

Alles Brands Inc. v Rosenthal & Rosenthal, Inc.

2021 NY Slip Op 30848(U)

March 17, 2021

Supreme Court, New York County

Docket Number: 654629/2020

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **IAS MOTION 14**

Justice

-----X

ALLES BRANDS INC.,

Plaintiff,

- v -

ROSENTHAL & ROSENTHAL, INC., MICHAEL CIPRIANI,
MICHAEL STANLEY

Defendant.

-----X

INDEX NO. 654629/2020

MOTION DATE 03/15/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 18

were read on this motion to/for DISMISS.

The motion to dismiss by defendants is granted in part and denied in part.

Background

Plaintiff sells pens, stationary and other items. It wanted to sell to non-party 99 Cent Only Stores (“99 Cent”) but was not on 99 Cent’s “approved” vendor list. Plaintiff claims that in February 2020, it entered into an agreement with 99 Cent to sell various merchandise for \$99,392.09 and delivered a “substantial portion” of the goods to 99 Cent. However, instead of jumping through the hoops to qualify for that approved vendor list, plaintiff invoiced 99 Cent under the name Watermark Beauty, which was approved. Plaintiff alleges that although the payment went to Watermark, “it was agreed and understood between 99 Cent and [plaintiff], as parties to the Supplies Agreement, that payment for the Delivered Merchandise was to be made solely for the benefit of Alles” (NYSCEF Doc. No. 10, ¶ 12).

However, in May 2017, nearly three years prior to its agreement with 99 Cent, Watermark and defendant Rosenthal entered into a collateral agreement, which eventually resulted in Watermark informing its customers that all accounts receivable owed to Watermark should be paid directly to Rosenthal. Unfortunately for plaintiff, 99 Cent paid Rosenthal the money billed by Watermark for supplied provided by plaintiff.

Plaintiff contends that despite being informed by plaintiff, 99 Cent and Watermark that the funds were sent to Rosenthal in error, Rosenthal retained the money. Plaintiff brings causes of action for conversion, unjust enrichment, declaratory judgment, constructive trust and injunctive relief against defendants. Defendants Cipriani and Stanley are principals of Rosenthal.

Discussion

“It is settled that a motion for dismissal pursuant to CPLR 3211(a)(7) must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. The pleading is to be liberally construed. The court must accept the facts alleged in the pleading as true and accord the opponent of the motion, here defendants, the benefit of every possible favorable inference to determine only whether the facts as alleged fit within any cognizable legal theory” (*Siegmund Strauss, Inc. v East 149th Street Realty Corp.*, 104 AD3d 401, 403, 960 NYS2d 404 [1st Dept 2013] [internal quotations and citations omitted]).

Claims against individual defendants Cipriani and Stanley

Defendants move to dismiss all claims against Cipriani and Stanley on the ground that these principals do not owe an independent duty to plaintiff. They emphasize that the amended

complaint does not contain any allegations that these individuals took the money 99 Cent wired to Rosenthal or provide a reason why the corporate veil should be pierced.

In opposition, plaintiff contends that Cipriani and Stanley knowingly and actively participated in the conversion of the wired funds. Plaintiff maintains that they were told by plaintiff that the money had been sent in error and should be returned. It also argues that a Rosenthal employee (acting under the direction of Cipriani and Stanley) initially agreed to return the money but then failed to do so.

The Court grants this branch of the motion. The allegations in the amended complaint do not state causes of action against these individual defendants. “Generally . . . piercing the corporate veil requires a showing 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” (*Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141, 603 NYS2d 807 [1993]).

The amended complaint merely alleges that Stanley and Cipriani refused to cause Rosenthal to return the money (NYSCEF Doc. No. 10, ¶ 22). But nothing about that paragraph or any other paragraph in the amended complaint demonstrates that these individuals could be held personally liable for the alleged wrongful retention of the money at issue. Rather, the inference to be drawn from the amended pleading is that Cipriani and Stanley were acting in their professional capacity at Rosenthal. There are not allegations, for instance, that Cipriani or Stanley deposited the disputed funds into their personal accounts or used the money for personal expenses. Plaintiff cannot recover against these individuals solely on the basis that they are principals of Rosenthal.

Conversion

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50, 827 NYS2d 96 [2006] [citations omitted]).

The Court finds that plaintiff has stated a cause of action for conversion. The amended complaint alleges that the funds sent by 99 Cent to Rosenthal were supposed to go to plaintiff, that plaintiff told defendant Rosenthal about 99 Cent's mistake and that Rosenthal refused to give the money back. Under plaintiff's version, which the Court must take as true on a motion to dismiss, the payment by 99 Cent to Rosenthal was a mistake and it should not retain these funds.

Defendants' assertion that if plaintiff is owed any money it is due to 99 Cent's action does not compel a different result. While that may be true—if it was 99 Cent's error in paying Rosenthal—that does not mean that Rosenthal should be entitled to retain money that was sent to it in error (assuming that plaintiff's version is true). That states a conversion cause of action.

Unjust Enrichment

The Court also denies the motion with respect to the 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. In a broad sense, this may be true in many cases, but unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor

committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled. An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790, 944 NYS2d 732 [2012]).

Here, there is no contract between plaintiff and Rosenthal and the allegation is that Rosenthal retained money from 99 Cent that it should not retain because it was supposed to go to plaintiff. The allegations here create an equitable obligation that Rosenthal should return the money (if plaintiff successfully shows it was supposed to get the money). Defendants’ assertion that there is a contract-- between 99 Cent and plaintiff—is beside the point. 99 Cent should not have to pay the money owed in the agreement twice if the matter could be resolved by Rosenthal simply returning the money (again, assuming that plaintiff’s version of events is borne out).

To the extent that defendants assert that there is a lack of a relationship between plaintiff and Rosenthal, that does not justify dismissing this cause of action. There is no requirement that plaintiff and Rosenthal be in privity. The allegation is that plaintiff (as well as 99 Cent and Watermark) reached out to Rosenthal about returning the money and Rosenthal refused. This is sufficient to establish the required connection. Any way you look at it, the allegation is that Rosenthal received money in error and refused to return it.

Constructive Trust

“Generally, a constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. In the development of the doctrine of constructive trust as a remedy available to courts

of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment” (*Sharp v Kosmalski*, 40 NY2d 119, 121, 40 NY2d 119 [1976] [internal quotations and citations omitted]).

The Court dismisses this cause of action because plaintiff did not adequately plead the existence of a confidential or fiduciary relationship, a promise or a transfer in reliance on a promise. The transfer was executed by 99 Cent based on an alleged mistake. There is no basis to find that Rosenthal had anything close to a fiduciary relationship with plaintiff; the allegations only contemplate a relationship between Rosenthal and Watermark.

Plaintiff’s assertion that the elements of a cause of action for constructive trust are not strictly construed may be true but plaintiff’s allegations do not come close to stating this claim. The allegedly mistaken transfer was made by a non-party based on Rosenthal’s agreement with Watermark. It was not a transfer that was at Rosenthal’s direction.

Injunctive Relief

In the third cause of action, plaintiff seeks a declaration that it is entitled the amount of the wired funds. This states a cognizable cause of action. If plaintiff successfully proves that it was entitled to the money and that 99 Cent should not have sent the funds to Rosenthal, then it would be entitled to a declaration stating as such.

The fifth cause of action seeks an injunction that prohibits defendants from transferring the money at issue. That also states a cause of action. Taking plaintiff’s allegations as true, plaintiff can plead a cause of action barring defendants from transferring money to which plaintiff claims it is entitled.

The Court observes that both of these causes of action are post-judgment claims.

Punitive Damages

The Court dismisses the demand for punitive damages. “Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations” (*Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 489, 836 NYS2d 509 [2007] [internal quotations and citations omitted]).

According to the amended complaint, this entire dispute arose because plaintiff and 99 Cent decided they did not want to wait to get plaintiff on the approved vendor list (NYSCEF Doc. No. 10, ¶ 9). Instead of going through the normal process, they concocted a scheme by which 99 Cent would pay Watermark (a vendor already on 99 Cent's approved vendor list). As 99 Cent and plaintiff devised this agreement, Rosenthal had already directed (as was its contractual right) Watermark's customers to pay Rosenthal under the terms of the accounts receivable contract with Watermark. For some reason yet unknown (maybe it was 99 Cent's honest mistake or maybe it was because it couldn't pay plaintiff because plaintiff was not an approved vendor or maybe something else), 99 Cent paid Rosenthal instead of complying with the side agreement it had reached with plaintiff.

The Court does not see how Rosenthal could be forced to pay punitive damages under the factual scenario as described by plaintiff. Plaintiff and 99 Cent agreed that the invoice for the agreement with 99 Cent would be under Watermark's name (*id.* ¶ 10). That raised the risk that if something happened with Watermark, it could create confusion or the possibility that plaintiff wouldn't get its payment. And that is exactly what happened.

Plaintiff's attempt to characterize defendants' retention of the funds as outrageous is not a compelling argument. From defendants' perspective, they were sent money from 99 Cent under

an invoice to Watermark; in other words, they received money they were, on its face, supposed to receive. That plaintiff may ultimately show it should have received the money does not mean that defendants should have just given up the money or that punitive damages are appropriate.

The Court also observes that plaintiff's allegation that Rosenthal agreed to a reduced payoff amount from Watermark with respect to Watermark's obligations to Rosenthal is not relevant on this motion. Plaintiff claims that this agreement took place on June 5, 2020 and Watermark wired the payoff money on June 17, 2020. But, according to plaintiff, 99 Cent wired the funds to Rosenthal on June 2, 2020. In other words, at the time 99 Cent allegedly sent the funds in dispute, Rosenthal had not resolved its dispute with Watermark and the money was already in Rosenthal's account. It could very well be that Rosenthal relied on keeping that money when it was negotiating with Watermark, and it could be that Watermark got the benefit of that money (by having to pay less to Rosenthal). Considering plaintiff created this mess by trying to circumvent getting on the approved vendor list, punitive damages against Rosenthal are inappropriate, especially because when Rosenthal took the money had no reason to think it was not entitled to it.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants is granted only to the extent that plaintiff's causes of action against the individual defendants are severed and dismissed, and the fourth cause of action for constructive trust as well as the demand for punitive damages are also dismissed; and it is further

ORDERED that the remaining branches of the motion are denied and the remaining defendant is directed to answer pursuant to the CPLR.

Remote Conference: April 29, 2021.

3/17/2021

DATE



ARLENE F. BLUTH, J.S.C.

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