

Johnny Woo, LLC v Stevealann, Inc.

2014 NY Slip Op 31578(U)

June 18, 2014

Sup Ct, New York County

Docket Number: 102292/10

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 102292/2010
JOHNNY WOO, INC.
VS.
STEVEALANN, INC.
SEQUENCE NUMBER : 001
VACATE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for Vacate jury demand
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion ~~is~~ to vacate the jury demand is granted in accordance with the attached memorandum decision.

(Consolidated for disposition with Motion Log 003)

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

FILED

JUN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/18/14

[Signature], J.S.C.
JUSTICE DORIS LING-COHAN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----- X
JOHNNY WOO, LLC and HAMDAN TURAN,

Plaintiffs,

- against-

STEVEALANN, INC. and STEVEN SADOFF,

Defendants,

-and-

JOHN TURAN,

Additional Counterclaim
Defendant.
----- X

Index No. 102292/10

Motion Seq. No.: 001 & 003

FILED

JUN 23 2014

DORIS LING-COHAN, J.:

COUNTY CLERK'S OFFICE
NEW YORK

Motion sequence numbers 001 and 003 are consolidated for disposition.

The defendants Stevalann Inc, s/h/a Stevealann, Inc. and its president Steven Sadoff (defendants) move for an order vacating the jury demand (motion sequence number 001). The defendants also move, pursuant to CPLR 3212 (e), for an order: dismissing this action against Steven Sadoff, on the grounds that Steven Sadoff acted solely in his corporate capacity, as president of defendant Stevalann Inc.; and dismissing plaintiffs' second through tenth causes of action as legally insufficient as a matter of law, and severing for trial plaintiffs' first cause of action and defendants' counterclaims (motion sequence number 003).

Plaintiffs Johnny Woo, LLC, and its principal Hamdan Turan (plaintiffs) commenced this action to recover a \$100,000 deposit given to defendants in connection with a failed commercial

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sublease transaction. Plaintiffs allege that under the sublease, article 13, paragraph (e), they properly exercised their right to cancel the sublease, when defendants failed to obtain the overlandlord's written approval. Defendants allege that their delay in obtaining the overlandlord's written permission was occasioned by plaintiffs' own delay in supplying tax returns and financial statements. Defendants also allege that the deadline for obtaining the overlandlord's consent was extended by mutual agreement.

In addition to breach of contract (first cause of action), the complaint also pleads causes of action for violation of General Business Law § 349 (a) (second cause of action), fraud (third and fourth causes of action), breach of the duty of good faith and fair dealing (fifth cause of action), breach of express warranty (sixth cause of action), unjust enrichment (seventh cause of action), negligence (eighth cause of action), conversion (ninth cause of action), and tortious interference with contracts (tenth cause of action). Defendants have counterclaimed against the plaintiffs, and added an additional counterclaim against defendant John Turan, as the president of Johnny Woo LLC, for breach of a written personal guaranty and the sublease.

In support of their motion for summary judgment, defendants argue that Steven Sadoff is not personally liable for Stevalann Inc.'s debts, and that the second through tenth causes of action should be dismissed because this is a simple breach of contract case.

In opposition to the motion for summary judgment, plaintiffs argue that this is not a mere landlord tenant dispute and that the heart of the action is fraud, misrepresentation, and tort.

"[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 eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal

quotation marks and citation omitted]). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). 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. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

All ten causes of action against Steven Sadoff must be dismissed. "It is well established that officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 407-408, [1st Dept 2011], *aff'd* 19 NY3d 511 [2012]). Steven Sadoff, who signed the sublease only in his capacity as president of Stevalann Inc., cannot be held personally liable for Stevalann Inc.'s breach of the sublease. Steven Sadoff is entitled to summary judgment since he established that he did not act in his individual capacity or commit any tort outside the scope of his corporate capacity (*Meyer v Martin*, 16 AD3d 632, 634 [2d Dept 2005]). Other than conclusory statements that Steven Sadoff, either committed individual tortious acts, or dominated and controlled Stevalann Inc., plaintiffs fail to allege particularized facts to warrant piercing of the corporate veil, so as to allow the claims against Steven Sadoff to continue (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]; *Barneli & Cie SA v. Dutch*

* 5]
Book Fund SPC, Ltd, 95 AD3d 736, 737 [1st Dept 2012]).

The second cause of action against Stevalann Inc. for violation of General Business Law § 349 (a) must also be dismissed. General Business Law § 349 (a) provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." The statute provides a private right of action to "any person who has been injured by reason of" such illegal conduct (General Business Law § 349 [h]). To successfully assert a claim under General Business Law § 349, "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]). In the instant case, plaintiffs fail to demonstrate any conduct on the part of defendants that was consumer oriented (*City of New York v. Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 623 [2009]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]).

The third and fourth causes of action for fraud must be dismissed because plaintiffs fail to allege tortious conduct separate and distinct from their breach of contract claim (*767 Third Ave. LLC v Greble & Finger. LLP*, 8 AD3d 75, 75-76 [1st Dept 2004]). Therefore, the fraud causes of action are duplicative of the breach of contract claim.

Likewise, the fifth cause of action for breach of the duty of good faith and fair dealing must be dismissed as merely duplicative of the cause of action for breach of contract (*Credit Suisse First Boston v Utrecht-America Fin. Co.*, 80 AD3d 485, 488 [1st Dept 2011]).

The sixth cause of action for breach of an express warranty also must be dismissed. "A warranty is not a promise of performance, but a statement of present fact" (*First Bank of the Ams.*

v Motor Car Funding, Inc., 257 AD2d 287, 292 [1st Dept 1999]). "Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract ... and therefore involves a separate breach of duty" (*id.*). Here, the gravaman of plaintiffs' claim does not include defendants intentionally misrepresenting material facts about the sub-tenancy. Moreover, as discussed above, plaintiffs fail to allege tortious conduct separate and distinct from their breach of contract claim.

The seventh cause of action for unjust enrichment is barred under the rule that "the existence of a valid contract governing the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]).

The eighth cause of action for negligence must be dismissed because plaintiffs fail to demonstrate a legal duty independent of the contract itself that has been violated (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *Wildenstein v 5H&Co, Inc.*, 97 AD3d 488, 491-492 [1st Dept 2012]).

The ninth cause of action for conversion must be dismissed. A conversion occurs when one "intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). The events underlying this litigation all took place in the course of the parties' agreement, so that Stevalann Inc.'s possession of the funds was not "without authority" (*B&C Realty, Co. v 159 Emmut Props. LLC*, 106 AD3d 653, 656 [1st Dept 2013]).

The tenth cause of action for tortious interference with contract must be dismissed. To

establish a claim for tortious interference with contract “the plaintiff must show the existence of its valid contract with a third party, defendant’s knowledge of that contract, defendant’s intentional and improper procuring of a breach and damages” (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). Plaintiffs fail to demonstrate a factual issue concerning whether Stevalann, Inc. committed independent torts or predatory acts.

Finally, turning to the motion to strike the jury demand, in both the sublease, and the guaranty, plaintiffs, in writing, waived trial by jury. Therefore, the motion to strike the jury demand must be granted. Plaintiffs “may not at the same time rely upon the lease as the foundation of their claim for damages and repudiate the provisions by which they waived their constitutional right to a jury trial” (*Sherry Assocs. v Sherry-Netherland, Inc.*, 273 AD2d 14 [1st Dept 2000]) quoting *Leav v Weitzner*, 268 App Div 466, 468 [1st Dept 1944]).

Accordingly, it is

ORDERED that defendant Steven Sadoff’s motion for summary judgment is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to defendant Steven Sadoff, as taxed by the Clerk upon submission of an appropriate bill of costs; and it further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that movant’s counsel serve a copy of this order with notice of entry upon the

County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption; and it is further

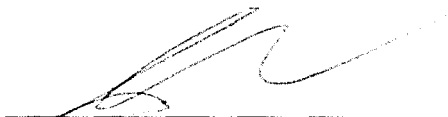
ORDERED that the motion by Stevalann, Inc. S/h/a Stevealann, Inc.'s for summary judgment is granted and the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth causes of action of the complaint are dismissed; and it is further

ORDERED that the first cause of action against Stevealann, Inc., and the counterclaims, are severed and continued; and it is further

ORDERED that the defendants' motion to strike the jury demand is granted and the jury demand is stricken; and it is further

ORDERED that, within 30 days of entry of this order, defendants' shall serve a copy of this order, with notice of entry, upon all parties, and the Clerk of the Trial Support Office (Room 158), who is directed to place this case on the appropriate nonjury calendar.

Dated: 6/18/14


Doris Ling-Cohan, J.S.C.

FILED

JUN 23 2014

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NEW YORK

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