

Nathan v TAA Apparel, Inc.
2017 NY Slip Op 31409(U)
June 30, 2017
Supreme Court, New York County
Docket Number: 653474/2014
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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NATHAN NATHAN, ELYAHOO TOMI NATHAN,

INDEX NO: 653474/2014

Plaintiff,

MOTION
DATE 5/1/2017

- v -

TAA APPAREL, INC., RONNY BEN JOSEPH,
RONEN BEN JOSEPH, INTIMO GROUP LLC

MOTION SEQ.
NO. 003 & 004

Defendant.

DECISION AND ORDER

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HON. BARRY R. OSTRAGER:

Presently before the Court are two post-note of issue motions for summary judgment. Motion sequence 003 is a motion for partial summary judgment by the Defendants and Counterclaim-Plaintiffs, Ronen Ben Joseph, Ronny Ben Joseph (collectively, the “Ben Josephs”), TAA Apparel, Inc. (“TAA”), and Intimo Group, LLC (“Intimo”) to dismiss the Third, Fourth, and Fifth Causes of Action sounding in breach of contract, conversion, and breach of fiduciary duty, respectively, pursuant to CPLR § 3212.¹ Motion sequence 004 is a motion by Plaintiffs, Nathan Nathan and Elyahoo Tomi Nathan (collectively, the “Nathans”), for summary judgment on all claims and to dismiss all counterclaims sounding in conversion, breach of contract, breach of fiduciary duty, an accounting, contractual indemnification, unjust enrichment, and common law and statutory indemnification, pursuant to CPLR §3212. A jury trial in this matter is scheduled for July 17, 2017. Both motions are denied for the following reasons.

¹ The defendants did not move to dismiss the First Cause of Action for an accounting (*see* NYSCEF Doc. No. 55). The Second Cause of Action for a declaratory judgment was dismissed pursuant to a short-form Order dated December 9, 2015 (*see* NYSCEF Doc. No. 16).

Intimo is a Limited Liability Company formed on or about February 6, 2012 to engage in the manufacture, import, and wholesale distribution of underwear and sleepwear (Amended Complaint, ¶13). Intimo is governed by an Operating Agreement dated April 4, 2012 (*see* Affidavit of Ronen Ben Joseph, Exh. 1). Pursuant to Intimo's Operating Agreement, the Nathans held a 50% interest in Intimo. TAA, an entity owned and controlled by the Ben Josephs, held a 50% interest in Intimo (Am. Compl., ¶1). Section 6.1(b) of the Operating Agreement designated the Ben Josephs and the Nathans to serve on Intimo's Board of Directors (Ben Joseph Aff., Exh. 1 at 8). In addition, the Operating Agreement granted TAA "exclusive authority" with respect to certain actions, including entering into agreements with third parties, extending credits to customers, capital expenditure, and banking relationships, among others (Ben Joseph Aff., Exh. 1 at 12). In addition, Section 6.4 of the Operating Agreement provides that the Board of Directors "shall be the sole body of the Company with the power to bind the Company..." (*id.* at 9). And, Section 6.6(b)(v) provides that the Directors "shall act only as a Board and the individual Directors shall have no power as such." (*id.* at 11).

It is alleged that Intimo operated for approximately one year before tensions between TAA and the Nathans led to a June 20, 2013 Dissolution Agreement which provided for the division of Intimo's unsold inventory and available cash, among other provisions (Am. Compl., ¶¶14-15; Exh. B). However, during the winding down process of the business, tensions between the parties continued to escalate and they mediated their disputes with a third-party mediator which resulted in a Mutual General Release and Indemnification Agreement dated June 20, 2014 (Affidavit of Nathan Nathan, Exh. D). The tensions and business disputes between the parties continued through the summer of 2014, after the execution of the Settlement Agreement.

On July 31, 2014 Ronny Ben Joseph unilaterally transferred \$263,000 from Intimo's account to another bank account, which is being held in TAA's name pending resolution of the parties' disputes

and to pay expenses for which Intimo is responsible (Ben Joseph Aff., ¶13); (Nathan Aff., Exh. F) (*see also*, Nathan Aff., ¶4). The Ben Josephs claim that the transfer was necessary to prevent the Nathans from improperly drawing down funds from Intimo's account because, on prior occasions, Nathan Nathan withdrew funds from Intimo's account for non-business purposes (*see* NYSCEF Doc. No. 76 and 77). For example, in an email dated April 22, 2014, a bank representative sent an email to Intimo's controller about Nathan's unauthorized wire transfers from the Intimo account (*see* NYSCEF Doc. No. 76). In addition, the Ben Josephs claim that in late June 2014, they learned that the Nathans failed to deliver some 11,000 pieces of inventory that TAA had purchased pursuant to the Dissolution Agreement (and other arrangements the parties had made during the winding down process), allegedly because the Nathans were selling the inventory for their own benefit (Ben Joseph Aff., ¶¶10-12). An email dated September 3, 2014 from Ronny Ben Joseph to the Nathans and others states that 11,368 units were sold "without authorization or consent from Intimo," and the goods left over in that warehouse were "substantially broken down and un-assorted" and "of no use to TAA." (Nathan Aff., Exh. G). The Ben Josephs subsequently issued "Debit Notes" for \$82,215.89 and \$115,521.12 for the inventory that they claim they never received (Am. Compl., ¶30); (Nathan Aff., Exh. G).

On their part, the Nathans claim that Intimo located 5,978 pieces of inventory that had been "misdelivered" and shipped those goods back to TAA, but TAA failed to accept the goods (Nathan Aff., ¶7). Significantly, the Nathans claim that they "never sold and retained the proceeds of any inventory owned by TAA" (¶9). Moreover, the Nathans assert that Ronny's unilateral transfer of \$263,000 from Intimo's account on July 31, 2014 was designed to deprive the Nathans of their share of available cash because only two days earlier, on July 29, Intimo's controller informed Nathan Nathan by email that the \$215,000 in available cash should be split equally between the partners (\$107,500 to the Nathans and \$107,500 TAA) with approximately \$50,000 as "hold back" to cover company debts (Nathan Aff., ¶¶12,

14; Exh. E). Thus, the Nathans claim that the Ben Josephs' story about 11,000 pieces of inventory is nothing but a pretext for the improper and unilateral transfer of money to which the Nathans are entitled (see Nathan Aff., ¶¶4-6).

In their competing motions for summary judgment, the parties raise various arguments, each asserting that they are entitled to judgment as a matter of law. For example, the Ben Josephs argue that the transfer of \$263,000 falls within TAA's authority under the Operating Agreement as a change in "banking relationship" and TAA has had certain authority over Intimo's finances from the inception of Intimo. Further, the Ben Josephs argue that the money was not misappropriated but rather is held in a TAA account pending resolution of their disputes. In opposition, the Nathans argue that the Ben Josephs engaged in classic self-dealing because they cannot unilaterally transfer funds out of a business account without proper disclosure. At the very least, they argue, the money should been placed in an escrow account. In addition, the Nathans argue that the Mutual General Release and Indemnification Agreement bars each and every counterclaim because the parties mutually agreed to "irrevocably and unconditionally" release one another from "any and all charges, complaints, claims liabilities, obligations, promises... and demands of any nature whatsoever, whether known to them or unknown" (Nathan Aff., Exh D at 1).

It is undisputed that Ronny Ben Joseph unilaterally transferred \$263,000 out of Intimo's account and placed it in an account held in TAA's name in the same bank. However, there are material issues of fact as to whether such actions constituted misconduct, were unauthorized, or constituted a breach of the Operating Agreement, particularly since TAA was granted "exclusive authority" over certain aspects of Intimo's finances and since there is evidence that the Nathans made improper withdrawals from Intimo's account in 2014 which prompted bank representatives to alert Intimo's controller and others to alleged misconduct by the Nathans. There are also issues of fact as to the alleged missing inventory, which the

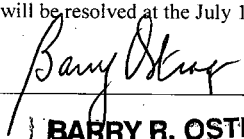
parties dispute in their respective affidavits. While the Operating Agreement states that only the Board of Directors is authorized to act on behalf of Intimo, there are issues of fact as to whether Ronny Ben Joseph acted improperly by transferring the funds to another account to which the Nathans had no access, especially since the business was a going concern for only one year and the parties have had a history of business disputes and disagreements. As for the releases, the parties released claims up to the date of the Agreement, June 20, 2014, and the alleged wrongdoings at issue here allegedly arose after the execution of the Release (*see e.g., Luxus Aviation, LLC v Kerwin Media LLC*, 91 AD3d 569, 572 [1st Dept 2012]) (claim for misappropriation of trade secrets survived dismissal because the alleged conduct occurred after the date of the release).

Accordingly, it is hereby

ORDERED that motions for summary judgment are denied; and it is further

ORDERED that all liability and damage issues will be resolved at the July 17, 2017 jury trial.

Dated: June 30, 2017



BARRY R. OSTRAGER
JSC