

**Ponce Bank v J. Giarnella & Son, Inc.**

2022 NY Slip Op 32318(U)

January 6, 2022

Supreme Court, Bronx County

Docket Number: Index No. 30675/2018E

Judge: Kim Adair Wilson

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, NEW YORK : Part IA-12

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PONCE BANK, f/k/a PONCE DE LEON  
FEDERAL BANK,

Plaintiff,  
-against-

J. GIARNELLA & SON, INC. and J. GIARNELLA  
& SONS II, INC.,

Defendants.

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**Kim Adair Wilson, J.:**

**DECISION AND ORDER**

Index No. 30675/2018E

**Motion Seq. #002**

**HON. KIM ADAIR WILSON**

**J.S.C.**

“**NOTICE OF MOTION**,” by Bernard D’Orazio, Esq. (Law Offices of Bernard D’Orazio & Associates, P.C.), dated and filed April 12, 2021, respectively, on behalf of plaintiff Ponce Bank, f/k/a Ponce De Leon Federal Bank (herein “Ponce Bank”), seeking an “order (A) pursuant to CPLR 3212, granting plaintiff summary judgment against defendant J. Giarnella & Sons II Inc. on its conversion cause of action and awarding plaintiff damages of \$150,000 plus interest from June 18, 2014, (B) pursuant to CPLR 3215, granting plaintiff judgment by default against defendant J. Giarnella & Son, Inc., for \$264,935.91 as of September 30, 2019, plus attorneys’ fees of \$52,987, [and] (C) directing the Clerk to enter Judgment for plaintiff accordingly,” and a “**NOTICE OF CROSS-MOTION**,” by Pantelis Skulikidis, Esq., dated and filed April 23, 2021, respectively, on behalf of defendant J. Giarnella & Sons II, Inc., seeking, pursuant to CPLR 3211(a)(5) and (7), an order “dismissing the proceeding in its entirety as the claims is barred by the statute of limitations and failure to state a cause of action as against defendant J. Giarnella & Sons II, Inc.” (**NYSCEF Line #s 50-80**) are consolidated for the purpose of disposition and decided as set forth below.

**Background**

This is a disputed commercial banking matter.

Plaintiff Ponce Bank is seeking “in this action two things.” First, a judgment for the unpaid balance on a commercial loan made to its customer, one defendant J. Giarnella & Son, Inc. (herein “Giarnella”). Second, plaintiff Ponce Bank seeks to hold defendant J. Giarnella & Sons II, Inc. (herein “Giarnella II”) liable for conversion of the Bank’s collateral for the loan, which purportedly occurred when Giarnella II purchased Giarnella’s assets, on which the Bank had a perfected UCC lien for \$150,000, without plaintiff Bank’s consent.

In substance, plaintiff Ponce Bank loaned monies to defendant Giarnella, which operated a roofing company known as “Giarnella Roofing” in the Bronx for decades. Its loan was fully secured by Giarnella’s assets. According to the papers submitted, Ponce Bank’s interest was perfected by a duly filed UCC financing statement. Further, purportedly, in May 2013, when the loan from Ponce Bank matured, Giarnella defaulted and, after notice, failed to cure. Ponce placed a lien on Giarnella. In June 2014, Giarnella shut down and purportedly “sold its entire business, including its trade name, equipment, inventory, and other assets, to Giarnella II for \$150,000. The Bank was not notified of the sale, which was outside the ordinary scope of Giarnella’s business, it did not consent to the sale and the sale was not permitted under the parties’ Security Agreement.” “The unpaid principal balance owed to the Bank by Giarnella is as of the date of this motion \$168,480.91 with interest and legal fees, the total amount owed is now \$317,922.91.” Giarnella II is now operating the same roofing business under the same name, “Giarnella Roofing.” The Bill of Sale represents that Giarnella was free and clear of liens, which is allegedly incorrect. Ponce now seeks its money, plus attorneys’ fees. Defendant Giarnella II’s defense is that triable issues of fact exist. Specifically, it asserts, *inter alia*, that plaintiff Ponce Bank lacks standing; its claims are barred by the statute of limitations; and it fails to identify the collateral it seeks to repossess.

#### **PLAINTIFF PONCE BANK’S MOTION**

In the instant motion, movant Ponce Bank’s counsel, one Bernard D’Orazio, Esq., seeks an “order (A) pursuant to CPLR 3212, granting plaintiff summary judgment against defendant J. Giarnella & Sons II Inc. on its conversion cause of action and awarding plaintiff damages of \$150,000 plus interest from June 18, 2014, (B) pursuant to CPLR 3215, granting plaintiff judgment by default against defendant J. Giarnella & Son, Inc., for \$264,935.91 as of September 30, 2019, plus attorneys’ fees of \$52,987, [and] (C) directing the Clerk to enter Judgment for plaintiff accordingly.”

This Court opts to first address the second branch of plaintiff’s motion which seeks a default judgment, pursuant to CPLR 3215, against defendant J. Giarnella & Son, Inc.

#### **Default Judgment**

Plaintiff Ponce Bank seeks a default judgment against defendant Giarnella on the basis that it has “failed and refused to appear, answer or otherwise respond to the Summons and Complaint,” and its time to do so has expired, and thus, it has defaulted. With that, [p]laintiff seeks entry of a Judgment against Giarnella on the First Cause of Action, for breach of the promissory Note (See terms above, entitled “The Loan”), in the sum of \$168,480.91 plus interest from May 1, 2013, the date of default, amounting in all to \$264,935.91 as of September 30, 2019...Plaintiff...is also entitled per the note to attorneys’ fees of 20% of the amount owed by Giarnella, which is \$52,987, bringing plaintiff’s total damages to \$317,922.91.” The default has not been cured.

### The Loan

On May 15, 2012, Joseph Giarnella, as President of J. Giarnella & Son, Inc., executed a Commercial Note. According to the pertinent terms therein, Giarnella agreed to pay Ponce Bank a) the principal loan amount of \$171,536.50 in full and all unpaid interest on May 1, 2013 (herein the "Note"), and b) accumulated interest on the principal loan amount of \$171,536.50 monthly beginning on June 1, 2012 at the rate of 2% per annum above the Bank's prime rate.

The **Commercial Note's** expressly delineated pertinent terms are as follows:

**Paragraph 5.5 DEFAULT.** This note shall be in default at any time the BANK deems itself insecure or at the Bank's option, upon the occurrence of any of the following without notice to the undersigned, any endorsers or guarantors: (a) failure to pay when due the principal of or interest on the note or any installment thereof; (b) change in the condition or affairs, financial or otherwise, of any of the undersigned or any endorsers or guarantors which in the opinion of the BANK impairs the prospect of payment thereof; (c) death, insolvency, termination of business, or commencement of any insolvency or bankruptcy proceedings by or against any of the undersigned, any endorsers or guarantors; (d) impairment of, damage to, or destruction of any collateral.

**Paragraph 5.6 REMEDIES.** On default, the BANK may declare this note and any other obligation of the undersigned, endorsers or guarantors to be immediately due and payable, unless said obligations were extended by the BANK for "consumer credit" purposes, and may apply the property in which it has a security interest toward repayment of this note. The interest rate of this note shall be increased to 5% above the Bank's Prime Rate.

**Paragraph 5.10 ADVERSE CHANGES IN FINANCIAL/OTHER CONDITIONS.** The undersigned warrants that there has been no material adverse change in the financial or any other condition of the undersigned, since the submission of the loan request to the BANK, which request resulted in the execution of and is evidenced by this note which would warrant withholding any disbursement or future disbursements under this note. The undersigned agrees to immediately advise the BANK in writing, upon the occurrence of any material adverse change in the financial condition or any other condition of the undersigned.

CPLR 3215[a] provides, in pertinent part, that "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." CPLR 3215[f] requires the movant for a default judgment file, by affidavit, proof of service of the summons and complaint and, of the facts constituting the claim.

