

Seele, L.P. v Kohl

2008 NY Slip Op 31438(U)

May 22, 2008

Supreme Court, New York County

Docket Number: 0603901/2004

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN
Justice

PART 3

SEELE LP

INDEX NO. 603901-04

- v -

MOTION DATE 4/16/08

MOTION SEQ. NO. 003

THEODORE KOHL et al

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying memorandum decision.

FILED

MAY 23 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 22, 2008


EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

-----X

SEELE, L.P.,

Plaintiff,

Index No.: 603901/04
Motion Date: 4/16/08
Motion Sequence No.: 003

-against-

THEODORE "TED" KOHL, JAMES L. STUMPF,
TREVOR PRINCE, LECH K. GORECKI,
GLENN R. LEVEY, HAROLD FRIEDMAN, and
IDI CONSTRUCTION CO., INC.

Defendant.

FILED
MAY 23 2008
COUNTY CLERK

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PRESENT: EILEEN BRANSTEN, J:

Plaintiff Seele, L.P., ("Seele") moves for summary judgment pursuant to CPLR 3212 on its damages claim against defendants Theodore "Ted" Kohl ("Mr. Kohl"), James L. Stumpf ("Mr. Stumpf"), Trevor Prince ("Mr. Prince"), Lech K. Gorecki ("Mr. Gorecki"), Glenn R. Levey ("Mr. Levey"), Harrold Friedman ("Mr. Friedman"), and IDI Construction, Inc. ("IDI") (collectively, "Defcndants"). Defendants oppose the motion.

BACKGROUND

In 2002, non-party Asprey Limited ("Asprey") entered into a management agreement with IDI, a corporation with its principal place of operations in New York, NY, for construction services related to its retail store located in the Trump Towers (See, Geissler Aff'd, Ex. A, Complaint at ¶ 2). Mr. Stumpf was IDI's President; Messrs. Prince, Gorecki,

and Levy were its Vice Presidents; Mr. Friedman was its Chief Financial Officer; and Mr. Kohl was part of its management team. In furtherance of the contract, IDI entered into a subcontractor agreement with Seele, a foreign corporation licensed to do business in New York, to build a steel curtain wall for the project (*Id.*, ¶ 3).

After the work was completed, Seele alleges that Asprey paid IDI \$5,772,272.00 for its benefit but that IDI only paid it \$3,676,055.46 (*Id.*, ¶ 5-6). It further alleges that Messrs. Kohl and Stumpf converted the outstanding \$2,096,216.54 for their own use (*Id.*, ¶ 6). After this dispute between IDI and Seele ensued, IDI filed Chapter 11 Bankruptcy. Seele is one of its creditors in that proceeding.

On December 7, 2004, Seele commenced this action against Defendants for fraudulent conveyance, conversion, forgery, fraud by concealment, and misrepresentation. In their depositions in this case, Messrs. Kohl and Stumpf asserted their Fifth Amendment rights when asked if they had converted money that Asprey paid it for Seele's benefit (*See*, Tarr Aff'd, Exs. A & B).

In October 2005, Messrs. Kohl and Stumpf each pled guilty to the crime of Grand Larceny. In their respective plea agreements with the New York County District Attorney, they stated that during the course of the project, IDI received money from Asprey that was entrusted to it for the benefit of all the project's subcontractors, including Seele (*See*, Geissler Aff'd, Ex. G). They admitted that the funds were never paid to the subcontractors,

in violation of the New York Lien Law (*Id.*). Mr. Kohl subsequently made restitution to Seele in the amount of \$383,028.63. Seele alleges that it is still owed \$1,713,187.91.

On September 21, 2006, Seele moved for summary judgment against Messrs. Kohl and Stumpf on its cause of action for conversion. In a so-ordered stipulation dated December 14, 2006, the two defendants admitted their “liability, jointly and severally, in favor of Plaintiff, Seele, on [the conversion cause of action]” with the damages amount to be “determined by the Court upon application of any party, or upon the trial of this action.” (Tarr Aff’d, Ex. C).

Seele now moves for summary judgment on the damages portion of its conversion claim, arguing that there is no issue of triable fact that Defendants owe it \$1,713,187.91 pursuant to the contract, and that this is the monetary amount that remains converted by Messrs. Kohl and Stumpf. Defendants oppose the motion.

DISCUSSION

To obtain summary judgment, the movant must establish its cause of action “sufficiently to warrant the court as a matter of law in directing judgment” in its favor (*CPLR 3212 [b]*), and it must “set forth evidence that there is no factual issue” requiring an adjudication on the facts (*Forrest v Jewish Guild for the Blind*, 3 N.Y.3d 295, 315 [2004]). “The motion must be supported by an affidavit of a person having knowledge of the facts”

(*S.J. Capelin Associates, Inc v Globe Mfg. Corp*, 34 N.Y.2d 338 [1974]). When the affidavit is based upon documentary evidence that is admissible at trial, “it is sufficient to support a motion for summary judgement” (*Marine Midland Bank, NA v. Embassy East, Inc.*, 160 A.D.2d 420 [1st Dept 1990]).

“The tort of conversion is established when one who owns and has the right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner” (*Republic of Haiti v. Duvalier*, 211 A.D.2d 379, 384 [1st Dept. 1995]). An action for conversion based on money will lie when there is a specific identifiable fund and an obligation to treat it in a particular manner (*See, Manufacturer’s Hanover Trust Co. v Chemical Bank*, 160 A.D.2d 113 [1st Dept. 1990]). Article 3-A of the New York Lien law creates “trust funds out of certain construction payments to assure payment of subcontractors . . . the primary purpose [of which] is to ensure that those who directly expended labor and materials . . . at the direction of the contractor. . . receive payment for the work performed.” (*Aspro Mechanical Contracting, Inc., et al, v. Fleet Bank, N.A.*, 1 N.Y.3d 324 [2004]).

By their own admission, Messrs. Kohl and Stumpf converted funds that Asprey entrusted to IDI in order to pay Seele (*See, Tarr Aff’d, Ex. C*). The question for this Court to resolve here is how much money they converted from Seele.

In support of this motion, Seele proffers the affidavit of Michael Heary, Asprey's Managing Director. He attests, with firsthand knowledge, that Asprey paid IDI \$5,772,272.00 for Seele's benefit (*See, Heary Aff'd at 2, ¶ 8*). In addition, Seele submits the affidavit of its Managing Director, Thomas Geissler. He attests with direct knowledge that IDI only paid Seele \$3,676,055.46 (*See, Geissler Aff'd at 3, ¶ 6*). Furthermore, Seele submits lien waivers, or the releases signed by contractors that they were paid for the work performed, which clearly indicate that Asprey paid IDI \$5,772,272.00 for the work that Seele performed and that Seele only received \$3,676,055.46 of it (*See, Heary Aff'd, Ex. A, at 3; Ex. C*). A simple mathematical calculation, after Mr. Kohl's restitution payment of \$383,028.63 is factored in, demonstrates that Seele is owed \$1,713,187.91 on the contract.

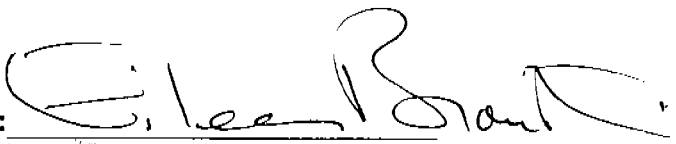
While Seele clearly identifies the funds it is owed on the contract with IDI, it fails to proffer evidence that would justify this Court to conclude, as a matter of law, the amount that was actually converted by Messrs. Kohl and Stumpf. Neither of them admitted to converting a sum certain in either their liability stipulation or their plea agreement with the District Attorney. Nor can an adverse inference be drawn with respect to a specific amount from their invocation of their Fifth Amendment rights since they were not questioned as to the amount of money they actually converted. If they had been, this Court may have been inclined to infer an adverse inference, altering this motion's disposition. The motion is therefore denied.

Accordingly, it is hereby

ORDERED that Seele's motion for summary judgment on the damages portion for its second cause of action for conversion is DENIED.

This shall constitute the decision and order of the Court.

Dated: May 22, 2008

Enter: 
HON. EILEEN BRANSTEN
Hon. Eileen Bransten

FILED
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