

Group IX, Inc. v Next Printing & Design Inc.
2009 NY Slip Op 33264(U)
December 3, 2009
Sup Ct, NY County
Docket Number: 601034/2007
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

GROUP IX, INC.,

Plaintiff,

INDEX NO. 601034/07

- v -

MOTION DATE 12/3/09

MOTION SEQ. NO. 009

NEXT PRINTING & DESIGN INC., DAVID
MOYAL, OFER GEVA, and SHMULIK
GROSSHTERN,

Defendants.

MOTION CAL. NO. 6

The following papers, numbered 1 to 4 were read on this motion to reargue

Notice of Motion— Affirmation — Exhibits 1-3
Answering Affirmation
Replying Affirmation — Exhibits

	PAPERS NUMBERED
Notice of Motion— Affirmation — Exhibits 1-3	1-2
Answering Affirmation	3
Replying Affirmation — Exhibits	4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to reargue by defendants Next Printing & Design Inc. and David Moyal is decided in accordance with the annexed memorandum decision and order.

FILED
JAN 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/3/09
New York, New York


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

-----X
GROUP IX, INC.,

Plaintiff,

- against -

NEXT PRINTING & DESIGN INC., DAVID MOYAL, OFER
GEVA, and SHMULIK GROSSHTERN,

Defendants.

Index No. 601034/2007

FILED
Decision and Order

JAN 08 2010

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff Group IX, Inc. (Group IX) seeks to recover damages for unpaid electrical service provided to defendant Next Printing & Design, Inc. (Next Printing), which shares half of the sixth floor of a building with Group IX. According to Group IX, Next Printing not only refused to pay invoices for electrical service provided to it, but Next Printing and its president, defendant David Moyal, also allegedly stole electricity from Group IX. Moyal allegedly arranged for installation of an unmetered electrical circuit on the sixth floor, and arranged for installation of a "tap" in the basement of the building which bypassed Group IX's sub-meter.

By decision and order dated August 13, 2009, this Court denied as untimely Next Printing and Moyal's motion for summary judgment. Next Printing and Moyal now move to reargue the decision, arguing that the Court should have allowed for an extra five days in computing the timeliness of the motion (Motion Seq. No. 009). Group IX moves for an order restoring this action to the trial calendar (Motion Seq. No. 008). This decision addresses both motions.

BACKGROUND

Next Printing occupies one-half of the 6th floor of premises of a building located at 121

Varick Street in Manhattan. Group IX occupies the other half of the sixth floor. Moyal is the President and sole shareholder of Next Printing (Answer to Second Amended Complaint ¶ 2), and he is also a 50% shareholder of Group IX. In November 2000, Moyal allegedly approached Group IX and asked if Next Printing could purchase electrical service from Group IX for Next Printing's operations. Second Amended Complaint ¶¶ 10-11. Group IX allegedly agreed to provide Next Printing with electrical service and allegedly installed a sub-meter to measure Next Printing's electrical usage. *Id.* ¶ 12. According to Group IX, Next Printing refuses to pay an invoice dated February 9, 2007 in the amount of \$65,839.16 for electrical usage.

In January 2006, Group IX allegedly discovered a "tap" that bypassed the sub-meter and allegedly ran to Next Printing's equipment. *Id.* ¶ 19. According to Group IX's secretary, Peter Golomb, an electrician that Group IX hired discovered the tap in the basement, leading from Group IX's electrical service into the third floor of the building. Golomb Opp. Aff. ¶ 18. Golomb claims that the basement tap was disabled in March 2006, and that during the 22 months that it was in place, Next Printing allegedly used approximately \$82,720 of electricity, for which Group IX had paid. *Id.* ¶ 21.

In November 2006, Group IX allegedly discovered an unmetered circuit in Group IX's electrical box on the 6th floor. Second Amended Complaint ¶ 23; Golomb Opp. Aff. ¶ 23. According to Group IX, employees from Next Printing advised Group IX that some of their equipment had been turned off when the unmetered circuit was turned off. *Id.* Group IX claims that Next Printing used \$42,350 worth of electricity from the unmetered circuit. Defendant Shmulik Grossstern allegedly installed the unmetered circuit on behalf of Next Printing and Moyal.

On March 29, 2007, Group IX commenced this action against Next Printing and Moyal.

Group IX later amended the complaint to add Ofer Geva and Shmulik Groschtern as defendants. Group IX discontinued the action as against Ofer Geva by a stipulation of discontinuance dated March 9, 2009. By decision and order dated May 1, 2009, this Court granted Group IX leave to amend the complaint, which amended, among other things, the spelling of Groschtern's name to Grosshtern. The Second Amended Complaint asserts nine causes of action.

