

**Crowley v Holly**

2009 NY Slip Op 32150(U)

September 16, 2009

Supreme Court, New York County

Docket Number: 602925/07

Judge: Charles E. Ramos

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

PRESENT: \_\_\_\_\_  
Justice

PART 53

*Christopher Crowley, individually and  
derivatively as a member of  
Tailorboard LLC - v -  
Dean Holly, Thomas Bonomo and  
TAILORBOARD LLC*

INDEX NO. 602925/2007  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 007  
MOTION CAL. NO. \_\_\_\_\_

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with  
accompanying memorandum decision and order.*

Dated: 9/16/09

  
\_\_\_\_\_  
HON. CHARLES E. RAMOS <sup>S.C.</sup>

Check one:  FINAL DISPOSITION.  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION  
-----X

CHRISTOPHER CROWLEY, individually and  
derivatively as a member of  
TAILORBYRD LLC,

Index No. 602925/07

Plaintiff,

- against -

DEAN HOLLY, THOMAS BONOMO, and  
TAILORBYRD LLC,

Defendants.

-----X

**Charles Edward Ramos, J.S.C.:**

In motion sequence 007, the plaintiff Christopher Crowley ("Crowley") moves pursuant to CPLR 3025(b) to amend the first amended complaint by adding Thomas Dean & Co., LLC ("Thomas Dean") as a defendant, discontinuing the eighth cause of action seeking judicial dissolution, and interposing causes of action for a constructive trust, usurpation of corporate opportunity, tortious interference, and prima facie tort.

The defendants Dean Holly ("Holly") and Thomas Bonomo ("Bonomo") oppose the leave to amend arguing that the proposed causes of action are pled insufficiently.

**Background**

On August 29, 2007, Crowley commenced this action seeking injunctive and declaratory relief against Holly, Bonomo, and TailorByrd LLC ("TailorByrd").

As alleged in the first amended verified complaint, in late 2003, Crowley, Holly, and Bonomo formed TailorByrd, an apparel company focusing primarily on men's shirts. Each member had a different background necessary to create and run the company. In

March 2004, the three members executed an operating agreement (the "Operating Agreement") whereby each member would have a one-third membership for all purposes including compensation, distributions, and authority. The Operating Agreement does not contain a non-compete clause, a merger clause, or any other language indicating that it is the complete agreement of the members, or that it supersedes any prior oral agreements. In addition, the Operating Agreement is silent with respect to expulsion, voting, and amendments. Given the nature of each member's tasks and contributions, they jointly decided that Crowley should serve as the manager responsible for ministerial and administrative duties. It was also the practice for the members to make all decisions regarding the company jointly.

On July 9, 2007, a membership meeting was held where Holly and Bonomo informed Crowley that they wanted to purchase his interest in TailorByrd. At this meeting, Holly and Bonomo then purported to vote Crowley out of his position as manager and replace him with Holly. Following the meeting, the members began negotiating a resolution both directly and through their respective attorneys. On August 9, 2007, Holly and Bonomo purported to amend the Operating Agreement and remove Crowley as a member. Unsatisfied with the ongoing relations within the company, Crowley commenced this litigation in September 2007 before Justice Cahn.

On August 7, 2008, Justice Cahn approved a stipulation to have TailorByrd's accountant, Lee Cohen, appointed as a receiver.

Justice Cahn ordered that no further production of TailorByrd products may be had and that the receiver must wind up the company. On January 28, 2009, this action was reassigned to this Court.

Following Cohen's appointment the parties agreed to an auction process to purchase the assets and liabilities of TailorByrd. Bidding started at \$60,000 and the last bid prior to this application was \$261,000. The auction process stalled when Crowley discovered that Holly and Bonomo launched a new brand called Thomas Dean in February 2008.

Crowley alleges that Thomas Dean is using: (1) the same style numbers as those that are used for TailorByrd shirt specifications and fabrics, (2) the same employees and sales representatives as TailorByrd, and (3) the same phone number and fax number as TailorByrd. :

#### Discussion

Pursuant to CPLR 3025(b), "leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay" (*Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 [1st Dept 2006]).

"While leave to amend a pleading is freely granted, this Court has consistently held that, in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted" (*Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 116 [1st Dept 1998] [internal citations omitted]). "A motion seeking leave to amend pleadings

requires the proponent to allege facts legally sufficient to support its proposed pleading" (*id.*).

#### *Addition of Thomas Dean*

Crowley seeks to add Thomas Dean as a defendant to the action. No prejudice has been alleged that would deny the addition of Thomas Dean as a defendant. Furthermore, no surprise will result because Holly and Bonomo are the principals of Thomas Dean and have been involved in this action since its commencement in 2007.

#### *Discontinuing the Eighth Cause of Action*

Holly and Bonomo oppose the discontinuance of the eighth cause of action seeking judicial dissolution because issues has already been joined. However, the eighth cause of action is moot, because Holly and Bonomo dissolved the company by vote and Crowley purchased the TailorByrd name and its assets for \$260,000 (Transcript, March 31, 2009, 12:6). Therefore, this cause of action is discontinued.

#### *Constructive Trust*

Crowley's second amended verified complaint seeks to impose a constructive trust on the assets of Thomas Dean. Crowley alleges that Thomas Dean wrongfully acquired the assets of TailorByrd, thus, requiring the imposition of a constructive trust on its assets (Second Amended Verified Complaint, ¶ 103-6).

A constructive trust is imposed when the acquisition of property occurs in such a manner that the legal title holder may not retain the beneficial interest in good conscience (*Sharp v*

*Kosmalski*, 40 NY2d 119 [1976])). For a court to impose a constructive trust, there are four requirements that must be present: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (*Matter of Gupta*, 38 AD3d 445, 446 [1st Dept 2007])). Courts look to several factors to determine if there is a fiduciary relationship: the totality of the relationship among the parties, to any contracts formed, and whether any of the parties involved relied on another's superior expertise or knowledge (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 122 [1st Dept 1998])).

The specific allegations are insufficient to form a cognizable cause of action for a constructive trust. Crowley alleges the existence of a fiduciary relationship between Crowley, Holly, and Bonomo as equal co-members in TailorByrd. Each member contributed distinct talents and skills to the company and relied on the other members to do the same. Therefore, Crowley adequately alleges that each member was reliant on the superior skill and knowledge of the other two members to achieve success.

However, Crowley fails to allege the second and third elements, namely of a promise and a transfer in reliance on that promise. This cause of action would only be sustainable if Crowley made a transfer in reliance of a promise made to him by a defendant. No such promise has been alleged. Therefore, the application to interpose the ninth cause of action for a constructive trust is denied.

### *Usurpation of Corporate Opportunity*

In order for a cause of action for usurpation of corporate opportunity to be a cognizable cause of action, a plaintiff must allege that a corporate fiduciary diverted for his own benefit an opportunity that was an asset of the corporation (*Gupta* at 446). In addition to establishing that a corporate opportunity was diverted, Crowley must also demonstrate the "tangible expectancy" by TailorByrd that it would receive that asset. Tangible expectancy is defined as "something much less tenable than ownership, but...more certain than a desire or hope" (*Moser v Devine Real Estate, Inc.*, 42 AD3d 731, 735 [3rd Dept 2007]).

Crowley has alleged upon that there are orders for TailorByrd that being diverted to Thomas Dean. Those allegations are sufficient to demonstrate that the cause of action is properly pled.

Consequently, this Court will permit the interposition of the tenth cause of action.

### *Tortious Interference*

Crowley's proposed eleventh cause of action in the second amended verified complaint is for tortious interference against Holly, Bonomo, and Thomas Dean.

In order to support a cause of action for tortious interference with contractual relations, Crowley must plead that there was a valid contract with a third party, that the defendants had knowledge of that contract, that the defendants intentionally procured 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 [1996]).

Here, Crowley alleges that the defendants interfered with the contractual relations TailorByrd had with its customers and vendors without alleging a breach, a contract, a customer, a vendor, or an act of inducement. Therefore, this Court must deny leave to interpose the eleventh cause of action with leave to replead, if so advised.

#### *Prima Facie Tort*

The proposed twelfth cause of action is for prima facie tort as against Holly and Bonomo. To state a cause of action for prima facie tort, the plaintiff must plead: (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-3 [1985]). In addition, the plaintiff must allege "disinterested malevolence, that is, that the defendant's sole motive was to harm the plaintiff" (*Curiano v. Suozzi*, 63 NY2d 113, 117 [1984] [internal quotations omitted]).

Crowley has failed to allege that Holly and Bonomo acted with disinterested malevolence that is required to sustain a cause of action for prima facie tort. Therefore, this leave to amend to interpose the twelfth cause of action is denied.

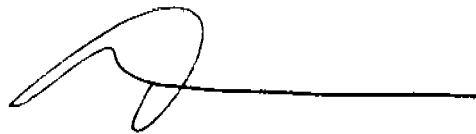
#### *Sanctions*

Holly and Bonomo's request for sanctions has been considered

and is denied.

Settle order on notice.

Date: September 16, 2009



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J.S.C.

**HON. CHARLES E. RAMOS**