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| <b>eProdigy Fin. LLC v Boaz Capital LLC</b>  |
| 2020 NY Slip Op 33473(U)   |
| October 21, 2020   |
| Supreme Court, New York County   |
| Docket Number: 154274/2019   |
| Judge: Nancy M. Bannon   |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM**

*Justice*

-----X

EPRODIGY FINANCIAL LLC,

Plaintiff,

- v -

BOAZ CAPITAL LLC and DESMOND MILLER

Defendants.

-----X

**INDEX NO. 154274/2019**

**MOTION DATE 9/9/2020**

**MOTION SEQ. NO. 002**

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 46

were read on this motion to/for

DISMISSAL

**I. INTRODUCTION**

In this action seeking to recover \$64,639.00 in allegedly diverted receivables, the defendants Boaz Capital LLC (Boaz) and its principal, Desmond Miller (Miller), move, pre-answer, pursuant to CPLR 3211(a)(7) to dismiss the complaint on the ground that it fails to state a cause of action. The plaintiff, eProdigy Financial LLC (eProdigy), opposes the motion. The motion is granted.

**II. BACKGROUND**

The business of eProdigy is to provide cash advances in exchange for a portion of a business' future credit card receivables, per a merchant case advance or factoring agreement. Boaz is an independent broker that locates merchants interested in entering such agreements. Pursuant to an agreement between eProdigy and Boaz, Boaz would perform brokerage or underwriting services, collect signed applications and bank statements from businesses, review applications, and generate MCA agreements on its letterhead that would be executed by Boaz and the businesses. The copy of the "Credit Facility Agreement" submitted by eProdigy is unsigned and reflects an unspecified date in June 2018. The agreement, which had a two-year

term, includes a financing and securitization scheme and provides in part that “Boaz shall direct all appropriate and responsible parties to cause all proceeds of receivable (“collections”) to be deposited directly into accounts authorized by eProdigy”. According to eProdigy, Boaz procured approximately 600 merchants in this manner between March 2018 to October 2018.

eProdigy further alleges that on April 23, 2018 Boaz sent it an MCA agreement executed by BTA Howe LLC d/b/a Tuffy Tire (Tuffy Tire). Pursuant to the agreement, eProdigy advanced Tuffy Tire \$60,000 in exchange for a 15% interest in its daily future receivables until \$88,000 of receivables had been delivered. With the agreement, a confession of judgment was executed by Tuffy Tire’s owner James Howe. Boaz received a \$3,762.50 commission.

The MCA agreement procured by Boaz purportedly for eProdigy does not mention eProdigy. According to eProdigy, however, Boaz would notify it of any signed agreements and eProdigy would pay out the promised cash advance to the signatory business via wire transfer and would pay Boaz a commission. Boaz would instruct the businesses to deposit the receivables into a particular account, which had been pre-authorized by eProdigy and was serviced by yet another party, ACH Capital, LLL. eProdigy alleges that this practice of using the name of a broker who does not advance the cash is common practice in the MCA industry and that such an arrangement is not intended to confer upon the broker any rights to recover under the agreement. eProdigy maintains that, although the MCA identifies Boaz as the buyer of the future receipts, Boaz is not actually the buyer. Rather, the use of Boaz’ name in this way is merely a “white label”, the “actual” parties to the MCA being eProdigy, as the buyer/funder and the merchant as the seller. Boaz claims that it nonetheless has an interest in the receivables.

On May 18, 2018, Tuffy Tire defaulted on the agreement. eProdigy alleges that on March 14, 2019, it called Tuffy Tire for a final attempt at resolving the matter and Tuffy Tire advised that he had already been sent a payoff letter on Boaz Capital letterhead dated December 21, 2018. The letter demanded that Tuffy Tire remit the total amount of \$48,486.00 to Boaz to fully satisfy its obligations with respect to the MCA agreement. Tuffy Tire paid that amount to Boaz, and provided eProdigy with proof of two wire transfers to Boaz totaling \$48,486.00. eProdigy alleges that it severed its business ties with Boaz in October 2018, but Boaz and Miller thereafter began collecting payments from various businesses that entered MCA agreements with eProdigy, including Tuffy Tire.

eProdigy commenced this action on April 25, 2019, asserting causes of action for conversion, fraud, tortious interference with contract, and unjust enrichment against both defendants. Notably, eProdigy asserts no breach of contract claim. By an order dated June 3, 2019, this court denied e-Prodigy's motion for a preliminary injunction against the defendants (MOT SEQ 001). This motion ensued.

### III. DISCUSSION

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1<sup>st</sup> Dept. 2004); CPLR 3026. The complaint does not meet this standard.

#### A. Conversion

To plead a cause of action for conversion, a plaintiff must sufficiently allege that a defendant, intentionally and without authority, assumed or exercised control over the property belonging to someone else, thereby interfering with that person's right of possession. See William Doyle Galleries, Inc. v Stettner, 167 AD3d 501 (1<sup>st</sup> Dept. 2018). However, to sustain an action for conversion of an identifiable sum of money, a plaintiff must allege that it had ownership, possession, or control of the money which is the subject of the action in the first place. See Soviero v Carroll Group Intl., 27 AD3d 276 (1<sup>st</sup> Dept. 2006); City of New York v 611 West 152<sup>nd</sup> Street, Inc., 273 AD2d 125 (1<sup>st</sup> Dept. 2000). "A conversion claim cannot be based only on the allegation that a defendant received money and failed to remit payment to the plaintiff (Stack Elec., Inc. v DiNardi Cosntr. Corp., 161 AD2d 416 [1<sup>st</sup> Dept. 1990])." Interstate Adjusters, Inc. v First Fidelity Bank, N.A., 251 AD2d 232, 234 (1<sup>st</sup> Dept. 1998).

Here, the gravamen of the entire complaint is that eProdigy, though perhaps entitled to the receivables, was never in possession of them. eProdigy alleges that Boaz did not come into

possession of those funds rightfully and then wrongfully retain them, but rather that Boaz fraudulently extracted the funds directly from Tuffy Tire and then retained them for itself, bypassing eProdigy altogether. Thus, while these allegations support other causes of action such as breach of contract, or possibly some level of criminal liability, they do not make out the necessary elements of conversion. Indeed, it is well established that “an action for conversion cannot be predicated on a mere breach of contract.” Yeterian v Heather Mills N.V. Inc., 183 AD2d 493 (1<sup>st</sup> Dept. 1992); see also Peters Griffin Woodward, Inc. v WCSC, Inc., 88 AD2d 883 (1<sup>st</sup> Dept. 1982).

### B. Fraud

eProdigy’s allegations are likewise insufficient to allege a cause of action for fraud. In that regard, eProdigy appears to be alleging that Boaz entered the agreement with eProdigy with fraudulent intent, in that it later collected monies from Tuffy Tire and retained them in contravention of the contract between eProdigy and Boaz. That is, in essence a breach of contract claim. “It is well settled that a cause of action for fraud does not arise where the only fraud alleged merely relates to a party’s alleged intent to breach a contractual obligation.” 767 Third Ave. LLC v Greble & Finger, LLP, 8 AD3d 75, 76 (1<sup>st</sup> Dept. 2004). That is, a cause of action based on promissory fraud, in which it is alleged that a defendant entered into an agreement with an undisclosed intention not to perform it, is only viable where the alleged misrepresentations concern matters outside the text of the parties’ contract. See Sabo v Delman, 3 NY2d 155 (1958); Wyle, Inc. v ITT Corp., 130 AD3d 438 (1<sup>st</sup> Dept. 2015).

### C. Tortious Interference

The cause of action for tortious interference with contract must also be dismissed. For that claim to survive a motion to dismiss, the plaintiff must sufficiently allege “the existence of a valid contract between the plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the third-party’s breach of the contract without justification, actual breach of the contract, and damages resulting therefrom.” Lama Holding Co. v Smith Barney, Inc., 88 NY2d 413, 424 (1996); see also 330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B., 293 AD2d 314 (1<sup>st</sup> Dept. 2002). Here, eProdigy fails to allege the existence of a valid contract between it and the third party. The only parties to the MCA agreement are Boaz and Tuffy Tire. For no clear reason, eProdigy is not mentioned anywhere in that agreement. Its contract is with Boaz.

#### D. Unjust Enrichment

“The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in ‘equity and good conscience’ should be paid to the plaintiff (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173 [2011]; *quoting* Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415 [1972]).” Corsello v Verizon New York, Inc., 18 NY3d 777, 791 (2012). However, “unjust enrichment is not a catchall cause of action to be used when others fail.” Id. “An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim (Clark-Fitzpatrick, Inc. v Long Is. RR. Co., 70 NY2d 382 [1987]; Samiento v World Yacht, Inc., 10 NY3d 70 [2008]; Town of Walkkill v Rosenstein, 40 AD3d 972 [2<sup>nd</sup> Dept. 2007]).” Id. at 791-792. Here, eProdigy alleges that Boaz was enriched by collecting the \$48,486 from Howe at eProdigy’s expense and that it would be against equity and good conscience to allow Boaz to retain the repayment. However, as previously stated, even though eProdigy purports to have entered and later terminated its agreement with Boaz, the complaint does not include a breach of contract cause of action. As correctly argued by the defendants, and in accordance with the authority cited above, eProdigy’s unjust enrichment claim merely replaces a breach of contract claim and, as such, must be dismissed. See Markov v Katt, 176 AD3d 401 (1<sup>st</sup> Dept. 2019); Empire Outlet Builders, LLC v Constr. Resources Corp. of New York, 170 AD3d 582 (1<sup>st</sup> Dept. 2019); Scarola Ellis LLP v Padeh, 116 AD3d 609 (1<sup>st</sup> Dept. 2014).

#### E. Individual Liability

Even if the claims were not dismissed for the reasons set forth above, they would be subject to dismissal as against defendant Miller for the additional reason that eProdigy does not allege any basis to impose individual liability. “A corporate officer is not subject to personal liability for actions taken in furtherance of the corporation’s business under the well-settled rule that an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent’s intention to substitute or superadd his personal liability for, or to, that of his principal.” Worthy v New York City Housing Auth., 21 AD3d 284 (1<sup>st</sup> Dept. 2005). No such allegations are made here. The complaint alleges that Boaz, on company letterhead, demanded payment from Tuffy Tire and that Tuffy Tire paid money into Boaz’ bank account. There is nothing to suggest that Miller personally was enriched. To the extent eProdigy is seeking to pierce the corporate veil, it has not alleged, much less demonstrated, that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which

resulted in plaintiff's injury." Ciavarella v Zagaglia, 132 AD3d 608, 608-609 (1<sup>st</sup> Dept. 2015) (quotation and citation omitted); see also Fantazia Int'l Corp. v CPL Furs New York, Inc., 67 AD3d 511 (1<sup>st</sup> Dept. 2009).

#### IV. CONCLUSION

The complaint is dismissed in its entirety pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

Accordingly, it is,

ORDERED that the defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is granted in its entirety and the complaint is dismissed, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

  
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NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

10/21/2020

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED  DENIED

GRANTED IN PART  OTHER

APPLICATION:  SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE