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COUNTY CLERK  
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI, A.J.S.C. IA Part 3

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[Redacted]

Index  
Number 707975/2019

Plaintiff,

-against-

NY Medical Health Care, P.C., "XYZ CORPORATION A", name fictitious, actual name and number of such corporation being unknown, "XYZ CORPORATION B", name fictitious, actual name and number of such corporation being unknown, Bijan Golyan, Joseph Golyan, Daniel Golyan and Sterling National Bank,

**DECISION/ORDER**

Motion Seq. # 1

Defendants.

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The following numbered papers read on this pre-answer motion pursuant to CPLR §§ 3211 (a)(1) and (7) by defendant Sterling National Bank ("Sterling"), seeking to dismiss plaintiff's complaint.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavit - Exhibits .....	EF 11-19
Answering Affidavits- Exhibits.....	EF 30-35
Reply Affidavits.....	EF 36-37

Upon the foregoing papers, it is ordered that the motion is determined as follows:

In this action, the plaintiff [Redacted] seeks to recover damages for alleged breach of contract and conversion by the defendants, in addition to allegations against her former employer co-defendant NY Medical Health Care P.C. ("NY Medical"), the plaintiff claims that the co-defendant Sterling converted the funds of the plaintiff by honoring a check made payable to her, as payee, but endorsed by, and paid to, co-defendant NY Medical, who was not a payee.

In support of its motion, Sterling submits, *inter alia*, its attorney's affirmation and memorandum of law, the pleadings, a copy of the cancelled check at issue, a copy of the employment agreement between the co-defendant NY Medical and the plaintiff. Sterling contends that the plaintiff's complaint is insufficient to state a cause of action primarily because she did not affirmatively allege having actual or constructive possession of the check.

On a motion to dismiss a complaint pursuant to CPLR §3211(a)(1), the documentary evidence must utterly refute the plaintiff's allegations (*See Phillips v Taco Bell Corp.*, 152 AD3d 806 [2d Dept. 2017]). Such evidence must be unambiguous, authentic and undeniable such as judicial records and documents such as a contract, the contents of which are essentially undeniable. (*Id.*) Suffice it to say, that the arguments presented by Sterling are not resolved by the documents but involve interpretations of the relevant contractual provisions as they relate to the facts, and other equitable principles which are the subject of the underlying litigation. (*See Georgica Builders, Ltd., v 136 Bishops Lane, LLC*, 175 AD3d 610 [2d Dept. 2019].)

As to CPLR §3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only if the facts alleged fit within any cognizable legal theory. (*See Leon v Martinez*, 84 NY2d 83 [1994]; *Travelsavers Enterprises, Inc. v. Analog Analytics, Inc.*, 149 AD3d 1003 [2d Dept 2017]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether one has been artfully stated. (*See Leon*, 84 NY2d 83.) Unless it is shown that a material fact as claimed by the pleader is not a fact at all, and that no significant dispute exists regarding it, dismissal is not warranted. (*See Guggenheimer v Ginzburg*, 43 NY2d 268 [1977].)

UCC 3-419 provides in its pertinent part:

“(1) An instrument is converted when

(c) it is paid on a forged indorsement.

(3) Subject to the provisions of this Act concerning restrictive indorsements a representative, including a depository or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.”

To have standing to pursue the alleged conversion under this provision, the plaintiff must show that she had obtained delivery of the check, either actual or constructive in order to fulfill the indispensable prerequisite of this action. (*See State v Barclay's Bank of New York, N.A.*, 76 NY2d 533 [1990]).

In her verified complaint, the plaintiff avers a business relationship between herself, and co-defendant NY Medical. She was employed by NY Medical as a physician, working at NY Medical's facility. The employment agreement evidencing this relationship, submitted by Sterling, includes many references to the business address of plaintiff being at NY Medical's locations, and the requirement that all checks paying for her services be mailed there, and requiring the plaintiff's presence at one of these locations at particular times. Thereby, an inference can be drawn that the plaintiff received business mail at co-defendant NY Medical's location. It can be inferred that the check was delivered to the plaintiff at the office of her employer, as NY Medical acknowledged in its verified answer, that it did gain possession of the check. Therefore, it can be said that a favorable inference can be drawn that the plaintiff had constructive delivery of the check at her place of business. (*cf. State*, 76 NY2d 533.) Whether NY Medical inappropriately converted the subject check, is a matter yet to be determined. However, the check's mailing to plaintiff's business address, and NY Medical's acknowledgment that it received it, demonstrates constructive delivery and possession over the check by NY Medical, arguably on behalf of the plaintiff. (*Id.*) It is noted that Sterling does not dispute that it honored the check with an indorsement of codefendant NY Medical, (as presented to it by NY Medical), not that of the payee plaintiff.

With respect to the merits of the underlying complaint, at this early stage of the litigation prior to any discovery, it is premature to make any determinations involving interpretation of contractual provisions between the plaintiff and co-defendant NY Medical, and facts related to entitlement of distribution from the dissolution of the mutual insurance company. The issue involving "unjust enrichment" is further complicated as this particular dissolving entity is, and has been, the subject of litigation throughout the State of New York, with fluid results. (*See Schaffer, Schonholz & Drossman, LLP, v Title*, 171 AD3d 465 [1<sup>st</sup> Dept. 2019]; *Tonelli v Chase Manhattan Bank*, 41 NY2d 667 [1977]). Since there has been no adjudication of this issue by the Appellate Division, 2d Department, it is the general rule that a non-conflicting decision of an appellate court is binding upon the trial courts of other departments unless and until its own department rules otherwise, or the Court of Appeals determines the issue. (*See Mountain View Coach Lines, Inc., v Storms*, 102 AD2d 663 [2d Dept. 1984]; *Maple Medical LLP*, 64 Misc 3d 909.) The First Department in *Schaffer*, held that in seemingly similar circumstances, the distribution should go to the employer who made the premium payments. However, at this time, there is insufficient

evidence upon which to decide whether the facts here are substantially the same or significantly different than *Schaffer*.

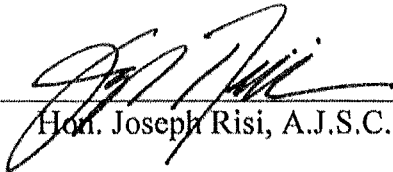
The plaintiff's pleadings, given liberal construction with every favorable inference, are sufficient to support a claim for conversion against the co-defendant Sterling. (*See Leon*, 84 NY2d 83). [REDACTED] had constructive possession at her place of employment, the check was made out in her sole name as payee, and the indorsement was somehow accepted by the drawee bank, co-defendant Sterling, even though indorsed by a party who was not the payee of the check.

Sterling is entitled to assert any and all defenses it believes applicable in its answer, however, it submitted insufficient evidence to meet its burden on this CPLR §§ 3211(a) (1) and (7) motion.

Accordingly, defendant's motion to dismiss the plaintiff's complaint is denied in all respects.

This is the decision and order of the Court.

Dated: February 7, 2020

  
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Hon. Joseph Risi, A.J.S.C.

