Cajun Enterprises, Inc. v. Champney, No. 210-03-07 Wncv (Toor, J., Sept. 11, 2008)

STATE OF VERMONT
WASHINGTON COUNTY

CAJUN ENTERPRISES, INC. and WILLIAM HANNON, Plaintiffs v. GARY S. CHAMPNEY ENTERPRISES, INC., GARY S. CHAMPNEY, CERTIFIED BUSINESS BROKERS, LTD., and ROBERT SAHLMAN, Defendants GARY S. CHAMPNEY ENTERPRISES, INC. and GARY S. CHAMPNEY, Cross-Complainants v. CAJUN ENTERPRISES, INC., WILLIAM P. HANNON, and PILGRIM PARTNERSHIP, LLC, Cross-Defendants	Docket No. 210-03-07 Wncv

RULING ON MOTIONS FOR SUMMARY JUDGMENT

This case involves a commercial real estate sale that took place in 2002 involving a lumber supply facility in Waterbury. There are currently three motions for summary judgment pending. The court will address each in turn.

1. Plaintiffs' Motion

Plaintiffs move for summary judgment with regard to the following issue: whether "Defendant Gary S. Champney Enterprises, Inc. is in breach of the warranty of good title in the Bill of Sale from Station Lumber and Hardware Supplies, Inc. to Cajun Enterprises, Inc., dated April 30, 2002, regarding the so-called 'Freight House' building located at [address redacted], Waterbury, Vermont." Plaintiffs' First Motion for Summary Judgment, p. 1.

Plaintiffs' Statement of Material Facts sets forth a detailed set of facts that, in sum, suggests that Champney Enterprises purported to sell a building it did not own, the "Freight House." Defendants Gary Champney and Champney Enterprises respond that there is a dispute of fact over which building was the "Freight House," and over whether the building in question was or was not included in the sale.

A review of the parties' factual assertions reflects that the following is undisputed. The parties negotiated for the sale of a set of buildings located on [address redacted] in Waterbury, then owned by Station Lumber and Hardware supplies, of which Mr. Champney was president. The sale went through in April of 2002. Champney Enterprises is Station Lumber's successor corporation. At the time of the negotiations for the sale, documents provided to Plaintiffs stated that Station Lumber operated out of buildings owned by it on land leased from the Central Vermont Railway. In addition, the bill of sale states that it transfers title to Station Lumber's interest in "all buildings situated on land leased by the seller from Rail America at [address redacted], Waterbury." Station Lumber warranted that it had good title to convey the buildings.

However, Mr. Champney states in an affidavit that he expressly told Hannon during negotiations that Station Lumber did not own the "Freight House," but instead leased it from the railroad. In addition, Champney states that the building shown as the "Freight Building" on a map he

attaches to his affidavit – the source of which is not described – is not what he meant when he referred to the "Freight House." He states that when he said "Freight House," he meant the building shown on that map as ""1 ½ sty Att Shed." He further states that he walked the property with Hannon around the time of the sale, and at that time confirmed that the "Freight House" was not part of the sale.

Plaintiffs have filed no reply memorandum, and no affidavit from Hannon addressing Chimney's assertions. The court does note that attached to Hannon's original affidavit is a different map which may or may not have the buildings labeled differently from the map supplied by Champney -- the court is unable to tell from comparing the two maps because neither is marked with directional signals, the buildings are different shapes an sizes, and they do not have the same street references. The bill of sale and warranty language do not clearly identify which buildings are being sold and warranted. They refer to "all buildings situated on land leased by the seller from Rail America at [address redacted]." The court concludes that the facts are too fuzzy to sustain summary judgment.

2. Champneys' Motion

Defendants Gary Champney and Gary S. Champney Enterprises, Inc. move for partial summary judgment with respect to Count 8 of the Amended Complaint. However, as that count is asserted only against Gary Champney and Robert Sahlman in their individual capacities, the court concludes that Gary S. Champney Enterprises has no standing to seek judgment on these claims. The company's motion, therefore, is denied on that basis.

Champney has filed a statement of material facts supported by affidavit. That statement asserts in sum that all of Champney's actions in this matter were taken in his capacity as a corporate officer, and that Plaintiffs have proffered no evidence (1) that he acted in any other capacity, (2) that

he held himself out as a sole proprietor, (3) that he failed to maintain corporate formalities or (4) that any other facts support piercing the corporate veil. Plaintiffs have filed to file any response to the motion. Thus, all the facts set forth in the Statement of Material facts, supported by affidavit, are deemed admitted. V.R.C.P. 56.

Champney has interestingly not set forth affirmative statements that he did *not* act in a personal capacity. Instead, he merely says that Plaintiffs have not come up with any proof that he did. However, for purposes of this motion the court concludes that this distinction does not matter. It is Plaintiffs' burden to support their claims with evidence, and the utter failure to respond to the motion means that the court deems true the allegations that Plaintiffs have no evidence to support their claim of personal liability. There being no factual support proffered by Plaintiffs for the claim, Champney is entitled to summary judgment in his favor on Count 8.

3. Certified and Sahlman's Motion

Defendants Certified Business Brokers ("Certified") and Robert Sahlman seek summary judgment in their favor as to all claims asserted against them by Plaintiffs and all counterclaims asserted by them against Plaintiffs.

The claims asserted against Certified and Sahlman are consumer fraud (Count 2), negligent misrepresentation (Count 3), unjust enrichment (Count 5) and a claim that Sahlman is personally liable (Count 8). Certified and Sahlman assert counterclaims for breach of contract (Counterclaim Count 1) and tortious interference with contract (Counterclaim Count 2).

The statement of material facts set forth in support of this motion, to which Plaintiffs have failed to respond in any way, sets forth the following facts supported by affidavit, which are now deemed admitted. V.R.C.P. 56. Certified acted as Champney and Champney Enterprise's business broker in this case, and in that capacity provided to William Hannon information about the property.

That information was provided after Hannon signed a Non-Disclosure agreement (the "Agreement") requiring Hannon not to further distribute information provided to him. That Agreement, signed by Hannon on January 3, 2001[1], also states that Hannon understands it is his "responsibility to perform the due diligence at my cost prior to an acquisition," and that Certified "shall have no liability as a result of furnishing me the material included in this agreement." Exhibit D to Statement of Material facts.

The Agreement also states that Hannon "will protect the Certified Business Broker's right to the fee" under Certified's agreement with the seller, and that if Hannon "interfere[s] in any way with Certified Business Broker's contractual right to fees from the seller," he "may be personally liable for payment of that fee." Id.

After Hannon signed the Agreement, Certified gave him a "Confidential Memorandum" concerning the property in question. That memo expressly stated that the information therein was furnished by the seller or other sources "considered reliable," that Certified had no reason to doubt the accuracy of the data, but that "neither the [seller] nor [Certified] makes any representations or warrantees, express or implied, as to the accuracy or completeness of any of the information in this report." Exhibit E to Statement of Material Facts.

Certified and Champney had an agreement that Certified would receive $35,000 at closing plus ten percent of each later progress payment from a buyer. Exhibit C to Statement of Material Facts. At some point after the sale of the property, Plaintiffs stopped making payments on the note.

Certified and Sahlman did not verify the title information provided to them by Champney. Certified and Sahlman had no information suggesting that Champney did not own all of the buildings it listed for sale with Certified.

[1] The Agreement was not signed by any representative of Certified.

Hannon signed the Agreement in his personal capacity. He never mentioned that he was representing any entity other than himself. Cajun Enterprises was not a party to any dealings with Certified. Cajun Enterprises was in fact not incorporated until April of 2002, more than a year after Hannon signed the Agreement with Certified.

Based upon the above undisputed facts, Certified and Sahlman argue that they are entitled to judgment in their favor. The court will address each Count at issue separately.

a. Count 2: Consumer Fraud

The Consumer Fraud claim is asserted against all defendants, without any specific allegations against Certified or Sahlman. The count asserts that all defendants knowingly made false representations about the ownership of the property and Champney's ability to convey it. The undisputed facts set forth above establish that Certified and Sahlman did not knowingly make any false representations to Plaintiffs. Thus, summary judgment will be granted in their favor on this count.

b. Count 3: Negligent Misrepresentation

Count Three alleges that all defendants breached a duty of care to Plaintiffs by failing to investigate the ownership of the listed property, and are thus liable for negligent misrepresentation. Vermont uses the definition of negligent misrepresentation used in the Restatement of Torts. Thus, one who "supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss to them caused by their justifiable reliance upon the information." Hedges v. Durrance, 2003 VT 63 ¶ 10, 175 Vt. 588, 591 (quoting Restatement (Second) of Torts, § 552(1) (1977).

However, the undisputed evidence is that Plaintiff Hannon signed a document acknowledging that he understood it was up to him to investigate the matter prior to any purchase.

Under these circumstances, there could be no justifiable reliance upon the information provided by Certified. *See, e.g.*, Cataldo Ambulance Service, Inc. v. City of Chelsea, 688 N.E. 2d 959, 962 (Mass. 1998)("The question whether a party's reliance on a promise by another is reasonable is often a question of fact, but in an appropriate case can present an issue of law. . . .[Plaintiff's] post hoc claim of reliance is not determinative, if the summary judgment record demonstrates that . . .[Plaintiff] could not have reasonably relied" on the information provided by the defendant.), cited in Marble v. First American Flood Data Service Inc., No. 2003-428, 2004 WL 5582088 *3 (Vt. June 2004) (entry order).

With regard to Cajun, it had no dealings with these defendants at all, and therefore could not have been the victim of misrepresentation by them.

For the foregoing reasons, the court grants the motion for summary judgment in favor of Sahlman and Certified on this count.

c. Count 5: Unjust Enrichment

The unjust enrichment claim asserts that all defendants were unjustly enriched because they received payments from Plaintiffs but "did not deliver the consideration promised by Defendants." Amended Complaint ¶ 51. It is not clear what "consideration" is referred to with regard to Certified and Sahlman.

"[T]he equitable doctrine of unjust enrichment rests upon the principle that a man shall not be allowed to enrich himself unjustly at the expense of another. In other words, the inquiry is whether, in light of the totality of circumstances, it is against equity and good conscience to allow [a party] to retain what is sought to be recovered." Legault v. Legault, 142 Vt. 525, 531 (1983). Such a claim "must allege that a benefit was conferred on defendant, that defendant accepted the benefit, and that it would be inequitable to allow defendant to retain the benefit." Johnson v. Harwood, 2008

VT 4 ¶1, __ Vt. __. "In ruling on such a claim, 'the inquiry is whether, in light of the totality of the circumstances, equity and good conscience demand that the defendant return that which the plaintiff seeks to recover.'" Id. (citation omitted). The most important element is that "the enrichment to the defendant be unjust." Ray Reilly's Tire Mart Inc. v. F. P. Elnicki, Inc., 149 Vt. 37, 40 (1987).

The facts before the court, undisputed by Plaintiffs, demonstrate that Hannon signed a document that expressly informed him that no promises were being made by Certified as to the accuracy of any information provided by Certified. That document, as well as second document provided to Hannon by Certified, stated that it was Hannon's responsibility to verify the information before making a purchase of the property in question. Exhibits D and E to Statement of Material Facts. The only payments made to Certified were fees associated with the sale of the property. Under these circumstances, in which Hannon was on notice from the start that he should not rely upon the documents from Certified without further investigation, the court concludes that no reasonable jury could find anything "unjust" about Certified's receipt of the brokerage fee from the sale (or any payment to Sahlman as part of that fee). The motion for summary judgment on this count is granted.

d. Count 8: The Claim that Sahlman is Personally Liable

In Count 8, Plaintiffs allege that Sahlman is personally liable because he made misrepresentations to Plaintiffs in his personal capacity, held himself out as a sole proprietor, did not maintain corporate formalities, commingled funds, and otherwise acted in a manner allowing "piercing of the corporate veil."

"The term 'piercing the corporate veil' refers to a common-law equitable remedy by which a court imposes personal liability upon otherwise immune corporate officers, directors, or shareholders for a corporation's wrongful acts." Frazier v. Preferred Operators, Inc., 2004 VT 95 ¶ 6,177 Vt. 571, citing Black's Law Dictionary 1168 (7th ed.1999). Thus, "shareholders can be held liable where the

corporate form has been used to perpetrate a fraud or to shield the shareholders' assets against legitimate claims of a creditor." Agway, Inc. v. Brooks, 173 Vt. 259, 262 (2001). Even where there is no fraud, in Vermont courts can "look to the facts and circumstances of each case to determine whether the corporate veil should be pierced in the interests of fairness, equity, and the public need." Id. at 263.

Count 8, however, asserts no independent substantive claim against Sahlman other than those already set forth in Counts 2, 3, and 5. Instead, it merely seeks to hold Sahlman personally liable on those claims. Because the court has already granted Sahlman summary judgment on those substantive claims, he is also entitled to summary judgment on Count 8. Because the count asserts no claims against Certified, the motion by Certified on this count is denied for lack of standing.

e. Counterclaim Count 1: Breach of Contract

Certified and Sahlman argue that Hannon and Cajun have breached a contract because the Agreement that Hannon signed required him to protect Certified's right to its fees from Champney. The court concludes that the Agreement does not constitute a contract.

It is a rule of contract law that "[t]o constitute consideration, a performance or a return promise must be bargained for." Ragosta v. Wilder, 156 Vt. 390, 393 (1991), quoting Restatement (Second) of Contracts § 71(1) (1981). Although Sahlman says in his affidavit that he would not have provided the property information to Hannon without the Agreement, what was in Sahlman's mind is not the issue. The issue is whether a contract existed between the parties. Restatement (Second) Contracts § 71 ("the law is concerned with the external manifestation rather than the undisclosed mental state"). The document itself reflects no promise by Certified, only a promise by Hannon. Thus, the court denies the motion for summary judgment on this counterclaim.

f. Counterclaim Count 2: Tortious Interference with Contract

The second counterclaim is also based upon Hannon's failure to continue making payments to Champney, thus leading to reduced payments from Hannon to Certified.

To establish a claim of intentional interference with contract, Certified would have to show that Cajun and Hannon "intentionally and improperly induced" Champneys "not to perform [their] contract" with Certified. Field v. Costa, 2008 VT 75 ¶ 25, __ Vt. __. In determining whether the acts were improper, "[a]ll the circumstances must be analyzed and considered with reference to the type of relation disrupted, the means employed and the purpose of the actor's interference." Mitchell v. Aldrich, 122 Vt. 19, 24 (1960). In this case, Cajun and Hannon allege that they were sold a piece of property the seller did not own, and that this is the reason for their terminating payments on the note. Such a reason, if proved, might well provide a legitimate motive for the non-payment, and would thus not demonstrate any tort directed at Certified. *See* Restatement 2d Torts § 767 (motive of defendant is one factor in determining whether acts were improper).[2] Thus, Certified's motion for summary judgment on this issue is denied.

Order

The Plaintiffs' motion for partial summary judgment is denied. Champney Enterprises' motion for partial summary judgment is denied for lack of standing. Gary Champney's motion for partial summary judgment is granted. Summary judgment is granted for Certified and Sahlman on all claims asserted against both of them by Plaintiffs: consumer fraud (Count 2), negligent misrepresentation (Count 3), and unjust enrichment (Count 5). Certified's motion with respect to Count 8 is denied for lack of standing; Sahlman's motion for summary judgment with respect to

[2] In addition, it is unclear that Champney has actually been induced to breach its contract with Certified. The contract merely says that if payments are made, certified gets a certain percentage of each payment, and if they are not made, Certified bears the loss of those percentage payments. Exhibit C to Statement of Material Facts. Thus, it does not appear that Champney is in breach of that agreement. Therefore, it seems that Certified cannot prove another necessary element of its claim: that Cajun and Hannon "induc[ed] or otherwise caus[ed] the third person not to perform the contract." Restatement (Second) Torts § 766. *See also* Foster & Gridley v. Winner, 169 Vt. 621, 624 (1999) (mem.) (Plaintiff must "suffer harm as a result of a third person's failure to perform his or her contractual obligations with the plaintiff").

Count 8 (personal liability) is granted. Their motion for summary judgment on the counterclaims is denied.

The court's file suggests that this case should be trial-ready at this time. Thus, the court is scheduling a pretrial conference to discuss trial scheduling.

Dated at Montpelier this 11th day of September, 2008.

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Helen M. Toor
Superior Court Judge