Growbright Enters., Inc. v Barski
2014 NY Slip Op 31805(U)
July 7, 2014
Supreme Court, New York County
Docket Number: 650596/2010
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---x

GROWBRIGHT ENTERPRISES, INC., | Index No.: 650596/2010

Plaintiff, | Motion Seq. Nos. 005 & 006

-against-

SAM BARSKI, SAMTASTIC INDUSTRIES, INC., and IMPULSE INDUSTRIES, INC.,

Defendants.

---x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION[1]

Plaintiff, Growbright Enterprises, Inc.'s ("plaintiff") commenced this action against defendants Sam Barski ("Barski"), Samtastic Industries, Inc. ("Samtastic") ("Samtastic," with Barski the "Samtastic defendants"), and Impulse Industries, Inc. ("Impulse") (collectively, the "defendants") to recover monies allegedly owed for goods plaintiff shipped to defendants.

Factual Background[2]

Plaintiff, a health and beauty aids wholesaler, alleges that Barski placed an order for Impulse for certain goods. Based on Barski's order, plaintiff "consigned" to Impulse various "Unilever" products pursuant to an invoice dated December 15, 2009 (the "Unilever invoice"), and "sold" "Crest" products to Impulse pursuant to an invoice dated December 29, 2009 (the "Crest invoice"). Payment under the Crest invoice was due within 30 days.

When defendants allegedly failed to pay plaintiff for both invoices, plaintiff commenced

---

[1] Motion sequence 005 and 006 are consolidated for joint disposition and decision herein.

[2] Unless indicated, the background facts and parties' arguments in the Interim Decision on motion sequence 005 and 006 dated September 7, 2012 are incorporated and made part of this decision. Familiarity with the facts and background is therefore assumed.

this action for breach of contract against Impulse (first and second causes of action), unjust enrichment against all defendants (third cause of action), liability based on alter ego against all defendants (fourth cause of action) and conversion against all defendants (fifth cause of action).

Defendants now move for summary judgment pursuant to CPLR §3212: (i) in favor of all defendants on the ground that plaintiff lacks standing to sue pursuant to CPLR §3211(a)(3) (lack of capacity to sue);[3] (ii) partial summary judgment in favor of Barski pursuant to CPLR §3211 (a)(7); and (iii) summary judgment dismissing the complaint against Impulse pursuant to CPLR §3211(a)(1) and (7) as Impulse never received the goods in question.[4]

In turn, plaintiff moves for summary judgment against all defendants on all claims, and to dismiss Impulse's breach of contract counterclaim.

Discussion

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 eliminate any material issues of fact" (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). However, the moving party must

---

[3] This Court's second Interim Decision, dated October 22, 2012, found, after a hearing, that as to "the issue of [plaintiff's] standing based on the assignment," "there was a valid assignment from Trade Deals to Growbright." This decision was unanimously affirmed by Appellate Division's decision, dated March 20, 2014. Therefore, the branch of defendants' motion to dismiss the complaint for lack of standing pursuant to CPLR 3211(a)(3) (sequence 005) is moot.

[4] Although defendants' notice of motion seeks summary judgment pursuant to 3211 as to Impulse and Barski, the motion papers expands its request to dismiss almost all of the causes of action in the complaint. And, plaintiff's opposition addresses all of the relief defendants' seeks.

demonstrate entitlement to judgment as a matter of law (*see Zuckerman, supra*), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Johnson v. CAC Business Ventures, Inc.*, 52 A.D.3d 327, 859 N.Y.S.2d 646 [1st Dept 2008]; *Murray v. City of New York*, 74 A.D.3d 550, 903 N.Y.S.2d 34 [1st Dept 2010]).

Defendants' Motion For Summary Judgment: 005

First and Second Causes of Action: Breach of Contract Against Impulse

The elements of a claim for breach of contract are (1) the existence of a contract, (2) due performance of the contract by claimant, (3) breach of the contract by the other party, and (4) damages resulting from the breach (*Harris v. Seward Park Housing Corp.,* 79 A.D.3d 425, 426, 913 N.Y.S.2d 161 [1st Dept 2010]; *Morris v. 702 East Fifth Street HDFC*, 46 A.D.3d 478, 850 N.Y.S.2d 6 [1st Dept 2007]; *Renaissance Equity Holding, LLC v. Al-An Elevator Maintenance Corp*., 36 Misc. 3d 1209(A), 954 N.Y.S.2d 761 (Table) [Sup. Ct., New York County 2012]).

The two invoices which form the basis of the first and second causes of action clearly identify Impulse as the entity to which plaintiff sold the subject goods. "Actual authority, whether express or implied, 'exists when an agent has the power to do an act or to conduct a transaction on account of the principal which, with respect to the principal, he is privileged to do because of the principal's manifestation to him'" *(Ryan v. Prescott*, 38 Misc. 3d 1234(A), 969 N.Y.S.2d 806 (Table) [Sup. Ct., Albany County 2013] *citing Forest Park Coop., Inc., v. Commonwealth Land Tit. Ins. Co.*, 2011 N.Y. Slip Op 31352U at *10–11 [Sup Ct, Queens County 2011], *quoting Minskoff v. American Exp. Travel Related Servs. Co.*, 98 F3d 703, 708 [1996] [quoting Restatement (Second) of Agency § 7 comment a (1958)]). A "corporation can only act through its directors, officers and employees. They are the conduit through which the

corporation is given being and from which its power to act and reason springs" (*Ryan v. Prescott, supra, citing Goldenberg v. Bartell Broadcasting Corp.*, 47 Misc.2d 105, 108 [Sup Ct, New York County 1965]). Thus, in order for the corporation sued herein to be bound, the proponent of the contract must establish the authority of the director, officer or employee to enter into the contract (*Ryan v. Prescott, surpa, citing Booth v. Litchfield*, 201 N.Y. 466 [1911] and *Sponge Rubber Prods. Co. v. Purofied Down Prods. Corp.*, 281 A.D. 380 [1st Dept 1953], affd 306 N.Y. 776 [1954]). Here, defendants established that neither Barski nor Samtastic were directors, officers or employees with actual authority to bind Impulse to the subject invoices. In this regard, plaintiff failed to raise an issue of fact.

However, plaintiff raised an issue of fact as to whether Barski had *apparent* authority to bind Impulse.

"Essential to the creation of apparent authority are words *or conduct* of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority. 'Rather, the existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal—not the agent'" (*Hallock v. State*, 64 N.Y.2d 224, 474 N.E.2d 1178 [1984] *citing Ford v. Unity Hosp.*, 32 N.Y.2d 464, 473, 346 N.Y.S.2d 238, 299 N.E.2d 659; see, also, Restatement, Agency 2d, § 27) (emphasis added)).

Defendants' claim that there is no documentary evidence that either Samtastic or Barski had authority to bind Impulse to any agreement with plaintiff is insufficient to defeat the first and second causes of action. Defendants submit the affidavit of Impulse's sole owner, Joel Weiss

("Weiss"), who attests that he did not have any dealings with Growbright, but that "all deals were with Tradedeals";[5] Impulse did not receive the goods; he did not speak with anyone at Tradedeals regarding the goods at issue; and he did not speak to anyone in connection with the two invoices at issue. He also attests that "Samtastic through its representative Sam Barski" did not have authority to bind Impulse to any obligations concerning the goods at issue. Barski also attests that he was never authorized to execute contracts on behalf of Impulse regarding the goods under the subject two invoices.

Nonetheless, Barski testified at his deposition, in regards to previous orders: *"I represented Impulse at the time to make sure everything we ordered comes in a timely manner with the correct dating. So anything that happened, I was the broker, the guy in the middle. I was responsible to deal with the problem." (*EBT, p. 101). Defendants' moving papers acknowledge that "Prior to this [subject] transaction[s], although Impulse had entered into several independent transactions with Tradedeals through which it would agree to purchase goods from Tradedeals, *Impulse in each and every one of those prior instances would immediately (or soon after purchase)" pay the "full amount*" for those goods (Motion, ¶75). Plaintiff's representative Jayaveerapandian ("Jay") Shunmugavel ("Shunmugavel") testified that *during plaintiff's course of business with Impulse*, it "never spoke to anybody else" other than Barski. Therefore, given that Barski's prior orders on behalf of Impulse were paid by Impulse, Weiss attested that "Prior deals between Impulse and Tradedeals were invoiced and *paid in full by Impulse* immediately or soon thereafter," Shunmugavel testified that he only dealt with Barski in relation to Impulse's orders, who promised to pay for the goods, it cannot be said, as a matter

---

[5] It bears noting that this Court found that there was a valid assignment from Trade Deals to Growbright.

of law, that Barski lacked apparent authority to bind Impulse as to the subject two invoices. That these prior transactions were "ratified" by payment after the order does not eliminate issues of fact as to whether Barski had apparent authority to bind Impulse under the two orders, at the time they were made (*see Advance Magazine Publishers Inc. v. Mastour Galleries, Inc.*, 19 Misc.3d 1120(A), 862 N.Y.S.2d 812 (Table) [New York City Civ.Ct. 2008] ("it is inherently a factual question whether plaintiff reasonably relied on the authority of Joseph Mastour to place the advertisement in the magazine based on his having placed one previous advertisement in the magazine which had been paid for")).

Plaintiff also raised an issue of fact as to whether there was a joint venture between Samtastic and Impulse such that they are jointly and severally liable for payment under both invoices. A joint venture is "an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge" (*Forman v. Lumm*, 214 A.D. 579, 583, 212 N.Y.S. 487 [1st Dept 1925]). "Among the *indicia* of a joint venture are the intention of the parties and acts manifesting their intent to be associated as joint venturers, such as sharing of profits and losses, and ownership of partnership assets" (*American Business Training Inc. v. American Management Ass'n*, 50 A.D.3d 219, 851 N.Y.S.2d 491 [1st Dept 2008]; *Richbell Info. Servs. v. Jupiter Partners*, 309 A.D.2d 288, 298, 765 N.Y.S.2d 575 [1st Dept 2003]).

Weiss testified that Barski would find and buy the product under his account, and if "I put up the money, I would [place] it under my company [Impulse] and give up part of the profit." When asked if he had a joint venture with Barski, Weiss replied "Exactly" (EBT, p. 9). Weiss also stated: "We had certain things that we bought, and we had that relationship that, if you bring

me the deal then you would get 25 percent . . . If a deal is going bad or sour, I would expect him to cough up the money. You get 25 percent of the gains, you get 25 percent of the loss." (EBT, p. 14). Barski testified, "When I brought him this deal on paper and I said: Listen, we are going to make a contract with Jaya [plaintiff], we are going to give him X amount of containers, every money, it's going to roll in. Before he even shipped the container, we speculated that this is the profit we're going to make based on the orders we're going to bring in and that we lost. (EBT, pp. 79-80).

And, defendants' claim that Impulse did not take goods on consignment, which was contrary to Impulse's standard business practice is insufficient to warrant dismissal of the breach of contract claims.

Further, that Impulse did not receive the goods does not dispose of plaintiff's breach of contract claim against Impulse, as the invoices do not contain any indication that payments due thereunder were conditioned upon Impulse's receipt of the goods.

Therefore, dismissal of the first and second causes of action for breach of contract against Impulse is denied.

Third Cause of Action: Unjust Enrichment Against Barski and Impulse[6]

Plaintiff alleges that defendants have realized and may continue to realize substantial sums of money from its sales of the Unilever and Crest goods, and that they have been unjustly enriched since they have not paid for these items. In opposition to dismissal, plaintiff clarifies its

[6] Defendants concede that plaintiff states a cause of action for unjust enrichment against Samtastic, which received the goods in question. Further, defendants' contention in reply, that plaintiff is foreclosed from summary judgment on its unjust enrichment claim against Samtastic by failing to move for such relief, is unsupported by any caselaw, and defeated by the fact that plaintiff moved for summary judgment subsequent to defendants' motion.

claim against Samtastic, alleging that after selling the goods to Impulse, Samtastic sold the goods and retained the proceeds without tendering payment to plaintiff.

In order to prevail on a claim of unjust enrichment, a plaintiff must show that he or she "conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor" (*Nakamura v Fuji*, 253 A.D.2d 387, 390 [1st Dept 1998]). The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Mandarin Trading Ltd. v. Wildenstein*, 65 A.D.3d 448, 884 N.Y.S.2d 47 [1st Dept 2009]; *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215 [2007] [citation and internal quotation marks omitted]; *see also Dragon Inv. Co. II LLC v. Shanahan*, 49 A.D.3d 403, 405 [1st Dept 2008]; *Korff v Corbett,* 18 A.D.3d 248, 251 [1st Dept 2005], *quoting Wiener v Lazard Freres & Co.*, 241 A.D.2d 114, 119 [1st Dept 1998]; *Nakamura v Fujii et al., supra*).

Plaintiff does not address defendants' request for dismissal of this claim against Barski and Impulse, and the record fails to show that either Impulse or Barski (individually) received the goods in question. Therefore, the third cause of action for unjust enrichment is severed and dismissed as against Barski and Impulse.

Fourth Cause of Action: Alter Ego Liability and Corporate Veil Piercing

Plaintiff's fourth cause of action alleges that the Unilever and Crest goods were delivered to Impulse and invoices for same were issued to Impulse. Allegedly, Samstastic is the alter ego of Impulse, and that Samtastic's CEO, Barski, advised plaintiff that Samtastic was responsible for the invoices. However, neither Samtastic nor Impulse could pay the invoices due to their lack of funds. Plaintiff alleges that both Impulse and Samtastic are inadequately capitalized to satisfy

their debts, that Barski exercised dominion and control over Impulse's and Samtastic's operations and affairs, including the transactions at issue, and his apparent transfer of assets to and from these companies rendered the companies unable to pay their debts to plaintiff. Thus, all three defendants are jointly liable and that the corporate veils should be pierced.

In order to pierce the corporate veil, plaintiffs must show that (1) the defendant(s) exercised complete domination and control with respect to the transaction(s) attacked, and (2) such domination was used to commit a fraud or wrong against them (*Teachers Ins. Annuity Ass'n of America v. Cohen's Fashion Optical of 485 Lexington Ave. Inc.*, 45 A.D.3d 317, 847 N.Y.S.2d 2, 2007 [1st Dept 2007] *citing Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 623 N.E.2d 1157 [1993]). Factors to be considered in determining whether the defendant "has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" *(D'Mel & Associates v. Athco, Inc.*, 105 A.D.3d 451, 963 N.Y.S.2d 65 [1st Dept 2013] *citing East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 A.D.3d 122, 127, 884 N.Y.S.2d 94 [2d Dept. 2009] [internal quotation marks omitted], affd. 16 N.Y.3d 775, 919 N.Y.S.2d 496, 944 N.E.2d 1135 [2011]).

As to dismissal of this cause of action, defendants established through the invoices, emails from Barski, and deposition testimonies of plaintiff's representative Shunmugavel, and Barski that there is no evidence of any of the above factors. Indeed, Shunmugavel denied being aware of any documents concerning Barski's dominion and control over Impulse or Samtastic (EBT, pp. 138, 192), and denied any knowledge of any connection between Barski and Impulse

or of any transfers of money or corporate transactions between Impulse and Samtastic (EBT, pp. 136-137, 139). And, Barski attests that he never held any ownership interest in Impulse and had no access to Impulse's books and records (Barski Affidavit, ¶6). There is no evidence of commingling of funds of assets , or of Barski's use of corporate funds for personal use.

Even assuming the Court could consider plaintiff's new argument that Barski committed fraud against it by lying about his intent to pay for the subject goods, such claim is insufficient to establish fraud to support a claim to pierce the corporate veil (*Sabre Intern. Sec., Ltd. v. Vulcan Capital Management, Inc.*, 95 A.D.3d 434, 944 N.Y.S.2d 36 [1st Dept 2012]; *see also Orchid Const. Corp. v. Gottbetter*, 28 Misc.3d 1212(A), 911 N.Y.S.2d 694 (Table) [Sup. Ct., New York County 2010] (sole allegation that defendant "misrepresented his intention to perform in the future under the contract, to wit, make payments owed to Plaintiff" held insufficient)). And, plaintiff's claim, essentially that Barski promised to pay the invoices with no intent of paying same, does not have any bearing on whether either he and/or Samtastic Impulse failed to adhere to corporate formalities, there was an inadequate capitalization of Impulse (the company identified on the invoices attached to plaintiff's complaint), that there was any commingling of assets, or that corporate funds of any of the above entities were for personal use. Contrary to plaintiff's contention, the emails are silent as whether Barski transferred and used funds generated from the sale of the subject goods.

