

J.A.O. Acquisition Corp. v Stavitsky

2005 NY Slip Op 30304(U)

February 24, 2005

Supreme Court, New York County

Docket Number: 604798/1999

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
J.A.O. ACQUISITION CORP., J.A.O. HOLDING COMPANY, INC.,
and D.B. BROWN, INC.
Plaintiffs and Counterclaim Defendants.

- against -

JEFFREY D. STAVITSKY, CRESCENT FOOD SALES, INC. and
FIRST UNION NATIONAL BANK f/k/a CORESTATES BANK, N.A.,
Defendants.

W. PAUL BROGOWSKI, JEFFREY BROGOWSKI,
DOUGLAS BROGOWSKI and MATTHEW BROGOWSKI,
Defendants and Counterclaim Plaintiffs.

-----X
W. PAUL BROGOWSKI, JEFFREY BROGOWSKI, DOUGLAS
BROGOWSKI and MATTHEW BROGOWSKI,
Thrd-Party Plaintiffs,

-against-

JAMES ORTENZIO,
Thrd-Party Defendant.

-----X

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits _____
Answering Affidavits -- Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision & Order.

Dated: February 24, 2005



KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED
FEB 28 2005
NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

J.A.O. ACQUISITION CORP., J.A.O. HOLDING COMPANY,
INC., and D.B. BROWN, INC.

Plaintiffs and Counterclaim Defendants.

Index No. 604798/1999
Seq. No. 16

- against -

JEFFREY D. STAVITSKY, CRESCENT FOOD SALES, INC.
and FIRST UNION NATIONAL BANK f/k/a
CORESTATES BANK, N.A.,

Defendants.

DECISION and ORDER

W. PAUL BROGOWSKI, JEFFREY BROGOWSKI,
DOUGLAS BROGOWSKI and MATTHEW BROGOWSKI,
Defendants and Counterclaim Plaintiffs.

W. PAUL BROGOWSKI, JEFFREY BROGOWSKI,
DOUGLAS BROGOWSKI and MATTHEW BROGOWSKI,
Third-Party Plaintiffs.

-against-

JAMES ORTENZIO,

Third-Party Defendant.

MOSKOWITZ, J:

Third-party defendant James Ortenzio, moves for summary judgment, pursuant to CPLR 3212, dismissing all of the third-party causes of action contained in the "Answer to the Second Amended Complaint with Counterclaims," dated March 28, 2003 (Answer) of defendant/counterclaim plaintiff W. Paul Brogowski (Brogowski), and Brogowski's three sons, defendants/counterclaim plaintiffs Jeffrey Brogowski, Douglas Brogowski and Matthew Brogowski (Brogowski Sons).

Ortenzio's motion is granted with respect to the first seven claims asserted against him in the Answer, and denied, to the extent set forth *infra*, with respect to the eighth claim.

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BACKGROUND

The court has recited the relevant facts at length in the prior decisions and orders of this court (including, among others, J.A.O. Acquisition Corp. v Stavitsky (192 Misc 2d 7 [Sup Court NY Co 2001], affd 293 AD2d 323) and, except as necessary, will not repeat the facts here.

Briefly, this action arises out of a sale of the outstanding capital stock of DB Brown, Inc. (DB Brown), a company engaged in the sale and distribution of meat and fish, pursuant to a Stock Purchase Agreement dated June 3, 1997, between JAO Acquisition Corp. (JAO Acquisition), as purchaser, and Brogowski and Jeffrey Stavitsky, as sellers. JAO Holding Company, Inc. (JAO Holding) formed JAO Acquisition in 1997 to acquire the outstanding capital stock of DB Brown.

