

Capellino v Escobar

2010 NY Slip Op 32061(U)

July 29, 2010

Sup Ct, Suffolk County

Docket Number: 8154-2008

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.

SHORT FORM ORDER

Index Number: 8154-2008

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

Present: HON. EMILY PINES

J. S. C.

Original Motion Dates: 03-11-2010; 05-11-2010

Motion Submit Date: 05-11-2010

Motion Sequence .: 003 MG

004 MD

_____ X
**JOHN A. CAPELLINO and DMC INDUSTRIES,
 INC.,**

Plaintiffs,**-against-**

**JOHN ESCOBAR, BRIAN KINGSTON,
 ESCAPPA PACKAGING, INC., and ES. CO.
 PAC, INC.,**

Defendants.

_____ X

Attorney for Plaintiff

Michael Salgo, Esq.

500 North Broadway, Suite 101

Jericho, New York 11753

Attorney for Defendants

Jeffrey I. Baum and Associates, P.C.

1205 Franklin Avenue, Suite 110

Garden City, New York 11530

ORDERED, that the motion (motion sequence number 003) by defendants, Brian Kingston and Es. Co. PAC, Inc., for summary judgment dismissing the action against them is granted to the extent that the second and third causes of action are dismissed; and it is further

ORDERED, that the cross-motion (motion sequence number 004) by plaintiffs for partial summary judgment on the Second and Third Causes of Action against Brian Kingston, the Fourth and Fifth Causes of Action against Es. Co. Pac., Inc., and the Sixth Cause of Action against both of these defendants is denied.

Cappellino v Escobar
Motion Decision 003 004
Index Number 08154-2008

This action reinforces the importance of written contracts in commercial transactions and demonstrates the unfortunate consequences that may result in the absence of such writings. Plaintiffs commenced this action against all defendants by the filing of a Summons and Complaint on February 28, 2008 and issue was joined as to defendants Brian Kingston (“Kingston”) and Es. Co. Pac, Inc., (“Es. Co.”) by the service of a Verified Answer dated April 3, 2008. Defendants John Escobar (“Escobar”) and Escappa Packaging, Inc., (“Escappa”) failed to answer or otherwise move with respect to the Complaint. By Order (PINES, J.) dated June 8, 2009, plaintiffs’ motion for a default was granted as against Escobar, with the issue of damages reserved until resolution against the remaining defendants. By Order (PINES, J.) dated June 18, 2009, The motion by Kingston and Es. Co. for a default against Escobar on their cross-claims was denied with leave to renew upon proof of compliance with CPLR §3215(g).

The submissions reflect that plaintiff, John Cappellino (“Cappellino”) and Escobar were each 50% shareholders of Escappa, a corporation which was in the business of packaging for the pharmaceutical industry. Cappellino is also the sole shareholder of plaintiff DMC Industries, Inc., a corporation which buys and sells used machinery related to the pharmaceutical industry. It appears undisputed that in 2007, Cappellino and Escobar were discussing the sale of Escappa and met Kingston when he sought to purchase some machinery. At this time, Escappa and DMC were in litigation with the landlord where the businesses were located and ultimately agreed to vacate the property. Also, at this point, Escappa’s largest client and a significant portion of its revenue was derived from Para Labs a/k/a “Hain Celestial (“Para”) although there was no written agreement with Para. Kingston was interested in purchasing Escappa for the price of \$200,000.00, however, said purchase was contingent on Escappa obtaining a written contract from Para with a two year commitment to continue its relationship. Ultimately, although Escobar negotiated with Para, they were unable to reach satisfactory terms and no agreement was executed. As a result thereof, Kingston did not purchase Escappa, despite the fact that he had already lease a space to relocate the business, since he was aware of the litigation with the landlord.

Cappellino testified in his examination before trial that when the negotiations with Kingston failed to result in a deal, Escobar advised him that he was willing to purchase his shares of Escappa and

Cappellino v Escobar
Motion Decision 003 004
Index Number 08154-2008

that he was going to relocate Escappa to the premises leased by Kingston. Ultimately, Escappa was relocated to the Bellport property and Kingston purportedly assigned the lease of the property to Escobar. Cappellino further testified that he was “in negotiations” with Escobar for the sale of his shares of Escappa, but only Escobar signed the lease assignment on behalf of Escappa, although Cappellino states he was still a 50% shareholder at the time of the relocation. Although Cappellino testified that he and Escobar exchanged written proposals during the negotiations, no contract was ever executed despite negotiations over a four or five week period in early to mid-2007. Then, in July of 2007, Cappellino goes to the Bellport location and discovers that there was a new name on the door “Es. Co. Pac.” and also that Kingston was working there. Based on these observations, Cappellino concluded that Escobar and Kingston withheld from him information regarding their continuing relationship. Cappellino further testified that he received approximately \$100,000.00 from Escobar as part payment toward the purchase of Escappa. Cappellino was seeking an additional \$100,000.00 from Escobar, who he alleges has left the country and relocated to Columbia. Cappellino claims he is still a 50% shareholder of Escappa and never transferred his shares to Escobar. Cappellino alleges that Kingston did not consummate the original deal with him and Escobar so he could make a more favorable deal solely with Escobar.

Kingston testified in his examination before trial that he paid Escobar \$150,000.00 for a 50% interest in Es. Co. and Escobar represented that he owned all of the assets of Es. Co. He further testified that some of the assets of Es. Co. were those formerly used by Escappa and that Para remained the largest customer of Es. Co. Kingston states that he saw cancelled checks from Escobar to Cappellino but that he did not perform any searches to determine whether Escobar owned 100% of the shares of Escappa. With regard to the lease of the Bellport property, Kingston testified that the landlord of the property agreed that Escobar could assume the lease, but that Kingston would still be liable in the event of a default. There was no written assignment or assumption of the lease.

Kingston now moves for summary judgment dismissing the Complaint against him. Kingston argues that the Complaint essentially alleges a cause of action against him for “aiding and abetting a breach of fiduciary duty” and that he had no fiduciary relationship with Cappellino such as to sustain this claim. Kingston notes that Cappellino admitted in his deposition that he (Kingston) did not proceed with the purchase of Escappa because Para would not agree to a long term contractual commitment.

Cappellino v Escobar
Motion Decision 003 004
Index Number 08154-2008

This, without more, fails to amount to a breach of fiduciary duty, nor does it demonstrate that Kingston assisted Escobar in breaching a fiduciary duty to Cappellino. Cappellino also admitted that he knew when Escobar purchased Escappa that he was planning on relocating to the space leased by Kingston. According to Kingston, the mere fact that he and Escobar subsequently entered into a relationship is insufficient to demonstrate he conspired with Escobar to wrong Cappellino. Instead, Cappellino's remedy is solely against Escobar. As an aside, Kingston notes that Escobar did not fulfill his obligations to Es. Co. and he believes he has relocated to Columbia. Kingston argues that he cannot be held responsible for Cappellino's failure to investigate the terms of any dissolution of Escappa and the motion for summary judgment dismissing the Complaint should be granted.

Cappellino opposes the motion and cross-moves for partial summary judgment on the second and third causes of action against Kingston and fourth and fifth causes of action against Es. Co. Cappellino submits an affidavit wherein he essentially agrees to the facts as set forth by Kingston, specifically, that his agreement to purchase Escappa was conditioned on a long term written commitment from Para. When Escobar and Kingston advised Cappellino that they could reach a deal with Para and Kingston would not purchase Escappa, Cappellino believed Kingston was "out of the picture". Cappellino states that he verbally agreed to sell to Escobar because they were under pressure to relocate due to the settlement of the landlord tenant proceeding. However, no stock certificates were ever transferred, which prompted him to visit the Bellport location where he discovered that Kingston and Escobar were operating Es. Co. Cappellino argues that Kingston failed to perform his due diligence to determine whether Escobar had the rights to transfer the assets of Escappa. He argues that Kingston paid a higher amount to Escobar than he had offered to pay to Cappellino and Escobar jointly and that Kingston still owes Escobar \$80,000.00. Cappellino argues that he has demonstrated that Kingston aided and abetted Escobar in his breach of fiduciary duty in that Kingston's refusal to purchase Escappa based on the refusal of Para to provide a long term agreement caused Cappellino to sell to Escobar at a reduced rate and now Kingston is operating Es. Co. using the assets of Escappa. Cappellino further argues that pursuant to the doctrine of "caveat emptor", Kingston was required to exercise due diligence but instead acted recklessly in entering into an agreement with Escobar without verifying whether

Cappellino v Escobar
Motion Decision 003 004
Index Number 08154-2008

Escobar had the right to transfer the assets of Escappa. Kingston should have required that Escobar provide written documentation, to wit, the stock certificates and/or an agreement and because he did not do so, he is liable to Cappellino for at least \$100,000.00 for his share of the assets as well as an accounting of the profits of Es. Co.

Kingston submits a reply in opposition to the cross-motion and further support of the motion to dismiss the Complaint. Kingston reiterates that he did not owe any fiduciary duty to Cappellino and plaintiff has failed to set forth any basis to substantiate a claim for aiding and abetting a breach of fiduciary duty. Kingston argues that Cappellino's claims, to the extent he has any, are against Escobar. Kingston further notes that prior to the deal falling through for his purchase of Escappa, he had committed to a three year lease and invested \$10,000.00 for two pieces of equipment. Kingston states in his affidavit that he was not involved in Escobar's negotiations with Cappellino and it was three months after his failed negotiations that Escobar approached him about becoming a partner. He states that Escobar showed him canceled checks and advised that he purchased Cappellino's interest. Kingston admits he agreed to pay more to Escobar than he originally offered but he felt that because Escobar had the relationship with Para, his investment was more secure and Escobar agreed to bring in more customers. Kingston believes that he also has claims against Escobar if he sold him assets which he did not own and further claims that Escobar breached his agreement by leaving the country and failing to solicit additional clients. Kingston urges the Court to recognize that he should not be responsible to pay because Escobar left the Country and since there is no privity between him and Cappellino, his motion for summary judgment dismissing the Complaint should be granted and Cappellino's cross-motion for partial summary judgment denied.

It is well settled 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.*

Cappellino v Escobar
Motion Decision 003 004
Index Number 08154-2008

School Dist., 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). However, if the movant fails to meet its prima facie burden, the Court need not consider the sufficiency of the opposition papers. *McMahan v. McMahan*, 66 A.D.3d 970, 886 N.Y.S.2d 825 (2d Dept. 2009). “It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather to determine whether there exists a genuine issue of fact.” *Triangle Fire Protection Corp. v. Manufacturer’s Hanover Trust Co.*, 172 AD2d 658, 570 NYS2d 960 (2d Dept. 1991). A motion for summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” *Scott v. Long Island Power Auth.*, 294 AD2d 348, 741 NYS2d 708 (2d Dept. 2002).

Here, the Court agrees with Kingston that the allegations of the second and third causes of action of the Complaint sound in aiding and abetting a breach of fiduciary duty. A claim for aiding and abetting a breach of fiduciary duty requires “(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and 93) that plaintiff suffered damage as a result of the breach”. *AHA Sales, Inc., v. Creative Bath Products, Inc.*, 58 A.D.3d 6, 867 N.Y.S.2d 169 (2d Dept. 2008)(internal quotations omitted). There must be an allegation that the defendant had actual knowledge of the breach of duty, constructive knowledge is insufficient to impose liability. *Id.* The defendant must have rendered “substantial assistance” to the fiduciary in the course of effecting the alleged breach of fiduciary duty. *Velazquez, v. Decaudin*, 49 A.D.3d 712, 854 N.Y.S.2d 163 (2d Dept. 2008). In the absence of evidence that defendant acted with the actual intent to aid in the fraud allegedly perpetrated, the cause of action must fail. *Greenfield v. Tassinari*, 8 A.D.3d 529, 779 N.Y.S.2d 531 (2d Dept. 2004).

In this case, Kingston has met his prima facie burden of demonstrating the absence of any material fact necessitating a trial. Instead, the parties agree that Kingston did not purchase Escappa because he was unable to secure a written commitment from Para, Escobar was negotiating with Para, and Cappellino did not take part in those negotiations, nor did he verify the outcome. Cappellino agrees that Kingston’s purchase was contingent on the Para commitment. Escobar and Cappellino entered into an agreement, unfortunately not in writing, for Escobar to purchase Cappellino’s shares of Escappa.

Cappellino v Escobar
Motion Decision 003 004
Index Number 08154-2008

Kingston did not participate in this transaction, and in fact, Cappellino had no contact with Kingston until he visited the Bellport location looking for Escobar. Cappellino was aware that Kingston assigned the lease to Escobar. Although it is unclear whether the transfer of the shares of Escappa occurred, Cappellino's claims are solely against Escobar, who has left the Country. Kingston was neither in privity of contract with Cappellino nor did he owe Cappellino a fiduciary duty. Moreover, Cappellino has failed to put forth any evidence that Kingston was aware of let alone provided substantial assistance to, Escobar, in his breach of fiduciary duty to Cappellino. Based on the foregoing, the second, third and sixth causes of action against Kingston are dismissed and Cappellino's motion for partial summary judgment on these causes of action are denied.

The fourth cause of action as against Es. Co. for an accounting is more problematic. Since it is unclear whether the shares of Escappa were transferred to Escobar (against whom a default has been entered), it appears that Cappellino may have a claim to Escobar's portion of Es. Co. Therefore, the Court declines to grant summary judgment to either Es. Co. or Cappellino on the fourth cause of action.

Counsel are reminded that a pretrial conference is scheduled for September 21, 2010 at 9:30 a.m. before the undersigned.

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

Dated: 7/29/10
Riverhead, New York



EMILY PINES
J. S. C.