

Klein v Auerbach

2008 NY Slip Op 30444(U)

February 5, 2008

Supreme Court, Suffolk County

Docket Number: 0027366/1998

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 12-3-07
SUBMITTED: 12-5-07
MOTION NO.: 021-MD

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SAMUEL J. KLEIN, Suing as a Director of CELLULAR
DESIGN CORP.,

Plaintiff,

LAMB & BARNOSKY, LLP
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Melville, New York 11747

-against-

STEPHEN B. AUERBACH, CENTRAL RADIO
COMMUNICATIONS CORP., and CELLULAR DESIGN
CORP.,

BRACKEN & MARGOLIN, LLP
Attorneys for Defendants Stephen B. Auerbach and
Central Radio Communications, Corp.
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Islandia, New York 11749

Defendants.

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Upon the following papers numbered 1 to 41 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-32 ; Notice of Cross Motion and supporting papers _____ ; Answering Affidavits and supporting papers 33-38 ; Replying Affidavits and supporting papers 39-41 ; it is,

ORDERED that this motion by the defendants Stephen B. Auerbach and Central Radio Communications Corp. for summary judgment in their favor is determined as follows:

The plaintiff, Samuel Klein, and the defendant Stephen Auerbach are each 50% shareholders of the defendant Cellular Design Corp. (hereinafter "CDC"), and they are its only officers and directors. CDC was engaged in the business of providing two-way radio (repeater) services to customers like taxicab companies and other businesses with vehicles in the field that needed to communicate with each other and with their home base. CDC did not sell radios, telephones, or other equipment. Rather, it obtained licenses from the Federal Communications Commission (hereinafter "FCC") for the operation of communication stations on 900 MHz frequencies and then constructed and maintained those stations.

The defendant Central Radio Communications Corp. (hereinafter "CRCC"), of which the defendant Stephen Auerbach is the sole shareholder, was in the business of selling, installing, and servicing two-way radio systems, security video systems, pagers, mobile telephones,

office telephone systems, and cellular telephones. CRCC did not provide its customers with repeater services, but referred them to such third-party providers as AT&T, CellularOne, and NorComm. After the formation of CDC, Auerbach referred his CRCC customers to CDC for repeater services.

On April 1, 1990, Klein and Auerbach entered into a stockholders agreement, which provides, in pertinent part, as follows:

No Stockholder shall devote any time or attention to or have any financial involvement in any remunerative or non-remunerative activity, except those in which he is currently involved (and only to the extent that he is currently involved), and except for passive investments and/or non-remunerative activities the management of which is not likely to interfere with or to divert such Stockholder's attention or energies from his performance hereunder (whether as Stockholder, Director, Officer or otherwise); unless, in each case, the circumstances are made known to the Board of Directors and each other member of the Board votes (or executes a Written Consent to Action) to permit such Stockholder to engage in same. Klein agrees that Auerbach may continue to be a shareholder, director and officer of Central Radio Communications Corp. and devote such time as Auerbach may determine to the business and operation of Central Radio Communications Corp. without limiting or diminishing Auerbach's rights and profits hereunder. The business of Central Radio Communications Corp. shall not be deemed or considered a diversion away from the Corporation of any corporate opportunity by Auerbach.

Auerbach was primarily responsible for obtaining users for CDC's repeater system through his sales and service activities at CRCC. Klein, on the other hand, was primarily responsible for obtaining FCC licenses and for constructing and maintaining CDC's licensed repeater facilities. This arrangement continued until the mid-1990's. By 1996, although CDC had approximately 70 FCC licenses at nine separate sites and hundreds of customers, the relationship between Auerbach and Klein had begun to deteriorate. According to Klein, Auerbach was advancing his own business at the expense of CDC. In 1996, Auerbach (through CRCC) was designated as a authorized Nextel representative. Nextel was a competitor of CDC. Because Auerbach was paid for placing and keeping customers on Nextel's radio communications network, Klein claimed that Auerbach promoted the sale of Nextel's services rather than those of CDC, thereby competing with CDC. The parties discussed a buy-out, but could not agree to mutually satisfactory terms. They eventually sold most of CDC's assets, which primarily consisted of FCC radio licenses, to Nextel. By an order of this court (Klein, J.) dated July 9, 2001, CDC was judicially dissolved.

In 1998, Klein commenced this action pursuant to Business Corporation Law § 720 alleging, inter alia, breach of fiduciary duty, unjust enrichment, tortious interference with contract,

and tortious interference with prospective economic advantage. In their answer, the defendants asserted 18 counterclaims sounding in breach of fiduciary duty, conversion, and unjust enrichment, among other things. The defendants Auerbach and CRCC have now moved for summary judgment dismissing the complaint.

The first cause of action alleges that Auerbach breached his fiduciary duty to CDC by becoming an authorized Nextel representative and engaging in direct competition with CDC in violation of the shareholders agreement. The moving defendants contend that, prior to the commencement of this action in 1998, Klein never considered Auerbach's Nextel dealership to be competing with CDC or a violation of the stockholders agreement, which allowed Auerbach to engage in CRCC's business. The moving defendants further contend that Klein never advised Auerbach that he objected to the Nextel dealership and, in fact, facilitated Nextel's relationship with Auerbach and CRCC by attending and participating in meetings with Nextel, among other things. Thus, the moving defendants argue that Klein is estopped from maintaining the first cause of action.

An estoppel rests upon the word or deed of one party upon which another rightfully relies and, in so relying, changes his position to his injury. It is imposed by law in the interest of fairness to prevent the enforcement of rights that would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought (*see, Nassau Trust Co. v Montrose*, 56 NY2d 175). Estoppel prevents one from denying his own expressed or implied admission that has, in good faith, been accepted and acted upon by another. With respect to the party estopped, the elements of estoppel are: (1) conduct that amounts to a false representation or concealment of material facts, (2) an intention that such conduct will be acted upon by the other party, and (3) knowledge of the real facts. In addition, the party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts, (2) reliance upon the conduct of the party estopped, and (3) a prejudicial change in his position (*see, Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 81-82).

Auerbach correctly argues that silence can be used as an element of equitable estoppel. However, it is only when a party has a duty to speak and fails to do so in order to deceive that silence may give rise to an estoppel (*see, Fisher Bros. Sales v United Trading Co. Desarrollo y Comercio*, 191 AD2d 310, 311-312; *Matter of Su-Lien Chen*, 16 Misc 3d 1107[A]). Assuming that Klein had a duty to voice his objection to the Nextel dealership, Auerbach has failed to demonstrate that Klein's purported silence was intended to deceive him. Auerbach has also failed to demonstrate any detrimental reliance or prejudicial change in position in reliance on Klein's conduct. Specifically, Auerbach produces no evidence, nor does he even allege, that he would not have become a Nextel dealer if Klein had objected. Moreover, Klein has produced evidence in admissible form that he did, in fact, object to Auerbach's becoming a Nextel dealer. He avers that, although he communicated his objection to Auerbach, Auerbach ignored it and became a Nextel dealer over his objection. He also avers that he did not continue to object because Auerbach intimidated him and it would have been futile to do so. Under these circumstances, the court finds that the doctrine of estoppel does not bar the plaintiff's first cause of action as a matter of law. Accordingly, the motion is denied as to the first cause of action.

The moving defendants contend that there is no evidence to support the plaintiff's second, fifth, sixth, and seventh causes of action. As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense (*see, Corrigan v Spring Lake Building Corp.*, 23 AD3d 604,605; *Calderone v Town of Cortlandt*, 15 AD3d 602, 603; *Mennerich v Esposito*, 4 AD3d 399, 400). The moving defendants have failed to tender any evidence affirmatively showing that the plaintiff's second, fifth, sixth, and seventh causes of action lack merit. Rather, they contend that the plaintiff has failed to produce evidence in support thereof. The court finds that, under these circumstances, the moving defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law justifying dismissal of the second, fifth, sixth, and seventh causes of action. Failure to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Calderone v Town of Cortlandt*, *supra* at 603; *Mennerich v Esposito*, *supra* at 401). Accordingly, the motion is denied as to the second, fifth, sixth, and seventh causes of action.

The third cause of action to recover damages for unjust enrichment is duplicative of the first two causes of action. All three causes of action seek damages for events arising from the same subject matter, which is governed by an enforceable contract, i.e., the shareholders agreement (*see, Bettan v Geico General Ins. Co.*, 296 AD2d 469, 470). The existence of a valid and enforceable contract precludes recovery in quasi-contract for events arising out of the same subject matter. A quasi-contract, or any just enrichment, only applies in the absence of an express agreement (*see, Clark-Fitzpatrick v Long Is. R.R. Co.*, 70 NY2d 382, 388). Thus, the moving defendants are entitled to summary judgment dismissing the third cause of action, and the motion is granted as to that cause of action.

The fourth cause of action alleges that Auerbach and CRCC are indebted to CDC in connection with two transactions in the amount of \$10,000 and \$70,500, respectively. The moving defendants contend that both claims were resolved by an agreement dated March 21, 1997. The plaintiff does not dispute that the \$10,000 claim was settled on March 21, 1997, and has withdrawn that claim. However, he disputes that the \$70,500 claim was resolved, and the evidence submitted by the moving defendants does not conclusively establish that the \$70,500 claim was included in the settlement. Since there is a triable issue of fact regarding whether the \$70,500 claim was settled, the motion is granted as to the fourth cause of action only to the extent that the \$10,000 claim is dismissed.

In sum, the moving defendants motion for summary judgment is granted solely to the extent that the third cause of action and the \$10,000 claim contained in the fourth cause of action are dismissed. The motion is otherwise denied.

HON. ELIZABETH HAZLITT EMERSON

DATED: February 5, 2008

J. S.C.