

Lotte Hotel N.Y. Palace, LLC v Anthony J. DiGuiseppe, P.C.
2022 NY Slip Op 32606(U)
July 29, 2022
Supreme Court, New York County
Docket Number: Index No. 657755/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48-----X
LOTTE HOTEL NEW YORK PALACE, LLC, D/B/A LOTTE
NEW YORK PALACE,

Plaintiff,

- v -

ANTHONY J. DIGUISEPPE, P.C., D/B/A DIGUISEPPE
ARCHITECT, and ANTHONY DIGUISEPPE,Defendants.
-----XINDEX NO. 657755/2019

MOTION DATE _____

MOTION SEQ. NO. 003**AMENDED DECISION +
ORDER ON MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 129, 130, 133, 135, 137, 138, 139, 144, 145, 146, 147, 148, 155, 156, 157, 158, 159, 160, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

In motion sequence 003, plaintiff Lotte Hotel New York Palace, LLC, d/b/a Lotte New York Palace (Lotte) moves for summary judgment pursuant to CPLR 3212 on its claims for breach of contract claim, conversion, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. Plaintiff also moves for summary judgment, dismissing defendants Anthony J. DiGuiseppe, P.C. d/b/a DiGuiseppe Architect (PC) and Anthony J. DiGuiseppe's breach of contract counterclaim. Finally, plaintiff also requests that this court find defendants in civil contempt, pursuant to New York Judiciary Law § 756, based on their failure to comply with the court's order directing the imposition of a constructive trust and award plaintiff sanctions pursuant to 22 NYCRR § 130-1.

Background

Plaintiff owns and operates the Lotte New York Palace hotel in New York, New York. (NYSCEF Doc. No. [NYSCEF] 98, Complaint, ¶ 4.) The PC provides architectural, design, and procurement services in the hotel and resort industry. (*Id.* ¶ 5.) DiGuiseppe is the President and Chief Executive Officer of the PC and a licensed architect. (*Id.* ¶ 6.)

On July 11, 2017, plaintiff and defendants entered an agreement for defendants to provide architectural, design, and procurement services in connection with the construction of a spa at plaintiff's hotel (Agreement). (NYSCEF 110, Choeh Aff ¶ 3; NYSCEF 111, Agreement.) The Agreement indicates that DiGuiseppe is the principal of the PC, and that DiGuiseppe is to act as plaintiff's agent for the procurement of furniture, furnishings, and equipment for the project. (NYSCEF 111, Agreement at 2 and 5.) In exchange for these services, defendants received a design fee of \$300,000 and a procurement fee equal to 8% of each purchase order along with a \$31,500 retainer for services. (NYSCEF 111, Agreement, at 6-7.) Plaintiff was to wire all payments to the PC's account at Chase Bank. (*Id.* at 8.) In an email from DiGuiseppe to plaintiff, DiGuiseppe outlined the procedure for purchase order processing.

(NYSCEF 112, Procurement Instructions.) The instructions state

1. Each Purchase Order has the vendor quote and the spec attached
2. The amount required for deposit or full payment is specified as 50% or paid in full and I shall prepare a consolidated Invoice for Lotte to pay DiGuiseppe; taxes shall be separated on the invoice for accounting purposes;
3. Lotte shall initial the purchase order in the box saying client approval
4. The Approved PO's shall be sent to DiGuiseppe and the check for the invoice is to be hand delivered to DiGuiseppe Architect for deposit, recording and processing
5. The money will be deposited into a special procurement account at Chase just for Lotte procurement

6. A DiGuiseppe check shall be written out for each vendor as per the heading on the PO, or wire transfer (for international vendors)
7. The check will have as a reference the PO number printed on the check detail
8. All Checks will be sent with delivery instruction sheet along with PO and Vendar quote by DiGuiseppe via Federal Express (cost of Fedex which shall be invoiced to Lotte as a reimbursable expense)
9. Tracking numbers shall be recorded by DiGuiseppe for all checks sent out
10. DiGuiseppe shall follow up with each vendor and vendors are to acknowledge receipt of PO and payment and issue an ETA

(NYSCEF 112, Procurement Instructions, at 6.)

Plaintiff contends that around July 2019, defendants failed to pay vendors or had checks and transfers rejected by vendors due to insufficient funds in the procurement account. (NYSCEF 110, Choeh Aff. ¶ 18.) Plaintiff continued to pay defendants when provided with purchase orders, and defendants received the 8% procurement fee. (*Id.* ¶¶ 19, 22; *see also* NYSCEF 97, Accounting Report at 3.)

On October 2, 2019, plaintiff sent defendants a letter demanding an accounting for all payments for the purchase of furniture, furnishings, and equipment, informed defendants that plaintiff would directly pay the vendors from that point and demanded the return of the remaining procurement funds. (NYSCEF 110, Choeh Aff. ¶¶ 23-24; *see also* NYSCEF 114, 10/2/2019 Letter.) Defendants provided a spreadsheet budget for the project without additional documentation. (NYSCEF 110, Choeh Aff. ¶¶ 25-26; *see also* NYSCEF 115, Budget Spreadsheet.) On December 5, 2019, plaintiff sent defendants an additional letter demanding the return of the funds held in furniture, furnishings, and equipment purchasing account. (NYSCEF 110, Choeh Aff. ¶ 30; *see also* NYSCEF 117, 10/5/2019 Letter.) Defendants refused to comply with plaintiff's demand to return the procurement funds. (NYSCEF 110, Choeh Aff. ¶ 31; *see also* NYSCEF 118, 10/6/2019 Letter.) On December 12, 2019, plaintiff notified defendants

that the Agreement was terminated. (NYSCEF 110, Choeh Aff. ¶ 33; *see also* NYSCEF 119, 10/12/2019 Letter.) Plaintiff commenced this action on December 30, 2019.

At oral argument on September 10, 2020, the court granted plaintiff's motion for summary judgement on its claim for an accounting and imposition of a constructive trust; an order was entered on September 17, 2020. (NYSCEF 102, 9/10/2020 Tr. 13:4-17, 20:25, 21:1-2; NYSCEF 101, Decision and Order.) Defendants' counsel represented that defendants were not using plaintiff's money and that it could be segregated into a separate account. (NYSCEF 102, 9/10/2020 Tr. 20:20-24.)

The accounting report was finalized on February 19, 2021. (NYSCEF 97, Accounting Report.) The accountant attempted to obtain documents to support the existence of a segregated account for the procurement funds, the current location of the procurement funds, paid and unpaid project invoices, and business records. (*Id.* at 1-2.) Defendants did not provide any supporting documentation; thus, the accountant could not verify the location of plaintiff's procurement funds, or the amount paid for the project. (*Id.*) The accountant found that defendants' business records could not be relied upon as accurate due to lack of consistency and "no logical accounting sense." (*Id.*) Further, the accountant determined that a separate bank account for the project had not been maintained, resulting in the comingling of funds in defendants' bank account. (*Id.*) The accounting report analyzed bank statements which included wires to entities and individuals that were not project or business related. (*Id.* at 2; *see also* Ex 2 of Accounting Report.) Plaintiff provided the accountant with a spreadsheet, along with supporting documents, encompassing plaintiff's disbursements to defendants for the project totaling \$1,968,144.03, including the 8% procurement fee. (*Id.* at 3.) Both

plaintiff and defendants approved the accounting report. (NYSCEF 107, Plaintiff's Approval of Accounting; NYSCEF 108, Defendants' Approval of Accounting.)

In a May 28, 2021 affidavit, DiGuiseppe averred that defendants complied with the court's September 17, 2020 Order by segregating plaintiff's fund into an account separate from defendants' usual business operating account. (NYSCEF 138, DiGuiseppe Aff. ¶ 31.) Oral argument was held on November 17, 2021. (NYSCEF 184, 11/17/21 Transcript.) The court ordered that defendants provide precise information as to the bank account where the plaintiff's procurement funds were transferred to within 24 hours. (*Id.* at 10:4-18; 22:7-25; 23:1-4.) On November 18, 2021, defendants submitted an affidavit stating the plaintiff's procurement funds were segregated from the operating funds and transferred to an account named Bakuf92 Enterprises Limited at Stanbic Bank Ghana. (NYSCEF 165, DiGuiseppe Aff. ¶ 1.) DiGuiseppe stated

"I do not control this account. The account holder advised me that the funds were subsequently transferred to an account in Ecobank, and subsequently to the Bank of Africa where they are currently frozen. The account holder advised me that there is \$10 million in that account. I have been attempting to have the funds released without success. I do not have any further information concerning the bank accounts in Ecobank or Bank of Africa.

I am actively making efforts to obtain from the account holder the statements for the accounts in Stanbic Bank, Ecobank and Bank of Africa but have not received them. I cannot provide the requested bank statements as they are not in my possession, custody or control."

(*Id.* ¶¶ 2-3.)

Defendants did not provide any further information. On January 7, 2022, defendants submitted an additional affidavit that included the name and number for the Bank of Africa account. (NYSCEF 182, DiGuiseppe Aff. ¶ 7.) Defendants assert they

do not have possession or control of statements for this account. (*Id.* ¶ 8.) On June 23, 2022, defendants filed a supplementary affidavit which included an annexed affidavit of attorney Grace Benson¹ on behalf of Sarah Badu concerning the Bank of Africa account in an attempt to substantiate defendants' procurement funds story. (NYSCEF186, DiGuiseppe Aff. ¶ 2.) The Benson Affidavit is not notarized or authenticated in any way and generates more questions than answers. (NYSCEF 187, Benson Aff.) The affidavit states:

"I am providing this affidavit at the request of Anthony DiGuiseppe to confirm the following.

During the period 2018- 2020, Mr. DiGuiseppe wired funds to me and thru my attorneys and Clinton Kofi Amgyang which transferred to a bank account in my name Bank Africa of in excess of \$1 million dollars The funds remained in the account and were not utilized for any purpose.

I subsequently during that time Mr. DiGuiseppe helped me to sell gold that was left to me from my deceased father, Forbes Davis. The proceeds of the sale, which are over million USD were deposited into the Bank of Africa. At present the funds are in account number [redacted]0217, who transferred those funds to an account in the Bank of Africa, which is under my father's name in which I am the trustee.

The funds have since been frozen by bank regulators in Bank of Africa in South Africa and I have been attempting to get those funds released, and upon release I will wire transfer Mr. DiGuiseppe \$2.0 million USD, which is due to him for helping me.

I am also attempting to obtain bank statements for the Bank of Africa account and will forward those to Mr. DiGuiseppe, as soon as possible."

(NYSCEF 187, Benson Aff, ¶¶ 1-5.)

¹ Grace Benson did not include any contact information or verification of bar admission status.

The court is incredibly concerned with defendants' handling of plaintiff's procurement funds as the Benson Affidavit creates an air of a confidence scheme². Further, the affidavit confirms that defendants had been transferring funds overseas since 2018 and knew the location of plaintiff's procurement funds throughout these proceedings. Defendants' brazen attempt to lead plaintiff and this court on a fool's errand is outrageous, an insult to the justice system, and a waste of New York State's resources.

Discussion

Under CPLR 3212, "the 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 demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

Breach of Contract

Plaintiff claims defendant the PC breached the Agreement by failing to maintain plaintiff's procurement funds in a separate Chase Bank account. (NYSCEF 98, Complaint, at ¶¶ 34-38.) Defendants counterclaim that plaintiff breached the Agreement

² The names "Bakuf 92 Enterprises", "Sarah Badu" and "Clinton Kofi Agyemang" appear numerous times in the Accounting Report. Exhibit 2 of the Report includes the PC's Citibank account statement for 2019. Bakuf 92 Enterprises received 26 wire transfers between September 6, 2019 and November 22, 2019, totaling \$42,700. Sarah Badu received four wires between February 12, 2019 and March 11, 2019, totaling \$22,940. Clinton Kofi Agyemang received 37 wire transfers between April 1, 2019 and September 6, 2019, totaling \$194,970. (NYSCEF 97, Accounting Report, 13-23.)

first by failing to pay open invoices. For the reasons stated on the record on November 17, 2021, plaintiff's motion for summary judgment on the breach of contract claim against the PC is granted, and defendants' counterclaim is dismissed. (NYSCEF 184, 11/17/21 Tr. 23:5-18, 29:1-8.)

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.’” (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010], quoting *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49 [2006].) A claim for the conversion of money requires a specific, identifiable fund with an obligation to return or treat that fund in a particular manner. (*Lucker v Bayside Cemetery*, 114 AD3d 162, 174 [1st Dept 2013] [citations omitted].) A conversion cannot be based on a breach of contract. (*Jeffers v Am. Univ. of Antigua*, 125 AD3d 440, 443 [1st Dept 2015] [citations omitted].) A corporate officer is liable if they are personally responsible for the conversion of a third-party's property if committed within the scope of employment. (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Arcturus Bldrs., Inc.*, 159 AD2d 283, 284 [1st Dept 1990] [citations omitted].) One in lawful possession of another's property can be charged with conversion if there is a refusal to return the property after a demand is made by the rightful owner. (*Mut. Benefits Offshore Fund, Ltd. v Zeltser*, 172 AD3d 648, 652 [1st Dept 2019] [citations omitted].)

Plaintiff's motion for summary judgment for conversion against the PC is denied because it stems from the failure to maintain a separate procurement fund account, thus

this claim is duplicative. However, DiGuiseppe's conduct extends far beyond the breach of contract claim.

There is no factual dispute that plaintiff demanded the procurement funds be returned by defendants and that defendants refused. (NYSCEF 110, Choeh Aff. ¶4; NYSCEF 138, DiGuiseppe Aff. ¶ 28.) The documentary evidence submitted by both parties shows that DiGuiseppe never separated the procurement funds into a sole account and lost control of the funds altogether. (See *generally*, NYSCEF 165, DiGuiseppe 11/18/2021 Aff; NYSCEF 182, DiGuiseppe 1/7/2022 Aff; NYSCEF 186, DiGuiseppe 6/23/2022 Aff; NYSCEF 187, Benson Aff.) The fact that plaintiff's procurement funds were transferred to unverifiable and unrelated individuals, who are account holders of an account at Bank of Africa, which is now frozen by bank regulators in South Africa, is independent of the breach of contract claim. (*Id. et al.*) DiGuiseppe, PC's CEO and President, is personally responsible for the conversion of plaintiff's funds. (*Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 AD2d at 284.) He exercised dominion and control over plaintiff's procurement funds and has refused to return them. Plaintiff's motion for summary judgment on the conversion claim is granted, in part, as to DiGuiseppe.

Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty

"A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand." (*William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173 [1st Dept 2000] [citations omitted]. However, there can be a breach of fiduciary duty arising out of the relationship created by the contract if the breach is independent of that contract. (*Id.*)

Here, plaintiff alleges defendants breached their fiduciary duty by mishandling and misappropriating the procurement funds. This was an obligation prescribed in the Agreement and the damages are the same. Therefore, this is duplicative of the breach of contract claim. Plaintiff's motion for summary judgment on the fiduciary duty claim is denied. However, the Supreme Court ... may search the record and grant summary judgment to a nonmoving party (see CPLR 3212 [b])" (*Princes Point LLC v Muss Dev. L.L.C.*, 30 NY3d 127, 134 [2017]), and in this instance that is appropriate. This claim is dismissed as duplicative.

For an aiding and abetting a breach of fiduciary duty claim, plaintiff must allege "a breach by a fiduciary or obligation to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 [1st Dept 2015], quoting *Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003].) Since the claim for breach of fiduciary duty is dismissed, this claim is dismissed as well.

Contempt

Under the Judiciary Law, the court has the power to punish a party for contempt by fine, imprisonment, or both. (Judiciary Law § 753 [A][3].) Under CPLR 5104, any "final judgment or order . . . may be enforced by serving a certified copy of the judgment or order upon the . . . person required . . . to obey it and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of the court." The purpose of civil contempt is "the vindication of a private right of a party to litigation and any penalty imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with that right." (*McCormick v Axelrod*, 59 NY2d 574, 583

[1983].)

Judiciary Law § 773 authorizes the court to impose a fine on the contemnor for the civil contempt for an amount that is sufficient to indemnify the aggrieved party. (*Id.*) The contemnor is entitled to an opportunity to purge himself of the contempt within ten days after service of the order. (*Id.*; *Davidowitz v Hamroff*, 196 Misc 209 [Sup Ct, Kings County 1949].) The contemnor may be committed to prison until the fine, plus costs and expenses, is paid or until he is discharged according to law. (Judiciary Law § 773.) When the contemnor willfully refuses to make a court-ordered payment, incarceration as a coercive remedy is justified. (*Melanie C. v Carlo B.*, 192 AD3d 624, 624 [1st Dept 2021].)

In September of 2020, the court ordered defendants to place the plaintiff's procurement funds into a constructive trust. (NYSCEF 102, 9/10/2020 Tr. 13:4-17, 20:25, 21:1-2; NYSCEF 101, Decision and Order.) Defendants' counsel stated it would be done. (NYSCEF 102, 9/10/2020 Tr. 20:20-24.) The Accounting Report was finalized in February 2021, and the accountant specifically noted he did not receive any documents evidencing a segregated account containing the plaintiff's procurement funds. (NYSCEF 97, Accounting Report at 1.) On May 28, 2021, DiGuiseppe submitted an affidavit stating:

"Defendants believe they have complied with the Court's directive to segregate the remaining procurement funds. While the amount that needed to be segregated is still in dispute, and even the Court did not state how much was required to be segregated, defendants had already segregated funds separate from their usual business operating accounts. Defendants did not believe, and do not believe, that any more was required of them in order to comply with the Court's Order."

(NYSCEF 138, DiGuiseppe Aff ¶ 31.)

At oral argument on November 17, 2021, the court ordered defendants to supply the name of the bank, the account number, and bank statements of the constructive trust to plaintiff. (NYSCEF 184, 11/17/21 Tr 8:19-22; 10:4-18.) DiGuiseppe stated the procurement funds were transferred to an account that defendant does not control or have access to named Bakuf92 Enterprises Limited at Stanbic Bank Ghana, which were then transferred to an account at Ecobank, and then subsequently to the Bank of Africa, where the funds are presently frozen. (NYSCEF 165, DiGuiseppe Aff ¶¶ 1-3.) On January 7, 2022, DiGuiseppe stated the funds were in an account named Forbes Davis at the Bank of Africa. (NYSCEF 182, DiGuiseppe Aff ¶ 7.) Finally, in DiGuiseppe's most recent attempt to justify international wire transfers of funds for a local construction contract, an unnotarized affidavit was submitted informing the court that AD had been wiring funds from 2018 through 2020 to help "Sarah Badu" "sell gold". (NYSCEF 187, Benson Aff.) This is the proverbial nail in the coffin.

The court finds defendants in contempt for their evasive behavior, untruthfulness, and wanton disregard for this court's orders. As confirmed by DiGuiseppe's own admission and documentary evidence, plaintiff's funds were only "segregated" in the sense that they were transferred out of DiGuiseppe's control into Africa's banking system where they are now frozen. DiGuiseppe had the knowledge and information about the procurement funds throughout these proceedings. Defendants' conduct is appalling. Therefore, defendants are to be held in civil contempt. The court directs defendants to pay a fine in the amount of \$500 a day until defendants comply with this court's order placing the funds into a segregated account which shall begin on July 22, 2022.

Sanctions

Pursuant to 22 NYCRR § 130-1.1 (a), “[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part.” “Conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law.” (22 NYCRR § 130-1.1 [c][1].)

Defendants wasted two years of the Court's and plaintiff's time with their deceptive conduct concerning the whereabouts of plaintiff's procurement funds. For the numerous reasons outlined above, the Court awards sanctions against the defendants in the amount of plaintiff's costs and reasonable attorney's fees incurred in prosecuting this action after the complaint was filed. Plaintiff's attorney is directed to submit an affirmation of services, with invoices and bios of counsel who worked on this matter.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment on its breach of contract claim herein is granted against defendant Anthony J. DiGuiseppe, P.C. d/b/a DiGuiseppe Architect and plaintiff shall submit a proposed judgment; and it is further

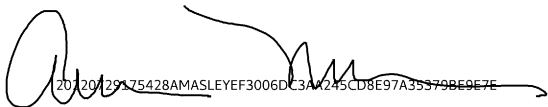
ORDERED that plaintiff's claims for breach of fiduciary duty and aiding and abetting in fiduciary duty are dismissed; and it is further

ORDERED that plaintiff's claim for conversion is dismissed as to defendant Anthony J. DiGuiseppe, P.C. d/b/a DiGuiseppe Architect; and it is further

ORDERED that defendants are in contempt of court and shall be fined \$500 per day comply with this court's order placing the funds into a segregated account, beginning July 22, 2022. Defendants had one week from July 15, 2022 to comply with this order before the \$500 per day penalty is triggered (see NYSCEF 188, Original Decision and Order); and it is further

ORDERED that the portion of plaintiff's motion for sanctions is granted and awards sanctions against the defendants in the amount of plaintiff's costs and reasonable attorney's fees incurred in prosecuting this action; and it is further

ORDERED that plaintiff's counsel is directed to submit an affirmation of services, with invoices and bios of counsel who worked on this matter within 20 days of July 15, 2022 or waived.

<u>7/29/2022</u>			
DATE		ANDREA MASLEY, 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