

Federal Ins. Co. v Persaud

2012 NY Slip Op 30177(U)

January 11, 2012

Supreme Court, Suffolk County

Docket Number: 44657/2008

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

FEDERAL INSURANCE COMPANY, a/s/o
QUALITY KING FRAGRANCE, INC., d/b/a
QUALITY FRAGRANCE GROUP,

Plaintiff,

-against-

GUIDEO PERSAUD, ISARDAI PERSAUD,
JAMNA PERSAUD, PETALS
INTERNATIONAL and JOHN DOES 1-10,

Defendants.

ORIG. RETURN DATE: FEBRUARY 17, 2011
FINAL SUBMISSION DATE: MAY 26, 2011
MTN. SEQ. #: 004
MOTION: MOT D

ORIG. RETURN DATE: MARCH 10, 2011
FINAL SUBMISSION DATE: MAY 26, 2011
MTN. SEQ. #: 005
MOTION: MD

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RAK

Upon the following papers numbered 1 to 22 read on these motions _____
FOR PARTIAL SUMMARY JUDGMENT AND AN ORDER OF ATTACHMENT.
Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Affirmation in
Opposition and supporting papers 5, 6; Affirmation in Opposition and supporting papers 7,
8; Replying Affidavit and supporting papers 9, 10; Reply Memorandum of Law 11; Order
to Show Cause and supporting papers 12-14; Affirmation and Affidavit in Opposition 15, 16;
Affirmation in Opposition 17; Affirmation in Opposition and supporting papers 18, 19;
Replying Affidavit and supporting papers 20, 21; Reply Memorandum of Law 22; it is,

ORDERED that this motion (seq. #004) by plaintiff, FEDERAL
INSURANCE COMPANY, a/s/o QUALITY KING FRAGRANCE, INC., d/b/a
QUALITY FRAGRANCE GROUP ("plaintiff"), for an Order, pursuant to CPLR
3212 (e) (1):

(1) granting plaintiff partial summary judgment against defendants,
GUIDEO PERSAUD ("Guidéo"), JAMNA PERSAUD ("Jamna") and PETALS
INTERNATIONAL, jointly and severally, as to their liability to plaintiff for the
merchandise that these defendants allegedly admitted they stole from QUALITY
KING FRAGRANCE, INC. ("Quality King") and resold in the admitted sum certain
of \$1,000,000.00, plus interest and the costs of this action;

(2) granting plaintiff partial summary judgment against defendants
Guidéo, Jamna and Petals International, jointly and severally, as to their liability
to plaintiff for any merchandise that these defendants allegedly stole from Quality
King and/or resold, above and beyond the allegedly admitted "sum certain" of
\$1,000,000.00;

(3) directing that the causes of action upon which plaintiff is granted
partial summary judgment herein be severed from plaintiff's causes of action
against the remaining defendants and from a determination of the amount of
plaintiff's remaining damages caused by Guidéo, Jamna and Petals International,
above and beyond the allegedly admitted sum certain of \$1,000,000.00, which
shall be conducted upon an inquest,

is hereby **GRANTED** solely to the extent set forth hereinafter; and it is further

ORDERED that this motion (seq. #005) by plaintiff for an Order:

(1) pursuant to CPLR 6201 (3), directing the Sheriff of Suffolk County
to levy within his jurisdiction, at any time before final judgment herein, upon

defendants' assets, funds, and/or property in which defendants have an interest and upon such debts owing to defendants, including but not limited to all funds held in all accounts and safety deposit boxes in the names of Guideo, Jamna and Petals International, and all merchandise seized from Guideo and Jamna by the Suffolk County District Attorney in connection with their criminal activity against Quality King, to the extent of the sum of \$2,033,135.45 which amount represents proceeds of and/or merchandise from defendants' alleged criminal conduct against Quality King; or, in the alternative

(2) pursuant to CPLR 6301, 6311 and 6313, restraining defendants from disposing of or transferring said assets, funds and/or property, to the extent of \$2,033,135.45, until a hearing on the instant motion,

is hereby **DENIED** in its entirety for the reasons set forth hereinafter. The Court has received opposition to these applications from the defendants herein.

Quality King commenced this action against defendants by the filing of a summons and verified complaint December 16, 2008, and the subsequent service upon Jamna and defendant ISARDAI PERSAUD ("Isardi") on December 17, 2008; upon Guideo on December 18, 2008; and upon Petals International on January 27, 2009. Plaintiff, as Quality King's assignee and subrogee, seeks to recover damages for Quality King's losses from defendants' alleged thefts of its merchandise and the subsequent sales of the alleged stolen merchandise to third-party companies and fraudulent billings to Quality King. Specifically, plaintiff has asserted causes of action for conversion, trespass to chattels, fraud, aiding and abetting fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, constructive trust, replevin, an accounting, and unjust enrichment. On or about January 5, 2009, Guideo served a verified answer, and on or about January 13, 2009, he served an amended answer. On or about January 13, 2009, defendant Isardai served a verified answer. On or about January 21, 2009, defendants Jamna and Petals International served a verified answer.

By So-Ordered Stipulation dated July 19, 2010, FEDERAL INSURANCE COMPANY was substituted as the plaintiff in this action in place of its assignor and subrogor, Quality King. Quality King had presented a claim to FEDERAL INSURANCE COMPANY under a crime bond for employee theft for the merchandise allegedly stolen by defendants, and had reimbursed Quality King in the sum of \$1,933,135.45, net of the policy's \$50,000.00 deductible. Quality King had submitted a proof of loss to plaintiff, dated May 12, 2009, for a

loss in the sum of \$2,347,686.14, which loss was discovered on November 21, 2008. Plaintiff also paid Quality King's claim for its loss investigation costs in the sum of \$100,000.00.

Plaintiff alleges that Quality King is a wholesale purchaser and seller of fragrance products, operating its warehouse facilities on Long Island. Guideo was employed by Quality King as its Receiving Manager at Quality King's warehouse, until he was terminated for committing the acts that are the subject of this action. As the Receiving Manager, Guideo was responsible for supervising the receipt of all incoming shipments of fragrance products.

Plaintiff informs the Court that in a statement to police sworn to on December 3, 2008, the date of his arrest, Guideo confessed to the police that for years he and his brother, Jamna, had stolen over \$1,000,000.00 in fragrance products from Quality King, then sold the stolen merchandise to third parties, and billed Quality King for purported fragrance product sales. Plaintiff alleges that Guideo admitted Jamna would drive a rented truck to Quality King's warehouse where Guideo would have two to three pallets of Quality King's fragrance products ready on the dock. Plaintiff further alleges that Guideo admitted he would load the fragrance products into the rental truck and Jamna would drive the stolen merchandise to a storage facility Jamna had rented in Hauppauge, New York. Plaintiff contends that Guideo admitted Jamna would then sell the stolen merchandise to third parties, including but not limited to Cosmo Connection, a Staten Island based fragrance distributor and one of Quality King's customers, and even back to Quality King. Guideo and Jamna allegedly split the sale proceeds between them fifty-fifty. In order to avoid detection of their fraud against Quality King, defendants allegedly resold the stolen merchandise through Petals International, which was operated by Jamna.

At the time of his December 3, 2008 arrest, Jamna was allegedly in possession of fragrance products stolen from Quality King, and he also allegedly confessed to the police that he knew he was selling stolen fragrance products. The owner of Cosmo Connection gave a sworn statement setting forth that she had been buying fragrance products from Jamna of Petals International since 2005, the same year Guido admitted that he and his brother started stealing from Quality King. Jamna was charged with one count of Criminal Possession of Stolen Property in the Third Degree. Guideo was charged with one count of Grand Larceny in the Second Degree, and one count of Criminal Possession of Stolen Property in the Second Degree.

Based upon the foregoing, plaintiff argues that it is undisputed that Guideo, Jamna, and Petals International stole and resold merchandise from Quality King in the sum of over \$1,000,000.00. As such, plaintiff seeks partial summary judgment against Guideo, Jamna, and Petals International in the sum of \$1,000,000.00, and an inquest to determine plaintiff's remaining damages. In support thereof, plaintiff has submitted, among other things, the pleadings, an affidavit of the chief financial officer of Quality King, and an affidavit of an assistant vice president of plaintiff.

On a motion for summary judgment the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). Therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (see *Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (see *Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard-Mobley v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NYS2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (see *Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022 [1970]). Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]; *Andre v Pomeroy*, 35 NY2d 361 [1974]).

On this record, the Court finds that plaintiff has established *prima facie* that it is entitled to judgment as a matter of law on the issue of liability against Guideo (see *Winegrad v New York Univ. Med. Ctr.*, *supra*; *Vaden v Rose*, 4 AD3d 468 [2004]; *McNulty v DePetro*, 298 AD2d 566 [2002]). On February 15, 2011, in the related criminal case, Guideo pleaded guilty to Grand Larceny in the Second Degree, and admitted his guilt in connection with the theft of perfume from Quality King. Guideo also agreed to forfeit the sum of \$284,547.00, which

was ultimately turned over to plaintiff by Stipulation and Order, dated June 16, 2011, in the companion civil forfeiture action. In appropriate situations, a particular issue expressly or necessarily decided in a criminal proceeding may be given preclusive effect in a subsequent affected civil action (see *Allstate Ins. Co. v Zuk*, 78 NY2d 41 [1991]; *In re Nassau Ins. Co.*, 78 NY2d 888 [1991]; *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659 [1990]; *Vavolizza v Krieger*, 33 NY2d 351 [1974]). Guideo has admitted that he took property from Quality King without permission or authority to do so, without the intention to return it. As such, the Court finds that summary judgment against Guideo on the issue of liability is warranted herein.

With respect to the extent of damages against Guideo, plaintiff relies on Guideo's sworn statement, dated December 3, 2008, given to police on the date of his arrest. Plaintiff alleges that Guideo confessed that he had stolen over \$1,000,000.00 in fragrance products from Quality King. However, in opposition to the instant application, Guideo avers that he was pressured into making a guess as to the amounts stolen, and was offered possible answers to the questions asked. Guideo further avers that he repeatedly claimed he was unsure about how much inventory was taken. The Court notes that Guideo's statement actually recites that "[s]ince 2005 I would have to say that me and my brother Jamna Persaud stole over one million dollars from Quality King." Moreover, the Court is cognizant that the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636 [1988]).

Regarding Jamna and Petals International, the Court notes that on February 15, 2011, in Jamna's related criminal case, Jamna was given an adjournment in contemplation of dismissal on the charge of Criminal Possession of Stolen Property in the Fifth Degree, without any admission of guilt. Thus, there is no such issue preclusion with respect to Jamna. Further, in opposition to plaintiff's instant motion, Jamna denies any involvement in Guideo's theft, and alleges that he did not split, receive or share in the proceeds of any theft. Jamna additionally disputes the oral admission he allegedly gave to police as recited in the felony complaint.

Plaintiff, in reply, argues that there are no issues of fact as to Jamna's conversion of Quality King's property, as he does not dispute that he

sold perfume products that had been stolen from Quality King. The Court of Appeals has held that 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 (*State of New York v Seventh Regiment Fund*, 98 NY2d 249 [2002]). Two key elements of conversion are: (1) the plaintiff's possessory right or interest in the property; and (2) the defendant's dominion over the property or interference with it, in derogation of the plaintiff's rights (see *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *State of New York v Seventh Regiment Fund*, 98 NY2d 249, *supra*; *Pierpoint v Hoyt*, 260 NY 26 [1932]). Contrary to plaintiff's argument, as noted hereinabove, Jamna has denied involvement in any theft, and disputes he ever admitted to police that he sold perfume stolen from Quality King. Intent is an element of the tort of conversion. In view of the foregoing, the Court finds that at this juncture, Jamna has raised issues of fact which preclude the granting of summary judgment against him and his agent, Petals International.

Accordingly, this motion by plaintiff for partial summary judgment is **GRANTED** solely to the extent that plaintiff is awarded summary judgment against Guideo on the issue of liability, with an assessment of damages against Guideo to be conducted at the time of trial or other disposition of this action.

Next, plaintiff has filed the instant application for an Order of Attachment. Plaintiff seeks to levy upon defendants' assets, funds, and/or property in which defendants have an interest and upon such debts owing to defendants, including but not limited to all funds held in all accounts and safety deposit boxes in the names of Guideo, Jamna and Petals International, and all merchandise seized from Guideo and Jamna by the Suffolk County District Attorney in connection with their criminal activity against Quality King, to the extent of the sum of \$2,033,135.45. In the alternative, plaintiff seeks a preliminary injunction restraining defendants from disposing of or transferring assets, funds and/or property, to the extent of \$2,033,135.45.

By temporary restraining Order dated February 23, 2011, this Court ordered that Guideo and Jamna be restrained from disposing of or transferring assets, funds, and/or property, pursuant to CPLR 6301, 6311, and 6313, until the return date of plaintiff's motion for an Order of attachment, including the assets, funds and/or property previously attached by the Suffolk County District Attorney, in excess of \$284,547.00. Upon the application of plaintiff's counsel, the

temporary restraining Order was continued pending the determination of the motion.

Initially, as the Court noted hereinabove, the sum of \$284,547.00 has been turned over to plaintiff by Stipulation and Order, dated June 16, 2011, in the companion civil forfeiture action.

CPLR 6201 (3) provides that an Order of attachment may be granted in any action where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts (CPLR 6201 [3]). The moving papers must contain evidentiary facts—as opposed to conclusions—proving the fraud (*Mineola Ford Sales v Rapp*, 242 AD2d 371 [1997]; *Societe Generale Alsacienne De Banque, Zurich v Flemingdon Dev. Corp.*, 118 AD2d 769 [1986]; see also *Rothman v Rogers*, 221 AD2d 330 [1995]; *Vita v Spina*, 15 Misc 3d 1137[A] [Sup Ct, Suffolk County 2007]). In addition to proving fraudulent intent, the plaintiff must also show probable success on the merits of the underlying action in order to obtain an order of attachment (see CPLR 6212 [a]; *Societe Generale Alsacienne De Banque, Zurich v Flemingdon Dev. Corp.*, 118 AD2d 769, *supra*; *Computer Strategies v Commodore Bus. Machs.*, 105 AD2d 167 [1984]). However, the mere removal, assignment or other disposition of property is not grounds for attachment (*Corsi v Vroman*, 37 AD3d 397 [2007]; *Computer Strategies v Commodore Bus. Machs.*, 105 AD2d 167, *supra*).

Here, the Court finds the allegation that the “likelihood is great that Defendants have and would continue to dispose of, dissipate or secrete assets, funds and/or property that are the subject of this action,” and Guideo’s alleged admission that “I do have a gambling problem – I constantly go to OTB to bet on the horses,” do not rise to the level of demonstrating an intent to defraud or frustrate enforcement of a judgment. Plaintiff’s moving papers do not contain any evidentiary facts proving fraudulent transfers (*Mineola Ford Sales v Rapp*, 242 AD2d 371, *supra*; *Societe Generale Alsacienne De Banque, Zurich v Flemingdon Dev. Corp.*, 118 AD2d 769, *supra*).

Regarding the alternate relief requested of a preliminary injunction, it is well-settled that if a plaintiff has an adequate remedy at law and may be fully

compensated by monetary damages, a preliminary injunction will not be granted (see *Reade v Rockaway Crossing, LLC*, 18 AD3d 337 [2005]; *Singer v Riskin*, 304 AD2d 554 [2003]; *Duane Roushia v Harvey*, 260 AD2d 687 [1999]; *Dairy Barn Stores v Bill's Friendly Auto Serv.*, 236 AD2d 578 [1997]). Here, plaintiff may be fully compensated by monetary damages.

Therefore, plaintiff's motion for an Order of attachment or a preliminary injunction is **DENIED**, with leave to renew in the event plaintiff can demonstrate actions undertaken by defendants designed to defraud plaintiff and/or frustrate enforcement of any money judgment. The temporary restraining Order contained in the Order to Show Cause dated February 23, 2011 is hereby vacated.

The foregoing constitutes the decision and Order of the Court.

Dated: January 11, 2012



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION