

**Bianchi v Mille**

2014 NY Slip Op 31390(U)

May 20, 2014

Supreme Court, Suffolk County

Docket Number: 27406-2011

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY



Present:

**Hon. Emily Pines**

J. S. C.

Motion Date: 02-28-2013  
Submit Date: 03-04-2014  
Motion No.: 003 MOTD

[ ] Final  
[ x ] Non Final

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**ALBERT BIANCHI, PHILIP INCORVIA,  
RICHARD BIANCHI and KAREN BIANCHI,  
individually and derivatively and in the right of  
FRAGRANCE SYSTEMS INTERNATIONAL,  
INC.,**

**Plaintiffs,**

**-against-**

**LAURENCE MILLE, DIANE BREIDENBACH,  
COSMETIC CONCEPTS, INC. and FRAGRANCE  
SYSTEMS INTERNATIONAL, INC.,**

**Defendants.**

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**ORDERED** that the defendants' motion for summary judgment (Mot. Seq. 003) is granted in part and denied in part as set forth below.

The plaintiffs, Albert V. Bianchi, Philip Incorvia, Richard Bianchi and Karen Bianchi ("Plaintiffs") collectively own 34.5% of the outstanding shares of stock in the defendant

Fragrance Systems International, Inc. (“FSI”). Plaintiffs commenced this shareholders’ derivative action against the defendants Laurence Mille (“Mille”) and Diane Breidenbach (“Breidenbach”), each owners of 32.75% of the outstanding shares in FSI, for breach of fiduciary duty, unjust enrichment, fraud, breach of contract (shareholders’ agreement), and an accounting. Plaintiffs also assert a cause of action against defendant Cosmetic Concepts, Inc. (“Cosmetic Concepts”), a separate corporation owned by Mille and Breidenbach, for aiding and abetting Mille and Breidenbach in breaching their fiduciary duties to Plaintiffs. Plaintiffs seek compensatory and punitive damages, as well as equitable relief. Mille, Breidenbach and Cosmetic Concepts now move for summary judgment dismissing the Verified Complaint. Plaintiffs oppose the motion.

#### *Factual Background*

FSI was formed in 1995. FSI’s Shareholders Agreement sets forth that its purpose is the “manufacturing, selling and distributing of a fragrance/perfume products” as described in the Shareholders Agreement as “a refillable perfume dispenser with a conventional spring loaded applicator, which dispenser is refilled with a replaceable leak proof cartridge.” Mille and Breidenbach assigned all of their rights, title and interest to a patent for the dispenser to FSI. The Shareholders Agreement provides, in relevant part:

10. The day to day operation of said Corporation shall be the sole and exclusive duty and responsibility of LAURENCE MILLE and DIANE BREIDENBACH. This shall include but are not limited to obtaining purchase orders, payments, keeping of financial accounts and records, inventory, supervisor of manufacture disbursements and production.

11. All other decisions, policy or action by or on behalf of the Corporation shall require approval of at least 71% approval of the outstanding common stock of the Corporation.

\* \* \*

13. Major expenditure and/or extraordinary expenditures in excess of TWO THOUSAND (\$2,000,00) DOLLARS for any individual item must be and shall require written disclosure to be approved by at least 71% of the voting shares of common stock. Such approval shall not be unreasonably withheld.

In their Verified Complaint the Plaintiffs allege, among other things, that FSI's products include, but are not limited to, cosmetic, lip gloss and fragrance dispensers and packaging, and that Mille and Breidenbach developed other patents related to cosmetic and fragrance products which they assigned to FSI. Plaintiffs allege that in October 2009 they discovered that Mille and Breidenbach had obtained patents for other items (cosmetic dispenser, lip applicator, lip product container, cosmetic applicator, and lip product applicator) which Plaintiffs claim are the property of FSI, and that Breidenbach and Mille assigned those patents to Cosmetic Concepts, a separate company they owned, to develop, market and sell those products. Plaintiffs also allege that Mille and Breidenbach used FSI's assets and resources, including FSI's physical offices, warehouses, patents and intellectual property, to fund the start-up and operations of Cosmetic Concepts, and spent time working to benefit Cosmetic Concepts while they should have been devoting their full-time efforts to the management of FSI. Plaintiff further allege that Mille and Breidenbach looted, squandered and wasted corporate assets on personal expenses and expenses of Cosmetic Concepts, and gave themselves unauthorized increases in compensation and benefits, including increased pension contributions. As stated above, the Verified Complaint asserts causes of

action for breach of fiduciary duty, unjust enrichment, fraud, breach of contract (shareholders' agreement), an accounting, and aiding and abetting breach of fiduciary duty.

In support of their motion for summary judgment, the Defendants submit, among other things, affidavits from Breidenbach and Mille. Breidenbach states, among other things, that she and Mille, her husband, own 65.5% of FSI's shares. She asserts that since FSI's inception she and Mille were the company's only employees and that they each worked approximately 50-60 hours per week for FSI in the promotion and sale of the perfume dispenser, ultimately resulting in distributions to Plaintiffs totaling more than \$2,200,000.00. In 2001, Breidenbach and Mille offered to license to FSI their rights to three other devices ("Improved Roll-On Applicator," "Vial for Cosmetics, Fragrances or Other Products," and a "Dual Cosmetic Container") for which they held patents ("Other Patents"), in exchange for royalty payments. Ultimately, in exchange for an assignment of the Other Patents to FSI, the FSI shareholders agreed to pay Breidenbach and Mille a percentage of revenue from gross sales on products incorporating the technology covered by the Other Patents.

Additionally, Breidenbach states that she and Mille applied for a utility patent for an applicator for lip products in February 2000, and they subsequently formed Cosmetic Concepts in 2001 to develop the lip products and applicator. They were issued a utility patent for the applicator mechanism in December 2002, and a design patent for the applicator in August 2005 ("Lipstick Patents"). Breidenbach and Mille also formed Exude, Inc. ("Exude") to market the new lip product applicator. Breidenbach claims that since she and Mille invented the lipstick applicator in 2000, they invested approximately \$3,000,000.00 of their after-tax personal income from FSI to pay others for product development, promotion, manufacture and warehousing for Cosmetic Concepts/Exude because they were devoting 50-60 hours each week to the business of

FSI. She states that since Cosmetic Concepts/Exude were formed, she and Mille have spent an average of one hour per week on the business of those entities. According to Breidenbach, separate books and records are maintained for FSI and Cosmetic Concepts. She denies that she or Mille ever applied the funds of either corporation to pay the expenses or carry out the business of the other. She states that except for the perfume dispenser patent upon which FSI was founded, she and Mille used their personal funds to finance the invention, patenting and development of all other products, including the lipstick applicator sold by Cosmetic Concepts/Exude.

Breidenbach states that in 2005 the FSI shareholders approved the implementation of a defined benefit (pension) plan for its employees (Mille and Breidenbach), which was done through Pension Design Services. Since that time, FSI has contributed to the plan in accordance with actuarial valuations received annually which proposed minimum and maximum contributions to the plan. She states that FSI has never contributed more than the maximum level as proposed by the actuary for any given year.

Mille also submits an affidavit in support of Defendants' motion for summary judgment in which he essentially adopts the facts set forth in Breidenbach's affidavit. Mille adds that the lipstick applicator developed by Cosmetic Concepts has not generated a profit and would likely require millions of dollars in additional investment before any profits could be generated.

Defendants argue, among other things, that they are entitled to summary judgment because the Shareholders Agreement explicitly describes the one and only invention offered by Mille and Breidenbach in return for Plaintiffs' investment, the perfume dispenser. Thus, Defendants contend that FSI has no right to the patent for the lipstick applicator. They also argue

that they spent \$3,000,000.00 of their own money, not FSI funds, in developing the lipstick applicator, and that they did not otherwise misuse FSI funds. Breidenbach and Mille contend that they fulfilled their obligation to manage the day-to-day operations of FSI by working an average of 50-60 hours per week each, and that there is no agreement obligating them to devote their efforts exclusively to FSI. With regard to the pension, Defendants argue that it was funded within the ranges proposed by the actuary and, in any event, excess funds would be returned to FSI and not paid to Breidenbach and Mille as benefits under the pension plan. Additionally, Defendants contend that they have provided Plaintiffs with extensive financial documentation constituting an accounting of FSI's finances which do not reflect misuse of corporate funds.

In opposition to Defendants' motion for summary judgment, the Plaintiffs contend that the "[D]efendants used FSI's assets and infrastructure to develop new inventions and patents and run their separate entities while serving as FSI's sole employees and officers, all in violation of their fiduciary duties" and "grant[ed] themselves annual increases in compensation" and "cause[d] FSI to deposit inflated and extraordinary contributions into their pension plan, from which they solely benefitted at a cost to the Minority Shareholders without the necessary disclosure and approval."

Plaintiff Philip Incorvia submits an affidavit in opposition in which he states, among other things, that the provision of the Shareholders Agreement requiring approval of at least 71% of the voting shares of common stock for certain decisions, policy or action by FSI was negotiated to ensure that the minority shareholders could and would participate in the operation of FSI. Incorvia states that Breidenbach and Mille developed other patents "at the very time they were working for FSI and using FSI's office space, computers, equipment, phone and utility

service, or more significantly, that they formed a separate corporation to hold title to said patents.” Incorvia contends that the formation of Cosmetic Concepts and Exude by Breidenbach and Mille to develop and market a lipstick applicator was in competition with FSI’s business. Incorvia states that FSI paid \$750.00 per month to a limited liability company owned by Breidenbach and Mille as rent for use of their home as a home office, while Cosmetic Concepts did not make such payments. Incorvia also points to Breidenbach’s deposition testimony that FSI paid for a portion of the utilities at the home office but that Cosmetic Concepts did not, as well as testimony confirming use of a car leased by FSI and a computer owned by FSI by Breidenbach for the business of Cosmetic Concepts. Plaintiffs seek to recover for the alleged misappropriation and use of these assets of FSI, as well as other expenditures to FSI for non-FSI purposes. Incorvia contends that Breidenbach and Mille hid the development of the other products from the Plaintiffs because they knew they were not permitted to do so while working for FSI. Citing to FSI’s own records, Incorvia contends that from 2008-2012, the Defendants caused FSI to contribute almost \$600,000 more than the total recommended contributions by the actuarial valuation, without advising the Plaintiffs or seeking approval in accordance with the Shareholders Agreement.

#### *Discussion*

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce

evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2<sup>nd</sup> Dept. 1996]). The key for the court on a motion for summary judgment is issue finding, not issue determination, and the court should not determine issues of credibility (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *Cerniglia v. Loza Rest. Corp.*, 98 AD3d 933, 935 [2d Dept. 2012]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

Directors and majority shareholders of a corporation have an obligation to all shareholders to adhere to fiduciary standards of conduct and to exercise their responsibilities in good faith when undertaking any corporate action (*Alpert v 28 Williams Street Corp.*, 63 NY2d 557, 568 [1984]; *Collins v Telcoa Inter. Corp.*, 283 AD2d 128 [2d Dept. 2001]). The fiduciary's obligations include fairness and candor as well as good and prudent management of the corporation (*Alpert*, 63 NY2d 557). A corporate officer or director may not assume and engage in the promotion of personal interests which are incompatible with the superior interests of the corporation (*Yu Han Young v Chiu*, 49 AD3d 535 [2d Dept. 2008]). The equitable remedy of an accounting based on a claimed breach of fiduciary duty is available to (a) compel a person in possession of financial records to produce them, (b) demonstrate how money was expended and (c) compel him or her to return pilfered funds in his or her possession (*Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 653 [2011]).

“The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform,

(4) resulting damage” (2 NY PJI2d 4:1, at 676 [2013]).

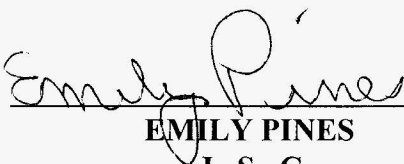
Here, the conflicting factual assertions in the affidavits of the parties submitted in support of and in opposition to the Defendants’ motion for summary judgment demonstrate the existence of material issues of fact as to whether Defendants breached their fiduciary duties and/or breached the Shareholders Agreement. Accordingly, Defendants’ motion for summary judgment is denied to the extent that it seeks dismissal of the first (breach of fiduciary duty), second (breach of fiduciary duty), fifth (aiding and abetting breach of fiduciary duty), sixth (breach of Shareholders Agreement) and eighth (accounting) causes of action.

However, Defendants’ motion is granted to the extent that it seeks dismissal of the third (unjust enrichment), fourth (fraud), and seventh (unjust enrichment) causes of action. There is no dispute that a valid and enforceable contract (Shareholders Agreement) existed between the parties. Therefore, recovery in quasi-contract may not be obtained (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009]; *Whitman Realty Group, Inc. v. Galano*, 41 AD3d 590, 593 [2d Dept 2007]), and the unjust enrichment causes of action are dismissed. A breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated, and the legal duty must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected with and dependent upon the contract (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 [1982]). “[A] misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud” (*Yenrab, Inc. v. 794 Linden Realty, LLC*, 68 AD3d 755, 758 [2d Dept. 2009] quoting *WIT Holding Corp. v. Klein*, 282 AD2d 527, 528 [2d Dept. 2001]). Where, as here, a fraud claim is based on an alleged

breach of a contractual duties, and the allegations with respect to the purported fraud do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie (*Fromowitz v W. Park Assocs., Inc.*, 106 AD3d 950, 951 [2d Dept 2013]). Accordingly, the cause of action for fraud is also dismissed.

This constitutes the **DECISION** and **ORDER** of the Court.

**Dated:** May 20, 2014  
Riverhead, New York

  
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**EMILY PINES**  
**J. S. C.**

Final  
 Non Final