

Byrnes v Sendtraffic.com, Inc.
2012 NY Slip Op 33344(U)
July 19, 2012
Sup Ct, NY County
Docket Number: 600829/2010
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

GREG BYRNES and CRAIG HANDELMAN,

Plaintiffs,

-against-

SENDTRAFFIC.COM, INC. and
TRAFFIC, INC.,

Defendants.

INDEX NO. 600829/2010

MOTION DATE Nov. 1, 2012

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to dismiss action.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

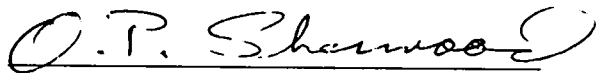
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the motion to dismiss action is decided in accordance with the accompanying decision and order.

Dated: July 19, 2012


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49**

-----X
GREG BYRNES and CRAIG HANDELMAN,

Plaintiffs,

-against-

**DECISION AND
ORDER**

SENDTRAFFIC.COM, INC. and TRAFFIC, INC.,

Index No. 600829/2010

Defendants .

DAVID HAMMER,

Additional Counterclaim Defendant.

-----X
Hon. O. Peter Sherwood, J.

Overview

Plaintiffs and Counterclaim-Defendants Greg Byrnes and Craig Handleman (“Counterclaim-Defendants” or “Byrnes and Handleman”) move pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the counterclaims brought by Defendants and Counterclaim-Plaintiffs, Sendtraffic.com and Atrinsic, Inc. (“Counterclaim Plaintiffs” or “Sandtraffic”). Byrnes and Handleman cross-move to disqualify David Hammer (“Hammer”) as counsel for Byrnes and Handleman.

I. Background

In the underlying action, Byrnes and Handleman seek to recover severance pay they assert has been owed to them since 2005. Byrnes and Handleman allege that they are entrepreneurs who built an internet marketing company. In 2004, they sold the assets of the company to Sendtraffic. Among the assets transferred were accounts with Fleet Bank holding approximately \$103,000. While Sendtraffic purchased the accounts as part of the sale, Sendtraffic had not changed the signatories as of February 2009. By that time, Fleet Bank had been acquired by Bank of America which then held the accounts.

The counterclaims assert that on February 19, 2009, Byrnes and Handleman, whose employment had terminated in 2005, represented to Bank of America that they were agents of Sendtraffic, withdrew the funds, and transferred them into an account controlled solely by them. The counterclaims further allege that after Counterclaim-Plaintiffs demanded that the funds be returned

to the Bank of America accounts, Byrnes and Handleman consulted with their attorney, Hammer, and, on his advice, deposited the funds into an escrow account solely under Hammer's control. Counterclaim-Plaintiffs promptly filed suit in April 2009, charging Byrnes and Handleman with conversion and fraud, and Hammer with conversion and negligence. Hammer contacted Counterclaim-Plaintiffs and offered to engage in settlement discussions regarding the funds. Ultimately Counterclaim-Plaintiffs agreed to drop the case after Byrnes and Handleman agreed to return the funds to the Bank of America account. The following year Byrnes and Handleman filed this lawsuit asserting breach of contract and violation of the New York Labor Law. The Labor Law claim was dismissed and the case proceeded on the breach of contract claim. Sendtraffic has asserted counterclaims for conversion against Byrnes and Handleman and Hammer and for fraud against Byrnes and Handleman.

II. Discussion

A. Conversion

A conversion takes place when someone, intentionally, or without authority, assumes or exercises control over personal property belonging to another, interfering with that person's right of possession. The key elements of conversion are 1) plaintiff's possessory right or interest in the property and 2) defendant's dominion over the property or interference with it in derogation of plaintiff's rights (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]). As to the first element, Counterclaim-Plaintiffs have sufficiently alleged that they were the rightful owners of the Bank of America accounts, and that the withdrawn funds came from those accounts without their approval. They have likewise sufficiently alleged that Counterclaim-Defendants exercised dominion and interference over the property in derogation of Counterclaim-Plaintiffs' rights. Counterclaim-Defendants refused to return the funds even after Counterclaim-Plaintiffs demanded their return. Counterclaim-Defendants have not provided documentary evidence conclusively proving these allegations to be false. The motion to dismiss the counterclaim for conversion must be denied.

Sendtraffic has sufficiently pleaded a cause of action for conversion against Hammer as well. He too allegedly interfered with Counter-Plaintiffs' alleged right to the funds. While Hammer has asserted arguments that, as an attorney, he did no wrong by placing what was arguably his clients'

money into an escrow account controlled solely by him, such argument is not grounds for dismissal at this early stage of the case. The funds at issue were allegedly converted from a bank through fraud. While Hammer's theory that he was acting under the norms of the legal profession may ultimately prevail, the issue to be decided at this point is merely whether a cause of action has been properly pleaded. As the Appellate Division First Department has noted in *Passaic Falls Throwing Co. v The Villeneuve-Pohl Corp.*, 169 AD 727, 728-29 [1st Dept 1915] regarding conversion claims:

The proof...need not show a tortious taking, or that the defendants acted in bad faith. If it should appear that they obtained the goods fairly from a person whom they had reason to think was the true owner, or if they acted under a mistake as to the plaintiff's title, or under an honest but mistaken belief that the property was their own, they would still be liable to plaintiff if their acts in regard to it amount to conversion. If they have taken into their own hands, or disposed of it to others, or exercised any dominion over it whatever, they are guilty of a conversion, and their liability plaintiff is established...A wrongful intent is not an essential element of the conversion. It is enough in this action that the rightful owner has been deprived of his property by someone unauthorized act of another assuming dominion or control over it.

B. Fraud

The counterclaim alleges that in February 2009, Bank of America was the custodian of Counterclaim-Plaintiffs' accounts and the funds deposited therein, and that on February 19, 2009, Byrnes and Handleman represented to the bank that they were the agents of or otherwise authorized by Counterclaim-Defendants to exercise dominion and control over the funds. The counterclaim also alleges that this representation was material and false because in February 2009, Byrnes and Handleman were not agents or otherwise authorized to move funds on behalf of Counterclaim-Plaintiffs. Finally, the counterclaim alleges that Byrnes and Handleman knew the representation was false at the time they made it; that they intended Counterclaim-Plaintiffs through their custodian, Bank of America, to rely on it; that Counterclaim-Plaintiffs (through the bank) did in fact rely on it by turning over the funds to Byrnes and Handleman, and that Counterclaim-Plaintiffs have been damaged as a result of Byrnes and Handleman' actions.

Counterclaim-Defendants reply that because the alleged representation was made to the bank, and not directly to Sendtraffic, Sendtraffic cannot show reliance. They cite *Escoett & Co v*

Alexander & Alexander, Inc., 31 AD2d 791, 296 NYS2d 929 [1st Dept 1969] in which the First Department stated:

Nor can the counterclaim be sustained as pleading a cause of action in fraud since none of the traditional elements of such an action is alleged. Defendant does not claim that it was deceived or induce into acting to its detriment, in reliance upon representations made by the plaintiff. The representations upon which the defendant claims were made to third parties, not to it, and those representations were relied upon by those third parties and not by it.

Similarly, in *Barth v Board of Managers of CBJE Condominium*, 17 Misc3d 1121 [Sup Ct, New York County], the Court held that a “cause of action for fraud is not stated because the representations of which plaintiffs complain were made to third parties and not to them, and those representations were relied upon by those parties and not by plaintiffs.” Although, as Counterclaim-Defendants observe, a misrepresentation need not be made directly (see 10 NY Jur 2d, Fraud and Deceit, §149, p. 662 [1996 ed]), Counterclaim-Defendants have identified no case, and the courts’ research has found none, where the party who acted to its detriment was a non-party to the case.

C. Cross-Motion to Disqualify Hammer

Because Hammer is now his clients’ co-defendant, Sendtraffic argues that he must be disqualified due to a conflict of interest. When the counterclaims were first asserted in a separate lawsuit brought by Sendtraffic, Justice Paul Feinman, after hearing the conversion allegations against Counterclaim-Defendants and Hammer, stated:

You have a couple of problems here. Number one...assuming I don’t grant your motion to dismiss, you have a conflict with your clients, because if they’re going to say we acted on the advice of our attorney...All I’m suggesting to you, sir, is you need to figure it out, and I’m not here as the ethics committee but—and I would want to know whether or not you’ve discussed with your clients the possibility of a conflict, first of all, between them, and as between them and you as named parties in the litigation. (Transcript of hearing, October 28, 2009).

Hammer’s response in this case is that his clients signed a waiver after being fully informed of the potential conflict of interest that could ensue if he continues as their counsel. The conflict does not appear to be serious enough to necessitate Court intervention to protect Hammer’s clients from exploitation. Having signed a conflict waiver after being fully informed, Byrnes and

Handleman agreed to move forward with Hammer as their counsel. On the specific facts of this case, Byrnes and Handleman will not be deprived of representation by counsel of their choosing.

Accordingly, it is hereby

ORDERED that the motion to dismiss the counterclaims alleging conversion and fraud against Byrnes and Handleman is DENIED; and it is further

ORDERED that the motion to dismiss the counterclaim for conversion against Hammer is DENIED; and it is further

ORDERED that the cross-motion to disqualify Hammer is DENIED.

This constitutes the decision and order of the court.

DATED: July 19, 2012

ENTER,



O. PETER SHERWOOD

J.S.C.