

Car Park Sys. of N.Y. Inc. v Ull

Supreme Court of New York, Appellate Division, First Department

October 5, 2017, Decided; October 5, 2017, Entered

650777/15-4605, 650777/15-4604, 650777/15-4603

Reporter

154 A.D.3d 444 *; 60 N.Y.S.3d 825 **; 2017 N.Y. App. Div. LEXIS 7072 ***; 2017 NY Slip Op 06986 ****

[****1] Car Park Systems of New York Inc., et al., Plaintiffs-Appellants, v Richard Ull, et al., Defendants-Respondents.

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

fraud claim, conversion claim

Counsel: [***1] DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Anna M. Piazza of counsel), for appellants.

Moritt Hock & Hamroff LLP, Garden City (Robert S. Cohen of counsel), for Richard Ull, respondent.

Rosenberg Calica & Birney LLP, Garden City (John S. Ciulla of counsel), for Jeffrey Ull, respondent.

Smith, Gambrell & Russell, LLP, New York (Donald L. Rosenthal of counsel), for Jennifer Ull, respondent.

Judges: Acosta, P.J., Renwick, Webber, Oing, Moulton, JJ.

Opinion

[*444] [**825] Judgments, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 19 and 29, 2016, dismissing the complaint, unanimously affirmed, without costs.

The motion court correctly found that the order dismissing a prior complaint barred the instant complaint on the ground of res judicata, because the determination in the first action that plaintiffs could not demonstrate reasonable reliance to support their fraud claim was a determination on the merits (see [Coutsodontis v Peters](#), 39 AD3d 274, 275, 831 N.Y.S.2d 902 [1st Dept 2007]). In addition, we find that dismissal of the conversion claim as time-barred in the prior action also barred the fraud claim in the instant action (see [Marinelli Assocs. v Helmsley-Noyes Co.](#), 265 AD2d 1, 705 N.Y.S.2d 571 [1st Dept 2000]). The fraud claim is merely incidental to the conversion claim, as the gravamen of the wrong is the alleged diversion [***2] of funds (see [Powers Mercantile Corp. v Feinberg](#), 109 AD2d 117, 119-121, 490 N.Y.S.2d 190 [1st Dept 1985], *affd* 67 NY2d 981, 494 N.E.2d 106, 502 N.Y.S.2d 1001 [1986]).

[*445] We have considered plaintiffs' other contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND

ORDER OF THE SUPREME COURT,
APPELLATE DIVISION, FIRST
DEPARTMENT.

ENTERED: OCTOBER 5, 2017

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