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COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK
COMMERCIAL DIVISION, WESTCHESTER COUNTY**

Present: **HON. KENNETH W. RUDOLPH**
Justice.

-----X
SURPRIT SINGH, Individually, and in behalf
of DHINDSA ENTERPRISES, INC., :

Index No. 12115/01

Plaintiff

-against-

: DECISION

LAMALBIR SINGH, GETTY PETROLEUM
MARKETING, INC., and PAVITT VENTURES, INC.,

Defendants.

-----X
LAMALBIR SINGH and DHINDSA ENTERPRISES,
INC.,

Plaintiffs on Counterclaim,

-against-

SURPRIT SINGH,

Defendant on Counterclaim,
-----X

The following papers numbered 1 to 49 read on these motions.

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Upon the foregoing papers, it is ORDERED that this motion by defendant, Getty Petroleum Marketing, Inc. ("Getty") for an order pursuant to CPLR §3212, granting Getty summary judgment dismissing plaintiff's complaint and co-defendants' cross claim for contribution, the cross motion of defendants, Kamalbir Singh ("Singh") and Pavitt Ventures, Inc., ("Pavitt") for an order pursuant to CPLR §3212, granting summary judgment dismissing plaintiff's complaint and defendant, Getty's cross claim and the cross motion of plaintiff for an order, pursuant to CPLR §3212(e) granting plaintiff summary judgment on plaintiff's second cause of action against defendant, Singh, are decided as follows.

Plaintiff's amended complaint, verified November 8, 2002 alleges a first cause of action against defendant, Singh for breach of contract; a second cause of action against defendant, Singh for violation of the Business Corporation Law ("BCL") provisions relating to the transfer or other disposition of the principal assets of a corporation; a third cause of action against defendant, Singh for conversion; a fourth cause of action against Singh for unjust enrichment and a fifth cause of action against defendant, Singh for intentional tort; plaintiff seeks money damages from Singh.

A sixth cause of action alleges conspiracy to effect an intentional tort upon plaintiff by defendants, Singh and Getty, seeking money damages therefor. A seventh cause of action alleges tortious interference with contract by defendant, Getty, seeking compensative and punitive damages therefor.

It is well established that summary judgment is a drastic remedy and should only be granted if there are no material and triable issues of fact. Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395. In evaluating a motion for summary judgment, a court should not determine credibility but whether there exists such issues. S. J. Capelin Assoc. v. Globe Manufacturing Corp., 34 NY2d 338. When reviewing a motion the papers must be scrutinized carefully in the light most favorable to the party opposing the motion. Robinson v. Strong Memorial Hosp., 98 AD2d 976. The party moving for summary judgment has the burden initially of coming forward with admissible evidence to support the motion so as to warrant the Court's directing judgment in movant's favor as a matter of law; the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of factual issue requiring a trial of the action. See, Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc., 46 NY2d 1065, 1067. Alvarez v. City of New York, 68 NY2d 320; Zuckerman v. City of New York, 49 NY2d 557.

Defendant, Getty's Motion For Summary Judgment

By answer dated December 2, 2002, Getty alleges denials, alleges several affirmative defenses and cross claims against defendant, Singh.

In support of its motion, Getty submits the affidavit of its Westchester sales manager, William A. Perry ("Perry"), who initially delineates the facts giving rise to this action and the relationships of the parties as follows:

Getty has long term leases of gasoline service stations at 751 White Plains Road, Scarsdale, New York (Station A), and at 755 White Plains Road, Scarsdale, New York (Station B). Station B is located adjacent to Station A, but only petroleum products are sold there. The two stations are separated by a fence and are on different grades. On February 1, 1995 Getty entered into a year to year Contractor Agreement with defendant, Singh to dispense petroleum products at Station A. Under the agreement Singh was to daily place all monies collected for gasoline sales into a bank account from which Getty could withdraw funds. Getty then paid Singh a management fee of 7.5 cents per gallon of gasoline sold. Singh was not required to pay any rent or utilities for the station. The property was also improved with a convenience store, which Singh was permitted to operate. He did not pay any utilities, rent or other fee to Getty to operate the store, nor did he pay any portion of the store's income to Getty. Singh subsequently formed a corporation: Dhindsa. Monies from the sale of gasoline at the station were placed into a bank account in Dhindsa's name, and Getty was permitted to electronically withdraw those proceeds from that account. Getty did not require that the bank account for the deposit of gasoline proceeds be in any particular entity's name. No written agreement was ever made assigning the Contractor Agreement from Singh to Dhindsa; management fees continued to be paid to Singh only; and, notices concerning Station A were issued solely in Singh's name. On May 28, 1999, Getty entered into a year-to-year Contractor Agreement with Dhindsa for the operation of Station B, which agreement went into effect on June 4, 1999.

On or about December 18, 2000, Getty and Singh entered into a Retail Gasoline Station Lease Agreement, Lessee Commission Contract and related agreements in connection with the operation of Station A. Those agreements went into effect on January 1, 2001, and were to run for three years. The agreements provide, inter alia, that Singh pay rent of \$500.00 per month plus utilities. On December 18, 2000, Getty

entered into a series of further agreements with Singh in connection with the operation of Station B, effective January 1, 2001. The agreements provide, inter alia, that Singh pay rent beginning at \$1,000.00 per month. On December 20, 2000, Getty and Singh entered into an agreement canceling the February 1, 1995 Contractor Agreement for Station A effective December 31, 2000. On December 20, 2000, Singh, as president of Dhindsa entered into an agreement with Getty to cancel the Contractor Agreement for Station B effective December 31, 2000.

Getty admits that at some point Getty was furnished with documentation indicating that plaintiff and Singh were each owners of 50% of the issued and outstanding shares of Dhindsa.

In opposition, plaintiff avers that he was a 50% partner of the businesses that leased and operated the two Getty stations and never agreed to terminate the leases; plaintiff was ill during October, November and December, 2000. Plaintiff's attorney's affirmation avers that Getty tortuously interfered with Singh's and plaintiff's contract that made Singh and plaintiff 50% shareholders of Dhindsa, further contending that Getty through Perry knew this and that neither Singh or plaintiff acting alone could terminate the corporate relationship; Getty assisted Singh in violating basic corporate law to secretly deprive plaintiff and Dhindsa of their rights.

The branch of Getty's motion seeking summary judgment dismissing plaintiff's sixth cause of action alleging conspiracy to effect an intentional tort upon plaintiff by defendants, Singh and Getty, is granted and the sixth cause of action is dismissed. There is no recognizable action for civil conspiracy in New York. See, Walter v. Pennon Associates, Ltd., 188 AD2d 596.

Plaintiff's seventh cause of action alleges that Getty tortuously interfered with the contract between Singh and plaintiff enabling Singh to breach the shareholders contract and maliciously and intentionally enabled a breach of said contract by Singh. The elements of the tort of interference with contract are (1) existence of a valid contract, (2) defendant's knowledge of that contract, (3) defendant's intentional procuring of the breach, and (4) damages, Lama Co. V. Smith Inc., 88 NY2d 413. The Court finds that Plaintiff has raised issues for a trier of the facts, including whether Getty procured a breach of the Plaintiff/Singh contract. The branch of Getty's motion seeking summary judgment dismissing plaintiff's seventh cause of action and Singh and Pavitt's cross-claim for contribution, is denied.

Defendant Singh and Pavitt Motion for Summary Judgement

Insofar as Singh and Pavitt seek summary dismissal of plaintiff's first cause of action: breach of contract and second cause of action: violation of BCL 909, the motion is denied in accord with the granting of summary judgement to plaintiff, infra, as to these two causes of action. Singh has not established his entitlement to summary judgement dismissing plaintiff's causes of action for conversion, unjust enrichment, and intentional tort, which are additionally, per-force permeated with factual issues. Singh's motion is denied as to plaintiff's, third, fourth and fifth causes of action and as to Getty's cross-claim.

Plaintiff's Cross Motion For Partial Summary Judgment

In support of its motion for summary relief for Singh's alleged violation of BCL 909 in surrendering or terminating the Contractor Agreement/Leases in December, 2000, plaintiff avers that he was a 50% shareholder of Dhindsa and did not consent to the termination entered into by Singh with Getty, supra. Singh's actions violated BCL 909 providing for notification, board approval, and shareholder action by a two-thirds vote where all the assets of a corporation are being disposed of not in the regular or usual course of business.

Singh responds that issues of fact exist including whether plaintiff paid for his shares of stock, whether the stock certificates should have been issued, whether the business was an asset for purposes of BCL 909.

The May 28, 1999 Contractor Agreement for 755 White Plains Road, Eastchester, New York between Getty and Dhindsa provided, inter alia, "the term of this Agreement shall be on a year to year basis, beginning on June 3, 1999 and terminating May 31, 2000 except that either party may terminate written this Agreement at any time upon thirty (30) day notice was given by either party". BCL 909 provides that the disposition ... of all or substantially all the assets of a corporation, if not made in the usual or regular course of the business... shall be authorized only where, inter alia the board "shall authorize the proposed sale... and direct its submission to a vote of shareholders"; "[n]otice of the meeting [is] given to each shareholder"; and "the holders of two-thirds of [the] outstanding shares" approve the sale.

The Court finds that plaintiff was a shareholder of Dhindsa.

Too, the December 20, 2000 Mutual Cancellation of Contractor Agreement for 755 White Plains Road signed by Singh and Getty was a disposition of substantially all of the assets of Dhindsa not made in the usual course of business, BCL 909(a) and in the absence of evidence of authorization by the corporate board of directors, notice to shareholders and the requisite approval by the holders of two-thirds of the shares of Dhindsas BCL 909(b), (c) the disposition was void. See, Sardavis v. Sumitomo Corporation, 282 AD2d 322.

Plaintiff's cross motion for summary judgment on its second cause of action is granted as to 755 White Plains Road, but denied as to 751 White Plains Road, the documentary evidence before the Court not establishing that any of the agreements between Getty and Singh as to 751 White Plains Road were assigned to Dhindsa.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
July 31st, 2003

E N T E R



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Justice of the Supreme Court

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