SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL PART 49M

PRESENT: HON. MARGARET CHAN
Justice

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GROCERY DELIVERY E-SERVICES, INC., d/b/a HELLOFRESH,

Plaintiff,

- v -

JOHN P. FLYNN a/k/a JACK FLYNN

Defendant.

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INDEX NO. 655837/2020

MOTION DATE 03/29/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 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, 121, 122, 123, 124, 125, 126, 127

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

Plaintiff Grocery Delivery E-Services, Inc. d/b/a Hello Fresh (HelloFresh) moves for summary judgment on the complaint which asserts a single cause of action for conversion. Defendant John Flynn opposes the motion and cross moves for summary judgment dismissing the complaint.

Background

HelloFresh is in the business of providing meal-kit boxes to consumers (NYSCEF # 1-Verified Complaint, ¶ 12). By a Service Level Agreement (SLA) dated December 13, 2017, nonparty Mariner Seafood LLC (Mariner) agreed to provide fresh salmon to HelloFresh and to compensate HelloFresh for damages in the event of a recall (*id.*, ¶¶ 17-20; NYSCEF # 81-SLA, § XI at 5-6). Flynn, who is the founder, sole owner, sole member and president of Mariner, signed the SLA on behalf of Mariner (NYSCEF #94, ¶ 1; NYSCEF # 81 at 11; 13-14). Under the SLA, Mariner agreed to provide coverage for, *inter alia*, product recall insurance with a minimum limit of $3 million for each occurrence and to name HelloFresh as an additional insured[1] (NYSCEF #1, ¶ 28; NYSCEF #81, § XIII at 8). Mariner purchased a product contamination insurance policy from Tokio Marine (the Tokio Marine

[1] While Flynn disputes that the SLA required that HelloFresh be named as an additional insured, as indicated below, in the Decision and Order dated May 22, 2022, the court found that the SLA required that HelloFresh be named as an additional insured and that Flynn was estopped from arguing the contrary based on his statements in an affidavit submitted in connection with his motion to dismiss.

Policy), for the period from July 26, 2018 to October 1, 2019 (NYSCEF #83-Tokio Marine Policy). However, Mariner failed to name HelloFresh as an additional insured as required by the SLA (NYSCEF # 1, ¶ 28; § XIII at 8; NYSCEF # 14-Flynn Reply Aff., ¶ 9).

On November 30, 2018, Mariner informed HelloFresh of a potential Listeria contamination in seafood already shipped to HelloFresh, which caused HelloFresh to issue a recall of product already sold to its customers allegedly resulting in more than $500,000 in losses (NYSCEF # 1, ¶¶ 21-26). Mariner thereafter submitted to Tokio Marine claims for its losses (first-party losses) and those of Hello Fresh (third-party losses) (NYSCEF # 87-Settlement Agreement, ¶ 5). On September 17, 2019, Tokio Marine and Mariner agreed to a settlement under which Tokio Marine agreed to pay $263,366 for the "HelloFresh Claim" (*id.*, ¶ 7). The Settlement Agreement was signed by Flynn on behalf of Mariner (*id.* at 5). On September 18, 2019, Tokio Marine wired $263,366 to Mariner's operating account at Wells Fargo Bank (NYSCEF #'s 88, 89, 95). The funds were never forwarded to HelloFresh (NYSCEF # 1, ¶ 33).

After Mariner failed to pay HelloFresh for its losses, HelloFresh brought an action against Mariner for breach of contract and conversion for retaining the insurance proceeds of the Tokio Marine Policy that were intended for HelloFresh's benefit (NYSCEF # 7-Mariner Seafood Complaint). In September 2020, Mariner filed for bankruptcy and did not include HelloFresh from the list of creditors (NYSCEF # 1, ¶¶ 38, 39; NYSCEF # 73-List of Creditors). But HelloFresh itself timely filed its statement of claim for $530,342.14 in the bankruptcy proceeding (NYSCEF # 112 at 2 – Exh to deft's opp). Thereafter, HelloFresh commenced this action against Flynn based on allegations that he improperly converted insurance proceeds belonging to HelloFresh (NYSCEF # 1, ¶¶ 41-46).

By Decision and Order dated June 3, 2021, this court denied Flynn's motion to dismiss the complaint (NYSCEF # 19), which decision was affirmed on appeal (*Grocery Delivery E-Services v Flynn*, 201 AD3d 585 [1st Dept 2022]). Of relevance to this motion and cross motion, the First Department held that HelloFresh's possessory interest in the insurance proceeds is based on equitable lien and not contractual expectancy or obligation (*id.* at 586). Flynn's subsequent motion to reargue or for leave to appeal to the Court of Appeals was denied (NYSCEF # 129).

Flynn answered the complaint and asserted nine affirmative defenses (NYSCEF # 22-Verified Answer). While discovery was proceeding, Flynn moved for leave to amend his answer to assert additional affirmative defenses and for leave to serve interrogatories. The motion was granted only as to the addition of the proposed tenth, twelfth, thirteenth, fifteenth, sixteenth, and seventeenth affirmative defenses (NYSCEF # 130 – Decision and Order dated May 12, 2022).

The tenth affirmative defense alleges that "Mariner was neither negligent nor did it fail to comply with the terms of the SLA." The twelfth, thirteenth, sixteenth, and seventeenth affirmative defenses are based on Wells Fargo's alleged superior possessory interest in the proceeds from the Tokio Marine policy. The fifteenth affirmative defense alleges that Flynn "did not participate in or obtain any personal benefit from an alleged conversion" (NYSCEF # 130 at 7; NYSCEF # 60 at 11 § 18.04 ¶ 40). These affirmative defenses are the only ones at issue on this motion and cross motion.

HelloFresh argues that it is entitled to summary judgment as it has established that proceeds from the Tokio Marine policy constituted a "specific, identifiable fund," that HelloFresh had an equitable lien on the proceeds which gave it a superior possessory interest, and that Flynn interfered with its possessory interest by "failing to pay HelloFresh the insurance proceeds Mariner received from Tokio Marine" (NYSCEF # 97 at 6-9). Additionally, HelloFresh argues that it had an equitable lien on the proceeds because the SLA required Mariner to name it as an additional insured on the policy.

In opposition and in support of his cross motion, Flynn argues that HelloFresh cannot demonstrate ownership or superior interest in the proceeds since there is no agreement to: "(i) creat[e] a lien in the property at issue; and (ii) a clear intent that the property be held as a security for an obligation." (NYSCEF #15 at 14).[2] Flynn also argues that, HelloFresh has failed to demonstrate that Mariner was negligent or failed to comply with the SLA, which he argues must be shown to hold Mariner liable under the SLA for damages or costs of a recall (NYSCEF # 115 at 19, citing SLA, § XI [providing that Mariner shall be held responsible for damages and costs of a recall "due to [Mariner's] negligence or other failure to comply with the terms of the SLA"]).

Flynn next asserts that HelloFresh cannot show a superior right to the insurance proceeds because based on Wells Fargo's perfected security interest, Wells Fargo had a superior interest in the insurance proceeds that were deposited into Mariner's operating account. In support of this argument, Flynn submits various documents to demonstrate that Wells Fargo had a perfected security interest in Mariner's property and collateral (NYSCEF #'s 101-105).[3]

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[2] Although Flynn argues that HelloFresh has not demonstrate that the SLA indicates an intent to create an equitable lien because the "SLA did not require that HelloFresh be named as an additional insured under the insurance policy" (*id.*, at 14-15), such argument is precluded by the court's finding that the SLA required Mariner to name HelloFresh as an additional insured (NYSCEF # 130 at 6-7).

[3] Flynn also argues that HelloFresh's motion for summary judgment is premature as discovery is not complete, and, in particular, that Flynn's deposition remains outstanding (NYSCEF # 115 at 9), However, he abandoned this argument since he requested, along with HelloFresh, that this court decide the motion and cross motion before Flynn's deposition.

Flynn also argues that since Tokio Marine was required to pay Mariner directly, he did not personally interfere with HelloFresh's asserted right to possess the insurance proceeds. Specifically, he contends that he did not exercise dominion and control over the proceeds, which were wired into Mariner's account on September 18, 2019, because by that date, Mariner was in default of its obligations to Wells Fargo. Flynn represents that Wells Fargo imposed strict restrictions on how Mariner used its funds under a Forbearance Agreement. In support of his position, Flynn submits the affidavit of the insurance broker involved in obtaining the Tokio Marine policy who states that because "Mariner, as the named insured, was the only beneficiary under the Policy, ... under no circumstances would HelloFresh be paid directly by Tokio Marine" (NYSCEF # 114-Lieberman Aff, ¶ 4). Flynn adds that he cannot be held personally liable for conversion in the absence of evidence of his malfeasance.

In opposition to the cross motion, HelloFresh reiterates that the Tokio Marine Policy was obtained for HelloFresh's benefit, and the parties intended for HelloFresh to have a possessory interest in the insurance proceeds. HelloFresh asserts that Flynn can be held liable for participating in the conversion because Flynn was the sole owner, member and president of Mariner; Flynn signed the Settlement Agreement with Tokio Marine under which Tokio Marine wired the proceeds to Mariner's operating account as provided in the Settlement Agreement; and Flynn failed to relay the proceeds to HelloFresh from Mariner's operating account despite Flynn's ability to do so. HelloFresh also asserts that Wells Fargo's interest is immaterial as it only extends to Mariner's property, not the insurance proceeds that belong to HelloFresh. HelloFresh adds that Mariner's negligence is irrelevant because the insurance proceeds were paid out for HelloFresh's losses.

In reply, Flynn argues that HelloFresh failed to show that Flynn participated in the conversion of the insurance funds. Flynn points out that "[a] director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character" (citing *PDK Labs, Inc. v G.M.G. Trans W. Corp.*, 101 AD3d 970, 973 [2d Dept. 2012]). Flynn states that by signing the Settlement Agreement, he was carrying out a "ministerial act of the president of Mariner"; being the president does not "support a claim for conversion" (NYSCEF # 123 at 6). Flynn also states that it was Mariner's Vice President of Finance, not Flynn, who handled the HelloFresh claim. Flynn concludes that Mariner's failure to forward the insurance funds to HelloFresh "does not automatically create liability in conversion for all of its officers who had control over Mariner's bank account" (*id.* at 6-7).

Discussion

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a showing has been made, the burden shifts to the

party or parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499, 503 [2012] [internal citations and quotation omitted]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Grossman v Amalgamated Hous. Corp*, 298 AD2d 224, 226 [1st Dept 2002]).

A conversion claim arises when (1) there's a specific, identifiable fund; (2) the party has a superior right to the fund; and (3) defendant interfered with the plaintiff's right to possession (*see Grocery Delivery E-Servs. USA, Inc. v Flynn*, 201 AD3d 585, 586 [1st Dept 2022] [internal citation omitted]). "An equitable lien is a right ... to have a fund, specific property, or its proceeds, applied in whole or in part to the payment of a particular debt" (*Bank of India v Weg & Myers, P.C.*, 257 AD2d 183, 192 [1st Dept 1999] [internal citations and quotations omitted]). A covenant under an agreement to "insure the [property] ... for plaintiff's benefit gives plaintiff an equitable lien in any proceeds to the extent of its interest" (*Rosario-Paolo, Inc. v C & M Pizza Rest.*, 84 NY2d 379, 383 [1994]).

Under these principles, HelloFresh has made a prima facie showing entitling it to summary judgment on the conversion claim. HelloFresh submits evidence identifying a specific fund as shown in the Settlement Agreement between Tokio Marine and Mariner in that Tokio Marine paid $263,366 to settle the "HelloFresh claim" (NYSCEF # 87, ¶¶ 5, 7). And the First Department has found that the insurance proceeds paid by Tokio Marine to Mariner for losses incurred in the product recall constituted a specifically identifiable fund (201 AD3d at 586; *see also Family Health Management LLC v Rohan Developments, LLC*, ___NYS3d ___ , 2022 Slip Op. 03796, 2022 WL 2068827, * 5 [1st Dept 2022] [affirming trial court's grant of summary judgment on conversion claim against their prospective landlord, finding that $96,000 sent by tenant's attorney for unpaid rent was a specific and identifiable fund]). Moreover, the intent of the SLA requiring Mariner to name HelloFresh as an additional insured under the product recall policy supports a finding that HelloFresh had an equitable lien on the proceeds of the Tokio Marine Policy, and a superior right to the proceeds.

HelloFresh has also demonstrated interference with its right to possess the insurance proceeds – the insurance proceeds to settle the "HelloFresh claim" were deposited into Mariner's operating account but were not remitted to HelloFresh. Thus, Mariner retained funds that were intended for HelloFresh. Flynn claims that he had no involvement in this automatic deposit of the proceeds in the operating account. But "[c]onversion is a tort that can occur without wrongful intent" (*Key Bank of New York v Grossi*, 227 AD2d 841, 843 [3d Dept 1996] [internal citation omitted]; *see also Leve v C. Itoh & Co. (Am.), Inc.*, 136 AD2d 477, 478 [1st Dept],

appeal denied [1988]). Instead, intent is shown by "any wrongful exercise of dominion by one other than the owner" (*Ahles v Aztec Enter., Inc.*, 120 AD2d 903, 904 [3d Dept 1986], *appeal denied* 68 NY2d 611 [1986] [internal citation omitted]; *see also Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro,* 187 AD2d 384, 385 [1st Dept 1992] [describing interference for the purposes of conversion as the exercise of "unauthorized dominion over the money in question to the exclusion of plaintiff's rights"]). Thus, Flynn's no-involvement argument is of no moment.

As to whether Flynn can be held personally liable, the court looks to *PDK Labs, Inc. v G.M.G. Trans. W. Corp.* that Flynn had cited in arguing that his ministerial act of signing the Settlement Agreement does not support a claim for conversion. The *PDK* court also states that "[a] corporate officer may be liable for torts committed by or for the benefit of the corporation if the officer participated in their commission. . . . Accordingly, '[a]n individual, even though acting for a corporation of which he is an officer, may be held liable for conversion'" (101 AD3d at 973 [internal citations omitted]). And dispelling Flynn's claim that he cannot be personally liable absent a showing that he engaged in malfeasance or benefited from the alleged conversion, it has been held that "[o]fficers . . . of corporations are personally liable for their own acts which bring about a conversion of a third party's property . . ." including when the conversion is for the corporation's benefit (*Ingram v Machel & Jr. Auto Repair*, 148 AD2d 324, 325 [1st Dept 1989], *appeal dismissed* 74 NY2d 792 [1989]).

Flynn's general assertion that Mariners' Vice President had responsibility of the HelloFresh claim is of little to no import because the record shows otherwise. The facts are that it was Flynn, as the founder, sole owner, sole member and President of Mariner, (i) signed the SLA with HelloFresh, which required Mariner to add HelloFresh as an added insured; (ii) omitted to add HelloFresh to the Tokio Marine policy; and (iii) signed the Settlement Agreement with Tokio Mariner which yielded the payment of $263,366 in insurance proceeds to resolve HelloFresh's recall claims. Finally, Flynn, who signed the Settlement Agreement, knew or should have known that the proceeds were for HelloFresh's benefit, permitted the proceeds to be wired to Mariner's operating account, which was subject to Wells Fargo's security interest, and failed to forward HelloFresh the proceeds (*Am. Feeds & Livestock*, 149 AD2d at 837 [finding corporate officer liable for conversion where the officer was aware of the conversion and "declined to exercise here ability to set it right"]; *accord Key Bank*, 227 AD3d at 842-843 [affirming trial court's determination that corporate officers were personally liable for conversion when proceeds from an auction sale of plaintiff's property were deposited in a corporate bank account with deficient funds]).

Flynn's arguments do not raise a triable issue of fact. Flynn has not controverted HelloFresh's showing that the insurance proceeds constitute a specific fund or that it had a superior right to the proceeds. In this regard, evidence that

Wells Fargo had a security interest in Mariner's accounts is insufficient to raise a triable issue of fact. Because HelloFresh had an equitable lien on the insurance proceeds, the use of the proceeds to pay moneys Mariner owed to Wells Fargo constituted "an unauthorized purpose" (*Petrone v Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017]). Further, that the proceeds belonging to HelloFresh were deposited in Mariner's general operating account where they were claimed by Wells Fargo does not provide a defense to conversion (*id.*, at 778 [the commingling of funds "does not preclude a cause of action for conversion"]; *see DiMarco v Baron Lincoln Mercury, Inc.*, 24 AD3d 409, 411 [2d Dept 2005][defendant car dealer converted plaintiff's money by depositing plaintiff's check into defendant's bank account despite plaintiff's instructions to hold the check]).

With respect to Flynn's argument that under the SLA, HelloFresh was required to prove Mariner's negligence to recover in the event of a recall, such argument is unavailing since the record establishes that Mariner submitted HelloFresh's claim for a customer recall loss to Tokio Marine and received settlement moneys on behalf of HelloFresh.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by Grocery Delivery E-Services, Inc. d/b/a Hello Fresh on the complaint's single cause of action for conversion is granted; it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Grocery Delivery E-Services, Inc. d/b/a Hello Fresh and against defendant John P. Flynn a/k/a Jack Flynn in the amount $263,366.00 plus interest from October 1, 2019, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further.

ORDERED that defendant John Flynn's cross motion for summary judgment is denied.

8/10/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE