

SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 9

THE AUTO COLLECTION INC.,
STEVEN LEVER and JOSHUA LEVER,

Plaintiffs,

INDEX NO.: 021294/2008
MOTION DATE: 02/18/2009
MOTION SEQUENCE: 001, 002,
003, 004, 005 and 006

-against-

CHRISTOPHER PINKOW,
MZIA GAZNELI,
BORIS KOTLYARSKY,
L&L AUTO DISTRIBUTORS & SUPPLIERS INC.,
EMPIRE LEASING INC.,
NIKOLAY BERGUNKER,
A1A AUTO LEASING INC.,
VIKTOR SHULMAN,
BOOMERANG AUTO INC.,
KONSTANTIN RADCHENKO,
ROYAL AUTO COLLECTION INC.,
ANATOLY ZLATOKRASOV,
EPELBAUM TEODOR,
ALEX BRIOUKHOV,
AZTE INC.,
ABR CONSULTING GROUP CORP.,
BUDGET AUTOS LLC,
VLADIMIR LYSOGORSKY,
FT & T CONSULTING INC.,
GLEB SAKHONTCHIK,
US AUTOLAND LLC,
OLEG SAKHONTCHIK,
LOV MOTORS INC.,
JOSE CARDONA,
LONG BEACH AUTO SALES CORP.,

NO LIMIT TOWING & RECOVERY INC.,
 NO LIMIT TOWING AND TRANSPORT INC.
 NO LIMIT TOWING INC.,
 PRA SHIPPING CORPORATION,
 JOHN DOE(S) 1-10 (said name being fictitious),
 JANE DOE(S) 1-10 (said name being fictitious) and
 ABC CORPORATION(S) 1-10 (said name being fictitious),

Defendants.

The following papers read on this motion:

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| Notice of Motion & Affirmation | 1 |
| Summons, Verified Complaint & Exhibits Annexed | 2 |
| Memorandum of Law in Support of Plaintiffs' Motion to Consolidate Pursuant to CPLR 602(a) & Transfer Venue of all Pending Supreme Court Actions to Nassau County Pursuant to CPLR 602(b) | 3 |
| Affirmation in Partial Opposition of Richard Furman, Esq. | 4 |
| Memorandum of Law in Opposition to Setting Venue in Nassau County | 5 |
| Affidavit of Vladimir Lysorgorsky in Support of Opposition to Plaintiffs' Motion to Set Venue, Upon Consolidation, in Nassau County & Exhibits Annexed | 6 |
| Affirmation in Opposition to Plaintiffs' Motion to Consolidate and Setting Venue in Nassau County of Michael Krigsfeld, Esq. & Exhibit Annexed | 7 |
| Affirmation in Opposition to Plaintiffs' Motion to Consolidate of Aaron Depass, Esq. | 8 |
| Notice of Cross Motion, Affirmation & Exhibits Annexed | 9 |
| Affirmation in Opposition to Motions to Dismiss Pursuant to CPLR 3211(a)(4) of Karl C. Seman, Esq. | 10 |
| Notice of Motion, Affirmation of Andrew Multer, Esq. & Affidavit of Defendant Mzia Gazneli in Support of Motion to Dismiss | 11 |
| Defendants Pinkow and Gazneli's Memorandum of Law in Support of Motion to Dismiss Pursuant to CPLR Rules 3211(a)(4) and (7), and in Opposition to Plaintiffs' Motion to Consolidate and Transfer Venue to Nassau County | 12 |
| Affirmation in Opposition to Gazneli Motion to Dismiss of Leo K. Barnes, Jr., Esq. & Exhibits Annexed | 13 |
| Notice of Motion, Affirmation & Exhibit Annexed | 14 |
| Memorandum of Law in Support of Plaintiffs' Motion to Dismiss Certain Counterclaims Pursuant to CPLR 3211(a)(7) | 15 |
| Notice of Cross Motion & Affirmation in Support of Kevin P. Fitzpatrick, Esq. | 16 |
| Notice of Cross Motion & Affirmation of Richard Furman, Esq. | 17 |
| Memorandum of Law in Support of Opposition to Plaintiffs' Motion Seeking to Dismiss the Counterclaims and in Support of Cross Motion Seeking Leave to Amend the Verified Answer Pursuant to CPLR 3025(b) | 18 |
| Affirmation in Opposition of S. John Bate, Esq. | 19 |
| Supplemental Affirmation in Opposition of S. John Bate, Esq. & Exhibit Annexed | 20 |

The plaintiff in this case has moved to consolidate this action with five separate actions currently pending in the County of Kings and two separate actions currently pending in the County of Richmond. The essence of this action is one in the form of a RICO case. The essence of each of the actions pending with in New York City is that of fraud by the defendant in the sales or purported sales of automobiles. The sale of the same automobile or automobiles to one or more parties, the payment or partial payment for these automobiles to our plaintiff or perhaps an employee of our plaintiff, and allegedly the shipment of these automobiles to Russia. The majority of the plaintiff's claim in our case is basically one of fraud and a scheme to defraud including a RICO violation. That the entity, Auto Collection, was actually formed at the suggestion of a conspirator, but that conspirator, along with Boris Kotlyarsky and Christopher Pinkow, collectively agreed to run the organization in competition with the best interests of Pinkow's employer. The second part of this conspiracy is allegedly the forming of a competing business called Long Beach Auto Sales. Long Beach Auto Sales that was allegedly competing with Auto Collections and was run and owned by Pinkow and Boris, while Boris was a "customer" of Auto Collection, and while Pinkow was the only employee of Auto Collection. This statement does not lay out the intricate factual allegations as set forth by the plaintiff in its complaint but merely touches on them.

Beside all of the motion papers listed above, there was extensive oral argument heard on each of these motions on February 18, 2008, and at that time the court ruled from the bench on each of the motions that will be addressed below.

Without going into great detail concerning the complex claims and allegations presented by our plaintiff against the numerous defendants that it has named in the above caption it is clear to the court that all of these cases, both those pending within the City of New York, and this one in Nassau County, have the same factual basis or foundation.

Six motions have been filed in this matter and all had been responded to with the

exception of Motion Sequence No. 6.

Motion Sequence No. 6 seeks leave to file an amended verified answer and has been filed by the defendants FT&T Consulting Inc. and Vladimir Lysogorsky. The plaintiff is hereby given twenty (20) days to respond to said motion or enter into a stipulation with the defendants allowing the defendants to file said amended answer to which the plaintiff will have the appropriate amount of time to reply, if he so chooses.

Motion Sequence No. 5 has been filed by the defendants José Cardona, Long Beach Auto Sales Corp., as well as the corporations known as a No Limit. Counsel for these defendants has moved for the consolidation of this Nassau County action with those actions pending in New York City and for a change of venue of all those New York City actions to Nassau County. For reasons that will be addressed under Motion Sequence No. 1, the motion to consolidate is granted and the motion for change of venue is denied, as to bringing all cases to Nassau County.

Motion Sequence No. 4 is a motion by the plaintiff's to dismiss counterclaims numbered 2, 3 and 4 that were filed as part of the answer of the defendants Vladimir Lysogorsky and FT&T Consulting Inc. These counterclaims, to some extent, mirror the actions pending in New York City, in that they claim fraud, conversion and requests, additionally, legal fees, in that order. In this matter, nor in any of the related matters, is there a contractual clause which allows for a successful party to be awarded legal fees. Thus, the plaintiff's motion to dismiss counterclaim number 4 is granted. The only way legal fees may, in some way, make their way into this case, would be if this court or some court in futuro would determine that the actions of the plaintiff in bringing this RICO matter were frivolous. Plaintiff's motion to dismiss the counterclaims numbered 2 and 3 is denied.

As part of the answer filed by FT&T to this motion, they requested the opportunity to file an amended answer. The original answer filed in this case was filed by predecessor counsel. Part of that answer has been described as "scandalous material" by the plaintiff. Defense counsel would now like the opportunity to amend the answer with respect to the alleged "scandalous material". The defendant is granted an opportunity and may file an amended answer specifically addressing the alleged "scandalous material" paragraph. See Motion Sequence No. 6 above.

Motion Sequence No. 3 has been filed by the defendants Christopher Pinkow and Mzia

Gazneli. In this motion these defendants moved to dismiss the entire action pending against them as being similar in fact to the actions pending in New York City involving the same parties. (CPLR 3211(a)(4) and (7)). They have argued that this Nassau County action could easily have been set forth as a counterclaim in any one or more of the actions pending in Kings County or perhaps Staten Island if our plaintiffs had chosen to do so. The court disagrees.

The legal elements of the RICO action filed by the plaintiffs in Nassau County are not equivalent to what would be filed as a counterclaim in the type of actions that are pending in Kings County and Richmond County. The motion to dismiss on these grounds as to the defendant Pinkow is denied.

What remains is the motion to dismiss on behalf of Ms. Gazneli. The essence of the argument made on behalf of Ms. Gazneli is that she is barely mentioned at all in this very lengthy complaint that has been filed by the plaintiff, and when mentioned what is attributed to her are completely innocuous acts. It is alleged by the plaintiff's that she aided and abetted the conspiracy. Plaintiffs' oral argument, which did, to some degree, support its complaint, relies on hearsay from a lawyer representing a plaintiff in one of the Staten Island cases, in which Mr. Pinkow is named as a defendant. The court cannot accept such information to support the complaint against the defendant Gazneli. Assuming the truth of all the allegations that are set forth as to Ms. Gazneli, there is no act that she has committed, otherwise innocent on their face, that would bring her into the RICO definition. Nor is the court convinced that the acts that she did commit, without more, can be considered to have aided and abetted the RICO claim. The action against Ms. Gazneli is dismissed. The plaintiff may, without further permission of the court, move to amend its complaint as to Ms. Gazneli.

Motion Sequence No. 2 has been filed by the defendant L&L and the defendant A1A. One branch of this motion is to deny consolidation and the other is to dismiss in that there was a similar action pending. Both branches of this motion are denied.

This brings us back to **Motion Sequence No. 1**, the motion for consolidation and change of venue. As stated previously in this decision, the evidentiary foundation required for the seven cases pending currently in New York City, and that which is needed for the RICO case, pending in Nassau County are nearly identical. It is clear that the motion for consolidation should be

granted, at minimum to prevent duplication of discovery efforts especially in the area of pre-trial depositions.

The court hereby consolidates the following cases:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

THE AUTO COLLECTION INC.,
STEVEN LEVER and JOSHUA LEVER,

Plaintiffs,

-against-

NASSAU COUNTY
INDEX NO. 021294/2008

CHRISTOPHER PINKOW,
MZIA GAZNELI,
BORIS KOTLYARSKY,
L&L AUTO DISTRIBUTORS & SUPPLIERS INC.,
EMPIRE LEASING INC.,
NIKOLAY BERGUNKER,
A1A AUTO LEASING INC.,
VIKTOR SHULMAN,
BOOMERANG AUTO INC.,
KONSTANTIN RADCHENKO,
ROYAL AUTO COLLECTION INC.,
ANATOLY ZLATOKRASOV,
EPELBAUM TEODOR,
ALEX BRIOUKHOV,
AZTE INC.,
ABR CONSULTING GROUP CORP.,
BUDGET AUTOS LLC,
VLADIMIR LYSOGORSKY,
FT&T CONSULTING INC.,
GLEB SAKHONTCHIK,
US AUTOLAND LLC,
OLEG SAKHONTCHIK,
LOV MOTORS INC.,
JOSE CARDONA,
LONG BEACH AUTO SALES CORP.,
NO LIMIT TOWING & RECOVERY INC.,
NO LIMIT TOWING AND TRANSPORT INC.,
NO LIMIT TOWING INC.,
PRA SHIPPING CORPORATION,

JOHN DOE(S) 1-10 (said names being fictitious),
JANE DOE(S) 1-10 (said names being fictitious) and
ABC CORPORATION(S) 1-10 (said name being fictitious),

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

L&L AUTO DISTRIBUTORS & SUPPLIERS INC.,

Plaintiff,

-against-

KINGS COUNTY
INDEX NO. 018728/2008

THE AUTO COLLECTION INC, STEVEN LEVER, et al.,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

BOOMERANG AUTO INC.,

Plaintiff,

-against-

KINGS COUNTY
INDEX NO. 022436/2008

THE AUTO COLLECTION INC., PLATINUM
VOLKSWAGEN LLC, STEVEN LEVER,
JOSHUA LEVER and BRIAN FLYNN,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

ROYAL AUTO COLLECTION INC,

Plaintiff,

KINGS COUNTY
INDEX NO. 021533/2008

-against-

THE AUTO COLLECTION INC. and
STEVEN LEVER,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

AZTE INC., ABR CONSULTING GROUP CORP.
and BUDGET AUTOS LLC,

Plaintiffs,

-against-

THE AUTO COLLECTION INC., STEVEN LEVER,
JOSHUA LEVER and CHRISTOPHER PINKOW,

Defendants.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

FT&T CONSULTING INC.,

Plaintiff,

-against-

THE AUTO COLLECTION INC., PLATINUM
VOLKSWAGEN LLC, STEVEN LEVER,
JOSHUA LEVER and BRIAN FLYNN,

Defendants.

KINGS COUNTY
INDEX NO. 019999/2008

KINGS COUNTY
INDEX NO. 028329/2008

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

US AUTOLAND LLC and LOV MOTORS INC.,

Plaintiffs,

-against-

RICHMOND COUNTY
INDEX NO. 104533/2008

THE AUTO COLLECTION INC., PLATINUM
VOLKSWAGEN LLC, STEVEN LEVER,
JOSHUA LEVER, BRIAN FLYNN, MATT
RUBINO and MATT CALIENDRO,

Defendants.

The court has specifically, and intentionally, not included the Butenko case currently pending in Staten Island. However, for the purposes of pretrial depositions, it would appear to be quite appropriate to coordinate discovery efforts of that case with all other cases which will now be pending in Kings County.

The remaining question, of course, is whether the court should transfer the New York City cases to Nassau County as requested by the plaintiff in our RICO action. The court finds that would be highly improper. Rather, the court on its own motion, changes the venue of this case currently pending in Nassau County to Kings County and the venue of one of the two Richmond County cases, specifically, US Autoland LLC and Lov Motors Inc. v. The Auto Collection Inc., Platinum Volkswagen LLC, Steven Lever, Joshua Lever, Brian Flynn, Matt Rubino and Matt Caliendro, Richmond County Index No. 104533/2008, which has been consolidated with the Nassau County action, to Kings County. The earliest filed case amongst the cases consolidated by the court is venued in Kings County.

The Clerk of the County of Nassau is directed to transfer the instant action as well as all the motion papers that have been filed herein to Kings County so that it may be consolidated with those cases currently pending in front of Justice Caroline Demarest as previously noted.

The Clerk of the County of Richmond is directed to transfer the entire file of the matter entitled, US Autoland LLC and Lov Motors Inc. v. The Auto Collection Inc., Platinum

Volkswagen LLC, Steven Lever, Joshua Lever, Brian Flynn, Matt Rubino and Matt Caliandro,
Richmond County Index No. 104533/2008, to Kings County, once again, to Justice Caroline
Demarest.

Dated: February 25, 2009


J.S.C.

ENTERED
MAR 03 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE