

[Ally Bank v. 1st Republic Mortg. Bankers, Inc.](#)

United States District Court for the Eastern District of New York

December 7, 2011, Decided; December 7, 2011, Filed

CV 09-247 (ADS) (WDW)

Reporter

2011 U.S. Dist. LEXIS 157144 *; 2011 WL 10549045

ALLY BANK f/k/a GMAC BANK, Plaintiff(s), -against-
1ST REPUBLIC MORTGAGE BANKERS, INC., SCOTT
SISSKIND, JOHN REIMER and LENDERS ABSTRACT
AND SETTLEMENT SERVICES, INC., Defendant(s).

Subsequent History: Adopted by, Judgment entered
by, Request denied by [Ally Bank v. 1st Republic Mortg.
Bankers, Inc., 2013 U.S. Dist. LEXIS 41514 \(E.D.N.Y.,
Mar. 23, 2013\)](#)

Core Terms

default, conversion, allegations, damages, cause of
action, loans, recommend, Mortgage

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For 1st Republic Mortgage Bankers, Inc., Scott
Sisskind, Lenders Abstract and Settlement Services,
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For John Reimer, Defendant: Karl C. Seman, Grunwald
& Seman PC, Garden City, NY.

For Bank Of America, N.A., Bank of America, N.A.,
Respondent: Michael Cardello, III, Moritt, Hock, Hamroff
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For 1st Republic Mortgage Bankers, Inc., Scott
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Judges: WILLIAM D. WALL, United States Magistrate
Judge.

Opinion by: WILLIAM D. WALL

Opinion

REPORT AND RECOMMENDATION

WILLIAM D. WALL, United States Magistrate Judge:

Before the court on referral from District Judge Spatt
[*2] is the determination of damages on the default of
defendant John Reimer. Default judgment was entered
against Reimer on October 9, 2009. DE[92]. I
recommend that damages in the amount of
\$8,884,398.57 be awarded against Reimer for the
reasons set forth *infra*.

BACKGROUND

On or about October 15, 2008, the plaintiff, then GMAC
Bank, and the defendant, 1st Republic Mortgage
Bankers, executed a Warehousing Credit and Security
Agreement, pursuant to which 1st Republic could
request loans ("Warehousing Advances") from the
plaintiff to make mortgage loans to third party borrowers
(the "Individual Borrowers") if they met certain criteria
set forth in the Credit and Security Agreement. In
January 2009, the plaintiff alleges that it became aware
that 1st Republic was in default of its obligations under
the Agreement and had ceased doing business on or
about January 13, 2009. The plaintiff alleges that it
subsequently learned that the defendants in this action
had perpetrated a fraud on the plaintiff and other
warehouse lenders by, *inter alia*, "double-pledging"

collateral and using Warehousing Advances to fund fictitious mortgage loans.

By letter dated January 19, 2009, the plaintiff advised 1st [*3] Republic and defendant Sisskind, 1st Republic's president and sole shareholder, of the defaults under the Agreement and declared 1st Republic's and Sisskind's obligations under the Agreement and Sisskind's obligations under a guaranty signed on October 15, 2008 to be immediately due and payable. Plaintiff also demanded that 1st Republic and Sisskind pay \$10,296,429.31 to satisfy those obligations. 1st Republic and Sisskind did not respond to the letter, and this action was commenced on January 21, 2009, asserting seven causes of action and seeking a judgment of \$10,296,429.38 plus interest, late charges, fees, costs and expenses. Defendants 1st Republic, Sisskind and Lenders Abstract answered on February 23, 2009. Defendant Reimer, identified in the Complaint as the Vice-President-Comptroller of 1st Republic, did not answer, nor has he opposed this motion for default damages.

An involuntary bankruptcy proceeding commenced against 1st Republic on April 8, 2009 and voluntary bankruptcy proceedings were commenced by Sisskind and Lenders on July 8, 2009. As a result, this action has been stayed against those defendants. On this motion for default judgment, the plaintiff seeks \$8,884,398.57 [*4] from Reimer as damages on the Seventh Cause of Action, for conversion.

DISCUSSION

A default constitutes an admission of all well-pleaded factual allegations in the complaint except those relating to damages. See [Delucia v. RTD Strategies, Inc. 2009 U.S. Dist. LEXIS 8898, 2009 WL 346972, *2 \(E.D.N.Y. Feb. 4, 2009\)](#) (citing [Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 \(2d Cir. 1992\)](#)). A default also "effectively constitutes an admission that the damages were proximately caused by the defaulting party's conduct: that is, the acts pleaded in a complaint violated the laws upon which a claim is based and caused injuries as alleged." [Cablevision Sys. New York City Corp. v. Lokshin, 980 F. Supp. 107, 111 \(E.D.N.Y. 1997\)](#). But, even after default, "it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." [Trustees of the Plumbers Local Union No. 1 Welfare Fund v. Philip Gen. Constr., 2007](#)

[U.S. Dist. LEXIS 78632, 2007 WL 3124612, *3 \(E.D.N.Y. Oct. 23, 2007\)](#). And, the movant must prove that the "compensation sought relate[s] to the damages that naturally flow from the injuries pleaded." [Greyhound, 973 F.2d at 159](#). [*5] An evidentiary hearing is not required so long as there is a basis for the damages awarded. [Transatlantic Marine Claims Agency v. Ace Shipping Corp., 109 F.3d 105, 111 \(2d Cir. 1997\)](#) (citations omitted). Detailed affidavits and other documentary evidence can provide this basis. See, e.g., [Action S.A. v. Marc Rich & Co., 951 F.2d 504, 508 \(2d Cir. 1991\)](#).

In support of this motion, the plaintiff has submitted the affidavit of Carol MacElree, a Senior Credit Officer of plaintiff Ally Bank. Ms. MacElree provides a list of the Double Pledged Loans and Fictitious Loans and a spreadsheet setting forth the Warehousing Advances sent by the plaintiff to 1st Republic for those Loans between November 2008 through January 2009. See MacElree Aff., DE[104], Exs. E & F. Ms. MacElree provides additional details about the loans to document the amounts sought, which are reduced somewhat from the amount sought in the Complaint, from \$10,296,429.31 to \$8,884,398.57.

The factual allegations against Reimer in the Complaint in this action are in paragraphs 4 and 7, which state, upon information and belief, his address and his role as Vice-President-Comptroller of 1st Republic, and in the Seventh Cause of Action, [*6] which asserts that Reimer, "in his individual capacity, . . . received and still possesses the proceeds of certain Warehousing Advances made by GMAC to 1st Republic." Complaint, ¶62. The Wherefore Clause seeks recovery from all of the defendants, on the seventh cause of action, "of any or all proceeds of Warehousing Advances made by GMAC to 1st Republic Mortgage Bankers, Inc. and wrongfully and illegally retained by defendants, in an amount to be determined at trial . . ." DE[1]. On the default motion, the plaintiff seeks relief only as to the Seventh Cause of Action for conversion.¹

To prove a claim of conversion under New York law, a plaintiff must show "legal ownership or an immediate superior right of possession to a specifically identifiable thing and must show that the defendant exercised unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights." [Federal National](#)

¹ The third and fourth causes of action also include a reference to Reimer, but the plaintiffs do not seek any relief for those causes of action on this motion.

Mortgage Ass'n v. Olympia Mortgage Corp., 2006 U.S. Dist. LEXIS 70175, 2006 WL 2802092, *13 (E.D.N.Y. Sept. 28, 2006)(citing Batsidis v. Batsidis, 9 A.D.3d 342, 343, 778 N.Y.S.2d 913 (2nd Dep't 2004)). [*7] "Money may be the subject of conversion if it is specifically identifiable and there is an obligation to return it or treat it in a particular manner." *Id.* (citing Hoffman v. Unterberg, 9 A.D. 3d 386, 388, 780 N.Y.S.2d 617 (2d Dep't 2004)(abrogated on other grounds by Tzolis v. Wolff, 10 N.Y.3d 100, 884 N.E.2d 1005, 855 N.Y.S.2d 6 (2008)). "When funds are provided for a particular purpose, the use of those funds for an unauthorized purpose constitutes conversion." *Id.*; see also Bank of America Corp. v. Braga Lembruger, 2007 U.S. Dist. LEXIS 95267, 2007 WL 4548298, *16 (S.D.N.Y. July 10, 2007)(same).

Here, the plaintiff has established, by virtue of well-pleaded allegations, that the Warehousing Advances were used for unauthorized purposes and that it is entitled to their return. It has also alleged that Reimer has "unauthorized dominion" over the funds, in that he allegedly "received and still possesses the proceeds of certain Warehousing Advances made by GMAC to 1st Republic," such amounts "to be proven at trial." Complaint, ¶62, Wherefor Clause. As noted, the Complaint sets the amount of Warehousing Advances at \$10,296,429.38, but that number has now been reduced, as set forth in the MacAlree affidavit, to the amount now sought - \$8,884,398.57 - a figure that [*8] reflects a reduction resulting from buydowns and recoveries by the plaintiff. The MacAlree Affidavit specifically identifies the money at issue to satisfy that requirement of a conversion claim for money. See LoPresti v. Terwilliger, 126 F.3d 34, 41-42 (2d Cir. 1997)(for conversion claim, money must be specifically identified, but need not be placed in separate account or otherwise segregated); Braga Lembruger, 2007 U.S. Dist. LEXIS 95267, 2007 WL 4548298 at *16 (plaintiff need not specifically identify where defendant put converted money or where it is at present time, nor need money have been segregated).

As noted earlier, "it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." Philip Gen. Constr., 2007 U.S. Dist. LEXIS 78632, 2007 WL 3124612 at *3. Put another way, "liability does not automatically attach from the well-pleaded allegations of the complaint, as it remains the court's responsibility to ensure that the factual allegations, accepted as true, provide a proper basis for liability and relief." Icestone, LLC v. MATEC, S.R.L.,

2011 WL 4460505, * 1 (E.D.N.Y. Sept. 9, 2011) (citing Au Bon Pain Corp. v. Arctect, Inc., 653 F.2d 61, 65 (2d Cir. 1981)). [*9] Here, the unchallenged facts do set out a claim of conversion against Reimer, but there are issues with the amount of money sought on that claim and whether Reimer is liable for the full amount. On the one hand, it is something of a leap to infer from the well-pleaded allegations that Reimer is in possession of that full amount on a theory of conversion. On the other hand, Reimer not only defaulted on the claims in the Complaint, but also failed to oppose the motion for default, where he had an opportunity to challenge the amounts sought despite the entry of judgment against him. Further, it is due to the bankruptcy filings and Reimer's default that the plaintiff has lost the chance to gather facts and to prove the amounts in Reimer's possession with greater certainty. Weighing these factors, I recommend that the full amount of Warehousing Advances sought be awarded. The plaintiff also seeks "applicable interest and fees," but has provided no basis for such award and I do not recommend it. Statutory interest will be awarded as a matter of course if the judgment is entered.

OBJECTIONS

A copy of this Report and Recommendation is being sent to counsel for the plaintiff by electronic filing [*10] on the date below. Plaintiff's counsel is directed to serve a copy of this Report on John Reimer, and to electronically file proof of service with the court. Any objections to this Report and Recommendation must be filed with the Clerk of the Court within 14 days. See 28 U.S.C. §636 (b)(1); Fed. R. Civ. P. 72; Fed. R. Civ. P. 6(a) and 6(d). Failure to file objections within this period waives the right to appeal the District Court's Order. See Ferrer v. Woliver, 2008 U.S. App. LEXIS 24018, 2008 WL 4951035, at *2 (2d Cir. Nov. 20, 2008); Beverly v. Walker, 118 F.3d 900, 902 (2d Cir. 1997); Savoie v. Merchants Bank, 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York

December 7, 2011

/s/ William D. Wall

WILLIAM D. WALL

United States Magistrate Judge