

Continental Indus. Group, Inc. v Ustuntas
2022 NY Slip Op 31107(U)
April 4, 2022
Supreme Court, New York County
Docket Number: Index No. 653215/2012
Judge: Andrea Masley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

-----X

CONTINENTAL INDUSTRIES GROUP, INC.,

INDEX NO. 653215/2012

Plaintiff,

MOTION DATE

- v -

MOTION SEQ. NO. 009

HAKAN USTUNTAS, PLASMAR PLASTIK VE KIMYA
SAN. TIC. A.S., A/K/A PLASMAR PLASTIC, INC., and
MARCHEM INTERNATIONAL TRADING LLP,

SUPPLEMENTAL DECISION
+ ORDER ON MOTION

Defendants.

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 545, 555, 556, 557, 558, 559, 560, 562, 563, 566

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

In motion sequence number 004, defendants moved for summary judgment dismissing plaintiff's remaining causes of action. This court decided a majority of the motion, but in its previous decision (NYSCEF Doc. No. [NYSCEF] 555), stated, in relevant part,

"[b]ased on a related action pending in the SDNY, there may be reason for . . . the aiding and abetting breach of fiduciary duty claim¹ to proceed. However, this court cannot make a determination based on the record currently before the court. Since this motion was filed, the procedural posture of the federal action has completely changed. This court recently

¹ Plaintiff's fourth cause of action seeks damages from defendants Plasmar Plastik ve Kimya San. Tic. A.S. a/k/a Plasmar Plastic, Inc. (Plasmar) and Marchem International Trading LLP (Marchem) for allegedly aiding and abetting in defendant Hakan Ustuntas's alleged breach of fiduciary duty.

invited the parties to submit the relevant federal court decisions, which the parties did. However, upon review of those decisions, this court has determined that supplemental briefing on this cause of action is required.”

(*Id.* at 11-12.)

In a related federal action, the U.S. Court of Appeals, Second Circuit, in reviewing the lower court’s decision on plaintiff’s motion for a default judgment, held that

“[t]he district court also found insufficient CIG’s pleading that Altunkilic² assisted CIG employee Ustuntas in breaching his duty of loyalty because the complaint does not show that Altunkilic did so knowingly. Although CIG does not specifically state that Altunkilic was aware of Ustuntas’s fiduciary duty, the complaint makes an inference of such knowledge plausible. CIG alleges that as general manager of CKS, Altunkilic worked closely with CIG employee Ustuntas. The complaint further alleges that together, Altunkilic and Ustuntas used CIG’s confidential and proprietary information to solicit CIG’s suppliers and customers, and that they also induced CIG employees to breach their employment agreements. Altunkilic’s relationships with CIG and Ustuntas, and Altunkilic’s knowledge that Ustuntas was employed by CIG, make plausible Altunkilic’s awareness that Ustuntas owed CIG a duty of loyalty regarding such matters.”

(*Continental Indus. Group, Inc. v Altunkilic*, 788 F Appx 37, 42 [2d Cir 2019]

[Altunkilic Action].) The matter was remanded, reinstating the aiding and abetting claim, among others, for an award of damages. (*Id.* at 43.) U.S. Magistrate Judge James L. Cott subsequently conducted an inquest on damages and recommended an award of “\$10,459,870.55 in compensatory damages and \$10,459,870.55 in punitive damages.” (*Continental Indus. Group v Altunkilic*, 2020 US Dist LEXIS 116763, *31 [SDNY July 1, 2020, No. 14-CV-790 (AT) (JLC)].)

² Mehmet Altunkilic is Plasmar’s General Manager and Chairman of its Board of Directors. (NYSCEF 60, tr. at 23:6-7 [testimony of Mehmet Altunkilic before Special Referee Feinberg].)

Here, plaintiff alleges similar claims that, like Altunkilic, defendants Plasmar and Marchem, in recruiting defendant Ustuntas with the intent that Ustuntas would steal plaintiff's proprietary information and solicit plaintiff's employees to work for Plasmar, aided and abetted in Ustuntas's alleged breach of fiduciary duty. Plaintiff asserts that these defendants knew of Ustuntas's fiduciary duty to plaintiff and assisted him in breaching it.

"A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participate in the breach, and (3) that plaintiff suffered damage as a result of the breach." (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003] [citation omitted].) "The defendants must have actual knowledge and not constructive knowledge of the breach." (*Epiphany Community Nursery School v Levey*, 171 AD3d 1, 15 [1st Dept 2019].) A "person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator." (*Kaufman*, 307 AD2d at 126.)

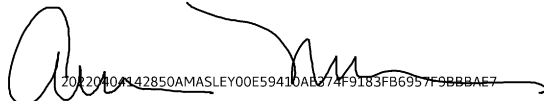
The Second Circuit's decision in the Altunkilic Action does not raise a triable issue of fact as to whether Plasmar and Marchem had actual knowledge of Ustuntas's alleged fiduciary duty to plaintiff, and in turn, his alleged breach of that duty. The Second Circuit reinstated the aiding and abetting claim against Altunkilic because "the complaint makes an inference of such knowledge plausible." (*Continental Indus. Group, Inc. v Altunkilic*, 788 F Appx at 42.) While the procedural posture of the Federal action was a motion for a default judgment, the action before this court is at the summary judgment stage. Defendants have

made a prima facie case that they did not have knowledge of the duty and breach. Thus, it is plaintiff's burden to raise a triable issue of fact.

Instead of addressing the federal court decisions, plaintiff's supplemental brief relies on the affidavit of Abdurrahman Bozkurt dated January 25, 2019 (NYSCEF 392), the Jurisdictional Hearing Transcript of Altunkilic dated January 22 and 23, 2014 (NYSCEF 60, 90, 91), the affidavit of Ustuntas dated January 25, 2019 (NYSCEF 408), excerpts from Ustuntas's July 26, 2006 deposition (NYSCEF 493), and the affidavit of Omer Karabey (NYSCEF 501) to create an issue of fact. However, these documents do not evidence Plasmar and Marchem's knowledge of Ustuntas's duty. Rather, plaintiff insists "there can be no doubt that [Plasmar and Marchem] knew and had knowledge of Ustantas's fiduciary duty." (NYSCEF 556, Plaintiff's Supplemental Memo of Law, at 5/9.) Finally, plaintiff cites no law to support its argument that the court should impute Ustantas's knowledge of his fiduciary duty on Plasmar because Ustantas became an owner of Plasmar in 2004.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing plaintiff's fourth cause of action is granted, and that claim is dismissed.



20220404142850AMASLEY00E59410AB774F9183FB6957F9BBAE7

4/4/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: