

**Lewinter v Charity Bev. USA Corp.**

2008 NY Slip Op 31554(U)

June 3, 2008

Supreme Court, New York County

Docket Number: 0109004/2007

Judge: Martin Shulman

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

MARTIN SHULMAN

J.S.C.

PRESENT:

PART 1

Index Number : 109004/2007

LEWINTER, KEITH

vs

CHARITY BEVERAGE USA CORP.

Sequence Number : 001

DISMISS ACTION

INDEX NO.

109004/07

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A+B

1

Answering Affidavits — Exhibits 1

2

Replying Affidavits \_\_\_\_\_

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

**FILED**  
JUN 04 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: June 3, 2008

MARTIN SHULMAN

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 1

-----X  
KEITH LEWINTER, CLAUDIO LODES and  
NICHOLAS SIMONE,

Plaintiffs,

-against-

Index No.: 109004/07

CHARITY BEVERAGE USA CORP., CHARITY  
BEVERAGE USA LLC, WILLIAM RICHARDS,  
individually and in his corporate capacity, STEPHEN  
BALDWIN, individually and in his corporate capacity,  
MYRNA RICHARDS, individually and in her corporate  
capacity, DISTRIBUTORSHIP.COM, POTAMKIN  
CADILLAC-BUICK-CHEVROLET-GEO, LTD.,  
MICHELLE CAFFREY, KEVIN L. MILLER and  
"SCOTT" DOE individually and in their corporate  
capacities for POTAMKIN CADILLAC-BUICK-  
CHEVROLET-GEO, LTD., and BANK OF AMERICA,

Defendants.

-----X

**FILED**  
JUN 04 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**SHULMAN, J.:**

Plaintiffs Keith Lewinter ("Lewinter"), Claudio Lodes ("Lodes") and Nicholas Simone ("Simone") commenced this action to recover money which they invested in defendants Charity Beverage USA, LLC ("Charity LLC"), and its successor corporation, Charity Beverage USA Corp. ("Charity Corp."), which is principally owned and controlled by defendant William Richards ("Richards"). The money which Lewinter, Lodes, and Simone invested in Charity LLC and Charity Corp. was for the exclusive distribution rights to distribute Loco Joe cappuccino drink ("Loco Joe") which was allegedly being produced for distribution throughout the United States.

Motion sequence numbers 001, 002 and 003 are consolidated for disposition. In motion sequence number 001, defendant Stephen Baldwin ("Baldwin"), Charity LLC's president of media relations, moves pursuant to CPLR 3211(a)(7) to dismiss the

complaint on the ground that the complaint fails to state a cause of action as against him. In motion sequence number 002, plaintiffs move pursuant to CPLR 3215(a) for an order directing that a default judgment be entered against all of the defendants, with the exception of Bank of America. In motion sequence number 003, Baldwin moves pursuant to CPLR 3211(a)(7) to dismiss the cross claim of defendant Potamkin Cadillac-Buick-Chevrolet-Geo, Ltd. ("Potamkin") for failure to state a cause of action.

### **FACTUAL ALLEGATIONS**

Lewinter, Lodes and Simone (collectively "plaintiffs") were each offered various incentives to invest in Charity LLC and Charity Corp., including a master distribution right for the Manhattan area for Lewinter; a similar distribution right for Lodes for the states of New York, New Jersey, Connecticut and Nevada; and distribution rights in Nevada as well as Nassau County, New York for Simone.

Lewinter and Lodes also allege that they were fraudulently induced to co-sign sales contracts and finance agreements for the purchase of automobiles for promotional and advertising use by Charity LLC. However, Lewinter and Lodes allege that defendants did not produce the corporate resolution and other documents necessary to properly register and finance the vehicles, leaving Lewinter and Lodes responsible for the payments on the vehicles. Despite plaintiffs' investments, it appears that Loco Joe was never produced or distributed beyond a small initial amount used to give the impression that the drink was being regularly produced and distributed.

Plaintiffs allege that Baldwin was intimately involved in the promotion of Loco Joe, in that he was planning a "huge multi-city promotional blitz" (Complaint, ¶ 40), discussed Loco Joe on two television program appearances and was featured on the

company's web site. Plaintiffs also allege that defendants assured them that Baldwin had a long-standing relationship with an employee of Potamkin, the car dealership which arranged for the purchase of the two vehicles. Baldwin was also named by defendants as president of media relations of Charity LLC, and while a percentage of the proceeds of the sale of Loco Joe would be going to various charities, a portion would be donated to Baldwin's mother's own charitable organization.

In sum, plaintiffs allege that Baldwin, through his actions, was part of the group which fraudulently induced them to invest in Loco Joe by investing in Charity LLC. Plaintiffs filed a summons and complaint on June 28, 2007, alleging causes of action against Baldwin for fraud, misrepresentation, breach of contract and conversion.

### **DISCUSSION**

Baldwin argues that the plaintiffs' complaint fails to state a cause of action as against him. "The test on a motion to dismiss for insufficiency of the pleadings is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Pepler v Coyne*, 33 AD3d 434, 435 (1st Dept 2006), quoting *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990). "[I]t is axiomatic that in considering a motion to dismiss pursuant to CPLR 3211, the court must assume as true the facts alleged in the complaint. Where . . . the various claims are sufficiently pleaded on their face, dismissal for failure to state a cause of action is unwarranted." *Marcus v Hemphill Harris Travel Corp.*, 193 AD2d 543, 544 (1st Dept 1993) (internal citations omitted).

The first, fourth, fifth, eighth, tenth, twelfth, fourteenth and sixteenth causes of action are based upon the torts of fraud and misrepresentation. "The essential elements of a cause of action for fraud are representation of a material existing fact, falsity, scienter, deception and injury." *Friedman v Anderson*, 23 AD3d 163, 166 (1st Dept 2005) (internal quotation marks and citations omitted). "[A] plaintiff seeking to recover for fraud and misrepresentation is required 'to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud.'" *Id.*, quoting *Handel v Bruder*, 209 AD2d 282, 282-283 (1st Dept 1994). Furthermore, "[a] fraud claim must be pleaded with particularity" and "the circumstances constituting the wrong shall be stated in detail." *Ramos v Ramirez*, 31 AD3d 294, 295 (1st Dept 2006) (citations omitted).

In the first cause of action, Lewinter alleges that Richards fraudulently induced him into investing funds into Charity LLC. Lewinter maintains that Richards repeatedly utilized Baldwin's name as a supporter and officer of Charity LLC and repeatedly advised Lewinter that Baldwin was planning a large scale promotional tour. Although a claim for fraud must be pleaded with particularity, this cause of action does not detail or specify that Baldwin himself made any such representations to Lewinter or had knowledge that funds invested by Lewinter and the other investors were not being utilized to assist in the production of Loco Joe.

In the fourth cause of action, Lewinter alleges that Richards advised him that Baldwin had a long-standing relationship with certain other defendants to induce Lewinter into entering into a sales contract and financing agreement with Potamkin to purchase a car. Lewinter states that Richards advised him that Baldwin had a

relationship with defendant "Scott" Doe and Potamkin, and that as a result of the relationship, a deal had been arranged with Potamkin to sell a vehicle to Charity LLC with Lewinter as co-signer and guarantor. Lewinter alleges that Baldwin, Richards and Charity LLC induced Lewinter into entering into the master distributorship contract which required him to purchase a vehicle; however, Lewinter fails to set forth any allegations that Baldwin himself made any false representations directly to him. Instead, the cause of action is based upon the representations which Richards made to Lewinter.

In the fifth and eighth causes of action, Lodes alleges that Baldwin had full knowledge of the facts and circumstances surrounding Richards' indictment and conviction and actively conspired with Richards to conceal these facts from potential investors. However, Lodes makes this conclusion without specifically identifying how Baldwin actively conspired to conceal Richards' misappropriation of the investors' funds.

With regard to the tenth cause of action, Lodes alleges that Baldwin fraudulently induced him into advancing \$5,000 for the purpose of paying defendants' principal salesman, Steve Canai, while the twelfth cause of action alleges that Baldwin induced Lodes into investing an additional \$30,000 for distribution rights for the New York, New Jersey and Connecticut tri-state area and actively concealed Richards' indictment and conviction. In the fourteenth cause of action, Lodes alleges that defendant Richards fraudulently induced him to co-sign a sales contract and financing agreement for the purchase and financing of a vehicle from Potamkin by stating that he had bad credit.

However, in each of these causes of action, plaintiffs fail to specify how Baldwin fraudulently induced Lodes or how he actively concealed Richards' conviction.

Finally, in the sixteenth cause of action, Simone alleges that he was induced by Richards as well as by Baldwin to invest \$12,500 into the company. However, again, the allegations against Baldwin are vague and fail to fully detail what actions Baldwin took to fraudulently induce Simone into investing in Charity LLC.

In opposition, plaintiffs allege that Baldwin's participation in the fraud is proven based on his contact with Lewinter and Simone, his own words as spoken on the "Best Damn Sports Show Period" and "Last Call with Carson Daly" television shows, and his consent to use his name, image and likeness on the CharityBeverageUSA.com website which lists him as a vice president of marketing and promotion. Although plaintiffs allege that Baldwin may have referred to Charity LLC as "my coffee company" while appearing on a television program, plaintiffs cannot state a cause of action for fraudulent misrepresentation against an individual by solely alleging that the individual was an owner of a corporation or because his or her name was on a website without proving that Baldwin participated or had knowledge of the fraud. *See Ramos v Ramirez*, 31 AD3d 294, 295 (1st Dept 2006) (holding that allegations of fraud should show that the party participated in the fraud or had knowledge of it).

Plaintiffs also allege that Lewinter met and spoke with Baldwin about an investment of \$15,000 he had made on July 14, 2005 and that Baldwin made a personal telephone call to Simone to induce him to invest money in Charity Corp. However, the complaint fails to allege what statements Baldwin made, whether Baldwin made any representations regarding potential investments, whether the representations

were true or false, whether Baldwin had an intent to defraud plaintiffs and whether Lewinter or Simone relied upon anything Baldwin said before making an investment.

As Lewinter's and Simone's claims against Baldwin lack the particularity required for causes of action based upon fraud and misrepresentation, specifically failing to identify any specific statements made by Baldwin that were material, false or made to intentionally defraud the investors, the first, fourth, fifth, eighth, tenth, twelfth, fourteenth and sixteenth causes of action must be dismissed as against Baldwin.

Lewinter, in the second cause of action, and Lodes in the sixth cause of action, set forth claims against Baldwin for breach of contract. In the second cause of action, Lewinter alleges that Baldwin breached the master distributor agreement by failing to produce Loco Joe for distribution and by failing to use funds invested by Lewinter for production of the drink. In the sixth cause of action, Lodes alleges that Baldwin breached the master distributorship contract by not producing and delivering Loco Joe for sale in New Jersey and not making finance and insurance premium payments on the vehicle which Lodes purchased.

The First Department has held that a cause of action for breach of contract must "allege, in nonconclusory language . . . the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated." *Matter of Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). Here, the agreement which plaintiffs entered into was not entered into between themselves and Baldwin individually. Instead, according to the affirmation of plaintiffs' attorney Gary R. DeFillipo, the agreement was entered into by Baldwin as an officer of Charity LLC.

"The mere facts that they are shareholders and/or officers [of a corporation] does not make them personally liable for the alleged breach of contract by the corporation." *Prudential-Bache Metal Co., Inc. v Binder*, 121 AD2d 923, 926 (1st Dept 1986); see also *Halford v First Jersey Sec., Inc.*, 182 AD2d 1003, 1004 (3d Dept 1992). Furthermore, "corporate officers may not be held personally liable on contracts of their corporations, provided they did not purport to bind themselves individually under such contracts." *Westminster Constr. Co., Inc. v Sherman*, 160 AD2d 867, 868 (2d Dept 1990). Here, the allegations in the complaint are insufficient to establish that Baldwin personally participated in any acts which constituted a breach of contract, and Baldwin cannot be held liable for breach of contract solely due to his position within Charity LLC. Therefore, the second and sixth causes of action must be dismissed.

Plaintiffs allege six causes of action for conversion against Baldwin. The third, seventh, ninth and thirteenth<sup>1</sup> causes of action allege that Richards and Baldwin intended to convert the investors' funds for their own use. In the eleventh cause of action, Lodes alleges that the \$5,000 he advanced for the purpose of paying the principal salesman, Steve Canai, was used by Richards to pay his legal bills in the New Jersey Superior Court criminal fraud case, while in the seventeenth cause of action, Simone alleges that the defendants, including Baldwin, refused to return a \$15,000 investment, and admitted that said money was converted for their own use.

"The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized

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<sup>1</sup> The thirteenth cause of action of the complaint is misnumbered on page 28 as the eleventh cause of action.

possession of another who has acted to exclude the rights of the owner." *Republic of Haiti v Duvalier*, 211 AD2d 379, 384 (1st Dept 1995). "Interference with the right to possession is the essence of a conversion. It is not necessary that one take actual physical possession of property to be guilty of conversion. Any wrongful exercise of dominion by one other than the owner is a conversion." *General Electric Co. v American Export Isbrandtsen Lines, Inc.*, 37 AD2d 959, 959 (2d Dept 1971) (internal citation omitted).

Here, plaintiffs fail to allege that Baldwin personally received wrongfully taken funds or exercised dominion or control over the investments. Furthermore, the complaint states that based upon information and belief, the source of which is the New Jersey Superior Court criminal case, none of the investors' funds, including Lewinter's investments, were used for production of Loco Joe, and that Richards had pocketed the money for his personal use. The complaint does not state that Baldwin also pocketed the money for his own personal use or ever interfered with the investments. Therefore, plaintiffs' causes of action based upon conversion must be dismissed.

Plaintiffs also move for a default judgment against Charity Corp., Charity LLC, Richards, Myrna Richards, Distributorship.com, Michelle Caffrey, Kevin L. Miller and "Scott" Doe (collectively the "defaulting defendants").<sup>2</sup> While plaintiffs' counsel's affirmation in support of the default motion alleges that the summons and verified complaint was served upon the defaulting defendants on July 25, 2007 and purports to attach copies of the affidavits of service, only multiple copies of one affidavit of service

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<sup>2</sup> Plaintiffs ultimately withdrew the default motion as to Baldwin and Potamkin.

upon defendant Scott "Doe" are in fact attached. Accordingly, plaintiffs' motion is denied without prejudice to renewal upon proper papers, to include proof of service and current affidavits of non-military service.

Baldwin also moves to dismiss Potamkin's cross claim for failure to state a cause of action. Potamkin does not oppose this motion. The cross claim seeks indemnification against Baldwin for any amounts plaintiffs may recover from Potamkin, together with costs, expenses and disbursements incurred in the defense of this action. Potamkin states in its answer that if plaintiffs recover against Baldwin for fraud, misrepresentation, negligence and/or breach of contract, "said culpable acts by Stephen Baldwin will have been primary and the culpable acts, if any, of Potamkin will be secondary." Potamkin's Verified Answer, ¶ 59. As Baldwin's motion to dismiss the complaint for fraud, misrepresentation, conversion and breach of contract has been granted, Potamkin's cross claim must be dismissed.

#### **CONCLUSION AND ORDER**

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is hereby severed and dismissed as against defendant Stephen Baldwin, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is continued as to the remaining defendants; and it is further

ORDERED that Stephen Baldwin's motion to dismiss Potamkin Cadillac-Buick-Chevrolet-Geo, Ltd.'s cross claim is granted; and it is further

ORDERED that the motion for a default judgment against defendants Charity Corp., Charity LLC, William Richards, Myrna Richards, Distributorship.com, Michelle Caffrey, Kevin L. Miller and "Scott" Doe is denied without prejudice to renewal upon proper papers.

Counsel for plaintiffs and the remaining defendants who have appeared in this action are directed to appear for a preliminary conference on July 1, 2008 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York. Plaintiffs' counsel is directed to notify said defendants of the foregoing conference date.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for plaintiffs and Baldwin.

DATED: New York, New York  
June 3, 2008

  
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HON. MARTIN SHULMAN, J.S.C.

**FILED**  
JUN 06 2008  
COUNTY CLERK'S OFFICE  
NEW YORK