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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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JRP HOLDING, INC.; BROADWAY OPTIX S.A., INC.;

Plaintiffs,

-and-

JONATHAN PRATT; JONATHAN PRATT d/b/a FLOAT EYEWEAR, INC,; JUST IN OPTICAL, INC.; EYE-MAX OF NEW YORK, INC.; FLOAT EYEWEAR, INC.; AND MATCH EYEWEAR, LLC,

Defendants

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TRIAL PART: 14
NASSAU COUNTY

INDEX NO: 015043-10

MOTION SEQ. NO:1 AND 2

SUBMIT DATE: 08/18/11

The following papers having been read on this motion:

Notice of Motion.....1
Cross Motion.....2
Memorandum of Law.....3

Motion by plaintiffs for summary judgment in the amount of $69,395.05, with interest from May 19, 2006, is granted on the first cause of action against Just In Optical, and on the second and third causes of action against Jonathan Pratt, Jonathan Pratt d/b/a Float, and Float Eyewear, Inc.

Cross-motion by defendants for an order denying plaintiffs' motion, and further for partial summary judgment dismissing the complaint against defendants Jonathan Pratt, individually and d/b/a Float Eyewear, Inc. ("Float"), Eye-Max of New York, Inc ("Eye-Max"), and Match Eyewear, LLC ("Match"), is denied as to defendants Jonathan Pratt, Jonathan Pratt d/b/a Float, and Float, and granted as to defendants Eye-Max and Match.

Background

It is undisputed that on May 19, 2005, Just In Optical ("Optical") transferred the ownership and operation of their ongoing business as a Cohen's Fashion Optical Franchise Eyewear Store ("the Store") to plaintiff Broadway Optix SA, Inc. ("Broadway"). According to the complaint, plaintiff JRP Holding, Inc. ("JRP") is Broadway's designee (complaint, par. 19). All of the non-individual

defendants are allegedly owned by defendant Jonathan Pratt. In addition, according to the complaint, Float is a fictitious name, and all of the other defendants have been doing business under this name (complaint, pars. 7-11).

While Optical redesignated the bank account into which the payments for charges on Visa and Mastercard credit cards were made at the Store, payments on charges by Discover and American Express credit cards at the Store continued to be deposited into an account held by defendants Jonathan Pratt and Float until nearly eight and one-half months later. Plaintiffs allege that the value of these payments for the time period that they were withheld is $69,395.05, and they seek summary judgment in this amount.

The record contains a letter dated May 18, 2005, wherein plaintiffs' then-attorney states to Optical's attorney the following:

> Your client agrees to immediately turn over any additional funds he receives from the credit card company of any other source related to the receipts from the Store.
>
> Your client agrees to immediately switch the credit card authorization account to an account designated by my client.

(Exhibit 10). The record also contains a letter dated May 19, 2005, by defendant Pratt, transmitting a copy of a voided check from plaintiff JRP to Newtek Merchant Solutions ("Newtek") advising it to:

> make sure that all charge backs and or credits processed after this date are taken from the new bank account.

Exhibit 12 to plaintiffs' moving papers.

According to plaintiffs, Newtek provided it with statements (Exhibit 15) that itemize the charges that were made at the store from May 2005 through February 2006. Those statements are in the name of defendants Pratt and Float. In addition, the record contains copies of the Store's daily batch reports and charge slips (Exhibit 16). Plaintiffs' accountant, Mr. Cassar, has analyzed these two sets of documents and compared them to the Store's bank account statements (Exhibit 17). Mr. Cassar states that the total amount of Discover and American Express charges made from the Store, but not deposited into the Store's bank account for the period from May 19, 2005 to January 31, 2006, is $69,395.05.

Defendants do not deny the improper deposit of payments for charges on Discover and

American Express, and they do not dispute the amount at issue. Their defense is that a global settlement was reached relating to all of the issues arising out of the transfer of the Store. They insist that the credit card processing claims that form the subject matter of the this litigation were released pursuant to a "Surrender and Termination Agreement" ("the Agreement"). They submit two copies, one completely unsigned copy dated October 27, 2006, and one copy signed only by Robert Weintraub on behalf of Broadway, dated October __, 2006.

Defendants purport to explain their inability to submit an executed copy of the Agreement by their attorney's claim that he changed firms and states that "most of my files concerning these matters were either lost or misplaced in the transition" (Perlstein affirmation, par. 4). Defendants further state that Cohen's Fashion Optical ("CFO") "is in the process of attempting to secure a copy of the Settlement Agreement signed by all of the parties from its former in-house counsel who has relocated to Arizona" (Lang supplementary affirmation, par. 4).

Broadway denies that the Agreement was accepted or countersigned. Broadway further points out that defendants have had eleven months to locate the missing document, and the reason for their lack of success is that an executed document does not exist. In addition, Broadway's attorney in October, 2006, submits a copy of his cover letter (Exhibit 2 to LaMonica affirmation), that accompanied the copy of the Agreement with Weintraub's signature. In that cover letter dated October 23, 2006, attorney LaMonica advises that he made some modifications to the Agreement, and if CFO did not agree, to "immediately return" the Agreement and the faxed signatures.

Summary Judgment Standard

Summary judgment is the procedural equivalent of a trial (*S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk County Dept. of Social Services on behalf of Michael V. v James M.*, 83 NY2d 178, 182 [1994]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations (*Zuckerman*).

Breach of Contract

A cause of action for breach of contract requires proof of the following elements: (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) defendant's breach of the contract; and (4) plaintiff's resulting damages (see *JP Morgan Chase v JH Elec of New York, Inc.*, 69 AD3d 802 [2nd Dept. 2010]).

Unjust Enrichment

"To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Zamor v L&L Associates Holding Corp.*, 85 AD3d 1154 [2nd Dept 2011], quoting *Old Republic Nat. Title Ins. Co. v Luft*, 52 AD3d 491, 491-492 [2nd Dept 2008]).

Conversion

"A cause of action alleging conversion of funds must allege "legal ownership or an immediate right of possession to specifically identifiable funds and that the defendant[s] exercised an unauthorized dominion over such funds to the exclusion of the plaintiff's rights" (*Zendler Const. Co., Inc. v First Adjustment Group, Inc.*, 59 AD3d 439, 440 [2nd Dept 2009]).

Analysis

Review of the unsigned copies of the Agreement submitted by defendants reveals the following language in the last paragraph: "upon the execution of this Agreement by all parties hereto, and delivery hereof by all parties hereto, this Agreement shall be binding on all parties hereto." This language, together with the cover letter by Broadway's then-attorney LaMonica, plainly indicates the parties' intent that the Agreement was to take effect only after all parties had signed it, and until that time, the matter was still in the stage of negotiations (*Scheck v Francis*, 26 NY2d 466, 470 [1970]). Under these circumstances the Court is compelled to conclude that the release in the Agreement never became effective, as the parties never executed the Agreement (*Wallkill Medical Development, LLC v Sweet Constructors, LLC*, 56 AD3d 764 [2nd Dept 2008]; *Lost Creek Associates v Marine Midland Bank*, 293 AD2d 719 [2nd Dept 2002]). Defendants' protestations to the contrary do not rise to the level of presenting a triable issue of fact (*Wall.kill Medical; Lost Creek*).

Furthermore, defendants' request for discovery from CFO on this issue is disingenuous. Defendants had more than eleven months from the time they submitted their answer to seek non-

party discovery.

On this record, Broadway has shown its contract with Optical for purchase of the business at the Store, breach of that contract by the improper deposits of Discovery and Amex charges to the account in the name of Pratt and Float, and plaintiffs' damages. Moreover defendants do not deny that the credit card charges were not properly paid to Broadway. As no other defense is offered, Broadway is entitled to summary judgment on its claim for breach of contract against Optical.

Plaintiffs have also shown that Float and/or Pratt was/were enriched at their expense, and that equity and good conscience demand the return of the monies improperly deposited to the account in the name of Pratt and Float. These defendants have failed to raise a triable issue of fact as to any defense. Accordingly, plaintiffs are entitled to summary judgment on the second cause of action for unjust enrichment against Pratt, Pratt d/b/a Float, and Float in the amount requested.

As to conversion of funds, once plaintiffs became aware of the wrongful deposits and demanded payment of those monies, they established an immediate superior right to identifiable funds while Pratt and Float continued to exercise unauthorized dominion over those funds to the exclusion of the plaintiffs. Consequently, plaintiffs are entitled to summary judgment on the third cause of action for conversion against Pratt, Pratt d/b/a Float, and Float.

At this juncture the Court notes for the record that the basis for summary judgment against Jonathan Pratt, individually, on the unjust enrichment and conversion causes of action is based upon his name, individually, on the bank account into which the Discover and American Express charges belonging to Broadway were deposited.

Plaintiffs did not seek summary judgment on their fourth and fifth causes of action, which are severed and continued.

Turning to the cross-motion by defendants for summary judgment dismissing all claims against all defendants except Optical, the Court notes that the this request is moot as to Pratt, Pratt d/b/a Float, and Float.

Pratt testifies that Eye-Max did not receive any of the mistakenly diverted funds, and that Match had no involvement with any of the transactions at issue. On this record, Eye-Max and Match have made out a *prima facie* case for dismissal of any claims against them.

Piercing the corporate veil requires allegations of facts that, if proved, would show: (1) the owner exercised complete domination of the corporation in respect to the transaction attacked; and

(2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*Morris v New York State Dept. of Taxation* and *Finance*, 82 NY2d 135, 141 [1993]). Domination alone is not enough; a plaintiff must show domination plus some wrongful conduct towards the plaintiff (*Morris* at 142).

On this record, plaintiffs have failed to raise a triable issue of fact that Eye-Max and Match are proper subjects for piercing the corporate veil. Under these circumstances, the cross-motion for summary judgment dismissing all claims against Eye-Max and Match must be granted.

This constitutes the decision and order of this court.

ENTER

DATED: September 27, 2011

HON. ARTHUR M. DIAMOND
J. S.C.

To

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