

Gidwill v Diamond Catering, Inc.

2007 NY Slip Op 34100(U)

December 10, 2007

Supreme Court, Nassau County

Docket Number: 8046-06/

Judge: Leonard B. Austin

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INDEX
No. 8046-06

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 6-8-07
Submission Date: 8-22-07
Motion Sequence No.: 001/MOT D

_____ x
OLAF GIDWILL,

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
Jeffrey M. Steinitz, Esq.
118-35 Queens Boulevard - 9th Floor
Forest Hills, New York 11375

DIAMOND CATERING, INC. and AL
HOLTZMAN,

Defendants.

COUNSEL FOR DEFENDANTS
William J. Keehon, P.C.
One Suffolk Square - Suite 500
Islandia, New York 11749

_____ x

ORDER

The following papers were read on Defendant's motion for summary judgment:

- Notice of Motion dated May 22, 2007;
- Affirmation of Joseph J. Ferrante, Esq. dated May 22, 2007;
- Affidavit of Al Holtzman sworn to on May 22, 2007;
- Affidavit of Olaf Gidwill sworn to on August 14, 2007;
- Affirmation fo Joseph J. Ferrante, Esq. dated August 21, 2007.

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Defendants, Diamond Catering, Inc. ("Diamond") and Al Holtzman ("Holtzman"), move for summary judgment dismissing the complaint and for summary judgment on their counterclaim.

BACKGROUND

Plaintiff, Olaf Gidwill ("Gidwill"), commenced this action alleging that he was fraudulently induced into purchasing a coffee truck and route from Diamond.

Diamond is a commissary that sells food and beverages to coffee trucks. Holtzman is Diamond's president. Holtzman and Diamond are also in the business of developing and selling coffee truck routes.

A coffee truck route is a series of locations at which a coffee truck stops to sell coffee, cake, sandwiches, soft drinks, snacks and other food and beverages. The route is developed so that a driver can stop at a location, open the truck, sell product, close the truck and then drive to the next location in a reasonably short period of time. The route is also developed so that the driver will be at each location at a break or lunch time.

In the summer of 2005, Gidwill, who was then unemployed, spoke with a friend about the possibility of purchasing a coffee truck and route. The friend told him to contact Holtzman, who might have a route and truck available. In August 2005, Gidwill contacted Holtzman and was advised that a route was available.

Several days after he first contacted Holtzman, and before he purchased the route, Gidwill went out on the route with Pete Alvarez ("Alvarez"), an employee of

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Diamond, on at least two and possibly as many as five consecutive days.¹ During these trips, Gidwill went with to all 18 active stops on the route.² They stopped at all of the stops. They then took a break for lunch. They then purchased pizza in the Bronx and returned to last five stops on the route a second time. They then returned to the commissary in Brooklyn.

Gidwill claims Alvarez advised him the route grossed between \$1,000 and \$1,200 per day. Gidwill also claims Alvarez advised the operating expenses on the route, to wit: food, gas, tolls, etc. ran between \$400 and \$500 per day.

Gidwill's statements regarding the income to be derived from the operation of the route are inconsistent and contradictory. Based upon the representations made to Gidwill by Alvarez, the route would be netting between \$500 and \$700 per day. In his affidavit in opposition to the motion, Gidwill avers Holtzman advised him the route grossed \$750 to \$800 per week. At his deposition, Gidwill testified that Holtzman advised him he should make about \$1,200 per week from the operation of the route.

Gidwill testified, that based upon his observations, he believed the route grossed less than \$1,000 per day. Although Gidwill's observations conflicted with the representations Holtzman and Alvarez made regarding the operation of the route, he

¹In his affidavit in opposition to the motion, Gidwill avers he went out on the route with Alvarez twice. Gidwill's deposition testimony suggests he may have gone out on the route with Alvarez as many as five times.

²When Gidwill went out on the route with Alvarez, one of the sites assigned to the route, the Bartow units, was closed. This location was a construction site at which construction had not commenced.

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never told Holtzman that he believed the route earned less than represented.

Gidwill apparently never learned of the exact amount the route grossed on a daily or weekly basis. He also never received or apparently requested any information from Holtzman or Alvarez that would verify their representations regarding the income and/or expenses relating to the route's operation.

Gidwill claims to have asked Holtzman about business he could expect to do on the route in the winter. Gidwill claims he was advised business would increase in the winter because of increased sales of hot drinks.

Gidwill further asserts he asked about how long the stops would continue to be on the route. He was allegedly assured the stops would always be there and that he would get more stops over time.

Gidwill further alleges that he was advised he would have so much business on the route he would need a second truck. In fact, he did buy a second truck although he testified at his deposition that his decision to purchase the truck was not based on any representation from Defendants.

At some point before he bought the route, Gidwill began working full time in construction. He asked Roger Burgos ("Burgos"), a tenant in the house in which Gidwill resided and who was unemployed, if Burgos would be interested in operating the route. Burgos indicated he might be interested.

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Gidwill made arrangements with Holtzman and Alvarez to have Burgos go out on the route with Alvarez to observe and learn about its operation. Burgos went out on the route with Alvarez for about two weeks during September.

After observing the operation of the route, Burgos advised Gidwill he was interested in operating the route.

On October 6, 2005, Gidwill entered into a contract to purchase Route 711. The entire contract reads:

" I Al Holtzman, pres of Diamond Catering Selling one route (Route Sheet Attached) and 1 truck 1999 Chev Vin #16BJC34R2Xf104158 to Olof (*sic*) Gidwill for \$105,000 - 55,000 down and 50,000 in notes to be paid 200 wk 50 wks a year 5 yrs. The route cannot be sold until all note's (*sic*) are paid.

Pres. s/ Al Holtzman

Buyer S/ Olav Gidwill"

Attached to this document was the route sheet which contained the name of the 19 locations on the route and the scheduled time of each stop. The route sheet contained the Bartow site even though construction had still not begun there. The route sheet did not indicate the locations or times of the lunch stops. However, Gidwill knew that the last 5 locations on the list were also lunch stops.

After purchasing the route, Gidwill leased the route to Burgos for \$800 per week. Burgos kept any amount earned over \$800.

For about three months, everything went well.

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After 3 months, problems allegedly arose. Gidwill claims stops closed up. The Yankee Stadium open air market closed for the winter in December. The Latin Terminal Market closed permanently. A construction site located on 159th Street closed even though construction at the site had not been completed. Bruckner Hospital which was really a senior citizen residence or nursing home decided to send out to a deli for coffee and food rather than permit its employees to purchase food and beverage from Gidwill's coffee truck. Construction at Da Beach Club was completed. Construction never began at the Bartow units.

Gidwill claims that he called Holtzman to advise him of the loss of business and locations. Holtzman allegedly told Gidwill he would assist him in getting new locations. However, Holtzman never obtained any new locations for Gidwill.

Because of the drop in business, Gidwill reduced Burgos rent on the route to \$500 per week.

By March 2006, the loss of business had become so severe that Burgos decided he would no longer operate the route. At this point, Gidwill took over the operation of the route. When Gidwill took over the route, he decided he would no longer go to the first 3 stops because they were not profitable. He also claims he lost one of his most profitable stops, an elevator factory near Yankee Stadium, because Holtzman assigned that location to another route.

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Even though the elevator factory was on Gidwill's route, he never complained to Holtzman or the other driver.

By that time, Gidwill had defaulted in the payment of his \$200 a week obligation. As a result, Diamond required him to pay for his food purchases weekly. Any amount not paid was added to the amount due on the purchase price.

To avoid incurring additional financial obligations to Diamond, Gidwill began purchasing food from another commissary which was located much closer to his home.

Gidwill claims the route had 11 stops some of which he had obtained without the assistance of Diamond, Holtzman or Alvarez. He offered to return the truck and route to Diamond in exchange for forgiveness on the note and other obligations due Diamond. Holtzman declined the offer.

Gidwill claims that he was netting between \$400 and \$500 per week from the operation of the route, which was not enough to pay his own living expenses.

Finally, in the summer of 2006, he sold the route and the truck.

Gidwill alleges he was fraudulently induced into purchasing the route. He seeks to recover the amount he claims he would have earned on the route had the representations made to him been true.

Defendants counterclaim to recover the amount due on the note and the unpaid commissary bills.

Defendants move for summary judgment dismissing the complaint and awarding awarding them summary judgment on the issue of liability on their counterclaim.

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DISCUSSION

A. Summary Judgement Dismissing the Complaint

In order to assert a claim for fraud in the inducement a plaintiff must establish that the defendant made material misrepresentation that were false, the defendant knew the representations were false when made, the misrepresentations were made with intent to deceive the plaintiff, the plaintiff justifiably relied upon these representations and the plaintiff was damaged as a result of relying upon these misrepresentations. Leno v. DePasquale, 18 A.D.3d 514 (2nd Dept. 2005).

The party to whom the false statement has been made may not rely thereon if the truth of that statement can be verified through the exercise of ordinary intelligence or reasonable diligence. Huron Street Realty Corp. v. Lorenzo, 19 A.D.3d 450 (2nd Dept 2005); Sanzotta v. Continuing Development Services, Inc., 262 A.D.2d 1047 (4th Dept. 1999); and Curran, Cooney, Penney, Inc. v. Young & Koomans, Inc., 183 A.D.2d 742 (2nd Dept. 1992). A party, who fails to exercise reasonable diligence, cannot recover when the actual nature of the transaction could have been ascertained through the exercise of ordinary care or intelligence and the party failed to do so. P. Chimento Co., Inc. v. Banco Popular de Puerto Rico, 208 A.D.2d 385 (1st Dept. 1994).

Gidwill failed to use ordinary care or intelligence to ascertain the actual nature of the transaction. Holtzman and Alvarez provided Gidwill with conflicting information regarding the revenue and income that could be earned through the operation of the route. Gidwill's own observations regarding the operation of the route conflicted with

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the information provided to him by Holtzman and Alvarez. Despite Gidwill's admitted skepticism regarding the representations made to him by Holtzman and Alvarez regarding the revenue being generated by the operation of the route and his own observations, Gidwill never asked for or obtained any information regarding the revenue being generated by the operation of the route.

Alvarez is alleged to have advised Gidwill that the operating expenses on the route relating to food, gas, tolls, etc. were approximately \$400 to \$500 per day. Gidwill never asked to see any food invoices or other bills relating to the operation of the route which would confirm these estimates.

Gidwill's claim that Holtzman and Alvarez advised that the route would be so successful that he would need a second truck is not actionable fraud. Statements regarding future expectations are not misrepresentations of material existing fact. Couri v. Westchester Country Club, Inc. 186 A.D.2d 712 (2nd Dept. 1992); and Lane v. McCallion, 166 A.D.2d 688 (2nd Dept. 1990).

Additionally, Gidwill's deposition testimony defeats this claim. Gidwill purchased a second truck. However, he testified that he did not purchase the second truck because of any representations made to him by Holtzman or Alvarez relating to Route 711. Gidwill purchased the second truck after he had a conversation with Alvarez about building a new route. Gidwill purchased the truck and leased it to either Alvarez or Diamond in an attempt to develop a new route. After about a month and half after he purchased the second truck, Gidwill took the truck back because Alvarez had been

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unable to develop a new route and Gidwill was not seeing any money from this truck.

Gidwill concedes that the allegations in the complaint regarding his hiring a second driver are not true. Gidwill testified he never hired a second driver.

Any representations regarding the permanency of the stops on the route are not actionable fraud. "Absent a present intent to deceive, a statement of future intentions, promises or expectations are not actionable as fraud." *Id.* at 690.

Three of the stops on the route were construction sites. Gidwill had previously owned and operated a small contracting business. He had also worked in construction. He knew or should have known that once the construction was completed, these sites would close and the stops would be lost.

The Yankee Stadium Market stop, which was an open air market, closed for the season in December and was to reopen in the spring. The Latin Terminal Market stop closed because New York City purchased the building and closed the market. Gidwill offers no evidence that Holtzman or Alvarez knew when they sold him the route that the Yankee Stadium Market would close for the winter or that Latin Terminal Market would be closing permanently. Gidwill offers no evidence regarding whether the Yankee Stadium market reopened in the spring and whether he once again began to sell at this site when it reopened..

Gidwill knew when he purchased the route that construction at the Bartow units had not yet begun. He offers no evidence that either Alvarez or Holtzman made any

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representations to him regarding when construction at this location would begin or the revenue that would be generated once construction began.

Gidwill also offers no evidence that Holtzman or Alvarez made any representations or had any knowledge that Bruckner Hospital would no longer permit its employees to patronize the coffee truck.

Gidwill's assertion that he was advised that the route would do well in the winter is also a statement of expectation.

This statement is inferentially contradicted by Gidwill's affidavit in opposition to the summary judgment motion. Gidwill avers that he was advised by Alvarez that he had built this route in five months. Gidwill rode the route with Alvarez in August 2005. Five months earlier would have been March 2005, which is after the winter. Since this route did not exist in the prior winter, Gidwill should have been able to ascertain that Alvarez had no basis for making any representations regarding the income that could be earned on the route in winter.

Gidwill decided he would no longer service the first three stops on the route, the Port Chester Liquor Warehouse and the two locations at the Journal newspaper plant. Gidwill determined not to service these sites because he they were not generating sufficient income and because they were too far away from his home, the commissary and the other stops on the route.

Gidwill made no effort to reclaim the elevator factory. Even though he observed another Diamond truck at the site, he did not speak with the other driver regarding this

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intrusion on his route or complain to Holtzman or Alvarez regarding this infringement on his territory.

The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or must demonstrate an acceptable excuse for its failure to do so. *Id.*; and Davenport v. County of Nassau, 279 A.D.2d 497 (2nd Dept., 2001); and Bras v. Atlas Construction Corp., 166 a.D.2d 401 (2nd Dept., 1991).

In this case, Defendants have established a *prima facie* entitlement to judgment as a matter of law. Gidwill failed to use reasonable diligence to determine the accuracy of the representations made to him by Holtzman and/or Alvarez regarding the income and expenses of the route. The remaining representations are representations of future expectations or opinions which, as discussed above, are not actionable fraud.

Finally, Gidwill's own deposition testimony disproves many of his allegations of fraud. This is, in several instances, his actions were a result of actions unrelated to any representations made to him by Holtzman and/or Alvarez.

To the extent Gidwill's affidavit submitted in opposition to the motion for summary judgment is inconsistent with his deposition testimony, the Court may disregard his

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affidavit. A party may not submit an affidavit in opposition to a motion for summary judgment that is inconsistent with that party's deposition testimony which is crafted to create issues of fact so as to avoid summary judgment. Branham v. Lowes Orpheum Cinema, Inc., 31 A.D.3d 319 (1st Dept. 2006); and Shapiro v. Munoz, 28 A.D.3d 638 (2nd Dept. 2006).

B. Summary Judgement on the Counterclaim

Defendants' counterclaim seeks to recover the amount due on the purchase price and possibly for items sold to Gidwill by Diamond while he was using its commissary services. Gidwill concedes he did not pay the balance of the purchase price. He claims he made 14 payments. He also concedes that since he was not making the payments and not paying for food, the food purchased was added on to the amount due on the purchase price. He has conceded liability on the counterclaim.

Diamond fails to provide the court with any evidence of the amount due on the purchase price or for food sold to Gidwill. Therefore, a hearing is necessary to determine the amount due on the purchase price of the route and any other amounts due Diamond.

Accordingly, it is,

ORDERED, that Defendants' motion for summary judgment dismissing the complaint is **granted** and the complaint is hereby dismissed; and it is further,

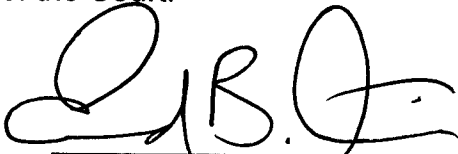
ORDERED, that Defendants' motion for summary judgment on its counterclaim is granted on the issue of liability only; and it is further,

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ORDERED, that counsel for the parties are directed to appear for a conference on January 17, 2008 at 9:30 a.m. to schedule a trial on the issue of damages on the counterclaim of Defendant Diamond Catering, Inc.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
December 10, 2007


Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

DEC 13 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**