SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

BERKMAN, HENOCH, PETERSON, PEDDY & FENCHEL, P.C. f/k/a BERKMAN, HENOCH, PETERSON & PEDDY, P.C.,

Plaintiff,

-against-

LONG ISLAND BUSINESS SOLUTIONS, INC., ANDREW FENTON and KEY EQUIPMENT FINANCE, INC.,

Defendants.

INDEX No. 8794/2010

MOTION DATE: Sept. 8, 2010
Motion Sequence #002, 003, 004, 005, 006, 007

The following papers read on this motion:

Order to Show Cause..... XXX
Notice of Motion..... XXX
Affirmation/Affidavit in Opposition..... XXX
Memorandum of Law..... XX

Motion (sequence # 2) by plaintiff for an equitable lien/constructive trust or for a preliminary injunction restraining defendants Long Island Business Solutions and Andrew Fenton from transferring their assets is **denied**. Motion (sequence # 3) by plaintiff to punish defendants for contempt is **denied**. Motion (sequence # 4) by plaintiffs for expedited discovery is **granted** to the extent indicated below. Motion (sequence # 5) by defendants Long Island Business Solutions and Andrew Fenton to dismiss the complaint for failure to

state a cause of action is **granted** in part and **denied** in part. Motion (sequence # 6) by defendants to quash a subpoena is **granted**. Motion (sequence # 7) by plaintiff for leave to serve its order to show on defendants' attorney is **denied** as **moot**.

This is an action for breach of contract. Plaintiff Berkman, Henoch, Peterson, Peddy & Fenchel, PC is a law firm. Defendants Key Equipment Finance Inc ("Key") and Long Island Business Solutions, Inc ("LIBS") are in the business of selling and leasing business equipment. Defendant Andrew Fenton is the president and sole shareholder of LIBS. In June 2006, Berkman, Henoch entered into an agreement with Key to lease 12 Panasonic copiers. The lease was for a term of five years and provided for a monthly rental of $13,400 plus tax.

On October 14, 2009, Berkman, Henoch entered into a "sales agreement" whereby it leased 13 Savin copiers from LIBS. The new lease was for a term of five years and provided for a rental fee of $11,700 per month. As part of the agreement, LIBS agreed to "release Berkman, Henoch from current lease obligation and return all equipment back to the leasing company." The agreement also provided that "LIBS will configure whatever faxing solution that Berkman Henoch desire[s]." At the same time or shortly after entering into the agreement with LIBS, Berkman, Henoch entered into certain "lease agreements" with Great American Leasing Corporation, Leaf Funding, Inc and GE Capital Solutions. It appears that the purpose of these latter agreements was to finance the lease of the Savin copiers from LIBS.

Plaintiff alleges that LIBS has failed to return the Panasonic copiers to Key and has failed to remit the monthly rental payments. On April 27, 2010, Key declared Berkman, Henoch in default and accelerated the lease payments.

Plaintiff commenced this action against LIBS, Fenton, and Key on June 10, 2010. In the first cause of action, plaintiff alleges that LIBS and Fenton breached the "faxing solution" provision in the lease by failing to install facsimile modules on Berkman, Henoch's desktop computers. In the second cause of action, plaintiff alleges that LIBS and Fenton breached the lease by failing to return the copiers to Key and make the remaining lease payments. In the third cause of action, plaintiff alleges that LIBS and Fenton breached a separate agreement to service and repair the Savin copiers. In the fourth cause of action, plaintiff alleges that LIBS and Fenton made fraudulent representations concerning LIBS' intention to return the Panasonic copiers to Key and Key's willingness to accept the surrender of the equipment. In the fifth cause of action, plaintiff alleges that LIBS and Fenton breached a fiduciary obligation to Berkman, Henoch by failing to remit the lease payments to Key. In the sixth cause of action, plaintiff seeks to recover $12,128 in attorney fees which it earned

by defending LIBS in three separate actions. In the seventh cause of action, plaintiff seeks to recover these attorney's fees on a theory of account stated. In the eighth and ninth causes of action, plaintiff seeks to recover the attorney's fees on theories of quantum meruit and unjust enrichment.

By order to show cause dated June 10, 2010, plaintiff moves to impress an equitable lien or constructive trust on $324,476.71 in the possession of LIBS or Fenton, which is apparently proceeds of loans from Great American, Leaf Funding, and GE Capital Solutions which were to be tendered to Key. Alternatively, plaintiff moves for a preliminary injunction pursuant to CPLR § 6301 restraining LIBS and Fenton from disposing of monies in the same amount. In the order to show cause bringing on the application, the court granted a temporary restraining order prohibiting LIBS and Fenton from disposing of their assets.

Defendants LIBS and Fenton move to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7). Defendants argue that plaintiff has not established the elements of a constructive trust. Defendants further argue that plaintiff's allegations of fraud are not plead with sufficient particularity and relate to a breach of contract.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (***AG Capital Funding Partners v. State Street Bank and Trust Co.***, 5 NY3d 582, 591 [2005]).

Generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest in the property (***Plumitallo v Hudson Atlantic Land Co***., 74 AD3d 138 [2d Dept 2010]). The elements of a constructive trust are 1) a fiduciary relationship, 2) a promise, 3) a transfer in reliance on the promise, and 4) unjust enrichment (Id).

The court notes that plaintiff has not explained why it, as opposed to LIBS, assumed the liability to the third party lenders, though the copiers were sold or leased from LIBS. Moreover, before an attorney may enter into a business transaction with a client, the client must consent to the essential terms of the transaction after full disclosure (22 NYCRR §1200.8). Since plaintiff has not explained the terms of the financing arrangement, much less alleged informed consent, the court cannot give plaintiff the benefit of the favorable inference that LIBS was a fiduciary. Accordingly, defendants' motion to dismiss the complaint for failure to state a cause of action is **granted** to the extent of dismissing the fifth

cause of action for breach of fiduciary duty or a constructive trust. Plaintiff's motion seeking the imposition of a constructive trust or equitable lien upon the proceeds of the loans from Great American, Leaf Funding, and GE Capital Solutions is **denied**.

A cause of action to recover damages for fraud will not arise when the only fraud alleged relates to a breach of contract (***Biancone v Bossi***, 24 AD3d 582 [2d Dept 2005]).

The only fraud alleged in the amended complaint relates to LIBS' breach of the copier lease agreement. Accordingly, defendants' motion to dismiss the complaint for failure to state a cause of action is **granted** to the extent of dismissing the fourth cause of action for fraud. Defendants' motion to dismiss the complaint for failure to state a cause of action is otherwise **denied**.

In order to be entitled to a preliminary injunction, plaintiff 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 its favor (***Aetna Ins. Co. v Capasso***, 75 NY2d 860 [1990]). Where plaintiff has an adequate remedy at law to recover money damages, a motion for preliminary injunctive relief should be denied (***EDP Hospital Computer Systems v Bronx-Lebanon Hospital***, 212 AD2d 569 [2d Dept 1995]). The court concludes that Berkman, Henoch has an adequate remedy in the form of an action for money damages for breach of contract. Plaintiff's motion for a preliminary injunction is **denied**.

The temporary restraining order prohibiting LIBS and Fenton from disposing of their assets was issued pursuant to plaintiff's motion for a preliminary injunction. The TRO would have been more properly issued as part of an application for an order of attachment (see, CPLR §6210 and accompanying practice commentary). Accordingly, the temporary restraining order will terminate in 30 days from the date of this order, unless plaintiff moves for an order of attachment.

Plaintiff's motion to hold defendants LIBS and Fenton in contempt of court for violation of the temporary restraining order is **denied** as a matter of discretion (***Dickson v Ferullo***, 96 AD2d 745 4th Dept 1983]). Plaintiffs' motion for leave to serve the order to show cause bringing on the contempt motion on defendants' attorney is **denied** as **moot**. The denial of the motions for a preliminary injunction and to punish defendants for contempt are without prejudice to a motion for an order of attachment, if plaintiff can establish that defendants have secreted property with the intent to frustrate the enforcement of a judgment (See CPLR § 6201[3]).

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Plaintiff moves for expedited discovery to permit it to ascertain facts demonstrating the amount and location of monies forming the corpus of a constructive trust. The court has ruled that because of the absence of a fiduciary relationship plaintiff is not entitled to a constructive trust. Nevertheless, plaintiff is entitled to information as to the disposition of monies received from Great American, Leaf, and GE Capital in order to determine whether defendants have secreted assets. Plaintiff's motion for expedited discovery is **granted** to the extent that defendants LIBS and Fenton shall respond to plaintiff's notice of discovery and inspection within 15 days of service of a copy of this order.

On July 28, 2010, plaintiff served a subpoena duces tecum on Empire National Bank. The subpoena seeks production of documents concerning all accounts maintained with the bank by AJ Fenton Corp. Defendants LIBS and Fenton move to quash the subpoena pursuant to CPLR § 2304 on the ground that it does not contain the notice required by CPLR § 3101. Plaintiff opposes the motion to quash arguing that the documents are relevant to defendants' receipt of monies which should have been paid to Key to satisfy the lease payments.

CPLR § 3101(a)(4) provides that there shall be full disclosure by any person; other than a party or the officer, director, member, agent or employee of a party; "upon notice stating the circumstances or reasons such disclosure is sought or required." The purpose of this requirement is "presumably to afford a nonparty who has no idea of the parties' dispute or a party affected by such request an opportunity to decide how to respond" (***Kooper v Kooper***, 74 AD3d 6, 13 [2d Dept 2010]). Pursuant to this section, a subpoena duces tecum served on a nonparty should contain a notice stating why disclosure is sought (Id). Nevertheless, even though a subpoena is facially defective, the party who served the subpoena may resist a motion to quash by making the required showing (Id).

While relevance and materiality must be shown to obtain disclosure from a nonparty, a showing of mere relevance and materiality is not sufficient (Id at 17-18). A party's inability to obtain the requested disclosure from her adversary or from independent sources is a significant factor in determining the propriety of nonparty discovery (Id at 16). However, other circumstances may be relevant in the context of the particular case (Id at 17).

Since expedited discovery has been granted, plaintiff has not established that the bank records cannot be obtained from Fenton or LIBS. Defendants' motion to quash the subpoena dated July 28, 2010 is **granted**. The granting of the motion to quash is without prejudice to plaintiff's service a new subpoena containing the proper notice as required by CPLR § 3101.

So ordered.

Dated NOV 29 2010

ENTERED

DEC 03 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

J.S.C.