This is not the only action which arose out of the apparent falling out between Moyal and Shtarkercom, the other 50% shareholder of Group IX. Moyal brought an action against Shtarkercom and its members in a shareholder dispute, which is currently pending before Judge Bransten. *Moyal v Group IX, Inc.*, Index No. 601973/07. Moyal is also apparently a managing member of One Two One on Varick, LLC, the purported co-op shareholder of the sixth floor of the building, and Group IX had brought a declaratory judgment action as to its rights under its lease with One Two One on Varick, LLC, *Group IX, Inc. v One Two One on Varick*, 103722/2007. Moyal is also purportedly the President of the board of directors of the co-op, 121 Varick St. Corp., which brought an unsuccessful holdover petition against Group IX, for installing a 1600 amp switch box in the building's basement, which Judge Singh dismissed with prejudice after a hearing. *121 Varick St. Corp. v Group IX, Inc.*, NYLJ, Aug. 12, 2009, at 26, col. 1. Judge Singh noted that Moyal's relationship as the "silent partner in Group IX" "has since become acrimonious." *Id.*

The note of issue and certificate of readiness in this action were filed on November 24, 2008. One hundred and twenty-one days after the note of issue was filed, Next Printing and Moyal moved for summary judgment dismissing the complaint. Accordingly, by decision and order dated August 13, 2009, this Court denied Next Printing and Moyal's motion as untimely.

DISCUSSION

Next Printing and Moyal's Motion to Reargue

Next Printing and Moyal's motion to reargue the Court's decision denying the motion as untimely is granted. As they indicate, when the notice of the filing of the note of issue is mailed, "The mailing of that notice to . . . counsel extended the deadline for action an additional five days." *Luciano v Apple Maintenance & Servs.*, 289 AD2d 90 (1st Dept 2001); *Szabo v XYZ, Two Way Radio Taxi Assn.*, 267 AD2d 134, 135 (1st Dept 1999). As Group IX points out, the Appellate Division, Second Department has rejected the reasoning of *Luciano*, holding "CPLR 2103(b)(2) does not extend the time within which such motions [motions for summary judgment] may be made." *Mohen v Stepanov*, 59 AD3d 502, 503 (2d Dept 2009).

However, this Court, which sits in the First Department, must follow *Luciano* and *Szabo*. Following these cases, Next Printing and Moyal's motion for summary judgment was timely. Accordingly, the Court grants reargument of their motion for summary judgment.

The standards for summary judgment are well settled.

"[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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

Next Printing and Moyal argue that the first, second, third, and fourth causes of action should be dismissed as against Moyal, because those causes of action are based on corporate obligations for

which Moyal has no individual liability. In addition, Next Printing and Moyal contend that Group IX lacks authority to bring suit against Moyal, because he is a 50% shareholder of Group IX.

Having reviewed the allegations of the second amended complaint, the Court reads the first, second, third, and fourth causes of action as seeking damages only against Next Printing. The relevant allegations of these causes of action name only Next Printing, not David Moyal. *See* Second Amended Complaint ¶¶ 27, 32, 35, 39. Group IX does not contend that these causes of action seek damages against Moyal in his individual capacity. Only the fifth and seventh causes of action are asserted against Moyal (and also against Next Printing).

Next Printing and Moyal have not met their prima facie burden that Group IX lacks authority to bring suit against Moyal. Next Printing and Moyal submit no evidence that Group IX's board of directors did not authorize suit against Moyal. There is no support for Next Printing and Moyal's contention that Moyal is one of two members on Group IX's board of directors. *See* Mem., at 5. They do not submit the bylaws of Group IX or evidence of a shareholder action fixing the number of members of the board of directors. *See* Business Corporation Law § 702 (a). Moyal himself does not state in his affidavit that he sat on Group IX's board of directors at the time the decision to commence the action was taken,¹ or that Group IX's board of directors did not authorize suit against him.

Next Printing and Moyal also argue that the second, third, and fourth causes of action should be dismissed because the damages sought cannot be proven with reasonable certainty. Moreover, they contend that they have no liability for electricity used from the basement tap running to the third

¹ Moyal's affidavit states only that he is "a fifty (50%) percent shareholder of Plaintiff Group IX" (Moyal Aff. ¶ 3), and that "My attorney informs me that an action can only be commenced against me derivatively." Moyal Aff. at 3 n 2.

floor, because 1 800 Postcards, Inc., not Next Printing, allegedly occupies the third floor. Moyal Aff.

¶ 33.

The second, third, and fourth causes of action, which sound in breach of contract, unjust enrichment, and quantum meruit, seek \$190,909.16 in damages from Next Printing. Each of these causes of action actually comprises three claims. It is apparent that Group IX computed the amount of damages by adding together the amount due on an allegedly unpaid invoice to Next Printing (\$65,839.16), the amount of electricity allegedly used from the unmetered circuit (\$42,350), and the amount of electricity allegedly used from the basement tap running to the third floor (\$82,720).

Group IX raises a triable issue of fact as to whether Next Printing occupied the third floor of the building, which does not definitively rule out whether it could be liable for electricity allegedly used from the basement tap. A letter dated March 29, 2007 from Next Printing's counsel, Richard J. Pilson, Esq., states, in pertinent part: "Mr. Moyal permitted Group IX to have a temporary line to draw electricity from the third floor, *where Next Printing operates*, to the sixth floor hotel. . . ." Golomb Opp. Aff. to Grossstern's Motion, Ex A. Pilson maintains that this statement was erroneous and was not meant to be a binding admission. Admissions of fact by counsel with the implied authority of their clients are binding upon their clients. *See Smith v State*, 49 Misc 2d 985, 994 (Ct Claims 1966), *aff'd* 29 AD2d 1050 (4th Dept 1968) (in a proceeding to recover compensation for taking of an easement, representations by condemnor's attorney at trial bound condemnor); *Matter of Hickey's Estate*, 73 NYS2d 508 (Sur Ct, Rensselaer County 1939)(admission by attorney at hearing was binding on attorney's client). The evidence of whether Next Printing occupies the third floor of the building here is based entirely on Moyal's statement; thus, a contrary statement from Next Printing's attorney is sufficient to raise a triable issue of fact. Pilson's assertion that he had no

personal knowledge of the facts in his letter (Pilson Reply Affirm. ¶ 5) only leads to the reasonable inference that such factual information could have come only from his client, Next Printing, and therefore the letter should be treated as an admission by Next Printing.²

Notwithstanding the above, the Court agrees with Next Printing and Moyal that the damages sought for the electrical use of the basement tap are speculative. Group IX does not explain how it calculated that \$82,270 worth of electricity was allegedly used from the basement tap. Moreover, Golomb states, “While the tap was in place, Moyal could have routed electrical power from the third floor to another floor in the building, so it was impossible for Group IX [to] determine whether the tap was actually providing electrical power to the third floor or to another floor in the building.” Golomb Aff. ¶ 19. Thus, Group IX is admitting that it is speculating that all (or even some) of the electricity from the basement tap went to Next Printing. Thus, Next Printing and Moyal are granted summary judgment dismissing so much of the second, third, and fourth causes of action that seek to recover damages based on electrical use of the basement tap.

Issues of fact arise as to whether Group IX can prove, with reasonable certainty, the amount of damages from the electricity obtained from the unmetered circuit. Group IX claims that it determined Next Printing’s alleged usage by using a logging meter before the unmetered circuit was disconnected, computed an average usage amount, and then multiplied that amount by 79 months, the time period during which the unmetered circuit was allegedly in place. Golomb Opp. Aff. ¶ 24. Next Printing and Moyal have not demonstrated, as a matter of law, that this method of computation,

² In general, the papers of both sides present credibility issues, in light of the apparent falling out between Moyal and the Shtarkercom, the other 50% shareholder of Group IX. Moyal brought an action against Shtarkercom and its members in a shareholder dispute, which is currently pending before Justice Bransten. *Moyal v Group IX, Inc.*, Index No. 601973/07.

i.e., using the logging meter to estimate the amount of usage, is too speculative.

However, the calculation of damages is based on the assumption that all the electricity from the unmetered circuit serviced Next Printing's equipment on the sixth floor. Moyal claims that Group IX installed the circuit in 2001, without being metered to Next Printing, because Next Printing allegedly allowed Group IX to use the circuit to power an air conditioning unit placed on Next Printing's premises, which serviced Group IX's premises. Moyal Aff. ¶ 37. Golomb denies that Group IX authorized the unmetered circuit. Golomb Opp. Aff. ¶ 26. Thus, there are issues of fact as to whether Group IX installed the unmetered circuit on the sixth floor, whether the unmetered circuit serviced Group IX's equipment for any period during which the unmetered circuit was active. If the latter is true, then there are unresolved issues as to whether Group IX can establish, with reasonable certainty, the amount of electricity attributable to its own use, and to Next Printing's alleged use.

The fifth cause of action, for fraud, is dismissed. To plead a claim for common-law fraud, a plaintiff must allege a "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holding Company v Smith Barney Inc.*, 88 NY2d 413, 421 (1996).³

Here, the second amended complaint alleges that Next Printing and Moyal represented to Group IX that they would pay for electrical usage, and would measure their usage with a sub-meter, but "*subsequently* caused a 'tap' to be installed" and "*subsequently* caused an unmetered circuit to

³ Contrary to Group IX's contention, Moyal did argue that the fraud cause of action was inadequately pled. Moyal Aff. ¶ 46.

be installed.” See Second Amended Complaint ¶¶ 41-43. Moyal argues that it is ridiculous that, at the time of the alleged misrepresentation, Next Printing would have planned to expand and someday later circumvent the sub-meter by an unmetered circuit and tap. Moyal Aff. ¶ 25.

