

<b>Cash on the Spot ATM Servs., LLC v Camia</b>
2016 NY Slip Op 32665(U)
August 16, 2016
Supreme Court, Richmond County
Docket Number: 102307/12
Judge: Philip S. Stranieri
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 19

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CASH ON THE SPOT ATM SERVICES, LLC, and  
RONALD P. CARROCCIO,

*Plaintiffs*

*against*

COSMO CAMIA, PHILIP CAMIA, SAVERIA CAMIA,  
PAYMENT ALLIANCE INTERNATIONAL, INC.,  
ALLIANCE ATM, INC.  
E-Z MONEY ATM SERVICES, CORP.,  
ECLIPSE TRANSACTIONS, LLC,  
ECLIPSE ATM HOLDINGS, LLC,  
FRANK ERCOLE,  
BARRY ABRAMS,  
JOHN DOES 1 through 10, JOHN DOE CORPORATIONS 1-10, and  
OTHER JOHN DOE ENTITIES 1-10, all whose true names are unknown,

*Defendants*

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The following items were considered in the review of the following motion to amend and cross-motions for costs and sanctions.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affirmation	1
Notice of Cross-Motion and Affirmation in Opposition	2
Memorandum of Law	3
Notice of Cross-Motion and Affirmation in Opposition	4
Memorandum of Law	5
Reply Affidavit and Opposition to Cross-Motion	6
Reply Affirmation and Opposition to Cross-Motion	7
Plaintiffs' Reply Memorandum of Law	8
Reply Affirmation	9
Reply Memorandum of Law	10
Affirmation in Opposition	11
Reply Affirmation of Plaintiff	12
Exhibits	Attached to Papers

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

Index No.: 102307/12

Motions: 13 & 14 & 16

DECISION & ORDER

HON. PHILIP S. STRANIERE

2016 SEP - 1 P 12: 37  
RICHMOND COUNTY CLERK

The plaintiffs move pursuant to CPLR §3025(b) for leave to file a second amended complaint for good cause shown. The defendants, E-Z Money ATM Services, Corp. ("E-Z Money"), and Frank Ercole ("Ercole"), oppose the motion and cross-move for sanctions pursuant to 22 NYCRR 130-1.1(a) for litigation abuses. The defendant, Payment Alliance International, Inc, <sup>1</sup>("PAI") opposes the motion and cross-moves seeking the imposition of costs and sanctions against plaintiffs pursuant to 22 NYCRR 130-1.1(a) for filing a motion that is without legal merit. Defendants Cosmo Camia and Philip Camia have not submitted papers. Saveria Camia has opposed plaintiffs' motion. Defendants Alliance ATM, Inc., Eclipse Transactions, LLC, Eclipse ATM Holdings, LLC and Barry Abrams are in default. Each movant has submitted reply papers.

Two prior orders of the Hon. Joseph Maltese dismissed the plaintiffs' original complaint pursuant to motions made under CPLR § 3211(a)(7). The order dated January 17, 2013 dismissed the complaint as to defendants, EZ-Money and Ercole. The order dated March 8, 2013 dismissed the complaint as to defendant PAI. Plaintiffs were permitted to amend their complaint by order of Hon. Joseph Maltese dated November 13, 2013. By order dated April 29, 2014 this Court dismissed the amended complaint against defendant PAI. By order dated April 29, 2014 this Court dismissed the first cause of action in the amended complaint against defendants, EZ-Money and Ercole. After a motion to reargue the court by written decision dated September 23, 2014 dismissed the remaining cause of action in the amended complaint against defendants, EZ-Money and Ercole.

The facts of the matter as set forth in Justice Maltese's January 17, 2013 order are:

The plaintiff Ronald P. Carroccio is the 70% shareholder of Cash On The Spot ATM Services, LLC ("COTS") a Nevada LLC that has its primary place of business on Staten Island, New York. The defendants Cosmo Camia and Philip Camia ("the Camias") were the managing member and an employee respectively. The business operates independent automated teller machines (ATMs) throughout Staten Island, New York. The plaintiff Carroccio alleges that the Camias maintained exclusive control of the entities bank accounts and vault account. The vault account contained those monies which were distributed through the ATM machines in the network maintained by COTS. The plaintiff alleges that the Camias embezzled approximately \$1,600,000.00 from the COTS bank accounts, inclusive of the vault account.

Plaintiffs proposed second amended complaint as to defendants, EZ-Money and Ercole alleges three causes of action for unjust enrichment, conversion and fraud. Plaintiffs commenced this action in 2012 and alleged twelve causes of action against EZ-Money and Ercole which included breach of covenant of good faith and fair dealing, breach of fiduciary duty, breach of duty of loyalty, unfair competition, fraud, conversion, embezzlement, constructive trust, failure to account, conspiracy to defraud, unjust enrichment, and fraudulent transfer. When that complaint was dismissed and plaintiffs amended the complaint they asserted only claims for tortious interference with contract and fraudulent conveyance. As stated above those claims were also dismissed pursuant to CPLR § 3211(a)(7).

Plaintiffs proposed second amended complaint as to defendant PAI alleges breach of contract and negligence claims. The initial complaint contained claims for failure to account, breach of fiduciary duty, commercial bad faith, conspiracy to defraud, unjust enrichment and fraudulent transfer. When the original complaint was dismissed plaintiffs' amended complaint asserted a claim for breach of fiduciary duty only. As stated above that claim was also dismissed pursuant to CPLR § 3211(a)(7).

Plaintiffs are not alleging new facts, but are seeking a second amendment for claims previously pled and dismissed. Plaintiff avers that in substance there is nothing new that could cause any surprise or prejudice to the defendants in the second amended complaint.

The rule on amendment of pleadings CPLR § 3025(b) states:

... A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading

The determination of whether to grant leave to amend a pleading is within the sound discretion of the trial court (*Sewkarran v. Debellis*, 11 AD3d 445 [2d Dept. 2004]). The Court of Appeals has noted that "leave to amend the pleadings, 'shall be freely given' absent prejudice or surprise resulting from the delay." (*McCaskey, Davies and Assocs., Inc. v. New York City Health & Hosp. Corp.*, 59 NY2d 755 (1983)). Defendants EZ-Money and Ercole argue that plaintiffs had

a full and fair opportunity to litigate their claims and they were dismissed by Justice Maltese. However, Justice Maltese clearly stated in his decision that granted plaintiffs the opportunity to amend that the dismissal was not res judicata. The decision quoted Professor Siegel in his treatise New York Practice as follows:

A judgment resulting from the grant of a CPLR 3211 motion is not res judicata of the entire merits of the case (unless the motion was treated as one for summary judgment). But it is res judicata of whatever it determined, and that can some times have the same effect. Where, for example, the first action is dismissed as barred by the statute of limitations, a second New York action that attempts to duplicate the claim will be dismissed: it is res judicata that the claim is time bared. If the first-round dismissal was under subdivision (a)(7) for a mere pleading deficiency in the cause of action, a new action with a complaint identical to the first will be barred by res judicata, but a new action with a complaint that remedies the deficiency will be sustained.<sup>2</sup>

The quote is once again relevant. Plaintiffs are again trying to cure pleading deficiencies. Plaintiffs have hired new counsel (this being plaintiffs third set of attorneys) and have proposed a second amended complaint that contains allegations that support each cause of action. The defendants have been on notice of the claims and causes of action since the original complaint was filed. "Mere lateness is not a barrier to the amendment, but lateness coupled with significant prejudice is."<sup>3</sup> Defendant PAI argues the new causes of action merely rebrand the previously dismissed claims and plaintiffs offer no explanation for why they were not brought in the first place other than to blame their prior attorneys. Restated causes of action based on the same facts and occurrences pled in the original complaint do not meet the standard of prejudice. (*Harding v. Filancia*, 144 A.D.2d 538, (NY App. Div. 2d Dept. 1988). "The defendants cannot claim prejudice or surprise since the proposed amendment arises out of the same facts as those underlying the original complaint. Exposure to additional liability does not, in itself, constitute prejudice." (*RCLA, LLC v. 50-09 Realty, LLC*, 48 A.D.3d 538, 539, (NY App. Div. 2d Dept. 2008) ). Defendants have not established that they suffered prejudice. Furthermore, it is the policy of the courts is to allow the parties their day in court.

Accordingly, it is hereby:

ORDERED, that the plaintiffs' motion is granted and

ORDERED, that the defendants' cross-motions are denied.

**GRANTED**

**AUG 26 2016**

DATED:

8/16/16

ENTER,

**STEPHEN J. FIALA**

Philip S. Stanieri  
Acting Justice of the Supreme Court

1. PAI is a Delaware corporation with its principal office located in Louisville, Kentucky. PAI is an Independent Sales Organization sponsored by MetaBank d/b/a Meta Payment Systems that provides products to process ATM transactions. On June 21, 2011, PAI entered into an Independent Sales Representative Agreement ("ISR Agreement") with the defendant Cosmo Camia.

2. Siegel, NY Prac § 276 (5<sup>th</sup> ed.), citing *Spindell v. Brooklyn Jewish Hosp.*, 35 AD2d 962 [2d Dept. 1970], aff'd 29 NY2d 888 [1972], *Flynn v. Sinclair Oil Corp.*, 20 AD2d 636 [1<sup>st</sup> Dept. 1964] aff'd 14 NY2d 853 [1964].

3. Siegel, NY Prac § 237 (5<sup>th</sup> ed.), *Edenwald Contracting Co. v. City of New York*, 60 N.Y.2d 957, 959, 459 N.E.2d 164 (1983).