Steinfeld v Twillary Ltd.
2007 NY Slip Op 33625(U)
October 31, 2007
Supreme Court, Nassau County
Docket Number: 4115-07/
Judge: Ira B. Warshawsky
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

SHERRY STEINFELD, individually and as a shareholder of Twillary Ltd., Twillary Ltd., Phillip Steinfeld and Steinmed Realty,

Plaintiffs,

INDEX NO.: 004115/2007
MOTION DATE: 09/28/2007
MOTION SEQUENCE: 001

-against-

TWILLARY LTD, RONALD BENJAMIN and IRIS BENJAMIN,

Defendants.

The following papers read on this motion:

Notice of Motion, Affidavits, Affirmation & Exhibits Annexed....................................	1
Affidavit of Sherry Steinfeld, Affidavit of Philip S. Steinfeld, Affidavit of Nancy Hantverk, Affirmation of Michael A. Levy & Exhibits Annexed.........................	2
Reply Affirmation of Robert E. Levy, Affidavit of Ronnie Benjamin & Attachments.....	3

This motion by defendants for an order pursuant to CPLR § 3211(a) 1, 5, 7 dismissing the complaint, or, in the alternative, for an order pursuant to CPLR 3212 granting summary judgment, and, additionally, for an order disqualifying counsel for the plaintiff, and an order granting an accounting is determined as follows.

This action was commenced by Sherry Steinfeld, a 50% owner of Twillary Ltd., and her husband, Philip Steinfeld, who loaned money to Twillary, to recover damages from the defendants', Iris Benjamin and Ronald Benjamin (the Benjamin defendants), alleged misappropriation of corporate funds, jointly and severally. Iris Benjamin is the co-equal owner

of Twillary Ltd., and is also a director and employee, as is the plaintiff.

A threshold procedural matter to be addressed is that issue has been joined and defendants have submitted a counterclaim, inter alia, for an accounting. There are, then, contradictory factual assertions in the record compiled here to fore. While defendants have moved, inter alia, to dismiss for failure to state a claim (as is permitted, see CPLR 3211e), the normal review undertaken on a motion to dismiss of taking as true the allegations in the complaint must be applied irrespective of the conflicting assertions. See, Guggenheimer v Ginzberg ,43 N.Y.2d 268. However movants have applied for summary judgment, apparently dismissing plaintiffs' claims and granting their own. In that procedural context the complaint and counter claims will be measured against the summary judgment standard of searching for questions of fact It should also be noted that in opposing the motion plaintiffs have argued the factual merits of their claims while giving scant attention to the applicable substantive law.

Finally, although the title of the action states that Sherry Steinfeld is suing as a shareholder of Twillary, she has not identified a section of the Business Corporation Law upon which she relies for the requested relief. Also, Twillary Ltd is listed as a party plaintiff and as a party defendant but there is no claim asserted for dissolution, judicial or voluntary, nor has there been any publication.

Twillary was begun in October of 2004 for the manufacture and wholesale distribution and sale of giftware and home decorating items to retail stores. Apparently both owners had access to the financial assets of Twillary through the checking account, an ATM card and an American Express card. In the several causes of action, plaintiffs plead that defendants have accessed such funds for personal use.

Defendant Iris Benjamin was seemingly the design artist but had no responsibilities for the financial affairs of Twillary. Allegedly, the parties decided not to take salary from the fledgling corporation. Defendant Iris Benjamin claims they agreed she could remove some funds from Twillary's account to pay for supplies and materials, and for modest living expenses. According to defendant Benjamin they agreed to equalize the withdrawls at a later date. In or about December of 2005 plaintiff became dissatisfied with the arrangement when she learned of the Benjamin Defendants' withdrawls; although the business was succeeding, and had taken on

employees, she was especially angry about the funds defendant Ronald Benjamin had taken if for no other reason than the business was still borrowing money to stay liquid. Seemingly the parties stopped communicating, plaintiff took control of the business herself, excluding her partner, and opened a competing business named "Twillery." When defendant Iris Benjamin declined to turn over her shares of stock in Twillary, in exchange for all indebtedness, this lawsuit ensued.

The criterion for dismissal on a CPLR 3211(a)(7) motion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. Guggenheimer v Ginzberg, 43 N.Y.2d 268 (1977). The court must afford the pleadings a liberal construction, and the complaint will be construed in the light most favorable to plaintiffs. Id.; see generally, Leon v Martinez, 84 N.Y.2d 83; Rovello v Orfino Realty Co., 40 N.Y.2d 633. Plaintiff's allegations must be taken as true, Pietropaoli Trucking v Nationwide Mutual Insurance Co., 100 A.D.2d 680 (3d Dept 1984), the only duty of the court being to review the allegations stated in the complaint, take them as true and resolve all reasonable inferences in favor of plaintiff. Cron v Hargro Fabrics, Inc., 91 N.Y.2d 362, 366 (1998). However, the court is not required to assume the truth of conclusory allegations lacking factual support. Elsky v KM Ins. Brokers, 139 A.D.2d 691 (2d Dept 1988). The inquiry is "not into whether the validity of the claim has been in any measure demonstrated; it is rather confined to whether the relevant allegations of the complaint liberally construed state a theory upon which relief can be granted."

The first cause of action claims embezzlement of corporate funds in the amount of $40,000 against all the Benjamin defendants. Although normally brought as criminal action, it is acceptable in a civil proceeding. In either case,

> "embezzlement is an intentional and fraudulent appropriation of the goods of another by a person intrusted with the same. 1 Wharton, Criminal Law, 1009.
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> The Century Dictionary defines:
>
> 'Embezzle: To appropriate fraudulently to one's own use, as what is intrusted to one's care; apply to one's private use by a breach of trust, as a clerk or servant who misappropriates his employer's money or valuables.'

> 'Embezzlement: The act of embezzling. Specifically the act by which a clerk, servant, or other person occupying a position of trust fraudulently appropriates to his own use the money or goods intrusted to his care; a criminal conversion; the appropriation to one's self by a breach of trust of the property or money of another; a sort of statutory larceny, committed by servants and other like persons when there is a trust reposed, and therefore no trespass, so that the act would be larceny at common law.' Bishop."

People v. Brenneau, 101 Misc. 156 (N.Y. Sup. 1917); see also Spiegel v Levine, 161 A.D. 764 (1st Dept 1914) (Embezzlement is a fraudulent appropriation of another's property by a person to whom it has been intrusted, or into whose hands it has lawfully come. It involves two elements: (1) A breach of duty or trust in respect to money, property or effects in the party's possession belonging to another; (2) the wrongful or fraudulent appropriation thereof.)

The court is of the opinion that the complaint is sufficient. The property allegedly embezzled is that of the corporation Twillary; Twillary is a party to this lawsuit, and defendants were entrusted with the care and custody of that property.

The second cause of action alleges embezzlement by the Benjamin defendants of corporate funds in the amount of $11,000 by misuse of a corporate American Express Card.

The third cause of action pleads unjust enrichment resulting from the Benjamin defendants' embezzlement of corporate funds through ATM withdrawals in the amount of $51,000.

The fifth cause of action alleges a conspiracy between the Benjamin defendants to embezzle corporate funds from the corporation's American Express Card. The first three causes of action and the fifth as plead in the complaint are sufficient when measured against the elements stated above for a civil claim of embezzlement. Moreover, a conspiracy is stated insofar as there were allegedly two independent persons working in concert to effect the tort of embezzlement. Rhodes v. Ocean Accident & Guarantee Corporation, Lim., 235 App. Div. 340, 341, 257 N.Y.S. 214, 215. Strictly, the only maintainable civil action for conspiracy is one in which a person 'suffers injury as the result of a conspiracy forbidden by the criminal law, to recover the damages which he has sustained at the hands of the parties to the combination.' Kellogg v. Sowerby, 190 N.Y. 370, 373, 83 N.E. 47.

The fourth cause of action alleges a breach of fiduciary duty by defendant Iris Benjamin

against the plaintiffs Twillary. and her fellow shareholder, officer and director. A cause of action is adequately stated since the duty between officer-shareholders of a small corporation is plain. Fiduciary relationship"only arises when one has reposed trust and confidence in the integrity and fidelity of another who thereby gains influence or assumes control and responsibility." See, Mars v. Diocese of Rochester, 193 Misc. 2d 349 (N.Y. Sup. Ct. 2003).

The sixth cause of action alleges tortuous interference with contract by defendant Iris Benjamin with respect to her competing business. To recover on a claim of tortuous interference with contract a proponent must establish " the existence of a contract between the plaintiff and a third party, the defendant's knowledge of the contract, the defendants intentional inducement of the third party to breach or otherwise render performance impossible, [by improper means], and damages to the plaintiff." Bayside Carting Inc. C Chic Cleaners, 240 A.D.2d 687 (2d Dept 1997) citing to Kronos, Inc., v AVX Corp., 81 N.Y.2d 90, 94 . The complaint does not identify any contract between plaintiff and another which defendant Iris Benjamin knew of and took deliberate action to produce a breach. Honest competition in the market place is not sufficient to satisfy the elements; the cause of action is not sufficient.

The seventh cause of action alleges a default by the corporate defendant in repayment of a loan in the amount of $40,000 together with interest at 4% per annum for which the pleader seeks to hold defendant Iris Benjamin liable

The eighth cause of action alleges an additional corporate loan in the amount of $2,000 and default in repayment for which defendant Iris Benjamin is held liable.

The ninth cause of action alleges loans to the corporate defendant and failure to repay by Iris Benjamin.

The seventh, eighth and ninth causes of action seek to hold an individual shareholder liable for the debts of the corporation. It is old law that if Iris Benjamin is to be held individually liable as a guarantor there must be a writing subscribed by her evidencing her promise to pay the obligation of the corporation GOL § 5-701 a, 2. An examination of the document submitted as Exhibit 3 to the moving papers shows that both shareholders were liable for the loan to Twillary from plaintiff, Steinmed Realty. There is no basis to find that Iris Benjamin was a guarantor of that loan, nor to view the business as a partnership. Those causes of action are insufficient as

plead.

The tenth cause of action alleges fraudulent inducement by the Benjamin defendants of plaintiff Phillip Steinfeld, to loan the defendant Twillary $42,000. To prevail on a claim of fraudulent inducement the law requires a showing of "representation of a material fact, falsity, scienter, deception and injury." Dalessio v Kressler, 6 A.D.3d 57 (2d Dept 2004). The crux of a fraudulent inducement claim is the making of a false promise that the defendant did not intend to keep at the time it was made. Id. In this case the pleading of fraudulent inducement is sufficient since it pleads with specificity the material fact relevant to the particular loans and advancements made, which were allegedly false at the time they were made. There is documentary proof that Twillary represented it would repay the loan but there is also a claim that at the time it was made that defendant Iris Benjamin had no present intention to use it strictly for business purposes. The allegations in the complaint must be taken as true, and defendant's averments that she could by agreement use corporate funds as needed forecloses any possibility of summary judgment.

For the same reasons that the tenth cause of action passes pleading muster the eleventh does as well. The eleventh cause of action alleges a conspiracy by the Benjamin defendants to fraudulently induce plaintiff Steinfeld to make loans or to advance to the corporation approximately $100,000 to use for business capital. It is alleged that at the times relevant defendants viewed it as capital they could access for nonbusiness matters and thus allegedly made a promise they did not intend to keep at the time they made it.

Turning to defendants motion for summary judgment as the proponent it is incumbent upon them to make a prima facie showing of entitlement to judgment as a matter of law by tendering evidentiary proof in admissible form. Zuckerman v City of New York, 49 N.Y.2d 557 (1980). Here, defendants submitted affidavits which show that the defendants had a different understanding of the financial plan for Twillary than did the plaintiffs. The only uncontradicted evidence before the court is that defendant Iris Benjamin did not execute a writing beholding her to pay the debt of the corporation. She established a prima facie case to support her claim and in opposition plaintiffs offered only more argument that that was their intention. However true or false it may be it is not competent evidence to raise an issue of fact warranting denial of defendants motion on the seventh cause of action.

Turning next to defendants' motion to disqualify Michael A. Levy, Esq. from further representation of plaintiffs the application is denied. Movant fails to establish that Levy represented them in any prior proceeding by the assertion that he filed for a corporate kit and registered Twillary as a corporation electing S chapter status to conduct business in the State of New York. The averments fall short of the necessary proof that "there was an attorney client relationship between the [defendants] and opposing counsel, that the matters involved in both representations are substantially related and that the interests of the [plaintiffs]... are materially to [the defendants.] Jamaica Public Service Co v AIU Insurance Co., 92 N.Y.2d 631, 636 (1998). Nor does the fact that Levy may be called to testify as a witness compel a different result at this stage of the pleadings.

In summary, it is ORDERED that the sixth, seventh, eighth and ninth causes of action are dismissed for failure to state a cause of action. It is further

ORDERED that defendants are granted summary judgment on the seventh cause of action. Insofar as defendants have not argued for summary judgment on their counterclaim, the court has not addressed them at this time.

All other requests for relief not expressly determined are denied.

A Preliminary Conference (see NYCRR 202.12) shall be held on December 4, 2007, at 9:30 A.M., before the undersigned in the Supreme Court of Nassau County.

Counsel for all parties are reminded that this matter has been assigned to the Commercial Division of the Supreme Court of Nassau County and the parties are directed to follow the Rules of this Division.

Dated: October 31, 2007

J.S.C.

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NASSAU COUNTY
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