On October 10, 1997, simultaneously with the closing, the parties entered into an amendment to the Stock Purchase Agreement, in which Stavitsky and Brogowski, inter alia, reduced the company's net worth to \$1,167,630 and reduced the purchase price from \$7,350,000 to \$6,317,630. Stavitsky received \$2,833,816 at the closing. Brogowski was to receive \$3,483,815 - \$1,483,815 at the closing and \$2 million over the following five years, pursuant to a promissory note JAO Acquisition issued to Brogowski (the Promissory Note). At the same time, DB Brown entered into a three-year employment agreement with Brogowski (Employment Agreement) and an eight-year consulting agreement with each of the Brogowski Sons (Consulting Agreements). Ortenzio, the president and primary shareholder of each plaintiff corporation, executed each of these agreements as an officer of the signatory corporation.

Chase Manhattan Bank, plaintiffs' lender, provided the funding for the

transaction and, at all times thereafter, was a secured creditor of DB Brown. At the time of the closing, Brogowski entered into a subordination agreement with Chase Manhattan Bank and sometime thereafter an amendment to the subordination agreement continuing its terms. Under the subordination and amended subordination agreements, Brogowski agreed to subordinate the \$2 million debt owed to him under the Promissory Note to the indebtedness plaintiffs owed to Chase Manhattan.

While the parties dispute the precipitating causes of DB Brown's ensuing problems, it is undisputed that DB Brown thereafter experienced severe financial difficulties. On May 16, 2000, DB Brown sold its physical assets, but not its account receivables, to an unrelated entity, Porky's Products, for \$3.4 million. All of the money from that sale went directly to secured creditor Chase Manhattan. Soon after the sale to Porky's Products, in August 2000 an involuntary petition for bankruptcy was filed against DB Brown. Because DB Brown's remaining assets, i.e., the receivables, worth \$10 to \$15 million, were fully encumbered, they were liquidated for the benefit of Chase Manhattan, and the revenues were distributed directly to Chase Manhattan. According to plaintiffs, Ortenzio and defendants, no other assets of DB Brown remained and the shareholders of DB Brown never received a distribution.

Plaintiffs commenced this action in 1999. In the Second Amended Complaint, dated February 28, 2003 (the Complaint), plaintiffs accuse defendants of misrepresenting the net worth of DB Brown and assert various contract and fraud-based claims against them. "The core of plaintiffs' claim is that defendants intentionally misrepresented material facts about the inventory, the accounts and the financial viability and net worth of [DB Brown] . . ." (192 Misc 2d, at 13).

In the Answer, defendants, in turn, assert various counterclaims against plaintiffs, primarily for breach of contract and fraud, for monies due under the Promissory Note, the Employment Agreement and the Consulting Agreements. Brogowski contends that he is owed \$2 million, plus interest, on the Promissory Note and over \$300,000 pursuant to the Employment Agreement. The Brogowski Sons contend that JAO Acquisition owes them \$750,000 pursuant to the Consulting Agreements. Part of the recovery Brogowski seeks represents approximately six month's time, during which Brogowski actually worked for DB Brown, but did not receive any payment (from October 22, 1999 until sometime in April 2000).

Defendants assert eight of the fifteen counterclaims in the Answer as third party claims against Ortenzio, the controlling shareholder of each of the plaintiffs.¹ These eight claims are as follows: (1) breach of the implied covenant of good faith and fair dealing; (2) tortious interference with the contractual obligations of DB Brown to Brogowski under the Promissory Note, the Employment Agreement and the Consulting Agreements; (3) violation of NJSA §14A:7-14.1 insofar as plaintiffs and Ortenzio allegedly liquidated DB Brown's assets to reduce their liability on their guarantees and to favor other creditors thereby constituting an unlawful distribution of corporate assets to shareholders rendering the corporation unable to pay its creditors; (4) violation of New Jersey's Uniform Fraudulent Transfer Act (NJSA §25:2-20 et seq.); (5) JAO Acquisition's and Ortenzio's breach of contract for failing to deliver a guarantee of the Employment

¹ Although Ortenzio is labeled a "third-party defendant" and in a third party action the eight claims asserted against him are labeled "third-party claims," it is clear that these claims are not true third party claims. Rather, it appears that Ortenzio is in this action as an additional defendant on some of defendants' counterclaims.

Agreement that JAO Holding Co. executed and the Stock Purchase Agreement required (remedy sought: money damages); (6) same as prior claim (remedy sought: specific performance); (7) fraudulent misrepresentations based on the same facts as the fifth and sixth claims; and (8) Ortenzio's and JAO Acquisition's fraudulent misrepresentation that they would perform the terms and conditions of the Stock Purchase Agreement and all agreements as a condition to Brogowski's sale of his stock in DB Brown to JAO Acquisition, but, contrary to these representations, JAO Acquisition and Ortenzio embarked on a concerted scheme to defraud Brogowski and deny defendants the benefits for which they had bargained.

DISCUSSION

Ortenzio maintains that he is entitled to summary judgment dismissing all of the claims third-party plaintiffs have asserted against him. He contends that, because all of the claims concern the Stock Purchase Agreement, the Employment Agreement with Brogowski, the Consulting Agreements with the Brogowski Sons, the Promissory Note, and the delivery of JAO Holding's guarantee, and because he did not sign any of these agreements individually, the court should grant summary judgment in his favor. Plaintiffs and Ortenzio further contend that defendants' misrepresentations concerning DB Brown's value precipitated DB Brown's financial difficulties, that plaintiffs thereafter attempted to resuscitate the company by obtaining infusions of capital or extensions of credit and that all of their actions were proper and economically justified.

Defendants oppose the motion. They contend that the evidence presents questions of fact as to whether these agreements bind Ortenzio personally and whether he engaged in tortious conduct or made fraudulent misrepresentations.

A. Breach of implied covenant of good faith and fair dealing (first claim)

Defendants allege that Ortenzio breached the implied covenant of good faith and fair dealing by failing to satisfy the financial obligations to Brogowski under the Promissory Note and the Employment Agreement and by failing to satisfy the financial obligations to the Brogowski Sons under the Consulting Agreements.

It is undisputed that Ortenzio executed each of the subject agreements in his corporate capacity, as president of DB Brown (with respect to the Employment Agreement and the Consulting Agreements) and as president of JAO Acquisition (with respect to the Promissory Note). Ortenzio submits that he was not a party to any of the agreements in question and he therefore cannot have violated the implied obligation of good faith and fair dealing.

The Employment Agreement and the Consulting Agreements contain New Jersey choice of law provisions. Both the law of New Jersey and New York recognize the doctrine that implicit in every agreement is an implied obligation of good faith and fair dealing and that the doctrine applies only to the actual parties to the agreement (see e.g. Levine v Yokell, 258 AD2d 296[New York law]; Sons of Thunder, Inc. v. Borden, Inc., 148 NJ 396, 420[New Jersey law]).

Defendants do not dispute that Ortenzio was not a party to the agreements, but claim that he should nevertheless be subject to the implied covenant of good faith and fair dealing because he used the various companies he commonly owned as his alter ego.

A party seeking to pierce the corporate veil bears a heavy burden of showing that the individual dominated the corporation with respect to the particular transaction at issue and that the domination was the instrument of fraud or otherwise resulted in

wrongful or inequitable consequences (Matter of Morris v New York State Dept. of Taxation and Finance, 82 NY2d 135, 141-142; see also TNS Holdings, Inc. v MKI Securities Corp., 92 NY2d 335). Here, defendants failed to show that Ortenzio used his alleged domination of the companies he controlled to commit a fraud or wrong against defendants (Spectra Securities Software, Inc. v Munibex.com, Inc., 307 AD2d 835; see also Feigen v Advance Capital Management Corp., 150 AD2d 281, 282 [“the alter ego theory is simply insufficient to support claims for breach of contract against individuals in the absence of specific factual allegations demonstrating fraud or other corporate misconduct or that the individuals in question conducted business in their personal rather than corporate capacity”]).

Additionally, a claim for breach of the implied duty of good faith and fair dealing cannot stand where, as here, the alleged breach is “intrinsically tied to the damages allegedly resulting from a breach of the contract” (Hawthorne Group, L.L.C. v RRE Ventures, 7 AD3d 320, 323, quoting Canstar v J.A. Jones Constr. Co., 212 AD2d 452, 453).

Accordingly, the court grants summary judgment to Ortenzio dismissing this claim.

B. Tortious interference with contract (second claim)

A claim for tortious interference with contract requires “the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third party's breach of contract without justification, actual breach and damages” (Vigoda v DCA Productions Plus Inc., 293 AD2d 265, 266, citing Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 424; see

also Snyder v Sony Music Entertainment, Inc., 252 AD2d 294, 299). There must be intentional interference, not merely an intrusion that is negligent or incident to some other lawful purpose (Costanza Constr. Corp. v City of Rochester, 135 AD2d 1111, 1112; see also NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc., 87 NY2d 614).

It is well established that a corporate executive is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely because, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation's breaking its promise (see Murtha v Yonkers Child Care Assn., 45 NY2d 913). Rather, the executive's personal liability for inducing a breach of a contract, even when the one allegedly harmed otherwise has proven the tort's elements, must rest on the executive's "independent torts or predatory acts directed at another" (Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp., 296 AD2d 103, 110, quoting Buckley v 112 Central Park South, Inc., 285 App Div 331, 334). Here, defendants have not produced any evidence to back up their accusations that Ortenzio acted beyond the scope of his employment, or that personal gain motivated his actions instead of the interests of the corporations (see Petkanas v Kooyman, 303 AD2d 303; see also Feigen v Advance Capital Management Corp., *supra*; BGW Development Corp. v Mt. Kisco Lodge No. 1552 of the Benevolent and Protective Order of Elks of the United States of America, Inc., 247 AD2d 565, 567; S.F.P. Realty Corp. v G.S. Rockaway Development, Inc., 206 AD2d 417; Citicorp Retail Services, Inc. v Wellington Mercantile Services, Inc., 90 AD2d 532, 533).

Accordingly, the court grants summary judgment dismissing this claim as against Ortenzio.

C. N.J.S.A. §14A:7-14.1 (third claim)

Defendants have not addressed or countered any aspect of Ortenzio's motion concerning the third claim. In any event, none of defendants' evidence controverts Ortenzio's showing that this claim is unsupported. The court therefore dismisses the third claim against Ortenzio.

D. New Jersey Fraudulent Transfer Act (fourth claim)

In the fourth claim, defendants allege that JAO Acquisition and Ortenzio schemed to liquidate the assets of DB Brown with the intent to avoid payment of their obligations to: (1) Brogowski under the Promissory Note; (2) Brogowski under the Employment Agreement; and (3) to the Brogowski Sons under the Consulting Agreements.

N.J.S.A. 25:2-25 states:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or

b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they become due.

A fraudulent transfer is defined in N.J.S.A. 25:2-27a as:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

A review of the evidence, including the deposition transcripts, shows that Brogowski primarily views the sale of DB Brown's assets to Porky's Products as violative of the Act. Thus, at his deposition on June 12, 2002, Brogowski testified that he believed that the sale of DB Brown's assets to Porky's Products was "a plan to liquidate the assets for the purpose of reducing Ortenzio's liability on [his personal] guarantees to lenders," because "[i]t would take the assets which I felt I would have otherwise have claim to, sell them for a price, and that the proceeds of that would be turned over to reduce the amount of debts they had with their lender" (Brogowski transcript at 568).

Upon review of the evidence and the law and cases from New Jersey, the court concludes that defendants do not have a claim against Ortenzio under the New Jersey Uniform Fraudulent Transfer Act (see Barsotti v Merced, 346 NJ Super 504, 515, 788 A2d 802 [NJ Super AD 2002]; see also Ralph P. Ferrara & Richard T. Kaltenbach, *Fraudulent Conveyance Cases: A Primer for Both Creditors' and Debtors' Attorneys*, 204 N.J. Lawyer 22, 26 [2000]). The New Jersey Uniform Fraudulent Transfer Act:

"prevent[s] a debtor from placing his or her property beyond a creditor's reach" (Gilchinsky v Natl. Westminster Bank N.J., 159 NJ 463, 475 [1999]; citation omitted). "[A] debtor cannot deliberately cheat a creditor by removing his property from 'the jaws of execution.'" Ibid. (quoting Klein, 251 F Supp. at 2). To determine whether a transfer constitutes a fraudulent conveyance, the court looks at two criteria. First, "whether the debtor [or person making the conveyance] has put some asset beyond the reach of creditors which would have been available to them at some point in time 'but for the conveyance.'" Ibid. (quoting In re Wolensky's Ltd., 163 BR 615, 626-27 (Bankr.D.C.1993)). Second, the court looks at "whether the debtor transferred property with an intent to defraud, delay, or hinder the creditor." Id. at 476. The individual who seeks "to set aside the conveyance bears the burden of proving actual intent." Ibid. (citations omitted).

(Id. at 515-516).

Here, as in Barsotti v Merced, there is no indication that Porky's Products,

the buyer of DB Brown's assets, was related to plaintiffs or that the \$3.4 million transaction was not otherwise an arms-length transaction. "Thus, the test of culpability under NJSA 25:2-27a, that the transfer was made without receiving reasonable value in exchange, has not been met" (*id.* at 516). Nor, as in Barsotti v Merced, have defendants shown that DB Brown became insolvent as a result of the transfer. Therefore, it cannot be said that the asset sale was in any respect fraudulent under the Fraudulent Transfer Act (*id.*).

Accordingly, the court grants summary judgment to Ortenzio dismissing the fourth claim.

E. Delivery of guarantee (fifth, sixth and seventh claims)

In the fifth and sixth claims, defendants claim that JAO Acquisition and Ortenzio breached their obligations under the Stock Purchase Agreement to deliver to Brogowski JAO Holding's guarantee of DB Brown's performance of the terms of the Employment Agreement. Because, as discussed previously, Ortenzio was not a party to the Stock Purchase Agreement or any of the ancillary agreements, but only executed those agreements in his corporate capacity, he cannot be personally liable for the alleged breach of this obligation. Nor, for reasons previously stated, have defendants submitted evidence supporting their claim to pierce the corporate veil.

The seventh claim, relying on a theory of fraudulent inducement, likewise concerns the alleged failure to deliver JAO Holding's guarantee. In this claim, defendants allege that Ortenzio represented and warranted that JAO Acquisition would deliver the guarantee, that the statement was false and known to be false, that Brogowski relied to his detriment upon these representations, and, as a result, that Brogowski suffered damages.

Third party plaintiffs have not particularized these allegations sufficiently and the evidence does not support them. Moreover, this claim is duplicative of the fifth and sixth claims (see e.g. Cornhusker Farms, Inc. v Hunts Point Co-op. Market, Inc., 2 AD3d 201, 206 [fraud cause of action was dismissed as duplicative of contract cause of action]).

Accordingly, the court grants summary judgment to Ortenzio dismissing the fifth, sixth and seventh claims.

F. Fraudulent misrepresentation (eighth claim)

In the eighth claim, defendants accuse Ortenzio of, among other things: (1) fraudulently inducing Brogowski to sign the Stock Purchase Agreement; (2) fraudulently inducing Brogowski to sign the Employment Agreement and to agree to subordinate the sums due under the Promissory Note to those of Chase Manhattan; (3) fraudulently inducing Brogowski to remain in DB Brown's employ after DB Brown had stopped paying wages; and (4) fraudulently inducing Brogowski to sign an amended subordination agreement in favor of Chase Manhattan.

To demonstrate a prima facie claim of fraud, a plaintiff must demonstrate by clear and convincing evidence the existence of a representation of material fact, falsity, scienter, justifiable reliance and injury (Lama Holding Co. v Smith Barney Inc., *supra*, 88 NY2d at 421; Lanzi v Brooks, 54 AD2d 1057, 1058, *affd* 43 NY2d 778; see also Small v Lorillard Tobacco Co., Inc., 94 NY2d 43, 57). The alleged misrepresentation "should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (Hawthorne Group, L.L.C. v RRE Ventures, 7 AD3d 320, 323-324, citing Deerfield Communications Corp. v Chesebrough-Ponds, Inc., 68

NY2d 954, 956 and Smart Egg Pictures, S.A. v New Line Cinema Corp., 213 AD2d 302). Further, an expression of opinion will not support an action for fraud (American Food & Vending Corp. v Intl. Business Machines Corp., 245 AD2d 1089, 1090 ["complaint fails to state a cause of action for fraud because the alleged fraudulent representation by IBM's representative relied upon, viz., that a national vending contract was 'most unlikely' and 'there was nothing to worry about' was not a statement of fact, but an expression of opinion, which will not support an action for fraud"]; Koagel v Ryan Homes, Inc., 167 AD2d 822; Chase Manhattan Bank v Perla, 65 AD2d 207, 210 [4th Dept 1978]). Nor will an expression of future expectations support a fraud claim (see Goldman v Strough Real Estate, Inc., 2 AD3d 677; Chase Manhattan Bank v Perla, supra). As the Fourth Department stated:

Defendants correctly contend that representations of opinion or predictions of something which it is hoped or expected will occur in the future will not sustain an action for fraud (Channel Master Corp. v Aluminum Ltd. Sales, Inc., 4 NY2d 403, 408 [1958]; Burgundy Basin Inn v Watkins Glen Grand Prix Corp., 51 AD2d 140, 144-145 [4th Dept 1976]; 1 Harper and James, Torts, § 7.8). However, a statement concerning a future act which is made with the knowledge or intention that the act would not occur, as the complaint alleges that these representations were made, is deemed a statement of "a material existing fact sufficient to support a fraud action" (Channel Master Corp. v Aluminum Ltd. Sales, Inc., supra, p 407; Sabo v Delman, 3 NY2d 155, 159-160 [1957]).

(Id. at 210).

Ortenzio submits that he is entitled to summary judgment dismissing this claim. He submits that the evidence shows that JAO Acquisition attempted to save DB Brown from the destruction that defendants' misrepresentation of DB Brown's financial viability caused by taking various steps to reduce and streamline operations and expenses, including the sale of unprofitable assets and operations to another entity. He submits that

these actions were objectively necessary, justified and warranted in all respects.

Brogowski, however, claims that Ortenzio personally told him that JAO Holding guaranteed the Employment Agreement, that Ortenzio would personally cover any obligated payments and that DB Brown's payments would be merely delayed. Brogowski alleges that he relied on these statements, for example, by not suing on the Promissory Note, and by amending his subordination agreement. He further claims, among other things, that Ortenzio schemed to and did: (a) fold DB Brown into the other corporations he owned and controlled; (b) transferred the assets and business of DB Brown to those controlled corporations; (c) sold off DB Brown's assets and put it into bankruptcy; and (d) committed other similar acts that prevented DB Brown's performance of its contractual obligations. Brogowski submits that, as a result of these acts, DB Brown's value became depleted, bankruptcy was inevitable and Brogowski was unable to collect his money.

Ortenzio submits that defendants have produced no evidence to support these multiple sweeping claims of fraud. The court agrees in part. Certainly, the claims with respect to Brogowski's subordination of his rights to those of Chase Manhattan, and the extension, lack any evidence of fraud. In this regard, Brogowski has failed to controvert the evidence showing that Brogowski agreed to subordinate the Promissory Note because, otherwise, Chase Manhattan would not have funded the acquisition, not because of any fraud on the part of Ortenzio. The same is true with respect to Brogowski's consent to continue the subordination in favor of Chase Manhattan, as it is clear that his rationale in doing so was because Chase Manhattan would have otherwise foreclosed on its loan to DB Brown at that time. Nor have defendants come forward with

any evidence showing that, at the outset - including the time the transaction closed and the parties executed the relevant agreements - Ortenzio made any actionable misrepresentations with respect to plaintiffs' intent to perform, or not to perform, their obligations under the Stock Purchase Agreement and ancillary agreements (see Hawthorne Group, L.L.C. v RRE Ventures, supra). Nor have defendants made any showing, that, even if Ortenzio made these promises at the time of the execution of the agreements, the promises went beyond a mere expression of opinion, or that these alleged statements caused defendants' losses (see e.g. Goldman v Strough Real Estate, Inc., supra).

As to the remaining fraud claims contained within the eighth cause of action, while it is far from clear that defendants ultimately will prevail, they have come forward with sufficient evidence to defeat summary judgment in Ortenzio's favor at this point. Thus, although the evidence does not support defendants' broad claims of fraud, the evidence before the court does present questions of fact with respect to whether Ortenzio made representations to Brogowski or the Brogowski Sons, that he would personally undertake to compensate Brogowski or the Brogowski Sons for the period they actually worked for DB Brown without payment. Thus, triable questions exist concerning what statements, if any, Ortenzio made to defendants that they would receive payment for their work pursuant to the Employment Agreement and the Consulting Agreements, as well as the scope of this promise (i.e., was there a promise to honor the entire term of these agreements, or only the portion for which defendants had actually worked, but not been paid?). Also, the circumstances regarding alleged transfers to a related company "Greentree" are unclear.

Accordingly, within the limits I have delineated, the court denies that aspect

of Ortenzio's motion seeking summary judgment dismissing the eighth claim.

Pursuant to CPLR 2001, this court may correct irregularities on such terms and mistakes as are just. And if a substantial right of a party is not prejudiced, the court may disregard any irregularity. As noted supra, third-party plaintiffs claims, and now partially remaining eighth cause of action, are not true third-party claims. A third party claim is against a person "who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant. . ." CPLR § 1007. Rather, defendants claim that Ortenzio is an additional defendant on part of the eighth counterclaim against plaintiff JAO Acquisition.

To correct this irregularity, the court dismisses the third-party action and adds James Ortenzio as an additional defendant on the surviving part of the eighth counterclaim against him.

CONCLUSION

It is ORDERED that the motion by third-party defendant James Ortenzio for summary judgment dismissing the third-party claims against him in the "Answer to the Second Amended Complaint with Counterclaims," dated March 28, 2003 is granted with respect to the first, second, third, fourth, fifth, sixth and seventh third-party claims, and denied with respect to the eighth third-party claim to the extent set forth herein; and it is further

ORDERED, that pursuant to CPLR 2001, the remainder of the third-party action is dismissed in its entirety; and it is further

ORDERED, that James Ortenzio is added as an additional defendant on part

of the eighth counterclaim; and it is further

ORDERED that the caption is deemed amended to read:

J.A.O. ACQUISITION CORP., J.A.O. HOLDING COMPANY,
INC., and D.B. BROWN, INC.
Plaintiffs and Counterclaim Defendants.

- against -

JEFFREY D. STAVITSKY, CRESCENT FOOD SALES, INC. and
FIRST UNION NATIONAL BANK f/k/a CORESTATES BANK,
N.A.,
Defendants.

W. PAUL BROGOWSKI, JEFFREY BROGOWSKI, DOUGLAS
BROGOWSKI and MATTHEW BROGOWSKI,
Defendants and Counterclaim Plaintiffs,

JAMES ORTENZIO,
Additional Defendant on Counterclaim.

and it is further

ORDERED that the Clerk is directed to enter judgment and dismiss the third
party action and to mark the court records with the amended caption supra in main action.

Dated: February 24 2005

ENTER:
FILED
FEB 28 2005
NEW YORK
COUNTY CLERKS OFFICE
J.S.C.