

Visual Arts Found., Inc. v Egnasko

2011 NY Slip Op 30264(U)

February 4, 2011

Supreme Court, New York County

Docket Number: 603078/2008

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 61

VISUAL ARTS FOUNDATION, INC.,

Plaintiff,

INDEX NO. 603078/2008

MOTION DATE June 24, 2010

-against-

MOTION SEQ. NO. 006

LOUIS A. EGNASKO, et al.

MOTION CAL. NO. 114

Defendants.

The following papers, numbered 1 to _____ were read on this motion for a summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, plaintiff's motion for an order granting a summary judgment in its favor is decided in accordance with the accompanying decision and order.

FILED

FEB 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: February 4, 2011



O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61**

-----X
VISUAL ARTS FOUNDATION, INC.,

Plaintiff,

-against-

**LOUIS A. EGNASKO, SHARI EGNASKO,
Individually and as Administratrix of the Estate of
Charles Egnasko, deceased, and GOLD LEAF
TRAVEL CENTER, INC.,**

Defendants.
-----X

O. PETER SHERWOOD, J.:

**DECISION AND
ORDER**

Index No.: 603078/2008

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The complaint alleges that while employed by plaintiff, Visual Arts Foundation, Inc. ("VAF"), defendant, Louis Egnasko ("Louis") misappropriated over \$175,000, the proceeds of which was deposited in bank accounts of Louis; his wife, Shari Egnasko ("Shari") and his father, Charles Egnasko ("Charles")¹; and was used to pay debts of a business he controlled, Gold Leaf Travel Center, Inc. ("Gold Leaf")². In August 2008, Louis confessed to stealing over \$300,000 from VAF and thereafter pleaded guilty to grand larceny in the second degree in the amount of \$304,262.

Plaintiff has now moved for summary judgment against the defendants.³ VAF seeks return of stolen funds in the aggregate amount of \$304,262, plus interest from June 20, 2006 (which claimed to be the date falling in the middle of the period during which the thefts occurred), forfeiture of compensation paid to Louis in the amount of \$68,507.80, an unspecified amount in punitive damages and attorney fees and costs in the amount of \$145,112.50 and \$44,369.26, respectively.

¹ Charles died in August 2009, shortly before the Note of Issue ("NOI") was filed. By order dated April 7, 2010, this court substituted Shari Egnasko, as the Administratrix of the Estate of Charles Egnasko, in place of Charles ("the Estate").

² Gold Leaf has neither appeared nor answered the complaint.

³ Explaining that the court was divested of jurisdiction over Charles due to death, within days after the NOI was filed and that the courts' jurisdiction was restored only recently, plaintiff seeks leave to file the motion more than 60 days after the NOI date. Leave is granted.

Louis has submitted an affidavit in opposition to the motion.⁴ Shari and the Estate have not responded to the motion. Louis does not dispute the claims made against him. He argues that VAF is guilty of “unclean hands” and was aware of fraud, thereby establishing questions of fact requiring a jury trial.

DISCUSSION

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212[b]; *Alvarez v. Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v. Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form (*see, Alvarez v. Prospect Hosp., supra; Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the *prima facie* showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v. Silver*, 90 NY2d 204, 208 [1997]). On a motion for summary judgment, it is not the function of the court to assess credibility (*see, Ferrante v. American Lung Assn.*, 90 NY2d 623, 631 [1997]). The court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v. Stop & shop, Inc.*, 65 NY2d 625 [1985]). However, the motion “may not be defeated by the assertion of mere conclusory allegations, expressions of hope or unsubstantiated assertions” *Jordan Mfg. Co. v. Zimmerman*, 169 AD2d 815, 816 (2d Dept 1991).

As to the first cause of action for fraud, VAF has established that Louis made misrepresentations to his employer in order to obtain for his own benefit funds that rightfully belonged to the employer thereby causing VAF the loss of \$304,262 (*see Laub v. Fuessel*, 297 AD2d 28, 31 [1st Dept 2002]). Specifically, VAF established, *inter alia*, that Louis made out phony check requests, forged endorsements of payees on VAF checks, submitted personal expenses as business expenses and received payment. The improperly received checks were deposited in the bank accounts of Louis, Shari and Charles. Louis has admitted to the thefts.

⁴ In addition, he has filed a number of hand-written submissions. The court has not considered the additional papers because, generally, sur-reply submissions are not permitted (*see* CPLR §2214). Louis has not shown “good cause” sufficient to warrant consideration of said submissions.

In its sixth cause of action, VAF seeks to recoup wages paid to Louis by application of the faithless servant doctrine. The Court of Appeals has declared that “[one] who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation ...” *Feiger v. Iral Jewelry, Ltd.*, 41 NY2d 928 (1977). The disloyal employee is not entitled to wages during the period of disloyalty (*see National Bank of Pakistan v. Basham*, 148 AD2d 399 [1st Dept 1989]). The employer’s claim may be asserted either as a defense to the employee’s claim for wages or by counterclaim sufficient to establish plaintiff’s claim (*see Miller v. Brown Harris Stevens, Inc.*, 209 AD2d 171, 172 [1st Dept 1994]). Plaintiff has made out a *prima facie* case of disloyalty which has not been rebutted by evidentiary proof.

As to its tenth cause of action, plaintiff has asserted a claim for the tort of conversion. Conversion has been defined as an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights (*see Thyroff v. Nationwide Mut. Ins. Co.*, 8NY3d 283, 288 [2007]). Under UCC 3-419(1)(c), a check is converted when it is paid on a forged endorsement (*see Mouradian v. Astoria Federal Sav. & Loan*, 91 NY2d 124, 128 [1997]). Based on the facts recited above, plaintiff has established a *prima facie* case of conversion.

The defense of unclean hands is not available in this claim for damages because the doctrine applies only in an action in equity and cannot be asserted in an action exclusively for damages (*see Manshion Joho Ctr. Co., Ltd. v. Manshion Joho Ctr. Inc.*, 24 AD3d 189, 190 [1st Dept 2005]). Moreover, Louis’ conclusory allegations against his former employer are insufficient to raise any triable issues of fact. The motion should be granted as to the first cause of action.

In the second and third causes of action, VAF alleges that Shari and Charles aided and abetted Louis’ fraud. Neither Shari nor the Estate opposes the motion. Louis has asserted a Fifth Amendment argument as to them. The elements of aiding and abetting fraud are (1) the underlying fraud; (2) knowledge of the fraud on the part of the aider and abettor; and (3) substantial assistance in commission of the fraud (*see Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 64 AD2d 472, 476 [1st Dept 2009]). As discussed above, VAF has established the first element of this cause of action. In a civil action, where a suspected aider and abettor elects to exercise his or her Fifth Amendment rights, the court may make an inference of liability (*see Marine Midland Bank v. Joseph E. Russo Produce Co.*, 50 NY2d 31, 42-43 [1980]). Both Shari and Charles invoked their Fifth Amendment rights at their respective depositions in this case. In these circumstances, the court may infer that they knowingly aided and abetted Louis in connection with his fraudulent scheme (*see*

Republic of Haiti v. Duvalier, 211 AD2d 379, 386 [1st Dept 1995][“When a party in a civil action, capable of testifying on the issues, refuses to testify by the claim of this privilege, he must thereupon bear all the legitimate inferences flowing from the adverse evidence against him and this without regard for his reasons for silence.”)]. Neither has denied knowledge of or assistance in Louis’ scheme, although both had ample opportunity to do so. VAF also proved that both Shari and Charles were substantial beneficiaries of the fruits of the fraud. Neither questioned the source of the large sums and lavish gifts received from Louis. Where, as in this case, one suspects or ought to suspect that the benefits he or she is receiving may not be from a legitimate source, she or he is bound to inquire and the law presumes knowledge of whatever a proper inquiry would reveal (*see Rochester & C. Turnpike Road Co. V. Paviour*, 164 NY 281, 286 [1900]). Having established a *prima facie* case of aiding and abetting the fraud and Shari and the Estate having failed to raise any triable issue of fact relating thereto, this branch of the motion for summary judgment will be granted.⁵

The request for an award of attorney fees on the grounds of bad faith or frivolous conduct is denied. The request for an award of punitive damages is also denied.

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment as to the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth causes of action is GRANTED; and it is further

ORDERED that plaintiff is granted judgment against Louis Egnasko on the first, fifth, sixth and tenth causes in the amount of \$304,262, together with interest at the rate of 9% per annum from June 20, 2006, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, the first, fourth, fifth, sixth and tenth causes of action is severed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendants Shari Egnasko and Shari Egnasko as the Administratrix of the Estate of Charles Egnasko, are found liable to plaintiff on the second, third, seventh and eighth


⁵ For reasons similar to those discussed, VAF is also entitled to have its motion for summary judgment granted as to the fifth cause of action as to Louis (breach of fiduciary duty) and seventh and eighth causes of action as to Shari and the Estate (aiding and abetting Louis’ breach of fiduciary duty). Further, Gold Leaf having failed to answer the complaint and VAF having made out a *prima facie* case as to it on the fourth and ninth causes of action, the motion will be granted against Gold Leaf on default.

causes of action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that defendant, Gold Leaf Travel Center, Inc., is found liable to plaintiff on the fourth cause of action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that counsel are directed to appear for a pre-trial conference in Room 341 on February 28, 2011, at 11:00 AM.

DATED: February 4, 2011

ENTER:

O. PETER SHERWOOD
J.S.C.

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