

**SportsJust4Girls, Inc. v Gongas**

2009 NY Slip Op 30451(U)

February 23, 2009

Supreme Court, Suffolk County

Docket Number: 10926/2006

Judge: Emily Pines

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

**Present:**

**HON. EMILY PINES**  
J. S. C.

Original Motion Date: 01-07-2009  
Motion Submit Date: 01-07-2009  
Motion Sequence No's.: 002 MOTD

\_\_\_\_\_  
**SPORTSJUST4GIRLS, INC.,**  
Plaintiff, X

Attorney for Plaintiff  
DAVID S. SHOTTEN, P.C.  
1707-26 Veterans Memorial Highway  
Islandia, New York 11749-1531

-against-

**MICHAEL GONGAS and**  
**SPORTSJUST4GIRLS & MORE, INC.,**

Attorney for Defendant  
FASULO, SHALLEY & DiMAGGIO, LLP  
225 Broadway, Suite 715  
New York, New York 10007

Defendants.

\_\_\_\_\_  
X

**ORDERED**, that the motion by plaintiff for summary judgment is denied; and it is further

**ORDERED**, that a trial in this matter is scheduled for March 9, 2009 at 9:30 a.m. before the undersigned.

This is an action seeking damages for breach of contract and fraud and misrepresentation arising out of the sale of a business from plaintiff to defendants. The business is a retail sporting goods store designed for the sale of sporting equipment for girls and operates in a shopping center located in Mount Sinai, New York. The submissions reflect that on or about September 3, 2005, plaintiff entered into an Asset Purchase Agreement (the "Agreement") with defendant, SPORTSJUST4GIRLS&MORE, INC., wherein the corporate defendant agreed to purchase the assets of plaintiff for the sum of \$38,000. The Agreement provided that defendant would pay the sum of \$7,500.00 on the signing of the Agreement; the sum of \$7,500.00 within thirty (30) days of the signing of the Agreement; and the balance of \$23,000.00 would be paid by delivery of a promissory note which would be payable in installments. The promissory note required payment of \$5,000.00 on December 31, 2005, May 1, 2006, September 1, 2006

and December 31, 2006. The balance of \$3,000.00 was due and payable on May 1, 2007. Plaintiff alleges that the defendant corporation has only paid the sum of \$7,500.00 and that the balance of \$30,500.00 is due and owing on the promissory note.

The Complaint sets forth causes of action against defendants for breach of contract, fraud and misrepresentation and a claim for counsel fees and costs. In addition to the claim for breach of contract on the promissory note, plaintiff alleges that, pursuant to the parties' Agreement, the corporate defendant agreed to assume all of the assets of plaintiff and hold it harmless from any actions taken by defendant after the closing date. In direct violation of the Agreement, plaintiff asserts that the corporate defendant failed to contact vendors of plaintiff, including Keyspan, LIPA, First Data, and Standard Merchandising, to change the responsible party on the accounts to its name, and as a result, incurred total charges in the amount of \$2,540.00. to these entities. Plaintiff seeks reimbursement of these amount plus counsel fees as provided for in the Agreement.

With regard to the claim against the individual defendant, plaintiff essentially alleges that the corporate defendant is actually the alter ego of Gongas and that Gongas should be responsible for the debts of the corporation. Plaintiff also seeks punitive damages, costs and counsel fees from Gongas.

Defendants initially submitted a pro se joint Verified Answer containing affirmative defenses and counterclaims but subsequently, submitted a Verified Answer by counsel. In that subsequent Answer, dated April 12, 2007, defendants assert a counterclaim against plaintiff wherein they assert that plaintiff failed to comply with certain terms and conditions of the parties' Agreement.

Plaintiff now moves for summary judgment and submits a copy of the Agreement, the pleadings, an affidavit by Nancy Dooley, president of plaintiff, an affidavit by Patrick Dooley, an affidavit by Rebecca Dooley, and copies of bills. Plaintiff argues that there are no genuine issues of fact to be tried and that it is entitled to judgment as a matter of law. Specifically, plaintiff asserts that the corporation failed to comply with the terms of the Agreement and promissory note, which it asserts Gongas drafted. Additionally, plaintiff argues there is no question of fact that Gongas incurred the expenses in plaintiff's name with the several vendors listed above and thus should be liable for those amounts. Plaintiff argues that Gongas should be held personally liable under the doctrine of piercing the corporate veil based upon his complete domination of the corporation in the subject transaction. Plaintiff states that defendant actually took control of the store about a week prior to the execution of the Agreement and that she and her daughter prepared an inventory of merchandise which she left on the counter of the store. Plaintiff states that at no time prior to the commencement of this action did defendant complain that he did not receive the list of inventory. Moreover, pursuant to the Agreement, plaintiff asserts a claim for counsel

fees against defendants. Finally, plaintiff urges the Court to recognize that based upon defendant's failure to comply with prior Court Orders regarding discovery, that defendant is precluded from offering documentary evidence.

Defendants oppose the motion for summary judgment and submit an affidavit by Gongas and a copy of the transcript of the examination before trial of Nancy Dooley. Defendants argue that plaintiff failed to perform material obligations and conditions precedent to further payment under the Agreement, specifically, the failure to provide a list of inventory. Although both Nancy Dooley and Rebecca Dooley state in their affidavits that the inventory list was left on the counter in the store, defendant notes that Nancy Dooley testified in her examination before trial that she personally delivered the inventory to Gongas. Additionally, defendants state that plaintiff failed to provide a list of vendors for the store and bulk-purchase customers and failed to provide access to the store's domain -name and customer email list. Defendant argues that pursuant to Article 6 of the Uniform Commercial Code, plaintiff was required to deliver to defendant an affidavit, attesting to no creditors and proof of no outstanding tax liabilities. Defendants dispute the vendor bills submitted by plaintiff and argue that plaintiff has failed to establish its causes of action sounding in fraud and/or misrepresentation. Defendants assert that questions of fact exist precluding summary judgment.

Plaintiff did not submit a reply.

It is well established that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Goldberger v. Brick & Ballerstein, Inc.*, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. *Zayas v. Half Hollow Hills Cent. School Dist.*, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). Moreover, it is axiomatic that an agreement that is clear and unambiguous on its face must be enforced according to its plain terms. *Henrich v. Phazar Antenna Corp.*, 33 A.D.3d 864, 827 N.Y.S.2d 58 (2d Dept. 2006); *Norma Reynolds Realty, Inc. v. Edelman*, 29 A.D.3d 969, 817 N.Y.S.2d 85 (2d Dept. 2006).

In the case at bar, the Agreement contained the following provisions as relevant to this motion:

1. SALE OF ASSETS
- 1.1 The Seller agrees to sell to the Purchaser and the Purchaser agrees to purchase from the Seller, all of the assets of the business known as SPORTSJUST4GIRLS INC., owned and operated by the Seller. The assets included in this sale are all assets used by the Seller in the operation of

the business, tangible and intangible, and including but not limited to telephone numbers, good will of the business, and the equipments *set forth on Schedule 1.1* annexed hereto. (Emphasis added).

2. Purchase Price and Payment

- 2.1 The Purchase Price for the *Assets as more particularly set forth on Schedule 1.1 annexed hereto* (the "Purchase Price") shall be equal to THIRTY EIGHT THOUSAND DOLLARS (\$38,000.00) (emphasis added). The Purchase Price shall be allocated as follows:

Equipment:	\$1,000	
Restrictive Covenant:	\$5,000	
Inventory:	\$28,000	
Good Will and Leasehold:	\$5,000	

- 2.2 The Buyer shall pay the Purchase Price as follows: (a) the sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS and no/100 (\$7,500) in certified funds payable to Seller upon the signing of Contract and (b) the sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS and No/100 (\$7,500.00) in certified funds payable to Seller no more than 30 days after the contract signing, and © the sum of TWENTY THREE THOUSAND DOLLARS and No/100 (\$23,000.00) by delivery of a promissory note payable to Seller in the form annexed as Exhibit A. The Promissory Note will be payable in installments as follows, Five Thousand on or before December 31st, 2005, Five Thousand on or before May 1<sup>st</sup>, 2006, Five Thousand on or before September 1<sup>st</sup>, 2006, Five Thousand on or before December 31<sup>st</sup>, 2006, and Three Thousand on or before May 1<sup>st</sup>, 2007.

In the case at bar, plaintiff has met her initial burden by the submission of the Agreement and the affidavits demonstrating that the defendant corporation fail to pay according to its terms and further, that the corporation incurred expenses in plaintiff's name, in violation of the Agreement. However, in opposition, although defendants admit they did not pay the full purchase price, they have raised triable issues of fact requiring a trial. Specifically, the undisputed terms of the Agreement required that a schedule of assets be annexed listing the inventory transferred to defendant. The Court notes that such a schedule was clearly not annexed to the Agreement and moreover, a dispute exists between the parties as to whether a list of inventory was provided to defendants. Although Nancy Dooley and her daughter allege that a hand-written list was provided to defendants and left on the counter in the store, defendant denies receipt of such a list, plaintiff is unable to provide a copy and testified in her deposition that she actually handed the list to Gongas at some unspecified time. This raises questions of fact which must be determined at the trial of this matter. Likewise, defendants raise issues of fact regarding whether plaintiff provided a list of vendors as well as access to the store's domain name and customer email list. With regard to defendants' claim that plaintiff failed to provide an affidavit, in accordance with Article 6 of the Uniform Commercial Code, such argument is without merit. Section 13.10 specifically provided that the affidavit was contained within the Bill of Sale, which is also attached to the moving papers. Thus, such is not a basis for the refusal to pay according to the terms of the note. On the claims

against Gongas individually, plaintiff has not met her burden of demonstrating the absence of a material fact such as to warrant summary judgment on those claims.

Based on the foregoing, the motion for summary judgment is denied and the matter shall proceed to trial on March 9, 2009 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: February 23, 2009  
Riverhead, New York

  
\_\_\_\_\_  
EMILY PINES  
J. S. C.