Group IX must allege that Next Printing and Moyal knew the alleged representation was false at the time it was made. See e.g. *Serino v Lipper*, 47 AD3d 70, 78 (1st Dept 2007); *Ederer v Gursky*, 35 AD3d 166, 167 (1st Dept 2006). The element of falsity is insufficiently pled because it is not reasonable to infer that events subsequent to the alleged representation would establish that the representation was false at the time that it was made.

The element of reliance is lacking as well. The second amended complaint pleads that “plaintiff . . . justifiably relied on the sub-meter as an accurate measurement of all of Next Printing’s electrical usage.” Second Amended Complaint ¶ 44. Group IX is not pleading reliance on Next Printing’s and Moyal’s alleged representations, but rather upon the readings of a sub-meter.

In its opposition papers, Group IX contends that the allegations support a cause of action for fraudulent concealment. Group IX argues that Next Printing and Moyal had a duty to disclose the existence of the unmetered circuit, and the existence of the basement tap, citing *Black v Chittenden* (69 NY2d 665 [1986]).

“A claim predicated on non-disclosure requires a showing that a party is duty-bound to disclose pertinent information.” *Rivietz v Wolohojian*, 38 AD3d 301, 301 (1st Dept 2007). If some conduct, more than mere silence, on the part of Next Printing and Moyal rises to level of active concealment, they may have a duty to disclose such information. *Boyle v McGlynn*, 28 AD3d 994 (3d Dept 2006) (seller had duty to disclose to buyers a wind turbine project on an adjacent parcel). Among the circumstances under which a cause of action for fraudulent concealment may arise is

where there has been a misleading partial disclosure.” *L.K. Station Group, LLC v Quantek Media, LLC*, 62 AD3d 487 (1st Dept 2009); *Downey v Finucane*, 205 NY 251, 264 (1912). Here, Group IX’s theory of fraudulent concealment fails because the allegations cannot be read to plead that Next Printing and Moyal actively concealed the existence of the unmetered tap, assuming that Moyal was aware of its existence.⁴ The alleged partial disclosure is based upon Next Printing and Moyal’s promise to pay for electrical services, which is not a disclosure about the electrical service itself.

Therefore, the fifth cause of action is dismissed. Dismissal of the fifth cause of action also results in dismissal of Group IX’s claim for punitive damages, which was sought only with respect to the fifth cause of action.

Summary judgment is denied as to the seventh cause of action for conversion. Contrary to Moyal’s argument, the alleged “theft” of electricity may be pled as conversion. *See Good Sports of New York v Llorente*, 280 AD2d 261 (1st Dept 2001) (sustaining nonjury trial awarding damages based on landlord’s conversion of electrical services from a tenant).

Summary judgment is denied as to the eighth and ninth causes of action. In the eighth cause of action, Group IX seeks a declaration that it has no obligation to continue providing electrical service to Next Printing, and that it can turn off electrical service to Next Printing. The ninth cause of action seeks a permanent injunction against Next Printing from obtain electrical service from Group IX. Contrary to Next Printing and Moyal’s argument, money damages are not an adequate remedy to the relief sought in these causes of action. Group IX’s concern is that Next Printing will resort to other means to obtain service from Group IX’s electrical supply, whether authorized or not.

⁴ Golomb claims that Grossstern admitted to him that Moyal had instructed Grossstern to install the unmetered circuit. Golomb Aff. ¶ 25.

Money damages are not an adequate remedy because, as discussed above, any unauthorized siphoning of Group IX's electrical supply could go undetected (perhaps for a prolonged period), and thus prove to difficult to quantify the amount of electricity used with reasonable certainty.

Group IX's Motion to Restore to the Trial Calendar

Group IX's motion to restore the action to the trial calendar is denied. Group IX was under the mistaken impression that this action was stricken from the trial calendar because the Trial Assignment Part (Part 40) had remanded the action to IAS Part 7. It appears that Part 40 did not schedule the trial of this action due to Next Printing and Moyal's motion to reargue this Court's decision. Remand of this action to the IAS Part does not constitute striking the action from the trial calendar. Thus, there is nothing to be restored to the trial calendar.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by defendants Next Printing and David Moyal to reargue the Court's decision dated May 1, 2009 is granted (Motion Seq. No. 009); and it is further

ORDERED that upon reargument, the motion for summary by defendants Next Printing and David Moyal is partially granted as follows:

1) so much of the second, third, and fourth causes of action that seeking to recover damages for electrical usage of an "basement tap," in the amount of \$87,720, is dismissed;

2) the fifth cause of action for fraud is dismissed;

and the motion is otherwise denied; and it is further

ORDERED that plaintiff's motion to restore the action to the trial calendar (Motion Seq. No. 008) is denied.

Dated: December 3/2009
New York, New York

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