

**Fresh Del Monte Produce N.V. v Eastbrook Caribe
A.V.V.**

2006 NY Slip Op 30125(U)

June 28, 2006

Supreme Court, New York County

Docket Number: 0600860/2003

Judge: Charles E. Ramos

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

PRESENT: CE Ramos

PART 53

Index Number : 600860/2003
FRESH DEL MONTE PRODUCE N.V.
vs
EASTBROOK CARIBE A.V.V.
Sequence Number : 014
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

C

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 **FILED**

Upon the foregoing papers, it is ordered that this motion

JUL 06 2006

NEW YORK
COUNTY CLERK'S OFFICE

*is decided in accordance with
accompanying memorandum decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/28/06

D
CHARLES E. RAMOS
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
FRESH DEL MONTE PRODUCE N.V., FRESH DEL
MONTE PRODUCE, INC., and IAT GROUP, INC.,

Plaintiffs,

Index No. 600860/03

-against-

EASTBROOK CARIBE A.V.V., EASTBROOK, INC.,
and EASTBROOK LIMITED,

Defendants.

FILED

JUL 06 2006

NEW YORK
COUNTY OF NEW YORK

Charles Edward Ramos, J.S.C.:

In motion sequence 14, plaintiff IAT Group, Inc. (IAT), moves, pursuant to CPLR 3212, for summary judgment on their fifth and sixth causes of action in the amended complaint. Eastbrook Caribe A.V.V., Eastbrook Inc., and Eastbrook Limited (collectively "Eastbrook") cross-move for summary judgment, dismissing those claims.

The fifth cause of action seeks to hold Eastbrook liable for an additional \$4.6 million in indemnity obligations. This Court previously found that Eastbrook's filing of its Summons with Notice in November 2002 ("Eastbrook Action") constituted an assertion of Released Claims¹ in breach of the 1996 Eastbrook Release Agreement. As a result of the breach, Eastbrook was

¹Eastbrook Release §2 (e) states: "The term 'Released Claims' shall include all Claims that (i) the Releasor or any of the Associated Parties may have had in the past, now have or hereafter can, shall or may have against any of the Releasees, and (ii) have arisen or arise directly or indirectly out of, or relates directly or indirectly to, any circumstance, agreement, activity, action, or omission, event or matter occurring or existing from the beginning of the world to the date of this Release, including (A) all rights, Claims, and interests asserted in the [Eastbrook Action]; (B) all rights, Claims and interests actually or purportedly assigned to [Eastbrook]..."

ordered to pay \$9.5 million in damages to IAT, the maximum indemnification award allowable under the Eastbrook Release Agreement. However, it is IAT's current claim that, based on the doctrine of equitable assignment, Eastbrook is liable for an additional \$4.6 million under the indemnity clause²The Release Agreement defines "Associated Parties" as (i) the Releasor's past, present and future employees, agents, representatives and attorneys; (ii) the Releasor's successors; (iii) the Releasor's past present and future assigns; (iv) each entity that the Releasor has the power to bind (by its acts or signature) or over which the Releasor owns, directly or indirectly, at least 50% of the outstanding equity, beneficial, proprietary, ownership, or voting interests; provided, however, that the Associated Parties shall not include any of the Releasees in the Trumpet Vine Investments N.V. ("Trumpet Vine") Release, whereby it is alleged that Eastbrook asserted or purported to assert Released Claims of Trumpet Vine in the Eastbrook Action.

²Trumpet Vine Release §4 Indemnification provides: "Without in any way limiting any of the rights or remedies otherwise available to any Releasee, the Releasor shall hold harmless and indemnify each of the Releasees from and against, and shall compensate and reimburse each of the Releasees for, any loss, damage, injury, decline in value, lost opportunity, liability, claim, demand, settlement, judgment, award, fine, penalty, tax, fee (including reasonable attorneys' fees), charge, cost or expense of any nature ("Damages") which is suffered or incurred by any of the Releasees or to which any of the Releasees may otherwise become subject (regardless of whether or not such Damages relate to any third party claim) and which arise from or as a result of, or are connected with, the assertion or purported assertion of any of the Released Claims by the Releasor or any of the Associated Parties from and after the date hereof provided that such indemnification shall be limited to U.S. \$4,600,000."

The sixth cause of action seeks, in the alternative, that the Court reform the Eastbrook Release to increase the indemnity obligation by \$4.6 million based on theories of fraud and equity.

Background

The background is set forth in this Court's decision dated September 22, 2004, and shall not be repeated here.

Summary Judgment

In order to grant summary judgment, the court must determine whether a material and triable issue of fact exists. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). After the movant makes a prima facie case, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a material issue of fact that requires a trial. *Winegrad v New York Medical Univ. Med. Cen.*, 64 NY2d 851 (1985). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion, and must give that party the benefit of every inference which can be drawn from the evidence. *See Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989).

Fifth Cause of Action - Equitable Assignment

IAT asserts that Eastbrook, in furtherance of the reactivation³ of Eastbrook Caribe in the Aruba Courts in 2002 ("Aruba Action"), made sworn statements relative to the direct and indirect ownership of Trumpet Vine's shares in Fresh Del

³Subsequent to the 1996 Settlement Agreement, Eastbrook Caribe was liquidated and distributed.

Monte Produce N.V. ("Del Monte"). Thereafter, in the Eastbrook Action before this Court, Eastbrook allegedly asserted (or purported to assert) Trumpet Vine's Released Claims proscribed in the Trumpet Vine Release Agreement. Further, Eastbrook did not add the alleged necessary and indispensable Trumpet Vine as a party in the action for rescission of a settlement agreement, to which Trumpet Vine was a signatory. In light of these allegations, IAT moves for a finding of an equitable assignment of rights from Trumpet Vine to Eastbrook. This Court is constrained to do so.

An equitable assignment of a debt, claim, or chose in action, either written or parol, if founded on good consideration, is valid and enforceable. *Hofferberth v Duckett*, 175 AD 480 (1st Dept 1916). No particular form of words is necessary to constitute such an assignment, but any words will suffice which show an intention to transfer the debt, claim, or chose in action. *Id.* Although this Court has the power to make such an equitable determination [*Nestor v McDowell*, 81 NY2d 410 (1993) (citing *NY Const*, Art VI, §7a)], IAT fails, as a matter of law, to adequately support such a finding.

IAT relies on the sworn statements made in the Aruba Action where, W. Scott Perry⁴, through counsel, alleged that Eastbrook Caribe was the direct and indirect owner of approximately 16 percent of the outstanding shares of Del Monte. Further, in Eastbrook's Verified complaint filed in the Eastbrook Action, it

⁴President of Trumpet Vine & Eastbrook Caribe.

was seeking to recover "the same percentage⁵ of outstanding shares of Del Monte as Eastbrook Caribe owned of Del Monte prior to the Settlement Agreement." *Eastbrook Complaint* ☆103(i). Eastbrook argues that it asserted its own rights in the Eastbrook Action based on the "direct and indirect ownership interests" transferred by Carlos Cabal Peniche⁶, and based upon Eastbrook's right as a minority shareholder of Del Monte, through Trumpet Vine, to receive adequate compensation for the shares of Del Monte transferred in the Settlement Agreement.

IAT fails to adequately persuade this Court that the circumstances warrant the finding of an equitable assignment as a matter of law. Eastbrook's alleged "assertion or purported assertion⁷" of Trumpet Vine's Released Claims in the Aruba Action and/or the Eastbrook Action does not "confirm," as a matter of law, that an equitable assignment had taken place. Similarly, where Eastbrook did not join the alleged "necessary and indispensable" Trumpet Vine in the Eastbrook Action, and where Trumpet Vine gave IAT "reasonable payment instructions⁸" to have the \$4.6 million settlement funds transferred to Eastbrook rather than Trumpet Vine in accordance with the Settlement Agreement, are not determinative, as a matter of law,

⁵Approximately 25 percent, of which, as IAT contends, included shares of Del Monte owned by Trumpet Vine.

⁶A Mexican businessman, who put together an investment group to acquire Fresh Del Monte Produce.

⁷Trumpet Vine Release \$4 Indemnification at note 2.

⁸Trumpet Vine Settlement Agreement §2(a).

that an equitable assignment had taken place. IAT provides insufficient evidence, either written or parol, of Trumpet Vine's intention to transfer their rights or claims to Eastbrook in order to effectuate an equitable assignment. In any event, this Court finds that triable issues of fact are in dispute as to whether Eastbrook asserted or purported to assert their own claims or those of Trumpet Vine. Summary judgment is therefore denied as to the fifth cause of action.

Sixth Cause of Action - Reformation of the Eastbrook Release

The elements required for a viable fraud action are: "an allegation of material fact, misrepresentation, scienter, reliance and damages." *Nottenberg v Walber 985 Co.*, 160 AD2d 574 (1st Dept 1990). IAT fails to establish those elements as a matter of law.

IAT alleges that, in light of Perry's contention that Eastbrook Caribe was supposed to and did receive the \$14.1 million settlement proceeds, Trumpet Vine and Perry made false representations in 1996 as to whom the \$4.6 million would be paid. IAT further alleges that those false representations were reasonably relied on when IAT entered into the settlement terms whereby indemnification was limited to the monetary amount paid in consideration for Del Monte shares. With regard to damages incurred, this Court has already found that the filing of the Eastbrook Action directly resulted in a drop of 56 cents per share of IAT's 26 million Del Monte shares for a total loss of \$14.56 million.

Generally, a claim for fraud, due to the highly subjective subject matter, is unsuitable for summary judgment. See e.g. *Falk v Goodman*, 7 NY2d 87 (1959). This is the case here.

Whether IAT knew or should have known in 1996 that the \$14.1 million would be received by Eastbrook; whether Eastbrook was aware that there was a "mistake" in the Releases in 1996; at what time IAT knew or should have known that there was an alleged fraud relative to the issue of timeliness in a fraud claim; and the credibility of Perry are all disputed issues of fact that cannot be determined on a motion for summary judgment.

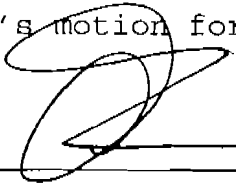
Summary judgment relief should not be granted where there is any doubt as to the existence of a triable issue, or where the issue is even arguable. *Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 (1st Dept 1987). It is not the court's function on a summary judgment motion to assess credibility unless untruths are clearly apparent. *Colonial Indem. Ins. Co. v NYNEX*, 260 AD2d 833 (3rd Dept 1999). It is clear that a trial is needed to determine the facts in dispute. Therefore, summary judgment is denied as to the sixth cause of action.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's motion for summary judgment is denied.

Dated: June 28, 2006



J.S.C.
CHARLES E. RAMOS

FILED
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JUL 10 2006

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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