

<b>Barbaro v Gd]bY`]</b>
2013 NY Slip Op 30002(U)
January 3, 2013
Supreme Court, Richmond County
Docket Number: 100155/09
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.: 100155/09  
Motion No.: 12, 13, 14**

**NICHOLAS BARBARO,**

*Plaintiff*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

**THOMAS SPINELLI,  
DONNA SPINELLI a/k/a DONNA MAZZAFERRO,  
ALLSTATE FUNDING SERVICES, INC.,  
MATIZ MALDONADO,  
BUSINESS CLUB NETWORK,  
HOWARD TAPS, and  
ILLUMILUNA, INC. d/b/a PLI,**

*Defendants*

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The following items were considered in the review of the following motions: 1) to amend answer; 2) to strike the Note of Issue and 3) for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion for Summary Judgment and Affidavits Annexed (012)	1
Memorandum of Law in Support	2
Memorandum of Law in Opposition to Summary Judgment	3
Reply Affirmation	4
Memorandum of Law in Reply	5
Notice of Motion to Strike the Note of Issue and Affidavits Annexed (013)	6
Memorandum of Law in Support of Motion to Strike the Note of Issue	7
Affirmation in Opposition	8
Memorandum of Law in Opposition	9
Reply Affirmation	10
Memorandum of Law in Reply	11
Notice of Cross-Motion to Amend the Complaint (014)	12
Memorandum of Law in Support	13
Affirmation in Opposition	14
Memorandum of Law in Opposition	15
Memorandum of Law in Reply	16
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on these Motions and Cross-Motion is as follows:

The defendants, Thomas Spinelli, Donna Spinelli a/k/a Donna Mazzaferro, Allstate Funding Services, Inc., Matiz Maldonado and Business Club Network move for an order granting them summary judgment dismissing the plaintiff's complaint. The plaintiff moves to strike the note of issue and cross-moves to amend the complaint. The defendants' motion for summary judgment is granted. The plaintiff's motion and cross-motion are denied.

### **Facts**

In March 2008 the plaintiff, Nicholas Barbaro, entered into a joint venture agreement with Matiz Maldonado and Howard Taps wherein each would be equal shareholders in a company known as Lifebulb International, Inc. ("Lifebulb"). The essence of Lifebulb's business was to purchase light bulbs from China and then to resell them in North America. The company engaged the defendant, Allstate Funding Services, Inc. and its principal, Thomas Spinelli to provide financing for a transaction with Villa Hermosa, Mexico. Lifebulb completed that transaction that netted a profit of \$566,000 which was distributed to the joint venturers. After the Villa Hermosa, Mexico single transaction, Maldonado, Taps, Allstate and Thomas Spinelli decided they no longer wished to do business with the plaintiff.

It is uncontested that Spinelli established two separate companies which dealt in light fixtures. The first company was called MHT, and it purchased and sold light fixtures. Spinelli avers that in its first year MHT had a net profit of \$2,200 without him drawing a salary. In its second year, MHT posted a net loss of \$165,000 and again Spinelli did not draw a salary. Subsequently, Spinelli founded a second company called North American Manufacturing Enterprises ("North American") that used MHT as a "dba." Unlike Lifebulb and MHT, North American purchased light bulb components and assembled the fixture in the United States using American workers. This corporate model required the building of a factory, assembly lines and the retention of engineers. However, even this business model was not profitable. In 2009 North American posted a net loss of \$640,410; and in 2010 the company had a net loss of \$1,199,480. The defendant Spinelli asserts that he did not draw a salary from this enterprise as well.

There have been a multitude of motions in this action. Before discovery was completed this court denied the defendants' motion to dismiss the plaintiff's fourth, fifth, sixth, seventh, eighth and ninth causes of action pursuant to CPLR § 3211(a)(7) as premature in a decision and order dated September 10, 2009. However, this court granted the motion to dismiss with respect to the plaintiff's first and second causes of action. In so holding, this court stated that on a motion to dismiss the complaint must be afforded a liberal construction and the allegations therein accepted as true with the pleadings viewed in the light most favorable to the plaintiff.<sup>1</sup> This, coupled with the early stage in litigation led this court to deny the defendants' motion in part.

After nearly a year of discovery the defendants once again moved to dismiss the plaintiff's complaint in a motion for summary judgment. Once again this court denied the summary judgment motion with leave to renew upon the completion of discovery. By decision and order dated January 13, 2012 this court held that after the completion of extensive relevant discovery, the restrictive covenant which sought to prevent the parties of the joint venture agreement from participating in any similar business for two years virtually anywhere in *North America* was unenforceable (emphasis added).

Eventually, after holding discovery open for an additional three years after the defendants' initial motion for summary judgment in 2009, this court closed discovery in August 2012 and directed the filing of the note of issue over the plaintiff's objection. The defendants filed the note of issue on August 27, 2012 and these motions followed.

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<sup>1</sup> *Doria v. Masucci*, 230 AD2d 764 [2d Dep't. 1996].

## Discussion

### *Motion for Summary Judgment*

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.<sup>2</sup> Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.<sup>3</sup> As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.<sup>4</sup> On a motion for summary judgment, the function of the court is issue finding, and not issue determination.<sup>5</sup> In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.<sup>6</sup>

The defendants argue that the remaining causes of action asserted by the plaintiff must be dismissed as an individual he lacks standing to bring this action. This court agrees. Contrary to the plaintiff’s assertion this court did not find that such an argument was without merit. The court found that based solely on the pleadings that the plaintiff had come forward with a legally sufficient claim. However, upon the completion of discovery the record is replete with

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<sup>2</sup> *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

<sup>3</sup> *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1<sup>st</sup> Dept 1994].

<sup>4</sup> *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

<sup>5</sup> *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

<sup>6</sup> *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

admissions on the part of plaintiff that the alleged torts were committed against the corporation and not against him individually. The plaintiff conceded that the business plan which he created was submitted to the corporation and was necessary for the company to be successful. The plaintiff's deposition transcript reveals that the business plan was a corporate asset and not a personal one. Furthermore, the plaintiff's testimony acknowledged that any profits that would have been realized had the business continued would have been profits to the company. Therefore, any money he would have made through Lifebulb would have been realized through his role as shareholder and divided with the other two shareholders. A shareholder, may not recover in his or her individual capacity for corporate losses; and any action for breach of fiduciary duty seeking the recovery of corporate assets allegedly diverted must be brought derivatively as a shareholder.<sup>7</sup> Consequently, the plaintiff lacks standing to bring this action.

Even assuming that the plaintiff had standing to bring this action in the first place, the plaintiff's third (tortious interference with contract) and seventh (unjust enrichment) causes of action must fail. As this court has previously held the restrictive covenant that plaintiff sought to enforce against the defendants is unenforceable because restricting business to the continent of North America is too broad. The defendants demonstrated that the business plan which was utilized in Spinelli's MHT lighting venture was fairly straightforward and standard. And the business plan used in North American was completely different from the one used by Lifebulb. Consequently, without a restrictive covenant not to compete an employee is free to compete absent the use of any trade secrets.<sup>8</sup> It is clear that the defendants did not utilize trade secrets, therefore the plaintiff's third and seventh causes of action would have been dismissed even if the plaintiff had standing, which he does not.

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<sup>7</sup> See, *Brancaleone v. Mesagna*, 290 AD2d 467 [2d Dep't. 2002]; see also, *Corso v. Byron*, 11 Misc3d 1072(A) [Sup Ct., Suffolk 2006].

<sup>8</sup> *NCN Co., Inc. v. Cavanagh*, 215 AD2d 737 [2d Dep't. 1995].

The same is true for the plaintiff's fourth cause of action for usurpation of a corporate asset. Assuming that the plaintiff had standing to sue, this cause of action would be dismissed as well. At its essence the plaintiff argues that defendants utilized his business plan and connections to profit in the lighting industry. Courts have consistently held that general business plans do not receive protection as a trade secret.<sup>9</sup> Consequently, the cause of action for usurpation of a corporate asset would be dismissed even if the plaintiff had standing to commence this action.

