Aventura Judaica, LLC v Aviv Judaica Imports, Ltd
2021 NY Slip Op 31768(U)
May 11, 2021
Supreme Court, Kings County
Docket Number: 512487/20
Judge: Carolyn E. Wade
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.

At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of May, 2021.

PRESENT:

HON. CAROLYN E. WADE,
Justice.

----------X

AVENTURA JUDAICA, LLC,

Plaintiff,

- against -

Index No. 512487/20

AVIV JUDAICA IMPORTS, LTD D/B/A AVIV JUDAICA AND ZIPORA LAX,

Defendants.

----------X

The following e-filed papers read herein:	NYSCEF Doc Nos.[1]
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	5-8
Opposing Affidavits (Affirmations)	13-16

Upon the foregoing papers, defendants, Aviv Judaica Imports, LTD d/b/a Aviv Judaica (Aviv), and Zipora Lax (collectively, defendants), move (in motion sequence [mot. seq.] one) for an order (1) pursuant to CPLR 3211(a) (7), dismissing the complaint of Aventura Judaica, LLC (plaintiff) for failure to state a cause of action; (2) pursuant to CPLR 3211 (a) (5), dismissing the first, second, and sixth causes of action based on the statute of frauds, codified in UCC § 2-201; (3) pursuant to CPLR 3211 (a) (3), dismissing the complaint because plaintiff lacks the legal capacity to sue; and (4) dismissing the breach of contract claims as against defendant Zipora Lax on the additional grounds that the complaint fails to allege that Zipora personally obligated herself as to the contract.

[1] New York State Courts Electronic Filing Document Numbers

According to the complaint, plaintiff, represented by Meir Kessler, and Aviv, represented by Phillip Lax, have acted as partners and joint venturers in New York since September 2015 in purchasing and developing various products for online sale via Amazon.com (*see* verified complaint, ¶ 5). Plaintiff designed multiple products, under its trademark, "The Dreidel Company," and Aviv sourced the products to Chinese manufacturers to be created and produced (*id.* at ¶ 7). Once the products were manufactured, Aviv sold "Plaintiff's Products to Plaintiff" (*id.*). Plaintiff also "partnered" with Aviv to sell Aviv's products on Amazon.com and, in March 2019, plaintiff became the "exclusive seller" of Aviv's products on Amazon.com (*id.* at ¶ 9).

In 2019, plaintiff purchased about $150,000.00 worth of Aviv's products which were sold for a profit (*id.* at ¶¶ 13-14), and likewise purchased about $300,000.00 worth of its own products from Aviv which were also sold for a profit (*id.* at ¶¶ 16-17). On or about September 12, 2019, Phillip Lax, Aviv's owner, passed away and Zipora Lax, Phillip Lax's spouse, took over Aviv's ownership and control (*id.* at ¶ 19).

From February 2020 to May 2020, Zipora Lax purportedly assured plaintiff that Aviv would continue to source plaintiff's products for the 2020 season and sell those products as well as Aviv's products to plaintiff for the 2020 season (*id.* at ¶¶ 20-21). However, on or about May 19, 2020, Zipora Lax conveyed to plaintiff that she would no longer honor the "enterprise agreement" and would sell plaintiff's "molds, artwork and property to an undisclosed purchaser" (*id.* at ¶ 22). Plaintiff attempted to recover its "molds, artwork and property" from defendants who have ignored all of plaintiff's attempts (*id.* at ¶ 23).

Based on the foregoing, plaintiff commenced this action alleging breach of contract (first and second causes of action), conversion (third cause of action), an accounting (fourth cause of action), imposition of a constructive trust (fifth cause of action), and unjust enrichment (sixth cause of action). Plaintiff seeks damages of $65,000.00, representing the face value of its "molds, artwork and property," $165,000.00 representing lost earnings for the "2020 season" and $2,000,000.00 representing future lost earnings (*id.* at ¶¶ 24-26).

Defendants move to dismiss all six causes of action, pursuant both to CPLR 3211 (a) (7), for failure to state a claim and, to CPLR 3211 (a) (5) on statute of frauds grounds, among others. The court will address dismissal of each cause of action seriatim.

Legal Standard

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff the benefit of every possible favorable inference" (*Halliwell v Gordon*, 61 AD3d 932, 933 [2d Dept 2009]; *see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The test to be applied is whether the complaint "gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (*Moore v Johnson*, 147 AD2d 621, 621 [2d Dept 1989] [internal citation omitted]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Breach of Contract

Defendants argue that plaintiff's breach of contract claims are dismissible because the Uniform Commercial Code requires a signed writing for the sale of goods over $500 and no such writing exists here. Further, that plaintiff does not state a claim for breach of contract because plaintiff fails to plead the contract's material terms such as price, quantity, delivery, duration, and ownership of the product.

In opposition, plaintiff argues that a statute of frauds defense is unavailable where, as in this case, the parties are engaged in a joint venture; and that defendants should be estopped from asserting the defense because plaintiff relied on defendants' unambiguous assurances "to continue sourcing Plaintiff's products for the 2020 season" (NYSCEF Doc No. 13, Affirmation in Opposition at 5, ¶ 24).

Plaintiff does not dispute that the parties' alleged agreement concerns the ongoing sale and purchase of goods and that a signed writing does not exist. Under NY UCC § 2-201(1),

> "a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker."

Generally, when determining whether a partnership or a joint venture exists, "the factors to be considered are the intent of the parties (express or implied), whether there was joint control and management of the business, whether there was a sharing of the profits as well as . . . of the losses, and whether there was a combination of property,

skill, or knowledge" (*Robinson v Jewish Hosp. & Med. Ctr.*, 221 AD2d 328, 328 [2d Dept 1995 [internal citation omitted]).

Here, despite plaintiff's characterization of the parties' relationship as a joint venture, the complaint is bereft of any facts supporting the allegation that the parties were joint venturers or partners. In fact, the complaint itself indicates that plaintiff and Aviv were separate business entities engaged in a conventional arms-length business transaction as buyer and seller, not as joint venturers (*see* NYSCEF Doc Nos. 1, 7 and 14, verified complaint, at 4, ¶¶ 6 - 9). Quite simply, Aviv manufactured the goods designed by plaintiff and sold such goods to plaintiff. None of the aforementioned factors of joint control and management or the sharing of profits and losses are even alleged by plaintiff.

With regard to whether defendants should be estopped from asserting the statute of frauds defense, it is well established that "[a]n oral promise cannot be relied upon to estop a plea of Statute of Frauds unless the circumstances are "such as to render it unconscionable to deny" the oral promise upon which the promisee has relied" (*Ginsberg v Fairfield-Noble Corp.*, 81 AD2d 318, 320-21 [1st Dept 1981] citing *Swerdloff v Mobil Oil Corp.*, 74 AD2d 258 [2d Dept 1980]; *Beck v New York News*, 92 AD2d 823, 825 [1983]). Even under the most liberal reading, neither plaintiff's injury of projected lost profits nor the circumstances surrounding the loss, i.e., defendants' refusal to continue the parties' relationship, can be viewed as "unconscionable."

Based on the foregoing, defendants are permitted to assert the statute of frauds as a defense to plaintiff's breach of contract claims.

Even if the statute of frauds did not apply, plaintiff's contract claims would not survive as plaintiff's alleged agreement with defendants is too indefinite to be enforceable (*see Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 61 [1st Dept 2015], *affd* 31 NY3d 100, 103 [2018]). Plaintiff fails to allege any terms that are common to purchase and sale agreements for goods such as price, quantity, delivery time frame, or even the duration of the parties' relationship. The only agreed upon "term" is the description of the parties' relationship, that is, that plaintiff would design products which Aviv would arrange to be produced in China, and that Aviv would sell such products to plaintiff so that plaintiff could sell same on Amazon.com for a profit. This open-ended "agreement" can be of no legal efficacy. Hence, for the reasons set forth above, plaintiff's contract claims must be dismissed.

Conversion

Defendants argue that plaintiff's conversion claim should be dismissed because (1) the phrase used throughout the complaint – "molds, artwork and property" – fails to sufficiently specify which molds or property were allegedly converted, and (2) plaintiff predicates its conversion claim on a mere breach of contract.

A conversion occurs "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" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). "If possession of the property is originally lawful, a conversion occurs when the defendant refuses to return the property after a demand . . ." (*Matter of White v City of Mount Vernon*, 221 AD2d 345, 346 [2d Dept 1995]).

Here, plaintiff alleges that its "molds, artwork and property" were delivered to defendants in connection with their business relationship, and that defendants refused to return said items despite due demand. These allegations are sufficiently particular and identifiable as to give defendants notice of the subject transaction. Defendants fail to establish that because they are in the business of receiving molds and artwork to manufacture products, plaintiff must describe or identify its "molds, artwork and property" with exactitude in its pleading. In addition, defendants fail to prove that plaintiff's conversion claim is predicated entirely on its breach of contract claim. Therefore, defendants' motion to dismiss plaintiff's conversion claim warrants denial.

Accounting

Defendants move to dismiss plaintiff's cause of action for an accounting on the grounds that there is no fiduciary relationship plead in this case. Plaintiff acknowledges that a confidential or fiduciary relationship is necessary to support a claim for an accounting, but it contends that it has adequately plead such a relationship because it "placed its trust in Company Defendant to act as a partner in the above enterprise and permitted Company Defendant to have physical possession of [its] molds, artwork, property used to create Plaintiff's Products" (NYSCEF Doc Nos. 1, 7 and 14, verified complaint, ¶ 10).

The right to an accounting rests on a trust or fiduciary relationship as to the subject matter of the controversy (*Town of New Windsor v New Windsor Volunteer Ambulance Corps, Inc.*, 16 AD3d 403, 404 [2d Dept 2005]). "[A] fiduciary relationship arises . . . when one . . . is under a duty to act for or to give advice for the benefit of another upon

matters within the scope of the relation" (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 592-93 [2012] [internal quotation marks and citation omitted]). "[A] conventional business relationship, without more, is insufficient to create a fiduciary relationship" (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 21 [2d Dept 2008]). Rather, a plaintiff must show "special circumstances that could have transformed the parties' business relationship to a fiduciary one . . ., such as control by one party of the other for the good of the other" (*id.* at 21-22).

Here, plaintiff fails to plead the existence of a fiduciary or trust relationship between the parties. Nor does plaintiff plead any special circumstances justifying the equitable relief of an accounting. Plaintiff's claims of trust and confidence placed in defendants are wholly conclusory and without any supporting facts. Accordingly, plaintiff fails to state a claim for an accounting, and said claim must be dismissed.

Constructive Trust

Having determined, above, that plaintiff failed to adequately plead a confidential or fiduciary relationship with defendants, plaintiff's cause of action for imposing a constructive trust must also be dismissed for the same reason (*see Diaz v Diaz*, 130 AD3d 560, 561 [2d Dept 2015]["The elements of a constructive trust are (1) a fiduciary or confidential relationship; (2) an express or implied promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment"]).

Unjust Enrichment

Defendants argue that plaintiff can not maintain an unjust enrichment claim because (1) plaintiff must have already incurred losses proximately caused by the

defendants' conduct whereas, here, plaintiff asserts losses in the future; (2) the alleged existence of a contract between the parties precludes asserting a claim for unjust enrichment; and (3) plaintiff cannot circumvent the statute of frauds by alleging quasi-contract claims.

In opposition, plaintiff argues that it has stated an unjust enrichment claim insofar as it alleges that defendants have been enriched by retaining its valuable property and will be further enriched by selling the property to an undisclosed purchaser. Plaintiff further argues that an unjust enrichment claim is not precluded because defendants' retention of the property constitutes conduct the contract does not cover.

To establish unjust enrichment, a plaintiff must show that a defendant was enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Unjust enrichment "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" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012], *rearg denied* 19 NY3d 937 [2012]). "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*id.*).

Here, to the extent that plaintiff alleges that defendants have been unjustly enriched by their control and retention of plaintiff's property, this claim is duplicative of plaintiff's conversion claim. To the extent that plaintiff is attempting to utilize an unjust enrichment claim to recover lost profits stemming from the 2020 season and beyond, it

fails to state a claim for unjust enrichment. Not only would this claim be precluded by the existence of an alleged contract between the parties covering the same subject matter (*see Ochoa v Montgomery*, 132 AD3d 827, 828 [2d Dept 2015]), it is quite difficult to see how defendants could be "enriched" at plaintiff's "expense" by their refusal to continue the parties' business relationship. As the complaint fails to otherwise state a claim for unjust enrichment, this cause of action must be dismissed.

Plaintiff's Capacity to Sue

Defendants' argument that plaintiff, a foreign company, lacks legal capacity to sue has been rendered moot. Plaintiff provided its Certificate of Authority under Limited Liability Company Law § 805 in its opposition and, in any case, such a defect would not warrant automatically dismissing the complaint.

Contract Claims Against Zipora Lax

The branch of defendants' motion seeking to dismiss plaintiff's contract claims against Zipora Lax, individually, has been rendered moot by this decision. Nonetheless, had this claim survived, it would still be dismissible as against Zipora Lax as the only factual allegation against her is that she assured plaintiff that the parties' relationship would continue for the 2020 season. This is insufficient to find liability against Zipora Lax personally or under a corporate veil-piercing theory. Accordingly, it is

ORDERED that the branch of defendants' motion (mot. seq. one) to dismiss plaintiff's claims for breach of contract (first and second causes of action), an accounting (fourth cause of action), imposition of a constructive trust (fifth cause of action), and

unjust enrichment (sixth cause of action) is **granted**, and said claims are dismissed; and it is further

ORDERED that the branch of defendants' motion (mot. seq. one) to dismiss plaintiff's conversion claim (third cause of action) is **denied**.

This constitutes the decision and order of the court.

E N T E R,

Hon. Carolyn E. Wade
Supreme Court Justice

J. S. C.