

Philadelphia Contributionship Ins. Co. v A 440 Keyboard, Corp.
2008 NY Slip Op 32432(U)
September 3, 2008
Supreme Court, New York County
Docket Number: 0106960/2006
Judge: Louis B. York
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: 1AS PART 2**

**PHILADELPHIA CONTRIBUTIONSHIP INSURANCE
COMPANY, as subrogee of LINDA E. CARLETON**

Plaintiff,

-against-

**A 440 KEYBOARD, CORP., d/b/a PIANO PIANO and
G. JOSEPH BINDER,**

Defendants.

Index No. 106960/06

SEQ#002
FILED

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NEW YORK

LOUIS B. YORK, J.:

This is a subrogation action to recover \$46,300 in damages in connection with the breach of a consignment contract and the conversion of plaintiff's Bosendorfer Grand Piano by defendants. Currently defendants A 440 Keyboards, Corp., d/b/a Piano Piano (Piano Piano) and G. Joseph Binder (Binder) move for summary judgment dismissing the complaint of plaintiff Philadelphia Contributorship Insurance Company, as subrogee of Linda E. Carleton (Philadelphia) on the grounds that the relevant statute of limitations has expired on plaintiff's conversion claim, plaintiff lacked the legal capacity to sue, plaintiff failed to state a proper cause of action against Binder, and there is no writing satisfying the statute of frauds upon which an action against Binder would lie.

Background

On May 7, 2003 Carleton, Philadelphia's subrogor, and Piano Piano entered into a consignment agreement, signed by Binder on behalf of Piano Piano. The agreement stipulated that Piano Piano would sell the Bosendorfer Grand Piano on behalf of Carleton and would pay her 66.66% of the proceeds from the sale or \$45,200, whichever was greater. Piano Piano sold the Bosendorfer on May 20, 2003 for \$60,000 and did not give any portion of the proceeds to Carleton. On May 6, 2004 Carleton's attorney contacted defendants and was told that the check in the amount of \$45,200 would be mailed to Carleton by the end of June 2004. The attorney contacted defendants again in August 2004 demanding payment or return of the Bosendorfer, but received no response. Carleton commenced an action against Binder and Piano Piano in 2005 for breach of contract. Carleton v. Piano Piano, Index No. 600947/2005 (Sup. Ct. N. Y. County). However, the action was dismissed due to Carleton's failure to provide defendants with discovery.

Prior to the above incidents, Philadelphia had issued an insurance policy to Carleton. The policy was effective between October 30, 2002 and October 30, 2003 and insured Carleton's Bosendorfer Grand Piano. The policy coverage limit was \$165,000, covering loss of property. On May 20, 2006 Carleton submitted a Sworn Statement of Loss to Philadelphia for the Bosendorfer Piano valued at \$46,300, alleging that defendants stole the piano. Based on this statement, Philadelphia issued a check to Carleton in the amount of \$46,300 to cover her loss. Also on May 20, 2006, Carleton signed the Release and Subrogation Receipt that subrogated to Philadelphia:

All of the rights, claims, and interest which the undersigned may have against any party ... liable for the loss mentioned above, and authorizes the said Company to sue ... in the undersigned's name.

Philadelphia then brought this action as subrogee of Carleton's claim.

Discussion

First, in this motion defendants urge the Court to grant summary judgment because the statute of limitations has expired on plaintiff's conversion claim. The statute of limitations for a conversion claim "begins to run when the plaintiff becomes aware that its agent's possession is hostile." D'Amico v. First Union Nat'l Bank, 285 A.D.2d 166, 172, 728 N.Y.S.2d 146, 151 (1st Dep't 2001). The New York Court of Appeals has ruled that a statute of limitations stops running after a plaintiff files paperwork with the Court, delivers the process to the Clerk of the Court, and pays any required fees. Grant v. Senowski, 95 N.Y.2d 605, 608, 721 N.Y.S. 597, 599 (2001). Defendant claims that plaintiff's conversion claim is barred by a one-year statute of limitations. However, CPLR §214(3) provides a three-year statute of limitations for "an action to recover a chattel or damages for the taking or detaining of a chattel." Carleton learned that her Bosendorfer was converted on May 6, 2004, less than 3 years from the time of filing the complaint on May 19, 2006. Thus, plaintiff's cause of action for conversion is timely and the Court denies this portion of defendants' motion for summary judgment.

Second, defendants also request that the Court grant their motion for summary judgment because, they allege, plaintiff has no legal capacity to sue them. Philadelphia commenced this action on behalf of its insured/subrogee, Linda Carleton, who, on May 20, 2006, subrogated her rights to Philadelphia. "Subrogation, an equitable doctrine, allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse."

Kaf-Kaf, Inc. v. Rodless Decorations, 90 N.Y.2d 654, 660, 665 N.Y.S.2d 47, 49 (1997).

This applies to claims for conversion as well. Lawyers' Fund for Client Protection v. Bank Leumi Trust Co., 94 N.Y.2d 398, 407, 706 N.Y.S.2d 66, 72 (2000). The Release and Subrogation Receipt was signed by both Carleton and Philadelphia and, hence, is valid. Thus, Philadelphia has the legal capacity to sue the defendants and this portion of defendants' motion also fails.

Third, defendant Binder argues that summary judgment on his behalf is proper because plaintiffs' complaint fails to state a proper cause of action against him. The complaint alleges that Binder was the alter ego, principal shareholder, and officer and agent of Piano Piano. The complaint also states that Binder used the corporation Piano Piano to sell the Bosendorfer for \$60,000 and not share the profit with Carleton. Plaintiff seeks to pierce the corporate veil to hold Binder personally responsible. The Court of Appeals has held that "piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." Morris v. State Dep't of Taxation & Fin., 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 810-811 (1993). Plaintiff has submitted no facts in the motion papers proving that Binder in fact exercised complete domination over the company and that he used his power to commit fraud against plaintiff. The complaint is a mere collection of allegations not supported by facts. "[A]llegations merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment." Banco Popular N. Am. v. Victory Taxi Mgmt., 1 N.Y.3d 381, 383, 774 N.Y.S.2d 480, 482

(2004). Therefore, the Court grants the part of defendant's motion that seeks summary judgment dismissing the claims asserted against Binder.

Fourth, defendants ask the Court to grant partial summary judgment because the statute of frauds is not satisfied in plaintiffs' claim against Binder. Since the Court already ruled above that Philadelphia failed to state a proper cause of action against Binder, there is no need to address the question of the statute of frauds.

Finally, when a party moves for summary judgment this party must submit an affidavit by a person having knowledge of the facts. CPLR 3212(b). The motion shall be denied if "any party shall show facts sufficient to require a trial of any issue of fact." Id. Here, Piano Piano provided an affidavit by Binder, its principal shareholder, reciting the facts and alleging that plaintiff's causes of action have no merit. Plaintiff has made a sufficient showing that there are triable issues of fact as to the first and the second causes of action but has not shown that the corporate veil has been pierced. Therefore, this Court grants in part and denies in part defendants' motion for summary judgment.

At oral argument, the parties noted that discovery had not been completed because this motion was pending. The Court indicated that if the motion was denied, it would schedule a final discovery conference.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied as to the first and the second causes of action; and it is further

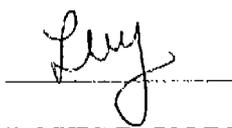
ORDERED that the motion is granted in part and the third and the fourth causes of action are severed and dismissed; and it is further

ORDERED that the action in all other respects continues; and it is further

ORDERED that the parties shall appear in Part 2, 71 Thomas Street, room 205, at 2:15 p.m. on September ~~15~~²⁴ 2008 to set up an expedited timetable for the completion of any outstanding discovery. The parties are directed to bring a copy of this order and copies of prior discovery orders to this conference.

Dated: ~~August~~^{Sept} 3, 2008

ENTER:



LOUIS B. YORK, J.S.C.

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