

<b>Kong v Schuessler</b>
2021 NY Slip Op 32683(U)
March 31, 2021
Supreme Court, Queens County
Docket Number: Index No. 701396/2016
Judge: Marguerite A. Grays
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4/6/2021  
11:43 AM

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS  
Justice

IA PART 4

\_\_\_\_\_  
Gary S. Kong and New T&L Beer & Soda, Inc.,

Plaintiff

-against-

Andrew T. Schuessler, Loupat Enterprise Ltd.  
d/b/a T&L Beer & Soda Inc., A&L Beer & Soda,  
Inc., Sandy Schuessler a/k/a Sandra Schuessler,  
Independent Beverage Co., Inc. d/b/a Pequa  
Beverage, Inc., Pequa USA Beverage Corp., and  
"John Doe #1 Through #10" and "ABC Corp.  
#1 Through 10",

Defendants.

Index  
Number: 701396/2016  
  
Motion  
Date: December 15, 2020  
  
Motion Seq. No.: 10

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The following papers numbered EF117 to EF180 read on this motion by defendants for an Order pursuant to CPLR §3212, granting summary judgment in their favor; and cross-motion by plaintiffs for an Order pursuant to CPLR §3212, granting summary judgment in their favor.

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF117-153
Notice of Cross Motion - Affidavits - Exhibits.....	EF154-166
Answering Affidavits - Exhibits .....	EF176-180
Reply Affidavits .....	EF167-175

Upon the foregoing papers it is ordered that the motion and cross-motion are determined herein as follows:

Plaintiffs commenced the instant action alleging eight causes of action, including: Breach of Contract, Enforcement of the Indemnity Agreement, Unjust Enrichment, Conversion, Fraud, Tortious Interference with Business Relations, and Breach of Fiduciary Duty. Plaintiffs allege that the Defendants violated the Non-Compete Agreement and the Sales Contract by engaging in a wholesale delivery business within the State of New York following the closing on the sale of the business. Defendants move for summary judgment in their favor dismissing the causes of action. Plaintiffs oppose the motion and cross-move for summary judgment in their favor. The cross-motion is opposed by defendants.

### Facts

Plaintiffs entered into a Contract of Sale on September 14, 2015, to purchase the business, including all customers of the business, that was operated by defendant Loupat Enterprise Ltd., d/b/a T & L Beer & Soda, Inc., namely the wholesale distribution and delivery and retail sales business (hereinafter "Business" or "T&L Beer"). The Bill of Sale indicates that Defendants sold the Loupat wholesale customer list to the Plaintiffs. Andrew T. Schuessler and his wife, Sandy Schuessler, were the sole owners, directly and/or indirectly of T&L Beer, and Gary S. Kong is the sole shareholder of New T&L Beer. Plaintiffs paid \$700,000 for the purchase of T&L Beer. As part of the sale of the business, defendants agreed to be bound by a covenant not to compete for a period of five (5) years, and also signed an Indemnity Agreement whereby defendants agreed to:

indemnify, defend and hold harmless [Plaintiffs] from and against all demands, claims, actions or causes of action, assessments, losses, damages, liabilities, debts and reasonable attorney's fee (collectively, "Damages"), resulting to, imposed upon or incurred by the Purchaser, by reason of or resulting from (i) any and all claims, liabilities or obligations arising out of any acts, omissions to act or occurrences, which arising out of, on or prior to the closing of the sale of the business, pertaining in any way to the operation and running of the business, and (ii) a breach of any representation or warranty of Seller or in any agreement or instrument made or delivered as a result of the consummation of the sale of the business.

Further, the Reciprocal Non-Compete Agreement provides that the Defendants are prohibited from operating a wholesale delivery liquor business within the State of New York, for five years from the date of the sale.

Plaintiffs submit that, as an inducement for the Plaintiffs to purchase the business, Andrew Schuessler agreed to become the manager of the business. Based on this assurance,

Plaintiffs purchased the business known as T&L Beer. Plaintiffs then created New T&L Beer & Soda Inc. as the new entity to purchase, operate and manage the business which included both a retail and wholesale business. At the time of sale, plaintiffs contend the wholesale business accounted for eighty percent (80%) of the business.

Following the closing on the sale of the business, Andrew Schuessler began working as a manager of the business for approximately six weeks. Plaintiffs allege that they discovered that while Andrew Schuessler worked as a manager, he took possession of checks belonging to the Plaintiffs but failed to turn them over to Plaintiffs. Rather, he kept the checks and collected the monies to use for his own benefit. During this period of employment, plaintiffs allege, Schuessler also wrongfully obtained proprietary confidential information of clients to use for his personal gain. Plaintiffs also allege that Defendants held themselves out to be the Plaintiffs or as Plaintiffs' agent in soliciting and fulfilling orders from Plaintiffs' customers without the consent or authority of Plaintiffs; conspired to solicit the employees of New T&L Beer in order to steal customers from New T&L Beer, in violation of the covenant not to compete; and continued to utilize the proprietary customer list and pricing information belonging to Plaintiffs for Defendants' own benefit.

Furthermore, following the sale of the Business from Defendants, Plaintiffs received a Notice of Determination of Sales Tax from the New York State Commissioner of Taxation and Finance indicating that Defendants owed a large sum of money to the State. According to the Notice, Defendants failed to file their Use and Sales Tax Returns to the State of New York for multiple periods prior to the sale of the Business to Plaintiffs. The New York State Department of Finance and Taxation proposed adjustments in excess of \$422,000.00 plus interest, and the Plaintiffs now owed this money to the State of New York due to the Defendants' failure to pay. The tax bill was negotiated down to approximately \$98,000. Plaintiffs contend that New T&L Beer & Soda Inc., remains liable for this amount. As a result of this tax liability, Plaintiffs have been denied renewal of their cigarette license due to the unpaid balance. Additionally, Plaintiffs allege that they incurred substantial legal fees in defending against the tax bill.

Finally, plaintiffs allege that, even though Schuessler agreed that the Defendants would not engage in the wholesale liquor delivery business within the State of New York for a period of five years following closing, Defendants did engage in the wholesale delivery business to the customers on a Client List that they had previously sold to the Plaintiffs.

### Discussion

It is well settled that “[t]he 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 eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form” (*Santanastasio v Doe*, 301 AD2d 511 [2003]). Where a question of fact exists as a result of conflicting evidence, summary judgment must be denied (*Messena v Manhattan & Bronx Surface Transit Operating Auth.*, 249 AD2d 280 [1998]; *see also Skiadas v Barsalis*, 292 AD2d 593 [2002]).

The branch of defendants’ motion which is to dismiss the first cause of action for Breach of Contract, is denied. The cross-motion which is for summary judgment in plaintiffs’ favor on their cause of action for breach of contract, is granted. “Covenants not to compete will be enforced if reasonably limited as to time, geographic area, and scope, are necessary to protect the employer’s interests, not harmful to the public, and not unduly burdensome” (*Ricca v Ouzounian*, 51 AD3d 997, 998 [2008]; *see BDO Seidman v Hirshberg*, 93 NY2d 382, 389 [1999]; *Arthur J. Gallagher & Co. v Marchese*, 96 AD3d 791, 792 [2012]). Paragraph 2 of the Non-Compete Agreement provides that:

“[w]ithin the first five years as New T&L is operating the wholesale liquor distribution business at the location of 521 Atlantic Avenue, Freeport, NY11520, T&L’s principals, owners, and/or managers shall cease and terminate its whole sale liquor delivery business within the State of New York.”

In this regard, Andrew Schuessler testified at his deposition that his former clients contacted him and he did engage in the wholesale liquor delivery business within the State of New York, in violation of the non-compete agreement. Plaintiffs also proffered receipts of transactions in violation of the non-compete agreement. Plaintiffs contend that they paid for a business relationship with third-party wholesale customers, and that the wholesale customer list represented all the customers that the Plaintiffs had a business relationship with. Defendant Schuessler admitted that despite the fact that Defendants sold the wholesale customer list and executed a non-compete agreement, Defendants conducted wholesale business with these customers. Plaintiffs allege that by violating a non-compete agreement, defendants caused injury by way of lost sales to Plaintiffs. It is further alleged that Andrew Schuessler held himself out to be New T&L Beer & Soda and then filled orders through Defendants’ other business. Plaintiffs established their prima facie entitlement to judgment as a matter of law on the cause of action alleging Breach of Contract by submitting defendants’ deposition testimony where defendant admits to, *inter alia*, engaging in the liquor delivery business in violation of the non-compete agreement (*see M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. v Werner*, 126 AD3d 859, 860 [2015]; *Express Shipping, Ltd. v Gold*, 63 AD3d 669, 671 [2009]).

In opposition, defendants failed to raise a triable issue of fact with respect to a bona fide defense (*see Verela v Citrus Lake Dev., Inc.*, 53 AD3d 574 [2008]; *Northport Car Wash, Inc. v Northport Car Care, LLC*, 52 AD3d 794 [2008]).

The branch of defendants' motion which is to dismiss plaintiffs' indemnification claims is denied. The branch of the cross-motion which seeks summary judgment on plaintiffs' claims for indemnification is granted. The undisputed record indicates that Andrew Schuessler executed the Indemnification Agreement by which he agreed to "indemnify, defend and hold harmless New T&L Beer & Soda Inc. from and against all demands, claims, actions or causes of action, assessments, losses, damages, liabilities, debts and reasonable attorneys fees," which is defined to be damages for purposes of the Indemnification Agreement. The above-quoted language unequivocally expresses Schuessler's intent to indemnify plaintiffs as to the losses resulting from Schuessler's breach of contract (*see Girardin v Citicorp*, 118 AD2d 754, 755 [1986]), and their expenditure of attorneys fees (*see Lavorato v Bethlehem Steel Corp.*, 91 AD2d 1184 [1983]; *County of Nassau v Hartford Ins. Co.*, 79 AD2d 696 [1980]). Since plaintiffs have made a prima facie evidentiary showing that they incurred damages as a result of defendants' actions in violating the non-compete agreement, the tax liability and the legal fees incurred in defending against the tax matter, as well as their inability to sell cigarettes due to the tax liability, they are entitled to summary judgment against defendants based on defendants' contractual liability for indemnification.

The branch of the motion which is to dismiss the cause of action for a preliminary injunction, is granted. The branch of the cross-motion which is for summary judgment in Plaintiffs' favor on their cause of action for a preliminary injunction is denied. A preliminary injunction will not be granted unless the moving party first establishes (1) a likelihood of ultimate success on the merits, (2) that irreparable injury will occur absent a preliminary injunction, and (3) a balancing of the equities favors the movant (*see CPLR §6301; W.T. Grant Co. v Srogi*, 52 NY2d 496 [1981]). Here, there are sharp factual disputes as to key issues in the record which preclude a finding of likelihood of success and irreparable injury at this juncture and which warrant the denial of that branch of the cross-motion (*see, e.g., Schneider Leasing Plus, Inc. v Stallone*, 172 AD2d 739, 740-41 [1991]; *Merrill Lynch Realty Assocs. v Burr*, 140 AD2d 589 [1988]).

The branch of the motion which is to dismiss the fourth cause of action for unjust enrichment is granted. The branch of the cross-motion which seeks summary judgment on its cause of action for unjust enrichment is denied. A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Here, at paragraph 49 of the Complaint, Plaintiffs allege that,

Defendants have been unjustly enriched as a result of Defendants' unlawful use of the customer list following the sale of the business of Plaintiffs' Confidential Information and Proprietary Data, for Defendants' own benefit.

Inasmuch as Plaintiffs' unjust enrichment claim is "indistinguishable from the breach of contract claim", it is dismissed (*see Andrews v Cerberus Partners*, 271 AD2d 348 [2000]; *see Goldstein v CIBC World Markets Corp.*, 6 AD3d 295, 296 [2004]).

"To establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights" (*Natl. Ctr. for Crisis Mgt., Inc. v Lerner*, 91 AD3d 920, 920-21 [2012], quoting *Cusack v American Defense Sys., Inc.*, 86 AD3d 586, 587 [2011]; *see Messiah's Covenant Community Church v Weinbaum*, 74 AD3d 916, 919 [2010]). " 'Tangible personal property or specific money must be involved'" (*Batsidis v Batsidis*, 9 AD3d 342, 343 [2004], quoting *Independence Discount Corp. v Bressner*, 47 AD2d 756, 757 [1975]). The branch of the motion which seeks to dismiss plaintiffs' conversion claim based upon the alleged use of Plaintiffs' proprietary customer list, noted at paragraph 55 of the Complaint, is granted inasmuch as no cause of action lies for the conversion of intangible property (*see Sporn v MCA Records*, 58 NY2d 482, 489; *Star Contr. Co., Inc. v McDonald's Corp.*, 201 AD2d 721, 721 [1994]).

The branch of the motion which seeks to dismiss plaintiffs' claims of conversion based upon the alleged theft by Andrew Schuessler of checks and other monies which belonged to plaintiffs, is denied. The branch of the cross-motion which is for summary judgment in plaintiffs' favor on their claims of conversion, is also denied. Here, Plaintiffs submitted copies of the checks which plaintiffs allege defendants pilfered along with other monies from New L&T Beer, by collecting on behalf of Plaintiffs from customers of New T&L Beer & Soda and wrongfully keeping these payments. In response to plaintiffs' prima facie showing of entitlement to judgment as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]), defendants raised a triable issue of fact as to whether they stole the said monies (*see Gen. Trading Co., Inc. v M & R Assoc.*, 307 AD2d 251, 252 [2003]). Upon review of the examination before trial testimony, Schuessler testified that some of the monies kept were from customers who had placed orders before the sale of the business but who paid for these goods after the sale of the business. At the very least, there are triable issues of fact that preclude summary judgment in plaintiffs' favor on the conversion cause of action.

The branch of the motion by defendants which is to dismiss plaintiffs' fraud claim for lack of specificity, is denied. The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; see *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). A claim rooted in fraud must be pleaded with the requisite particularity under CPLR §3016 (b). The purpose of this heightened pleading requirement "is to inform a defendant with respect to the incidents complained of" and "should not be confused with unassailable proof of fraud" (*Minico Ins. Agency, LLC v B & M Cleanup Services*, 165 AD3d 776, 777 [2018], quoting *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d at 491–492).

Plaintiffs here have stated a cause for fraud and particularized the facts surrounding the fraud. Plaintiffs submit that Schuessler took the position as manager and undertook to intentionally utilize the confidential wholesale customer list that he sold to the Plaintiffs for his own benefit. Plaintiffs also allege that Schuessler collected monies on behalf of plaintiffs and kept the monies for himself. When Plaintiffs contacted some of the customers to inquire about an outstanding invoice, they were told that the payment had been made to Andrew Schuessler. Further, Schuessler assured Plaintiffs that he would no longer be engaged in the wholesale business. Despite this assurance, Plaintiffs allege, Defendants serviced the customers that were on the confidential wholesale customer list for their own benefit.

Plaintiffs allege that Andrew Schuessler offered to become the manager of the business if the Plaintiffs purchased the business. Plaintiffs allege that they relied on that representation in deciding to purchase the business. While he worked for the Plaintiffs, Andrew Schuessler collected and kept checks belonging to plaintiffs. Plaintiffs also submitted evidence that Schuessler used the wholesale customer list that he sold to the Plaintiffs in order to divert the wholesale business from Plaintiffs to himself at Pequa Beverages, a company owned by Defendants. These facts, pled with particularity in the Complaint, raise issues of facts for trial. The parties disagree on basic facts relating to the nature of the transactions, for example, whether Defendants diverted business from Plaintiffs to their business. The existence of these questions of fact precludes summary judgment on the fraud cause of action (see, e.g., *Magi Communications v Jac-Lu Assoc.*, 65 AD2d 727 [1978]; cf. *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]).

In order to establish a cause of action for tortious interference with prospective business relations, a plaintiff must show; (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or an independent tort; and (4) that the defendant's interference caused injury to

the relationship with the third party (*Carvel Corp. v Noonan*, 3 NY3d 182 [2004]). Here, plaintiffs failed to establish that they had a contractual relationship with any alleged customer and failed to show that defendants “actually and wrongfully prevented [them] from entering into or continuing a specific business relationship” (*Korn v Princz*, 226 AD2d 278, 279 [1996]; see also, *WFB Telecommunications v NYNEX Corp.*, 188 AD2d 257 [1992], *lv. denied* 81 NY2d 709 [1993]; *Mandelblatt v Devon Stores*, 132 AD2d 162, 169 [1987]). Accordingly, the branch of the motion which is for summary judgment dismissing the cause of action for tortious interference with business relations is denied; as is the cross-motion for summary judgment in plaintiffs’ favor on this cause of action.

Finally, the branch of the motion which is to dismiss the cause of action for breach of fiduciary duty is denied. The branch of the cross-motion which seeks summary judgment in plaintiffs’ favor on their claim for breach of fiduciary duty, is granted. “It is well settled that an employee owes a duty of good faith and loyalty to an employer in the performance of the employee’s duties” (*30 FPS Productions, Inc. v Livolsi*, 68 AD3d 1101, 1102 [2009], quoting *Wallack Frgt. Lines v Next Day Express*, 273 AD2d 462, 463 [2000]). Here, plaintiffs allege that Andrew Schuessler breached the fiduciary duty he owed to his employer in many ways. For example, at paragraph 85 of the Complaint, Plaintiffs alleges that Schuessler obtained proprietary and confidential customer information belonging to Plaintiffs and conspired to utilize this information for his own benefit and for the benefit of the other defendants in this case. In support of this cause of action, Plaintiffs submitted evidence that defendants, inter alia, provided goods and services to customers on the non-compete list. Defendants did not submit contrary evidence in opposition.

### Conclusion

The branch of the motion by defendant’s for an Order dismissing the First Cause of Action, for Breach of Contract, is denied. The cross-motion by plaintiff for summary judgment in plaintiff’s favor on their cause of action for Breach of Contract, is granted.

The branch of the motion by defendant’s for an Order dismissing plaintiffs’ indemnification claims is denied. The branch of the cross-motion by plaintiff’s which seeks summary judgment on its claims for indemnification, is granted.

The branch of the motion by defendant’s to dismiss the cause of action seeking a preliminary injunction, is granted. The branch of the cross-motion by plaintiff seeking the entry of summary judgment in Plaintiffs’ favor on their cause of action for a Preliminary Injunction is denied.

The branch of the motion by defendant's to dismiss the Fourth Cause of Action for unjust enrichment, is granted. The branch of the cross-motion by plaintiff which seeks summary judgment on its cause of action for Unjust Enrichment, is denied.

The branch of the motion by defendant's which seeks to dismiss plaintiffs' conversion claim based upon the alleged use of plaintiffs' proprietary client List, is granted.


The branch of the motion by defendant's which seeks to dismiss plaintiffs' claims of conversion based upon the alleged theft by defendant Andrew Schuessler of checks and other monies which belonged to plaintiffs, is denied. The branch of the cross motion by plaintiff seeking the entry of summary judgment in plaintiffs' favor on their claims of Conversion, is also denied.

The branches of the motion by defendant's and cross-motion by plaintiff's which seek the entry of summary judgment in favor of defendant's and plaintiff's, respectively, on the Fraud cause of action, are denied.

The branches of the motion by defendant's and cross-motion plaintiff's which are for summary judgment in favor of defendant's and plaintiff's, respectively, on the cause of action for Tortious Interference of Business Relations, are denied.

The branch of the motion by defendant's seeking dismissal of the cause of action for Breach of Fiduciary Duty, is denied. The branch of the cross-motion by plaintiff which seeks summary judgment in plaintiffs' favor on their claim for breach of fiduciary duty, is granted.

Dated: March 31, 2021

  
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MARGUERITE A. GRAYS  
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