

McGrath v Fioramonti
2011 NY Slip Op 33005(U)
November 9, 2011
Supreme Court, Suffolk County
Docket Number: 20774-2010
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NUMBER: 20774-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: HON. EMILY PINES
 J. S. C.

Original Motion Date: 09-24-2010
 Return Date: 11-09-2011
 Sequence Number: 001 MGCASEDISP

[x] FINAL
 [] NON FINAL

_____ X
ELIZABETH McGRATH and KACY-KABY,
INC. d/b/a MILLIE'S PLASTERCRAFT,

Plaintiffs,

-against-

ANDREW FIORAMONTI, MICHELE
FIORAMONTI and GOOD AND PERFECT
GIFTS, INC., PLASTERCRAFT FACTORY
INC., and SOHEILA NARSI

Defendant.

_____ X

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The plaintiffs, Elizabeth McGrath and Kacy-Kaby, Inc. d/b/a Millie's Plastercraft ("Plaintiffs") commenced this action in 2010 ("2010 Action") against defendants Andrew Fioramonti, Michele Fioramonti, Good and Perfect Gifts, Inc., Plastercraft Factory, Inc. and Soheila Nasri ("Defendants").

The Plaintiffs allege, among other things, that the Defendants failed to comply with an Amended Judgment and Order of this Court dated October 28, 2009, entered in

the case of *Fioramonti et al. v. McGrath et al.*, Supreme Court, Suffolk County, Index No. 15687/2007 (“2007 Action”). In that action, Fioramonti sued McGrath alleging, among other things, that McGrath committed fraud in the inducement in connection with the sale of McGrath’s business to Fioramonti. At trial, a jury found for Fioramonti and awarded compensatory and punitive damages. The Amended Judgment and Order entered October 28, 2009, provided, in relevant part:

ORDERED AND ADJUDGED, that the plaintiff GOOD & PERFECT GIFTS, INC., recover of the defendants Elizabeth McGrath . . .and Kacy-Kaby, Inc. . . . jointly and severally, the sum of \$457,000, representing compensatory damages in the sum of \$253,000.00 and punitive damages in the sum of \$204,000.00 and it is ORDERED AND ADJUDGED that plaintiff GOOD & PERFECT GIFTS, INC. have execution therefor; and it is further

ORDERED AND ADJUDGED that the counterclaim of the defendant is dismissed, and the Promissory Note of October 15, 2006 is void and of no effect; and it is further

ORDERED AND ADJUDGED, that Good & Perfect Gifts, Inc. will deliver possession to Stephen Jellenik, Esq., as escrow agent, those items still in its possession as set forth in the record of the trial to be held in escrow, and that once the compensatory judgment and any accrued interest has been paid, that Stephen Jellenik, Esq., will turn over those items to Elizabeth McGrath and/or Kacy-Kaby, Inc.; the delivery of the items will be arranged for by and between counsel for the parties within sixty (60) days of the date this Amended Order and Judgment is served with Notice of its Entry; any and all costs associated with the delivery of the items and their storage will be borne by Elizabeth McGrath and/or Kacy-Kaby, Inc.; and it is further

ORDERED AND ADJUDGED, that Good & Perfect

Gifts, Inc. . . . will voluntarily turn over to Elizabeth McGrath the account folders including invoices and tax exempt forms for all Millie's customers, and all invoices for retail groups, parties and all sales done from October 2004 to October 2006 which are still in its possession, together with proof of payment of sales tax for the purchase of the business, within ten business days of the service of the Amended Order and Judgment with notice of its entry; Mr. Fioramonti will contemporaneously deliver an affidavit that the files and folders are the complete records maintained . . .

McGrath and Kacy-Kaby, Inc. appealed from the amended judgment. The Appellate Division, Second Department, by Decision and Order dated April 5, 2011, modified by deleting the award of punitive damages and otherwise affirmed.

In the 2010 Action, the Plaintiffs allege, among other things, that Fioramonti and Good and Perfect (1) retained certain records and information in violation of the Amended Judgment and Order, (2) failed and refused to provide proof of the payment of the sales tax to New York State, (3) failed and refused to deliver any of the assets of Kacy-Kaby into escrow as required by the Amended Judgment and Order, and (4) continued to use the assets in violation of the Amended Judgment and Order. Plaintiffs seek compensatory damages.

Defendants now move, pursuant to CPLR 3211(a)(4) and (5) to dismiss the complaint in the 2010 Action. Defendants contend that the doctrine of *res judicata* bars Plaintiffs from re-litigating the issues that were or could have been determined in the 2007 Action. Defendants contend that they received no response to several letters sent to Plaintiffs' counsel to arrange for the delivery of the items to be held in escrow by Mr. Jellenik. With regard to the allegation that all records were not turned over, Defendants provide a copy of Mr. Fioramonti's affidavit dated December 29, 2009, stating that he provided all records in his possession, in accordance with the Amended Judgment and Order.

Plaintiffs oppose the motion contending, among other things, that this action involves new parties, defendants Plastercraft Factory and Nasri, and that it arises from information obtained by Plaintiffs at the trial of the 2007 Action demonstrating conspiracy by Defendants to deprive Plaintiffs of its property and use thereof. Plaintiffs also contend that the Defendants continued use of Plaintiffs' molds used in the production of plastic products violates the Amended Judgment and Order. However, Plaintiffs fail to state whether they made any attempt to arrange delivery of the items with Defendants' counsel nor do they even mention the multiple letters sent by Defendants' counsel to Plaintiffs' counsel to arrange delivery or explain why they failed to respond to the letters.

By Order dated September 9, 2011, this Court, pursuant to CPLR 3211(c), notified counsel for the parties that it would treat the Defendants' motion as a motion for summary judgment. The parties were given until October 10, 2011, to submit supplemental affidavits and other available proof addressing, among other things, the manner in which the Defendants allegedly failed and refused to comply with the Amended Judgment and Order of this Court dated October 28, 2009, entered in *Fioramonti v. McGrath, et al.*, Suffolk County Index No. 15687/07, and the specific actions taken by counsel for the parties to arrange for delivery to Stephen Jellenik, Esq., as escrow agent, those items in the possession of Good & Perfect Gifts, Inc. as set forth in the record of the trial of *Fioramonti v. McGrath*.

In a Further Affirmation, Defendants' counsel reiterates that he made numerous attempts to make arrangements with Plaintiffs counsel for delivery of the items required by the Amended Judgment and Order but that Plaintiffs' counsel failed to respond to any of his letters. Counsel again points to letters to Plaintiffs' attorneys dated December 28, 2009, February 17, 2010, June 28, 2010, July 30, 2010, in which Defendants' counsel wrote to Plaintiffs' counsel to arrange for delivery of the items. Thus, Defendants argue that this action should be dismissed as it was the Plaintiffs, not the Defendants, who failed to comply with the Amended Judgment and Order by refusing to arrange for delivery of the items to Mr. Jellenik to be held in escrow. Defendants also argue that this

action should be dismissed because it improperly seeks enforcement of the Amended Judgment and Order entered in the 2007 Action by the commencement of a separate action.

In supplemental papers filed nearly three weeks after the October 10, 2011 deadline set in the Court's order dated September 9, 2011, the Plaintiffs contend, among other things, that the evidence demonstrates the existence of issues of fact as to (1) the circumstances surrounding the failure of the Defendants to properly and appropriately turn over the assets of the corporate Plaintiff to Mr. Jellenik as escrowee, (2) the continued unauthorized and illegal use of these materials by the Defendants, and (3) the present business relationship between the Defendants and how that relationship was intended to defeat the Plaintiffs rights. However, the Plaintiffs fail to provide any factual evidence demonstrating the manner in which the Defendants allegedly failed and refused to comply with the Amended Judgment and Order and the specific actions taken by Plaintiffs' counsel to arrange for delivery to Stephen Jellenik, Esq., as escrow agent, those items in the possession of Good & Perfect Gifts, Inc. as set forth in the record of the trial of *Fioramonti v. McGrath*.

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue; however, once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2d Dept 1996]). Speculative and conclusory allegations are insufficient to defeat summary judgment (*see, Boone v. Bender*, 74 AD3d 1111, 1113 [2d Dept 2010]).

Here, the Plaintiffs characterize this action as “based upon the wrongful acts of the Defendants . . . in wrongfully transferring and secreting the assets of the business to the extent that Plaintiff was deprived of the right to repossess same.” However, the Amended Judgment and Order in the 2007 Action clearly and unequivocally awarded possession of said assets to Plaintiffs and directed counsel for the parties to arrange for delivery of the items to Mr. Jellenik to be held by him in escrow until Plaintiffs satisfied the compensatory damages component of the Judgment and Order in the 2007 Action. Thus, in actuality, this action is nothing more than Plaintiffs’ attempt to assert a claim against Defendants for their purported failure to deliver the items in accordance with the Amended Judgment and Order.

CPLR 5102 provides that “[a] judgment or order, or part thereof, awarding possession of . . . a chattel may be enforced by an execution . . .” As noted by Professor Siegel, “the enforcement devices themselves are not special proceedings and are not independent of the action that produced the judgment. Quite the contrary. They are deemed post-judgment adjuncts of the action itself. Hence, the papers whereby these devices are exploited bear the caption of the action out of which the judgment arises and require no separate court file or index number” (Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR Art. 52, 1997 Main Volume). Thus, the Court finds that this separate action is an improper attempt by the Plaintiffs to enforce the Amended Judgment and Order entered in the 2007 Action.

In any event, the Defendants have made a prima facie showing of entitlement to judgment as a matter of law. The Defendants submitted evidence demonstrating that they complied with the Amended Judgment and Order by sending numerous letters to Plaintiffs’ counsel seeking to arrange for delivery of the items, that Plaintiffs’ counsel failed to respond to the letters, and by providing an affidavit from Mr. Fioramonti stating that he provided all records in his possession. In opposition, the Plaintiffs have failed to submit any evidence to support their assertions that the Defendants interfered with Plaintiffs’ right to have the enumerated items returned or otherwise failed to comply with the Amended Judgment and Order. Plaintiffs have not provided any evidence that their counsel took any action whatsoever to arrange for the delivery of the items. Moreover, contrary to the Plaintiffs’ contention, the Amended Judgment and Order does not contain a provision prohibiting Defendants from using the items prior to their delivery to Mr.


Jellenik. Thus, there is no basis for Plaintiffs' claim that Defendants violated the Amended Judgment and Order if, as Plaintiffs allege, they continued to use the items.

Accordingly, it is

ORDERED that the motion (motion sequence # 001) by Defendants pursuant to CPLR 3211, treated as a motion for summary judgment pursuant to CPLR 3211(c) upon adequate notice to the parties, is granted and the complaint is dismissed.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: November 9, 2011
Riverhead, New York



EMILY PINES
J. S. C.

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