Castella Imports, Inc. v Roumbos
2024 NY Slip Op 35153(U)
October 16, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 613005/2024
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX No. 613005/2024
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 09/27/2024
SUBMIT DATE 10/3/2024
Mot. Seq. # 01 - Mot D

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CASTELLA IMPORTS, INC.,

Plaintiff,

-against-

JOHN ROUMBOS,

Defendant.

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Upon the following papers read on this motion to dismiss; e-filed on the NYSCEF system as documents 9 - 14; it is,

Defendant moves for an order dismissing the complaint against him pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7). The plaintiff opposes the motion in all respects.

Plaintiff commenced this action on May 28, 2024 seeking damages against defendant John Roumbos, its former Chief Financial Officer for breach of loyalty, breach of fiduciary duty, and for intentional harm to the business. Plaintiff alleges that defendant perpetrated an illegal check kiting scheme during his employment with the plaintiff ultimately resulting in a shutdown of the business. Plaintiff claims defendant began his fraudulent acts "in the year 2017, and possibly before," and continued same until his removal as Chief Financial Officer in 2020. The defendant moves to dismiss all three causes of action against him on the basis that they are barred by the statute of limitations.

Motion to Dismiss Breach of Loyalty Claim

Defendant first argues that plaintiff's claim for breach of loyalty is barred by the applicable statute of limitations as set forth in CPLR 213(8). Plaintiff opposes this application arguing that the continuing tort theory bars dismissal and that the tortious acts occurred during the statute of limitations period even without the continuing tort theory.

CPLR 213(8) states, "an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it."

Defendant argues that since the alleged fraud took place beginning in 2017 and continued until 2020, the statute of limitations would have run until 2023 and thus plaintiff's claim should be barred. In opposition, plaintiff argues that the continuing tort theory is applicable to this case, but even if it does not apply, at least some of the improper acts were committed within the applicable statute of limitations period.

In ***Henry v. Bank of Am.***, 147 A.D.3d 599, 48 N.Y.S.3d 67 (1st Dept. 2017), the Court stated:

> The continuous wrong doctrine is an exception to the general rule that the statute of limitations " 'runs from the time of the breach though no damage occurs until later' " ***(Ely-Cruikshank Co. v Bank of Montreal***, 81 NY2d 399, 402 [1993]). The doctrine "is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act" ***(Selkirk v State of New York***, 249 AD2d 818, 819 [3d Dept 1998]). Where applicable, the doctrine will save all claims for recovery of damages but only to the extent of wrongs committed within the applicable statute of limitations (see ***Jensen v General Elec. Co.***, 82 NY2d 77, 83-85, 88 [1993]; ***Sutton Investing Corp. v City of Syracuse***, 48 AD3d 1141, 1143 [4th Dept 2008], lv dismissed 10 NY3d 858 [2008]).
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> The doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs" (***Doukas v Ballard***, 39 Misc 3d 1227[A], 2013 NY Slip Op 50776[U], *6 [Sup Ct, Suffolk County 2013] [citation omitted]; see also ***Roslyn Sav. Bank v National Westminster Bank USA***, 266 AD2d 272 [2d Dept 1999]).

While an action based upon fraud must be brought within six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud, the Court concludes that the continuing wrong doctrine applies to this case. ***CWCapital Cobalt VR Ltd. V. CWCapital Investments LLC,*** 195 A.D.3d 12, 145 N.Y.S.3d 61 (1st Dept. 2021). Plaintiff alleges that defendant

committed fraud beginning in 2017 and continued committing subsequent fraudulent acts of illegal check kiting and other acts of misconduct until 2020. Since the plaintiff's complaint alleges multiple acts of fraud continuing until 2020 and that defendant breached a recurring duty of loyalty, the continuous wrong doctrine is applicable. Thus, plaintiff's claim is not barred by the six year statute of limitations because plaintiff sufficiently set forth factual allegations of a continuing course of conduct that terminated within six years of plaintiff commencing this action. Accordingly, the defendant's motion dismissing the breach of loyalty cause of action is denied.

Motion to Dismiss Breach of Fiduciary Duty Claim

Defendant next argues that the six year statute of limitations similarly bars plaintiff's cause of action for breach of fiduciary duty pursuant to CPLR 213(8), and that nevertheless, plaintiff's cause of action for breach of fiduciary duty "fail[s] on its merits." In opposition, plaintiff claims that the six year statute of limitations did not begin to run until 2020 when defendant Roumbos was terminated as Chief Financial Officer. Moreover, plaintiff argues that it has pled a cause of action for breach of fiduciary duty by alleging that defendant's illegal check-kiting scheme led to the revocation of plaintiff's line of credit and ultimate demise of the business.

A cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period. ***Kaufman v. Cohen***, 307 A.d.2d 113, 760 N.Y.S.2d 157 (1st Dept, 2003). (*see also* ***Cusimano v. Schnurr***, 137 A.D.3d 527, 27 N.Y.S.3d 135 (1st Dept. 2016); ***Klein v. Gutman***, 12 A.D.3d 417, 784 N.Y.S.2d 581 (2d Dept. 2004)). The six year statutory period does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has otherwise been terminated. *See* ***Westchester Religious Inst. V. Kamerman***, 262 A.D.2d 131, 691 N.Y.S.2d 502 (1st Dept. 1999); ***Matter of Barabash***, 31 N.Y.2d 76, 286 N.E.2d 890 (1972); ***196 Owners Corp. V. Hampton Management Co.***, 227 A.D.2d 296, 642 N.Y.S.2d 316 (1st Dept. 1996). Since defendant served as the Chief Financial Officer of plaintiff until 2020, this action commenced in May 2024 is timely.

The Court next turns to defendant's argument that plaintiff's cause of action for breach of fiduciary duty is meritless. To succeed on a motion to dismiss pursuant to CPLR 3211 for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the complaint and granting plaintiff every favorable inference which may be drawn from the pleading, plaintiff can succeed upon any reasonable view of the facts stated (***Sokoloff v Harriman Estates Dev. Corp.,*** 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]; *see also* ***Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos LLP v Island Prop., LLC,*** 307 AD2d 953, 763 NYS2d 481 [2d Dept 2003], ***Bartlett v Konner,*** 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). If the pleading states a cause of action and if, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (*see* ***Wayne S. v County of Nassau Dept. of Social Services,*** 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see* ***Estate of***

Menon v Menon, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing ***Leon v Martinez,*** 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, ***Roth v Goldman,*** 254 AD2d 405, 406, 679 NYS2d 92).

In the context of a CPLR 3211 motion to dismiss, the Court must take the factual allegations of the complaint as true, consider the affidavits submitted on the motion only for the limited purpose of determining whether the plaintiff has stated a claim, and in the absence of proof that an alleged material fact is untrue or beyond significant dispute, the Court must not dismiss the complaint (***Wall Street Assocs. v Brodsky,*** 257 AD2d 526, 684 NYS2d 244 [1st Dept 1999], citing ***Guggenheimer v Ginzburg,*** 43 NY2d 268, 275; ***Rovello v Orofino Realty Co.,*** 40 NY2d 633, 634-636). In making a determination whether the complaint sets forth a cognizable claim, evidentiary material may be considered to "remedy defects in the complaint" (*see* ***Dana v Shopping Time Corp.,*** 76 AD3d 992, 908 NYS2d 114 [2d Dept 2010], quoting ***Rovello v Orofino Realty Co.,*** *supra* at 40 NY2d at 636).

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the plaintiff has pled a cause of action for breach of fiduciary duty cognizable at law as against the defendant. Defendant did not submit any documentary proof conclusively establishing that defendant's alleged disloyalty did not hinder the employer's financial gain. Therefore the defendant's motion to dismiss on these grounds is denied.

Motion to Dismiss Intentional Interference with Business Relations Claim

Defendant next argues that since "defendant took all action at the behest of Valsamos and in furtherance of benefitting the company" plaintiff's cause of action for intentional interference of business relations fails. In opposition, plaintiff argues that there are issues of fact and dismissal of this cause of action is inappropriate at this stage.

In ***M.J. & K. Co., Inc. V. Matthew Bender and Co., Inc.***, 220 A.D.2d 488, 631 N.Y.S.2d 938 (2d Dept. 1995), the court stated:

> Tortious interference with business relations "applies to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of the defendant" (***WFB Telecommunications v. NYNEX Corp.***, 188 A.D.2d 257, 590 N.Y.S.2d 460; see, ***Guard–Life Corp. v. Parker Hardware Mfg. Corp.***, supra, 50 N.Y.2d at 196, 428 N.Y.S.2d 628, 406 N.E.2d 445; ***Datlow v. Paleta Intl. Corp.***, 199 A.D.2d 362, 363, 605 N.Y.S.2d 119). "In such an action '[t]he motive for the interference must be solely malicious, and the plaintiff has the burden of proving this fact' (72 NY Jur 2d, Interference, § 44, at

> 240)" (***John R. Loftus, Inc. v. White***, 150 A.D.2d 857, 860, 540 N.Y.S.2d 610). In this case, the plaintiffs' cause of action in this regard was similarly defective because their conclusory allegations without factual support are insufficient to state a cause of action (John R. Loftus, Inc. v. White, supra; see, Edward B. Fitzpatrick, Jr. Constr. Corp. v. County of Suffolk, supra).

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleading, the plaintiff has not pled a cause of action for intentional interference with business relations. The plaintiff's complaint makes conclusory allegations that defendant intentionally set out to harm the business, but fails to provide factual support as to how defendant interfered with specific third party business relations. Therefore the defendant's motion to dismiss is granted only as to plaintiff's third cause of action for intentional interference of business relations.

Motion for Sanctions

The defendant's request for sanctions and costs against plaintiff and its counsel is denied.

ORDERED that a copy of this order shall be served by the plaintiff on defendant's attorney by regular mail on or before November 15, 2024; and it is further

ORDERED that defendant shall serve his answers within twenty (20) days from service of a copy of this order; (*see* ***Arias v First Presbyterian Church,*** 97 AD3d 712, 948 NYS2d 665 [2d Dept 2012]; *see also* ***Schonfeld v Blue & White Food Products Corp.,*** 29 AD3d 673, 814 NYS2d 711 [2d Dept 2006]), and it is further

ORDERED that counsel for the plaintiff and defendant are directed to complete a preliminary conference stipulation/order and upload it into the NYSCEF system on or before December 19, 2024.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 16, 2024

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION