No. 18-17270

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAST TRACK INVESTMENT COMPANY, LLC,
a Delaware limited liability company,
Plaintiff/Appellee,

v.

RICHARD PHILIP SAX, individually and as principal for
The Law Offices of Richard Sax;
LAW OFFICES OF RICHARD SAX,
a sole proprietorship,
Defendant/Appellant.

Court of Appeals Case No. 18-17270

United States District Court
Northern District of California
Case Number 4:17-cv-00257-KAW
The Honorable Kandis A. Westmore, Presiding Magistrate Judge

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This action was brought by plaintiff Fast Track Investment Company, LLC, a Delaware limited liability company ("Appellee" or "Fast Track"), against defendants Richard P. Sax, individually and as principal for The Law Offices of Richard Sax, and The Law Offices or Richard Sax, as sole proprietorship ("Appellant" or "Sax"). (See Defendants' First Amended Answer to Complaint, ER 545-550.)

Clearly the transaction in this case was champertous. The contracts involved were intended for the primary purpose of bringing a lawsuit.

A 2016 New York case, Justinian Capital SPC v. WestLB AG, controls the outcome of this action for breach of contract and breach of fiduciary duty (see Complaint, ER 443-544) involving claim funding, also referred to as litigation funding, alternative litigation funding, third-party funding, and litigation finance, among other labels. (Justinian Capital SPC v. WestLB AG, 65 N.E.3d 1253 (New York 2016).)

In Justinian, the New York Court of Appeals found a funding agreement champertous under a New York statute that "prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit," despite a safe harbor that exists when the aggregate purchase price of the notes or other securities is at least $500,000.00. (Justinian Capital SPC v. WestLB AG, *Id.*)

In Universal Inv. Advisory SA v. Bakrie Telecom PTE, Ltd., a 2017 case that cites Justinian, the Court held that:

"Judiciary Law §489 is New York's champerty statute. Section 489(1) restricts individuals and companies from purchasing or taking an assignment of notes or other securities 'with the intent and for the purpose of

bringing an action or proceeding thereon'" (Justinian Capital SPC v. WestLB AG, N.Y. Branch, 28 NY3d 160, 166, 43 N.Y.S.3d 218, 65 N.E.3d 1253 [2016]). Indeed, "[t]o constitute the offense [of champerty] the primary purpose of the purchase must be to enable [one] to bring a suit, and the intent to bring a suit must not be merely incidental and contingent" (id., quoting Moses v. McDivitt, 88 NY 62, 65 [1882]).

This matter involves a dispute between Fast Track and Sax, arising from a set of agreements between the parties beginning in approximately February of 2013, which was entered into for the purpose of filing and prosecuting personal injury cases (ER 417, ¶¶ 3-4; ER 53, ¶ 4).

Justinian, *Id*, was reported in New York in 2016.

In 2018, Fast Trak appears to have filed its Complaint in California to attempt to avoid the legal ramifications of the Justinian case in the State of New York. It is unlikely that Fast Trak is concerned with the convenience of the adversarial party in this case; there could be no other reason for Fast Trak to have filed this lawsuit in California than to avoid the laws regarding champerty in New York. Fast Trak is currently located in New Jersey, although it is a Delaware limited liability company. At the time it entered into the subject disputed agreements with Sax, its principal place of business was in the Bronx, New York, where it had been located for some years (ER 24, lines 25-26; ER 56, ¶ 2; ER 53, ¶ 2).

In its decision granting Fast Track's motion for summary judgment, the District Court held "…that the contracted choice of law provisions requiring the application of New York law is enforceable." (ER 25:9-10.)

Thus, the District Court determined that the substantive law of New York applies in this matter. (ER 24:12-28; 25:1-10.)

Fast Trak abandoned its choice of law argument, agreeing that "By contract, New York law applies to this case." (Appellant's Answering Brief p. 5:11-12; ER 28 (6-1[28:5-10]).

In its decision, the District Court ignored the Justinian case, which exemplified Sax's main affirmative defense of champerty. New York Judiciary Law §489 bars certain forms of trading in litigation claims. Justinian, *Id*, breathes new life into the doctrine of champerty.

In Appellee's Answering Brief, Fast Trak cites no contrary New York legal decisions regarding champerty to counter Sax's citing of Justinian in the arguments of his Opening Brief.

In the district court and in his Opening Brief, Sax did not argue the damages issue, because he asserts that he does not owe any damages due to the doctrine of champerty, which applies to this matter. There was no breach of contract because the contracts are not enforceable. The claim-funding agreements, in which Fast Track loaned money to Sax so that he could file and prosecute certain personal injury cases, were illegal, usurious, and champertous recourse loans. (ER 417, ¶ 4.)

Fast Track originally loaned Sax approximately $125,000.00. Fast Track was making a recourse loan, because it risked nothing. According to the manner in which Fast Track set the transactions up, its loans were secured by numerous others: each primary case was secured by the many other secondary cases (ER 72, ¶ ii; ER 417, ¶ 4). Therefore, even if Sax lost one or more of the "Primary Cases," Fast Track was going to be paid by another case that resulted in a favorable verdict or settlement.

In its Motion Granting Plaintiff's Motion for Summary Judgment, the trial court noted that Fast Trak claimed it was owed approximately

$430,000.00. (ER 11:10.) Fast Trak was unable to provide an amount certain at that time. (ER 11:14-15.)

The District Court afforded Fast Trak a second opportunity to brief the damages issue, including attorney's fees and costs, after the first supplemental brief failed to explain how damages were calculated. (ER 9:23-25.)

In the order requiring the second supplemental brief, Fast Trak "was informed that this would be its final opportunity to brief the damages issue, and was 'advised against seeking the recovery of the attorneys' fees and costs incurred in connection with any of its supplemental briefs.' " (ER 8:25-28.)

The District Court ultimately awarded $323,611.21 (ER 9:27-28-10:1-2; ER 8:13-14.) The District Court's award is almost $100,000.00 *less* than the $430,000.00 that Fast Trak initially claimed it was owed. (ER 11:10.)

II. ISSUES PRESENTED

Sax asserts that he does not owe any damages to Fast Trak due to the doctrine of champerty, because the subject transactions were illegal champertous loans.

Sax asserts that the District Court erred in granting Fast Track's motion for summary judgment, thereby denying Sax's affirmative defense of champerty. The claims of Fast Track against Sax are champertous. Further, there are genuine disputes of material facts and inherently factual inquires in this matter as to:

1. Whether the parties acted with the intent and for the purpose of bringing an action or proceeding on personal injury claims;

2. Whether the subject transaction was champertous;

3. Did the sale involve a debt instrument or a bare litigation claim?

4. Did the sale qualify for the §489 safe harbor?

5. Did the sale involve litigation that had already commenced?

6. Whether the parties intended the subject transaction to be recourse or non-recourse;

7. Whether subject transaction was an illegal recourse loan; and

8. Whether the subject transaction was usurious.

III. LEGAL ARGUMENT AND STATEMENT OF FACTS

A. The Justinian Capital Case Controls the Outcome of this Matter

New York's champerty law prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit. In its decision granting Fast Track's motion for summary judgment (ER 19-29), the District Court appears to have totally ignored the holding of the recent Justinian Capital SPC v. WestLB AG, 65 N.E.3d 1253 (New York 2016) action.

In Justinian Capital SPC v. WestLB AG, the New York Court of Appeals found a funding agreement champertous under a New York statute that "prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit," despite a safe harbor that exists when the aggregate purchase price of the notes or other securities is at least $500,000. (Justinian Capital SPC v. WestLB AG, 65 N.E.3d 1253 (New York 2016.)

New York Judiciary Law §489 bars certain forms of trading in litigation claims. Justinian, *Id*, breathes new life into the doctrine of champerty.

The funder in that case, Justinian Capital, had taken an assignment of notes that had declined in value for a purchase price of one million dollars. (*Id* at p. 1254-1255.) The very essence of the assignment was to bring suit against the issuer of the notes. The lawsuit was not merely an incidental or secondary purpose of the assignment, but its very essence. (*Id* at p. 1257.) Because the notes were acquired for the sole purpose of bringing litigation, the acquisition was champertous. (*Id* at p. 1259.)

The court also found that the safe harbor did not apply because Justinian had not actually paid any portion of the purchase price and had no binding or bona fide obligation to pay it independent of the successful outcome of the lawsuit. (*Id.* at p. 1259.) The court described the agreement as, in essence, a sham transaction between the owner of a claim that did not want to bring it and an undercapitalized assignee that did not want to assume the $500,000 risk to qualify for the safe harbor protection in New York Judiciary Law §489 (2). (*Id.* at p. 1259.)

B. Fast Trak Filed a Complaint in California to Try to Avoid the Justinian Capital Case

Fast Trak appears to have filed its Complaint in California in 2018 to attempt to avoid the ruling in Justinian Capital SPC v. WestLB AG, 65 N.E.3d 1253 (New York 2016). There could be no other reason for Fast Trak to have filed this lawsuit in California; it is unlikely that Fast Trak was considering a venue convenient for Sax.

Fast Trak is a Delaware limited liability company, although it is currently located in New Jersey. At the time it entered into the subject disputed agreements with Sax, its principal place of business was in the Bronx, New York, and had been for many years (ER 24: 25-26; ER 56, ¶ 2; ER 53, ¶ 2).

The dispute between Fast Track and Sax arose from a set of agreements between the parties beginning in approximately February of 2013. The contracts were entered into for the purpose of filing and prosecuting personal injury cases (ER 417, ¶¶ 3-4; ER 53, ¶ 4).

Justinian Capital was reported in New York in 2016.

In its decision granting Fast Track's Motion for Summary Judgment, the District Court held "…that the contracted choice of law provisions requiring the application of New York law is enforceable." (ER 25:9-10.)

Thus, the District Court determined that the substantive law of New York applies in this matter. (ER 24:12-28; 25:1-10.)

Fast Trak abandoned its choice of law argument, agreeing that "By contract, New York law applies to this case." (Appellant's Answering Brief p. 5:11-12; ER 28 (6-1[28:5-10]).

C. The District Court Ignored The Justinian Case

The District Court ignored Sax's main affirmative defense of champerty, which was exemplified in the Justinian case. Contrary to Fast Trak's contentions in its Answering Brief at page 27, Justinian is not "inapposite" to the instant matter. The contracts between the parties in this matter were entered into for the purpose of filing and prosecuting personal injury cases (ER 417, ¶¶ 3-4; ER 53, ¶ 4), which is champertous under the law of the State of New York.

New York Judiciary Law §489 bars certain forms of trading in litigation claims. Justinian shed light on the scope of the doctrine of champerty in the State of New York.

Sax asserts that the claim-funding agreements, in which Fast Track loaned money to him so that he could file and prosecute certain personal injury cases, were illegal, usurious, and champertous recourse loans. (ER 417, ¶ 4). Some of the cases upon which Fast Trak advanced money were cases where litigation had not already commenced, especially the primary Monigan cases, which Fast Trak urged and persuaded Sax to take on.

Richard Geller, an attorney for Fast Track, contacted Sax and induced him to spend heavily in time and money, including the prosecution of a hard-fought jury trial, litigating the two "Monigan cases," which were the primary cases under the disputed agreements. Geller strongly encouraged Sax to take on the Monigan claims. Geller persuaded Sax to borrow money from Fast Track so that Sax could afford to take on the Monigan cases *prior to filing suit*. Geller stated words to the effect that he was a plaintiff's attorney, and this is how plaintiffs' attorneys could make a lot of money, in good cases like Monigan's; they were excellent cases that would make a considerable amount of money. Fast Track screens their clients and customers, but it failed to discover the past extraordinary criminal conduct of Monigan, which severely impacted his cases. (ER 185:1-9; 16-18.)

Fast Track, in the Schlesinger Declaration of its motion for summary judgment, stated that "Fast Trak has no involvement in the underlying litigation.." (ER 56, ¶ 5(b).) However, Fast Track also stated, "In at least one case…is a 'disbursement' noting that in the Pacheco case Sax voluntarily withdrew and Pacheco dismissed the case." (ER 59, ¶ 19.)

Even though Fast Track avers that it wishes to have no control over the litigation matters, it would seem to be complaining that Sax withdrew from a case he ultimately decided was without merit, which is his professional duty as an attorney licensed in the State of California.

Recourse loans are those in which a borrower gives an undertaking to repay a debt, even if the funded asset cannot be liquidated to cover the loan amount.

Fast Track asserts that it made a "non-recourse agreement," or a loan that will be repaid based on the success of the project. (ER 53, ¶ 8.)

Fast Track was misleading when it stated throughout its motion for summary judgment that the subject transaction was the non-recourse *purchase of an interest* in a legal claim. (ER ¶¶ 5, 8.) Fast Track also claims that the realization of proceeds from any pledged primary or secondary case was a condition precedent for the agreements between Sax and Fast Track. (ER ¶ 8.)

Fast Track's assertions are illusory, because Fast Track provided funds to Sax in exchange for the assignment of "…SAX's entire right, title and interest in attorneys fees and disbursements recoverable in the matters set forth in Exhibit 'A'…" (ER 72, ¶ ii; ER 417, ¶ 4.)

D. Fast Trak Cites No Other Contrary Legal Decisions From New York In Its Defense

In Appellee's Answering Brief, Fast Trak cites no contrary New York legal decisions regarding champerty to counter Sax's citing of Justinian Capital in the arguments of his Opening Brief.

In its Answering Brief at page 25, Fast Trak cites a New York case from 2009, Trust for the Certificate Holders of the Merrill Lynch Mortg.

Investors v. Love Funding Corp., 2009 NY Slip Op 7323, ¶ 5 (13 N.Y. 3d 190, 199, 890 N.Y.S. 2d 377, 382, 918 N.E.2d 889, 894).

However, Fast Trak does not make an effort to prove that the actions of the parties in Trust for the Certificate Holders of the Merrill Lynch Mortg. Investors v. Love Funding Corp. in New York were not champertous, or that the actions apply to the facts of the instant case before the Court.

E. The Subject Agreements Are Illegal Champertous Recourse Loans; Fast Trak Acquired a Right in Order to Make Money From Litigating a Thing in Action, Not to Enforce or Protect It

New York's champerty law prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit.

In Justinian Capital SPC v. WestLB AG, the New York Court of Appeals found a funding agreement champertous under a New York statute that "prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit," despite a safe harbor that exists when the aggregate purchase price of the notes or other securities is at least $500,000. (Justinian Capital SPC v. WestLB AG, 65 N.E.3d 1253 (New York 2016).)

In Universal Inv. Advisory SA v. Bakrie Telecom PTE, Ltd. (2017) 154 A.D.3d 171, 62 N.Y.S.3d 1, 16, the Court held that, under the primary purpose analysis, there is a distinction "between acquiring a thing in action in order to obtain costs and acquiring it in order to protect an independent right of the assignee, with only the former being champertous."

In Universal Inv. Advisory SA v. Bakrie Telecom PTE, Ltd., the Court held that:

> "Judiciary Law §489 is New York's champerty statute. Section 489(1) restricts individuals and companies from purchasing or taking an assignment of notes or other securities 'with the intent and for the purpose of bringing an action or proceeding thereon'" (Justinian Capital SPC v. WestLB AG, N.Y. Branch, 28 NY3d 160, 166, 43 N.Y.S.3d 218, 65 N.E.3d 1253 [2016]). Indeed, "[t]o constitute the offense [of champerty] the primary purpose of the purchase must be to enable [one] to bring a suit, and the intent to bring a suit must not be merely incidental and contingent" (id., quoting Moses v. McDivitt, 88 NY 62, 65 [1882]). Under the primary purpose analysis, there is a distinction "between acquiring a thing in action in order to obtain costs and acquiring it in order to protect an independent right of the assignee" (id. at 167, quoting Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v. Love Funding Corp., 13 NY3d 190, 198-199, 918 N.E.2d 889, 890 N.Y.S.2d 377 [2009]), with only the former being champertous. However, and as set out in Trust for Certificate Holders of Merrill Lynch Mtge. Invs., (13 NY3d at 195), the offense of champerty does not arise if a corporation or association takes an assignment for the purpose of collecting damages, by means of a lawsuit, "for losses on a debt instrument in which it holds a preexisting proprietary interest." This is because there is a difference "between one who acquires a right in order to make money from litigating it and one who acquires a right in order to enforce it" (id. at 200).

(Universal Inv. Advisory SA v. Bakrie Telecom PTE, Ltd. (2017) 154 A.D.3d 171, 62 N.Y.S.3d 1, 15-16.)

IV. ARGUMENT

Sax asserts that the District Court erred when it granted Fast Track's motion for summary judgment, thereby denying Sax's affirmative defense of champerty. The claims of Fast Track against Sax are champertous. Further, there are triable issues of material fact in this matter:

1. The parties acted with the intent, and for the purpose, of bringing an action or proceeding on personal injury claims;

2. The sale involves a bare litigation claim, not a debt instrument;

3. The sale does not qualify for the New York Judiciary Law §489 (2) safe harbor;

4. The sale involved litigation in numerous cases, including primary cases, that had not yet commenced;

5. The subject transactions were usurious; and,

6. The parties intended the subject transactions to be recourse loans.

VI. CONCLUSION

Based upon the foregoing facts and law, it is respectfully submitted that this matter be remanded to the District Court, and that the following be overturned:

1. The Motion Granting Plaintiff's Motion for Summary Judgment filed on May 11, 2018.

2. The Order Awarding Damages dated August 21, 2018; and,

3. The Judgment dated October 26, 2018.

Dated: July 29, 2019

/S/ Richard Sax
Richard Sax, Attorney for
Defendant/Appellant,
Richard Sax, et al.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I state that there are no related bases pending in this Court.

Dated: July 29, 2019

/S/ Richard Sax
Richard Sax, Attorney for
Defendant/Appellant,
Richard Sax, et al.

ATTESTATION

I, Richard Sax, hereby attest that I have on file all holographic signatures corresponding to any signatures indicated by a conformed signature (/S/) within this e-filed document.

Dated: July 29, 2019

/S/ Richard Sax
Richard Sax, Attorney for
Defendant/Appellant,
Richard Sax, et al.

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DECLARATION OF RICHARD SAX AND CERTIFICATE OF COMPLIANCE

I, Richard Sax, hereby declare as follows:

1. I am the attorney for Defendant/Appellant Richard Sax, et al., in the above-entitled matter.

2. I have utilized the software program entitled Microsoft Word to determine the word count of Appellant's Opening Brief.

3. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the word count of Appellant's Opening Brief is 3,242 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

4. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately-spaced typeface, using Microsoft Office, Times New Roman 14-point font.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was signed on July 29, 2019, in Santa Rosa, California.

By: /S/ Richard Sax

Richard Sax, Attorney for
Defendant/Appellant,
Richard Sax, et al.

CERTIFICATE OF SERVICE

I declare that: I am employed in the County of Sonoma, California. I am over the age of eighteen (18) years and not a party to the within case; my business address is 448 Sebastopol Ave, Santa Rosa, CA 95401. My facsimile number is 707-525-8119, and my electronic mail address is Richard@rsaxlaw.com. On July 29, 2019, I served **APPELLANT'S REPLY BRIEF** on the interested party or parties in said cause. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

SERVICE LIST

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(XX) ELECTRONIC SERVICE VIA CM/ECF SYSTEM: In accordance with the electronic filing procedures of this Court, service has been effected on the parties above, whose counsel of record is a registered participant of CM/ECF, via electronic service through the CM/ECF system. A copy of the "Filing Receipt" page will be maintained with the original document in our office.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Santa Rosa, California, on July 29, 2019.

/S/ Richard Sax
Richard Sax,
Attorney for
Defendant/Appellant,
Richard Sax, et al.