

JDI Display Am., Inc. v Jaco Elecs., Inc.

2018 NY Slip Op 33949(U)

July 9, 2018

Supreme Court, Suffolk County

Docket Number: 17/623968

Judge: Jerry Garguilo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

E-FILE

SHORT FORM ORDER

INDEX NO. 17/623968

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY**

PRESENT:

**HON. JERRY GARGUILO
SUPREME COURT JUSTICE**

JDI DISPLAY AMERICA, INC.,

Plaintiff,

-against-

JACO ELECTRONICS, INC., JACO DISPLAY SOLUTIONS, LLC, JOEL GIRSKY, ROBERT SAVACCHIO, JEFFREY GASH, MICHAEL MUSTO, AND LEIGH LANE,

Defendants.

**ORIG. RETURN DATE: 4/20/18
SUBMISSION DATE: 5/23/18
MOTION SEQ#001,002, 003
MOTION: 001-MotD;
002-MotD; 003-MotD**

**ATTORNEY FOR PLAINTIFF
LAW OFFICE OF JOHN F. OLSEN, LLC
8 HILLSIDE AVENUE, SUITE LL1
MONTCLAIR, NEW JERSEY 07042**

**ATTORNEY FOR Jaco Display
DEFENDANTS
HOLLAND & KNIGHT LLP
31 W 52ND STREET
NEW YORK, NY 10019**

**ATTORNEY FOR DEFENDANTS
Joel Girsky, Jeffrey Gash and Robert
Savacchio
FOLEY & LARDNER LLP
90 PARK AVENUE
NEW YORK, NY 10016-1314**

Upon the following papers numbered 10 to 40 read on this motion to dismiss, to dismiss, for leave to amend complaint, and strike answer; Notice of Motion/ Order to Show Cause and supporting papers 10 - 15, 21 - 26, 37 - 40; Notice of Cross Motion and supporting papers30; Answering Affidavits and supporting papers 31; Replying Affidavits and supporting papers 33 - 36; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the defendants' motions (001, 002) and plaintiff's cross motion (003) are consolidated for the purpose of this determination; and it is further

JDI Display v Jaco Electronics

Index No. 17/623968

Page No. 2

ORDERED that the motion (001) by defendant Jaco Display Solutions, LLC, Michael Musto and Leigh Lane to dismiss the complaint pursuant to CPLR 3211 (a) (7) is granted to the extent that the second, fifth, and sixth causes of action are dismissed as asserted against them; and it is further

ORDERED that the motion (002) by defendants Joel Girsky, Jeffrey Gash and Robert Savacchio to dismiss the complaint pursuant to CPLR 3211 (a) (7) is granted to the extent that the second, fifth, and sixth causes of action are dismissed as asserted against them; and it is further

ORDERED that the first branch of plaintiff's cross motion (003) for leave to serve and file a first amended complaint to add defendants defendants Stephen Girsky, Edward Frankel and Martin Block is granted; and it is further

ORDERED that the second branch of plaintiff's cross motion (003) to strike Jaco's answer is denied with leave to renew upon the submission of proper papers; and it is further

ORDERED that the plaintiff's first amended complaint is deemed served; and it is further

ORDERED that plaintiff is directed to e-file the first amended complaint within twenty days of this order's notice of entry; and it is further

ORDERED that the moving defendants are directed to serve and efile answers pursuant to CPLR 3211 (f); and it is further

ORDERED that defendant Jaco is directed to efile its answer; and it is further

ORDERED that counsel are directed to appear in Part 48 for a Preliminary Conference on October 15, 2018 at 9:30 a.m. with clients.

In this breach of contract action, plaintiff seeks damages from defendants for the unpaid balance for goods sold and delivered to defendant Jaco Electronics, Inc. ("Jaco"). The record reveals that Jaco entered into a National Distributor Agreement ("Distributor Agreement") with KOE-Americas, Inc. ("KOE-Americas"), plaintiff's predecessor corporation. Jaco is a manufacturer of electrical equipment and purchased display products from plaintiff from September, 2014 through October, 2017. On April 1, 2016, plaintiff gave notice to Jaco that KOE-Americas merged with plaintiff, and the merged companies would be known as plaintiff's name, JDI Display America, Inc., and automatically succeeded to KOE-Americas' rights and obligations under the Distributor Agreement. In early 2017, Jaco allegedly became insolvent and seriously delinquent on its payments to plaintiff. The record reveals that Jaco sent five checks to plaintiff in late June for the sum of \$80,898.36. However, on July 28, 2017, the plaintiff's bank returned all five checks because Jaco stopped payment. By an Asset Purchase Agreement dated August 25, 2017, Jaco Display Solutions, Inc. merged with Jaco and occupied the same premises as Jaco. Although plaintiff kept in touch with

JDI Display v Jaco Electronics

Index No. 17/623968

Page No. 3

Jaco, it stopped shipping products. On October 23, 2017, plaintiff cancelled the Distributor Agreement. This action was commenced on December 15, 2017.

The complaint contains six causes of action: 1) fraudulent conveyance against all defendants, 2) intentional interference with contract against all defendants, 3) breach of contract as against Jaco, 4) alter ego/de facto merger liability as against Jaco Display Solutions, Leigh Lane and Michael Musto, 5) fraud against all defendants, and 6) conversion against all defendants.

Defendants Jaco Display Solutions, LLC, Michael Musto and Leigh Lane (“the Jaco Display defendants”) move to dismiss the complaint as asserted against them pursuant to CPLR 3211 (a) (1), (7). Defendants Joel Girsky, Jeffrey Gash and Robert Savacchio move to dismiss the complaint as asserted against them pursuant to CPLR 3211 (a) (7). Plaintiff cross-moves for leave to amend the complaint to add new defendants Steven Girsky, Edward Frankel and Martin Block, and to strike the answer of Jaco Electronics, Inc.

Pursuant to CPLR 3211 (a) (1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence “must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437, 736 NYS2d 605 [2d Dept 2002]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 756 NYS2d 94 [2d Dept 2003]). “In considering a motion to dismiss a pleading for failure to state a cause of action, the court must accept the allegations of the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (CPLR 3211 [a][7]; *Munger v Board of Educ. of the Garrison Union Free School Dist.*, 85 AD3d 747, 748, 924 NYS2d 578, 580 [2d Dept 2011]; accord *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]).

Initially, the Court finds that, accepting the allegations as true and according the plaintiff the benefit of every possible favorable inference, the plaintiff has failed to state a cause of action in the fifth and sixth causes of action. A cause of action may be dismissed as duplicative of another when they both arise out of the same facts and allege the same damages (see *Town of Wallkill v Rosenstein*, 40 AD3d 972, 974, 837 NYS2d 212 [2nd Dept 2007]). Further, no cause of action to recover damages for fraud will arise when the only fraud alleged relates to a breach of contract” (*Bella Maple Group, Inc. v Attias*, 78 AD3d 1092, 1093, 911 NYS2d 649 [2nd Dept 2010]). The complaint makes no allegations that are independent of the breach of contract claim. Conversion is defined as “the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights” (*State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259, 746 N.Y.S.2d 637 [2002]). Conversion claims cannot lie if they are “predicated solely on a mere breach of contract claim,” and simply restate the breach of contract claim (see *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269, 761 NYS2d 22 [1st Dept 2003]). Therefore, inasmuch as the fraud and conversion causes of action arise from the same facts as the breach of contract cause of action, they are dismissed.

JDI Display v Jaco Electronics
Index No. 17/623968
Page No. 4

In addition, accepting the facts alleged therein as true and interpreting them in the light most favorable to the plaintiff, the Court finds that plaintiff has failed to state a cause of action for intentional interference with contract. The elements of the tort of interference with economic advantage/contract are (1) the existence of a valid contract with a third party, (2) defendant's knowledge of that contract, (3) defendant's intentional procuring of the breach, and (4) resulting damages (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426, 835 NYS2d 530 [2007]). Here, although Jaco Display may have been aware of the Distributor Agreement, Jaco had already breached this Agreement by not paying its debt to plaintiff prior to the sale of its assets to Jaco Display. Therefore, it cannot be said that Jaco Display interfered with this Agreement or induced Jaco to breach it. Accordingly, the second cause of action is dismissed.

Turning to the remaining causes of action, accepting the facts alleged therein as true and interpreting them in the light most favorable to the plaintiff, the Court finds that plaintiff has adequately stated a cause of action for the first, third and fourth causes of action. "[T]he preferential satisfaction of debts owed by insolvent corporations to their directors, over debts due to other general creditors, is barred by the common law" (*Southern Inds. v Jeremias*, 66 AD2d 178, 184, 411 NYS2d 945 [2d Dept 1978]). Here, the complaint alleges that "the investment by Ms. Lane and Mr. Musto was used exclusively for the benefit fo Mr. Girsky, Jaco's founder and an officer and majority shareholder of the company. Among other things, the investment paid off loans made directly by Mr. Girsky to Jaco and was used to pay other loans personally secured by Mr. Girsky." Thus, plaintiff has adequately stated a cause of action for fraudulent transfer. In order to state a cause of action for breach of contract, the pleading must allege the existence of a valid and enforceable agreement, due performance by plaintiff, and a failure of performance by defendant, resulting in damages (see *Furia v Furia*, 116 AD2d 694, 695, 498 NYS2d 12 [2d Dept 1986]). Here, the Court finds that there is no dispute that Jaco has breached the National Distribution Agreement with plaintiff by failing to pay for the products that were delivered to it. In order to plead a proper cause of action to impose "alter-ego" liability, a plaintiff must allege that : [1] the owners of the corporation exercised complete domination of the corporation in respect to the transactions at issue; and such domination was used to commit a fraud or otherwise resulted in wrongful or inequitable consequences causing plaintiff's injury (*Retropolis, Inc. v 14th Street Development, LLC*, 17 AD3d 209, 797 NYS2d 1 [1st Dept. 2005]). As veil piercing claims are inherently fact driven, they are not typically susceptible to attack on an pre-answer motion to dismiss (*Kralic v Helmsley*, 294 AD2d 234, 236, 743 NYS2d 15 [1st Dept 2002]). Therefore, the Court finds that this cause of action should be preserved until issue has been joined and the claims are ready for a dispositive motion or trial.

Turning to the first branch of the plaintiff's cross motion seeking leave to amend the complaint, in support, plaintiff claims that after the motion papers were served, plaintiff learned from the attached copy of the Asset Purchase Agreement that significant transfers were made to Jaco insiders prior to closing and identified the specific transfers. Plaintiff now moves to amend the complaint to include claims against the additional Jaco insiders: Stephen Girsky, Edward Frankel and Martin Block and demand the return of the amount transferred to them as a result of the Asset

JDI Display v Jaco Electronics
Index No. 17/623968
Page No. 5

Purchase Agreement. In opposition, defendants dispute plaintiff's allegations. Leave to amend one's pleadings is to be freely granted absent prejudice or surprise to the party opposing the motion (*Fahey v County of Ontario*, 44 NY2d 934, 408 NYS2d 314 [1978]; *Armstrong v Peat, Marwick, Mitchell & Co.*, 150 AD2d 189, 190, 540 NYS2d 799 [1st Dept 1989]). Here, inasmuch as defendants have failed to convey prejudice or surprise in their opposition papers, the plaintiff's cross motion to amend the complaint is granted.

Turning to the second branch of the plaintiff's cross motion to strike Jaco's answer, CPLR 321 (a) requires that a corporation shall appear by an attorney. Plaintiff claims that the answer was verified by defendant Gash. Plaintiff has not submitted a copy of Jaco's answer, and the answer has not been e-filed. Therefore, without having the opportunity to review the answer, the Court denies plaintiff's application with leave to renew upon the submission of proper papers.

Accordingly, the motion by the Jaco Display defendants is granted to the extent that the second, fifth and sixth causes of action are dismissed. The motion by Joel Girsky, Jeffrey Gash and Robert Savacchio to dismiss the complaint is granted to the extent that the second, fifth and sixth causes of action are dismissed. The first branch of the plaintiff's cross motion to amend the complaint is granted. The second branch of plaintiff's cross motion to strike Jaco's answer is denied with leave to renew upon the submission of proper papers.

DATED

7/9/18


HON. JERRY GARGUILO, J.S.C.