

M&T Bank v Khan

2013 NY Slip Op 32153(U)

September 6, 2013

Supreme Court, Richmond County

Docket Number: 150628/12

Judge: Joseph Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:150628/12
Motion No.: 001,002,003**

M&T BANK,

Plaintiff

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

**SAQUI KHAN,
NABILA HUSSAIN,
LEWIS SHAPIRO,
SHAKEEL AHMAD,
MARAM AHMAD, and
WAQAS AHMAD,**

Defendants

The following items were considered in the review of the following motion and cross-motions to dismiss the plaintiff's complaint.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support	2
Notice of Cross-Motion and Affidavits Annexed	3
Notice of Cross-Motion and Affidavits Annexed	4
Memorandum of Law in Support	5
Affidavit of Michael J. Poch in Opposition	6
Affirmation of Michael Luskin	7
Memorandum of Law in Opposition	8
Reply Affirmations	9, 10, 11
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motions is as follows:

The defendant, Saquib Khan, moves to dismiss the plaintiff's complaint or in the alternative an order staying the action as against him. The co-defendant, Nabila Hussain, cross-moves to dismiss the plaintiff's complaint or in the alternative an order staying the action against her. The co-defendants, Shakeel Ahmad, Maram Ahmad, and Waqas Ahmad cross-move to dismiss the plaintiff's complaint as against them, as well as an award of costs and disbursements. The motions are granted to the extent that this matter shall be stayed pending the completion of the federal bankruptcy proceedings.

Facts

The defendant Saquib Khan is a principal of Richmond Wholesale Company, Inc. (“Richmond Wholesale”) that has its principal place of business at 81 Winant Place, Staten Island, New York. It is acknowledged that Nabila Hussain was a member of Richmond Wholesale. But in support of her cross-motion to dismiss, Hussain submits a copy of an Agreement of Sale dated June 8, 2012 wherein Saquib Khan agrees to buy her portion of Richmond Wholesale.

The plaintiff alleges that on or about July 27, 2011, Richmond Wholesale entered into an agreement known as the M&T Master Treasury Management Services Agreement (“Treasury Management Agreement”). This agreement set forth the terms of Richmond Wholesale’s use of M&T’s “Funds Transfer/Wire” and “Remote Check Deposit Service.” The funds transfer service allowed Richmond Wholesale to make wire transfers from its accounts with the plaintiff to accounts held at other banks. The remote check deposit service allowed Richmond Wholesale to scan and deposit checks remotely from its office.

These services were accessible only through a user name and password. Richmond Wholesale requested that the following users be created on its system: Saquib Kahn, Shakeel Ahmad, Maram Ahmad, and Waqas Ahmad. Each user had full access to the aforementioned services provided by the plaintiff.

It is alleged that between November 1, 2012 and November 14, 2012 Richmond Wholesale and the named defendants utilized accounts held at the plaintiff institution and third-party accounts in a check-kiting scheme. A check-kiting scheme is a form of check fraud where the “check kiter” maintains accounts at two or more separate banks and passes checks, or wire transfers, between them to obtain unauthorized credit from each bank during the time it takes the checks to clear, which is known as the “float time.” This scheme may continue as long as the

check kiter continues to deposit checks, or wire transfers, in both banks and both banks believe there are sufficient funds in their respective accounts to cover the checks or wire transfers. As long as the kiting scheme continues, the check kiter is able to disburse and utilize funds which would otherwise be unavailable. Due to the float time, the check kiter is able to make use of these unavailable funds, although doing so is in direct violation of the check kiter's account agreement with the bank and ultimately, the check kiter remains obligated to repay whichever of the banks is left with overdrafts that eventually result when the kiting scheme collapses.

Between November 1, 2012 and November 13, 2012 Richmond Wholesale issue approximately \$31,000,000 in checks drawn on third-party accounts and deposited into the plaintiff's institution. All or nearly all of the checks were signed by Saquib Khan. And all or nearly all of the checks were deposited remotely using the defendant Maram Ahmad's online user ID. Concurrently, Richmond Wholesale initiated wire transfers and issued checks from accounts held with the plaintiff to third party accounts. All or nearly all of the checks drawn on Richmond Wholesale's account with the plaintiff were signed by Saquib Kahn; and all or nearly all of the wire transfers were initiated by Shakeel Ahmad and Waqas Ahmad's online user Ids. When the check kiting scheme collapsed the M&T account was overdrawn by \$13,592,921.26.¹

On November 20, 2012 the plaintiff commenced a special proceeding in aid of arbitration in the Supreme Court for the State of New York, New York County, captioned *M&T Bank v. Richmond Wholesale Co., Inc.*, Index No. 654009/12. The case was assigned to Justice Peter Sherwood. On November 21, 2012 the court issued an ex parte order of attachment. On November 26, 2012 Flushing Savings Bank, FSB ("Flushing") filed a motion to intervene in the special proceeding, and Capital One, N.A. commenced a separate action against M&T, Flushing, Richmond Wholesale and several other banks where Richmond Wholesale conducted business. By two orders dated November 30, 2012 Justice Sherwood granted Flushing's motion to intervene in the special proceeding and joined the Capital One action.

¹ Plaintiff indicates that this amount is subject to change as the bank's investigation is ongoing.

On December 11, 2012 Saquib Khan confessed judgment on behalf of Richmond Wholesale in favor of the plaintiff in the amount of \$13,522,540.05 plus interest and costs by affidavit. At paragraph 13 of the affidavit of Confession of Judgment it states that

This Affidavit of Confession of Judgment will result in a Judgment against Richmond Wholesale to be filed in Richmond County and will also resolve the contemplated arbitration against Richmond Wholesale referenced in Special Proceeding, Index Number 654009/2012, pending in New York, County Supreme Court.

The confession of judgment was entered in the Richmond County Clerk's Office on December 14, 2012. That same day Flushing commenced a special proceeding seeking to attach Saquib Khan's assets, and on December 17, 2012 Flushing commenced an additional action by summary judgment in lieu of complaint to collect under a guaranty allegedly signed by Saquib Khan. On February 11, 2013, Justice Sherwood entered an order of attachment that was subsequently amended by order dated February 15, 2013. M&T was not named, nor did it ever appear in these actions. Furthermore, these actions are stayed pursuant to an involuntary bankruptcy petition filed against Richmond Wholesale.

On or about December 19, 2013, Capital One commenced an action against Saquib Khan in the United States District Court for the District of New Jersey. M&T is not a party to that action, nor has it sought to intervene. And finally on or about December 13, 2012, Saquib Kahn was arrested by the Federal Bureau of Investigation for bank fraud. On May 21, 2013, Kahn waived indictment and pleaded guilty to charges that he engaged in a bank fraud scheme.

The plaintiff commenced this action by filing a summons and complaint in the Richmond County Clerk's office on or about December 18, 2012. The plaintiff served Khan's counsel Sharon McCarthy of the law firm of Kostelanetz & Fink, LLP. According to an affirmation of service dated May 3, 2013 provided by Stephan Hornung, Esq., an associate attorney at Luskin Stern, Attorney McCarthy stated that she was authorized and did accept service of the summons and complaint on Khan's behalf.

The plaintiff's complaint contains the following nine causes of action: 1) Fraud against all defendants; 2) Aiding and Abetting Fraud against all defendants; 3) Civil Conspiracy against all defendants; 4) Breach of Contract against Khan, Shapiro, and Hussain; 5) Indemnification against Kahn, Shapiro and Hussain; 6) Tortious Interference with contract against all defendants; 7) Unjust Enrichment against all defendants; 8) Conversion against Khan, Hussain and Shapiro; and 9) Aiding and Abetting Conversion against all defendants.

The defendants now move to dismiss the plaintiff's complaint, or in the alternative stay the action pending the completion of the ongoing bankruptcy action involving Richmond Wholesale.

Discussion

Bankruptcy Stay and Necessary Party

Each of the defendants cite the involuntary bankruptcy of Richmond Wholesale as grounds to stay this action. The Bankruptcy Code provides for an automatic stay as follows:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. . .²

The defendants, Khan and Hussain, each argue that the this matter should be stayed pursuant to aforementioned section of the Bankruptcy Code arguing that the plaintiff is pursuing the owners of Richmond Wholesale under a theory that they are its “alter-ego” without joining Richmond Wholesale as a party defendant. The defendants Khan and Hussain argue that the Appellate Division, First Department’s decision in *Mannucci v. Missionary Sisters of the Sacred Heart of Jesus* is applicable to this action. In that case the Appellate Division affirmed the trial court’s dismissal of a complaint with leave to replead in an action against the defendants as alter-egos of a corporation where the corporate defendant was not made a party. In the *Mannucci* case, as is the case here, the necessary non-party was in bankruptcy protection. However, in this case Khan has already confessed judgment on the part of Richmond Wholesale.

In order to pierce the corporate veil it is necessary to show first, that the owners exercised complete domination of the corporation in respect to the alleged transaction; and secondly, that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff’s injury.³ Furthermore, the allegedly dominated corporations must be named as defendants in order to pierce the corporate veil.⁴ In this case, Richmond Wholesale would be a

² 11 USCA § 362 [West]

³ See, *Morris v. State Dept. Of Taxation & Fin.*, 82 NY2d 135 [1993].

⁴ See, *Popwich v. Korman*, 73 AD3d 515 [1st Dep’t 2010].

necessary party to this litigation.

The plaintiff concedes that at least three of the causes of action alleged against the defendants constitute an alter-ego theory of liability. Consequently, motions are granted to the extent that this matter is stayed pending either the resolution of the bankruptcy proceeding; or the lifting of the automatic stay by the federal bankruptcy judge to allow this action to move forward.

Cross motion to dismiss by Shakeel Ahmad, Maram Ahmad and Waqas Ahmad

The cross-motion to dismiss made by the employees of Richmond Wholesale, Shakeel Ahmad, Maram Ahmad and Waqas Ahmad shall be held in abeyance pending the lifting of the automatic stay by the federal bankruptcy court.

Accordingly, it is hereby:

ORDERED, that the motion made by Saquib Khan and cross-motion by Nabila Hussain is granted to the extent that this action is stayed pending the removal of the stay by the federal bankruptcy judge in the federal bankruptcy action involving Richmond Wholesale Company, Inc.; and it is further

ORDERED, that the cross-motion made by Shakeel Ahmad, Maram Ahmad and Waqas Ahmad is held in abeyance until the bankruptcy stay is lifted;

ORDERED, that this matter is stayed.

ENTER,

DATED: September 6, 2013

Joseph J. Maltese
Justice of the Supreme Court