

**413 W. 48th St. Hous. Dev. Fund Corp. v Saparn
Realty, Inc.**

2017 NY Slip Op 31773(U)

August 17, 2017

Supreme Court, New York County

Docket Number: 653891/2013

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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413 WEST 48TH STREET HOUSING
DEVELOPMENT FUND CORPORATION,

Plaintiff,

-against-

Index No. 653891/2013

SAPARN REALTY, INC., ANITA SAPIRMAN,
ALAN GORELICK, THE OAKS AT LA TOURETTE
CONDOMINIUM SECTION II, BOARD OF
MANAGERS OF THE OAKS AT LA TOURETTE
CONDOMINIUM SECTION II, MARK ROSEN,
JOHN/JANE DOES 1-5,

DECISION AND ORDER

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, *inter alia*, to recover damages for money had and received, plaintiff 413 West 48th Street Housing Development Fund Corporation (“HDFC”) moves for, summary judgment on its cause of action for money had and received asserted against defendant The Oaks at La Tourette Condominium Section II (“Oaks”), dismissal of the Oaks’ affirmative defenses, and severance of its claims pursuant to CPLR 3212(e)(1) (motion sequence 003). The Oaks and defendant Mark Rosen (“Rosen”) move for summary judgment dismissing all claims and cross claims asserted against them (motion sequence 004).

HDFC commenced this action in or about November 2013. HDFC is a non-profit corporation which owned and operated an apartment building located at 413 West 48th Street. In the amended complaint, HDFC alleges that, in May 2012, HDFC retained defendant Saparn Realty, Inc. (“Saparn”) as managing agent for the building. As part of

Saparn's responsibilities as managing agent, it was required to collect and deposit funds in a separate bank account in its name as agent of HDFC, without commingling them with any other funds collected from other properties managed by Saparn. Saparn was also required to provide copies of bank statements to HDFC every month.

In October 2012, HDFC instituted a policy requiring that at least \$200,000 be kept in its reserve account, to be used for emergency purposes only. HDFC communicated that policy to Saparn. Over time, Saparn stole funds from that reserve account. In August 2013, HDFC learned that its bank accounts with Saparn as its agent were closed out, and its reserve funds had vanished. While stealing the funds, Saparn had been delivering false managing reports to HDFC, containing altered copies of the HSBC reserve account bank statements, displaying a balance of more than \$200,000.

HDFC investigated, and discovered that Saparn had been transferring money out of HDFC's bank accounts since May 2013. HDFC reported the theft to the New York District Attorney and informed other building owners defrauded by Saparn, including Oaks. One of Saparn's principals, Alan B. Gorelick, is now incarcerated after confessing that Saparn had stolen almost two million dollars from its clients, including more than \$219,000 from HDFC.

Gorelick admitted that, since 2006, he had been depositing maintenance and rent checks from multiple clients into Saparn's business account. He also wrote checks against the accounts of his clients and deposited checks into accounts of other clients. He

admitted to transferring money between his clients' accounts through January 6, 2014.

He admitted to stealing \$219,068.28 from HDFC and \$207,011.45 from Oaks.¹

HDFC had originally commenced this action only against Saparn and its principals to recover the money that was stolen from it. Thereafter, it discovered that \$91,172.00 of the stolen money that had been withdrawn from HDFC's reserve bank account No. 048-36802-4 was deposited into two bank accounts held by Oaks. HDFC had never had any dealings with Oaks, so there was no agreement or obligation pursuant to which that payment was made. HDFC informed Oaks of its findings and demanded the return of its funds in March 2014, and again in September 2014. Oaks refused to return any of HDFC's money. HDFC has not received compensation from any of the defendants in this action, or from any other sources.

HDFC now moves for summary judgment on its cause of action for money had and received asserted against Oaks, dismissal of the Oaks' affirmative defenses, and severance of its claims pursuant to CPLR 3212(e)(1). It argues that HDFC's money was wrongfully deposited into Oaks' bank accounts, thereby conferring a benefit on Oaks. HDFC argues that, even though Oaks did not participate in the wrongdoing, it may not retain the windfall. HDFC submits a report generated by forensic accountants hired by Oaks which indicated that Oaks had identified the two checks as "fraudulent and unauthorized." Further, Pamela Borella, legal assistant in HSBC Bank's legal processing

¹ Saparn's other principal, Anita Sapirman Gorelick, has commenced a bankruptcy proceeding, and this action insofar as asserted against her was stayed pending resolution of the bankruptcy proceeding.

department, provided an affidavit in which she averred that “upon review of the books and records kept in the regular course of business by HSBC, I confirm that two checks, numbered 006 and 010, in the total amount of \$91,172.00 were drawn on HDFC's HSBC bank account number 048-36802-4 and deposited into two discrete HSBC bank accounts of another HSBC customer, Oaks at La Tourette Section 11 condominium.” One check was deposited in May 2013, and the other in July 2013. HDFC further argues that Oaks’ affirmative defenses must all be dismissed.

Oaks and Rosen also move for summary judgment dismissing all claims and cross claims asserted against them. They first argue that any claims asserted against Rosen must be dismissed because he was not personally involved in the scheme, did not personally benefit from Saparn’s scheme, and committed no bad faith or self-dealing.

Oaks next argues that because it was a victim just like HDFC, it should not have to lose money twice by having its own money stolen and then having to pay another of Saparn’s victims. One victim of a fraudulent scheme should not be permitted to recover from another victim.

Finally, Oaks argues that, per its forensic report, in 2013, \$156,469.20 was transferred out of the Oaks account and \$163,767.02 was transferred into its accounts. None of those funds have any identifying features and therefore, HDFC cannot point to which dollars were used or benefitted by Oaks, and which were simply transferred out of the account.

Oaks claims that Saparn admitted to moving monies between accounts and creating false bank statements, so it cannot be established that any money Oaks has in its

account belongs to HDFC. The Oaks account was used as a vehicle to move money between other third parties. The money deposited into its account from HDFC could have just as easily been transferred out. Further, HDFC provided no expert analysis, such as an audit performed by a forensic accountant, to prove that the money taken from HDFC's account and deposited into Oaks' account belonged to HDFC.

In opposition to Oaks' and Rosen's motion for summary dismissal of the claims against them, HDFC argues that Oaks' claim that HDFC's bank account may have contained some other third party's money is mere speculation. There is no evidence that HDFC received a fraudulent transfer from Saparn. Further, Oaks had over six years to discover Saparn's fraud, and had it exercised due diligence it could have discovered the fraud and prevented it from happening to HDFC. HDFC was the one who discovered the fraud and immediately notified all affected parties.

Discussion

I concluded at oral argument held on August 10, 2016 that the action insofar as asserted against defendant Mark Rosen must be dismissed, because HDFC had not shown any basis to hold him personally liable on any of the claims asserted in this action. I now affirm dismissal of the action as against defendant Mark Rosen.

A claim for money had and received requires a showing that: (1) defendant received money belonging to plaintiff; (2) defendant benefited from the receipt of the money; and (3) under principles of good conscience defendant should not be allowed to retain that money. *Litvinoff v. Wright*, 150 A.D.3d 714 (2nd Dept. 2017). An action for money had and received is an obligation which the law creates in the absence of

agreement when one party possesses money that in equity and good conscience he/she ought not to retain and that belongs to another. *New York v. Park*, 204 A.D.2d 531 (2d Dep't 1994).

Upon review of the evidence presented, I find that HDFC has not met its burden of establishing entitlement on the claim of money had and received as a matter of law. The evidence presented demonstrates that from May through July 2013, Saparn stole \$219,068.28 from HDFC's accounts and from June 2009 through November 2013, Saparn stole \$207,011.45 from Oaks' accounts. In May and July 2013, a total of \$91,172.00 was withdrawn from HDFC's accounts and deposited into Oaks' accounts. In 2013, \$156,469.20 was transferred out of the Oaks account and \$163,767.02 was transferred into its accounts.

While HDFC has demonstrated that Oaks received money from HDFC's account, HDFC has not made a *prima facie* showing that Oaks either retained or benefitted from the receipt of that money. HDFC has not provided any forensic report of its own, or any expert analysis of Oaks' accounts. There is simply no probative evidence submitted to establish that Oaks benefitted from the receipt of HDFC's money, and any factual conclusion to that effect could only be made on speculation. Both parties were victims of Saparn's fraud. Accordingly, HDFC's claim for money had and received asserted against Oaks must be dismissed.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff 413 West 48th Street Housing Development Fund Corporation's motion for summary judgment on its cause of action for money had and

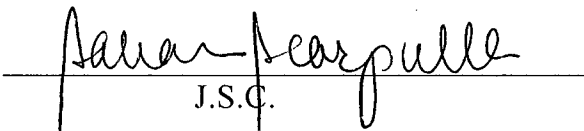
received asserted against defendant The Oaks at La Tourette Condominium Section II and for dismissal of the Oaks' affirmative defenses (motion sequence 003) is denied; and it is further

ORDERED that defendants The Oaks at La Tourette Condominium Section II, and Mark Rosen's motion for summary judgment dismissing all claims and cross claims asserted against them (motion sequence 004) is granted and all claims and cross claims asserted against them are dismissed; and it is further

ORDERED that the remaining claims are severed.

This constitutes the decision and order of the court.

Dated: August 17, 2017
New York, New York



J.S.C.