Here, in support of this branch of its motion, plaintiff Ponce Bank proffers the Affidavit of Service (*Plaintiff's Exh. K*), which establishes proper service of process upon defendant J. Giarnella & Son, Inc. pursuant to statute; the Affirmation of Additional Mailing by plaintiff's counsel (*Plaintiff's Exh. L*); and the affidavit of facts constituting the claim by submission of the affidavit of James Visioli, plaintiff's Vice President. No opposition is submitted to this branch of plaintiff's motion.

Based on the foregoing, this Court determines that plaintiff Ponce Bank has submitted the requisite proof necessary for the entry of a default judgment against defendant J. Giarnella & Son, Inc. and this branch of plaintiff's motion is GRANTED.

### **Summary Judgment**

The first branch of plaintiff Ponce Bank's motion seeks CPLR 3212 summary judgment against defendant J. Giarnella & Sons II, Inc. on its conversion cause of action and an award of damages in the amount of \$150,000, plus interest from June 18, 2014.

Summary judgment is a drastic remedy which a court should employ only when there is no doubt as to the absence of triable issues of fact (*Andre v Pomeroy*, 35 NY2d 361 [1974]; *Gibson v American Export Isbrandtsen Lines, Inc.*, 125 AD2d 65 [1<sup>st</sup> Dept 1987]).

Plaintiff Ponce Bank seeks summary judgment in its favor and against defendant Giarnella II. Specifically, plaintiff seeks to "hold Giarnella II liable based on conversion of the Bank's collateral for the Loan, which occurred when Giarnella II purchased Giarnella's assets, on which the Bank had a perfected UCC lien, for a price of \$150,000, without the consent of the Bank." In other words, plaintiff Ponce Bank argues that, because it had a first priority security interest in all of Giarnella's assets in accordance with the Master Security Agreement, and the Bank's lien was duly perfected in 2008, by the original UCC filing, and extended in 2012 (See UCC 9-515), Giarnella's assets were subject to the Bank's lien when Giarnella II acquired the assets in 2014. Therefore, plaintiff avers that Giarnella II is liable for conversion damages.

It is undisputed that on March 19, 2008, approximately four years prior to the execution of the Loan Agreement, Joseph Giarnella, on behalf of defendant J. Giarnella & Son, Inc., (Debtor) and Ponce Bank (Secured Party) entered into a "MASTER SECURITY AGREEMENT." "The loan to Giarnella was secured by collateral, consisting of Accounts, etc; Inventory; Equipment; Documents and Instruments; General Intangibles, etc.; Securities; Deposit Accounts; Property in Secured Party's Possession; Partnership Interests; Books and Records; and Proceeds" (Master Security Agreement ¶2). According to Plaintiff Ponce Bank, "the security interest that was granted in the collateral continued to secure any obligations of Giarnella to the Bank. Including obligations thereafter arising, such as rolling over of the loan at maturity."

The pertinent part of the Master Agreement (¶3) provides as follows:

#### **MASTER SECURITY AGREEMENT**

"The Obligations secured by this Security Agreement shall consist of any and all debts, obligations, and liabilities of Debtor to Secured Party arising out of or related to the Credit Documents (whether principal, interest, fees, or otherwise, whether now existing or hereafter arising whether voluntary or involuntary, whether or not jointly owed with others, whether

direct or indirect, absolute or contingent, contractual or tortious, liquidated or unliquidated, arising by operation of law, or otherwise, whether or not from time to time created or incurred, and whether or not extended, modified, rearranged, restructured, refinanced, or replaced, including without limitation, modifications to interest rates or other payment terms of such debts, obligations, or liabilities).”

Defendant J. Giarnella & Sons II, Inc. opposes plaintiff’s motion. Defendant’s counsel, one Attorney Pantelis Skulikidis, asserts, in substance, that the documentary evidence that purportedly forms the basis for plaintiff Ponce Bank’s entitlement to summary judgment is deficient. Counsel annexes to his Affirmation, the Bill of Sale, pleadings and obituaries of Joseph and Ralph Giarnella. While an attorney’s affirmation may serve as a vehicle to introduce documentary evidence in support of a motion for summary judgment, an opposing attorney’s assertions, unsupported by any factual proof whatsoever, have no probative value, and therefore, fail to raise a triable issue of fact (*Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324 [1<sup>st</sup> Dept 2004]; *Ramnarine v Memorial Center for Cancer and Allied Diseases*, 281 AD2d 218 [1<sup>st</sup> Dept 2001]). Here, specifically, defendant submits no affidavit to refute plaintiff’s documentary evidence, or the statements made by its Vice-President; or to establish that a lien search was performed and yielded no such claimed results.

#### **DEFENDANT GIARNELLA II’S CROSS-MOTION**

Defendant J. Giarnella & Sons II, Inc. cross-moves, pursuant to CPLR 3211 (a)(5) and (7), by “**NOTICE OF CROSS-MOTION**,” for an order “dismissing the proceeding in its entirety as the claims is barred by the statute of limitations and failure to state a cause of action against defendant, J. Giarnella & Sons II, Inc.”

#### **Statute of Limitations**

Defendant Giarnella II cross-moves to dismiss plaintiff’s action pursuant to CPLR (a)(5) which provides that a party may move to dismiss based on the statute of limitations. It is well settled that the statute of limitations for conversion and replevin actions is three years (see *Harlem Capital Center, LLC v Rosen & Gordon, LLC*, 145 AD3d 579 [1<sup>st</sup> Dept 2016]); and *Berman v Goldsmith*, 141 AD2d 487 [2<sup>nd</sup> Dept 1988]). The New York Court of Appeals elaborates in *Vigilant Ins. Co. of America v Housing Authority of City of El Paso, Tex*:

Conversion is the ‘unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights’ [citations omitted]. For Statute of Limitations purposes, an action for conversion...are subject to a three-year limitation period (see, CPLR 214[3])...[A]ccrual runs from the date the conversion takes place [citations omitted] and not from discovery or the exercise of diligence to discover [citations omitted] (*Vigilant Ins. Co. of America v Housing Authority of City of El Paso, Tex*, 87 NY2d 36, 44-45 [1995]).

Defendant Giarnella II's counsel contends that plaintiff's claim for conversion is time-barred. This Court agrees. Plaintiff's position that the cause of action for conversion of collateral claim did not accrue at the time of sale, but rather, "after this action was filed, when the Bank first learned that the collateral had been sold to Giarnella II" is contrary to the Court of Appeals' determination. In accordance with the Bill of Sale, the statute of limitations for the cause of action for conversion (and replevin) in this action accrued on May 24, 2014, when the purchase occurred, and would have expired on or about May 23, 2017. Plaintiff commenced the instant action in 2018. Moreover, "a cause of action for replevin or conversion requires a demand for the property and refusal" [citations omitted] (*Feld v Feld*, 279 AD2d 393 [1st Dept. 2001]). Plaintiff's counsel proffers no proof of a demand to Giarnella II for Giarnella's assets. In light of the foregoing, this branch of defendant's cross-motion is GRANTED. Accordingly, the plaintiff's conversion and replevin causes of action are DISMISSED. Given this Court's determination, the second branch of defendant's cross-motion asserting that the plaintiff failed to state a cause of action relative to conversion is moot.

Upon review and the analysis of statutory authority, relevant case law, the papers submitted and the record, this Court determines that the plaintiff's motion is GRANTED IN PART; and the defendants' cross-motion is GRANTED.

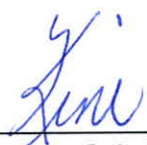
Accordingly, **plaintiff Ponce Bank's motion for summary judgment is GRANTED IN PART.** The branch of plaintiff's motion seeking entry of a default judgment against defendant J. Giarnella & Son, Inc. in the amount of \$317,922.91 is GRANTED. **Defendant Giarnella II's cross-motion to dismiss plaintiff's motion for summary judgment on the ground that it is time-barred is GRANTED** as stated herein.

**The Clerk is directed to enter judgment against defendant J. Giarnella & Son, Inc. in the amount of \$317,922.91.**

The movant is directed to serve a copy of this Order with Notice of Entry, upon the parties within thirty (30) days of entry of this Order and file proof of service with the Court.

This constitutes the Decision and Order of this Court.

Dated: January 6, 2022  
Bronx, New York

  
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Hon. Kim Adair Wilson, J.S.C.