Konig v Chanin
2011 NY Slip Op 33951(U)
August 5, 2011
Sup Ct, NY County
Docket Number: 100822/09
Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 100822/2009
KONIG, MICHAEL
vs
CHANIN, SAM
Sequence Number : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	36-1-10
Answering Affidavits — Exhibits _____	39, 40, 41-44, 45, 47
Replying Affidavits _____	46

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order of the Court.

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

Dated: 8/5/11

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 54

----------X

MICHAEL KONIG, STEVEN KRAUSMAN &
DAVID LIFSCHUTZ,

Plaintiffs,

-against-

Index No. 100822/09
DECISION & ORDER

SAM CHANIN and DANIEL GREENBERG,

Defendants.

----------X

SHIRLEY WERNER KORNREICH, J.:

Plaintiffs, Michael Konig, Steve Krausman and David Lifschutz, move, pursuant to CPLR 3211 (a) (1) and (7) and CPLR 3016 (b), to dismiss the counterclaims alleged by defendant, Sam Chanin. This case involves the sale, by plaintiffs and nominal defendant Daniel Greenberg, of a company known as Classic Closeouts, LLC (Classic) to defendant, Chanin, on September 22, 2005. It is undisputed that Classic was in the business of selling overstock items through an e-commerce website on the internet.

I. Facts

Pursuant to a purchase and sale agreement (the Agreement) Chanin purchased 100% membership interest in Classic. The purchase price was $550,000, with an initial payment of $10,350 to plaintiff Krausman and of $1,150.00 to plaintiff Konig at closing, and a series of installment payments to Krausman and Konig thereafter, commencing on October 5, 2005 and concluding on December 5, 2008. The Agreement also provided for penalties and acceleration of the debt, if required payments were not made within three calendar days after a notice of default was received by Chanin. Finally, pursuant to the Agreement, Chanin personally guaranteed the payment of all sums due under the Agreement.

Plaintiffs allege that, on or about August 21, 2008, Chanin was provided with a notice of default in the payment of the installments due commencing March 2008, which he received on September 2, 2008. A second notice of default was sent to Chanin on or about October 27, 2008, which he received on October 29, 2008. Plaintiffs allege that as a result of the default, Chanin is liable for the entire balance owed as of November 5, 2008, or $202,100.00, with interest at 15.9% per annum from November 5, 2008.

In his answer to plaintiffs' amended complaint, Chanin alleges that he purchased Classic at the request of his friend Greenberg, who told him that he wished to purchase the other members' membership interests in Classic, but that they would not sell to him. Greenberg, therefore, requested that Chanin purchase Classic and, in turn, sell it to him on the day of his purchase, which Chanin did. Chanin contends that plaintiffs knew of this arrangement and agreed to it, in order to obtain his personal guarantee. He further contends that in doing so, Konig and Krausman evaded their responsibility to inform him of an enforcement action previously commenced by the Federal Trade Commission (FTC) and the Attorney General of the State of New York (NYAG) against a different company, UrbanQ, which was owned by Greenberg, Konig and Krausman. UrbanQ was in the business of offering rebates to consumers for purchases made on e-commerce websites.

The FTC enforcement action against UrbanQ was resolved by means of a Stipulated Final Order for Permanent Injunction, signed by United States District Judge Wexler on July 7, 2003 (the FTC Order). *Federal Trade Commission v UrbanQ,* EDNY CV 03- 3147. Pursuant to the section of the FTC Order governing Conduct Prohibitions, Greenberg, Konig, Krausman and UrbanQ agreed that they would not:

A. Misrepresent, in any manner, expressly or by implication, the terms or conditions of any rebate offer including but not limited to the time in which any rebate in the form of cash or credit towards future purchases will be mailed, or otherwise provided to purchasers;

B. Fail to provide any rebate within the time specified, or, if no time is specified, within thirty (30) days;

C. Offer a rebate without having a reasonable basis or ability to pay it;

D. Violate any provision of the Mail Order Rule in connection with any rebate in the form of merchandise, including failing to provide the rebate within the time specified, or, if no time is specified, within thirty (30) days, unless respondent offers to the purchaser the option of either:

1. Consenting to the delay; or

2. Canceling the rebate request and promptly receiving reasonable cash compensation instead of the rebate originally offered; or

E. Fail to provide any rebate in the form of services or any other consideration (other than cash, credit towards future purchases, or merchandise) within the time specified, or, if no time is specified, within thirty days, unless respondent offers to the purchaser the option of either:

1. Consenting to the delay; or

2. Canceling the rebate request and promptly receiving reasonable cash compensation instead of the rebate originally offered; or

F. Misrepresent, in any manner, expressly or by implication, any material terms of any rebate program, including the status of or reasons for any delay in providing any rebate.

FTC Order at 4-5.

Pursuant to the order, "rebate" is defined as "cash, credit towards future purchases, merchandise, services, or any other consideration offered to consumers who purchase products or services from any Defendant, which is provided subsequent to the purchase." FTC Order at 3.

The FTC Order requires Greenberg, Konig, Krausman and UrbanQ, for a period of three

years from the date of the entry of the order, to distribute the order, as follows:

> A. Defendant UrbanQ shall deliver a copy of this Order to all principals, officers, directors, managers, employees, agents, and representatives *having responsibilities with respect to the subject matter of this Order*, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order.
>
> B. Defendants Daniel Greenberg, Michael Konig, and Steven Krausman, shall deliver a copy of this Order to the principals, officers, directors, managers and employees under Defendants Daniel Greenberg's, Michael Konig's, and Steven Krausman's control for any business that (a) employs or contracts for personal services from Daniel Greenberg, Michael Konig, and Steven Krauman *and (b) has responsibilities with respect to the subject matter of this Order.* Defendants Daniel Greenberg, Michael Konig, and Steven Krausman shall secure from each such person a signed and dated statement acknowledging receipt of the Order within thirty (30) days after the date of service of the Order or the commencement of the employment relationship. [emphasis added]

FTC Order at 11.

Additionally, the FTC Order requires that, for a period of three years from the date of the entry of the order, Greenberg, Konig, and Krausman shall notify the FTC and the NYAG of any change of residence, mailing address and telephone numbers and any changes in their employment status, including any business that each of them is affiliated with or employed by, and any change in corporate structure

> *where the business is engaged in offering a rebate,* such as a creation incorporation, dissolution, assignment, sale, creation or dissolution of subsidiaries, *that may affect compliance obligations arising under this Order,* including but not limited to dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate *that engages in any acts or practices subject to this order* .... [emphasis added]

FTC Order at 12-13.

Chanin alleges that, had he known about the enforcement action against UrbanQ, he would never have agreed to assist Greenberg in gaining control of Classic by agreeing to

purchase the company. Finally, Chanin alleges that in or about 2008, Greenberg, through Classic, committed consumer fraud, resulting in an FTC action against Greenberg, Classic and others, filed in 2009. *See Federal Trade Commission v Classic Clouseouts, LLC,* ED NY, CV 09-2692.

Chanin asserts the following six counterclaims against plaintiffs, all relating to plaintiffs' purported duty to provide Chanin with copies of the FTC Order pursuant to the Agreement and the FTC Order and their failure to do so: 1) Breach of Contract; 2) Fraud; 3) Promissory Fraud; 4) Fraudulent Concealment; 5) Breach of Implied Covenant of Good Faith and Fair Dealing; and 6) Promissory Estoppel.

Plaintiffs move to dismiss the counterclaims, pursuant to CPLR 3211 (a) (1), based upon the terms of both the Agreement and the FTC Order, and pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. Alternatively, they move to dismiss the fraud claims pursuant to CPLR 3016, for lack of specificity.

II. Discussion

A. Breach of Contract

In support of his breach of contract counterclaim, Chanin relies on section 3.3 of the Agreement. Section 3.3 provides that "Seller will deliver to Purchaser all Company records, accounting documents, account statements, files and records of every kind and description in their possession. This clause shall survive the Closing." Agreement, § 3.3.

Chanin contends that this section covers any documents in Konig and Krausman's possession, regardless of whether the documents relate to Classic. He argues that Konig and Krausman were in possession of the FTC Order and that their failure to provide it to him

constituted a breach of the Agreement.

"[I]t has long been the rule, in construing contracts, that '[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.'" *Duane Reade, Inc. v Cardtronics, LP,* 54 AD3d 137, 144 (1st Dept 2008)(citation omitted). Under Chanin's interpretation of section 3.3, plaintiffs would be required to provide him with an infinite number and kind of documents that have nothing do with Classic records. These would include, but not be limited to, documents from any other companies plaintiffs might be involved in, and presumably, even their own personal records such as driver's licenses, and medical records. Such a broad reading of section 3.3 defies common sense. A common-sense reading of the provision would indicate that the word "Company" modifies all that follows, i.e., "records, accounting documents, account statements, files and records of every kind and description in their possession." The court, therefore, concludes that the FTC Order does not fall within the Company records, files and documents covered by section 3.3 of the Agreement. Plaintiffs' motion to dismiss the first counterclaim for breach of contract is granted.

B. Fraud

Chanin's second, third and fourth causes of action are all essentially causes of action for fraud. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Here, Chanin contends that the material misrepresentation consisted of concealing material facts and documents relating to UrbanQ, specifically, the FTC Order against UrbanQ, Konig, Krausman

and Greenberg, which, he argues, plaintiffs were required to provide pursuant to section 3.3 of the Agreement.

Because the court concluded that the Agreement does not require plaintiffs to provide a copy of the FTC Order to Chanin, Chanin must demonstrate an independent basis for the purported duty to provide that information. For that, he relies on the introductory language of the portion of the FTC Order which specifies prohibited conduct. That introductory language states as follows:

> IT IS HEREBY ORDERED that Defendants, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, shall not ... .

FTC Order at 4. Based upon this language, Chanin argues that the subject of the FTC Order is "manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce." He then argues that the notification provision which requires Konig and Krausman to provide copies of the Order to "all principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this Order" (FTC Order at 11) applies to him and Classic, which offers and distributes products in commerce.

A consent order, is, of course, a contract, and to understand its provisions, it must be "'read as a whole to determine its purpose and intent.'" *Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1799 (4th Dept 2010)(citation omitted); *see also Hercules Inc. v Hexcel Corp.*, 15 Misc 3d 1128(A), 2007 NY Slip Op 50896(U), *5 (Sup Ct, NY County 2007), *affd* 48 AD3d 257 (1st Dept 2008)(a writing is interpreted as a whole). The language on which Chanin relies to

establish the subject matter of the consent order introduces only the paragraph relating to prohibited conduct, all of which relates to the offering of rebates. Examining the entire document, it is clear that the subject matter of the FTC Order is not general activities affecting commerce, such as the manufacture and sale of goods, but rather, the offering of rebates. So, for example, the section of the FTC Order governing performance bonds requires that a bond be obtained if the defendants in the FTC action "engage[] in or assist others engaged in offering rebates." FTC Order at 8. That section also requires that when the defendants disclose the existence of the performance bond to a consumer, they must also disclose that the bond is

> AS REQUIRED BY ORDER OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK IN SETTLEMENT OF CHARGES URBABNQ, DANIEL GREENBERG, MICHAEL KONIG AND STEVEN KRAUSMAN AND URBANQ.COM ENGAGED IN FALSE AND MISLEADING REPRESENTATIONS *IN CONNECTION WITH OFFERING REBATES TO CONSUMERS.* [emphasis added]

FTC Order at 9.

Similarly, the record-keeping provision of the FTC Order requires that the defendants in that action and their agents, employees, etc., keep specified records for six years for any business where:

> (1) any Defendant is the majority owner of the business or directly or indirectly manages or controls the business; *and* (2) *the business offers a rebate* in connection with the advertising, promotion, offering for sale, sale, or distribution of any product or service ... . [emphasis added]

FTC Order at 10.

The compliance reporting requirements require the defendants to report to the FTC and the NYAG about any proposed changes in the corporate structure of UrbanQ "and any business entity owned or controlled" by Greenberg, Konig or Krausman "*where the business is engaged in*

offering a rebate." [emphasis added] FTC Order at 12.

Thus, it is clear from the totality of the FTC Order that the subject matter of the order is the business of offering a rebate, not any and all businesses involved in the manufacture, sale, or distribution of products or services affecting commerce, as Chanin would have it. Since Classic was not in the business of offering rebates, there is nothing in the body of the FTC Order on which Chanin can rely to establish a duty by plaintiffs to provide him with that order. Nor are the various requirements of the FTC Order triggered by the *possibility* that Classic might, one day in the future, offer rebates, as Chanin seems to argue.

Finally, though there may be an affirmative duty to disclose where a fiduciary relationship exists between the parties (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 12 [2005]), such a relationship generally does not exist between parties in an arm's -length business transaction. *Dembeck v 220 Central Park S., LLC*, 33 AD3d 491, 492 (1st Dept 2006).

> Generally, where parties have entered into a contract, courts look to that agreement "to discover ... the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency." "If the parties ... do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them." [internal citations omitted]

EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d at 19-20. Here, though such a relationship may have existed between Chanin and Greenberg, Chanin's allegation that plaintiffs knew of his plan to sell Classic to Greenberg, without more, is insufficient to transport the relationship between Chanin and plaintiffs to that higher realm. Thus, Chanin's counterclaims for fraud, promissory fraud and fraudulent concealment are dismissed. The court need not reach plaintiffs' arguments that the fraud claims are duplicative of the breach of contract claim or that they lack required specificity.

C. Covenant of Good Faith

In his fifth and sixth counterclaims, Chanin alleges a breach of an implied covenant of good faith and fair dealing and promissory estoppel. Both of those claims are based upon promises allegedly made to Chanin in the Agreement and are essentially duplicative of his first counterclaim for breach of contract. *2470 Cadillac Resources, Inc. v DHL Express (USA), Inc.*, 84 AD3d 697, 698 (1st Dept 2011)(implied covenant of good faith claim based on same facts as contract claim is duplicative); *Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614, 615 (1st Dept 2009)(promissory estoppel claim duplicative of breach of contract claim where no duty is alleged independent of contract). Consequently, the fifth and sixth counterclaims also are dismissed. Accordingly, it is

ORDERED that plaintiffs' motion to dismiss Chanin's counterclaims is granted, and the counterclaims are dismissed.

Dated: August 5, 2011

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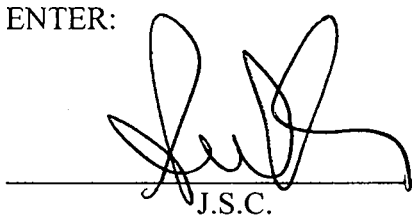

J.S.C.