

<b>TC Tradeco, LLC v Karmaloop Europe, AG</b>
2019 NY Slip Op 30044(U)
January 3, 2019
Supreme Court, New York County
Docket Number: 651631/2015
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

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TC TRADECO, LLC,

Plaintiff,

- v -

KARMALOO EUROPE, AG, CAPSTONE PARTNERS LLC,  
CRS CAPSTONE PARTNERS, LLC, BRIAN DAVIES, and GREG  
SELKOE,

Defendants.

INDEX NO. 651631/2015

03/05/2018,  
03/05/2018,  
03/05/2018

MOTION DATE

MOTION SEQ. NO. 005 006 007

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 120, 122, 123, 124, 125, 126, 127, 128, 131, 183, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 247

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 006) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 184, 186, 187, 188, 189, 190, 191, 192, 193, 194, 235, 236, 237, 238, 239, 244, 246

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 007) 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 185, 240, 241, 242, 243, 245

were read on this motion to/for

SUMMARY JUDGMENT

**MASLEY, J.:**

This action arises from a merchandise inventory agreement executed between certain business entitites, including defendant Karmaloo Europe, AG (Karmaloo), and plaintiff TC Tradeco, LLC and a later agreement concerning payment obligations executed by those parties and a financial advisory entity.

Motion sequence number (Motion) 003, plaintiff's prior application for a default judgment against Karmaloo in connection with the first amended complaint (NYSCEF

Doc. No. [Doc] 29 *et seq.*) was granted as to liability. With extensive discovery in this 2015 case now complete, the remaining parties each move for summary judgment.

In Motion 005, defendants Capstone Partners LLC (Capstone), CRS Capstone Partners, LLC (CRS), and Brian Davies (collectively, Capstone Defendants) seek an order summarily dismissing the second amended complaint as against them.

In Motion 006, plaintiff seeks an order awarding it partial summary judgment on the issue of liability for the third through seventh causes of action in the second amended complaint, raised, variously, against the Capstone Defendants and defendant Greg Selkoe. Plaintiff requests that an inquest as to damages be conducted if the court grants its motion for partial summary judgment.

In Motion 007, Selkoe seeks an order summarily dismissing the second amended complaint as raised against him.

All evidence being now before the court in connection with these motions, Motion 005 is granted, Motion 006 is denied, and Motion 007 is granted in part such that plaintiff's unjust enrichment claim is dismissed.

### **Background**

Defendant Karmaloop, an entity organized under the laws of Switzerland, is an entity affiliated with Karmaloop, Inc. and Karmaloop TV, Inc. (collectively, Karmaloop Entities), each of which were engaged in the business of e-commerce apparel sales. Plaintiff, a limited liability company organized under the laws of New Jersey, was formed to service the inventory needs of Karmaloop Entities, as reflected in the Inventory Supply Agreement (ISA) executed by the Karmaloop Entities and plaintiff on October 27, 2014. The ISA provides plaintiff the exclusive right to source and purchase

inventory for the Karmaloop Entities and provides the terms and conditions under which they would purchase such inventory from plaintiff.

Karmaloop, Inc. (on behalf of itself and its successors and assigns) engaged the Capstone Defendants—specifically, CRS—for financial advisory services in 2014 (e.g. Docs 162-163). As of January 2015, the Karmaloop Entities had defaulted on a payment obligation to plaintiff under the ISA. On January 22, 2015, the Karmaloop Entities, plaintiff, and CRS entered a new agreement, the Payment Protection Agreement (PPA). The PPA provides that the Karmaloop Entities

“shall vest Capstone (with Capstone acting through its employee Brian Davies) with the sole and exclusive authority to pre-approve and authorize any and all payments made by Karmaloop [Entities] to any person or entity prior to any such payments being made. Karmaloop [Entities] further agree[] . . . not to make any payments to any person or entity absent obtaining Capstone’s prior approval and authorization”;

and

“Capstone agrees that it shall not pre-approve or authorize Karmaloop [Entities] to make any payment to any person or entity if [they are] not then current on any and all sums then owed to [plaintiff] under the [ISA]” (Doc 198).

The PPA further provides that a breach of the PPA by the Karmaloop Entities or Capstone/CRS “shall constitute a breach by Karmaloop [Entities] of the [ISA],” includes a merger clause as to the parties’ agreement, and also contains a personal guarantee of Selkoe, one of the co-founders of Karmaloop (*id.*). Selkoe agreed that “he shall personally guarantee Karmaloop[ Entities]’s performance under the [PPA] and that he shall be personally liable to [plaintiff] and/or Capstone for any breach by Karmaloop [Entities] under the [PPA].”

On March 23, 2015, the Karmalooop Entities<sup>1</sup> filed a voluntary petition for Chapter 11 bankruptcy (Doc 165).

Karmalooop's default and the first amended complaint:

Plaintiff filed the first amended complaint on July 1, 2015 (Doc 12). After Karmalooop failed to timely respond to that pleading, plaintiff sought a default judgment against it in Motion 003. In the absence of opposition, Motion 003 was granted in part such that Karmalooop was found liable for breach of the ISA/PPA (the first and second causes of action in the first amended complaint) (see Doc 12 ¶¶ 67-76 [first amended complaint]; Doc 46 [12/17/2015 order, Oing, J.]; Doc 67 [02/03/2016 order, Oing, J.]). Justice Oing further held the issue of damages attributable to Karmalooop in abeyance "pending final resolution of this action" (Doc 67).

The second amended complaint:

In the second amended complaint, plaintiff alleges the following causes of action: (1) breach of ISA against Karmalooop; (2) breach of PPA against Karmalooop; (3) breach of PPA against Capstone and CRS; (4) breach of the PPA against Selkoe; (5) breach of fiduciary duty against Davies; (6) unjust enrichment against Capstone, CRS, Davies, and Selkoe; and (7) equitable estoppel against Davies, CRS, and Capstone (Doc 111 ¶¶ 83-123). Plaintiff alleges it has and continues to sustain unspecified damages, and seeks an award of compensatory damages, consequential damages, interests, costs, attorneys' fees, and punitive damages in amounts to be determined at trial (*e.g. id.* at 14-17).

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<sup>1</sup> The petition names Karmalooop, Inc. and Karmalooop TV, Inc. as debtors, lists Karmalooop amongst additional entity names used by Karmalooop in the eight years prior to filing the petition, and identifies Karmalooop as a subsidiary of Karmalooop, Inc. (Doc 165).

### Discussion

Summary judgment is a drastic remedy that will be granted only where the movant demonstrates that no genuine triable issue of fact exists (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see generally* CPLR 3212). Initially, “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 demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

#### 1. Motion 005: Capstone, CRS, and Davies

The Capstone Defendants move, pursuant to CPLR 3212, for an order summarily dismissing the third, fifth, sixth, and seventh causes of action.

Plaintiff’s claims against Capstone, CRS, and Davies all arise from the PPA: the third cause of action alleges that Capstone and CRS failed to perform obligations under the PPA; the fifth cause of action alleges that Davies breached a fiduciary duty owed to plaintiff by pre-approving and/or authorizing Karmaloop Entities’ payments in violation of the PPA, or in permitting such payments to be made without pre-approval or authorization; the sixth cause of action alleges that the Capstone Defendants were unjustly enriched by violating the PPA; and the seventh cause of action (identified as equitable estoppel) alleges that plaintiff was harmed by Capstone Defendants’ misrepresentations which caused plaintiff to enter the PPA. In its second amended complaint, plaintiff asserts it sustained damages in continuing to source products for the

Karmaloop Entities under the ISA, plaintiff was not paid for its performance, and plaintiff continues to sustain damages, which, in turn, continue to accrue interest.

Among other things, the Capstone Defendants move for summary dismissal on the basis that plaintiff cannot demonstrate that it sustained any injury that resulted from a material breach of the PPA. The Capstone Defendants' submissions in support of Motion 005 establish prima facie entitlement to judgment in that they demonstrate that the third, fifth, sixth, and seventh causes of action are fatally defective without proof that plaintiff sustained a related injury (PJI 4:1, 4:2, 4:20 [discussing elements of contract and quasi-contract claims, and damages]; see *Forman v Guardian Life Ins. Co. of Am.*, 25 Misc 3d 1224(A) [Sup Ct, NY County 2009], *aff'd* 76 AD3d 886 [1st Dept 2010] [party asserting equitable estoppel must demonstrate it prejudicially changed its position due to alleged conduct amounting to false representation or concealment of material facts]).

The Capstone Defendants' submissions establish an absence of demonstrable injury arising from a qualifying breach of the PPA during the operative period—January 22, 2015, when the PPA was executed, through March 23, 2015, when the Karmaloop Entities filed for bankruptcy and their finances became governed by Title 11 of the United States Code. Specifically, their submissions demonstrate that the Karmaloop Entities were not indebted to plaintiff when the bankruptcy petition was filed (see Doc 125 [plaintiff's spreadsheets illustrating that Karmaloop Entities owed plaintiff \$291,000 as of March 23, 2015]; Docs 126-127 [plaintiff's representative, Kneller, testifying at deposition that Karmaloop Entities had a \$300,000 credit balance with plaintiff as of March 23, 2015]; see *also* Doc 124 [agreement resulting in Karmaloop Entities credit]).

The Capstone Defendants' liability, if any, for breach of contract or unjust enrichment can derive from only breaches of the PPA during the operative span of that agreement, which ended when the Karmaloop Entities filed for bankruptcy. The PPA provides that a breach of the PPA by the Capstone Defendants constitutes a breach of the ISA by Karmaloop Entities; the PPA contains no provision creating any other consequence resulting from a breach the PPA by the Capstone Defendants.

The Capstone Defendants' submissions establish that any breach of the PPA during the operative period was immaterial or caused no injury to plaintiff attributable to the Capstone Defendants inasmuch as the claimed Karmaloop Entities' debt, as of the date of bankruptcy filing, of \$291,000 was or should have been offset by the \$300,000 credit. Notably, the \$300,000 credit evidenced by the Limited Consent Agreement (LCA) between the Karmaloop Entities and plaintiff, dated January 24, 2015, and supported by other submissions with Motion 005, was earmarked for application to future debts incurred by Karmaloop Entities (Doc 124). Plaintiff declined to apply the credit, however, until long after the bankruptcy proceeding was commenced.

Plaintiff's burden to submit evidence that raises a triable issue of material fact as to the issue of damages arising from the claims alleged against the Capstone Defendants is not satisfied.

As it relates to plaintiff's injuries, plaintiff's submissions in opposition to Motion 005 include the Second Supplemental Interrogatory Responses of its attorney, which alleges certain damages and contains two spreadsheets created to illustrate plaintiff's damages calculations (Doc 222). Those documents do not establish a triable issue of fact sufficient to defeat the Capstone Defendants' motion for summary judgment.

Preliminarily, plaintiff's attorney's interrogatory response includes a verification page signed by plaintiff's representative, Kneller; the verification, however, is qualified such that Kneller notes "[t]he matters stated in the foregoing responses [of plaintiff's attorney] are not all within my personal knowledge, and I am informed and believe that there is no officer or agent of Plaintiff who has personal knowledge of all such matters" (*id.* at 9). Kneller further asserts that the damages information in the interrogatory response was "assembled" from various sources (*id.*). Plaintiff's attorney asserts without support that, as a result of conduct of all defendants in this action, plaintiff was harmed in the amount of "[a]ll sums Karmaloop [Entities] paid to any person or entity other than the Plaintiff while Karmaloop [Entities] was not current on any and all sums then owed to Plaintiff," and "[a]ll sums Plaintiff expended in reasonable expectation and reliance that Defendants would comply with their obligations under the [PPA], including[] . . . those payments made in connection with the [ISA]" (*id.* at 7). Plaintiff's attorney claims that plaintiff's total injuries resulting from unspecified breaches of the ISA and PPA amount to "no less than \$13,706,896," and are comprised of "unpaid base costs, plus purchase fees, plus unpaid storage charges, plus interest calculated through February 9, 2016," with continuing interest accruing at the rate specified in the ISA (*id.*).

In opposition to Motion 005, plaintiff has not submitted any admissible evidence demonstrating those alleged injuries; for instance, there are no invoices, bills, bank statements, letters, emails, or other indicia supporting the statements of plaintiff's attorney. The damage-calculation spreadsheets included with plaintiff's interrogatory response do not render plaintiff's unreliable assertions sufficient.

As explained by plaintiff's attorney, the two spreadsheets—"Damages Calculation Version 1" (Spreadsheet 1) and "Damages Calculation Version 2" (Spreadsheet 2)—represent alternative calculation methods employed by plaintiff in reaching its damages sums (*id.*).

Spreadsheet 1 reflects plaintiff's "position that the damages it sustained include each and every dollar paid by Karmaloop [Entities] to third parties without first complying with the [PPA]," including their employee payroll distributions, and posits \$5,587,386 in such "unauthorized" payments. Spreadsheet 2 reflects plaintiff's alternative position "pre-approval, authorization and/or permission" to make payroll and tax payments was not required or would have been obtained under the PPA, and asserts \$3,324,991 in "unauthorized" payments (*id.* 7-8).

Neither the interrogatory response nor the spreadsheets raise a triable issue of fact as to damages arising in connection with the Capstone Defendants. While plaintiff asserts—in vague, self-serving statements by its Manager, Seth Gerszberg (*see* Doc 196 ¶¶ 16, 33 [claiming plaintiff "invested millions . . . in reliance upon (the Karmaloop Entities') promises to perform . . . by having purchased millions of dollars of inventory"])—that there is an issue of fact as to the amount of damages, it has put forth no sufficiently reliable, admissible evidence in opposition to Motion 005 to support that position.

Plaintiff's generalities that it sustained damages and the discovery responses and spreadsheets prepared for litigation do not raise a triable issue of fact with respect to damages arising from, or relating to any alleged breach of, the PPA by the Capstone Defendants. After years of litigation and discovery, plaintiff's evidence consists of little

more than a self-serving employee affidavit that fails to identify any specific harm relating to the Capstone Defendants and its attorney's interrogatory response with two unsupported damage-calculation spreadsheets created for litigation (*see 25 Fifth Ave. Mgt. Co. v Ivor B. Clark, Inc.*, 280 AD 205, 208 [1st Dept 1952] ["The fact of damage must be susceptible of ascertainment in some manner other than mere conjecture or guesswork."], *aff'd* 304 NY 808 [1952]; *see also Safeguard Sec., Inc. v Ryan*, 225 AD2d 364, 365 [1st Dept 1996] [affirming summary dismissal in absence of proof of damages]). Plaintiff's attorney is not a witness.

As with plaintiff's breach of the PPA claim, plaintiff has failed to submit any evidence sufficient to create a triable issue of fact whether the Capstone Defendants were unjustly enriched at plaintiff's expense in connection with the PPA. Plaintiff's unsupported speculation that all defendants were enriched because plaintiff kept the Karmaloop Entities in business longer than they otherwise would have been are not adequate.

Likewise, even if plaintiff had established that Davies had a fiduciary obligation to it, plaintiff has failed to submit evidence sufficient to raise a triable issue of fact as to any damages arising from a breach of that relationship. Plaintiff's evidence in opposition to Motion 005 does not demonstrate any improper payments that should have been made to plaintiff but were, instead, transferred to a Capstone Defendant.

Finally, plaintiff has not raised a triable issue of fact sufficient to defeat summary judgment as to its equitable estoppel claim against Capstone and CRS. Regardless whether Capstone or CRS is the entity that entered the PPA, plaintiff has failed to raise

a triable issue of fact as to a qualifying prejudice it sustained as a result of the PPA or during the PPA-period.

Accordingly, Motion 005 is granted and the second amended complaint is dismissed against the Capstone Defendants.

**2. Motion 006: Plaintiff's motion for partial summary judgment on liability**

Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability for the third through seventh causes of action against the Capstone Defendants and Selkoe. Motion 006 is denied as plaintiff's evidence does not demonstrate prima facie entitlement to judgment as a matter of law for those claims.

As to liability for breach of the PPA, plaintiff has not established that either Capstone or CRS caused a compensable, material breach that caused plaintiff to sustain an injury. The same deficiency applies to the breach of the PPA claim as against Selkoe; issues remain as to whether there was a material, qualifying breach of the PPA that harmed plaintiff. The court rejects plaintiff's argument that Selkoe is liable for breach of the PPA as a matter of law as a guarantor because Karmaloop failed to timely respond to the first amended complaint. Selkoe is entitled to defend his personal liability for alleged breach of PPA and there are issues of fact surrounding whether there exist a material breach or any damages arising therefrom.

Likewise, plaintiff has not established entitlement to judgment on liability as to its unjust enrichment claim. Issues of fact remain as to whether either the Capstone Defendants or Selkoe were, in fact, enriched at plaintiff's expense. Plaintiff's generalizations that the Capstone Defendants were paid a consulting fee and that all

defendants benefited from the Karmaloop Entitie's continued business operations are not sufficient.

Plaintiff has not established that Davies had a fiduciary obligation to plaintiff, as opposed to the Karmaloop Entities, or—if such a relationship existed—whether plaintiff was harmed as a result of the alleged breached fiduciary obligations. Finally, plaintiff has not established entitlement to partial summary judgment on the seventh cause of action for equitable estoppel: the Capstone Defendants concede that CRS is a party to the PPA; in any event, summary judgment is precluded by issues of fact whether the Capstone Defendants had the requisite intent or actual or constructive knowledge of the facts and whether plaintiff was prejudiced by the alleged improper behavior.

### **3. Motion 007: Selkoe's motion for summary dismissal**

Selkoe's motion is granted to the extent that the unjust enrichment claim is dismissed against him; the breach of the PPA claim against him survives. Selkoe's submissions in support of Motion 006 do not eliminate triable issues of fact as to whether he is personally liable for damages, if any, plaintiff sustained due to a breach of the PPA by the Karmaloop Entities or Capstone Defendants. Selkoe personally guaranteed "Karmaloop[ Entities]' performance under the [PPA]" and "shall be personally liable to [plaintiff] . . . for any breach by Karmaloop under the [PPA]" (Doc 175). The personal guarantee "forms a material part of [the PPA,]" and a breach of the PPA by a Karmaloop Entity, Capstone, or CRS "shall constitute a breach by Karmaloop [Entities] of the [ISA]" (*id.*).

Selkoe's initial moving papers do not include the LCA and do not eliminate all issues of fact as to whether an alleged breach of the PPA caused an injury to plaintiff,

and the evidence submitted by the Capstone Defendants in support of Motion 005 is not incorporated into Selkoe's Motion 006 submissions simply because the two motions share an Index Number (see CPLR 3212).

In any event, the issue whether a Karmaloop Entity breached the PPA to plaintiff's detriment is not before the court in Motion 007, and Selkoe's submissions do not conclusively eliminate issues of fact pertaining to that issue. Karmaloop failed to timely respond to the first amended complaint, and plaintiff's motion for a default judgment was granted against Karmaloop for liability as to the breach of the PPA claim. The issue of damages resulting from Karmaloop's default/breach of the PPA remains held in abeyance pending resolution of this action. Selkoe's motion is, therefore, denied as to the fourth cause of action in the second amended complaint.

Selkoe's motion is granted, however, inasmuch as he seeks dismissal of plaintiff's unjust enrichment claim. Selkoe's submissions establish that plaintiff cannot demonstrate Selkoe was enriched at plaintiff's expense. Plaintiff does not technically submit any evidence in opposition to Selkoe's motion; rather, all of plaintiff's opposing submissions are submitted jointly in connection with Motion 005, separate from the papers submitted in connection with Motion 007. Nonetheless, there are no triable issues of fact to preclude summary judgment in favor of Selkoe on that cause of action: plaintiff's allegations that Selkoe was unjustly enriched are inadequately supported by only conclusory statements and conjecture that Selkoe benefited from the Karmaloop Entities' continued operation.

Accordingly, it is

- 1. As to Motion Sequence Number 005:

ORDERED that Motion Sequence Number 005, the summary judgment motion of defendants Capstone Partners LLC (Capstone), CRS Capstone Partners, LLC (CRS), and Brian Davies (collectively, Capstone Defendants), is granted and the second amended complaint is dismissed against those defendants, with costs and disbursements to those defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of those defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal against the Capstone Defendants and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the Capstone Defendants shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-filing" page on the court's website – [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and

2. As to Motion Sequence Number 006:

It is ORDERED that Motion Sequence Number 006, the partial summary judgment motion of plaintiff TC Tradeco, LLC, is denied; and

3. As to Motion Sequence Number 007:

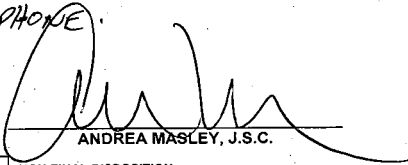
It is ORDERED that Motion Sequence Number 007, the summary judgment motion of defendant Greg Selkoe, is granted in part, and the sixth cause of action (unjust enrichment) is dismissed as against that defendant; and it is further

ORDERED that the remaining parties shall appear for trial in Part 48, Room 242 at 60 Centre Street, on TBD; and it is further

ORDERED that any motions in limine must be served no later than 30 days from the date this order is entered on NYSCEF; and it is further

ORDERED that the parties shall appear for a pre-trial conference on 1/25/19 at 3:45 a.m. (p.m.) by PHONE.

1/3/2019  
DATE

  
ANDREA MASLEY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN
- DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

- OTHER
- REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: