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| Langenbach v Cuozzo |
| 2008 NY Slip Op 33441(U) |
| December 16, 2008 |
| Supreme Court, New York County |
| Docket Number: 604002/06 |
| Judge: Martin Shulman |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Index Number : 604002/2006
LANGENBACH, ROLF
vs.
CUOZZO, RICHARD J.
SEQUENCE NUMBER : # 001
ENFORCEMENT PROCEEDING

INDEX NO. 604002-06
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

Here read on this motion to/for _____


PAPERS NUMBERED
1, 2, 3
4, 5
6
7

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...
Cross-motion
Answering Affidavits — Exhibits _____
Replying Affidavits
Reply Aff. on cross-motion

Cross-Motion: Yes No

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

FILED
DEC 24 2008
COUNTY CLERK'S OFFICE
NEW YORK



Dated: DEC 16 2008

MARTIN SHULMAN
J.S.C. 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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
ROLF LANGENBACH and BAY TERRACE
BAKE SHOP, INC.,

Plaintiffs,

Index No.: 604002/06

-against-

DECISION AND ORDER

RICHARD J. CUOZZO, THE CAKE BOX,
INC. and MICHAEL AMODEO CO., INC.,

Defendants.

-----X
SHULMAN, J.

FILED
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NEW YORK

FACTUAL BACKGROUND

Plaintiffs seek summary judgment, pursuant to CPLR 3212, for dismissal arising from defendants' alleged default on promissory notes. Defendants¹ cross-move to dismiss the complaint.

In September, 2000, plaintiffs sold their bakery business to defendants for a total purchase price of \$600,000, with \$200,000 paid at the closing, and the remainder evidenced by promissory notes and secured by a security interest in the business' equipment and fixtures. The sales agreement also permitted plaintiffs to re-enter the premises in the event of a default.

Plaintiffs perfected their security interest by filing a finance statement on September 22, 2000. That finance statement lapsed on September 22, 2005 and was not renewed.

¹ It is noted that defendant Michael Amodeo Co., Inc. is a neutral stakeholder, and the term "defendants" as used herein only applies to the other named defendants.

On August 28, 2006, defendant The Cake Box, Inc. ("Cake Box") defaulted on one of the promissory notes, and has not made any payment on that or subsequent notes since. In total, Cake Box has defaulted on a total of \$82,528.12 since August 28, 2006.

Shortly after the default, the business was allegedly closed down due to health code violations, and the landlord subsequently regained possession of the property. Plaintiffs assert that this is in violation of the sales agreement, depriving them of the ability to re-enter the premises. Defendants contend that the business had declined due to competition in the neighborhood, and they had to terminate the business because they were unable to continue to operate at a profit.

On October 16, 2006, defendants auctioned off the equipment and fixtures located at the premises, allegedly in violation of plaintiffs' security interest in that property. The auction resulted in raising \$17,180.70, after auction expenses, and the proceeds are currently being held, pursuant to a demand made by plaintiffs, in a Citibank IOLA account of Eugene A. Baer, Esq.

Plaintiffs allege five causes of action. The first two causes of action are against Cake Box only, and are for breach of contract and enforcement of the promissory notes. For these causes of action, plaintiffs seek judgment in the amount of \$82,528.12, plus interest from August 28, 2006, and an order to pay over the proceeds from the auction, \$17,180.70, which amount is to be credited towards the \$82,528.12. The last three causes of action, for fraudulent conveyance, conversion and tortious interference with business relations, are against both defendants.

DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted].” *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion’s opponent to “present facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiffs have submitted proof of the contract of sale and the default of the promissory notes, as well as evidence of the auction of the business’ equipment and fixtures, in support of their first two causes of action for breach of contract and enforcement of the promissory notes. See generally, *Ian Woodner Family Collection, Inc. v Abaris Books, Ltd.*, 284 AD2d 163 (1st Dept 2001). Defendants’ only argument in opposition is that the individual defendant should not be held liable for these causes of action because he did not sign the sales agreement in his individual capacity. Defendants do not dispute the breach or the amount claimed. Since plaintiffs are only seeking judgment on the first two causes of action against the corporate defendant, and the amount claimed is not disputed, plaintiffs are entitled to summary judgment on the first two causes of action.

Turning to the third cause of action alleging a fraudulent conveyance, as stated by the court in *Friedman v Anderson* (23 AD3d 163, 166 [1st Dept 2005]):

A mere recitation of the elements of fraud is insufficient to state a cause of action" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 9 [1st Dept 199]). Furthermore, 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" (*Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994]).

In the instant matter, plaintiffs' allegations of fraud are conclusory and lack sufficient particularity to satisfy the requirements of CPLR 3016(b).

"[T]he mere assertion that the contracting parties did not intend to meet their contractual obligations does not convert a cause of action for breach of contract into one for fraud (internal quotation marks and citations omitted)." *Modell's N.Y. Inc. v Noodle Kidoodle, Inc.*, 242 AD2d 248, 249 (1st Dept 1997). Accordingly, the fraudulent conveyance cause of action is dismissed.

"To establish a cause of action in conversion the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question ... to the exclusion of the plaintiff's rights [internal quotation marks and citation omitted]." *Castaldi v 39 Winfield Associates*, 30 AD3d 458, 458 (2d Dept 2006).

Although personal liability will ordinarily not attach to corporate officers and directors for actions they take in furthering the corporate interests, unless they have specifically agreed to assume individual responsibility, "[p]ersonal liability will be imposed ... upon corporate officers who commit or participate in the commission of a tort, even if the

commission or participation is for the corporation's benefit. Conversion is a tort which can occur without wrongful intent, but an action for conversion cannot be predicated on a mere breach of contract [internal citations omitted]." *Key Bank of New York v Grossi*, 227 AD2d 841, 843 (3d Dept 1996); *American Express Travel Related Services Co., Inc. v North Atlantic Resources, Inc.*, 261 AD2d 310 (1st Dept 1999).

Plaintiffs' secured interest in the business equipment gave them a right of possession to the property on the occasion of Cake Box's default. Uniform Commercial Code (UCC) §9-306. This possessory right permits plaintiffs to maintain an action for conversion if the collateral is misapplied. The UCC replaces the collateral with its proceeds if the collateral is sold, and the remedies remain the same. UCC §9-306(4).

Defendants' argument that plaintiffs' failure to renew the finance statement forfeits their security interest in the collateral or the proceeds from its sale is specious. Filing only perfects the interest, and is intended for notice to third parties of such interest. See *Badillo v Tower Ins. Co. of New York*, 92 NY2d 790 (1999). The security interest as against the debtor and the security holder is not defeated by not filing.

However, since it has already been determined that the proceeds of the auction of the secured property are to be turned over to plaintiffs as a remedy for the breach of contract and promissory notes, this cause of action is dismissed. "It is well established that a creditor is entitled to one satisfaction of [its] debt and no more [internal quotation marks and citation omitted]." *Five Star Bank v CNH Capital America, LLC*, 55 AD3d 1279, 1282 (4th Dept 2008).

Plaintiffs' last cause of action is for tortious interference with business relations. "[C]onduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship. [U]nder New York law, in order for a party to make out a claim for tortious interference with prospective economic advantage, the defendant must ... direct some activities towards the third party ... [internal quotation marks and citations omitted]." *Carvel Corp. v Noonan*, 3 NY3d 182, 192 (2004).

Further, to maintain a claim for tortious interference with business relations, plaintiffs must establish that defendants used dishonest, unfair or improper means to interfere with plaintiffs' business relationship, and that plaintiffs suffered damages thereby. See *M.J. & K. Co., Inc. v Matthew Bender & Co., Inc.*, 220 AD2d 488 (2d Dept 1995). In the instant matter, plaintiffs only claim that defendants' act of closing the business and selling the equipment prevented plaintiffs from re-establishing the enterprise. Plaintiffs do not even allege that they were prepared or eager to resume the business that they had sold after operating it for over 20 years, nor do they indicate any resulting damage. These allegations fail to meet the requirements for a claim of tortious interference with business relations, and so this cause of action is dismissed.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiffs and against defendant The Cake Box, Inc. as follows:

[* 8]

1. Plaintiffs are granted judgment on the first cause of action in the amount of \$82,528.12, together with interest as prayed for allowable by law at the rate of 9% per annum from the date of August 28, 2006, until entry of judgment, as calculated by the Clerk of the Court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, the first cause of action is severed and the Clerk is directed to enter judgment accordingly;

2. Plaintiffs are granted judgment on the second cause of action in the amount of \$17,180.70;

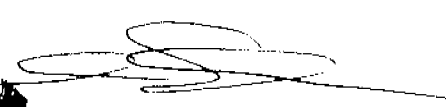
3. The action against defendant stakeholder Michael Amodeo Co., Inc. is severed and said defendant is directed to pay over to plaintiffs said amount, which is to be used to offset the amount of the judgment awarded for the first cause of action; and it is further

ORDERED that defendants' cross-motion to dismiss the complaint is granted to the extent of dismissing the third, fourth and fifth causes of action.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
December 16, 2008

FILED


Hon. Martin Shulman, J.S.C.

DEC 24 2008

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