STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

CASCO SECURITY SYSTEMS, INC.,

Plaintiff,

v.

DECISION AND ORDER

INDEX No. 2003/09484

DAVENPORT MACHINE, INC., and
BRINKMAN INTERNATIONAL GROUP, INC.,

Defendant.

Defendant Davenport Machine, Inc., moves for summary judgment dismissing the First Cause of Action directed to the maintenance and monitoring agreement entered into between Casco and "Davenport Machine" on January 28, 2003, on the ground that Davenport Machine, Inc. is not in privity with Casco with respect to that agreement. In support of its motion, Davenport Machine, Inc. alleges that the contract was, in reality, between Casco and Davenport Industries, LLC, many of the assets of which were acquired by Davenport Machine, Inc. in connection with a bankruptcy proceeding concerning the LLC. Davenport Machine, Inc. contends that the maintenance and monitoring agreement was executed by James Henderson only while he was an employee of Davenport Industries, LLC, and well before he became an employee of Davenport Machine, Inc. on March 17, 2003.

Davenport Machine, Inc. also submits in support of its motion documents relating to the bankruptcy proceedings involving Davenport Industries, LLC. It appears that Davenport Industries, LLC and Davenport Machine, Inc. entered into an asset purchase agreement on December 12-13, 2002, which was submitted to the bankruptcy court for approval in connection with the Davenport Industries, LLC bankruptcy proceedings. That approval did not ultimately come through until February 13, 2003, by order of Bankruptcy Judge John C. Nemfo, III, nearly a month after execution of the maintenance and monitoring agreement. The asset acquisition agreement between Davenport Industries, LLC and Davenport Machine, Inc. closed on March 17, 2003.

Davenport Machine, Inc. contends in support of its motion for summary judgment that Casco representatives knew that the individual signing the maintenance and monitoring agreement, James Henderson, was employed only by Davenport Industries, LLC and not Davenport Machine, Inc. However, no evidence in support of that conclusory allegation has been adduced. Instead, Davenport Machine, Inc. maintains in affidavits that the decision to enter into the maintenance and monitoring agreement was made solely by supervisors at Davenport Industries, LLC without any input or involvement of Davenport Machine, Inc. or the Brinkman International Group. But no evidence has been submitted that Casco's representatives knew of this, and therefore Davenport

Machine, Inc. fails to meet its initial burden to show entitlement to judgment as a matter of law, particularly in light of the "Davenport Machine" heading on the purchase contract forms it created.

Even assuming that Davenport Machines, Inc. established as a matter of law that Henderson had no authority to enter into the contract on behalf of Davenport Machine, Inc. and that Casco's representative had no reason to assume that Henderson had authority on behalf of Davenport Machine, Inc. to enter into the contract on behalf of the corporation, a dubious proposition on this record, Casco raises an issue of fact that the contract was, indeed, between Casco and Davenport Machine, Inc. The purchase orders in question all refer to "Davenport Machine," not Davenport Industries, and there is a question of fact raised by Mr. McCooey's testimony that he did not really know which entity Henderson was employed by on January 23rd, but that he assumed that it was Davenport Machine because no effort was made by Henderson to correct the heading on the contract, which read "Davenport Machine." McCooey deposition at 25-26. McCooey testified further that his understanding at the time was that McCooey was responsible for keeping the assets of Davenport Industries "intact" during "the transitional stage," and that Henderson "was more than likely going to stay on with Davenport Machine, Inc." While it is true that McCooey acknowledged that

he realized at the time that Henderson was employed by Davenport Industries, LLC in January of 2003, the foregoing testimony is sufficient to raise an issue of fact on the apparent authority question. See also, McCooey deposition at 28 ("I couldn't be sure who he was working for at the time, really").

Also submitted as raising an issue of fact, although not as persuasive as the heading on the contracts themselves, was the Dagger letter to all of Davenport's suppliers which sought to reassure them that their interests would not be compromised by the asset acquisition agreement. It is not disputed that Casco received this letter, although Davenport Machine, Inc. now contends that the letter concerned only a December invoice for additional detectors. I note that the letter does not purport to qualify Davenport's commitment nor did it seek to segregate some invoices from others. It reads: "Invoices for any deliveries after December 16, 2002, which are not paid prior to closing will be honored by the new company, Davenport Machine, Inc." The letter also requested suppliers "to extend your open account or discount terms to Davenport Machine, Inc. effective with the closing on March 17, 2003." Accordingly, the motion for summary judgment dismissing the First Cause of Action, insofar as it is pled against Davenport Machines, Inc., is denied.

Brinkman's motion for summary judgment on both causes of action is granted. Brinkman established as a matter of law that

it is not liable for the contractual obligations of its subsidiaries, Billy v. Consol. Mach. Tool Co., 51 N.Y.2d 152, 163 (1980); Lorkowski v. J.C. Putnam Co., Inc., 177 A.D.2d 1021 (4th Dept. 1996), and plaintiff has raised no issue of fact warranting a conclusion, or tending to establish, that Brinkman disregarded Davenport's separateness, or exercised such control over the day-to-day operations of Davenport "that the subsidiary had become a mere instrumentality of the parent." Billy, 51 N.Y.2d at 163. The arguments raised by Brinkman regarding piercing the corporate vail in its reply affirmation have not been considered.

Davenport Machines, Inc. and Casco each cross-move for summary judgment on the Second Cause of Action relating to the fire alarm agreement executed the day after the asset purchase agreement closed. Plaintiff contends that the type of fraud alleged, i.e., an expression of opinion concerning fire code compliance, concerns a protected expression of opinion which cannot be actionable as a fraud. Although generally expressions of opinion cannot amount to fraud in the inducement, Koagel v. Ryan Homes, Inc., 167 A.D.2d 822 (4th Dept. 1990)(and cases there cited), a representation of the kind at issue here, that defendants' premises are not in code compliance, may be actionable fraud. National Conversion Corp. v. Cedar Building Corp., 23 N.Y.2d 621, 627-28 (1969)(misrepresentation by a landlord that the premises are in an unrestricted zoning

district). See 60A N.Y. Jur. 2d Fraud and Deceit §54. See also, Crowther v. Guidone, 183 Conn. 464, 467-68, 441 A.2d 11, 13 (1981).

But plaintiff's insistence that defendants' affirmative defense must be dismissed because they failed to investigate the alleged misrepresentation, could easily have done so, and indeed did do so within a business day or two after executing the contract, has merit. Here, as in Edmar Creations, Inc. v. Instrument Systems Corp., Inc., 74 A.D.2d 632 (2d Dept. 1980), defendants' "own affidavits conclusively establish that it has no . . . [defense of fraudulent inducement] . . . because [u]nder the circumstances, as they are stated by . . . [defendants themselves], . . . [they] unreasonably failed to investigate the truth of the alleged misrepresentation." Id. 74 A.D.2d at 632-33. Defendants allege that they discovered the truth about the matter of fire code compliance within a business day of executing the contract in question. Yet there is no "allegation that defendant made any effort, even as little as a telephone call . . . , to ascertain, prior to . . . [executing the contract]," the issue of code compliance or, as in this case, the existence of an extant city fire department permit. Onieda City School District v. Seiden & Sons, Inc., 177 A.D.2d 828, 829 (3d Dept. 1991). "It has been uniformly held that, if the facts represented are not matters peculiarly within the representor's knowledge, and the

other party has the means available to him of knowing by the exercise of ordinary intelligence the truth or real quality of the subject of the representation, he must make use of those means or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations." Dunkin' Donuts of America, Inc. v. Liberatore, 138 A.D.2d 559, 560 (2d Dept. 1988)(citing Danann Realty Corp. v. Harris, 5 N.Y.2d 317). See Sirota v. Langtry, 204 A.D.2d 1009 (4th Dept. 1994); Most v. Monti, 91 A.D.2d 606, 606-07 (2d Dept. 1982). See also, Culver & Theisen, Inc. v. Starr Realty Co. (NE) LLC, 307 A.D.2d 910 (2d Dept. 2003); DiFilippo v. Hidden Ponds Assoc., 146 A.D.2d 737, 738 (2d Dept. 1989).

Accordingly, plaintiff's cross-motion for summary judgment on the Second Cause of Action is granted insofar as it is alleged against Davenport Machine, Inc. Defendants' motion for summary judgment dismissing the Second Cause of Action is denied as to Davenport Machine, Inc., and, for the reasons stated above, is granted insofar as that cause of action is alleged against Brinkman International Group, Inc.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December 14, 2005
Rochester, New York