing *Reliance Ins. Co. of N.Y. v. Information Display Tech.*, 2 A.D.3d 701 (2d Dept. 2003).

The Court denies the cross motion by Chase to intervene, and for other relief, based on the Court's conclusion that Chase will not be adversely affected by the Court's Order directing Defendant Alicia Towne a/k/a Alicia Keating to comply with the Stipulation, to which Chase is not a party. Moreover, intervention will unduly delay the resolution of this action and prejudice Plaintiffs' rights, in light of the Related Decision in which the Court rejected Defendant's claims, and the Defendant's repeated delays in complying with the Stipulation.

In light of the Related Decision, and the proof before the Court that Defendant has failed to comply with the court-ordered Stipulation, the Court grants Plaintiffs' motion and, accordingly, it is hereby:

ORDERED, that JP Morgan Chase shall immediately liquidate the currently frozen account of Alicia A. Towne ending in the numbers "4249," and deliver the liquidated funds to Karina E. Alomar, Esq., counsel for Plaintiffs; and it is further

ORDERED, that Defendant Alicia Towne a/k/a Alicia Keating shall appear at the Chase branch located at 42 West Main Street, Smithtown, New York on **October 5, 2011 at 10:00 a.m.**, for the purpose of inventorying the merchandise located in the safe deposit box maintained by Towne, where the merchandise of Cash is currently located; and it is further

ORDERED, that the contents of the safe deposit box belonging to Defendant Alicia Towne a/k/a Alicia Keating, after being inventoried against the daily cash sheets for the

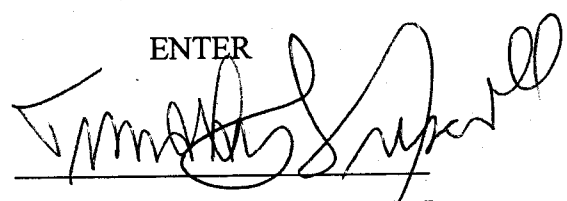
respective days represented by the Merchandise, shall be delivered to Plaintiffs' Counsel; and it is further

ORDERED, that if Defendant Alicia Towne a/k/a Alicia Keating does not appear at the Smithtown Branch of Chase on October 5, 2011 at 10:00 a.m. as directed herein, Plaintiffs' Counsel shall conduct the inventory in her absence.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
September 15, 2011

ENTER


HON. TIMOTHY S. DRISCOLL

J.S.C.

X + J

ENTERED
SEP 19 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE