

Marcone APW, LLC v Servall Co.

2012 NY Slip Op 33745(U)

December 12, 2012

Supreme Court, Erie County

Docket Number: 2010/7257

Judge: John A. Michalek

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**STATE OF NEW YORK
SUPREME COURT : ERIE COUNTY**

**MARCONE APW, LLC,
Plaintiff,**

vs

**SERVALL COMPANY,
KARL P. ROSENHAHN, and
MARK J. CREIGHTON,
Defendants**

**Memorandum
Decision
Consolidated
Index No.
2010/7257**

**MAR-CONE APPLIANCE PARTS
COMPANY,
Plaintiff,**

vs

**KIM K. ADLER,
KEVIN J. SULLIVAN, and
MICHAEL G. MANGAN,
Defendants.**

**FILED
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ERIE COUNTY CLERK**

BEFORE: HON. JOHN A. MICHALEK

APPEARANCES:

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Michalek, J.

Pending before the court is a motion filed by defendants Servall Company, Karl P. Rosenhahn and Mark J. Creighton seeking partial summary judgment pursuant to CPLR 3212(e) "dismissing" plaintiff Marccone APW, LLC's claim for disgorgement damages equal to the amount of profits and/or sales that Servall has made from its northeast operations, as well as seeking to limit at time of trial certain related documents and testimony in connection with this claim for damages, pursuant to CPLR 4011, Commercial Division Rule 27, and Uniform Trial Rule 202.26(c).¹ Joining in this motion are defendants Kevin J. Sullivan and Kim K. Adler. Plaintiff opposes the motions.

The Court first notes that defendants have moved under CPLR

¹ The court assumes familiarity with the facts of the case (see *Marccone APW LLC v Servall Company*, 85 AD3d 1693 [4th Dept 2011]).

3212(e), which states:

Partial summary judgment; ... summary judgment may be granted as to **one or more causes of action**, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just.

(emphasis supplied)

Defendants' motions for summary judgment do not seek relief as to any of the four stated causes of action in the amended complaint against them. In addition, defendants' motions are not supported by any evidentiary proof. A motion for summary judgment supported only by affirmations of counsel is unavailing (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Defendants' quarrel with the form of damages sought by plaintiff is a dispute which may only be resolved by the particular facts and evidence before the court. Evidence of how the loss was caused will trigger how damages will be assessed. Damages are also dependent upon the evidence presented of both plaintiff's losses and defendants' enrichment as a result of wrongful conduct (see e.g. *Ashland Mgmt v Janien*, 82 NY2d 395, 403 [1995]; *Michel Cosmetics v Tsirkas*, 282 NY 195, 200[1940]; *Spielvogel v Zitofsy*, 175 AD2d 830 [2nd Dept 1991]; *Gomez v Bicknell*, 302 AD2d 107 [2nd Dept 2002]; *Harry J. Defler Co. v Kleeman*, 19 AD2d 396,403 [4th Dept 1963]; *Compsolve v Neighbor*, 18 Misc 3d 1104 (A) [Sup Ct Erie

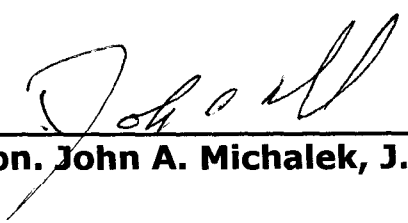
County 2007])).

In any event, because no evidence is presented to the court by defendants, they fail to carry their burden of proof on summary judgment and the motions for summary judgment are, therefore, denied.

Similarly, defendants' motions in limine are not appropriate at this time. The motions fail to identify what documentary evidence defendants are seeking to bar at time of trial. The motion strikes the court as an attempt to do by motion in limine what is properly covered by Article 31 of the CPLR. The motion in limine is denied.

Plaintiff shall submit an order accordingly, on notice to all defense counsel.

**Dated: December 12, 2012
Buffalo, New York**



Hon. John A. Michalek, J.S.C.

~~Granted:~~