The plaintiff's fifth cause of action for fraud must also be dismissed even if the plaintiff had standing to sue. The plaintiff has failed to allege, and discovery has not demonstrated any evidence that the defendants made any false representations concerning the Lifebulb joint venture. The plaintiff's allegations concern whether the defendants misled him into believing that they would never enter into the lighting industry. Even assuming these facts as true, a cause of action for fraud would not be actionable as promises of future intent are not misrepresentations of existing facts.<sup>10</sup> Consequently, assuming that the plaintiff had standing the fifth cause of action for fraud would also be dismissed.

Once again, assuming that the plaintiff had standing the plaintiff's eighth cause of action for breach of fiduciary and his ninth cause of action for an accounting are barred because there was no fiduciary relationship between the parties.

#### *Motion to Strike the Note of Issue*

The plaintiff's motion to strike the note of issue is denied. In a decision and order dated May 21, 2012 this court closed discovery on this case bearing a 2009 index number. This case has had fourteen motions and thirty-four separate appearances. In addition, this court has

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<sup>9</sup> *Beverage Mktg. USA v. S. Beach Beverage Co., Inc.*, 58 AD3d 657 [2d Dep't. 2009].

<sup>10</sup> *DaCosta v. Trade-Winds Environmental Restoration, Inc.*, 61 AD3d 527 [2d Dep't. 2009].

repeatedly denied summary judgment motions in order for the plaintiff to conduct more discovery. All of the parties have been subjected to depositions. Some of the parties have had to submit to multiple depositions. In addition, the defendants have responded to multiple demands for discovery and inspection. Here, more discovery will not shed any more light on the causes of action claimed by the plaintiff. This court has determined that the restrictive covenant is unenforceable, and consequently, the defendants could not be precluded from doing business in North America, which includes Mexico. Whether or not the defendants were conducting business in Mexico under a separate corporate structure is of no consequence. Therefore, the motion to strike the note of issue is denied.

#### *Cross-Motion to Amend the Complaint*

The plaintiff's motion to amend his complaint after over three years of litigation is denied. While it is true that motions for leave to amend pleadings are to be liberally granted in the absence of prejudice or surprise, it is equally true that the court should examine the sufficiency of the merits of the proposed amendments when considering such motions. Where the proposed amendments are totally devoid of merit and are legally insufficient, leave to amend should be denied.<sup>11</sup> Here, this court has denied applications to amend the complaint on two prior occasions; the first was by decision and order dated January 13, 2012 and the second denial came on May 21, 2012. Once again, this court denies the plaintiff's cross-motion to amend his pleadings.

#### **Conclusion**

Summary judgment is granted in favor of the moving defendants Thomas Spinelli, Donna Spinelli (a/k/a Donna Mazzaferro), Allstate Funding, Inc., Matiz Maldonado, and Business Club Network and the complaint is dismissed as against those individuals and business entities. The remainder of this action against Howard Taps and Illumiluna, Inc. d/b/a PLI is stayed pending the resolution of Taps' federal bankruptcy proceeding.

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<sup>11</sup> *Zabas v. Kard*, 194 AD2d 795 [2d Dep't. 1993].

While this decision would be similarly applicable to Howard Taps and Illumiluna, Inc. d/b/a PLI, there is a federal bankruptcy proceeding which stays any determination as to them. Moreover, Taps and Illumiluna, Inc. d/b/a PLI did not move to dismiss this case.

Accordingly, it is hereby:

ORDERED, that the defendants' motion for summary judgment is granted and the complaint is severed and dismissed as to the moving defendants: Thomas Spinelli, Donna Spinelli (a/k/a Donna Mazzaferro), Allstate Funding, Inc., Matiz Maldonado, and Business Club Network; and the Clerk is directed to enter judgment in favor of those defendants; and it is further

ORDERED, that the motion and cross-motion brought by the plaintiff to strike the note of issue and amend the complaint are denied; and it is further

ORDERED, that the remainder of this case against Howard Taps and Illumiluna, Inc. d/b/a PLI is stayed pending the resolution of the federal bankruptcy action.

ENTER,

DATED: January 3, 2013

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Joseph J. Maltese  
Justice of the Supreme Court