

Patrick Powers Custom Brokers, Inc. v Powers

2010 NY Slip Op 31052(U)

April 19, 2010

Sup Ct, Nassau County

Docket Number: 012527/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 8

**PATRICK POWERS CUSTOM BROKERS, INC.
d/b/a POWERS FREIGHT EXPRESS,**

Plaintiff,

**INDEX NO.: 012527/2009
MOTION DATE: 02/09/2010
MOTION SEQUENCE: 001**

-against-

BRANDON POWERS,

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Affirmation in Opposition of James R. Murphy, Affidavit in Opposition of Donna Powers Bowe & Exhibits Annexed	2
Affirmation in Reply of Dirk Marschhausen	3

PRELIMINARY STATEMENT

Defendant moves to dismiss each of the five causes of action in the complaint. The first cause of action is based upon conversion, and defendant claims that it neither identifies the specific property allegedly converted or alleges a demand for its return. The second cause of action alleges a constructive trust, and defendant claims that plaintiff failed to plead the essential elements of confidential relationship, promise, transfer in reliance upon a promise and unjust enrichment. The third cause of action is stated by defendant to be unintelligible and impossible to respond to in an answer. The fourth

cause of action allegedly calls for the forfeiture of a domain name created by defendant and sets forth no basis upon which name should be relinquished. The fifth cause of action calls upon defendant to return the 5% interest in the corporation, but states no reason why defendant should do so.

Plaintiff opposes the motion and annexes as Exh. "D" an Amended Verified Complaint. The original complaint was filed June 26, 2009. The amended complaint is dated December 14, 2009. It was not served within 20 days of the original complaint and there is no evidence that plaintiff obtained leave of Court to serve it. The Court will consider whether or not the original complaint adequately states a cause of action, as it may be expanded by the amended verified complaint, which may serve as an affidavit to remedy defects in the complaint. (*Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]).

DISCUSSION

Defendant moves to dismiss the action pursuant to CPLR 3211 (a) (2), (5), (7) and (10). Subdivision (2) asserts a claim that "the court has not jurisdiction of the subject matter of the action"; subdivision (5) involves a claim that "the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds"; subdivision (7) asserts that "the pleading fails to state a cause of action"; and subdivision (10) provides that "the court should not proceed in the absence of a person who should be a party". The only basis expounded upon by defendant is failure of the complaint to state a cause of action upon which relief can be granted.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine, "accepting as true the factual averments of the complaint and according the plaintiff every benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts stated". (*Malik v. Beal*, 54 A.D.3d 910, 911 [2d Dept. 2008]); (*Simmons v. Edelstein*, 32 A.D.3d 464, 465 [2d Dept. 2006]).

First Cause of Action - Conversion

A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*State of New York v. Seventh Regiment Fund*, 98 N.Y.2d 249 [2002]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property (*Pierpoint v. Hoyt*, 260 N.Y.26 [1932]; *Seventh Regiment Fund*, 98 N.Y.2d at 259) and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. (*Employers' Fire Ins. Co. v. Cotten*, 245 N.Y. 102 [1927]); see also Restatement [Second] of Torts §§ 8A, 223, 243; Prosser and Keeton, Torts § 15, at 92, 102 [5th ed.].

The verified complaint attached to the motion alleges plaintiff's possessory right to the funds of Patrick Powers Custom Brokers, Inc. d/b/a Powers Freight Express, defendant's access to such funds as the person in control of the Accounting Department, with authority to open all mail, deposit checks, authorizing expenditures and paying bills. The complaint further alleges that defendant converted to his own use monies in the amount of \$750,000. Defendant claims that the complaint fails to allege a demand for the refund of the funds. Plaintiff alleges at ¶ 14 of the amended verified complaint that the return of the funds was demanded, without refund.

The motion to dismiss the first cause of action is denied. This is the pleading stage of the proceeding and plaintiff is not obligated to identify from which client, or by what particular means funds were diverted. They have adequately placed defendant on notice that they claim an interference with plaintiff's right to funds and that they were diverted by defendant in derogation of the rights of the plaintiff.

Second Cause of Action - Imposition of a Constructive Trust

A constructive trust may be imposed "(w)hen property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest." (*Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386 [1919]). It is an equitable remedy, necessarily flexible so as to accomplish its purpose. (*Counihan v. Allstate Insurance Co.*, 194 F3d 357, 361 [2d Cir. 1999]), citing (*Simonds v. Simonds*, 45 N.Y.2d 233, 241 [1978]).

In *Sharp v. Kosmalski*, 40 N.Y.2d 119, 123 (1976), the Court of Appeals set forth four elements to establish a constructive trust: "(1) a confidential or fiduciary relation, (2), a promise,

(3) a transfer in reliance thereon and (4) unjust enrichment.” There are no rigid requirements for the establishment of a constructive trust, and these are more aptly considered as guidelines. Because the fundamental purpose is to prevent unjust enrichment, a constructive trust is appropriate whenever necessary to satisfy the demands of justice.(*Matter of Estate of Knappen*, 237 A.D.2d 677 [3d Dept 1997]).

Despite defendants contention to the contrary, New York common law recognizes a fiduciary duty between employees and their employers which survives termination of the employment relationship. (*Velo-Bind, Inc. v. Scheck*, 485 F.Supp. 102 [S.D.N.Y. 1979]). This is all the more so when plaintiff is a closely held corporation owned by family members. A fair reading of the complaint imports a promise by an employee to faithfully perform the duties attendant to his position of employment.

While the complaint adequately alleges the first element, a fiduciary relationship, there is no allegation that plaintiff was caused to transfer particular property in reliance upon a false representation, thereby unjustly enriching defendant. The complaint seeks the imposition of a constructive trust on three real estate parcels, which, in a conclusory fashion, plaintiff alleges were purchased with diverted funds belonging to them. It does not, for example, allege a conveyance of these properties by plaintiff to defendant on a promise by defendant to hold them for the benefit of another.

What plaintiff in fact seeks, is a pre-judgment attachment of real estate. Grounds for attachment are set forth at Civil Practice Law and Rules § 6201. The essence of attachment is to prevent the destruction, diversion or removal of the property from the state in an effort to frustrate the enforcement of a judgment which may be obtained by plaintiff. The complaint makes no such allegations, and the source of the funds with which the property was purchased is presently unknown.

The motion to dismiss the second cause of action for a constructive trust on the three identified real estate parcels is granted.

Third Cause of Action - Trade Name Infringement

Plaintiff alleges that Patrick Powers Custom Brokers, Inc. filed a Certificate of Assumed

Name in the Nassau County Clerk's Office under the name Powers Freight Express. It further alleges that defendant has formed a limited liability company under the laws of New Jersey using the identical name, and that "the use of said corporate name by defendant is causing confusion and damage to plaintiff". The remedy it seeks, conveyance of defendant's "corporate stock of said corporation" is inappropriate.

A limited liability company involves membership interests, not shares of stock, and plaintiff is not entitled to an interest in a company formed by another. What plaintiff may be entitled to is an injunction to prevent defendant from using plaintiff's trade name to confuse the public and thereby engage in unfair competition. The language of the Third Cause of Action is sufficient to give notice to defendant that his use of the trade name, registered to plaintiff, is unauthorized, and may constitute a basis for a claim for injunctive relief.

The motion to dismiss the Third Cause of Action is denied.

Fourth Cause of Action - Misuse of Plaintiff's Trade Name for Defendant's Website.

For essentially the same reasons, the motion to dismiss the Fourth Cause of Action is also denied. Protection against confusing similarity rests on the principle that no person has the right to sell his or own goods or services as those of another. Here plaintiff alleges not only similarity, but identity in the use of their trade name. While the remedy sought may not be available, at this stage of the proceeding, plaintiff has adequately stated a claim upon which relief may be granted.

Fifth Cause of Action - Compel Tender of Defendant's 5% Shareholder Interest.

The motion to dismiss the Fifth Cause of Action is granted. Movant is authorized to seek a dissolution of the corporation based on a claim that dissension between or among shareholders under Business Corporation Law § 1104, and may offer to purchase shares of defendant with discount for marketability in accordance with § 1118 (a). (*In re Brooklyn Home Dialysis Training Center, Inc.*, 293 A.D.2d 747 (2d Dept. 2002)). The allegations of the Fifth Cause of Action do not adequately set forth a claim under the Business Corporation Law upon which relief in the form requested can be granted.

This constitutes the Decision and Order of the Court.

Dated: April 19, 2010


J.S.C.

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APR 22 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE