

**Twentysix N.Y., Inc. v Sporn Goup, Inc.**

2008 NY Slip Op 31626(U)

June 9, 2008

Supreme Court, New York County

Docket Number: 0602342/2007

Judge: Richard B. Lowe

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PRESENT

PART 56

Index Number : 602342/2007

**TWENTYSIX NEW YORK, INC.,**

vs.

**THE SPORN GROUP, INC.,**

SEQUENCE NUMBER : # 001

PARTIAL SUMMARY JUDGMENT

stice

INDEX NO. 602342-0

MOTION DATE 12/19/07

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

ad on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits – Exhibits \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE  
 WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

JUN 13 2008

COUNTY CLERK'S OFFICE

NEW YORK

HON. RICHARD B. LOWE, III

Dated: 6/19/08

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

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

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

..... X  
TWENTYSIX NEW YORK, INC,

Plaintiff,

Index No.: 602342/07

-against-

THE SPORN GROUP, INC.

Defendant.

..... X

**FILED**  
JUN 13 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**Hon. Richard B. Lowe, III:**

This action arises out of a dispute over several postdated checks which Plaintiff, Twentysix New York, Inc. ("Twentysix"), claims were fraudulently drawn by Defendant, The Sporn Group, Inc. ("Sporn"), to induce Twentysix to continue providing services to Sporn. Twentysix moves for partial summary judgment on its fraud cause of action pursuant to CPLR § 3212. Sporn cross-moves for summary judgment pursuant to CPLR § 3212 seeking an order dismissing Twentysix's fraud cause of action.

**BACKGROUND**

Twentysix alleges a fraud cause of action based upon three post dated checks which were drawn by Sporn in return for services provided by Twentysix. The postdated checks were subsequently deposited and then returned because the account they were drawn on had insufficient funds. Payment for the services rendered to Sporn, to this point, has not been made.

An underlying service agreement between the parties required Twentysix to provide computer programming services and to prepare a computer program for Sporn's client, Streamline VM. Twentysix and Sporn had an ongoing business relationship dating back to

March 2006. In March 2007, David Sporn, principal of The Sporn Group, signed three checks totaling \$35,000, two of which were dated for March 30, 2007 (the "March 30 checks"), and one which was dated April 13, 2007 (the "April 13 check"). Twentysix alleges that Sporn delivered these checks knowing the accounts they were drawn on did not, and would not, have sufficient funds in them to pay the checks when they became due. Twentysix further alleges this was done for the purpose of inducing Twentysix to continue working for Sporn, because Sporn had stopped making payments for these services by November 2006, and Twentysix threatened to cease work.

Twentysix deposited the March 30 checks on April 5, 2007. On April 8, Twentysix was informed by its bank that the two checks were dishonored because of insufficient funds in the account. The April 13 check was deposited into Twentysix's bank on April 16. On April 19, Twentysix was informed by its bank that this check was dishonored because of insufficient funds in the account. Jay Rabin, principal of Twentysix, alleges that on April 27 David Sporn told him that he could redeposit two of the checks because there were sufficient funds in the account for the checks to clear. These checks were redeposited on April 30. Both of these checks were later returned by Twentysix's bank for insufficient funds in the account.

David Sporn alleges it was customary that when he wrote a postdated check to Twentysix, someone from that company would call Sporn to confirm sufficient funds were available in the account before depositing the check. Sporn alleges this arrangement was employed throughout the previous year, and until the checks in question were returned, there had not been any problems between the parties. Sporn further alleges that the only reason these checks were returned on this occasion is because Twentysix broke its arrangement with Sporn and deposited the checks before receiving authorization from David Sporn that the funds were in

[\*4]  
fact available. Thus, Sporn argues that Twentysix is not entitled to the payment of those checks because it did not first get Sporn's authorization.

Twentysix sued Sporn to recover an outstanding balance of \$295,949.50, plus interest, for services performed for Sporn. Twentysix now moves for partial summary judgment on its fraud cause of action. Sporn cross-moves for summary judgment on that same fraud cause of action. Sporn argues that summary judgment on the fraud cause of action should be granted in its favor because fraud cannot be predicated on a breach of contract claim, nor can it be based on misrepresentations of future intent.<sup>1</sup> Additionally, Sporn argues the fraud claim should be barred on the grounds of equitable estoppel and criminal usury.

## DISCUSSION

### *Summary Judgment*

To obtain summary judgment, "the cause of action or defense shall be established sufficiently [by the movant] to warrant the court as a matter of law in directing judgment" in its favor. (CPLR 3212 [b].) In any other action, summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted. (CPLR 3212 [e].) The movant must "set forth evidence that there is no factual issue" requiring adjudication. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004].) Conversely, to defeat a summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." (CPLR 3212 [b].)

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<sup>1</sup> Plaintiff argues in its reply memorandum in further support of its motion for summary judgment that because Defendant has not submitted any memoranda of law, but only affirmations of fact by David Sporn, who is not an attorney, all of Defendant's legal arguments should be rejected. Although NY CRR § 208.11 (1)(b) states that the purpose of an affidavit is to set forth facts, and the purpose of a memorandum of law is to set forth legal arguments, Comment 21 of Siegel's Civil Practice Commentary to CPLR § 2214 simply states that these requirements *should be* adhered to as much as possible. Nowhere does it indicate that the consequence of overlap between these two requires rejecting all arguments submitted through this allegedly improper form.

[\* 5 ]

### *Fraud*

To establish a cause of action alleging fraud, the plaintiff must show “a representation of fact, which is either untrue and known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury.” (*McMorrow v Dime Sav. Bank of Williamsburgh*, 48 AD3d 646, 646 [2d Dept 2008], citing *Jo Ann Homes at Bellmore v Dworetz*, 25 NY2d 112, 119 [1969].) Moreover, the plaintiff must show not only that he or she actually relied on the misrepresentation, but also that such reliance was reasonable. (*Id.*) “Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful [sic] default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.” (*Bernstein v Kelso & Co., Inc.*, 231 AD2d 314, 320 [1st Dept 1997].)

Here, Twentysix’s fraud claim is based on representations made by David Sporn that the postdated checks, drawn on accounts at Signature Bank, had or would have sufficient funds to pay the checks, even though he knew they would not. “A corporate officer who issues a corporate check with knowledge that there are insufficient funds in the account to cover the check commits fraud.” (*Societe Generale Alsacienne De Banque, Zurich v Flemington Development, Corp.*, 118 AD2d 769, 773 [2nd Dept 1986].) Twentysix argues that these statements were made by David Sporn to induce Twentysix to continue performing services, even though David Sporn knew the accounts did not have sufficient funds available in them to pay the checks. However, Twentysix has failed to allege any facts showing Sporn knew the accounts would have insufficient funds in them when the checks became payable.

Sporn argues Twentysix’s fraud cause of action is defective because it is based on misrepresentations of future intent. (*Glenn Partition, Inc. v Trustees of Columbia University in the City of New York*, 169 AD2d 488, 489 [1st Dept 1991].) Twentysix counters this by claiming

[\* 6 ]  
that David Sporn knew at the time he signed the postdated checks, he would have insufficient funds to pay the checks when they became due. Again, however, it fails to allege any facts showing Sporn's knowledge that he would have insufficient funds to pay these checks when they became due several weeks later.

In this case, there was an agreement for Twentysix to provide services to Sporn, for which Sporn agreed to pay Twentysix. These parties had a business relationship for approximately a year prior to March 2007. Further, it is not in dispute that on occasion David Sporn postdated checks and then gave instructions to Twentysix employees indicating when they should be deposited. This appears to be the first time checks written by Sporn to Twentysix were dishonored after more than \$100,000 in payments were made to Twentysix over the past year. Without alleging more, Twentysix fails to demonstrate that Sporn's failure to pay \$35,000 in postdated checks amounts to fraud.

Twentysix has failed to satisfy the high burden for establishing a fraud claim. Further, and central to this decision, Twentysix has failed to show fraudulent intent on behalf of Sporn. Moreover, fraud causes of action cannot be predicated on breach of contract claims. (*Glenn Partition*, 169 AD2d at 489.) Therefore, Twentysix's motion for summary judgment on its fraud cause of action must be denied, and Sporn's cross-motion for summary judgment on the fraud cause of action must be granted in its favor.

Sporn also raises the defenses of equitable estoppel and criminal usury in opposition to Twentysix's fraud cause of action.

#### ***Equitable Estoppel***

The doctrine of **equitable estoppel** is "imposed by law in the interest of fairness to prevent the enforcement of rights which would work a fraud or injustice upon the person against

[\*7]

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." (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982].)

"The party asserting estoppel must show (1) lack of knowledge of the true facts; (2) reliance on the conduct of the party estopped, and (3) a prejudicial change in its position." (*Broadworth Realty Assoc. v Chock 336 B'way Operating, Inc.*, 168 AD2d 299, 301 [1st Dept 1990].)

Sporn's affirmation in support of its cross-motion for summary judgment sets forth a confusing set of facts it claims form the basis of an equitable estoppel defense against the fraud cause of action. It appears Sporn is arguing that because Twentysix induced Sporn to turn over to it Sporn's customer for whom Twentysix was doing the work for Sporn, it is inequitable to make Sporn pay for goods that it no longer has any use for. Sporn's equitable estoppel defense reads as follows:

When the defendant was not paying the alleged charges, Plaintiff induced the defendant to turn over to the plaintiff, the defendant's prime customer – for whom all of the software was produced – which is the subject of this lawsuit. Therefore, the defendant has no present or future use of this software. It is inequitable for the plaintiff to maintain this present action under these circumstances – where the plaintiff will not profit from the software – which the plaintiff is suing the defendant for in this action. Plaintiff, in good conscience and equity, ought to be estopped from maintaining this action against the defendant.

(Defendant's Memorandum of Law in Support of Cross-Motion for Summary Judgment ¶ 28.)

This argument is clearly deficient based on both its facts and the law. Sporn has not shown how a fraud or injustice would be worked against it if this relief were granted for Twentysix. Further, Sporn fails to show how it relied on Twentysix to its detriment, or how its position would be prejudicially changed if this relief were granted to Twentysix. From this, it is clear that Sporn has failed to satisfy the elements for an equitable estoppel defense.

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### ***Criminal Usury***

Sporn further argues that because Twentysix seeks 12% interest per month in its demand for relief in its Complaint, the New York Penal Code and the General Obligations law regarding criminal usury render the underlying debt, as well as the interest, void.

A person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on a loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period.

(CPL 190.40.) Further, “the existence of a loan or a forbearance of money is a rudimentary element of usury.” (*Feinberg v Old Vestal Rd. Assocs.*, 157 AD2d 1002, 1003 [3d Dept 1990].)

Here, the interest charged is not on a loan or forbearance. It is interest on services rendered but, as of yet, unpaid for. Usury law does not apply where the interest charged is only on past due obligations. (*Bristol Inv. Fund Inc. v Carnegie Int’l Corp.*, 310 F Supp 2d 556, 563 [SD NY 2003].) Moreover, “[u]nless the real purpose of the transaction was, on the one side, to lend money at usurious interest and, on the other side, to borrow upon the usurious terms dictated by the lender, there can be no usury.” (*Donatelli v Siskind*, 170 AD2d 433, 434 [2d Dept 1991].) As a result, criminal usury laws are inapplicable in this situation.<sup>2</sup>

### ***Summary Judgment in Lieu of Complaint***

Twentysix attempts to conflate a motion for summary judgment in lieu of complaint with its summary judgment motion on its fraud cause of action. It asks the Court to use the standard for summary judgment in lieu of complaint pursuant to CPLR § 3213 to decide this summary judgment motion. Because Twentysix already filed a complaint which included a cause of

<sup>2</sup> Although the Complaint seeks 12% interest per month, Plaintiff has not sought 12% interest per month in its partial summary judgment motion for its fraud cause of action. Plaintiff seeks \$1,984.93 of interest on the dishonored checks from May 4, 2007, to the time of filing which was November 30, 2007 (12% interest per month would total approximately \$30,000 from May 4, 2007, through November 20, 2007).

action for fraud based on three postdated checks, it cannot now move for summary judgment in lieu of complaint as a backdoor approach to recover on those checks. As a result, the Court employed the standard for summary judgment pursuant to CPLR § 3212(e), and not CPLR § 3213, on these two motions.

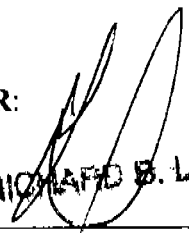
Because Twentysix has failed to show fraudulent intent on the part of Sporn, its partial summary judgment motion on its fraud cause of action must be denied. Additionally, Sporn's cross-motion for summary judgment on the fraud cause of action should be granted in its favor for that reason, and because fraud causes of action cannot be predicated on breach of contract claims, nor can they be predicated on misrepresentations of future intent.

**CONCLUSION**

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment on its fraud cause of action is denied, and Defendant's cross-motion for summary judgment on the fraud cause of action is granted in its favor.

**Dated:** June 9, 2008

ENTER:  
  
HON. RICHARD B. LOWE, III  
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J.S.C.

**FILED**  
JUN 13 2008  
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