

<b>Business Lenders, LLC v PKR Stores, LLC</b>
2010 NY Slip Op 32831(U)
September 28, 2010
Sup Ct, Nassau County
Docket Number: 005566/2010
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**

BUSINESS LENDERS, LLC, as servicing provider  
for BANK OF AMERICA, N.A., and BANK OF  
AMERICA, N.A., successor in interest to  
MERRILL LYNCH BANK, USA, Assignee,

Plaintiffs,

-against-

INDEX NO.: 005566/2010  
MOTION DATE: 07/29/2010  
MOTION SEQUENCE: 001 and 002

PKR STORES, LLC, MICHAEL KORS STORES,  
L.L.C., MICHAEL KORS, L.L.C., MICHAEL KORS  
(USA), INC., MICHAEL KORS CORPORATION  
and PRISCILLA KAPLAN,

Defendants.

The following papers read on these motions:

Notice of Motion, Affidavit, Affirmation & Exhibits Annexed .....	1
Memorandum of Law in Support of Motion to Dismiss .....	2
Affirmation of Jeffrey Marley Zalkin in Opposition & Exhibits Annexed .....	3
Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss .....	4
Notice of Cross-Motion, Affirmation & Exhibits Annexed .....	5
Plaintiffs' Memorandum of Law in Support of Cross-Motion .....	6
Reply Memorandum in Further Support of Motion to Dismiss and in Opposition to Cross-Motion for Order of Continuance and Limited Disclosure .....	7

**PRELIMINARY STATEMENT**

Defendant moves pursuant to CPLR §§ 3211 (a)(1) and 3211 (a)(7) to dismiss the First and Second Claims against Michael Kors Stores, L.L.C., Michael Kors, L.L.C., Michael Kors (USA), Inc., and Michael Kors Corporation ("Kors Defendants"), on the ground that a defense is founded upon documentary evidence, and that the claims fail to state a cause of action against the moving defendants.

Plaintiff opposes the motion and cross-moves for a continuance of the pending motion by the Kors Defendants and directing the production of relevant records and the depositions of a managing member of PRK Stores, LLC ("PRK") and each of the Kors Defendants on the grounds that facts essential to justify opposition to Kors Defendants' motion may exist, but cannot be stated in the absence of such discovery.

#### BACKGROUND

PRK operated a high-end women's clothing and shoe store in the Americana Shopping Center in Manhasset. It was licensed by the Kors Defendants to market their products. As a result of controversies, and a default by PRK under the License Agreement, the Kors Defendants agreed to acquire the interests of PRK and operate the store itself.

This controversy involves the priority of liens between an October 22, 2004 loan to PRK, secured by promissory note and a October 24, 2004 Commercial Security Agreement, and a March 23, 2007 Sales Agreement between PRK and H-Co, Sellers, and MK, LLC and Michael Kors Stores, L.L.C.

The PRK loan involved a series of payments made by General Electric Credit for PRK to acquire inventory and for working capital. The loan was in the amount of \$500,000 to be repaid in monthly payments over a period of 84 months. Defendant Priscilla M. Kaplan and non-party Richard S. Kaplan guaranteed the note. GE filed a New York Uniform Commercial Code financing statement ("UCC-1"), covering "(a)ll Equipment; Inventory; Accounts; Instruments; Chattel Paper and General Intangibles as more fully described on Exhibit "A" attached hereto and made a part hereof". Upon purchase of the PRK loan from GE, Merrill Lynch Bank USA ("MLBUSA") recorded a UCC-3 Statement, and after merger with Bank of America, N.A., the latter is the present holder of the note.

By terms of the Sales Agreement, PRK agreed to sell, assign, and deliver to MKS, LLC exclusive ownership and use of all property and rights within, constituting or used in operation of the MK Store including, without limitation, all inventory, furnishings, and fixtures, free and clear of any rights of third parties (excepting certain rights of the Landlord, Licensor's rights under the License, and as otherwise proved in the MKS Sale Agreement. PRK also assigned its lease to MKS, LLC and MK, LLC. In addition, H-Co agreed to vacate the adjoining store and deliver it to MKS, LLC and MK, LLC, subject only to the rights of the landlord.

The motion is addressed to two claims of the complaint. The first claim against Kors Entities is for conversion of property subject to recorded security interests and liens under the UCC Security Agreement. The second claim against Kors Entities alleges intentional interference with contractual relations between GE and PRK stores under the security agreement. The promissory note for \$500,000 is annexed to the complaint as Exh. "A", and the Security Agreement is Exh. "B". The Security Agreement contains an Exh. "A" which specifies what is subject to the lien of the Agreement.

Exh. "A" to the Agreement includes equipment of the debtor; accounts receivable, contract rights, and every right of debtor to the payment of money, at the time of the agreement or in the future; and

(a)ll inventory in all of its forms, wherever located, now or hereafter existing ( including, but not limited to (i) all raw materials and work in process, finished goods, and materials used or consumed in the manufacture or production of inventory, (ii) goods in which the Debtor has an interest in mass or a joint or other interest or right of any kind, and (iii) goods which are returned to or repossessed by the Debtor), and all accessions thereto, proceeds and products thereof and documents therefore (any and all such inventory, accessions, products and documents being the "inventory"), and all books and records (in whatever form maintained<sup>0</sup> relating to any of the foregoing described collateral.

Moving defendants point to the License Agreement between PRK and certain Kors entities as documentary evidence constituting a defense to the plaintiff's claim for violation of the UCC Security Agreement. Movants also contend that certain assets the Kors Defendants acquired under the Asset Sale Agreement were not subject to the Security Agreement, and that Kors Defendants did not have actual notice of the UCC lien and that there is no allegation of constructive knowledge of them.

Plaintiffs, in their opposition to the motion, concede that their perfected security interests are not effective against the assignment of the Lease by PRK to Kors, the Store License Agreement, the Kors Note, or any genuinely qualified fixtures. Their contention is that the merchandise of PRK, including Kors branded merchandise described as inventory, its equipment, furnishings, etc. of PRK Stores is precisely the type of property described in the

Asset Sale Agreement, and subject to the UCC filings.

#### DISCUSSION

CPLR § 3211 (a)(1) provides as follows:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence;

In order to succeed in a claim based upon documentary evidence, “. . . the defendant must establish that the documentary evidence which form the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff’s claim”. (*Symbol Technologies, Inc. v. Deloitte & Touche, LLP*, 69 A.D.3d 191, 194 [2d Dept. 2009]); (*DiGiacomo v. Levine*, 2010 WL 3583424 (N.Y.A.D. 2d Dept.)).

When determining a motion to dismiss for failure to state cause of action pursuant to CPLR § 3211 (a)(7), the pleadings must be afforded a liberal construction, facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory. (*Symbol Technologies* 69 A.D.3d at 194); (*Uzzle v. Nunzie Court Homeowners Ass’, Inc.* 55 A.D.3d 723 [2d Dept. 2008]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments. (*Brinkley v. Casablanco*, 80 A.D.2d 815 [1<sup>st</sup> Dept. 1981]).

#### Defendants’ Documentary Evidence

In order to successfully negate a claim, the submitted documentary evidence must conclusively resolve all factual questions as a matter of law. In this case, defendants propound the Lease between PRK and Fifth Avenue of Long Island, a License Agreement between PRK and MKS, LLC, the March 22, 2007 Sales Agreement between PRK and H-Co (Hermes) with Michael Kors Stores, LLC, and the March 22, 2007 promissory note as such documentary evidence. Under the Sales Agreement PRK, the tenant under a lease with Fifth Avenue Realty of

Long Island Realty Associates, assigned its rights under the lease and License Agreement to Michael Kors Stores (MKS). ¶ 4 of the Agreement, captioned “Assignment of the MK Store Lease and Transfer of the MK Store”, includes additional language, providing that PRK will “assign, deliver and convey to MKS exclusive ownership and use of all property and rights within, constituting or used by PRK in the MK Store . . . but including, without limitation, all inventory, furnishings, fixtures, equipment, wiring, customer and sales data and records (other than internal financial records of PRK, decorations and leasehold improvements (collectively, the “MK Store Property,” . . . .

These documents do not vitiate the validity of the continuing general lien on after-acquired inventory referred to in the Security Agreement. (*William Iselin v. Burgess & Leigh Ltd.*, 52 Misc.2d 821 [Sup.Ct. NY County, 1967]). Defendant contends that they had no actual knowledge of the lien at the time of the 2007 Sales Agreement, but none was required. Defendants do not challenge the authenticity of the 2004 UCC-1 filing, or that of the UCC-3 amendment to reflect the transfer from GMC. UCC 9-325 deals with the priority of security interests in transferred collateral. It provides that a security interest created by a debtor is subordinate to a security interest in the same collateral created by another person if the debtor acquired the collateral subject to the security interest created by the other person, the security interest was perfected when the debtor acquired the collateral, and there was no period when the security agreement was unperfected.

Kors Defendants position is that upon the purchase of the assets of PKR, they acquired a possessory right which was superior to that of plaintiff, and that the claimed lien on inventory was illusory, because it did not constitute a lien on a “particular identifiable thing”. It is true that a lien pursuant to a security agreement, evidence of which is filed, is not inviolate. In *General Electric Capital Commercial Automotive Finance, Inc. v. Spartan Motors, Ltd.*, 246 A.D.2d 41 (2d Dept. 1998) plaintiff’s predecessor entered into an “Inventory Security Agreement” dated September 28, 1983 with Spartan in connection with its “floor plan” financing of the dealership’s inventory. Similar to the language in the subject Agreement, lender acquired a “blanket” or “dragnet” lien over “(a)ll inventory, of whatever kind or nature, wherever located, now owned or hereafter acquired, and all returns, repossessions, exchanges, substitutions, replacements, attachments, parts, accessories and accessions thereto and thereof, and all other

goods used or intended to be used in conjunction therewith, and all proceeds thereof (whether in the form of cash, instruments, chattel paper, general intangibles, accounts or otherwise)". The security agreement was filed with the County Clerk of Dutchess County and with the New York State Secretary of State.

On July 19, 1991 Spartan signed a new Wholesale Security Agreement with GMAC in which the latter agreed to provide floor plan financing. This Agreement required Spartan to pay to GMAC the amount it advances for each vehicle from a manufacturer or distributor, and granted GMAC a security interest in the vehicles and the proceeds of sale thereof, the "collateral". Spartan agreed that "as each vehicle is sold, or leased, we will faithfully and promptly remit to you the amount you advanced or have become obligated to advance on our behalf to the manufacturer, distributor or seller". The GMAC security interest was duly filed and on July 17, 1991 GMAC notified GEEC (plaintiff's predecessor) of their competing security interest.

On May 7 and July 7, 1992 Spartan purchased two Mercedes Benz 600 SEL vehicles for \$121,500 and \$120,000 with their own funds. GMAC reimbursed Spartan for both vehicles and they were placed on the GMAC floor plan. On October 2, 1992 GEEC commenced an action for \$1,180,999.98, representing money due under their agreement with Spartan. The action was brought against Spartan, its principals upon their guarantees, as well as against GMAC and Mercedes-Benz of North America, Inc. in order to determine lien priority. Spartan promptly filed for bankruptcy protection. GEEC settled with all defendants except GMAC, whom they accused of conversion of the two Mercedes Benz vehicles in violation of their antecedent security interest.

Recognizing the priority of a purchase money security interest, the lower court concluded that this applied only when payment was made directly to a manufacturer or distributor. The Appellate Division reversed. The Court noted that a perfected purchase money security interest provides an exception to the general first-in-time, first-in-right rule of conflicting security interests. Citing UCC 9-312 (3) the Court determined that a perfected purchase money security interest has priority over a conflicting prior security interest in the same inventory.

There is, however, no evidence that such an exception applies in the instant case. MKS, L.L.C. and Michael Kors, L.L.C. did not advance funds for the acquisition of the inventory by

PKR and did not acquire a security interest. They acquired the property in a bulk sales transaction, which triggered the claim by plaintiff for entitlement to the inventory in which they had a greater possessory interest.

To establish a cause of action in conversion “the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff’s rights” (*Batsidis v Batsidis*, 9 AD3d 342, 343 [2004]) . (*Castaldi v. 39 Winfield Assoc.*, 30 A.D.3d 458 [2d Dept. 2006]). In that case plaintiff alleged a claim of conversion for the proceeds of the sale of real estate upon which they performed work. Because they never had control over the proceeds of sale, there could be no claim for conversion.

Defendants claim that the plaintiff is unable to specifically identify the property which it alleges have been converted. For this, and other reasons, the plaintiff seeks leave for a continuance of defendants’ motion and the conduct of discovery of PRK Stores, LLC through Richard S. Kaplan, and the Kors defendants in order to interpose proper opposition and to seek leave to amend the complaint pursuant to CPLR § 3025 (b).

Importantly, the only remaining item which plaintiffs contend is subject to their security interest is inventory. 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 NY2d 249 [2002]). Two key elements of conversion are (1) plaintiff’s possessory right or interest in the property (*Pierpoint v Hoyt*, 260 NY 26 [1932]; *Seventh Regiment Fund*, 98 NY2d 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 NY 102 [1927]; see also Restatement [Second] of Torts §§ 8A, 223, 243; Prosser and Keeton, Torts § 15, at 92, 102 [5th ed]).

Plaintiff had a superior possessory right to the inventory on hand at the time of the sale of the assets of PRK in 2007. The Security Agreement between GE Capital and PRK provided in part that “(e)xcept for inventory sold or accounts collected in the ordinary course of Grantor’s business, or as otherwise provided for in this Agreement, Grantor shall not sell, offer to sell, or otherwise transfer or dispose of the Collateral”. PRK’s sale of the inventory to Michael Kors

Stores, LLC contravened this prohibition. Defendants do not claim that they have a superior lien in accordance with UCC 9-107. A mere contractual agreement to purchase in bulk is not superior to a recorded lien. The claim that plaintiff's inability to particularly identify each item of inventory in which they have a security interest is belied by the language of the security agreement, referring as it does to after-acquired inventory. This is similar to the original lien in *Spartan* which attached to the newly acquired automobiles 11 years after the Agreement. The liens existed, but were subordinate to a purchase money security interest. In this case there is no lien to which plaintiff's claim is to be subordinated.

While plaintiff has taken the precaution of seeking additional discovery so as to obtain information as to the specific items which constituted the inventory, such itemization, in the opinion of the Court, is unnecessary. It has always been clear that inventory consisted of Michael Kors branded merchandise, which PRK sold under a License Agreement. Were the hyper-technical requirement that Plaintiff identify each and every item of inventory to state a claim for conversion, it would constitute an unwarranted limitation upon the right of the plaintiff to the security for their \$500,000 advances to PRK.

Defendants' motion to dismiss the Cause of Action for Conversion for failure to state a cause of action is denied. Defendant seeks to limit the liability to the companies which signed the Sales Agreement. Plaintiff cites to the fact that all four Kors Companies acknowledged a benefit from the transaction and each guaranteed the payment of the \$1,000,000 purchase price. At this stage of the proceeding, the Court is unwilling to make a determination with respect to the responsibility of Michael Kors (USA), Inc. and Michael Kors Corporation. The motion to dismiss as to these defendants is denied with leave to renew at the conclusion of discovery.

Plaintiff also claims damages as a result of intentional interference with contractual relations between plaintiff's predecessor and PRK Stores. The allegation is that the Kors Defendants actually knew, should have known, or were chargeable with notice of the Security Agreement by virtue of the UCC filing. That agreement prohibited PRK Stores from selling inventory other than in the usual course of business, and by inducing PRK to sell its assets to them, the Kors Defendants induced a breach of contract, thereby damaging plaintiff.

The elements of tortious interference with contractual relations are: (1) a valid contract

between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to the plaintiff resulting therefrom. (*Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 [1996]).

Plaintiff had a valid security agreement with PKR Stores, which the complaint alleges the Kors Defendants either knew of, should have known of, or were chargeable with constructive notice of; defendants contend that actual notice is required and allegations of constructive knowledge, or a duty to inquire, are inadequate to constitute an enforceable claim under the applicable decisional law. The Court agrees with this position.

Defendants' motion to dismiss the Second Claim against the Kors Defendants is denied at this early stage of the proceeding. Plaintiff's application for leave to serve an amended complaint at the conclusion of limited discovery in order to allege actual knowledge of Kors Stores of the Security Agreement between plaintiff and PKR Stores is denied at this time with permission to renew at that time.

The parties are directed to appear for a Compliance Conference on October 25, 2010 at 9:30 A.M., at which time the parties will develop a discovery schedule.

This constitutes the Decision and Order of the Court.

Dated: September 28, 2010

  
J.S.C.

**ENTERED**  
**OCT 07 2010**  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE