ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE : James J. Golia, JSC
Justice

IA Part 33

REDMAN VAN & STORAGE CO.,

Plaintiff(s),

– against –

LEON GUGEL AND METROPOLIS INTERNATIONAL, LLC,

Defendants(s)

Index Number 700257 2010

Motion Date November 15, 2012

Motion Cal. No. 107

Motion Seq. No. 5

2013 APR -3 AM 9:55 FILED QUEENS COUNTY CLERK

The following documents were e-filed and read on this motion by defendants pursuant to CPLR 3212 to dismiss the complaint on the ground plaintiff lacks standing to maintain this action under Business Corporation Law § 1312, or in the alternative, pursuant to CPLR 3212 to dismiss the complaint for failure to state a cause of action and upon a defense founded on documentary evidence, for an award of sanctions against plaintiff and its counsel pursuant to 22 NYCRR 130-1.1, and pursuant to CPLR 8501 to compel plaintiff to furnish security for costs; and this cross motion by plaintiff pursuant to 22 NYCRR 130-1.1 to impose sanctions against defendants and their counsel, to strike defendants' answer, or in the alternative, for summary judgment in favor of plaintiff or to allow certain discovery to be conducted notwithstanding the filing of the note of issue.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 28-31
Notice of Cross Motion - Affidavits - Exhibits	EF 33-40
Answering Affidavits - Exhibits	EF 41-50

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff, a Utah company which provides transportation and storage services, commenced this action alleging that it was hired by non-party GE Healthcare to transport certain medical

equipment from Bay City Vascular Center, located in Michigan, to GE Healthcare's headquarters in Utah. While the equipment was en route to Utah, plaintiff was allegedly contacted by defendant Gugel, who claimed his company, defendant Metropolis International LLC (Metropolis), owned the equipment, and was entitled to immediate possession of it. Plaintiff also alleges that based upon such misrepresentations, and certain confidential information provided to it by defendants, it was fraudulently induced by defendants to release the equipment to Atlas, defendants' shipper. Plaintiff further alleges that it was subsequently advised by GE Healthcare that defendants did not own the equipment and had no right to take possession of it, and that plaintiff should not have released the equipment without GE Healthcare's express authorization or consent. Because defendants sold the equipment to a third party, plaintiff became liable to GE Healthcare for the value of the equipment due to its release of the equipment to defendants without GE Healthcare's authorization or consent. Plaintiff alleges that it entered into an agreement with GE Healthcare, whereby it credited GE Healthcare, with amounts totalling $32,500.00, representing the value of the "diverted" equipment, as against monthly bills owing by GE Healthcare to plaintiff. Plaintiff asserted three causes of action in the complaint against defendants based upon tortious interference with contract, fraud and unjust enrichment, and seeks monetary damages, and attorneys' fees.

Defendants served an answer with various affirmative defenses.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination *(see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

First, defendants claim that plaintiff is a foreign corporation doing business in New York without authorization, and therefore lacks standing to maintain the action in New York State pursuant to BCL 1312. Defendants have confused standing with lack of legal capacity to sue (*see Digital Centre, S.L. v Apple Industries, Inc.*, 94 AD3d 571, 572 [1st Dept 2012]). However, even assuming defendants intended to assert as an affirmative defense in their answer (*see* CPLR 3018[b]; 3211[e]) that plaintiff lacks legal capacity to sue (*see Caprer v Nussbaum*, 36 AD3d 176 [2d Dept 2006] [although related, standing and lack of capacity to sue are distinct concepts]), they have failed to carry their burden of proving that plaintiff is a foreign corporation and that if one, its business activities in New York are " 'not just casual or occasional,' but 'so systematic and regular as to manifest continuity of activity in the jurisdiction" *(S & T Bank v Spectrum Cabinet Sales*, 247 AD2d 373 [2d Dept 1998] quoting *Peter Matthews, Ltd. v Robert Mabey, Inc.*, 117 AD2d 943, 944 [3d Dept 1986]).

Michael D. Anderson, the vice-president of plaintiff, testified at his deposition that plaintiff is a Utah company which has "hauling authority for New York" and trucks traveling into the State on a frequent basis. He also testified plaintiff's business address is in Utah, and that plaintiff has administrative offices there, and warehouses in Utah and Montana. He further testified that he is unaware of any office of plaintiff being located in any other city or state, and indicated plaintiff occasionally uses an agent in New York, but that the agent's facilities are located in Monroe Township, New Jersey. These contacts with New York are insufficient to constitute systematic and regular activities within the State. Defendants have failed to offer any additional evidence to prove plaintiff is doing business in this State. That branch of the motion by defendant to dismiss the complaint on the ground plaintiff lacks standing to maintain this action under Business Corporation Law § 1312 is denied.

In the complaint plaintiff alleges three causes of action, tortious interference with a contract, fraud and unjust enrichment. With respect to the cause of action for tortious interference with contractual relations, the elements of such a claim are: (1) a valid contract between the plaintiff and a third party; (2) that the defendant has knowledge of that contract; (3) the defendant's intentional inducement of the third party to breach; and (4) damages to the plaintiff resulting therefrom *(see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *Pacific Carlton Development Corp. v 752 Pacific, LLC*, 62 AD3d 677 [2009]). Here plaintiff has failed to allege or demonstrate that non-party GE Healthcare was induced to breach the contract between GE Healthcare and plaintiff. Therefore, the branch of the motion by defendants for summary judgment dismissing the claim for intentional interference with contractual relations is granted for failure to state a cause of action.

With respect to plaintiff's claim of fraud, elements of fraud in the inducement are misrepresentation of a material existing fact, falsity, scienter, reliance and injury *(see Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 407 [1958]; *Urstadt Biddle Props., Inc. v Excelsior Realty Corp.*, 65 AD3d 1135 [2d Dept 2009]; *Urquhart v Philbor Motors, Inc.*, 9 AD3d 458, 458-459 [2d Dept 2004]).

Plaintiff asserts that defendant Metropolis had leased the equipment to Bay City Vascular, but at the expiration of the lease, sold it to Bay City Vascular for $35,000.00. Plaintiff further asserts that Bay City Vascular, in turn, traded-in the equipment for a $35,000.00 credit towards the purchase price of new equipment Bay City Vascular bought from GE Healthcare. Plaintiff contends that by the time GE arranged to have the traded-in equipment shipped to Utah, defendants no longer had any right to take possession of the equipment, and used deceit in convincing plaintiff to divert the shipment to them. Plaintiff asserts defendants presented information as to the equipment's model and serial numbers, the "STI Tracking" number on the bill of lading, and the city of the shipment's origin (Bay City, Michigan), and such information was illicitly obtained from GE Healthcare.

Defendants deny that Metropolis transferred ownership of the equipment to Bay City Vascular, or issued any bill of sale or other document transferring title to the equipment to Bay City Vascular, GE Healthcare or plaintiff. In addition, defendants assert that plaintiff has failed to allege any facts demonstrating plaintiff suffered damages as a consequence of the alleged fraudulent misrepresentations.

Plaintiff's allegations are sufficient, and in requisite detail (CPLR 3016[b]) to state a cause of action for fraud, and its claim that it suffered damages as a result of the fraud is akin to claim of equitable subrogation, i.e. it is entitled to recoup the monies it credited its customer, GE Healthcare, as a result of the fraud allegedly practiced upon it by defendants.

Defendants have failed to make a prima facie showing of their entitlement to summary judgment dismissing the fraud claim. They have failed to prove they still owned the equipment, and had the right to possession of it, on the day it was released to Atlas. Defendants have failed to explain the purpose of the payment made by Bay City Vascular to defendant Metropolis pursuant to the cancelled check dated June 10, 2009 in the amount of $35,000.00 on the account of Bay City Vascular, P.C. Defendants also have failed to present evidence that GE Healthcare authorized or consented to the release of the equipment to Metropolis. Nor have defendants shown that plaintiff was not damaged as a result of their alleged fraud. Defendants have failed to show plaintiff did not credit GE Healthcare with the amount of $32,500.00 in settlement of a claim by GE Healthcare against plaintiff for breach of contract as a result of the improper release of the equipment to defendants. Therefore, the branch of the motion by defendants for summary judgment dismissing the cause of action for fraud asserted against them is denied.

To successfully plead unjust enrichment, "[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citations omitted]). "Although privity is not required for an unjust enrichment claim" (*id.*, citing *Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]), "a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part" (*Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 408 [1st Dept 2011], citing *Mandarin Trading*, 16 NY3d at 182). Plaintiff has failed to state a viable cause of action for unjust enrichment. Plaintiff has not alleged or demonstrated the existence of any connection or relationship between plaintiff and defendants sufficient to support the cause of action for unjust enrichment, or to warrant a finding that defendants unjustly received something of value at the expense of plaintiff (*see Sperry v Crompton Corp.*, 8 NY3d at 215 [2007]). Therefore, the branch of the motion by defendants for summary judgment dismissing the cause of action for unjust enrichment asserted against them is granted for failure to state a cause of action.

Based on the foregoing, the branch of plaintiff's cross motion for summary judgment on the first and third causes of action are denied. Additionally, plaintiff has failed to establish its entitlement to summary judgment on its second cause of action for fraud claim. Plaintiff has not demonstrated that Bay City Vascular purchased the equipment from Metropolis and transferred ownership of it to GE Healthcare before its release to Atlas, or that GE Healthcare did not consent or authorize the release of the equipment to defendant Metropolis. Plaintiff has failed to show the unsigned deposition transcripts of Chad Kendell, the vice president of sales for the United States and Canada surgery business of GE Healthcare, and defendant Leon Gugel, submitted in support of its cross motion were previously forwarded to Kendell and Gugel for their review pursuant to CPLR 3116 (a). In addition, the transcript of Mr. Kendell does not contain a proper certification

pursuant to CPLR 3116 (b). Thus, neither transcript is in admissible form (*see* CPLR 3116; *see also Moffett v Gerardi*, 75 AD3d 496 [2d Dept 2010]; *Marmer v IF USA Express, Inc.*, 73 AD3d 868 [2d Dept 2010]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901 [2d Dept 2008]; *see generally Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008 [2d Dept 2008]), and cannot be considered on the cross motion by plaintiff for summary judgment.

In addition, the affidavits of Messrs. Anderson and Kendell, and the affidavit of Ranielle Boettner were signed and notarized outside of the State of New York, and are not accompanied by the required certificates of conformity (CPLR 2309[c]), and plaintiff has made no attempt to rectify this defect (*see* CPLR 2309[c]). Such affidavits, therefore, likewise may not be considered as evidence in connection with the cross motion by plaintiff for summary judgment. It is unclear whether the statements of Mortgages. Boettner, an X-ray technician and doctors' assistant, regarding the purchase of the equipment by Bay City Vascular from Metropolis and trade-in of it to GE Healthcare, were made within the scope of her authority as a Bay City Vascular employee. The copy of the "Rental Buy-Out Contract" dated May 19, 2008, moreover, is unsigned and notably calls for a total sales price of $70,000.00. Thus, the cancelled check of Bay City Vascular, without more, does not prove, that Bay City Vascular purchased the equipment from defendant Metropolis prior to the time the equipment was picked up by Atlas, or that GE Healthcare did not authorize or consent to release of the equipment to defendant Metropolis.

Therefore, the branch of the cross motion by plaintiff for summary judgment in its favor as against defendants on the second cause of action for fraud is denied.

With respect to the branch of the motion by defendants for an order directing plaintiff to furnish security for costs, CPLR 8501(a) provides that upon motion by the defendant, the court shall order the plaintiffs to provide security for costs where none of the plaintiffs are a domestic corporation, a foreign corporation licensed to do business in the state of New York or a resident of the state of New York at the time the motion is made. Insofar as plaintiff is not a resident of New York, CPLR 8503 provides that such security is five hundred dollars ($500) in counties within the City of New York "or such greater amount as shall be fixed by the court." Since no argument is made by plaintiff or defendants that the amount posted should deviate from the amount provided by statute, the amount that plaintiff must post is $500.00. This sum shall be posted within ten (10) days after service with a copy of this order with notice of entry. In accordance herewith, it is hereby:

ORDERED that plaintiff shall post security for costs pursuant to CPLR 8501(a) in the amount of $500.

That branch of the motion by defendants to impose sanctions, and that branch of the cross motion by plaintiff to impose sanctions are denied (22 NYCRR 130-1.1).

Turning now to the remaining branches of plaintiff's motion, "a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR 3211[b]). "Upon a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any

doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]; *see Amerada Hess Corp. v Town of Southold*, 39 AD3d 442 [2d Dept 2007]; *Warwick v Cruz*, 270 AD2d 255 [2d Dept 2000]). The movant bears "the burden of demonstrating that those defenses [a]re without merit as a matter of law" (*Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]).

The branch of the cross motion by plaintiff to strike defendants' answer is granted only to the extent of striking the first, second, fifth and sixth affirmative defenses asserted by defendants based upon lack of privity of contract, the expiration of the applicable statute of limitations, failure to allege facts with the specificity required pursuant to CPLR 3016(b) and (f), and defective verification. Lack of privity is not a defense to a claim based upon fraud. The applicable statute of limitations for a fraud claim is six years (*see* CPLR 213). Plaintiff commenced this action within six years of the alleged fraud and as discussed earlier, the complaint sufficiently states a cause of action for fraud. That the complaint herein is unverified is of no moment. CPLR 3020(b)(1), by its terms, does not mandate verification of the initial pleading, but rather requires verification of the answer when the complaint charges the defendant with fraud affecting a right or property of another (*see* Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3020:5). Plaintiff has failed to establish the third and fourth affirmative defenses asserted by defendants based upon lack of standing and lack of an assignment of any claim by GE Healthcare are without merit.

With respect to that branch of the motion by plaintiff for leave to conduct discovery after the filing of the note of issue, the court notes that the case is scheduled for trial on April 25, 2013. Nevertheless, in view of the recently developed facts regarding the purported sale of the equipment to Bay City Vascular, plaintiff should be allowed an opportunity to conduct additional discovery on the issue of whether defendant Metropolis sold the equipment to Bay City Vascular. That branch of the motion by plaintiff for leave to conduct discovery after the filing of the note of issue is granted to the extent of granting plaintiff leave to conduct additional discovery on the issue of whether defendant Metropolis sold the equipment to Bay View Vascular and defendant Gugel is directed to appear for a further deposition within 30 days after entry and service of a copy of this order, and the parties are directed to complete discovery, including any nonparty depositions, including of Bay City Vascular or GE Healthcare, within 60 days after the entry of the order.

Accordingly, defendant's motion is granted only to the extent that the plaintiff's causes of action for tortious interference and unjust enrichment are dismissed and plaintiff is directed to pay $500.00 in costs pursuant to CPLR 8501(a), all other aspects of defendant's motion are denied. The cross motion by plaintiff is granted, as set forth above, only to the extent that the first, second, fifth and sixth affirmative defenses in defendants' answer are stricken and the plaintiff is granted leave to conduct post note of issue discovery. All other branches of plaintiff's cross motion are denied.

This constitutes the order of the court.

Dated: March 22, 2013

James J. Golia, J.S.C.