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

PRESENT: Jane S. Solomon Justice

PART 55

Fox Rich Textiles, Inc

- v -

Newburgh Dye & Printing, Inc

INDEX NO. 602514/05

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

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

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided as per attached decision & order.

FILED
JUN 05 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/31/07

JANE S. SOLOMON J.S.C.

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

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: IAS PART 55

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FOX-RICH TEXTILES INC.,

Plaintiff,

-against-

NEWBURGH DYE & PRINTING, INC. and GREGORY C. MASSIMI,

Defendants.

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DECISION AND ORDER

Index No. 602514/05



**JANE S. SOLOMON, J.:**

This matter arises in connection with the disposition of certain fabric and textile inventory (the Inventory) owned by plaintiff, Fox-Rich Textile Inc. (Fox-Rich), that was stocked, processed, and held for distribution to Fox-Rich's customers by defendant Newburgh Dye & Printing, Inc. (Newburgh). Defendant Gregory Massimi was the president and chief executive officer of Newburgh.

According to the complaint, Fox-Rich began to do business with Newburgh in May 2004. Newburgh had been in Chapter 11 proceedings since 2003 in the United States Bankruptcy Court for the Southern District of New York; the case was dismissed in June of 2005.[1]

The arrangement between the parties was that Fox-Rich

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[1] Matter of Newburgh Dye & Printing, Inc., United States Bankruptcy Court, SD NY, June 17, 2005, Morris, J., Case No. 03-30316-cgm.

would have Newburgh dye and/or finish greige goods[2] in Inventory and, upon completion of the applicable process, direct Newburgh to hold the goods for further instruction, or ship them to Fox-Rich's customers. When Fox-Rich was not satisfied with Newburgh's performance, or if there was damage to the Inventory, it would issue a "chargeback".

Fox-Rich maintains that from and after February 2005, Newburgh's work for Fox-Rich's customers was inadequate, generating extraordinary working losses, more than usual returns and excessive chargebacks. As early as March 2005, Fox-Rich requested that Newburgh send a statement listing all open invoices, debits, and credits, as well as an inventory listing of greige goods, work in progress, and finished goods, but Newburgh did not do so.

Early in June 2005, Newburgh's customers were informed that Newburgh would be open for business. Later that same month, Newburgh informed its customers that it would be ceasing production, and that all sums due had to be paid via bank transfer before any merchandise would be released to customers. Fox-Rich demanded its Inventory. When Newburgh refused to release it without payment, this action was commenced. The complaint was drafted in language speaking in replevin, and

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[2] "Greige" goods are raw or unprocessed fabric directly off the loom.

sought damages against both Newburgh and Massimi, in his personal capacity, for conversion of withheld Inventory (first cause of action), breach of contract for payment of Newburgh's outstanding obligations to Fox-Rich in excess of that due from Fox-Rich (second cause of action), account stated (third cause of action), and "monies due and owing" (fourth cause of action).[3]

Both Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the first cause of action, now only for conversion (see, infra, re the failed replevin effort), and any portion of the complaint seeking punitive damages. Massimi also seeks dismissal of all claims against him.

**First Cause of Action**

Conversion is the unauthorized exercise of dominion over goods belonging to another to the exclusion of the owner's rights. See Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex., 87 NY2d 36, 44 (1995); Employers' Fire Ins. Co. v Cotten, 245 NY 102, 105 (1927). Here, Fox-Rich, whose statements enjoy the inference of veracity (Patrolmen's Benevolent Assn. v City of New York, 27 NY2d 410, 415 [1971]; Creighton v Milbauer, 191 AD2d 162, 166 [1st Dept 1993]), states in the complaint that

[3] Fox-Rich states that, by stipulation, its causes of action for tortious interference with contractual relations (fifth), tortious interference with advantageous business relations (sixth), and prima facie tort (seventh), as well as Newburgh's counterclaim for fraud (third), have been withdrawn with prejudice. Carmen Affirmation, ¶8.

it demanded that the Inventory be sent to customers and Newburgh improperly refused.

Newburgh notes that there are two classes of items at issue in the claim for conversion: rotary screens, and fabric. Regarding the screens, Newburgh maintains first, that no demand was ever made for their return and there was no refusal to do so, and, secondly, that all screens in its possession were returned. Fox-Rich submits evidence contradicting the claim that all have been returned. Since, upon a motion for summary judgment, Newburgh is required to demonstrate that Fox-Rich's claim has no merit by tendering sufficient evidence to demonstrate the absence of any material issues of fact, Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957), the motion must be denied as to the screens.

With regard to the fabric, Newburgh asserts that it maintained a valid Artisan's Lien, giving it a superior possessory right to the Inventory. In addition, it claims that no proper demand was made. Fox-Rich has submitted a letter, sent to Newburgh on July 1, 2005, purporting to be "formal written demand ... that no fabric be 'sold off'; and ... that [Newburgh] provide a written inventory of all fabric being held for Fox-Rich, so Fox-Rich can send a truck to pick-up the entire

inventory of its goods." Reich Affidavit, Exhibit 32. This constitutes a valid demand for purposes of establishing the right to bring an action sounding in replevin and/or conversion.

Newburgh then argues, on the one hand, that Fox-Rich has not specifically identified the fabric that is the subject of its claim, and has therefore failed to demonstrate its superior right to possession. Meese v Miller, 79 AD2d 237, 242 (4th Dept 1981). On the other hand, it contends that under Section 180 of the New York Lien Law it has a valid Artisans' Lien on that same Inventory because Newburgh improved it. See e.g. Kutcher v Oriental Silk Print. Co., 113 Misc 331 (App Term, 1st Dept 1920). Newburgh's contradictory statements fail for the following reasons.

First, regarding the requirement that the subject of a conversion claim be specifically identifiable, all of the cases upon which Newburgh relies deal with conversion of funds (see Winter v Bernstein, 177 AD2d 452, 453 [1st Dept 1991]; Batsidis v Batsidis, 9 AD3d 342, 343 [2nd Dept 2004]; Independence Discount Corp. v Bressner, 47 AD2d 756, 757 [2nd Dept 1975]), and not of products, such as fabric.

Second, the Appellate Division, First Department, has specifically established that the withholding of fabric by a processor, which was otherwise sold to a customer by its owner, is subject to a claim for conversion. Toshoku Am. v Rhoda Lee,

212 AD2d 455 (1st Dept 1995).

Third, Newburgh's contradictory statements raise further issues of fact. Although a party may plead legal theories in the alternative (EBC I, Inc. v Goldman Sachs & Co., 7 AD3d 418, 420 [1st Dept 2004]; CPLR 3026), as summary judgment is the procedural equivalent of a trial, it is beyond cavil that Newburgh was required to elect the basis upon which judgment is sought. Wilmoth v Sandor, 259 AD2d 252, 254 (1st Dept 1999); Lonsdale v Speyer, 249 App Div 133, 141-142 (1st Dept 1936) (upon trial, a party is entitled to relief only in accordance with his proof); see also Todd v Keator, 177 App Div 112, 117 (3rd Dept 1917) ("he is not to be heard who alleges things contradictory to each other"); compare Condon v Associated Hosp. Serv. of N.Y., 287 NY 411, 415 (1942) (mutually contradictory allegations may render a complaint insufficient).

Here, Newburgh claims that Fox-Rich did not identify the Inventory, while it also assures the court that "the inventory that Newburgh was holding had been improved by Newburgh at the specific request of [Fox-Rich]" (Memorandum in Support, at 3), and that "Newburgh's records demonstrated that Plaintiff owed it a sum of $37,793.01 for the work performed on [Fox-Rich's] inventory" (id. at 5). Such assertions could only be made if the Inventory was, indeed, identified.

Fourth, the Artisan's Lien would not extend to all

fabric held for Fox-Rich, but only to fabric finished under the contracts for which Newburgh claims payment. See e.g. Blumenberg Press v Mutual Mercantile Agency, 177 NY 362, 363 (1904). As at least some of the products were unfinished and held for storage, the Artisan's Lien would be of limited application.

Finally, as a result of the injunctive relief granted when this action was commenced, there should be no dispute as to the Inventory at issue, because it had been made available for retrieval in August 2005, although Fox-Rich did not obtain it, under circumstances which are hotly contested. The subsequent disposition by Newburgh of that which had been assembled is what has made a claim originally sounding in replevin now one for conversion only.

Newburgh now claims, without any legal support, that a debit notice thereafter sent by Fox-Rich, dated September 9, 2005, for the estimated full value of the Inventory constituted a sale of the Inventory, and, therefore, a waiver of the conversion claim.

This argument is unavailing for at least two reasons. First, Newburgh has not paid the debit notice, so no sale occurred. In fact, Newburgh specifically denied the validity of the notice. See Reich Affidavit, Exhibit 29. In any event, the delivery of a debit notice is not an "abandonment of a known right," but, rather, a reassertion of that right. At best, such

a notice offers to abandon the right for a price. If there is no acceptance of that offer, there can be no abandonment. Thus, while the debit notice may give an indication of the expected damages, it cannot, standing alone, obviate the right to recover in conversion.

Fox-Rich's failure to acquire the Inventory pursuant to the preliminary injunction issued by this court, and the reasons for that failure, will bear heavily on the conversion claim. Nonetheless, upon this motion, Newburgh has failed to prove, as required, that Fox-Rich has no cause of action for conversion, or that there are no remaining issues of material fact to determine. CPLR 3212. The motion to dismiss the first cause of action must be denied.

**Claims as Against Massimi**

Massimi seeks to dismiss the complaint against him personally, but, by the absence of any argument to the contrary in the memoranda, he seems to accept that he might be liable to Fox-Rich if a cause of action for conversion is proved. See Slavenburg Soelling Corp. v W. A. Assomull & Co., 15 AD2d 645, 645 (1st Dept 1962) (participation in conversion creates individual liability therefor); accord Wembach Corp. v Emigrant Indus. Sav. Bank, 264 App Div 161, 163 (1st Dept), affd 289 NY 662 (1942); Passaic Falls Throwing Co. v Villeneuve-Pohl Corp., 169 App Div 727, 729 (1st Dept 1915) (wrongfully taking,

disposing of, or exercising dominion over property creates individual liability for conversion).

In the second through fourth causes of action, the claims against Massimi are said to be based on the ground that the corporate veil of Newburgh should be pierced. To do so, Fox-Rich must show that Massimi exercised complete domination of the corporation with respect to the transaction attacked, and such domination was used to commit fraud or a wrong that injured the plaintiff. Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 (1993). In evaluating a claim to pierce the corporate veil, New York courts consider factors such as: (i) the absence of corporate formalities, records, personnel, or other indicia of corporate existence; (ii) inadequate capitalization; (iii) diversion of corporate funds to personal use; (iv) overlap in ownership, officers, directors, and personnel; (v) common office space, address and telephone numbers; (vi) the absence of arm's-length transactions; and (vii) intermingling of payment obligations, debts, profits, or property. Forum Ins. Co. v Texarkoma Transp. Co., 229 AD2d 341, 342 (1st Dept 1996); Wm. Passalacqua Bldrs. v Resnick Devs. S., 933 F2d 131, 139 (2nd Cir 1991).

Here, Massimi has testified that he billed customers, including Fox-Rich, through a company called All American because he "was just trying to keep customers off balance and not ...

giving them the illusion that they were dealing with a company that wasn't in Chapter 11." This suggests, at the very least, an absence of corporate formalities, an overlap in directorship, the absence of arm's-length transactions, and the intermingling of profits. He went on to explain that: (i) he engaged in this practice because "a lot of customers wouldn't deal with a company in Chapter 11;" and (ii) the billing to Fox-Rich was carried on the books of All American. Reich Affidavit, Massimi Deposition, Exhibit 5, at 59-61.

Meanwhile, Massimi, charged with the burden of proof on his motion for summary judgment, relies on his own affidavit (see S.J. Capelin Assoc., 34 NY2d at 341 [credibility determination inappropriate upon summary judgment]), and the single statement of an employee claiming to have had authority to sign new customers and set prices in most cases. These evidentiary submissions are insufficient, especially as an action to pierce the corporate veil requires a fact-laden inquiry that is not well suited to resolution upon summary judgment. First Capital Asset Mgt. v N.A. Partners, 300 AD2d 112, 117 (1st Dept 2002).

Despite this, upon a search of the record (CPLR 3212[b]; Besen & Assoc. v Besdine Mgt. Co., 266 AD2d 105, 105-106 [1st Dept 1999]), it is clear that a cause of action for account stated has not been pled against either Newburgh or Massimi. "An account stated is an account, balanced and rendered, with an

assent to the balance either express or implied. There can be no account stated where no account was presented or where any dispute about the account is shown to have existed." Abbott, Duncan & Wiener v Ragusa, 214 AD2d 412, 413 (1st Dept 1995) (citation omitted).

Here, the complaint itself states, and documentary evidence submitted by Fox-Rich shows, that this action was commenced specifically in response to a disagreement as to how much was owed to each party. "Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails." M & A Const. Corp. v McTague, 21 AD3d 610, 612 (3rd Dept 2005) (citation omitted); see also Public Broadcast Mktg, Inc. v Trustees of Univ. of Penn., 216 AD2d 103 (1st Dept 1995) (documentary evidence establishing that defendant disagreed with invoices or failed to assent to a balance warranted dismissal).

Dismissal of the third cause of action is appropriate because the cause of action is deficient; the complaint itself states that Massimi objected to the account as stated. However, the balance of the motion, except as provided below, is denied.

**Claims for Punitive Damages**

Newburgh requests summary judgment dismissing any claim for punitive damages. The harm alleged in the complaint was not physical, did not evince an indifference to, or a

reckless disregard of, the health or safety of others, was not directed toward the financially vulnerable, but was a single incident, and was at least partially motivated, according to Fox-Rich's own complaint, by economic factors. See BMW of N. Am. v Gore, 517 US 559, 576-577 (1996); Home Ins. Co. v American Home Prods. Corp., 75 NY2d 196, 203-204 (1990).

Punitive damages under these circumstances are inappropriate. The United States Supreme Court has held that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." State Farm Mut. Auto. Ins. Co. v Campbell, 538 US 408, 419 (2003).

As the allegations in this action do not establish such gross, wanton, or willful fraud or other morally culpable conduct to a degree sufficient to justify an award of punitive damages (Walker v Sheldon, 10 NY2d 401 [1961]), the requests for punitive damages are dismissed.

Accordingly, it hereby is

**ORDERED** that the motion of defendant Newburgh Dye & Printing, Inc. for summary judgment dismissing the first cause of action is denied; and it further is

**ORDERED** that the third cause of action of the complaint is dismissed; and it further is

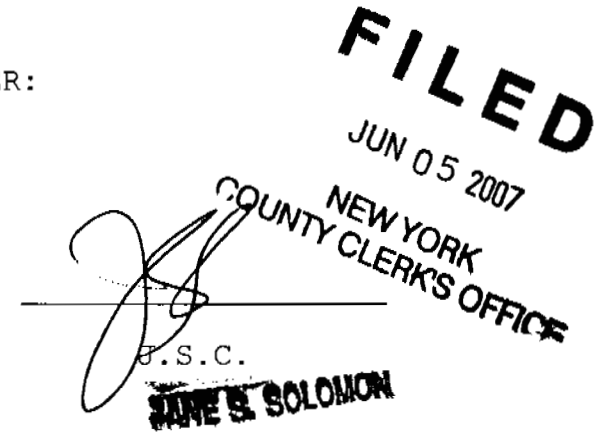
**ORDERED** that the motion of defendant Gregory Massimi for summary judgment dismissing the first through fourth causes of action as against him personally is granted as to the third cause of action only and otherwise is denied, with entry of judgment thereon to abide the further resolution of this action; and it further is

**ORDERED** that the motion of defendants Newburgh Dye & Printing, Inc. and Gregory Massimi for summary judgment dismissing any request for punitive damages is granted; and it further is

**ORDERED** that counsel shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY on July 24, 2007 at 2PM.

Dated: May 31, 2007

ENTER:

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