Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

TGF PRODUCTION LLC et al.

- against -

UNIVERSAL FOOD I, INC., et al.

Index Number 28990 2008

Motion Date April 1, 2009

Motion Cal. Number 24

Motion Seq. No. 1

The following papers numbered 1 to 6 read on this motion by defendant Universal Food I, Inc. (Universal), defendant Iosif Aminov (Iosif), and defendant Olga Aminov (Olga) for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them for failure to state a cause of action and on this cross motion by plaintiff Anzor Pichkhadze (Anzor) and plaintiff TGF Production, LLC (TGF) for summary judgment on their first and second causes of action.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-2
Notice of Cross Motion - Affidavits - Exhibits	3
Answering Affidavits - Exhibits	4
Reply Affidavits	5
Memorandum of Law	6

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff Anzor alleges the following: He serves as the President of plaintiff TGF, a supplier of European food products. In or about October, 2005, he met defendant Iosif and defendant Olga as they were opening their new business, a food market selling mostly

Russian products. The defendants offered him the opportunity of becoming a one-third shareholder in Universal, and they agreed that he would become such in the future in consideration of cash and food products delivered by TGF. On or about December 15, 2005, Iosif and Olga opened their food market at 97-48 63rd Road, Rego Park, New York, utilizing Anzor's experience in the food business and products supplied by TGF in consideration of the promise to make Anzor a one-third shareholder of Universal. Plaintiff Anzor took back four promissory notes from the defendants for sums he gave them in contemplation of becoming a shareholder in Universal to protect himself in case they reneged on the deal. The defendants defaulted on their promise to make plaintiff Anzor a one-third shareholder of Universal, and they defaulted on the payment of the promissory notes. The plaintiffs began this action on or about December 12, 2008.

The first cause of action alleges the following: The defendants promised to make plaintiff Anzor a shareholder of defendant Universal in consideration of a loan in the principal amount of $50,000. On or about October 28, 2005, the defendants gave a promissory note to plaintiff Anzor evidencing the loan of $50,000 (Note 1). The defendants defaulted on the repayment of the note and did not make Anzor a shareholder in Universal. The defendants again promised to make plaintiff Anzor a shareholder in Universal in consideration of a second loan in the principal amount of $26,000. On or about November 21, 2005, the defendants gave plaintiff Anzor a second note evidencing the loan of $26,000 (Note 2). The defendants defaulted on the repayment of the second note and did not make Anzor a shareholder in Universal. The defendants promised for a third time to make Anzor a shareholder in Universal in consideration of a loan in the principal amount of $88,000 from his company, plaintiff TGF. On January 26, 2006, the defendants gave Anzor a promissory note in the amount of $88,000 evidencing the loan (Note 3). The defendants defaulted on the repayment of the loan and did not make Anzor a shareholder in Universal. On or about March 20, 2007, the defendants gave plaintiff Anzor a fourth promissory note in the amount of $230,000 (Note 4) which has not been repaid.

The second cause of action alleges the following: Pursuant to written contracts, plaintiff Anzor sold food products to the defendants from around November 22, 2005 to July 28, 2008. The defendants have not paid in full for the food products which they accepted.

That branch of the defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the first cause of action is denied. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference***." (*Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v Martinez*,

84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion. (*See, Stukuls v State of New York*, 42 NY2d 272; *Jacobs v Macy's East Inc.*, *supra*.) As a general rule, where a CPLR 3211(a)(7) motion is not converted into one for summary judgment, the court may only "consider affidavits for the limited purpose of remedying any defects in the complaint ***." (*One Acre, Inc. v Town of Hempstead* 215 AD2d 359; *see, Nonnon v City of New York* , 9 NY3d 825.) The issue on a CPLR 3211(a)(7) motion is "whether the plaintiff has stated a cause of action and not whether he or she may ultimately be successful on the merits ***." (*Ferrandino v Alvin J. Bart & Sons*, *Inc*, 247 AD2d 428; *see, Jacobs v Macy's East, Inc.*, *supra*.) Defendant Iosif alleges that he paid Note 1 in full and denies that he and defendant Olga "entered into" Note 2 and Note 3. Defendant Iosif alleges that the fourth note, which shows defendant Olga as the promisor, was never executed by her and that, moreover, she never deposited or cashed a $230,000 check drawn by TGF. These denials and allegations by the defendants raise issues outside the scope of a CPLR 3211(a)(7) motion.

That branch of the plaintiffs' motion which is for summary judgment on the first cause of action is denied. Summary judgment is not warranted where there is an issue of fact which must be tried. (*See*, *Alvarez v Prospect Hospital*, 68 NY2d 320.) The conflicting allegations of the parties regarding, inter alia, what notes were given and what notes, if any, were paid have created issues of fact and credibility which cannot be determined on a motion for summary judgment. (*See*, *Dayan v Yurkowski*, 238 AD2d 541; *T&L Redemption Center Corp. v Phoenix Beverages, Inc.*, 238 AD2d 504; *First New York Realty Co., Inc. v DeSetto*, 237 AD2d 219.)

That branch of the defendants' motion which is for an order dismissing the second cause of action pursuant to CPLR 3211(a)(7) is denied. The defense based on the Statute of Frauds raises issues of fact which cannot be determined on this motion. (*See*, *Air Masters, Inc. v Bob Mims Heating and Air Conditioning Service, Inc.,* 300 AD2d 513.) While contracts for the sale of goods in excess of $500 are generally unenforceable unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party to be charged (*see*, *UCC 2-201[1]*; *Modu Craft, Inc. v Liberatore*, 89 AD2d 776), there is a merchants' exception based on confirmatory writings such as invoices which may be applicable to the case at bar (*see*, *UCC 2-201[2]; Mulitex USA, Inc. v Marvin Knitting Mills, Inc.,* 12 AD3d 169*; B & R Textile Corp. v Domino Textiles Inc.,* 77 AD2d 539*)* and there is also an exception for goods which have been "received and accepted." (*See*, *UCC 2-201[3][c]; Air Masters, Inc. v Bob Mims Heating and Air Conditioning Service, Inc., supra*.) Moreover, while defendant Iosif alleges that "[w]e paid for all goods sold and delivered by the plaintiffs," his allegations raise issues which fall outside the scope of a CPLR 3211(a)(7) motion. (*See*, *Stukuls v State of New York*, *supra*; *Jacobs v Macy's East Inc*., *supra*.)

That branch of the plaintiffs' motion which is for summary judgment on their second cause of action is denied. The conflicting allegations of the parties regarding whether the defendants have paid for goods sold and delivered have created issues of fact and credibility which cannot be determined on a motion for summary judgment. (*See*, *Dayan v Yurkowski, supra*; *T&L Redemption Center Corp. v Phoenix Beverages, Inc., supra; First New York Realty Co., Inc. v DeSetto, supra*.)

That branch of the defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the third cause of action is denied. The third cause of action, read liberally, alleges that the defendants breached an agreement to make plaintiff Anzor a shareholder in Universal. Whether the parties had such an agreement presents an issue of fact which is outside the scope of this CPLR 3211(a)(7) motion. (*See*, *Stukuls v State of New York*, *supra*; *Jacobs v Macy's East Inc*., *supra*.)

That branch of the defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the fourth cause of action is denied. "To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor." (*Nakamura v Fujii*, 253 AD2d 387, 390; *see, MT Property, Inc. v Ira Weinstein and Larry Weinstein, LLC*, AD3d 855 NYS2d 627; *Smith v. Chase Manhattan Bank, USA, N.A.*, 293 AD2d 598.) In the case at bar, plaintiff Anzor has adequately alleged that he provided goods and services to build the defendants' business but received neither payment for the goods and services nor an interest in their corporation. The court notes that a plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (*See*, *Rovello v Orofino Realty Co., Inc. supra; Kenneth R. v Roman Catholic Diocese of Brooklyn,* 229 AD2d 159.)

That branch of the defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the fifth cause of action is granted. While those in control of a corporation owe a fiduciary duty to the corporation and to minority shareholders (*see*, *Alpert v 28 Williams Street Corp*., 63 NY2d 557; *Matter of Greenberg*, 206 AD2d 963), the complaint shows on its face that plaintiff Anzor never became a shareholder of Universal, and, thus, he has no cause of action for breach of fiduciary duty on behalf of the corporation or in his own right.

That branch of the defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the sixth cause of action is granted. The complaint shows on its face that plaintiff Anzor did not become a shareholder of Universal, and, thus, he cannot state a cause of action for "misappropriation of corporate and shareholder funds."

That branch of the defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the seventh cause of action is granted. The elements of a cause of action for tortious interference with contract include "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom ***." (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424.) The complaint, read in its entirety, alleges that defendant Iosif and defendant Olga breached an agreement with plaintiff Anzor to make him a shareholder of Universal. Defendant Olga and defendant Iosif are not strangers to the contract who induced its breach.

That branch of the defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the eighth cause of action is granted. The eighth cause of action, which alleges a wrong done to Universal (the conversion of its assets), should be asserted by way of a shareholder's derivative action. (*See*, *Abrams v Donati*, 108 AD2d 704, *affd*, 66 NY2d 951.) However, the plaintiff is not a shareholder of Universal with standing to bring a derivative action for the conversion of corporate assets. (*See*, *Pessin v Chris-Craft Industries, Inc*., 181 AD2d 66.)

That branch of the defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the ninth cause of action is granted. The ninth cause of action, which purports to be for "theft of trade secret," alleges sparsely that "[d]efendant stole all of the methods of operating Universal Foods I, Inc. from plaintiff and has used them to generate a profit." The plaintiffs have not adequately alleged that trade secrets are involved in this case. (*See*, *Ashland Mgt. v Janien*, 82 NY2d 395; *Marietta Corp. v Fairhurst*, 301 AD2d 734.)

That branch of the defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the tenth cause of action ("larceny by false pretense") is granted. (*See*, *Pessin v Chris-Craft Industries, Inc., supra; Abrams v Donati, supra*.)

Dated: June 15, 2009

J.S.C.