

**Berkman, Henoch, Peterson, Peddy & Fenchel, P.C.
v Long Is. Bus. Solutions, Inc.**

2011 NY Slip Op 31795(U)

June 20, 2011

Supreme Court, Nassau County

Docket Number: 9794/10

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 8794/10

MOTION DATE: April 27, 2011
Motion Sequence # 009

BERKMAN, HENOCH, PETERSON, PEDDY
& FENCHEL, P.C. f/k/a BERKMAN, HENOCH,
PETERSON & PEDDY, P.C.,

Plaintiff,

-against-

LONG ISLAND BUSINESS SOLUTIONS, INC.,
ANDREW FENTON and KEY EQUIPMENT
FINANCE, INC.,

Defendants.

The following papers read on this motion:

- Order to Show Cause..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

Motion by plaintiff for leave to reargue its motions for an equitable lien/constructive trust, a preliminary injunction restraining defendants Long Island Business Solutions and Andrew Fenton from transferring their assets, and its motion to hold defendants in contempt of court is **denied**. Motion by plaintiff for leave to reargue defendants Long Island Business Solutions and Andrew Fenton's motion to dismiss the complaint for failure to state a cause of action to the extent that the court dismissed plaintiff's fraud and breach of fiduciary duty claims is **denied**. Motion by plaintiff pursuant to CPLR 3015(b) for leave to serve a supplemental summons and second amended complaint naming a related company, Newport Business Solutions, Inc., as a defendant is **granted**.

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This is an action for breach of contract. Plaintiff Berkman, Henoch, Peterson, Peddy & Fenchel, PC (“Berkman, Henoch”) is a law firm. Defendant Key Equipment Finance Inc. (“Key”) is in the business of selling and leasing business equipment. In June 2006, Berkman, Henoch entered into an agreement with Key to lease 12 Panasonic copiers. The lease was for a term of five years and provided for a monthly rental of \$13,400 plus tax.

On October 14, 2009, Berkman, Henoch entered into an agreement to lease 13 Savin copiers from defendant Long Island Business Solutions, Inc. (“LIBS”), another supplier of business equipment. Defendant Andrew Fenton is the president and sole shareholder of LIBS. The new lease was for a term of five years and provided for a rental fee of \$11,700 per month. As part of the agreement, LIBS agreed to “release Berkman, Henoch from current lease obligation and return all equipment back to the leasing company.” The agreement also provided that “LIBS will configure whatever faxing solution that Berkman Henoch desire[s].” At the same time or shortly after entering into the lease agreement with LIBS, Berkman, Henoch entered into certain “lease agreements” with Great American Leasing Corporation, Leaf Funding, Inc., and GE Capital Solutions. While these agreements were denominated as leases, it appears that the purpose of these agreements was to finance the acquisition of the Savin copiers by LIBS.

Plaintiff alleges that LIBS has failed to return the Panasonic copiers to Key and has failed to remit the monthly rental payments. On April 27, 2010, Key declared Berkman, Henoch in default and accelerated the lease payments.

Plaintiff commenced this action against LIBS, Fenton, and Key on June 10, 2010. In the first cause of action, plaintiff alleges that LIBS and Fenton breached a provision in the lease which required them to install facsimile modules on Berkman, Henoch’s desktop computers.

In the second cause of action, plaintiff alleges that LIBS and Fenton breached the lease by failing to return the copiers to Key and make the remaining lease payments. In the third cause of action, plaintiff alleges that LIBS and Fenton breached a separate agreement to service and repair the Savin copiers. In the fourth cause of action, plaintiff alleges that LIBS and Fenton made fraudulent representations concerning LIBS’ intention to return the Panasonic copiers to Key and Key’s willingness to accept the surrender of the equipment. In the fifth cause of action, plaintiff alleges that LIBS and Fenton breached a fiduciary obligation to Berkman, Henoch by failing to remit the lease payments to Key.

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In the sixth cause of action, plaintiff seeks to recover \$12,128 in attorney fees which it earned by defending LIBS in three separate actions. In the seventh cause of action, plaintiff seeks to recover these attorney's fees on a theory of account stated. In the eighth and ninth causes of action, plaintiff seeks to recover the attorney's fees on theories of quantum meruit and unjust enrichment.

By order dated November 29, 2011, the court denied plaintiff's motion to impress an equitable lien or constructive trust on \$324,476.71 in the possession of LIBS or Fenton, which was the proceeds of loans from Great American, Leaf Funding, and GE Capital Solutions. The court noted that plaintiff had not explained why it, as opposed to LIBS, the lessor of the copiers, had assumed the liability to the third party lenders. Moreover, plaintiff had not established that LIBS was under a fiduciary duty with respect to the loan proceeds. The court further denied plaintiff's motion for a preliminary injunction, restraining LIBS and Fenton from disposing of the loans proceeds, on the ground that plaintiff had an adequate remedy at law in the form of its action for breach of contract.

In the order of November 29, the court granted defendants LIBS and Fenton's motion to dismiss the fifth cause of action for breach of fiduciary duty or a constructive trust for failure to state a cause of action. The court further granted defendants' motion to dismiss the fourth cause of action for fraud for failure to state a cause of action on the ground that it related to plaintiff's breach of contract claim, i.e LIBS' breach of the lease provision requiring it to return the copiers to Key (*Biancone v Bossi*, 24 AD3d 582 [2d Dept 2005]). Defendants' motion to dismiss the complaint for failure to state a cause of action was otherwise **denied**.

Finally, in the order of November 29, the court denied plaintiff's motion to hold defendants in contempt of court for violation of the temporary restraining order prohibiting defendants from disposing of their assets. The denial of the motions for a preliminary injunction and to punish defendants for contempt were without prejudice to a motion for an order of attachment on the ground that defendants had secreted property with the intent to frustrate the enforcement of a judgment (See CPLR § 6201[3]).

Plaintiff moves for leave to reargue defendants' motion to dismiss the complaint to the extent that the court granted dismissal of the fourth cause of action for fraud and the fifth cause of action for a constructive trust. Plaintiff further moves for leave to reargue its motions for a preliminary injunction and to hold defendants in contempt of court. Finally,

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plaintiff moves pursuant to CPLR 3015(b) for leave to serve a supplemental summons and second amended complaint naming a related company, Newport Business Solutions, Inc., as a defendant.

Plaintiff asserts that the court overlooked or misapprehended the fact that LIBS acted solely as a “broker” for the transaction between plaintiff and the new lenders, albeit plaintiff’s agreement with LIBS was denominated a lease. Thus, plaintiff argues that LIBS owed a fiduciary duty to plaintiff to use the loan proceeds to pay off plaintiff’s obligations to Key under the prior lease.

Generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest in the property (*Plumitallo v Hudson Atlantic Land Co.*, 74 AD3d 138 [2d Dept 2010]). The elements of a constructive trust are 1) a fiduciary relationship, 2) a promise, 3) a transfer in reliance on the promise, and 4) unjust enrichment (Id).

A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation (*Marmelstein v Kehillat*, 11 NY3d 15, 21 [2008]). Whether a fiduciary relationship has been established is an inquiry that is necessarily “fact specific” (Id). Two essential elements of a fiduciary relation are “de facto control and dominance” (Id).

Plaintiff has not established that LIBS had de facto control or dominance, whether LIBS is considered to be a principal or a broker with respect to plaintiff’s copier lease transaction. Thus, plaintiff has not established that the court overlooked or misapprehended any matter of fact or law in determining that LIBS was not under a fiduciary duty with respect to the copier lease. Accordingly, the court properly granted defendants’ motion to dismiss plaintiff’s fifth cause of action for breach of fiduciary duty and properly denied plaintiff’s motion to impose a constructive trust over the loan proceeds. Furthermore, plaintiff has not shown that the court overlooked or misapprehended any matter of fact or law in denying plaintiff’s motion for a preliminary injunction or to hold defendants in contempt.

Leave to amend a pleading shall be freely given upon such terms as may be just CPLR 3025(b). However, leave to amend may be denied where the proposed amendment is palpably improper or insufficient as a matter of law, or prejudice or surprise will directly result from the delay in seeking amendment (*Koenig v Action Target*, 76 AD3d 997 [2d Dept 2010]).

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It appears that Newport Business Solutions, Inc. is a successor to LIBS, defendant Fenton's other company. Since Fenton received notice of plaintiff's claims, he has not been prejudiced. Accordingly, plaintiff's motion for leave to serve a supplemental summons and second amended complaint naming a related company, Newport Business Solutions, Inc., as a defendant is **granted**. The second amended complaint shall be deemed served in the form annexed as Exhibit B to plaintiff's motion.

The temporary restraining order issued April 1, 2011 is continued for 30 days from the date of this order.

So ordered.

Dated JUN 20 2011


J.S.C.

ENTERED

JUN 24 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE