

Sabo v Candero

2007 NY Slip Op 30351(U)

March 21, 2007

Supreme Court, New York County

Docket Number: 0401573

Judge: Shirley W. Kornreich

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

PRESENT
Index Number : 401573/2004

PART 54

SABO, ABRAM

vs

CANDERO, ALBERTO

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE

12/14/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

1-3

4-6

7-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 27 2007

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: March 21, 2007

SHIRLEY WERNER KORNREICH
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
ABRAM SABO,

Plaintiff,

-against-

ALBERTO CANDERO and CANDERO REALTY CORP.

Defendants.
-----X

KORNREICH, SHIRLEY WERNER, J.:

Index No.: 401573/04

**DECISION
and
ORDER**

This is a shareholder's derivative action sounding in fraud (first cause of action), conversion of corporate assets (second cause of action), breach of fiduciary duty and breach of contract (jointly third cause of action), and demanding an accounting (fourth cause of action). The fifth cause of action seeks punitive damages. Plaintiff now moves for summary judgment, directing defendant Albert Canderero ("Canderero" or "defendant") to pay to the corporate defendant, Canderero Realty Corp. ("Canderero Realty" or "Corporation"), the amount of \$815,963.31, plus interest. Plaintiff alleges defendant misappropriated that sum from the Corporation in two transactions, which occurred without plaintiff's knowledge or consent: 1) the refinancing of a mortgage on a building owned by Canderero Realty; and 2) the subsequent sale of the building. Defendant opposes plaintiff's motion and cross-moves for summary judgment on his first counterclaim for breach of contract and to dismiss the amended complaint.

Factual Background

On July 16, 1998, the plaintiff and Canderero entered into a Stock Purchase Agreement (the "Contract"). Prior to that date, defendant had been the sole shareholder of Canderero Realty Corp.

("Candero Realty"). Candero Realty's sole asset was a piece of real property located at 856 Tenth Avenue in New York City (the "Property"). The Contract, in pertinent part, provided as follows:

2. INTENTION

It is the agreement of the parties herein that Alberto [defendant] will transfer to Abram [plaintiff] one hundred (100) of the shares he owns in Candero [Realty]. Thereafter, Abram will be the owner of 50% (fifty percent) of all of the issued and outstanding shares in the corporation.

3. PURCHASE PRICE

Abram agrees to pay Alberto \$109,981.33. Payment shall be made upon the signing of the agreement herein and the transfer of the stock certificates from Alberto to Abram. Abram agrees that he has been shown the corporation's books and records, and knows that the corporation is indebted by virtue of a mortgage, which mortgage covers the sole property owned by the corporation. . . .

4. REPRESENTATIONS

- c.) Alberto represents that there are no debts except those reflected on the books of Candero [Realty] herein as of the date of sale except those debts incurred in the ordinary course of the day-to-day operation of the business of Candero [Realty]. Should there be any debt of Candero [Realty] which debt exceeds Ten Thousand (\$10,000) [sic] Dollars, and which debt is not recorded on the books of Candero [Realty] as of the date of the execution of this agreement, and which debt was not incurred in the ordinary course of business . . . Alberto agrees that . . . he shall remain liable therefor.

15. ENTIRE AGREEMENT

The parties . . . further agree that this document contains their entire understanding and that there are no oral agreements or other written agreements.

16. MODIFICATION

There shall be no oral modification of this Agreement. Any modification shall be in writing and shall be signed by the party herein to be charged.

The parties shared office space at the Property subsequent to the execution of the Contract, until about September 1, 2000, at which time plaintiff relocated his office. The books and records of the Corporation continued to be maintained with defendant at the Property. The relationship between the men remained friendly for some time, but soured when plaintiff discovered through third-party sources that the Property had been refinanced and sold to Kee Won Chung for \$1,500,000, without plaintiff's knowledge.

Unable to contact defendant for an explanation, plaintiff brought the predecessor to this action (*Sabo v. Cadero*, Index. No. 101800/02, hereinafter the "Initial Action"), alleging that defendant had impermissibly sold the Property and misappropriated the proceeds. In his answer to the complaint in the Initial Action, defendant asserted three counterclaims: 1) breach of the Contract, seeking nullification of the sale of the Corporation's stock to plaintiff; 2) an accounting and damages for insurance money of the Corporation allegedly collected by plaintiff; and 3) repayment of a \$100,000 loan allegedly made by defendant to plaintiff.

In September 2002, plaintiff moved for summary judgment in the Initial Action. In October 2002, defendant cross-moved for a default judgment on his counterclaims, summary judgment on his third counterclaim for the \$100,000 loan, and dismissal of the complaint. Defendant also opposed plaintiff's summary judgment motion on the ground that discovery was incomplete and moved to compel disclosure.

In opposition to plaintiff's motion for summary judgment, defendant had argued that, by oral agreement, he had given the stock certificate to Jay Zerlin, the attorney who drafted the Contract, with the understanding that Mr. Zerlin would hold the certificate in escrow until the full purchase price had been paid to Mr. Zerlin.

In reply, plaintiff submitted, Mr. Zerlin's affidavit, sworn to on October 29, 2002, in which he denied the existence of the escrow agreement. Mr. Zerlin further averred that:

Sabo and Canderero signed the Stock purchase agreement in my presence and I issued the shares to each party. It was my understanding that as of that point, each party was a fifty (50%) percent shareholder of Canderero Realty Corp.

In addition, plaintiff submitted a stock certificate in his name, dated the same day as the Contract, for 100 shares of Canderero Realty Corp.; two personal checks dated July 31, 1998, drawn on the account of Sofia Sabo, made out to Alberto Canderero, in the amount \$40,000 and \$25,000, which plaintiff alleged was partial payment of his 50% interest in the Corporation, claiming he paid the remainder in cash; and an unsigned U.S. Income Tax Return form for Canderero Realty for the year 2000, which listed plaintiff's name in Schedule K-1 as a shareholder with 50% ownership. The 2000 tax return indicated that it was prepared by Elliot M. Roth, CPA.

On January 29, 2003, this court issued an order in the Initial Action ("Prior Decision") denying summary judgment to plaintiff, denying defendant's motion for summary judgment, dismissing defendant's counterclaims, denying defendant's motion for a default judgment, granting defendant's motion to compel discovery solely to the extent that it sought proof of plaintiff's cash payments on account of the purchase price of his stock, and directing an accounting before a Special Referee of the proceeds of the refinancing and sale of the Property.

On May 9, 2003, this court granted plaintiff's motion to amend the complaint and again

referred the accounting to a Special Referee. Defendant's answer to the amended complaint continued the breach of contract and insurance proceeds counterclaims, but omitted the claim regarding the \$100,000 loan.

Subsequently, the Initial Action was removed by defendant to Rockland County and then refiled in New York County under the present index number. The accounting was heard and Special Referee Louis Crespo issued a report on March 8, 2005, which was modified by order of this court dated October 31, 2005.

Plaintiff's current motion seeks an order directing defendant to remit to Candero Realty the following amounts based on the accounting: \$93,963.31, the amount defendant received from the refinancing of the Property on November 21, 2000; \$716,100.00, the amount of the proceeds defendant received from the sale of the Property on March 21, 2001; and \$5,900.00 that Candero Realty paid to an attorney who handled the sale of the Property.

Defendant does not dispute that these figures accurately reflect the findings of Special Referee Crespo. Nonetheless, defendant argues, as he did on the motion that resulted in the Prior Decision, that plaintiff does not own 50% of Candero Realty because he breached the Contract by failing to pay the full purchase price for his stock. Defendant also argues that he is entitled to credit for a loan, in the amount of \$320,487.00, that he made to Candero Realty to purchase the Building, prior to his Contract with plaintiff.

Plaintiff counters that his ownership of 50% of the stock of Candero Realty is law of the case under the Prior Decision and the May 9, 2003 orders of this court, and that defendant is precluded from further litigation of the issue. Defendant has submitted an affidavit of Elliot Roth, Candero Realty's accountant, who avers that the 2000 income tax return relied on by the

court in the Prior Decision was not authentic and that no return was filed that year. Mr. Roth also states that he only filed returns for Candero Realty for tax years 1998 and 1999, copies of which are annexed to his affidavit, and which state that defendant owned 100% of Candero Realty. The 1998 tax return has an entry on line nineteen, entitled "Loans from shareholders," in the amount of \$320,488. Mr. Roth also furnishes the court with excerpts from the general ledger for Candero Realty for 1998, which according to his affidavit shows a loan made by Albert Candero to Candero Realty Corp. as of December 31, 2000 in the same amount. Affidavit of Elliot Roth, sworn to on September 22, 2006, Ex. 5. The 2000 date for the ledger in Mr. Roth's affidavit is clearly an error, as Exhibit 5 is the general ledger for 1998. In a second affidavit, sworn to on December 14, 2006, Mr. Roth admits that the loan in the amount of \$320,488.96 that Mr. Candero made to Candero Realty to purchase the Property in March of 1998 was not reflected in the ledger until the end of that year, subsequent to the sale of one-half of the Corporation's stock to plaintiff.

Conclusions of Law

A. Law of the Case and Statute of Limitations

The Appellate Division recently summarized the law of the case doctrine succinctly:

The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding (*see Bellavia v Allied Elec. Motor Serv.*, 46 A.D.2d 807, 361 N.Y.S.2d 193). The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision (*see Gay v Farella*, 5 A.D.3d 540, 772 N.Y.S.2d 871). The doctrine may be ignored in extraordinary circumstances such as a change in law or a showing of new evidence (*see Foley v Roche*, 86 A.D.2d 887, 447 N.Y.S.2d 528).

Brownrigg v. New York City Hous. Auth., 29 A.D.3d 721, 722, 2006 NY Slip Op 3828 (2d Dept.

2006). Law of the case is sometimes referred to as intra-action *res judicata* and is an “amorphous doctrine” that “directs a court’s discretion,” but does not restrict its authority. *People v. Evans*, 94 N.Y.2d 499, 503-504 (2000).

The Prior Decision directed an accounting after a lengthy discussion of the fiduciary obligations of corporate directors and officers and a review of the evidence submitted by each party with regard to the claim that plaintiff was a 50% stockholder of the Corporation. Implicit in the Prior Decision’s order directing an accounting was a determination that, based upon the evidence submitted on plaintiff’s motion for summary judgment, plaintiff had prevailed on his claim that he owned half of the stock of the Corporation. The remaining issues of fact identified by this court were whether defendant breached his fiduciary duty by converting the proceeds from the refinancing and sale and whether plaintiff had paid the balance of the purchase price. The evidence of the 1998 and 1999 tax returns and the affidavit of the accountant who prepared them, submitted for the first time on this motion, clearly were available on the prior motion. Defendant failed to present this evidence on the original motion and does not explain why. It would be manifestly unfair to allow defendant to relitigate this issue now that Mr. Zerlin, the attorney who represented the Corporation during the sale and who supported plaintiff’s proof of the sale, has died. Renewal should be denied where a party fails to offer a valid excuse for not submitting the additional facts upon the original application. *Foley v. Roche*, 68 A.D.2d 558, 568 (1st Dept. 1979). Accordingly, the doctrine of law of the case bars defendant from presenting new evidence negating plaintiff’s claim to 50% ownership of the Corporation and that determination stands.

However, in the exercise of discretion, the court corrects the Prior Decision insofar as the

second decretal paragraph entirely dismissed defendant's counterclaim for breach of contract. Every court retains continuing jurisdiction to reconsider prior interlocutory orders during the pendency of an action. *Liss v. Trans Auto Systems*, 68 N.Y.2d 15, 20 (1986). Although the body of the Prior Decision recognized that an issue of fact existed as to whether plaintiff had proven that he had paid the full purchase price under the Contract, the second decretal paragraph erroneously dismissed defendant's counterclaim for breach of contract. In addition, the court corrects its prior order insofar as there was no decretal paragraph granting plaintiff summary judgment on liability on his claim for an accounting.

B. Defendant's Counterclaim for Breach of Contract

Defendant clearly is entitled to damages for the balance of the purchase price, as plaintiff now does not dispute defendant's claim that the balance of the purchase price due under the Contract remains unpaid. *Ascoli v. Lynch*, 2 A.D.3d 553 (2d Dept. 2003). Plaintiff previously alleged that he had paid the balance in cash. The remedy for failure to pay the purchase price is not, as defendant previously contended and now maintains, the return of plaintiff's stock. Contractual damages are measured by the amount needed to compensate the plaintiff for the actual loss or anticipated profit of the bargain. *Freund v. Washington Square Press, Inc.*, 34 N.Y.2d 379, 382-383 (1974). The injured party may not recover more from the breach than he would have gained had the contract been fully performed. *Id.* Furthermore, the existence of a valid and enforceable contract precludes restitution of the benefit received on the theory of unjust enrichment. *Sergeants Benevolent Assoc. Annuity Fund v. Renck*, 19 A.D.3d 107, 111 (1st Dept. 2005)(unjust enrichment does not lie where damages arise from breach of valid contract); *Korff v. Corbett*, 18 A.D.3d 248, 251 (1st Dept. 2005)(restitution appropriate damages for unjust

enrichment claim). Indeed, for more than two years, defendant treated plaintiff as a partner, sharing the corporate office with him and never demanding the return of the stock.

Accordingly, defendant's motion for summary judgment on his first counterclaim for breach of contract is granted only to the extent that he may recover from plaintiff the balance of the purchase price, plus interest from July 16, 1998.

B. Defendant's Alleged Loan

Defendant argues that he is entitled to credit on the accounting for the \$320,487 loan allegedly made by him to the Corporation to purchase the Property. This issue was expressly reserved during the hearing before the Special Referee. Defendant argues that Candero Realty was obliged to repay the amount of that loan, regardless of the Corporation's ownership.

Plaintiff's affidavit states that there were no loans on Candero Realty's books at the time he executed the Contract. Section 4(c) of the Contract provides that any loan in the amount of \$10,000 or more, not incurred in the ordinary course of business, that was not reflected on Candero Realty's books as of July 16, 1998, is the personal obligation of defendant. Defendant has presented no proof that the alleged loan was on the books on the critical date. Defendant offers the affidavit of Elliot Roth, the accountant, which states that the loan was on the books at the end of 1998. The general ledger itself does not show a loan from defendant in that amount as of July 16, 1998, the date of the Contract of sale.

As defendant has presented no proof that the loan was on the books as of July 16, 1998, it does not matter whether the loan was in existence. The crucial issue is whether it was reflected on the books. Accordingly, defendant has failed to come forward with proof in admissible form that he is entitled to a credit for the loan on the accounting.

C. Plaintiff's Breach of Contract Claim

Defendant argues that plaintiff's breach of contract claim must be dismissed. He contends that "a single complaint cannot contain personal claims and claims that are derivative in nature," citing *Abrams v. Donati*, 66 N.Y.2d 951 (1985). In *Abrams*, the Court of Appeals held that although a shareholder has no individual claim for a wrong against the corporation despite the diminution of the value of his investment, a shareholder may maintain an individual action for breach of a duty owed to the individual shareholder, if it is independent of any wrong to the corporation. *Id.* at 953. Here, some of plaintiff's claims involve a breach of Candro's independent obligations to plaintiff, notably the contractual undertaking to remain personally liable for loans not recorded on the books as of July 16, 1998. Therefore, plaintiff has both an individual and a derivative claim.

Accordingly, defendant's cross-motion for summary judgment dismissing plaintiff's claim for breach of contract is denied. In searching the record, the court holds that plaintiff is entitled to summary judgment on his breach of contract claim to the extent that it encompasses repayment of the loan in violation of the Contract.

D. The Accounting

The court has already determined, based on the Special Referee's Report, as modified by this court's order of October 31, 2005, that defendant Candro received the following amounts from the two challenged transactions: \$84,863.31 from the November 21, 2000 refinancing and \$650,000 from the March 21, 2001 sale. The Referee's Report was based upon stipulations of the parties as to these amounts and the court's modification consisted of correcting an arithmetical mistake, which defendant did not oppose.

Plaintiff argues that defendant should not have paid from the proceeds of the sale of the Property a fee in the amount of \$5,900 to Alan Brill, Esq., who handled the transaction. However, the court holds that this was a proper expense as the Corporation benefitted from the sale.

In addition, plaintiff seeks to an order that defendant must repay to the Corporation \$9,100, out of a check in the amount of \$13,300, which was issued to the League of Mutual Tax Owners Credit Union (“LOMTO”) in connection with the refinancing. Plaintiff presents the affidavit of Stuart Wiener, Chief Financial Officer of LOMTO, which states that a \$13,300 check to defendant was endorsed by him and deposited in an escrow account, from which \$9,100 was deposited in defendant’s account at LOMTO. Defendant does not rebut this evidence and accordingly, the total amount of the refinancing that he received from the refinancing is \$93,963.31, which is the sum of the \$84,863.31 check paid directly to defendant, plus the \$9,100 that found its way to his LOMTO account.

E. Plaintiff’s Remaining Claims

Plaintiff is granted summary judgment on his claims for fraud and breach of fiduciary duty as there is no dispute that defendant converted money from the sale and refinancing of the Property that belonged to the Corporation. Plaintiff’s fraud claim does not duplicate his claim for breach of fiduciary duty, as there is undisputed proof that defendant failed to inform plaintiff of the two transactions. *See, Kaufman v. Cohen*, 307 A.D.2d 113 (1st Dept. 2003).

F. Statute of Limitations Barring the Loan Claim

The court rejects defendant’s contention that plaintiff’s claims regarding repayment of the loan to defendant are barred by the statute of limitations . The claim relating to the loan

encompasses a claim for breach of section 4(c) of the Contract, as well as claims against a stockholder for injury to corporate property, for an accounting and for fraud. These claims are subject to a six year statute of limitations. C.P.L.R. §§ 213(2), 213(7) and 213(8). These claims did not accrue, as defendant contends, when the loan was made. There was no wrong until Candero took the proceeds of the sale to repay himself in March of 2001. Plaintiff's original complaint was filed on January 25, 2002, within the statute of limitations, and his amended complaint relates back to the filing of the original complaint. C.P.L.R. §203(f). The fraud claim is also subject to a discovery rule, which would extend the accrual of plaintiff's claim until at least May 2001, when he discovered the refinancing. C.P.L.R. §213(8).

G. Additional Accounting Issues and Punitive Damages

Plaintiff's motion asks for a hearing on consequential and punitive damages, in addition to the damages awarded on the basis of the accounting. Plaintiff's attorney's affirmation states that a hearing is necessary to determine additional damages from the sale, including lost rents and the current value of the Property. There is an unresolved issues relating to the accounting regarding a \$3,000 check disbursed by Alan Brill, Esq., nine months after the sale of the Property. Finally, there remains defendant's second counterclaim for an accounting of insurance proceeds, which was not addressed by either party on these motions.

Punitive damages may be awarded in an action against corporate officers and directors for breach of fiduciary duty, fraud and diversion of corporate funds and assets where the defendant's conduct is gross, wanton, deliberate and demonstrates a high degree of moral culpability. *Giblin v. Murphy*, 73 N.Y.2d 769 (1988); *VJV Transport Corp. V. Santiago*, 173 A.D.2d 537 (2d Dept. 1991). Here, whether defendant's conduct was deliberate and demonstrated a high degree of

moral culpability is a question of fact and, therefore, defendant's motion for summary judgment dismissing plaintiff's fifth cause of action for punitive damages is denied.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted solely to the extent that he is entitled to summary judgment on his first and second causes of action for fraud and conversion of corporate assets, on his third cause of action for breach of fiduciary duty, and partial summary judgment on his third cause of action for breach of contract, insofar as it relates to a loan from Albert Canderero not recorded on the books of Canderero Realty Corporation as of July 16, 1998, and the balance of plaintiff's breach of contract claim is dismissed with prejudice, and the remainder of the motion is denied; and it is further

ORDERED that Alberto Canderero owes Canderero Realty Corp. \$93,963.31, with interest from November 21, 2000, and \$716,100 with interest from March 21, 2001, and that plaintiff Abram Sabo is entitled to recover half of that amount from defendant Albert Canderero; and it is further

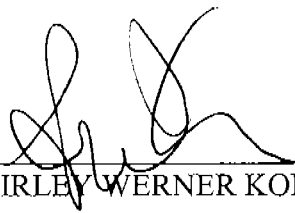
ORDERED that defendant Albert Canderero's cross-motion for summary judgment dismissing the amended complaint and for summary on his first counterclaim for breach of contract is granted solely to the extent that he is granted summary judgment against plaintiff Abram Sabo on his first counterclaim for breach of contract in the amount of \$44,981.33, with interest from July 16, 1998, and in all other respects the cross-motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and sever the remainder of the action, which shall continue; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 54, Room 1227

at 111 Centre Street, New York, N.Y. on April 5, 2007.

Dated: March 21, 2007


SHIRLEY WERNER KORNREICH

[FILED]
MAR 27 2007
COUNTY CLERKS OFFICE
NEW YORK