

**Versadial, Inc. v Donaldson**

2011 NY Slip Op 31853(U)

June 24, 2011

Supreme Court, Nassau County

Docket Number: 11974/10

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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VERSADIAL, INC. and INNOPUMP, INC.,

Plaintiffs,

-against-

GEOFFREY DONALDSON, MATTHEW HARRITON, JBCEP-24 LLC, VARIBLEND DUAL DISPENSING SYSTEMS, LLC, J. BURKE CAPITAL PARTNERS, SEA CHANGE GROUP, LLC and GERHARD BRUGGER,

Defendants.

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JBCEP-24 LLC, VARIBLEND DUAL DISPENSING SYSTEMS, LLC and J. BURKE CAPITAL PARTNERS, LLC,

Third-Party Plaintiffs,

-against-

WILLIAM F. HARLEY, III, FURSA ALTERNATIVE STRATEGIES, LLC and FURSA MASTER GLOBAL EVENT DRIVEN FUND, LP,

Third-Party Defendants.

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TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 11974/10

MOTION DATE: April 29, 2011  
Motion Sequence # 006

The following papers read on this motion:

Notice of Motion..... X  
 Affirmation in Opposition..... X  
 Reply Affirmation..... X  
 Memorandum of Law..... XX  
 Reply Memorandum of Law..... X

Motion by plaintiffs to dismiss the counterclaims and by third party defendants to dismiss the third party claims for failure to state a cause of action is **granted** in part and **denied** in part.

Gerhard Brugger, a German citizen, is the owner of patents covering a variable dispensing system used in lipstick, sun screen, and certain pharmaceutical products. Brugger licensed the right to distribute the variable dispensing system to defendant Sea Change Group, LLC, and Sea Change sublicensed the right to distribute the system to plaintiffs Versadial, Inc. and Innopump, Inc. It appears that plaintiffs were in need of capital in order to continue to market the variable dispensing system and/or refinance existing debt. In any event, according to defendants, because plaintiffs were unable to make their royalty payments, plaintiffs' sublicense is no longer in effect.

The present action was commenced on June 22, 2010. Defendants Geoffrey Donaldson and Matthew Harriton are directors of Versadial. In the first cause of action, plaintiffs assert a claim for breach of fiduciary duty against Donaldson and Harriton based on their alleged failure to inform the other directors that Matthew Kornberg had made an offer to purchase 22% of Versadial for \$3.5 million. It appears that plaintiffs' theory is that, with that additional capital, plaintiffs would have been able to cure their default in royalty payments and continue to distribute the product.

In the second cause of action, plaintiffs assert a claim against defendant J Burke Capital Partners for aiding and abetting Donaldson and Harriton to breach their fiduciary duties to the Versadial. Plaintiffs allege that J. Burke Capital aided and abetted the breach of fiduciary duty by lending \$3.45 million to Versadial on terms that were less favorable than the Kornberg proposal. In the third cause of action, plaintiffs assert a claim against J. Burke Capital for tortious interference with plaintiffs' license agreement with Sea Change. In the fourth cause of action, plaintiffs assert a claim against J. Burke Capital for tortious interference with plaintiffs' relationship with Brugger, the owner of the patents.

In their answer, defendants JBCP-24 LLC, Variblend Dual Dispensing Systems, LLC, and J. Burke Capital Partners, LLC assert counterclaims for prima facie tort, injurious falsehood, tortious interference with prospective economic advantage, unfair competition, and contractual indemnity for attorney's fees in this litigation. Defendants also seek a declaratory judgment that Variblend has the exclusive right to manufacture and sell the variable dispensing system and plaintiff's sublicense is terminated. Defendants assert the same claims as third party claims against third party defendants William F Harley III, Fursa Alternative Strategies, LLC, and Fursa Master Global Event Driven Fund, LP.

Defendants allege that Harley and his hedge fund, Fursa Master Global, invested \$14 million in Versadial. Defendants allege that Fursa Master prevented Versadial from obtaining the financing which it needed to make royalty payments on the sublicense and, as a result, the sublicense terminated. Defendants allege that the present lawsuit is brought out of spite and malice to prevent Variblend from exploiting its new license.

Plaintiffs Versadial and Innopump and third party defendants Harley, Fursa Alternative Strategies, and Fursa Master Global move to dismiss the counterclaims and third party claims for failure to state a 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 facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Arnav Industries, Inc. v. Brown*, 96 NY2d 300, 303 [2001]).

Because defendants do not submit serious opposition, plaintiffs' and third party defendants' motion to dismiss is **granted** to the extent of dismissing defendants' first two counterclaims/third party claims, prima facie tort and intentional falsehood, for failure to state a cause of action.

Where there has been no breach of an existing contract, but only interference with prospective contract rights, plaintiff must show "more culpable" conduct on the part of the defendant (*NBT Bancorp v Fleet/Norstar*, 87 NY2d 614, 621 [1996]). More culpable conduct includes physical violence, fraud, and harassment with meritless litigation (*Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]).

Defendants allege that plaintiffs interfered with Variblend's prospective business

relationship with Gaplast GmbH, a manufacturer of cosmetic bottles, and Avon Products, Inc., one of Versadial's customers, by filing a frivolous lawsuit, namely the present action. For purposes of the present motion to dismiss the counterclaims and third party claims, the court must assume that plaintiffs' lawsuit is frivolous. Plaintiffs' and third party defendants' motion to dismiss defendants' counterclaim and third party claim for interference with prospective contract rights for failure to state a cause of action is **denied**.

New York law recognizes two theories of common law unfair competition, palming off and misappropriation (*ITC Ltd. v Punchgini*, 9 NY3d 467, 476 [2007]). Palming off, the sale of the goods of one manufacturer as those of another, has been extended to situations where the parties are not even in competition (Id). On the other hand, unfair competition by misappropriation refers to misappropriating the skills, expenditures, or labors of a competitor (Id). Defendants allege that plaintiffs are maintaining a Versadial website to advertise and offer for sale dispenser products for which they no longer hold a license. Defendants do not allege that plaintiffs are palming off variable dispensers under the name of another manufacturer. Nor do defendants allege that they contributed skill, expenditure or labor to Versadial's website. Plaintiffs' and third party defendants' motion to dismiss defendants' unfair competition claim for failure to state a cause of action is **granted**.

By letter agreement dated October 20, 2008, in consideration of defendant JBCP-24's providing funding to Sea Change, and Sea Change's providing funding to Innopump, Innopump agreed to indemnify JBCP-24 from any an all claims, including attorney's fees, which relate to "our agreements with Sea Change" or relate to "any position taken by Fursa Master Global"... "contesting the rights of JBCP-24 LLC in the security interest granted by Sea Change in ...the license or sublicense."

The court interprets the indemnity agreement as covering legal fees incurred by JBCP-24 in defending the priority of its security interest in the license agreements against claims by other parties. The claims asserted by plaintiff in the present action concern an alleged breach of fiduciary duty by directors of Versadial, rather than a claim by a third party asserting an interest in the collateral. Thus, the indemnity provision in October 20, 2008 letter agreement is not triggered. Plaintiffs' and third party defendants' motion to dismiss defendants' indemnity claim for failure to state a cause of action is **granted**.

So ordered.

Dated JUN 24 2011

*Stephen A. Bucaria*  
J.S.C.

**ENTERED**

JUN 28 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**