

**Fusion Brands Am., Inc. v Pieper-Vogt**

2014 NY Slip Op 32226(U)

August 14, 2014

Supreme Court, New York County

Docket Number: 113050/11

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

-----X  
FUSION BRANDS AMERICA, INC.

Plaintiff,

-against-

CAROLINE PIEPER-VOGT

Defendant.  
-----X

Index No. 113050/11

DECISION AND ORDER

Motion Sequence No. 005

**MELVIN L. SCHWEITZER, J.:**

Defendant moves for summary judgment on all of plaintiff’s causes of action. On the breach of contract claim, summary judgment is denied with respect to two contract provisions, and granted with respect to one contract provision. The motion on the remaining three causes of action, breach of fiduciary duty, gross negligence and misappropriation of corporate opportunity, is granted as these claims are duplicative of the breach of contract claim.

**Background**

Fusion Brands (Fusion), is a Delaware corporation, which sells a line of beauty products, and also develops and markets fragrances and cosmetics to major retailers. Eugene Melnyk (Mr. Melnyk) is Chairman and sole shareholder of Fusion. Caroline Pieper-Vogt (Mrs. CPV) joined Fusion as Chief Executive Officer pursuant to a May 14, 2009 Employment Agreement (Agreement). Mrs. CPV resigned from her position with Fusion on October 28, 2011.

Pursuant to Paragraph 1 of the Agreement, Mrs. CPV reported directly to Mr. Melnyk. Pursuant to Paragraph 2 of the Agreement, Mrs. CPV was to “devote all of her working time, attention, and ability to the business of the company, truly and faithfully serve the company, and use her best efforts to promote the interests of the company.” Fusion paid Mrs. CPV an annual

base salary of \$425,000 and a \$40,000 signing bonus. Mrs. CPV created an Executive Committee at Fusion, comprised of key employees, who met once a month to discuss important strategic issues arising at the company. It included Mrs. CPV, the Chief Marketing Officer, the Head of Marketing, the President of the Luxury Fragrance division, and other senior professionals. Mrs. CPV asserts she regularly provided Mr. Melnyk with detailed emails concerning Fusion's business activities, business plans, and executive committee agendas. Fusion contends that Mrs. CPV systematically and intentionally misled Mr. Melnyk as to the true state of Fusion's affairs.

By August 2011, a number of Fusion's suppliers had stopped providing Fusion with product, as Fusion was not making timely payments. Mrs. CPV contends that Mr. Melnyk agreed to provide cash infusions to Fusion for operating expenses. Mr. Melnyk denies agreeing to be an unlimited funding source for Fusion. Lacking sufficient financial resources, Fusion was unable to buy inventory, launch brands, or make sales goals during 2011. In a June 2, 2011 business restructuring, Mr. Melnyk decided to close out brands and businesses that were not projected to be profitable, and Mrs. CPV started to sell off certain brands at his request.

On August 18, 2011, Mrs. CPV informed Mr. Melnyk that due to a shortage of cash, Fusion's "wheels were coming off." Mrs. CPV resigned her position at Fusion, noting "it was clear to Mrs. CPV that the support she had requested and that they had agreed upon was not forthcoming." Mrs. CPV did not pursue any related employment opportunities for six months after her resignation, in compliance with the Agreement's non-competition clause.

Fusion brought this action against Mrs. CPV on November 16, 2011, alleging breach of contract, breach of fiduciary duty, misappropriation of corporate opportunity, gross negligence, and seeking declaratory judgment, and injunctive relief.

For its breach of contract claim, Fusion alleges that while employed as Fusion's CEO, Mrs. CPV was actively engaged in managing and overseeing another fragrance company, the Scent Marketing Institute (SMI). Fusion claims Mrs. CPV violated Paragraph 2 of the Agreement which required her to "devote all of her working time, attention, and ability to the business of the company, truly and faithfully serve the company, and use her best efforts to promote the interests of the company."

Mrs. CPV's husband, Harold Vogt (Mr. Vogt), founded SMI in 2007. On July 28, 2010, Mr. Vogt passed away at age 51. Mrs. CPV asserts that she continued to work full-time at Fusion following her husband's death. Mrs. CPV became the executrix of Mr. Vogt's estate. Mrs. CPV became a director, the president, and secretary of SMI. Mrs. CPV asserts that she was "just doing in a moment of crisis what her estate attorney directed her to do." Mrs. CPV contends she did not want her husband's company and did not want to be its president.

Fusion alleges that Mrs. CPV breached the Agreement by mismanaging the company's assets, committing corporate waste, misusing corporate funds for her personal benefit, performing services for companies not affiliated with Fusion, depriving Fusion of corporate opportunities, misappropriating confidential documents, disparaging Fusion and its employees, and maliciously interfering with Fusion's business relationships and contracts. Fusion alleges that Mrs. CPV committed Fusion to an extravagant and inappropriate sponsorship of the Daytime Emmys, incurring a cost of \$500,000. Mr. Melnyk claims that Fusion did not approve this sponsorship. Mrs. CPV insists that he did, watched the Emmy's, and even considered attending the Emmy's.

Fusion contends that Mrs. CPV breached the Agreement by depriving Fusion of a corporate opportunity with Fusion client ID Beauty International (ID Beauty). Fusion explored a

joint venture opportunity with ID Beauty. On January 25, 2011, Fusion and ID Beauty entered into a letter agreement that confirmed they would seek to form a joint venture for the purpose of distributing the products of ID Beauty in the United States and possibly Canada. The joint venture was not consummated. ID Beauty decided against a joint venture and elected to continue with a sales agent relationship.

In its breach of fiduciary duty claim, Fusion contends that Mrs. CPV owed a fiduciary duty of trust, honesty and utmost loyalty to Fusion in her position as CEO. Fusion alleges that Mrs. CPV breached this duty by failing to execute her responsibilities as CEO in a capable and appropriate manner, mismanaging company assets, committing corporate waste, performing services for companies not affiliated with Fusion, depriving Fusion of corporate opportunities, misappropriating confidential documents, disparaging Fusion and its employees, and maliciously interfering with Fusion's business relationships and contracts.

Under Fusion's remaining claims of gross negligence and misappropriation of corporate opportunity, Fusion reiterates Mrs. CPV's alleged misconduct stated above.

Fusion seeks compensatory damages, claiming that Fusion was substantially harmed by Mrs. CPV's conduct. Mr. Melnyk testified that the investigation of Fusion's damages is ongoing. Mr. Melnyk also testified that damages at the very least are (i) \$520,479 representing the salary Fusion paid Mrs. CPV for the period of her disloyalty, from August 7, 2010 to October 28, 2011, the date she left Fusion, (ii) \$10,000, the amount which defendant diverted from Fusion to SMI, and (iii) \$500,000 for Mrs. CPV's bad faith expenditure on the sponsorship of the Daytime Emmy's.

## Discussion

On a motion for summary judgment, the movant has the initial burden of establishing there are no material issues of fact in dispute, and it is entitled to judgment as a matter of law. *Flores v City of New York*, 815 NYS2d 48, 50 (1st Dept 2006). The burden then shifts to the non-moving party to present facts demonstrating that genuine, triable issues exist precluding the granting of summary judgment. *Id.* The party opposing summary judgment must lay its proof in evidentiary form and raise an issue of fact requiring a trial. *Christomides v Fidelity Detective Bureau*, 538 NYS2d 559, 560 (1st Dept 1989).

### Breach of Contract

Mrs. CPV's motion for summary judgment is granted as it relates to the "Best Efforts Requirement" of the Agreement. Her summary judgment motion is denied as it relates to the "Devote All of Your Time" and "Truly and Faithfully Serve" requirements of the Agreement, as there are unresolved issues of material fact.

There must be objective criteria against which a party's efforts can be measured in order for a best efforts requirement to be enforceable. *Timberline Dev. LLC v Kronman*, 263 AD2d 175, 180 (1st Dept 2000). The requisite objective criteria are not present in this case. Fusion argues that objective criteria can be implied, yet does not demonstrate how. This lack of evidence results in Fusion failing to meet its burden of proof. Summary judgment is granted to Mrs. CPV as it relates to the "Best Efforts Requirement" of the Agreement.

As to the "Devote All of Your Time" and "Truly and Faithfully Serve" terms of the Agreement, no case law supports Mrs. CPV's position that these terms are unenforceable. The facts developed on the record must be reviewed to determine if there is an unresolved issue of a material fact requiring denial of summary judgment.

Fusion contends that Mrs. CPV breached the “Devote All of Your Time” provision of the Agreement because Mrs. CPV was managing SMI while employed as the CEO of Fusion. Fusion also argues that Mrs. CPV was using Fusion’s resources while doing so. Mrs. CPV asserts she was not managing SMI. Mrs. CPV argues that she was simply getting her deceased husband’s affairs in order, and had plans to shut down SMI, as Fusion was her “one true passion.” Additionally, Mrs. CPV argues that she was not using Fusion resources. Mrs. CPV asserts she was holding meetings regarding SMI in Fusion’s offices so she could focus on Fusion’s affairs and not leave the office.

Fusion argues that Mrs. CPV assumed executive titles at SMI, that she made decisions regarding its course, and this is the end of the matter. There is additional detail, which accretes in Fusion’s favor. Mrs. CPV attempts to compellingly rebut all of Fusion’s points. She asserts that she hired co-presidents to run SMI, only attended to minor matters, and was fully transparent regarding her role.

Mrs. CPV’s arguments are clever and facile, but, in fact, go a considerable distance toward undermining her position. She very well may have been ordering her late husband’s estate, but she was doing so, in part, in executive capacities at SMI. Corporations are managed by a board of directors, and operations are attended to by senior officers, such as a president and secretary. Mrs. CPV held these positions at SMI, and was admittedly dealing with the affairs of SMI. Her contentions that she did so at the direction of an attorney, and planned to dispose of SMI, is an explanation of her state of mind at moments of her tenure at Fusion. They do not trump the facts of what she actually did while at Fusion.

Mrs. CPV had a full plate at Fusion, where she was involved in major projects, and, in her words, the “wheels were coming off.” All of her executive capacity was needed there. The

fact that she hired co-presidents at SMI does not mean that she was not a co-president there herself. The Agreement barred her from becoming involved in the operational affairs of SMI. There is evidence she elected to take a different path which surely raises material factual issues regarding her compliance with the “Devote All of Your Time” term of the Agreement. Summary judgment is denied with respect to this element of the case.

Similarly, there is an issue of material fact as it relates to the “Truly and Faithfully Serve” term of the Agreement. Fusion argues that Mrs. CPV did not truly and faithfully serve the company in that she committed Fusion to an extravagant \$500,000 sponsorship of the Daytime Emmy’s without any disclosure to Mr. Melnyk, and in defiance of Fusion’s Executive Committee. Mrs. CPV contends that Mr. Melnyk knew of, and approved, the sponsorship.

Fusion contends that Mrs. CPV deprived Fusion of a joint venture opportunity with ID Beauty. Mrs. CPV argues that ID Beauty terminated the joint venture opportunity without any influence exerted by Mrs. CPV.

Since these material issues of fact concern credibility, summary judgment is denied as it relates to the “Truly and Faithfully Serve” term of the Agreement.

#### Breach of Fiduciary Duty

Mrs. CPV’s motion for summary judgment on the breach of fiduciary duty claim is granted because the claim is duplicative of the breach of contract claim. A cause of action for breach of fiduciary duty, which is merely duplicative of a breach of contract claim, must be dismissed. *William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173 (1st Dept 2000). Such duplication exists here. Mrs. CPV’s status as a corporate officer arises from the Agreement, and Fusion alleges the exact same misconduct in the Complaint and its Verified Bill of Particulars (VBOP) in connection with each cause of action.

Fusion's argument that there is a relationship of higher trust, which would allow for a separate fiduciary duty claim, is without merit. Such a duty is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's-length business transactions. *EBC 1, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 18 (2005). Where parties have entered into a contract, courts look to that agreement to discover the nexus of the parties' relationship. *Id.*

The court finds there is not a special relationship present in this case. Paragraph 1 of the Agreement reads, "You [CPV] will be reporting to the Chairman of the Board. You will endeavor to enhance the business and operations of the Company and its affiliates and you shall perform such other duties as the Chairman may reasonably assign to you." The Agreement demonstrates that the relationship between Mr. Melnyk and Mrs. CPV was a typical relationship between a CEO and Chairman of the Board. The parties did not create a relationship of higher trust in the Agreement. When the parties do not create such a relationship, courts do not do so for them. *Id.*

Summary judgment on the fiduciary duty claim is granted in Mrs. CPV's favor.

#### Gross Negligence and Misappropriation of Corporate Opportunity

The acts of gross negligence that Fusion identifies in its complaint and VBOP are identical to those asserted in its breach of contract cause of action. Similarly, the only alleged act of misappropriation – that Mrs. CPV deprived Fusion of a corporate opportunity with ID Beauty – is identical to that covered by the breach of contract cause of action.

Summary judgment is granted in favor of Mrs. CPV on the gross negligence and misappropriation claims.

**Conclusion**

ORDERED that defendant's motion for summary judgment on the breach of contract claim is granted as it relates to the "Best Efforts Requirement." Summary judgment is denied as it relates to the "Devote All of Your Time" and "Truly and Faithfully Serve" terms of the contract; and it is further

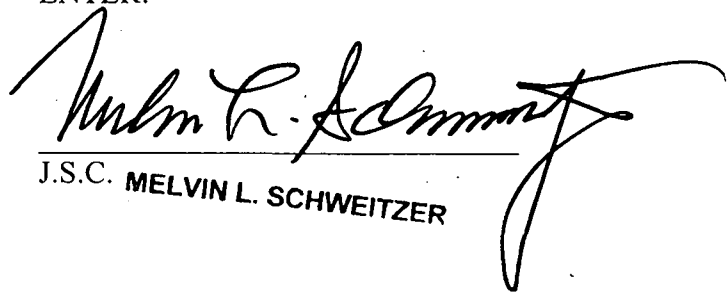
ORDERED that defendant's motion for summary judgment on the breach of fiduciary duty claim is granted; and it is further

ORDERED that defendant's motion for summary judgment on the gross negligence claim is granted; and it is further

ORDERED that defendant's motion for summary judgment on the misappropriation of corporate opportunity claim is granted.

Dated: August 14, 2014

ENTER:



J.S.C. MELVIN L. SCHWEITZER