

Shri Sai Krupa, Inc. v Floral Park Wines & Liqs., Inc.
2010 NY Slip Op 30478(U)
February 24, 2010
Supreme Court, Nassau County
Docket Number: 008729-09
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X

SHRI SAI KRUPA, INC.,

Plaintiff,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 008729-09
Motion Seq. No: 3
Submission Date: 1/5/10**

-against-

**FLORAL PARK WINES & LIQUORS, INC.,
EVERAD WILLIAMS and
HENRY RADZIEWICZ,**

Defendants.

-----X

The following papers have been read on this motion:

- Notice of Motion, Affirmation in Support, Affidavit of Merits and Exhibits...X**
- Affidavit in Opposition, Affirmation and Exhibits.....X**
- Reply Affirmation.....X**

This matter is before the Court for decision on the motion filed by Defendants Floral Park Wines & Liquors, Inc. ("Park") and Everad Williams ("Everad") on December 7, 2009 and submitted on January 5, 2010. For the reasons set forth below, the Court 1) denies Defendants' motion to dismiss the first cause of action in the verified complaint ("Complaint") and for judgment on the first counterclaim; 2) grants Defendants' motion to dismiss the third and fourth causes of action in the Complaint; and 3) dismisses the second and third counterclaims.

BACKGROUND

A. Relief Sought

Defendants Floral Park and Williams move, pursuant to CPLR § 3212, for an Order granting summary judgment dismissing the Complaint and granting Defendants judgment on

their counterclaims.

B. The Parties' History

In December 2008, Park entered into a contract ("Contract") with Nadeem Noormohammad ("Noormohammad") to sell its liquor business ("Business") located at 318 Jericho Turnpike, Floral Park, New York ("Premises") for the sum of \$70,000. The Contract provided that Noormohammad could assign his rights to Plaintiff corporation, Shri Sai Krupa, Inc. ("Plaintiff"). The Contract (Ex. C to Aff. in Opp.) refers to Park as "Seller" and to Noormohammad as "Purchaser."

On December 12, 2008, Plaintiff's counsel ordered a Uniform Commercial Code ("UCC") search which disclosed that Park owed the sum of \$6,259.00 to the Department of Taxation and Finance representing sales tax from the sale of stock of the business.

On February 5, 2009, the closing for the Business was held and Plaintiff paid Park \$31,000 towards the purchase price.¹ Plaintiff also executed a demand note in favor of Park for the sum of \$39,000.00. Everad executed a bulk sales affidavit (Ex. I to Aff. in Opp.) in which he averred that he, as well as an individual named Simone Williams, was the majority shareholder of Park, and that Park had no creditors. A bill of sale was issued to Noormohammad and Plaintiff took possession of the liquor store pursuant to a 10 year lease with Henry Radziewicz ("Radziewicz"), the landlord, commencing February 1, 2009.

At the closing, the parties entered into a management agreement rider and an addendum to the management agreement rider. Paragraphs 1 and 2 of the management agreement rider (Ex. F to Aff. in Opp.) provided, in pertinent part, that:

Buyer agrees to apply for licenses and permits associated with the business within 30 day[s] of this closing, February 5, 2009.

During the License and application Period, the buyer shall manage the business under the supervision of the Seller.

The addendum to the management agreement rider (Ex. G to Aff. in Opp.) provided that

¹ The Complaint makes reference to Exhibit C in support of this allegation, but Defendants have not provided copies of the exhibits to the Complaint. Moreover, as Defendants' Affirmation in Support does not contain exhibit tabs or labels for exhibits to which it refers, the Court will make reference to the exhibits in Plaintiff's opposition papers, which are clearly marked.

if Buyer did not obtain its temporary liquor license within 30 days of the closing, Buyer would pay Seller \$10,000.00 on the thirtieth day, and in the event that Buyer did not obtain its temporary license by the sixtieth day, the balance of \$29,000.00 would be paid on the sixtieth day following the closing date. The addendum also contained a handwritten paragraph stating:

Further all judgments and liens evident to the Business or Seller's name as attached hereto will be satisfied within 60 days. If said liens are not satisfied, said liens/judgments will be paid from the \$29,000.00 by Purchaser.

By letter dated February 24, 2009 (Ex. L to Aff. in Opp.), the New York State Department of Taxation and Finance notified counsel for Plaintiff that Park had open sales tax liabilities of approximately \$11,000.00 and that this liability could be transferred to Plaintiff as the purchaser in a bulk sale. In addition, Plaintiff allegedly discovered that Park had debts in excess of \$31,000. By letter dated March 10, 2009 (Ex. M to Aff. in Opp.), Defendants' attorney advised Plaintiff's attorney that the sum of \$10,000.00 was due pursuant to the addendum to the management agreement rider and reminding Plaintiff that it had agreed to apply for a temporary license.

Thereafter, Plaintiff's attorney informed Defendants' attorney that unless Defendants paid all of the debts related to the Business, totaling \$31,492.00, Plaintiff would reject Park's demand for any outstanding monies pursuant to the addendum to the management agreement. Counsel for Plaintiff further advised counsel for Defendant that Plaintiff had applied for the required license but the applicable liquor authority would not issue the license until Defendant surrendered its license.

On April 5, 2009, at approximately 9:00 a.m., Everad allegedly broke into the Premises, triggering the alarm. The alarm company called Madhukar Parmar ("Parmar"), the president of the Plaintiff corporation, who instructed the alarm company to call the police.

Upon arrival at the Premises, the police informed Parmar and his son that the individual who had entered the Business' premises was the owner of the Business and that Plaintiff did not have a right to be on the Premises. Notwithstanding Parmar's display to the police of a Bill of Sale and the lease, the police further informed Parmar that if he or his agents attempted to return

to the Premises, the police would arrest them. Plaintiff also alleges that, on the same day, Everad impermissibly changed the locks to the Business.

In May of 2009, Plaintiff commenced this action to recover monetary damages for breach of contract, mental anguish and punitive damages.² The Complaint contains four (4) causes of action. Count two is alleged against Defendant Radziewich, the landlord, who has not moved for relief in the instant motion. In addition, Plaintiff has withdrawn its third cause of action.³

The first cause of action is for breach of the Contract, and related agreements, against Defendants Park and Everad.⁴ The fourth cause of action seeks punitive damages against Defendants Park, Everad and Radziewicz on the theory that Park and Everad's conduct in re-entering the Premises was wilful and reckless, and Radziewicz breached his duties as landlord in failing to protect Plaintiff's possession of the Premises.

In their Answer (Ex. B to Aff. in Opp.), Defendants Park and Everad deny many of the allegations in the Complaint and assert three affirmative defenses: 1) Plaintiff has failed to obtain jurisdiction over "defendant" due to improper service of process; 2) Plaintiff has failed to state a cause of action on which relief can be granted; and 3) Plaintiff breached the Contract by failing to pay certain monies due.

Defendants Park and Everad also assert three counterclaims: 1) breach of contract based on Plaintiff's alleged failure to pay the balance due, 2) unjust enrichment by Plaintiff with respect to profits it earned when it improperly retained possession of the Business, and 3) Plaintiff's intentional and negligent infliction of emotional distress by trying to deprive Everad of his

² Plaintiff also commenced an action against the Incorporated Village of Floral Park to recover damages allegedly sustained as a result of actions taken by a police officer or police officers employed by the Village. By decision dated November 10, 2009 ("Judge DeStefano's Decision") in *Shri Sai Krupa, Inc. v. Incorporated Village of Floral Park*, Nassau County Index Number 17020-09 (Ex. O to Aff. in Opp.), the Hon. Vito M. DeStefano dismissed the action against Floral Park.

³ In its opposition papers, Plaintiff "acknowledges that its claims against the Defendants were not proper and hereby withdraws said claim in accordance with [Judge DeStefano's decision] in which Judge DeStefano held that a corporation cannot suffer mental anguish."

⁴ Although the heading to the second cause of action lists only Defendants [sic] Park, paragraph 24 of the Complaint, the last paragraph under the first cause of action, refers to Plaintiff's "claims against the Defendants Park and Everad \$75,000 for breach of contract [sic]."

livelihood.

C. The Parties' Positions

Park and Williams move for summary judgment dismissing the Complaint, and for judgment on the counterclaims, on the grounds that Plaintiff's failure to pay the balance of the purchase price constituted a material breach of the Contract entitling Defendants to regain possession of the Business. Defendants further submit that Plaintiff was operating the Business under Defendant's liquor license and incurring liabilities for which Defendant was responsible.

Plaintiff opposes Defendants' motion, submitting, *inter alia*, that 1) Park breached the terms of the Contract by failing to pay all its obligations to its creditors totaling approximately \$31,000; 2) Park failed to surrender its liquor license; 3) Everad improperly re-entered the Premises and took possession of the business and the stock; and 4) Everad improperly changed the locks to the Business, without a court order or other authority.

Ruling of the Court

A. Summary Judgment Standard

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. There are Triable Issues that Preclude Summary Judgment for Breach of Contract

The elements of a cause of action for breach of contract are: 1) formation of a contract between the parties, 2) performance by plaintiff, 3) defendant's failure to perform and 4) resulting damages. *Furia v. Furia* 116 A.D.2d 694 (2d Dept. 1986).

Paragraph 21 of the Contract at issue provided as follows:

In the event the New York State Liquor Authority does not act on the Purchaser's application within sixty (60 days) from the date of filing said application, Seller may cancel this contract and any monies paid by the Purchaser herein shall be

returned to him and, thereafter neither party shall have any claim as and against the other.

In light of the disputed factual issues, including 1) which party (or parties) may have been responsible for Plaintiff's failure to obtain a liquor license within the designated time period, and 2) whether, under the circumstances, Defendants were permitted to re-enter the Premises, the Court concludes that summary judgment is inappropriate with respect to the first cause of action, and counterclaim, based on breach of contract. Accordingly, the Court denies Defendants' motion to dismiss the first cause of action, and its application for judgment on the first counterclaim for breach of contract.

C. The Contract Precludes Recovery for Unjust Enrichment

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). A plaintiff, however, may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

In light of the Contract, which governs the matter in dispute, Plaintiff's unjust enrichment cause of action cannot survive. The Court also dismisses the second counterclaim, which is based on unjust enrichment.

D. The Counterclaims do not State a Cause of Action for Intentional or Negligent Infliction of Emotional Distress

To establish a cause of action for intentional infliction of emotional distress, the alleged conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Benyo v. Sikorjak*, 50 A.D.3d 1074, 1077 (2d Dept. 2008), quoting *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 303 (1983), citing Restatement of Torts (Second), § 46, subd. (1). This same test has been applied to causes of action for the negligent infliction of

emotional distress. *See Chime v. Sicuranza*, 221 A.D.2d 401 (2d Dept. 1995). Even accepting the allegations of the counterclaim as true, they do not allege conduct so outrageous in character, and so extreme in degree, as to state a cause of action for negligent or intentional infliction of emotional distress. Accordingly, the Court dismisses the third counterclaim.

E. Plaintiff's Cause of Action for Punitive Damages is not Viable

Ordinarily, punitive damages are not recoverable for breach of contract, and are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally. *Tartoro v. Allstate*, 56 A.D.3d 758 (2d Dept. 2008). Applying these principles to the case at bar, the Court concludes that the allegations do not meet this standard and dismisses the fourth cause of action seeking punitive damages.

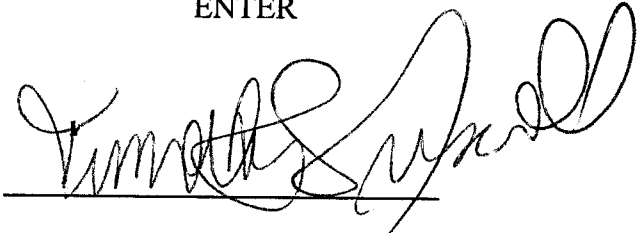
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a Certification Conference on March 29, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY
February 24, 2010



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
MAR 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE