

**Center for Rehabilitation & Nursing at Birchwood,
LLC v S&L Birchwood, LLC**

2010 NY Slip Op 32698(U)

September 23, 2010

Supreme Court, Nassau County

Docket Number: 005173/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

THE CENTER FOR REHABILITATION
AND NURSING AT BIRCHWOOD, LLC
and THE STEFFENS FAMILY LIMITED
PARTNERSHIP,

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 005173/09

MOTION DATE: July 29, 2010
Motion Sequence # 003, 004, 005

Plaintiffs,

-against-

S&L BIRCHWOOD, LLC, S&L BIRCHWOOD
REALTY, LLC and ZALMAN OBERLANDER,

Defendants.

The following papers read on this motion:

- Notice of Motion..... XXX
- Affirmation in Opposition..... X
- Affirmation in Support..... X
- Affirmation in further Support..... X
- Reply Affirmation..... X
- Memorandum of Law..... X

Motion by defendant S & L Birchwood Realty, LLC for leave to reargue is **denied**.
Motion by defendant S & L Birchwood, LLC for leave to reargue is **denied**. Motion by
defendant Zalman Oberlander for leave to reargue is **denied**.

This is an action for breach of contract. Plaintiff The Steffens Family Limited

**THE CENTER FOR REHABILITATION
AND NURSING AT BIRCHWOOD, LLC, et al**

Index no. 005173/09

Partnership was the owner of a parcel of real property located at 78 Birchwood Drive, Huntington Station, New York. Plaintiff The Center for Rehabilitation and Nursing at Birchwood, LLC operated a nursing home at the premises. On August 27, 2004, Steffens entered into a contract to sell the real property to defendant S & L Birchwood Realty, LLC. On the same date, Center for Rehabilitation entered into a contract to sell its assets to defendant S & L Birchwood, LLC. Defendant Zalman Oberlander is the principal of S & L Birchwood.

The asset purchase agreement provided that the purchase price for the assets was \$2.5 million. The agreement provided that all of seller's accounts receivables for the period up to and including the day of the closing were to remain the sole property of the seller. Similarly, accounts payable were the seller's responsibility. Paragraph 11.2 of the agreement provides that "after the closing date, buyer will give seller...during normal business hours and after prior reasonable notice, full access to, and [the] right to inspect...[the] records of the Facility...This provision shall survive the closing." Paragraph 20 of the agreement provided that "Except as specifically set forth to the contrary, all of the representations, warranties, covenants and agreements contained in this agreement will survive the closing for a period of 12 months."

The closing of both transactions occurred on February 16, 2007. At the closing, S & L Birchwood was given a credit adjustment of \$109,000, representing expenses that the purchaser claimed to have paid on behalf of the seller.

This action was commenced on March 19, 2009. Plaintiffs allege that defendant S & L Birchwood breached the asset purchase agreement by failing to account for \$840,170 in accounts receivable and failing to permit plaintiff to examine S & L Birchwood's books and records to verify the \$109,000 credit. Aside from the claim for breach of the asset purchase agreement, plaintiffs assert claims against all three defendants for conversion of the accounts receivable, fraud and misrepresentation, unjust enrichment, and an accounting.

By order dated June 10, 2010, the court denied defendants' motion to dismiss plaintiffs' breach of contract claim for failure to state a cause of action. The court determined that pursuant to the plain language of paragraph 11.2 of the agreement plaintiffs were entitled to inspect the books and records for the purpose of verifying the \$109,000 closing credit.

**THE CENTER FOR REHABILITATION
AND NURSING AT BIRCHWOOD, LLC, et al**

Index no. 005173/09

However, the court granted defendants' motion to dismiss plaintiffs' unjust enrichment claim. The court ruled that the existence of a valid and enforceable written contract governing the accounts receivable, and the closing adjustment, precluded recovery in quasi contract for those items (*Goldman v Metropolitan Life*, 5 NY3d 561, 572 [2005]).

Additionally, the court granted defendants' motion to dismiss plaintiffs' fraud and misrepresentation claims. The court determined that those claims were duplicative of plaintiffs' breach of contract claim (*Altman v Bd of Trade*, 52 AD3d 396 [1st Dept 2008]).

The court denied defendants' motion to dismiss plaintiffs' claim for an accounting. The court reasoned that defendants' contractual duty to remit the accounts receivable to plaintiff as the accounts were collected may give rise to a quasi fiduciary obligation.

Finally, the court denied defendant S & L Birchwood's motion for summary judgment dismissing the complaint based upon the contractual limitations provision. The court interpreted the provision that warranties and agreements would survive for 12 months as meaning that accounts receivable which were received within 12 months of the closing would be remitted to the plaintiff. Thus, defendants were not required to account for receivables received more than one year after the closing. However, as to receivables collected within the first year, plaintiffs had six years after the receivables were received to commence an action. Neither defendants' motions to dismiss, nor the court's order of June 10, 2010, specifically addressed the sufficiency of plaintiffs' conversion claim.

Defendant S & L Birchwood, LLC moves pursuant to CPLR 2221(d) for leave to reargue its motion to dismiss the complaint for failure to state a cause of action to the extent that the court denied the motion to dismiss plaintiffs' breach of contract, conversion, and accounting claims. With respect to plaintiffs' breach of contract claim, defendant argues that the court overlooked paragraph 8 of the closing agreement which provides that, "Notwithstanding the foregoing, the credit to the buyer in the amount of \$109,432 listed on the closing statement as Item 'D' shall be further reviewed by the firm of Horan, Martello & Morrone, PC within 30 days of the date hereof." The asset purchase agreement recites that "both seller and buyer (and its affiliates) use Horan, Martello & Morrone, PC as their outside accountants..."(¶11.4). Paragraph 8 further provides that "any further adjustment" would be paid within five business days of the accountants' determination.

Defendant asserts that the accountants failed to review the closing adjustment within

**THE CENTER FOR REHABILITATION
AND NURSING AT BIRCHWOOD, LLC, et al**

Index no. 005173/09

the 30 day period or at any time thereafter. In view of the continuing relationship between S & L Birchwood and Horan, Martello, the accountants' failure to conduct a review of the closing adjustment should not be deemed a waiver of plaintiffs' rights. Moreover, in view of the provision in the asset purchase agreement granting plaintiffs access to the books and records, it is by no means clear that the accountants' "determination" would have been binding upon plaintiffs.

With respect to plaintiffs' claim for an accounting, defendant argues that the court misapprehended the nature of its relationship with plaintiff after the asset sale took place. Defendant further argues that a quasi-fiduciary relationship is insufficient to require an accounting. The parties dealt at arm's length through the formation of the asset purchase agreement. However, paragraph 4.1 of the agreement provides:

All of seller's accounts receivables (...whether or not actually billed)...for the period up and including the day prior to the closing will be the sole property... of the seller. All money received by the buyer for services provided by the seller prior to closing will be held by buyer for the benefit of seller and paid over to seller within ten business days of receipt. Buyer will hold all such funds as a *fiduciary for the seller* and will safeguard and transfer such funds to seller, together with all statements and documentation, within the time limitations established hereby.
(Emphasis supplied).

Since the contract clearly provides that S & L Birchwood is under a fiduciary duty to plaintiff with respect to the accounts receivable, plaintiff is entitled to an accounting.

A cause of action for conversion of funds requires the legal ownership or an immediate right of possession to specifically identifiable funds and that the defendant exercised an unauthorized dominion over such funds to the exclusion of the plaintiff's rights (*Zendler Construction Co. v First Adjustment Group*, 59 AD3d 439 [2d Dept 2009]). The mere right to payment cannot be the basis for a cause of action alleging conversion (Id).

**THE CENTER FOR REHABILITATION
AND NURSING AT BIRCHWOOD, LLC, et al**

Index no. 005173/09

Paragraph 4.1 of the agreement makes clear that plaintiff retained legal ownership of the accounts receivable even though S & L Birchwood was not required to pay over the funds for ten days. Defendant exercised an unauthorized dominion over the funds received by failing to pay them over to plaintiff within the time required. The court concludes that plaintiff has alleged a legally sufficient cause of action for conversion of the accounts receivable. Defendant S & L Birchwood, LLC's motion for leave to reargue its motion to dismiss for failure to state a cause of action is **denied**.

Defendant S & L Birchwood Realty similarly moves for leave to reargue its dismissal motion. Defendant argues in essence that plaintiffs have alleged no facts with respect to S & L Birchwood Realty, other than its affiliation with S & L Birchwood, the company which signed the asset purchase agreement. Defendant further argues that the rule that a parent or affiliated corporation will not be liable for the contractual obligation of a subsidiary or affiliate, unless it is exercising complete domination and control in the matter, should be applied to a limited liability company (See *Gulf & Western Corp v New York Times Co.*, 81 AD2d 772 [1st Dept 1981]).

The court notes that the first cause of action for breach of the asset purchase agreement is asserted against defendant S & L Birchwood, LLC, rather than defendant S & L Birchwood Realty, LLC. Thus, there is no need for reargument with respect to that cause of action.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (*AG Capital Funding Partners v. State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]). Since defendants have failed to account for the accounts receivable, the court must give plaintiff the benefit of the favorable inference that S & L Birchwood Realty received or collected accounts receivable which were the property of the plaintiff. Thus, the court concludes that plaintiff has alleged a legally sufficient claim against S & L Birchwood Realty for conversion.

S & L Birchwood's fiduciary duty to plaintiff is sufficient to support a cause of action against S & L Birchwood Realty for an accounting. Defendant has not established that the court overlooked or misapprehended any matter of fact or law in determining the prior motion. Defendant S & L Birchwood Realty, LLC's motion for leave to reargue its motion to dismiss for failure to state a cause of action is **denied**.

**THE CENTER FOR REHABILITATION
AND NURSING AT BIRCHWOOD, LLC, et al**

Index no. 005173/09

Defendant Zalman Oberlander also moves for leave to reargue his dismissal motion. Defendant argues that the court overlooked the fact that he signed the asset purchase agreement in a representative capacity as a member of S & L Birchwood. Nevertheless, as noted above, the first cause of action for breach of the asset purchase agreement is asserted only against defendant S & L Birchwood, LLC. However, since Oberlander is a member of S & L Birchwood, the court must give plaintiff the benefit of the favorable inference that Oberlander received or collected accounts receivable. Thus, the court concludes that plaintiff has alleged a legally sufficient claim against Oberlander for conversion and an accounting. Defendant Zalman Oberlander's motion for leave to reargue his motion to dismiss for failure to state a cause of action is denied.

So ordered.

Dated 23 September 2010

Stephen A. Bucarea
J.S.C.

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SEP 24 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE