

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

MANNA PHYLLIS ON BEHALF
OF ALBERTA PROPERTIES CORP.
-v-

MOTION INDEX NO. 113408/05
MOTION DATE _____
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

Pale Management Co
et al

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits: Not accepted as it was not filed.

FILED
NOV 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

Cross-Motion: Yes No

Upon for foregoing papers, it is ordered that this wabycare motion which was held
is decided per attached

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Dated: 11/13/08

EMILY JANE GOODMAN
ISC

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

-----X
PHYLLIS MANNA, individually and on
behalf of ALBERTA PROPERTIES CORP.,

Plaintiffs,

-against-

PALE MANAGEMENT CO. and
SCOTT LEISNER,

Defendants

-----X
EMILY JANE GOODMAN, J.S.C.:

By Decision and Order, dated September 28, 2007 (the Decision), this Court held in abeyance a final determination regarding the amount of a turnover pending further briefs/evidence on the issue of whether JP Morgan Chase (Chase) and Dime Savings Bank of Williamsburg (Dime) were entitled to exercise a set off as to the 33 accounts at issue, and if so, the amounts thereof. Chase has submitted papers in support of its right to setoff but nothing has been submitted by Dime.

Ronald Maseroni, David Soriano and Mark Rubin (the Movants) oppose the setoff, noting that the referee's determined, and the Court confirmed, that the accounts which Movants claimed should be turned over to them belonged to them as trust funds. However, pursuant to Daly v Atlantic Bank of New York, 201 AD2d 128 [1st Dept 1984]), Chase is entitled to setoff debts due it by a depositor (here, Pale Management Co.) absent being "aware of facts which would fairly provoke it to inquire as to the true ownership of the funds and such inquiry, if made with ordinary diligence, would reveal the true ownership." Here, as noted in the Decision,

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005

of the 33 accounts, only three escrow funds management accounts were maintained as "trust accounts" (maintained for the benefit of others) and the remaining 30 accounts were regular demand deposit accounts, maintained under Pale Management Co.'s tax identification number. In the Decision, the Court has already determined that, "Contrary to Movants' contention, their right to the funds was not readily apparent as the accounts were in the name of Pale Management Co., and were not standard trust accounts as defined in EPTL §7-5.1 et al." Thus, Chase was not aware of facts which would put it on inquiry notice that the money did not belong to Pale Management Co., but rather belonged to the Movants or other third parties, and therefore Chase is entitled to offset debts due to it by depositor Pale Management Co.

Plaintiffs also oppose the setoff because it was made after Chase admittedly received the restraining notices on June 22, 2006. Chase argues such setoff was proper, after receipt of the notices, because Pale Management Co.'s debts existed prior to receipt of the notices, citing Aspen Indus., Inc. v Marine Midland Bank, N.A., 52 NY2d 575 [1981] [assuming a violation of a restraining order, the judgment creditor could not establish damages for the violation because the bank's right of setoff of a pre-existing debt of a depositor was superior to the creditor's right]). Chase maintains that on June 7, 2006 it elected to hold Pale Management Co. in default in connection with two loans which were approved in 2004, and also assessed administrative costs between June and October of 2006 on various accounts. Accordingly, as the setoff involved pre-

existing debts, even assuming that Chase violated the restraining orders, Plaintiffs cannot show any damages and Chase was entitled to exercise a right of setoff.

Chase has submitted proof of its agreement with Pale Management Co., regarding its right "to offset and apply all deposits (general and special) and any other indebtedness at any time held or owing ... on account of all obligations, liabilities and claims of [Pale] to [Chase] and in such amounts as [Chase] may elect. . . [Pale] hereby grants to [Chase] a lien on, security interest in and right of setoff against all moneys, securities and other property of [Pale] and the proceeds thereof now and hereafter delivered" Chase has also submitted proof of the amount of setoff totaling \$35,416.69 (comprised of amounts Chase advanced to Pale Management Co. on Loan Account 200-450512831927 and Loan Account 200-450512831928 and certain administrative fees on various accounts). The Court is aware that Plaintiffs, Movants, and the banks are all innocent parties. However, as between such innocent parties, the law creates the priorities reflected herein.

Accordingly, it is hereby

ORDERED the turnover of certain accounts at JP Morgan Chase and Dime Savings Bank of Williamsburg is granted, subject to JP Morgan Chase's right of setoff of \$35,416.69; and it is hereby

ORDERED that a turnover order should be settled in conformity with this Decision and Order and the Decision and Order dated September 28, 2007.

This constitutes the Decision and Order of the Court.

Dated: November 17, 2008

ENTER:



J.S.C.

EMILY JANE GOODMAN

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