SHORT FORM ORDER

INDEX
NO.: 00783-06

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

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 10-3-07
SUBMITTED: 11-07-07
MOTION NO.: 005-MOT D
006-MOT D

JAMES SHANNON, TIPPA ME LLC,

Plaintiffs,

-against-

RAUL MENDES, FEDEX GROUND PACKAGE SYSTEM, INC., and CHARLES McCALLEF,

Defendants.

SILBERLING & SILBERLING, ESQS.
Attorneys for Plaintiffs
300 Rabro Drive
Hauppauge, New York 11788

EGAN & GOLDEN, LLP
Attorneys for Defendant Charles Micallef
475 East Main Street, Suite 114
Patchogue, New York 11772

Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion and supporting papers 1-5; Notice of Cross Motion and supporting papers 6-19; Answering Affidavits and supporting papers 20-25; Replying Affidavits and supporting papers 26-27; it is,

***ORDERED*** that the motion by the plaintiff for summary judgment and the cross motion by the defendant Charles Micallef for dismissal or summary judgment are determined as follows:

On December 19, 2001, the plaintiff Tippa Me, LLC (hereinafter "Tippa Me") purchased a Federal Express ground route from Joseph Dudek for the sum of $17,000. Tippa Me is a New York limited liability company whose members are the plaintiff James Shannon and the defendant Raul Mendez. Shannon owns 99% of the shares of Tippa Me and Mendez owns 1%. The operating agreement, which was executed by Shannon and Mendez on December 19, 2001, provides that Shannon is the managing member and that only the managing member has the authority to bind Tippa Me regarding the sale or disposition of property.

In October 2005, the defendant Charles Micallef made a down payment in the amount of $15,000 to Mendez, who represented that he was acting on behalf of Tippa Me, for the purchase of the aforementioned Federal Express route, which was assignable. Mendez subsequently received additional payments on behalf of Tippa Me. No formal contract of sale was executed. However, by a letter dated January 22, 2006, Mendez and Micallef acknowledged the

sale. The letter, which is signed by Mendez on behalf of Tippa Me, provides as follows:

> This letter is to state the sale of the fed ex ground route known as the Bohemia (11716) route. The sale pertains to Raul Mendez also known as Tippa Me LLC. Selling the route to Charles Micallef. This letter is to state that route has been paid in fully by Charles Micallef to Raul Mendez.
>
> Raul Mendez (Tippa Me LLC)
>
> Charles Micallef

After the final payment, Federal Express (hereinafter "Fed Ex") acknowledged the transfer, and Micallef entered into an agreement with Fed Ex to deliver packages along the route.

The plaintiffs commenced this action against Mendez, Micallef, and Fed Ex Ground Package System, Inc., for a permanent injunction enjoining Mendez from transferring the route to Micallef, for a judgment declaring the transfer null and void, and for damages. The plaintiffs alleged that Mendez fraudulently transferred the route without the knowledge or consent of Shannon, the 99% member of Tippa Me. The action was subsequently discontinued against Fed Ex. By an order dated August 9, 2006, this court denied the plaintiffs' motion for a preliminary injunction on the grounds that the plaintiffs had failed to establish irreparable injury and a clear right to the ultimate relief sought. By a further order dated February 2, 2007, the court, inter alia, granted the plaintiffs' motion for an order of default against Mendez and reserved decision on the issues of damages and Shannon's ownership interest in Tippa Me until the time of trial or other disposition of the action against the remaining defendant, Charles Micallef. The plaintiffs now move for summary judgment on the declaratory judgment cause of action. The defendant Charles Micallef cross moves for an order dismissing the complaint pursuant to CPLR 3211 or for summary judgment.

Micallef contends that the plaintiffs' motion papers are insufficient because the plaintiffs have failed to annex thereto copies of the pleadings and an affidavit from someone with knowledge of the facts (*see*, CPLR 3212[b]). Since the pleadings are annexed to Micallef's cross motion, the court will consider the plaintiffs' motion on the merits. Although the affirmation of an attorney who lacks personal knowledge of the facts generally does not have any probative value, when the affirmation is based upon documentary evidence annexed thereto, it will be considered by the court (*see*, **Weingarten v Marcus**, 118 AD2d 640, 641; *see also*, **Finnegan v Staten Island Rapid Transit Operating Authority**, 251 AD2d 539, 540, *citing* **Olan v Farrell Lines**, 64 NY2d 1092, 1093). Here, the affirmation of the plaintiffs' attorney serves as a vehicle for the submission of documentary evidence (*see*, **Zuckerman v City of New York**, 49 NY2d 557). Moreover, the complaint, which is verified by Shannon, may be used as an affidavit (*see*, CPLR 105[u], and the plaintiffs have submitted an affidavit by Shannon in their reply papers.

Micallef contends that this matter should have been submitted to arbitration pursuant to the terms of the agreement that was executed by Mendez, on behalf of Tippa Me, and Fed Ex. CPLR 3211(a)(5) provides, in pertinent part, that a party may move to dismiss one or more causes of action asserted against him on the ground that the action may not be maintained because of "arbitration and award." This ground is available only when the dispute has already

gone to arbitration and an award has been made. When, as here, what is sought is merely to preclude litigation on the ground that there is an outstanding and unfulfilled obligation to arbitrate it, the remedy is not a motion to dismiss the action under CPLR 3211(a)(5), but a motion to compel arbitration under CPLR 7503(a), which merely stays the litigation in deference to arbitration (*see*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3211:21). In any event, a motion to dismiss must be made before service of a responsive pleading (*see*, CPLR 3211[e]). Micallef answered without making a motion to dismiss. Moreover, he failed to raise the 3211(a)(5) objection in his answer. Accordingly, it is waived (*see*, CPLR 3211[e]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:57).

Micallef contends that the complaint fails to state a cause of action against him. While a motion to dismiss pursuant to CPLR 3211(a)(7) may be made at any time (*see*, CPLR 3211(e); Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:28 & CPLR 3211:53), Micallef proffers no reason why he failed to make such a motion sooner (*see*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:28). Given that discovery is now complete and this case is ready for trial, the court will treat that branch of the cross motion as a motion for summary judgment on CPLR 3211(a)(7) grounds.

For the movant to prevail on a motion for summary judgment it must clearly appear that no material and triable issue of fact is presented (*see*, **Di Menna & Sons v City of New York**, 301 NY 118). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*see,* **Braun v Carey**, 280 AD 1019) or where the issue is arguable (*see,* **Barrett v Jacobs**, 255 NY 520). Issue-finding, rather than issue-determination, is the key to the procedure (*see,* **Sillman v Twentieth Century-Fox Film Corp.,** 3 NY2d 395, *citing to* **Esteve v Abad**, 271 AD 725).

The documentary evidence establishes that Mendez, who represented that he was acting on behalf of Tippa Me, sold the route to Micallef and that Fed Ex subsequently transferred the servicing of the route from Tippa Me to Micallef. Limited Liability Company Law § 402(d)(2) provides that, except as provided in the operating agreement, the vote of at least a majority in interest of the members entitled to vote thereon shall be required to approve the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited liability company. The documentary evidence establishes that Shannon is the majority shareholder of Tippa Me and that, under Tippa Me's operating agreement, his vote was required to sell the route. When, as here, there is a transfer of a substantial portion of the plaintiff's assets, which is not in the ordinary course of business and not authorized under the plaintiff's operating agreement or Limited Liability Company Law § 402(d), the transfer is void (*see*, **TIC Holdings v HR Software Acquisitions Group**, 301 AD2d 414). It is well settled that a void contract is no contract at all. It binds no one and is a nullity (*see*, **420 East Assocs. v Kerner**, 81 AD2d 545). When a contract is void and incapable of enforcement in a court of law, the party paying the money in pursuance thereof may treat it as a nullity and recover the money (*see*, **Erben v Lorillard**, 19 NY 299). The court, therefore, finds as a matter of law that the contract between Mendez and Micallef is null and void. Accordingly, the plaintiffs' motion for summary judgment on their declaratory judgment cause of action is granted, and the branch of Micallef's cross motion which is for summary judgment dismissing that cause of action is denied.

It appears that the plaintiffs have abandoned their cause of action for a permanent injunction enjoining Mendez from transferring the route to Micallef. In any event, the documentary

evidence establishes that the transfer, which was completed on January 22, 2006, has now been determined to be null and void. The injunctive relief sought is, therefore, academic. Accordingly, the branch of Micallef's cross motion which is for summary judgment dismissing the plaintiffs' cause of action for a permanent injunction is granted.

In their reply papers, the plaintiffs contend that Micallef was involved in the alleged fraudulent transfer of the route, and they seek damages against Micallef as a perpetrator of the fraud and the recipient of the alleged fraudulent transfer. Since this allegation is not contained in the complaint, it constitutes an unpleaded cause of action. The general rule is that a party may not obtain summary judgment on an unpleaded cause of action unless the proof supports such a cause of action and the opposing party has not been misled to its prejudice (*see*, **Weinstock v Handler**, 254 AD2d 165, 166; **Torrioni v Unisul, Inc.**, 214 AD2d 314, 315). Given that discovery is now complete and this case is ready for trial, Micallef would be severely prejudiced were the court to grant the plaintiffs' summary judgment on this unpleaded cause of action. Moreover, the plaintiffs' allegations fail to state a cause of action for fraud against Micallef (*see*, **Lama Holding Co. v Smith Barney**, 88 NY2d 413, 421), and they are too vague to meet the enhanced pleading requirements of CPLR 3016(b). Accordingly, the unpleaded allegations of fraud against Micallef are dismissed.

The plaintiffs seek to recover their lost revenue from the route since January 2006, when it was transferred to Micallef. New York follows the rule that one who seeks to rescind or avoid a transaction and recover back what he has parted with must restore the other party to the transaction to the status quo and return what he has received under the transaction. The effect of rescission is to declare the contract void from its inception and to restore the parties to the status quo. Therefore, rescission of a contract necessarily involves an inquiry as to whether the parties can be returned to the status quo (*see*, 22A NY Jur 2d, Contracts § 578). Accordingly, the parties are directed to appear for a conference with the court to address appropriate issues including, without limitation, the return of the purchase price, compensation for services rendered, and any increase in the value of the route, and to schedule a hearing on that issue, if necessary. The conference shall be held on May 7, 2008 at 9:45 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

HON. ELIZABETH HAZLITT EMERSON

DATED: March 11, 2008

J. S.C.