SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

PRESENT: _____ **J.S.C.** **PART** 3

Justice

Index Number : 160214/2013
TRADE EXPO INC
vs.
STERLING BANKCORP.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. 160214/2013
MOTION DATE 5/30/2014
MOTION SEQ. NO. 002

The following papers, numbered 1 to 3 **, were read on this motion to/for** dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	**No(s).** 1
Answering Affidavits — Exhibits	**No(s).** 2
Replying Affidavits	**No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9-11-14

EILEEN BRANSTEN J.S.C.

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☑ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☑ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**

☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

----------X

TRADE EXPO INC., and FASHION IMPORTS INTERNATIONAL LLC,

Plaintiffs,

-against-

STERLING BANCORP, STERLING NATIONAL BANK, and STERLING FACTORS CORPORATION,

Defendants.

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Index No. 160214/2013
Motion Date: 5/30/2014
Motion Seq. No.: 002

BRANSTEN, J.:

This matter comes before the Court on Defendants Sterling Bancorp., Sterling National Bank, and Sterling Factors Corporation's motion to dismiss plaintiffs' amended complaint pursuant to CPLR 3211(a)(7).

I. Background

Plaintiffs Trade Expo Inc. ("Trade Expo") and Fashion Imports International LLC ("Fashion Imports") are affiliated companies with common ownership that import garments and sell them to wholesalers. Nonparty Superior Apparel Inc. ("Superior") was customer of plaintiffs and is now bankrupt. Between September 2007 and December 2009, Superior purchased garments from plaintiffs, and the garments were delivered to a location designated by Superior. Superior allegedly designated nonparty Fall Rivers Distribution Center ("FRDC") as one such location. In October 2008, plaintiff Fashion Imports entered into a

warehousing agreement with FRDC, which also applied to the warehousing of Trade Expo's goods. When a container of plaintiffs' goods arrived at FRDC for Superior, a FRDC employee would confirm delivery, count the garments, and store them until plaintiffs provided written authorization for their release to Superior.

Defendant Sterling Factors Corp. ("Sterling Factors") had a "Factoring Agreement," dated December 18, 2006, with Superior. Pursuant to the Factoring Agreement, Sterling Factors advanced funds to Superior in exchange for an assignment and/or sale of Superior's accounts receivables at a reduced price, less a factoring fee. In other words, the resale to third parties of the garments Superior ordered from plaintiffs generated accounts receivables that Sterling Factors accepted for factoring and collected directly from the third-party purchasers of the garments. Sterling Factors and Superior also entered into an "Inventory Loan Agreement," dated December 21, 2006, pursuant to which Sterling Factors agreed to make certain loans to Superior in amounts up to 50% of "Eligible Inventory" (as defined therein) up to a maximum principal amount of $1 million. These two agreements are attached to, and incorporated by reference into, the amended complaint. The agreements gave Sterling Factors a security interest in, and lien upon, the merchandise which generated the accounts receivables. Defendant Sterling National Bank is allegedly the assignee of Sterling Factors' rights and interests in and to the Factoring Agreement.

Plaintiffs allege that, between November 2008 and January 2010, they made approximately 20 deliveries, totaling 47,827 garments, to FRDC. As of December 2009,

plaintiffs had not authorized the release of 35,000 of these garments valued at $684,345.39. Nevertheless, sometime between December 1, 2009 and January 27, 2012, Superior allegedly took possession of the garments and sold them to a third party. By doing so, Superior allegedly generated accounts receivables, which were ultimately paid to Sterling Factors.

The amended complaint alleges that, by virtue of the fact that Superior's borrowing ability was based on the amount of its inventory, defendants were aware of that inventory. Defendants were also allegedly aware, by virtue of direct email communications between plaintiffs and defendants' representatives, that garments shipped by plaintiffs did not become part of Superior's inventory until plaintiffs authorized their release. Plaintiffs further allege, on information and belief, that defendants collected the proceeds of the sales of plaintiffs' garments "with knowledge that Superior [] had no right to sell such goods" and that defendants knew or should have known that Superior did not have the legal right to possess or sell the garments. (Am. Compl. ¶¶ 56, 70.)

The amended complaint alleges two causes of action for unjust enrichment and the imposition of a constructive trust. Plaintiffs allege that, by accepting the proceeds of the sales of plaintiffs' garments while knowing that such items were not in Superior's inventory, defendants were unjustly enriched to the detriment of plaintiffs.

II. Discussion

A. *Unjust Enrichment*

"The theory of unjust enrichment lies as a quasi-contract claim." *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561, 572 (2005). "It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009). An unjust enrichment claim is rooted in "the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." *Miller v. Schloss*, 218 N.Y.400, 407 (1916). To plead such a claim, the plaintiff must allege "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 N.Y.3d 173, 182 (2011) (brackets and internal quotation marks omitted). Such a claim "is undoubtedly equitable and depends upon broad considerations of equity and justice." *Paramount Film Distrib. Corp. v. State of N.Y.*, 30 N.Y.2d 415, 421 (1972).

Where one party misappropriates property from another and uses that property to pay a debt to a third party, an action for unjust enrichment may lie against the party who ultimately received the money. *See 3105 Grand Corp. v. City of New York*, 288 N.Y. 178 (1942) (defendant unjustly enriched where its property taxes were paid from funds diverted from a receivership and beneficially owned by the plaintiff); *Carriafielio-Diehl & Assoc., Inc. v. D&M Elec. Contracting, Inc.*, 12 A.D.3d 478 (2d Dep't 2004) (claim for

unjust enrichment stated where embezzled funds were diverted to real estate developer which used them to post performance bond, proceeds of which were awarded to defendant after defendant completed construction on project).

Sterling Factors argues that it was not unjustly enriched -- that it is merely a secured creditor that was reimbursed for its own prior cash outlay to Superior pursuant to its written agreements to factor Superior's accounts receivables. While defense counsel admits that Sterling Factors received "borrowing base certificates" from Superior which "allow a factor to monitor the financial condition of its borrower," it argues that "there is nothing in the Amended Complaint that asserts that the Defendants actively, or even tacitly, participated in Superior's purported sale of Plaintiffs' Garments." (Defs.' Br. at 9.)

Contrary to the arguments of defense counsel, the amended complaint alleges that Sterling Factors was aware of the fact that plaintiffs had not authorized the release of the garments by virtue of its receipt of monthly borrowing base documentation and that there were email communications between plaintiffs and defendants' representatives alerting them to the situation. *See* Am. Compl. ¶¶ 52-53, 68-71. On a motion to dismiss the complaint, the court must accept these allegation as true and plaintiffs do not need to come forward with any supporting proof. *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994); *see also 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151-152 (2002). Plaintiffs make the additional allegation that Sterling Factors collected the proceeds of the sales of the garments from the third-party buyer, with actual knowledge that Superior had no right to sell the goods. *See* Am. Compl. ¶¶ 56, 70.

Defense counsel argues that the facts of this case closely mirror *Ultramar Energy v. Chase Manhattan Bank,* 191 A.D.2d 86 (1st Dep't 1993), where the court dismissed a claim for unjust enrichment by a crude oil supplier against Chase Manhattan Bank ("Chase"), the secured lender of its buyer, based on Chase's collection of accounts receivables generated from the sale of the crude oil. In that case, the crude oil supplier had argued that its buyer did not and could not earn any right to any part of the proceeds of the sale unless and until it made full payment to the supplier. The First Department disagreed, concluding that nothing in the parties' agreements conditioned the buyer's right to be paid accounts receivable by its vendees on the buyer's payment to the supplier and that the supplier "has never argued that it had any right to or interest in the accounts receivable, assigned and paid to Chase, which are at issue in this proceeding." 191 A.D.2d at 90.

Ultramar Energy is distinguishable from the facts alleged in the amended complaint in this very respect because, here, plaintiffs argue that they never gave up ownership rights to the collateral and allege that Sterling Factors knew that Superior was insolvent. Plaintiffs further allege that Sterling Factors knew it was receiving payments from third parties for sales of goods that Superior did not have the legal right to possess or sell.

As the First Department explained in *Ultramar Energy*, "[i]t is not unfair . . . for the debtor arbitrarily to select the creditors whom he chooses to pay, although these favourites know that there will not be enough left to pay the others." 191 A.D.2d at 91.

This Court likewise is not suggesting that a factor has a duty or responsibility to monitor its customers' borrowing base for the benefit of other creditors. However, if plaintiffs can prove their claim that Superior had converted approximately 35,000 of plaintiffs' garments, which were then sold downstream to a third party and Sterling Factors accepted payment of the proceeds of the sale of the converted goods, with actual knowledge of their misappropriation by Superior, a claim for unjust enrichment may be established.

"[W]hile 'a plaintiff need not be privity with the defendant to state a claim for unjust enrichment,' there must exist a relationship or connection between the parties that is not 'too attenuated.'" *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 516 (2012) This requirement is satisfied in this case since plaintiffs allege direct communications with defendants regarding the garments Superior was acquiring from plaintiffs. *See* Am. Compl. ¶ 53.)

B. *Constructive Trust*

The second cause of action for imposition of a constructive trust is dismissed. "[A] party claiming entitlement to a constructive trust must establish: '(1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment.'" *Wachovia Sec., LLC v. Joseph*, 56 A.D.3d 269, 271 (1st Dep't 2008) (quoting *Bankers Sec. Life Ins. Soc'y. v. Shakerdge*, 49 N.Y.2d 939,

940 (1980). Nothing in the amended complaint suggests that a confidential or fiduciary relationship existed between these sophisticated entities.

C. *Claims Against Sterling Bancorp*

The action is also dismissed as against Sterling Bancorp. The only basis identified for suing this defendant is that it is the corporate parent of Sterling Factors, *see* Am. Compl. ¶¶ 10-11, and there are no allegations that would permit a court to pierce Sterling Factors' corporate veil.

III. Conclusion and Order

For the reasons set forth above, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted only to the extent of dismissing the second cause of action and dismissing all claims against Sterling Bancorp, and the motion is otherwise denied; and it is further

ORDERED that the complaint is severed and dismissed as against defendant Sterling Bancorp with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal of defendant Sterling Bancorp and that all future papers filed with this court bear the amended caption; and it is further

ORDERED that counsel for defendant John Wampler shall serve a copy of this order with notice of entry, upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158) and the Clerk of the E-filing Support Office (Room 119), who are directed to mark the Court's records to reflect the amended caption; and it is further

ORDERED that the remaining defendants shall serve and file an answer to the complaint within 30 days from service of a copy of this order with notice of entry.

Dated: New York, New York
September 11, 2014

ENTER:

Hon. Eileen Bransten, J.S.C.