

Ceppos v Szlendak

2012 NY Slip Op 30205(U)

January 13, 2012

Supreme Court, Nassau County

Docket Number: 013788/11

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

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MOTION DATE: Nov. 16, 2011
Motion Sequence # 001, 002

ALAN CEPPOS, FREDERIC RAMBAUD,
Individually and Derivatively as the Majority
Shareholders and/or Members for and On
behalf of THE SARUT GROUP, INC., and
each of SAN FRANCISCO CITY LIMIT, INC.,
CITY LIMITS, S.F., LTD., 61 GROVE CORP.,
25 VANDERBILT CORP., 7 GRAND CENTRAL
CORP., TEA AND HONEY, INC., PYLONES
USA, LTD., PYLONES FUNDING, LLC, 828
LEXINGTON, LLC, S.F. CITY LIMIT CORP.,
780 HUMBOLT, LLC, HUMBOLT, LLC, 343
CALYER, LLC, and 855 HUMBOLT, LLC, and
THE SARUT GROUP, INC. and each of SAN
FRANCISCO CITY LIMIT, INC., CITY LIMITS,
S.F., LTD., 61 GROVE CORP., 25 VANDERBILT
CORP., 7 GRAND CENTRAL CORP., TEA AND
HONEY, INC., PYLONES USA, LTD., PYLONES
FUNDING, LLC, 828 LEXINGTON, LLC, S.F.
CITY LIMIT CORP., 780 HUMBOLT, LLC,
HUMBOLT, LLC, 343 CALYER, LLC and 855
HUMBOLT, LLC (as Nominal Plaintiffs),

Plaintiffs

-against-

MARIUSZ SZLENDAK and AGNIESZKA
SZLENDAK,

Defendants.

The following papers read on this motion:

Order to Show Cause.....	X
Cross-Motion.....	X
Affirmation in Opposition.....	XXXX
Affirmation in Further Support.....	XXXXXX
Reply Affirmation.....	X
Memorandum of Law.....	X-

Motion by plaintiffs for a preliminary injunction restraining defendants from enforcing the severance, escrow, or pledge agreements is **granted**. Motion by plaintiffs for a preliminary injunction restraining defendants from using any confidential business information of plaintiffs is **denied**. Cross-motion by defendants to dismiss the complaint on the ground of release and failure to state a cause of action is **denied**.

This is an action to rescind three contracts for fraud. Plaintiffs Alan Ceppos and Frederic Rambaud operate a number of stores in the New York City area which sell home furnishings and gift accessories. Plaintiffs operate these businesses through plaintiff The Sarut Group, Inc. and related entities.

In October 1990, plaintiffs hired defendant Mariusz Szlendak as a shipping clerk. Over time, Szlendak became in effect the accounts receivable and accounts payable bookkeeper for the Sarut companies. In 1995, Mariusz married defendant Agnieszka Szlendak. Agnieszka was then hired by plaintiffs as a sales assistant and eventually as Sarut's personnel director. In 2002, Mariusz became Sarut's chief financial officer.

Around October 2004, Mariusz and Agnieszka had a son, Maximillian, and then a daughter, Iga. Ceppos and Rambaud were very fond of Mariusz and established a close relationship with his children. Plaintiffs also granted Mariusz a 30 % stock interest in the Sarut companies.

In February 2010, plaintiffs discovered that Mariusz had embezzled approximately \$500,000 from Sarut by issuing company checks to pay personal credit cards, his children's private school tuition, and other personal expenses. Rather than reporting the theft to law enforcement, plaintiffs entered into certain agreements with Mariusz in order to terminate his employment amicably and continue to have a relationship with his children.

On April 30, 2010, the parties entered into a severance agreement whereby Sarut agreed to pay Mariusz \$29,000 per month for the period May 1 through December 1, 2010 and \$17,000 per month for the period January 1, 2011 through June 30, 2013. In the severance agreement, Mariusz agreed not to compete with Sarut during the two year period ending April 30, 2012. Mariusz also agreed not to use any confidential information of Sarut, including lists of customers and suppliers, sales plans, and "product and service information." The severance agreement provided that Sarut forgave \$213,560 in loans, and Mariusz surrendered his stock interest in the companies. Finally, the agreement provided that both Sarut and Mariusz released each other of all claims.

Nevertheless, in June 2010, plaintiffs entered into a "pledge agreement," whereby Ceppos and Rambaud pledged Mariusz' 30 % stock interest back to him in order to secure Sarut's payment obligations under the severance agreement. The pledge agreement provides that in the event of a default under the severance agreement, the pledgee may sell the stock or transfer it into his own name. On the same date, plaintiffs entered into an escrow agreement, whereby Blank Rome LLP was appointed "escrow agent" to hold the stock subject to the pledge agreement.

In August 2010, plaintiffs learned that Mariusz had opened a competing retail store, known as Maxiga, at Lexington Avenue and 82nd Street in Manhattan and was purchasing merchandise from Sarut's suppliers. In August 2011, Mariusz opened a second store under a similar name at Third Avenue and 63rd Street, only four blocks from one of Sarut's stores. Marius has also a third store at Broadway and 79th Street.

This action was commenced on September 26, 2011. Plaintiffs seek a declaratory judgment that all three agreements are void and unenforceable because defendants falsely represented that they would restore the "familial and emotional" relationship which plaintiffs enjoyed with defendants' children. Plaintiffs seek a permanent injunction, restraining defendants from enforcing any of the default provisions in the various agreements. Plaintiffs assert claims for damages based on breach of fiduciary duty and unjust enrichment and also seek an accounting.

By order to show cause dated September 27, 2011, plaintiffs seek a preliminary injunction restraining defendants from enforcing the severance, pledge, and escrow agreements. Plaintiffs also seek a preliminary injunction restraining defendants from using plaintiffs' confidential business information in connection with any competing business. In

the order to show cause, the court granted a temporary restraining order, restraining defendants from enforcing the agreements, upon condition that plaintiffs paid the severance payments into escrow with their attorney.

Defendants move to dismiss the complaint on the ground of the general release provided in the severance agreement. Additionally, defendants move to dismiss the complaint on the ground that it fails to state a cause of action for fraud in the inducement. Defendants argue that their statements about restoring a family relationship with plaintiffs are too vague to provide a basis for rescinding the various agreements.

In order to be entitled to a preliminary injunction, defendants must show a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]). To state a claim for fraudulent inducement, plaintiff must allege all of the elements of a fraud cause of action (*Merrill Lynch v Wise Metals Group*, 19 AD3d 273 [1st Dept 2005]). Absent a present intention to deceive, a statement of future intentions, promises or expectations is not actionable on the grounds of fraud (*Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 [1st Dept 1998]). A complaint based upon a statement of future intention, must allege facts to show that defendant, at the time the promissory representation was made, never intended to honor or act on his statement (Id).

Defendants' promise to foster a relationship between plaintiffs and their children may be too vague for enforcement. Nevertheless, the circumstances suggest that defendants never intended to allow plaintiffs to continue to extend love and generosity to Iga and Maximillian and indeed intended to cut the children off from plaintiffs' affection. Thus, plaintiffs have established a likelihood of success on the merits that the severance, pledge, and escrow agreements were fraudulently induced.

Moreover, overarching public policy may mandate the voiding of all three agreements (See *Glassman v ProHealth Ambulatory Surgery Center*, 14 NY3d 898 [2010]). Such overarching public policy may be found where the purpose of an agreement is the obstruction of justice or the frustration of criminal prosecution (22 NY Jur2d Contracts § 161). To the extent that the purpose of the severance agreement was to avoid Mariusz' criminal prosecution, it is void as against public policy.

Plaintiffs have established a danger of irreparable injury in the event the Sarut stock were to be sold to a third party. Moreover, the balance of equities are clearly in plaintiffs'

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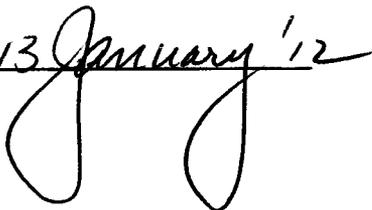
favor. Plaintiffs' motion for a preliminary injunction restraining defendants from enforcing the severance, pledge, and escrow agreements is **granted**. Plaintiffs' counsel is authorized to return the escrowed severance payments to plaintiffs and plaintiffs are relieved of the obligation to make further escrow payments.

A release may be invalidated for any of the traditional bases for setting aside written agreements, namely duress, illegality, fraud, or mutual mistake (*Centro v America Movil*, 17 NY3d 269, 276 [2011]). The court having determined that plaintiffs have established a likelihood of success with respect to their fraud claim, defendants' motion to dismiss on the grounds of release and failure to state a cause of action is **denied**.

Nevertheless, a party who avoids a contract on the ground of fraud has made an election of remedies and may not seek the benefits of the contract (*Vitale v Coyne Realty*, 66 AD2d 562, 568 [4th Dept 1979][Callahan, dissenting]). Every right under the repudiated contract must be absolutely surrendered (22A NY Jur2d Contracts § 564). Thus, having disavowed the severance agreement on the ground of fraud, plaintiffs may not seek the benefit of its anti-competitive provisions. Plaintiffs' motion for a preliminary injunction restraining defendants from using plaintiffs' confidential business information is **denied**.

So ordered.

Dated 13 January '12



J.S.C.

ENTERED

JAN 18 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE