SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 9, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Moskowitz, Renwick, Manzanet-Daniels, JJ.

9870 AIG Financial Products Corp., Index 651117/11
Plaintiff-Respondent,

-against-

ICP Asset Management, LLC, et al.,
Defendants-Appellants,

ICP Strategic Credit Income Fund, Ltd., et al.,
Defendants.

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Akin Gump Strauss Hauer & Feld LLP, New York (David M. Zensky of counsel), for Moore Capital Management, LP and Seychelles Ltd., appellants.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Jonathan E. Pickhardt of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 8, 2012, which, insofar as appealed from, denied the motion of defendants Moore and Seychelles to dismiss the cause of action against them for aiding and abetting fraud, unanimously affirmed, with costs. Appeal by ICP Asset Management LLC, ICP Securities LLC, and Institutional Credit Partners LLC from the aforesaid order unanimously withdrawn in accordance with

the stipulation of the parties dated April 2, 2013.

Defendants Moore Capital Management, LP and Seychelles Ltd. (Moore) contend that plaintiff AIG Financial Products Corp. (AIG) failed to allege sufficient facts to establish a cause of action for aiding and abetting fraud. According to the first amended complaint, the underlying fraud was committed by the ICP defendants (ICP) when they entered into an arrangement with Moore to secure from it residential mortgage backed securities pursuant to a forward purchasing agreement. AIG, which had issued credit default swaps in connection with the collateralized debt obligations (CD0s) that those residential mortgage backed securities were associated with, claims that the forward purchasing agreement between ICP, the collateral manager for the CD0s, and Moore, was purposely structured to deplete the CDOs' assets by setting the price for the mortgage backed securities at a level much higher than that justified by the deteriorating market for those products at the time in question, 2007 and 2008. Plaintiff asserts that ICP was required, pursuant to the indentures governing the CD0s, to obtain its consent before purchasing new collateral, and that it was defrauded when ICP failed to obtain such authorization before entering into the forward purchasing agreement.

With respect to Moore, the first amended complaint specifically alleges that it was privy to the indentures, and thus knew of AIG's veto power over transactions such as the forward purchase agreement. Further, AIG alleged various facts intended to suggest that the forward purchase agreement was designed to defraud AIG. For example, it asserted that the CDOs themselves, which were the actual parties in interest to the forward purchase agreement, were not made signatories to the agreement. In addition, AIG alleged that the forward purchase agreement made little economic sense for the CD0s, since it promised to purchase mortgage backed securities from Moore at prices not commensurate with the foundering market for those products. The first amended complaint alleges that Moore did not obtain the securities in question independently, but rather that ICP "arranged for them to be acquired" by Moore. AIG further avers in the first amended complaint that Moore realized a large windfall as a result of its transactions with ICP. Finally, AIG alleges that Moore participated in "swapping" with TOP certain mortgage backed securities in place of securities with respect to which AIG did exercise its right to veto, as a way of quashing AIG's approval rights under the indenture agreements. While this allegation does not appear in the first amended complaint itself,

it is apparent from papers submitted by the parties in connection with a related SEC enforcement action, which papers were considered by the motion court for purposes of amplifying the first amended complaint.

Moore asserts that the first amended complaint fails because it does not allege that Moore had actual knowledge of the facts supporting each and every element of the fraud cause of action against ICP. It claims that, at best, the first amended complaint alleges that Moore had constructive knowledge of the facts, which it correctly notes is insufficient on an aiding and abetting claim (*see CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 472 [1st Dept 2011]). Moore further argues that AIG did not sufficiently allege that it substantially assisted ICP in carrying out its fraud, or that its conduct as alleged proximately caused damage to AIG.

Initially, we note that ICP has not appealed the finding that AIG sufficiently pleaded a cause of action for fraud against it. Further, Moore has not challenged that aspect of the motion court's order. Accordingly, we accept for purposes of this appeal that AIG has made out a claim for fraud, the necessary predicate to the cause of action against Moore for aiding and abetting.

While the allegations in the first amended complaint alone, if proven, would not definitively establish that Moore had actual knowledge of ICP's efforts to defraud AIG sufficient to trigger aiding and abetting liability, that is not the standard on a motion to dismiss pursuant to CPLR 3211(a)(7). This Court held in *Oster y Kirschner* (77 AD3d 51, 55-56 [1st Dept 2010]) that

> "[a] plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance. This Court has stated that actual knowledge need only be pleaded generally, cognizant, particularly at the prediscovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind. Participants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud. The Court of Appeals has stated that an intent to commit fraud is to be divined from surrounding circumstances (*see Eurycleia Partners, LP y Seward & Kissel, LLP*, 12 NY3d 553 [2009])."

Here the "surrounding circumstances" described in the first amended complaint permit the reasonable inference that Moore actually knew of ICP's alleged fraud. AIG alleges not merely that Moore was a passive beneficiary of ICP's largesse in purchasing its securities at well-above-market rates, but that Moore willingly turned a blind eye to evidence that the forward purchase agreement was a sham. At the pleadings stage, such an allegation is sufficient to state a claim for aiding and abetting

fraud, since to hold otherwise would be to "endorse what is essentially a 'see no evil, hear no evil' approach," which this Court has refused to do (id. at 57).

In any event, all that is needed to overcome a motion to dismiss a fraud claim is a rational inference of actual knowledge (*see Houbigant, Inc. y Deloitte & Touche*, 303 AD2d 92, 98 [1st Dept 2003]). Here, the allegations provide ample reason to believe that Moore was a willing conspirator with ICP against AIG. First, AIG asserts that there was an enormous economic incentive to Moore in entering into the forward purchase agreement, in realizing profits on the sale of mortgage backed securities that were almost too good to be true. One could reasonably infer based on the allegations that the opportunity to realize such an unexpected windfall, considering the market conditions, would not be randomly bestowed on an innocent party, but rather that the party had to be knowledgeable as to why it was the recipient of such good fortune. Further, the "swaps" allegedly made between ICP and Moore were outside the ordinary course of the forward purchase agreement and suggest an even greater level of awareness by Moore that the former was attempting to do an end-run around AIG. Indeed, it can be inferred from the papers in the SEC action that Moore actually

initiated the swaps.

The first amended complaint also supports the other necessary element of AIG's aiding and abetting claim, which is that Moore must have provided "substantial assistance" to ICP, in a manner beyond just performing routine business services (*see CRT Invs. , Ltd. y BDO Seidman*, LLP, 85 AD3d at 472). For instance, AIG alleges that Moore implored ICP to begin the forward-purchasing arrangement when Moore realized that the market for mortgage backed securities was entering its decline. Further, Moore's willing entrance into the "swaps" with ICP evinces a concerted effort on Moore's part to help ICP avoid its obligation under the indentures to obtain AIG's consent for each and every asset purchase on behalf of the CDOs.

Finally, we reject Moore's contention that the first amended complaint fails to allege that its activities proximately caused injury to AIG. As alleged, Moore actively participated in the transactions at issue and moved assets into the CDOs at above market prices to its benefit while leaving the CDOs with less money to repay the note holders. This allegedly caused a foreseeable increase in the risk that AIG's payment obligations would be triggered.

We have considered Moore's other contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 9, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10394 Fleming and Associate, CPA, PC, et al., Plaintiffs-Respondents, Index 651813/11

-against-

Murray & Josephson, CPAs, LLC, et al., Defendants-Appellants.

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Doron Zanani, New York, for appellants.

Bamundo, Zwal & Schermerhorn, LLP, New York (James M. Caffrey of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about May 21, 2012, which granted plaintiffs' motion for summary judgment on the second cause of action as to liability, unanimously reversed, on the law, and the motion denied.

In this dispute between plaintiffs, the sellers of an accounting practice, and defendant purchasers, regarding monies owed pursuant to the contract between the parties, plaintiffs failed to make a prima facie showing of entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Plaintiffs allege that the contract's acceleration clause, contained in paragraph 5.06, was triggered by an event of default, defined by the contract as "the failure

of the Firm [defendants] to make a payment due Consultant [plaintiffs]." Plaintiffs maintain that, pursuant to the contract, defendants failed to make a payment of 37.5% of the 2010 Aggregate Fee for Clients and Related Clients listed in Schedule 1 attached to the contract.

Plaintiffs' claim is unavailing based on the plain language of the contract, which further provides for a revised Schedule 1. Specifically, paragraph 3.04(e) of the contract states that "[t]he Firm [defendants] shall prepare and deliver to Consultant [plaintiffs] by January 31, 2011 a schedule showing all billings . . . with respect to services performed by the Firm in 2010 to Schedule 1 Clients and their Related Clients." This paragraph further states that "Consultant [plaintiffs] shall prepare and deliver to the Firm [defendants] a revised Schedule 1 showing all billings of Clients for services rendered in 2010 by Consultant [plaintiffs] and the Firm [defendants] . . . , within 10 days after it receives the 2010 schedule from the Firm [defendants]." Thus, the required schedule is *not* the one attached to the parties' October 2010 contract. Rather, it is the revised schedule, which plaintiffs were supposed to provide within 10 days of receipt of defendants' schedule. Plaintiffs failed to show that it delivered the required schedule; hence, they failed

to show that a payment was due.

In addition, it was inconsistent for the court to find, as a matter of law, that defendants had defaulted in making a payment while reserving for trial the issue of whether they had actually paid more than was due pursuant to the agreement.

Contrary to plaintiffs' assertion, defendants may request summary judgment dismissing the second cause of action for default and acceleration for the first time on appeal (*see e.g. Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 111 [1984]). On the merits, however, defendants are not entitled to such relief. Through their course of dealings, the parties waived the contractual requirement contained in paragraph 3.04(e) (*see RPI Professional Alternatives, Inc. v Citigroup Global Mkts. Inc.*, 61 AD3d 618, 619 [1st Dept 2009]). Defendants made payments to plaintiffs from February through July 2011, even though plaintiffs had not provided the revised Schedule 1 required by the contract. Defendants also stated in writing that they were "required" to pay plaintiffs $11,441.41 per month and then subsequently claimed that plaintiffs' share of the 2010 Aggregate Fees for Schedule 1 Clients was only $8,500 per month.

Thus, drawing all inferences in plaintiffs' favor on defendants' request to dismiss the second cause of action, defendants should have continued to pay plaintiffs $8,500 per month and escrowed the difference.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 9, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10421N American Transit Insurance Company, Index 307769/11
Plaintiff-Appellant,

-against-

Yolanda Solorzano, et al.,
Defendants,

Advanced Orthopaedics, P.L.L.C., et al.,
Defendants-Respondents.

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Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), and Law Offices of James F. Sullivan, P.C., New York (James F. Sullivan of counsel), for appellant.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered January 10, 2013, which denied plaintiff's motion for summary judgment against defendant New York Spine Specialists (NYSS) and for a default judgment against the non-appearing defendants, and granted NYSS and defendant Advanced Orthopaedics' motion to dismiss the complaint as against them pursuant to CPLR 3211(a)(4), unanimously modified, on the law, to grant plaintiff's motion for summary judgment as against NYSS and, upon a search of the record, Advanced, and it is declared that there is no coverage with respect to the injured defendant's accident under plaintiff's policy, to deny NYSS and Advanced's motion to dismiss, and, as to the defaulting defendants other than

Advanced, otherwise affirmed, without costs, and the appeal from the denial of plaintiff's motion for a default judgment as against Advanced unanimously dismissed, without costs, as moot.

Although plaintiff was not entitled to a default judgment, because it failed to comply with CPLR 3215(g)(4)(ii), it demonstrated its entitlement to summary judgment by submitting competent evidence of the mailing of the notices scheduling the injured defendant's independent medical examinations and of her failure to appear (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]). Under the circumstances, it was an improvident exercise of discretion to dismiss this action because of two pending Civil Court actions, particularly in favor of Advanced, which had defaulted in this action (*see Holubar v Holubar*, 89 AD3d 802 [2nd Dept 2011]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 9, 2013

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10429 Ames Ray, Index 652314/10
Plaintiff-Appellant,

-against-

Christina Ray,
Defendant-Respondent.

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Balestriere Fariello, New York (John G. Balestriere of counsel), for appellant.

Christina Ray, respondent pro se.

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Order, Supreme Court, New York County (Charles Edward Ramos, J.), entered July 14, 2011, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The parties, who are divorced, share an extensive business, financial and litigation history. In September 1998, plaintiff commenced an action against defendant (*Ray v. Ray*, Supreme Court, NY County, Index No 604381/98) (1998 action) for money damages stemming from a promissory note and confession of judgment that defendant signed, as well as a trading agreement. Defendant retained the Dechert LLP law firm in October 1998 to represent her in that action and the Dechert firm continued to represent her at least through June 2009.

Following motions by each side for summary judgment, the

motion court dismissed the 1998 action in its entirety by order dated January 11, 2008. Plaintiff filed a notice of appeal on March 20, 2008, and in its order dated April 7, 2009, this Court reversed the motion court's order and reinstated the complaint (61 AD3d 442 [1st Dept 2009]). Although this Court found that the confession of judgment was not timely filed within three years, as required under CPLR 3218, the underlying debt was not extinguished (*id*. at 443).

After the trial court's decision, but before this Court reversed and reinstated the complaint in the 1998 action, defendant took steps to refinance her apartment. A mortgage company acquired a recorded security interest in the apartment on January 15, 2008, and the closing of the refinanced mortgage occurred on April 21, 2008. On May 6, 2008, defendant paid her attorneys $80,000 in legal fees using the proceeds. Plaintiff initially commenced an action against defendant, the Dechert firm and "unknown others" by filing a summons with notice (Index No. 101315/10), asserting that defendant's payment of legal fees to the Dechert firm was a fraudulent conveyance. Plaintiff did not further pursue that action, however, and instead brought the action at bar. In his amended verified complaint, plaintiff seeks, among other things, a constructive trust imposed on the

proceeds of the refinance and a permanent injunction against defendant's fraudulent conveyances of those proceeds. In the complaint, defendant makes numerous references to the 1998 action and includes the complaint in the 1998 action as an exhibit to the complaint herein.

In this complaint, plaintiff alleges that defendant "fully mortgaged her co-op apartment," her only significant asset, so as to make herself insolvent and avoid paying him money damages in the 1998 action. The complaint also alleges that defendant's undue haste in paying Dechert's fees, and the "unprofessional manner" of her payments demonstrate she made the conveyance in bad faith. The motion court dismissed the complaint finding that there were no "badges of fraud" because there was no judgment against her, defendant did not begin the mortgage process until after she prevailed in having the 1998 action dismissed, and there was no close relationship between defendant and the Dechert firm.

Plaintiff's claim against defendant is for actual, not constructive fraud. A claim under the Debtor and Creditor Law for actual fraud, as opposed to constructive fraud, in making the conveyance alleged does not require proof of unfair consideration or insolvency, allowing the plaintiff to rely on so-called

"badges of fraud" to prove his case (*see* Debtor and Creditor Law §§ 270, 273, 275, 276; *Wall St. Assoc. v Brodsky,* 257 AD2d 526, 529 [1st Dept 1999]). Badges of fraud are circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent (*see Wall St. Assoc. v Brodsky*, 257 AD2d at 529; *Wildman & Bernhardt Constr. v BPM Assoc.*, 273 AD2d 38, 38-39 [1st Dept 2000]).

Since the motion that is the subject of this appeal is for an order dismissing the complaint based upon CPLR 3211(a), regardless of which subsection of CPLR 3211(a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Plaza PH2001 LLC v. Plaza Residential Owner LP*, 98 AD3d 89, 99 [1st Dept 2012]).

The court below correctly dismissed the claims based upon Debtor and Creditor Law 273-a because there was no judgment against defendant when she refinanced the mortgage and she had prevailed on having the 1998 action dismissed. Although plaintiff filed a notice of appeal, there was no stay against

defendant taking the steps that she took.

Plaintiff's claims under Debtor and Creditor Law § 276 were also properly dismissed. Those claims were not pleaded with the particularity required under CPLR 3016(b) (*see NTL Capital, LLC v Right Track Rec., LLC*, 73 AD3d 410, 412 [1st Dept 2010]; *Wildman*, 273 AD2d at 38-39 [1st Dept 2000]). General statements by plaintiff that defendant "hastily" paid her legal fees, and that the timing of those payments was "suspect" because he had filed a notice of appeal, fail to support a cause of action for actual intent to defraud, even giving the plaintiff the benefit of every possible favorable inference. Defendant's payment of legal fees to the attorneys who had represented her in the 1998 action almost from its inception until she could no longer afford to pay them, does not demonstrate circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent, regardless of whether the payment was for services already rendered or to be rendered in that ongoing action (*see Wall St. Assoc.* at 529; *Wildman* at 529).

A plaintiff may provide, and the court can consider, sworn affidavits to remedy any defects in the complaint and preserve a possibly inartful pleading that may contain a potentially meritorious claim (*Cron v Hargro Fabrics*, 91 NY2d 362, 366

[1998]). Furthermore, facts submitted by the plaintiff in opposition to a motion to dismiss are also accepted as true (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]). Plaintiff argues that defendant's intent can be inferred from certain statements she made. The statement defendant allegedly made in a phone conversation is not part of the record on appeal, and we decline to consider it (*see Matter of Acme Bus Corp. v Board of Educ. of Roosevelt Union Free School Dist.*, 91 NY2d 51, 56 n [1997]). While defendant states in her reply affidavit that "[I would] probably prefer to be a debtor to anyone other than [p]laintiff," given his "litigious history," this statement does not supply facts missing from plaintiff's complaint that would satisfy the requirements of CPLR 3016. The words manifest an intent by defendant to pay plaintiff before other debtors, not the other way around.

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 9, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Freedman, Clark, JJ.

10525 The People of the State of New York, Ind. 3880/09
Appellant,

-against-

Walbert Rivera,
Defendant-Respondent.

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Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

David K. Bertan, Bronx, for respondent.

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Order, Supreme Court, Bronx County (Patricia A. Williams, J.), entered October 1, 2012, which granted defendant's CPL 210.40 motion to dismiss two counts of criminal possession of a weapon in the second degree in furtherance of justice, unanimously affirmed.

After fully considering the relevant factors set forth in CPL 210.40, the court providently exercised its discretion in dismissing the felony counts in furtherance of justice (*see People v Colon*, 86 NY2d 861, 863 [1995]; *People v Rickert*, 58 NY2d 122, 128 [1983]). Defendant, who was licensed to carry concealed handguns in his home state of Connecticut, asserts that he drove into New York without realizing that his Connecticut-licensed pistols were still in the trunk of his car. In

connection with the motion to dismiss, both sides relied on testimony taken at a suppression hearing at which, among other things, defendant explained in detail the circumstances of his possession of the weapons. As a result, in deciding the dismissal motion the court had the benefit of what was, in effect, an evidentiary hearing on the motion. The court, which had the advantage of having seen and heard witnesses (*see generally People v Prochilo*, 41 NY2d 759, 761 [1977]), expressly found that defendant's transport of his licensed pistols into New York was inadvertent, and we find no basis for disturbing that credibility determination.

The court's ruling does not, as the People claim, create a broad exemption from felony charges for anyone with an out-of-state firearm license. The court cited the Connecticut license as only one among several factors warranting dismissal, including defendant's very respectable educational, employment and family background, his service in the Air Force and the Air Force Reserve, and his lack of a criminal history, as well as the previously discussed circumstances of the offense, defendant's voluntary surrender of the weapons when stopped by the police, and the court's express finding of inadvertent possession in New York. In addition, defendant has not been absolved of criminal

liability for his conduct, as he still faces two misdemeanor charges of criminal possession of a weapon in the fourth degree. The court also properly concluded that defendant's situation was similar to those of certain other defendants with out-of-state firearm licenses who brought their weapons into New York and received lenient dispositions.

The court properly rejected factual claims made by the People on the basis of alleged documentary proof that was never produced in court. While defendant had the burden of proof on the motion, the People had the burden of substantiating these factual assertions. We have considered and rejected the People's remaining claims.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 9, 2013

CLERK