

WF Kosher Food Distrib., Ltd. v Laish Israeli Food Co., Ltd.

2012 NY Slip Op 33476(U)

June 29, 2012

Sup Ct, NY County

Docket Number: 602504/2008

Judge: Shirley Werner Kornreich

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

SHIRLEY WERNER KORNREICH

PRESENT: _____ J.S.C. Justice

PART 54

Index Number : 602005/2008
WF KOSHER FOOD DISTRIBUTORS
VS.
LAISH ISRAELI FOOD
SEQUENCE NUMBER : 007
RENEWAL

INDEX NO.
MOTION DATE
MOTION SEQ. NO. 007
MOTION CAL. NO.

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

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

PAPERS NUMBERED
73, 74, 75, 76, 77,
78, 79, 80, 81, 82, 83, 84, 85, 86

Cross-Motion: [] Yes [] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and Justice Low's decision dated 4/13/12 did NOT decide the motion in full, the portion of his grey sheet which marked the decision disposed is vacated.

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

9/29/12 SHIRLEY WERNER KORNREICH J.S.C.

Check one: [] FINAL DISPOSITION [X] 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: PART 54

-----X
WF KOSHER FOOD DISTRIBUTORS, LTD.,
a wholly owned subsidiary of G. Willi-Food
International, Ltd.,

Index No.
602005/2008

Plaintiffs,

DECISION & ORDER

-against-

LAISH ISRAELI FOOD COMPANY, LTD.,
LAISH DAIRY, LTD., ARIE STEINER, JOSH
STEINER, ELI BIRAN, 860 NOSTRAND AVENUE,
LTD., JOEL ZAFIR, BENZION KELMAN,
ABRAHAM GREENBERG, JOSEPH SCHWARTZ,
and BENZION HONIG,

Defendants.

-----X
860 NOSTRAND ASSOCIATES, LLC,

Index No.
602504/2008

Plaintiff,

-against-

G. WILLI-FOOD INTERNATIONAL, LTD.,

Defendant/Third-Party Plaintiff,

Third-Party Index No.
590074/2009

-against-

ELI BIRAN and ARIE STEINER,

Third-Party Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

The remainder of Motion Sequence 007 in Index No. 602005/08 (WF Case) and Motion

Sequence 010 in 602504/08 (Nostrand Case) are consolidated for disposition.¹

Motions before the Court

Defendants Laish Israeli Food Company, Ltd. (Laish), Arie Steiner (Steiner), Josh Steiner (J Steiner), and 860 Nostrand Associates, LLC (Nostrand), s/h/a, 860 Nostrand Avenue, Ltd. (collectively, Steiner Parties), moved on October 3, 2011 in the WF Case (Seq 007): 1) to renew their motion to dismiss the complaint based upon a change in the law; 2) to file an amended answer asserting a defense of *res judicata* and for summary judgment dismissing the complaint against them based upon that defense; and 3) for summary judgment dismissing WF's fraudulent inducement and conversion claims for lack of evidentiary support. WF Case, Doc 73.

On February 27, 2012, Nostrand and Steiner moved in the Nostrand Case (Seq 010) to reargue a decision on Sequence 008 and to transfer the underlying summary judgment motions to Justice Lowe. Nostrand Case, Doc 119. They subsequently withdrew the request to transfer the motions. Thus, the motion to reargue is before this court. The underlying motions were made on October 3, 2011, wherein Nostrand and Steiner had moved for: 1) summary judgment in its favor on its complaint to enforce a guaranty against G. Willi-Food International, Ltd. (Willi); and 2) for summary judgment dismissing the third-party complaint of Willi against Steiner. Nostrand Case, Doc 90.² On February 26, 2012, this court denied the Steiner Parties' motion. Nostrand Case, Doc 112. The motion to reargue was made the next day.

Background

¹These cases were consolidated for discovery and joint trial by order of Justice Lowe in the Nostrand Case, dated June 28, 2011. Nostrand Case, Docs 72 & 82.

²The Steiner Parties filed identical notices of motion and supporting papers in each case in connection with their two October 3, 2011 motions.

The facts relating to these actions are contained in prior decisions of Justice Lowe and this judge, with which the reader's familiarity is presumed, and will not be repeated in full here. In brief, the complaint in the WF Case alleges that pursuant to a January 19, 2007 Asset Purchase Agreement (APA), Laish sold certain assets to WF and its Israeli parent G. Willi-Food International, Ltd. (Willi). On the same day Nostrand leased the first two floors of a warehouse it owned to WF (2007 Lease), where WF was to operate its business. The 2007 Lease was guaranteed by Willi. Also on the same day, WF entered into an employment contract with Steiner (Employment Agreement), pursuant to which he was to be WF's daily manager.

In June 2007, Steiner (the sole shareholder of Laish), WF, Laish and Willi entered into a settlement agreement and mutual general releases (Settlement Agreement). Steiner places the date of the Settlement Agreement as late as June 2007. Steiner Affidavit, WF Case, Doc 73-1, ¶15. On January 31, 2008, Nostrand, as Landlord, and WF, as Tenant, entered into a lease for the third floor of the warehouse (2008 Lease). The 2008 Lease was signed by Eli Biran (Biran), who was the Chief Operating Officer (CEO) of WF, effective June 1, 2007. Gil Hochboim, Willi's Vice-President, signed a guaranty of the 2008 Lease (2008 Guaranty).

WF claims that it did not need the third floor of the warehouse, that the 2008 Lease and Guaranty were procured by fraud, that Biran did not have authority to execute the 2008 Lease, and that Steiner (the sole member of Nostrand) knew Biran lacked authority. Willi claims that Hochboim did not have authority to sign the 2008 Guaranty. Hochboim avers that Steiner promised him it was only an "accommodation" and said he would not enforce it against Willi. Essentially, WF and Willi claim that both documents were part of a fraudulent conspiracy between Biran and Steiner. Biran allegedly involved WF in the frozen food business in 2008 in

order to justify leasing the third floor that had refrigerators and freezers, as well as unneeded office space. Affidavit of Zwi Williger, WF Case, Doc 93, ¶¶ 14-16 and exhibits referred to therein. In addition, WF alleges that Biran caused WF to buy over-priced, frozen food near its expiry date from Dekel, another company owned by Steiner. *Id.* Biran testified that Steiner told him that he wanted to put WF out of business because Mr. Williger had cheated him in an unrelated stock option deal. *Id.*, ¶19 and exhibits referred to therein.

On December 11, 2009, Justice Lowe ordered WF to commence arbitration on the fifth, sixth and seventh causes of action in the WF Case against Biran. WF Case, Doc 37. The arbitrator (George Bundy Smith Senior) found as a fact that Biran leased unnecessary space and concluded that Biran breached his fiduciary duty to WF, specifically the duty of care and the duty of loyalty. WF Case, Doc 49-2. On September 26, 2011, this court entered judgment on the award against Biran. WF Case, Doc 68.

Motions in the WF Case

The Steiner Parties' motion (Seq 007) to renew their dismissal motion in the WF Case was based on a Court of Appeals decision about a fiduciary's obligation, prior to entering into a settlement agreement or general release, to disclose material facts to his or her principal. The Steiner Parties' motion said that some of the claims in the WF Case should have been dismissed because, under the new precedent, the Settlement Agreement was enforceable, despite Steiner's fiduciary duty as an employee of WF. I referred the renewed motion to Justice Lowe, who had decided the original motion in 2009 (2009 Lowe Decision). In that decision, Justice Lowe had dismissed only the eighth cause of action asserted against J Steiner and the entire complaint against defendant Laish Dairy.

Justice Lowe made a decision on the renewal motion on April 13, 2012 (2012 Lowe Decision) and sent the balance of the motion back to me. The 2012 Lowe Decision dismissed the first through fifth and tenth causes of action against the Steiner Parties. In so doing, he enforced WF's release of Steiner and Laish in the Settlement Agreement and dismissed most of the claims involving the 2007 Lease, the APA and the Employment Agreement.

It appears that Justice Lowe's dismissal of the fifth and tenth causes of action was in error. As previously noted, the fifth cause of action against defendant Eli Biran for breach of fiduciary duty had been sent by Justice Lowe to arbitration in 2009, and judgment had been entered in 2011. (WF Case, Docs 37 and 68). The tenth cause of action sought an injunction preventing defendants from interfering with WF's business. It had nothing to do with the Settlement Agreement and the new precedent relating to it. Similarly, it appears that Justice Lowe did not dismiss portions of the sixth and eleventh cause of actions to rescind the 2007 Lease and for a declaration that the Settlement Agreement, 2007 Lease, APA and Employment Agreement are unenforceable. The 2012 Lowe Decision, enforced the releases in the June 2007 Settlement Agreement. Consistent with that logic, the portions of the sixth and eleventh causes of action relating to the invalidity of the January 2007 Lease, APA and Employment Agreement should have been dismissed. However, this court cannot modify Justice Lowe's determination.

Accordingly, the following causes of action in the WF Case against the Steiner Parties remain, numbered here as they are in the complaint: 6) against Steiner and Nostrand, rescission of the 2007 and 2008 Leases; 7) against Steiner and Nostrand, damages for fraudulent inducement of the 2008 Lease; 9) against Steiner and J Steiner, conversion of WF property and money; 11) a declaratory judgment declaring that the Settlement Agreement, 2007 Lease, APA and 2008 Lease

should be rescinded; 12) against all defendants, an accounting of money and assets of WF allegedly diverted and converted. The Steiner Parties' motion does not address the twelfth cause of action for an accounting.

The motion which was referred back by Justice Lowe is the Steiner Parties' motion: 1) to amend their answer to assert a defense of *res judicata*; 2) for summary judgment on the basis of *res judicata* on WF's claims relating to the 2008 Lease; and 3) for summary judgment on the fraudulent inducement and conversion claims based upon lack of proof.

Res Judicata in the WF Case

The Steiner Parties' proposed *res judicata* defense is based upon a default judgment entered against WF, on June 11, 2008, in a summary non-payment proceeding brought by Nostrand, against WF, in Civil Court, Kings County (Civil Court Judgment). The WF Case was filed in this court in July 2008. The Steiner Parties claim that the Civil Court Judgment, subsequently affirmed on appeal by the Appellate Term, established that the 2008 Lease was a valid agreement, not induced by fraud, because: 1) WF could have raised that defense in Civil Court; and 2) Nostrand's Civil Court petition alleged that WF was in possession pursuant to the 2008 Lease.

Res Judicata prevents a party bound by an adverse adjudication from relitigating matters raised, or that could have been raised, in a prior proceeding. *Schuylkill Fuel Corp. v B. & C. Nieberg Realty Corp.*, 250 NY 304, 306-307 (1929)(Judgment in one action conclusive in later one as to matters actually litigated or which could have been litigated when different judgment in second action would destroy or impair rights or interests established by first). Moreover, a motion to amend should be freely granted in the absence of prejudice, at any time, even on appeal. CPLR

3025; *Murray v City of NY*, 43 NY2d 400 (1977)(amendment to assert defense granted by Court of Appeals). However, an amendment should not be granted where it is insufficient as a matter of law. *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495 (1st Dept 2011).

WF's damage claim for fraudulent inducement of the 2008 Lease is barred under the doctrine of *res judicata*. At common law, a judgment of possession granted on default in a non-payment proceeding established the validity of the lease and barred a subsequent suit by the tenant claiming that it entered into the lease based upon the lessor's fraudulent misrepresentations. *Fairview Chase Corporation*, 254 NY 55 (1930)(Cardozo, J.)(final order granted on default in summary proceeding to dispossess tenant is conclusive determination of valid, subsisting tenancy); *see also Reich v Cochran*, 151 NY 122 (1896)(judgment on default against tenant in non-payment proceeding conclusively establishes existence and validity of lease).

The common law rule was partially abrogated by RPAPL 747(2),³ with respect to equitable claims for affirmative relief that could not be asserted in a summary proceeding due to the court's limited jurisdiction, so long as the claim is raised within sixty days of entry of the judgment. *Henry Modell and Co., Inc. v Minister, Elders and Deacons of the Reformed Protestant Dutch Church*, 68 NY2d 456 (1986). Declaratory judgment and rescission are forms of equitable relief. *R. Gale Rhodes, Jr. v Buechel*, 258 AD2d 274 (1st Dept 1999)(rescission of trust due to breach of fiduciary duty equitable); *US Fidelity & Guaranty Co. v Goetz*, 285 NY 74 (1941)(declaratory judgment equitable). Equitable relief is affirmative where it is necessary to

³RPAPL 747(2) provides that the judgment in a special proceeding to recover real property "shall not bar an action, proceeding or counterclaim, commenced or interposed within sixty days of entry of the judgment, for affirmative equitable relief which was not sought by counterclaim in the proceeding because of the limited jurisdiction of the court."

grant the relief sought by the party asserting it. *US Fidelity & Guaranty Co., supra.*

Here, the Steiner Parties' motion to amend to assert the defense of *res judicata* and for summary judgment on that defense is granted as to the seventh cause of action for money damages for fraudulent inducement and denied as to the portions of the sixth and eleventh causes of action for, respectively, rescission of the 2008 Lease and a declaratory judgment that it is invalid. *Res judicata* does not bar WF's affirmative equitable claims. The WF Case was brought timely, pursuant to RPAPL 747(2), less than sixty days after the Civil Court Judgment was entered. Rescission of the 2008 Lease and a declaration that it is invalid are affirmative equitable claims. WF needed more than a denial of possession and rent, which were defenses to Nostrand's non-payment petition, in order to assert those claims.

Merits of the Fraudulent Inducement and Conversion Claims

Turning to the merits of the fraudulent inducement claim, the Steiner Parties argue that there is no evidence Steiner or Nostrand made a misrepresentation of fact to induce WF to enter into the 2008 Lease. "To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury." *Kaufman v Cohen*, 307 AD2d 113, 119 (1st Dept 2003); *Channel Master Corp. v Aluminium Ltd. Sales, Inc.*, 4 NY2d 403, 407 (1958)(elements required to rescind contract for fraudulent inducement are representation of material existing fact, falsity, scienter, justifiable reliance and injury). There is no evidence that Steiner or Nostrand misrepresented a fact.

Nor can there be a claim for fraudulent concealment. After the June 2007 Settlement Agreement, Steiner and Nostrand did not have a fiduciary relationship with WF, or another

relationship of trust giving rise to a duty to disclose. *Kaufman v Cohen*, at 119-120 (fiduciary relationship required for fraudulent concealment claim). These were sophisticated businessmen whose relationship had soured before the 2008 Lease was signed.

Nonetheless, the seventh cause of action for fraudulent inducement of the 2008 Lease against Steiner and Nostrand is dismissed with leave to replead a claim for aiding and abetting breach of fiduciary duty. *Yuko Ito v Suzuki*, 57 AD3d 205 (1st Dept 2008)(granting leave to replead aiding and abetting breach of fiduciary duty in absence of misrepresentations to support fraud). A person knowingly participates in a breach of fiduciary duty by providing substantial assistance to the primary violator. *Kaufman v Cohen*, at 125-126; *Yuko Ito v Suzuki*, *supra*. In order to sustain a claim for aiding and abetting breaches of fiduciary duty, there must be an allegation that the aider and abettor had actual, as opposed to constructive, knowledge of the breach of duty. *Id.* “Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.” *Id.* One who aids and abets a breach of a fiduciary duty is liable for that breach as well, even if he or she had no independent fiduciary obligation to the allegedly injured party. *Caprer v Nussbaum*, 36 AD3d 176, 193 (2d Dept 2006). Rescission is a remedy for breach of fiduciary duty. *R. Gale Rhodes, Jr. v Buechel*, *supra*.

The arbitration found that Biran breached his fiduciary duty to WF by entering into the 2008 Lease. Whether or not Steiner and/or Nostrand, knew of the breach and substantially participated is a question of fact. The evidence shows that there are questions of fact as to whether Steiner conspired with Biran, to benefit Nostrand and Steiner at the expense of WF, by expanding WF’s business to frozen food in order to dump Dekel products near their expiry date

that Steiner wanted to sell at an inflated price, and entering into an unneeded, unauthorized 2008 Lease, purportedly to support the frozen food business. There is evidence that a few days before Biran signed the 2008 Lease, Mr. Williger wrote him a letter saying that he should not sign it because WF did not need the space. See 12/1/11 Affidavit of Zwi Williger ¶14, WF Case, Doc 93 and exhibits referred to therein. Mr. Williger's letter asked Biran to forward it to Steiner. In addition, there was a corporate resolution requiring two signatures to bind WF to transactions over \$5,000. *Id.* Steiner was the former manager of WF, from which it could be inferred that he was aware of the resolution. Biran testified that Steiner wanted to get two signatures on the 2008 Lease in order to bind WF. Biran EBT, pp 145-146. Further, WF points out that the Settlement Agreement, to which Steiner was a party, has two signatures for WF. WF Case, Doc 73-9. Lastly, Biran testified that Steiner was trying to destroy WF. While the Steiner Parties present evidence that WF management discussed going into the frozen food business, that Steiner did not receive Mr. Williger's letter from Biran, and that WF ratified the 2008 Lease with payments thereunder and by using the third floor for frozen food, they merely raise issues of fact requiring a trial. Nostrand was wholly controlled by Steiner, who owns 100% of its stock. Nostrand received the rent and security from WF and, thus, the aiding and abetting claim may be maintained against it as well.

The Steiner Parties have not proven as a matter of law that the 2008 Lease was ratified by WF. There is evidence that WF immediately objected to it both before and after Biran signed it, and that WF's use of the premises for frozen food was part of the conspiracy between Biran, Steiner and Nostrand. Further, WF claims that the rent and security it paid was for the 2007 Lease and a small portion of the third floor that they were renting month to month for storage of their

non-frozen inventory. 12/1/11 Affidavit of Zwi Williger, WF Case, Doc 93, ¶¶17-18. There is evidence that WF deducted allegedly unauthorized payments by Biran for the 2008 Lease. *Id.*

With respect to the ninth cause of action for conversion, there are issues of fact that preclude summary judgment. The claim is pled against Steiner, J Steiner and other non-moving parties. There is evidence in the record that Steiner admitted that he converted checks in the total amount of \$120,000. While Steiner claims that he returned all of the money, there is evidence that he did not. See Biran EBT, pp 286-287 and 340. With respect to J Steiner, who did not put in an affidavit, there is evidence that he took payments due to WF from customers. See WF Case, 10/29/08 Affidavit of Gil Hochboim, Doc 89, ¶5.

Nostrand Case Motion for Summary Judgment

Nostrand moved in the Nostrand Case (Seq 010) to reargue its motion for summary judgment (Seq 008),⁴ on the ground that it should have been transferred to Justice Lowe. Subsequently, the court was advised by the Steiner Parties' attorneys that as Justice Lowe had decided only part of the motion in the WF Case and referred the remainder of the summary judgment motion back to this court, the motion in the Nostrand Case will be decided by me. The note of issue was filed in the Nostrand case on August 2, 2010, almost three years prior to Justice Lowe's order consolidating it for joint trial with the WF Case.

On reargument, the Steiner Parties contend that their latest motion for summary judgment (Seq 008) was timely because nearly identical relief was sought by Willi's timely motion. However, Willi's summary judgment motion was denied as untimely. Nostrand Case, Doc 113,

⁴Although the notice of motion to reargue does not state which motion it wishes to reargue, the supporting affirmation quotes the decision in Sequence 008. Nostrand Case, Doc 113.

deciding Motion Seq 009.

This court denied the Steiner Parties' latest summary judgment on the ground that Nostrand and Stein previously moved for summary judgment (Seq 006) and the motion was denied by Justice Lowe, who would have to hear the motion if it were for renewal.⁵ The court grants reargument solely to add the Steiner Parties' latest motion for summary judgment, which is denied as untimely. *Brill v City of NY*, 2 NY3d 648 (2004). Accordingly, it is

ORDERED that the portion of motion (Seq 007) by defendants Laish Israeli Food Company, Ltd., Arie Steiner (Steiner), Josh Steiner, and 860 Nostrand Associates, LLC (Nostrand), s/h/a, 860 Nostrand Avenue, Ltd., in the first-entitled action (Index No. 602005/2008), to amend the complaint to assert the defense of *res judicata* and for summary judgment is granted solely to the extent that the motion to amend is granted to assert the defense of *res judicata* with respect to the seventh cause of action for money damages for fraudulent inducement of the 2008 Lease and summary judgment is granted dismissing said seventh cause of action; and in all other respects the motion is denied; and plaintiff WF Kosher Food Distributors, Ltd., is granted leave to replead a claim for aiding and abetting breach of fiduciary duty against defendants Steiner and Nostrand within ten days of entry of this order in the New York State

⁵Prior to Motion Sequence 008, two motions for summary judgment were made by the Steiner Parties and decided by Justice Lowe. Motion Sequence 002 was for summary judgment on Nostrand's claim against Willi to enforce the 2008 Guaranty. It was decided by Justice Lowe on May 13, 2010, before the note of issue was filed. Nostrand Case, Doc 7. The decision reflects that Justice Lowe denied the motion due to ongoing discovery and because he found that there were issues of fact as to the underlying obligation, the 2008 Lease. Sequence 006, was Steiner's post-note-of-issue motion for summary judgment to dismiss the third-party claim by Willi against him. 8/31/10 Notice of Motion, Nostrand Case, Doc 26. The motion was denied by Justice Lowe's order of November 30, 2010, in accordance with a transcript which is not in the record of motion Seq 006, or the instant reargument motion, Seq 010. Nostrand Case, Doc 63.

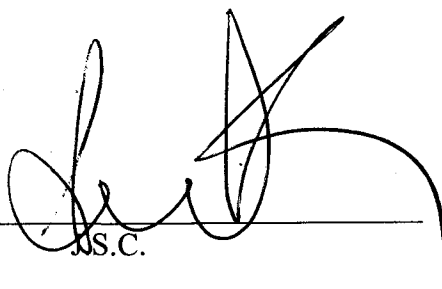
Courts Electronic Filing System; and it is further

ORDERED that the motion (Seq 010) by Nostrand and Steiner the above-entitled action bearing Index No. 602504/2008, to reargue this court's decision in Motion Sequence 008 is granted, and, upon reargument, the motion is denied for the additional reason that it was not timely made; and it is further

ORDERED that the parties shall appear for a pre-trial conference on July 17, 2012 at 11 a.m., in Room 228 of the courthouse located at 60 Centre Street, New York, NY.

Dated: June 29, 2012

ENTER:



J.S.C.