

Ittco Sales Co., Inc. v America In-Line Corp.
2008 NY Slip Op 30559(U)
February 27, 2008
Supreme Court, Suffolk County
Docket Number: 0023731/2002
Judge: Elizabeth H. Emerson
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Elizabeth Hazlitt Emerson

_____x
ITTCO SALES CO., INC.,

Plaintiff,

-against-

STUART R. BERG, P.C.
Attorney for Plaintiff
1205 Franklin Avenue
Garden City, New York 11530

AMERICA IN-LINE CORP., AMERICA IN-LINE OF
MT. SINAI CORP., HOCKEY PRO RINK SYSTEMS
INC., EXEC-U-CAR OF NEW YORK INC., N.Y.C.
NANSCO CORP., JOSEPH ARACRI, NANCY ARACRI,
ANN ARACRI, LISA ARACRI and JAMES ARACRI, and
PETER RICCARDO,

SILVERMAN PERLSTEIN & ACAMPORA
LLP, Attorneys for Defendants
100 Jericho Quadrangle, Suite 300
Jericho, New York 11753

Defendants.

_____x

DECISION AFTER TRIAL

By an order of this court dated August 26, 2003, all of the plaintiff's causes of action were dismissed, except the first cause of action for fraud in the inducement. A non-jury trial on this remaining issue was conducted on October 15 and 16, 2007.

In its remaining cause of action, plaintiff claims that over a fifteen month period it was induced through fraud and misrepresentation to invest approximately Eighty-Five Thousand (\$85,000.00) Dollars, into America In-Line Corp. ("AIL"). Furthermore, plaintiff claims it was to receive approximately Three Thousand Five Hundred (\$3,500.00) Dollars per month rent from AIL for a four year period as rent on commercial space it owned which was used by AIL and its subsidiaries.¹ Plaintiff further alleges that as a result of misrepresentations and fraud committed by the officers and directors of AIL, Ittco did not receive the shares of stock it was entitled to, subsequently lost its entire investment, and was never repaid loans which Ittco had advanced to certain defendants.

_____x
¹ The rental amount in the complaint was alleged to be \$3,500.00 per month however, the testimony at trial alleged the rent to be \$2,500.00 per month.

Turning to the facts of this case. This case arises from a business relationship between the parties in which they anticipated forming a corporation to build and operate skating facilities throughout the country (the "Project"). The concept formulated by the parties, included offering investment opportunities to the public in order to assist in the financing of this venture. The first facility to be opened was located in Mt. Sinai, New York. Plaintiff claims that AIL marketed the business plan to secure investors, located property to build the facility and invested time and money in developing the Project. However, it is alleged that AIL never benefitted from these efforts. Plaintiff claims that subsequent to the formation of AIL, the Aracri family formed a new corporation, N.Y.C. Nansco Corp. ("Nansco") and that all of the assets and benefits derived from the work of AIL have been transferred to Nansco. It is undisputed that the plaintiff has no interest in Nansco. Plaintiff further claims that though a series of misrepresentations and fraud, Nansco now holds title to the property in Mt. Sinai and is the sole beneficiary of all investments into AIL.

Summary of Trial Testimony.

Mr. Pat Cunningham

Mr. Pat Cunningham is an individual who initially worked at AIL performing the sales and marketing function. He testified on behalf of plaintiff and claimed that in or around 1994, he was approached by Mr. Peter Riccardo with the Project which would come to be known as America In-Line. At the time, Mr. Cunningham understood that other than himself, there were several individuals involved in the Project including, Peter Riccardo, Joseph Aracri, Sr., Bob Foote, Mr. Dundas and eventually Neil Rosenberg. He further testified that he was aware of the forming of two corporations; AIL and America In-Line of Mt. Sinai ("AILMS") which was a subsidiary of AIL. He testified that in or around 1995 he attended a venture capital convention with Mr. James Aracri, Jeff Burton and Mr. Joseph Aracri Sr., all representing the interest of AIL. The purpose of this convention was to present this Project to venture capitalists, in anticipation of raising additional funds.

Mr. Cunningham testified that at some point during the second year, AIL moved its offices to Mr. Rosenberg's building in Ronkonkoma. He testified that there were discussions and meetings held regarding the Mt. Sinai property and that in or around 1996 Peter Riccardo and Joe Aracri prepared various applications to obtain bank financing to purchase the property. However, any details regarding this financing were discussed only between Joe Aracri Sr, James Aracri and Peter Riccardo.

Mr. Cunningham then testified that the skating rink opened for business and it was his understanding that AIL was operating the facility. However, he eventually became aware that NYC Nansco had purchased the property and not AIL as originally planned. Subsequent to the opening of the facility, Mr. Cunningham fell ill and realizing that the organization was being run only by the Aracri family and not the original core of investors, he decided to pull out of the company. He attempted to "cash out" his stock but he claims that he was told by Joe Aracri Sr. that the company was not making money at the time. Later on he learned that the Mt. Sinai

location was no longer operating as AIL, but as In-line I, Inc.

On cross-examination, Mr. Cunningham testified that Mr. Riccardo first presented the concept of opening the skating facility to him and then eventually to Mr. Rosenberg. Mr. Riccardo handled the day-to-day operations but eventually Mr. James Aracri took more of an active role. Mr. Cunningham further testified on cross examination as to his knowledge of the loans that Mr. Rosenberg made to AIL. It is his position that when AIL needed money, Mr. Rosenberg made several loans, in different amounts, to the company.

Mr. Neil Rosenberg

Mr. Neil Rosenberg, testified on behalf of plaintiff. Mr. Rosenberg is the president and CEO of Ittco Sales Co., ("Ittco"), the plaintiff herein. Mr. Rosenberg testified that he was initially approached by Mr. Cunningham with the idea of opening an in-line skating facility. These discussions subsequently included Mr. Riccardo and eventually Joseph Aracri. After the initial discussions, Ittco invested \$20,000.00 in exchange for 10% interest in AIL. After several months, Mr. Rosenberg received a stock certificate indicating that he personally owned 85,000 shares of America In-Line Corp. However, Mr. Rosenberg testified that on several occasions he requested that the shares be put in the name of Ittco, but it was never done.

Mr. Rosenberg then testified as to the alleged verbal agreement to provide space in his building to AIL. He claims that an agreement was reached between AIL and Ittco to pay Ittco \$2,500.00 per month for as long as AIL needed the space. Mr. Rosenberg further testified that no rent was ever paid to Ittco for this building.

Mr. Rosenberg also testified that in May 1997 he was contacted by Peter Riccardo and Joseph Aracri, Sr. regarding the closing of title on the property in Mt. Sinai. Mr. Rosenberg testified that it was his impression that the land was being purchased by AIL or AILMS. He alleges that on the day of the closing, Peter Riccardo and Joseph Aracri, Sr represented that they did not have all of the necessary funds to proceed with the purchase. He contends that Joseph Aracri, Sr. asked for a \$35,000.00 loan which would be returned in a few days. Mr. Rosenberg discussed it with his partner in Ittco, he issued check, #1857 for \$35,000.00 made payable to Ms. Vidoni (the seller of the property in Mt. Sinai), had the funds certified at the bank and then the check was picked up by Joseph Aracri an hour later. At the time, Mr. Aracri reiterated that the money would be paid back in a few of days. Mr. Rosenberg claims that despite his demand for repayment, the money was never returned. He then testified as to meetings which occurred in 1999 in which discussions pertaining to the Project, budgeting, and advertising were held. Mr. Rosenberg contends that during these meetings, this loan was discussed in detail and it was agreed that the money was owed to him, but never repaid.

Mr. Rosenberg testified that at the time the skating rink opened, all indications were that it was an AIL operation. The signs on the building and advertisements were all marked AILMS. However, several months later, without any discussions with him, the signs were changed to In-Line I and AIL was no longer indicated anywhere on the building. Upon seeing this change,

Mr. Rosenberg searched the County records which indicated that title to the property in Mt. Sinai, was held by Nansco.

Cross-Examination

During cross examination, Mr. Rosenberg testified that AIL and AILMS used the offices owned by Ittco for approximately five years. He further testified that other entities in which the Aracri family held an interest, used these offices and/or work was conducted on behalf of these companies, at this location. These companies included Hockey Pro Rink Systems, Exec-U-Car of New York Inc. and Nansco. However, there were no written leases for any of these entities, nor did any of these entities ever pay rent.

At the conclusion of Mr. Rosenberg's testimony, the plaintiff rested its case.

The defendants did not offer live testimony during the two-day trial. However, the defendants' attorney requested that portions of the deposition transcript of defendant, Mr. Joseph Aracri be read into the record. The indicated portions of that testimony will be summarized below in relevant portion.

Deposition testimony of Joseph Aracri

Mr. Aracri indicated that his son James Aracri, another defendant in this action worked at the skating rink as assistant manager and then as manager and his daughter Lisa Aracri another defendant herein, conducts the Tots Sports Program at the rink. He also testified that his wife, Ann Aracri, a defendant herein, is affiliated with more than one of the companies involved in the Project. These companies include In-Line I where she is an officer of the corporation and Nansco which owns the land where the rink is located. Mr. Riccardo asked Mr. Joseph Aracri to become an investor in the Project however, he did not invest. He testified that in approximately 1996 or 1997, his wife invested hundreds of thousands into the Project, but she never worked at the facility. Mr. Aracri would attend meetings on her behalf, to represent her interest. He also personally met with several banks with the purpose of obtaining financing. Mr. Aracri claims that it was represented to the bank that Nansco was the borrower, Nansco would have title to the land and Nansco would own the structure. He then testified that AIL did not pay rent to Nansco for use of the facility. However, Nansco continues to pay the note for the construction loan which is \$17,500.00 per month. Mr. Aracri then testified that AIL surrendered the lease to the facility approximately one-year prior to the opening of the facility and a corporation, In-Line I Inc. was formed by Ann Aracri and James Aracri. In-Line I currently operates the rink. Nansco never paid AIL any money once AIL vacated the Mt. Sinai property. However, after AIL vacated, Nansco constructed the building and In-Line I began operating the facility.

Motions

At the end of the trial, counsel for the defendants moved to dismiss this action

against Lisa, Ann and Nancy Aracri, as well as Exec-U-Car and Hockey Pro. He then moved separately to dismiss against Nansco and then the remaining defendants, America In-Line, America In-Line of Mt. Sinai, and Joseph and James Aracri. These motions seek to dismiss the only remaining cause of action which alleges fraud in the inducement. He claims that neither Lisa and/or Nancy Aracri made any representations to Mr. Rosenberg and/or Ittco which would support this cause of action against them. The same reasoning was used to support the application for the corporate defendants, Exec-u-Car, Hockey Pro and Nansco. He claims that the plaintiff failed to prove that any of these entities made representations that would support its claim that it was fraudulently induced to invest in AIL. Furthermore, since the plaintiff in this action is Ittco and Ittco never owned shares in AIL, it could not have been induced into purchasing any shares. He argues that Mr. Rosenberg purchased the stock in his individual capacity and as such, Ittco does not have standing to bring this action and it should therefore be dismissed in its entirety.

In response to these motions, the plaintiff argues that Nansco profited from the money invested by both Mr. Rosenberg and other investors. In addition, it argues that the allegations of self-dealing, withdrawals of money for personal use and the fact that Nansco and the Aracri defendants are the ultimate beneficiaries of this Project, support its claim for fraud in the inducement and seeks denial of these motions.

Legal Arguments

The essential elements of proving fraud in the inducement require a showing that the defendant made a material misrepresentation that was false, that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, that the plaintiff justifiably relied on the defendant's representation and that the plaintiff was injured as a result of the defendant's representation (*see, Leno v DePasquale* 18 AD3d 514, *see also, Dalessio v Kressler* 6 AD3d 57). In addition, these elements must be proven by clear and convincing evidence (*see, Leno v DePasquale* 18 AD3d 514). In the case currently before the court, the plaintiff has failed to prove that defendants Lisa, Ann, Nancy and/or James Aracri made any representations regarding the Project, upon which plaintiff relied. Furthermore, the plaintiff has failed to prove by clear and convincing evidence that these individuals are personally responsible for any "loan" Ittco advanced for the purpose of purchasing the property in Mt. Sinai. Accordingly, the court dismisses this action against these individual defendants. Similarly, the plaintiff has failed to prove its case against the entities Exec-U-Car of New York Inc. or Hockey Pro Rink Systems Inc. Accordingly, the Court dismisses this action against these corporate defendants. However, for reasons described below, the court denies defendants motion to dismiss the action against Joseph Aracri, America In-Line, America In-Line of Mt. Sinai and N.Y.C. Nansco Corp.

In reviewing the record and assessing the credibility of the witnesses, the court finds that the plaintiff has met its burden of proof as to the remaining defendants in so far as described herein. The record is clear that a portion of the damages which plaintiff seeks to recover is the money lent to AIL and/or AILMS in connection with the purchase of the property in Mt. Sinai. The facts presented to the Court demonstrate that in or about May 1997, Joseph Aracri both

individually and on behalf of Nansco and/or Peter Riccardo on behalf of AIL and AILMS made certain representations to Mr. Rosenberg including that in order for the closing to go forward on the property in Mt. Sinai, they needed an additional \$35,000.00. The testimony of Mr. Rosenberg, supported by the documentary evidence, proved that in reliance on the representations made to him, he advanced \$35,000.00 from his company Ittco for the purpose of closing on the Mt. Sinai property and that Mr. Rosenberg believed that title would be held by either AIL and/or AILMS, the corporations with which he was an interested party. However, it is undisputed that Nansco took title to the Mt. Sinai property at the closing, and ultimately benefitted from plaintiff's \$35,000.00 loan.

The defendants did not dispute the fact that the money was advanced by Ittco nor did they dispute that the money was used by Nansco to purchase the property. Courts have held that even though a corporation was not the perpetrator of the actual fraud, the direct beneficiary is liable for the fraud of its agent (*see, Chubb & Son Inc. v Consoli* 283 AD2d297). Therefore the Court finds Nansco liable to Ittco in the amount of \$35,000.00.

The Court finds that the plaintiff has failed to prove his remaining claims. After careful consideration of all the matters alleged, and the quality of the evidence adduced, and the relative credibility of each of the witnesses who testified, it is

ORDERED that plaintiff is entitled to the return of the \$35,000.00 it advanced for the purpose of securing the property located in Mt. Sinai, plus interest from May 17, 1997.

Settle judgment.

HON. ELIZABETH HAZLITT EMERSON

DATED: February 27, 2008

J. S.C.