Further, even assuming plaintiff established that Barski and/or Samtastic exercised dominion and control over Impulse, which this Court does not find, "domination and control alone are insufficient to pierce the corporate veil" (*Cobalt Partners, L.P. v. GSC Capital Corp.*, 97 A.D.3d 35, 944 N.Y.S.2d 30 [1st Dept 2012]).

And, *Shkolnik v. Krutoy* (65 A.D.3d 1214, 886 N.Y.S.2d 705 [2d Dept 2009]) and *Daniel J. Edelman, Inc. v Korn* (231 A.D.2d 405, 646 N.Y.S.2d 811 [1st Dept 1996]) cited by plaintiff offer no guidance, in that the Courts did not explain the factual basis for denying summary judgment to defendants (*Shkolnik, supra* (stating that defendants "failed to make a prima facie showing of entitlement to judgment as a matter of law, inasmuch as they failed to demonstrate the absence of a triable issue of fact as to whether a certain contract dated January 12, 1999, was breached, and whether the corporate veil of certain of the named corporations should be pierced."); *Daniel J. Edelman, Inc., supra* (finding "that there are triable issues of material fact as to whether either defendant so dominated the form of the corporate judgment debtor, Videobox Inc., as to justify piercing the corporate veil")).

Therefore, the fourth cause of action based on alter ego and piercing of the corporate veil is dismissed.

Fifth Cause of Action: Conversion Against All Defendants

In its fifth cause of action, plaintiff alleges that defendants possessed the "Unilever Goods that belonged to the Plaintiff" and by failing to pay for or return them, defendants "exercised dominion and control over the Unilever Goods" inconsistent with plaintiff's wishes.

Under New York law, a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43 [2006]; *State of New York v Seventh Regiment Fund,* 98 N.Y.2d 249, 746 N.Y.S.2d 637, 774 NE2d 702 [2002]). Two 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 (*Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43 [2006], internal citations omitted; *Employers' Fire Ins. Co. v. Cotten,* 245 N.Y. 102 [1927]; *see also* Restatement [Second] of Torts §§ 8A, 223, 243; Prosser and Keeton, Torts § 15, at 92, 102 [5th ed.]; *Vigilant Ins. Co. of America v. Housing Authority of City of El Paso, Tex.*, 87 N.Y.2d 36 [1995]; *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384, 590 N.Y.S.2d 201 [1st Dept 1992]).

Defendants established, through the affidavits of Weiss (for Impulse) and Barski, that neither Barski nor Impulse ever received the Unilever goods identified in the complaint, and therefore, did not possess the "Unilever Goods" as alleged. Therefore, the claim against Barski and Impulse cannot stand.

Further, the record indicates that in addition to the Crest goods, plaintiff "sold" the Unilever goods to Impulse. Shunmugavel insisted at his deposition that the transaction was an "outright sale" and that Barski "requested [plaintiff] to put that [consignment language] for his accounting" purposes (EBT, p. 69). Also, plaintiff did not ask for the return of the goods because Barski continued to promise to pay for the goods. Under the trade practice, if, after seven days, Barski did not want to keep the goods, they were to be returned. (EBT, pp. 143-144). Likewise, Barski testified that Shunmugavel told him, "You're buying the goods, it's your responsibility to sell it" and that all of the Unilever goods were in fact sold (EBT, pp. 15-16). And, although Barski testified at his deposition that the transaction was a "consignment," he testified that his understanding of the agreement was "whatever you sell, you pay me for"; the "short-dated product [] sold at 11, $12 a case when we were paying at the time, 30 or 35 or $37.50"; Barski "felt that [he] deserve[d] a credit for that [short-dated product]; and Shunmugavel's "words to me

were: Sam, I'm the seller, you're the buyer. You're responsible to sell the goods, I have nothing to do with that" (EBT, pp. 14-16). Thus, although plaintiff asserts that the Unilever goods were "consigned" (plaintiff's General Manager, Toshiyuki Tetkahash Affidavit, ¶2), since Samtastic, which received the Unilever goods, "had the power to sell" them "without obtaining permission from plaintiff, there was no indication that plaintiff retained any control over the price defendant was to charge, and there was no evidence that defendant was to be paid a commission, the Unilever transaction appears to be akin to a sale or return arrangement (*see Goldmuntz, supra citing Dark Bay Intl., Ltd. v. Acquavella Galleries*, Inc., 12 A.D.3d 211, 784 N.Y.S.2d 514 [1st Dept. 2004], lv. denied 4 N.Y.3d 705, 792 N.Y.S.2d 898, 825 N.E.2d 1093 [2005] (noting that "there was no evidence that plaintiff exercised any control over defendant as an employee or agent" so as indicate a consignment relationship)).

Consequently, under such a sale or return transaction, the proceeds of the sale are not the proper subject of a conversion claim (*see, B & C Realty, Co. v. 159 Emmut Properties LLC*, 106 A.D.3d 653, 966 N.Y.S.2d 402 [1st Dept 2013] (finding that $2 million cannot be the subject of a conversion claim; by alleging that "it agreed to, and did, transfer the funds in return for the 7% interest in the property, plaintiff tacitly concedes that possession of the money was authorized")).

In any event, as defendants point out, since a "cause of action for conversion 'cannot be predicated on a mere breach of contract,'" the conversion claim cannot stand as a matter of law (*Jagarnauth v. Massey Knakal Realty Services, Inc.*, 104 A.D.3d 564, 961 N.Y.S.2d 415 [1st Dept 2013]).

Plaintiff's claim in opposition that defendants and Barski individually are liable for conversion of the proceeds of the sale is insufficient to maintain its conversion claim, and the

cases cited by plaintiff are factually distinguishable. In *AMF Inc. v. Algo Distribs.* (48 AD2d 352, 369 N.Y.S.2d 460 [2d Dept 1975]), plaintiff's conversion claim for the proceeds of a sale occurred under a security agreement, in which plaintiff established a "security interest in the collateral and in the proceeds of any sale thereof, the sale of the collateral, and the failure by two of the defendants to pay over the proceeds on behalf of the corporate defendant upon proper demand therefor and the diversion of the proceeds for general corporate purposes." The Court also noted that the security agreement expressly "created an immediate right to possession of specific moneys, since under its terms the debtor covenanted to account to the plaintiff for the proceeds of any goods upon request. . . . . The security agreement imposed upon the debtor the obligation to hold specific moneys for the creditor and barred the debtor from disbursing those moneys for general corporate purposes." In *Penn Toyota, Ltd. v Troy* (4 Misc.3d 1014(A), 791 N.Y.S.2d 871 (Table) [N.Y. Dist. Ct. 2004]), defendant was an automobile salesperson employed by the plaintiff, and exercised dominion and control over the proceeds of a sale of a car at plaintiff's dealership. Instead of accounting for the proceeds of the sale, in which the buyer gave defendant $9000 cash and a certified check, defendant either placed the funds in his unsecured drawer or in his pocket. Here, none of the invoices at issue herein is the type of security agreement found in *AMF Inc.*, or involved goods that were sold by an employee of and on behalf of the plaintiff like in *Penn Toyota.*

And, as to plaintiff's claim that Barski is personally liable for the proceeds of the sale, there is no indication that Barski received the goods or the proceeds from the sale in his individual capacity.

Therefore, the fifth cause of action for conversion is dismissed against all defendants.

Plaintiff's Motion For Summary Judgment: 006

In support of plaintiff's motion, plaintiff argues defendants are jointly and severally liable for payment of the goods. Plaintiff and defendants formed valid and binding sales contracts with the defendants, which satisfy the Statute of Frauds (NY UCC § 2-201(3)(c), 2-201(2), and 2-201(3)(b)). Defendants, who are merchants, admitted to making the sales contracts, received and accepted the goods from the plaintiff, and received plaintiff's written confirmation of sale, and did not object to it within 10 days.

The goods were delivered within a reasonable time, and defendants failed to pay for the goods. Defendants' belated defense of non-conformity is unavailing since they retained and/or re-sold the goods after having a reasonable opportunity to inspect them. Defendants' retention and subsequent sale of all or some of the goods are acts inconsistent with the seller's ownership. And, defendants' excuses based upon alleged nonconformity or lateness do not excuse payment.

Therefore, plaintiff argues that it is entitled to recover the contract price for the goods, and defendants are not entitled to a setoff. Further, the defendants are jointly and severally liable for plaintiff's damages.

Defendants oppose the motion, arguing that plaintiff failed to plead the claim of joint venture, there is no evidence of any joint venture, and there is evidence to support joint and several liability against all defendants. Defendants also point out that objections to the shipment of goods were made because the goods were "short-dated" and came in late. And, plaintiff has given defendants discounts and credits toward the payment of the goods.

As to the first and second causes of action against Impulse, plaintiff's motion for summary judgment is unwarranted. As indicated above, issues of fact exist as to Barski's

apparent authority to bind Impulse to the two invoices which are the subject of these two causes of action. And, as discussed above, issues of fact also exist as to whether there was a joint venture between Samtastic and Impulse so as to render Impulse liable for payment of the invoices under which Samtastic received the goods in question.

Since the third cause of action for unjust enrichment is dismissed as against Barski and Impulse, plaintiff's request for judgment on this claim as to these defendants is unwarranted. As to summary relief in plaintiff's favor against Samtastic, however, it is uncontested that Samtastic received the goods in question, and that plaintiff was not paid in full for such goods. As plaintiff has shown that it "conferred a benefit upon the defendant [Samtasic], and that the defendant [Samtasic] will obtain such benefit without adequately compensating plaintiff therefor" (*Nakamura v Fuji*, 253 A.D.2d 387, *supra*). Therefore, summary judgment against Samtastic on the issue of liability for unjust enrichment is warranted.

Since the fourth cause of action based on alter ego and piercing of the corporate veil, and the fifth cause of action for conversion against all defendants are dismissed, summary judgment in plaintiff's favor on these two causes of action is unwarranted.

Therefore, plaintiff's motion for summary judgment against all defendants on all its claims is warranted solely as to its claims against Samtastic for unjust enrichment.

Furthermore, plaintiff's motion to dismiss Impulse's counterclaims for breach of contract and unjust enrichment is denied.[7] According to defendants, Impulse notified Tradedeals that "the separate shipments comprising [six orders] needed to arrive one month apart, starting at the end

---

[7] Only Impulse alleged counterclaims against plaintiff, and such counterclaims relate to goods shipped during 2009.

of April 2009." However, such orders arrived at least two months late in each instance. And, defendants claim that one of the products in each of these orders was allegedly short-dated, therefore, entitling Impulse to a discount. Defendants also assert that as a result of the six (6) contractual breaches Impulse was damaged in excess of $111,648.56, and that Tradedeals and/or plaintiff were enriched in excess of $111,648.56 based on its acceptance of more than $1.1 million from Impulse and its failure to properly remit a discount or additional goods to properly make Impulse whole. Therefore, notwithstanding that the goods subject to plaintiff's claims were sold, in light of the various issues of fact concerning the objection of the "short-dated" goods shipped in 2009, summary dismissal of the counterclaim is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion for summary judgment pursuant to CPLR §3212 in favor of all defendants on the ground that plaintiff lacks standing to sue pursuant to CPLR §3211(a)(3) is denied; and it is further

ORDERED that the branches of defendants' motion for summary judgment pursuant to CPLR §3212 for partial summary judgment in favor of Barski pursuant to CPLR §3211 (a)(7), and pursuant to CPLR §3212 for summary judgment dismissing the complaint against Impulse pursuant to CPLR §3211(a)(1) and (7) is granted solely to the extent that third cause of action for unjust enrichment is severed and dismissed as against Barski and Impulse, the fourth cause of action for piercing the corporate veil and alter ego liability is severed and dismissed, and the fifth cause of action against all defendants for conversion is severed and dismissed; and it is further

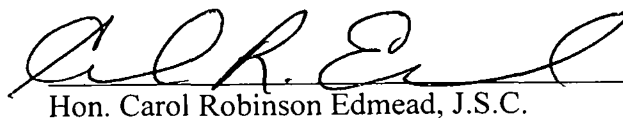
ORDERED that plaintiff's motion for summary judgment against all defendants on all

claims is granted solely on the issue of liability as to the third cause action for unjust enrichment as asserted against Samtastic; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 7, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD