SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. ROLANDO T. ACOSTA

PART 61

Index Number : 602649/2003
JAG TECHNICAL ASSOCIATES
vs
BERNSTEIN, MERYL
Sequence Number : 006
VACATE

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Dated: 6/13/06

SO ORDERED

ROLANDO T. ACOSTA J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMITTED FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JAG Technical Associates, Inc., et al.,

Plaintiffs,

– against –

Meryl Bernstein, et al.,

Defendants.

Judgment on Equitable Claims and Decision/Order Re: CPLR §§ 4401 & 4404(a) Motions

Index No. 602649/03

Seq. No. 6

Rolando T. Acosta
Supreme Court Justice

Introduction

Plaintiffs, computer consultants, sued the defendants for legal and equitable relief.[1] The legal claims consisted of breach of contract and account stated on behalf of Apogee Software (Apogee) and DeeBeCon against Datalink Corporation, and fraud on behalf of all twelve plaintiffs against Datalink, All Star, Meryl Bernstein and Rita Citrin. The equitable claims consisted of successor liability, piercing the corporate veil and unjust enrichment. The case was sent to this Court from the Commercial Part after a jury had already been selected for trial. The parties declined the Court's offer to try both the legal and equitable claims without a jury and a five

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1. The plaintiffs include the following: JAG Technical Associates; Framework Solutions, LLC; Dakran Systems, Inc.; On-Line Technology, Inc.; Apogee Software Systems, Inc.; 4W, Inc.; Kurt H. Kober; Systems Applications, Inc.; Uarctik Atomata, Inc.; Adit, Inc.; DeeBeCon; and, Jennifer Hong.

day trial ensued. The Court reserved decision on defendants' motion for judgment as a matter of law pursuant to CPLR § 4401, submitted the legal claims to the jury, and reserved verdict on the equitable claims.[2]

The jury awarded Apogee $81,256 and DeeBeCon $10,005 on both the breach of contract and account stated claims. It also found all four defendants liable under the fraud claim, finding each 25% responsible and finding each defendant liable for $500,000 as punitive damages.

After the jury verdict, but before the Court reached a decision on the equitable claims, defendants Bernstein and Citrin moved independently now through separate counsel for judgment notwithstanding the verdict or for a new trail pursuant to CPLR 4404(a).

The following documents were considered in reviewing the various claims:

Papers	**Numbered**
Notice of Motion by Citrin, Affirmation & Memorandum of Law	**1-2 (Exhibits 1-7; Transcript)**
Bernstein, Datalink, All Star and Maxemmum Consulting's Brief	**3**
Plaintiffs' Memorandum of Law in Opposition and in Support of their	

2. The Court dismissed the action against defendants Datalink International Business Services, Inc. and Maxemmum Consulting (T. 717).

Background

After a five-day jury trial, nothing could be clearer to the Court that Bernstein and Citrin conspired to defraud the consultants out of their hard-earned money and then went to great lengths in their efforts to cover up their deeds. It was clear to the Court and it was clear to the jury.

The plaintiffs were computer consultants hired by Datalink and farmed out to various clients of defendants. The consultants would submit their time sheets to Datalink and Datalink would submit invoices to the clients based on work reflected in the time sheets. Datalink used the services of Merchant Financial (Financial), an asset based financier (factor), to deal with cash flow. Pursuant to the Merchant-Datalink agreement, Merchant would advance 80% of the amount of the invoice and withhold 20% until the invoice was paid. Under this scheme, time sheets were the life blood of Datalink and All Star.

Bernstein operated Datalink and Citrin, Bernstein's friend, was a creditor, having loaned about $750,000 to Datalink. The evidence clearly indicates that by the Summer of 2002, Bernstein had looted Datalink to such an extent that given the mounting debt, Datalink could no longer function. Indeed, the evidence showed that Bernstein spent $60,000 of Datalink funds to adopt a child, thousands of dollars on children's clothing, $1,200 bikes, and hundreds of dollars on beauty treatments, none of which admittedly had any legitimate business purpose. In addition, Datalink paid for the leases on Bernstein's two cars, a Saab and a Range Rover, and Bernstein testified that she never reimbursed Datalink for those funds. The looting was so extensive that Neville Grusd, Merchant's Executive Vice President, met with Bernstein to "impress on [Bernstein] that she cannot simply withdraw funds from the company for personal use irrespective of whether the company [could] afford such drawings." Neville Grusd's testimony at T. 253; see also T. 247-264. Notwithstanding its financial troubles, Bernstein and Citrin conspired to keep the consultants working and submitting time sheets from the various clients with no intention of ever paying the plaintiffs.[3]

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3. Datalink conceded that it breached its contract with 11 of the twelve plaintiffs and All Star conceded that it breached its contract with the twelfth. The defendants also conceded the amount due to 10 out of the twelve plaintiffs.

The evidence also clearly established to this Court's satisfaction that to avoid paying its debt, Datalink ceased operations only to start up again under a different name, All Star, for the purpose of helping Citrin recoup her $750,000 loan, while eliminating its other debt. This was also very clear to the jury. Indeed, some members of the jury rolled their eyes in disbelief during Citrin's testimony claiming ignorance of the extent and nature of her investment or the nature of her involvement in All Star, especially given Bernstein's incriminating testimony related to Citrin's knowledge after specific meetings related to the creation of All Star. Citrin's "head in the sand" testimony was simply incredible.

The charge conference in this case was particularly lengthy, having spanned the course of two days where all the issues were hashed out in chambers (T. 711). The parties ultimately agreed upon the charge and the verdict sheet, which was somewhat of a compromise between the parties, but one to which none of the parties objected (T. 711-16; 809).

Directed Verdict and JNQV

Pursuant to CPLR § 4401, a party may move for a directed verdict if its entitled to judgment as a matter of law. As Siegel noted in its Practice Commentaries:

> The judge may grant the motion only when convinced that the jury could not find for the other side by any rational process. See Siegel, New York Practice 2d Ed. § 402. All of the evidence offered by the party against whom the motion is made must be taken in its most favorable light, and all matter of the

credibility of witnesses must also be resolved in that party's favor McKinney's Consolidated Laws of New York, Book 7B, C4401:4, p 407.

The standard for a judgment notwithstanding the verdict is essentially the same as when a party seeks a directed verdict. Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493, 499 (1978). A judgment notwithstanding the verdict may be granted where "there is simply no valid line of reasoning and permissible inference which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial." Id.

Applying the above-stated standards to the facts of this case, the defendants were not entitled to a directed verdict with respect to the amount of damages to be awarded to Apogee and DeeBeCon for the breach of contract and account stated causes of action. Both Apogee and DeeBeCon submitted sufficient evidence of amounts owed to them to permit the issue to go to the jury. The verdict on this issue was clearly rational. Apogee's evidence consisted of e-mails where Bernstein admitted that Apogee was owed $88,000. DeeBeCon's evidence consisted of the agreement between it and Datalink, time sheets, and a cancelled check issued by Datalink from which the jury arrived at the $10,005.

The fraud claim was also properly submitted to the jury. It cannot be said that the verdict was not supported by any valid line of reasoning. To establish a fraud, the

plaintiffs' needed to establish by clear and convincing evidence: (1) a material false representation; (2) known to be false; (3) made for the purpose of inducing plaintiffs to rely upon it; and, (4) and justifiable reliance resulting in injury. Lama Holding Co.v. Smith Barney Inc., 88 N.Y.2d 413 (1996). "Concealment with intent to defraud of facts which one is duty bound in honesty to disclose is of the same legal effect and significance as affirmative misrepresentations of fact." Nasaba Corporation v. Harfred Realty Corporation, 287 N.Y 290, 295 (1942); Emord v. Emord, 193 A.D.2d 775 (2nd Dept. 1993). Thus, in Emord, the Appellate Division, Second Department, held that a claim for fraud had been properly alleged where

> complaint clearly sets forth that plaintiff was misled by the defendant Paul Emord's affirmative representations as well as the silence of his partner, the appellant William J. Volkman, Jr., so that she believed that Paul Emord was satisfying the mortgage payments. Neither defendant informed the plaintiff that Paul Emord permitted the marital residence to be foreclosed upon or that he and his cohort, the appellant Volkman, subsequently purchased the premises, thereby extinguishing the plaintiff's rights in the property.

Id. at 776.

The Court also charged the jury, without objection, that Bernstein and Citrin may be held liable for fraud and based on their actions when acting in behalf of Datalink and All Star. See Nat'l Survival Game, Inc, v. Skirmish, U.S.A., Inc., 603 F. Supp. 339, 341 (S.D.N.Y. 1985); A-1 Check Cashing Services, Inc., v. Goodman, 148 A.D.2d 482 (2nd Dept. 1989).

Here, applying the above-stated principles to the facts of this case, this Court will not disturb the jury's verdict inasmuch as there is a valid line of reasoning supporting it. Indeed, with respect to Bernstein, there is ample testimony that she lied to the consultants to keep them working and submitting time sheets to Bernstein so that she may submit them to clients and get paid knowing full well that the consultants' were not going to be paid their commensurate portion of those payments. Moreover, it can be reasonably inferred that she lied to the consultants to induce them to continue working and that they relied on these misrepresentations to their detriment. See Ally v. F. E.D. Concrete Co., 1990 WL 1273 (S.D.N.Y. 1990)("a series of representations that a contract will not be breached may state a claim for fraud if that series caused the non-breaching party reasonably to rely upon those representations to its detriment"). What makes this case particularly troubling is that the fraud was being perpetrated so that Bernstein could continue looting Datalink to finance her expensive life style.

Contrary to Citrin's assertions, there is a valid line of reasoning supporting the jury's verdict against her as well. The evidence clearly supports the position that Citrin conspired with Bernstein to recoup her $750,000 dollar loan at the expense of the consultants and other corporate creditors by creating All Star. This conspiratorial act, intentionally concealed by Citrin, had the same legal effect as an affirmative

misrepresentation. " Nasaba Corporation v. Harfred Realty Corporation, supra, 287 N.Y at 295; Emord v. Emord, supra, 193 A.D.2d at 776. Citrin's "head in the sand" testimony to the contrary, Bernstein admitted that she met with Citrin and, inter alia, decided to form All Star to help her friend recoup some of the monies lost in her Datalink investment. See Bernstein's testimony at T. 649-50. It is simply irrational for Citrin to ask this Court or the jury to believe that she was unaware nor had any reason to believe that Bernstein would loot All Star as it did Datalink.[4]

New Trial

As an alternative to judgment notwithstanding the verdict, defendant seeks a new trial pursuant to CPLR 4404(a) on the grounds that the verdict was against the weight of the evidence and not in the interest of justice. Whether a jury verdict should be set aside as contrary to the weight of the evidence requires a discretionary balancing of many factors, including interest of justice factors (i.e., trial error). Nicastro v. Park, 113 A.D.2d 129, 133-34 (2nd Dept. 1985). "A preeminent principle of jurisprudence in this area is that the discretionary power to set aside a jury verdict

4. Contrary to defendants' assertion, the fraud claims are independent of the breach of contract claims. For instance, after Datalink breached the contracts by not paying the consultants, Bernstein repeatedly asked the consultants to submit their time sheets, knowing full well that she was not going to pay them, to induce them to continue generating income for Bernstein's benefit. As for Citrin, the crux of the fraud claim against her is that she concealed the creation of All Star to defraud the consultants.

and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict. Fact finding is the province of the jury, not the trial court, and a court must act warily lest overzealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and 'unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty.'" Id. at 133.

To obtain a new trial in the interest of justice, "[t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected . . . and 'must look to his own common sense, experience and sense of fairness rather than to precedents in arriving at a decision.' . . . This power conferred upon a court to order a new trial is discretionary in nature." Micallef v. Miehle Co., 39 N.Y.2d 376, 381 (1976)(citations omitted).

Given the clear evidence supporting the verdict, this Court will not set aside the verdict as against the weight of the evidence. Moreover, the alleged errors of which Citrin complains have no merit and thus the verdict will not be set aside as not in the interest of justice. First, Citrin asserts that the element of concealment should have been submitted to the jury. Citrin, however, waived any claims on this issue inasmuch as no objections were lodged nor preserved as to the charge. CPLR § 4110-

b; Bergstrom v. Plaza Const., 16 A.D.3d 256 (1st Dept. 2005). Indeed, the charge conference in this case spanned the course of two days, where the parties ultimately agreed on the charge that was given, which was adapted from the pattern jury instructions. See N.Y. Pattern Jury Instructions 3:20.

In any event, to the extent that there were factual questions not submitted to the jury, both parties waived their right to trial by jury on the issues. Loughry v. Lincoln First Bank, N.A., 67 N.Y.2d 369 (1986)("where the case was submitted on special questions, and where neither party requested inclusion of the fact question . . . both parties are deemed to have waived their right to a trial by jury of the omitted issue."). Pursuant to CPLR § 4111(b), the court may make a finding on any issue that was not submitted to the jury, or, if the court declines to do so, the court is deemed to have made a finding in accordance with the judgment. Here, this Court in accordance with the above-stated principles, finds that Citrin conspired to conceal the formation of All Star for the express purpose of recouping her investment and defrauding the consultants and other creditors.

Citrin also complains at this late date that all four defendants were lumped together in the jury charge on fraud. But, if the jury had found that Citrin had not engaged in any fraud, it would have assigned her zero percent responsibility. Nor were the jurors required to rely on the same facts to find Citrin responsible that it used

to find the other defendants liable.

Last, Citrin's claim that there was a conflict of interest because the same attorney represented both Citrin and Bernstein has no merit since she waived any potential conflict. It should also be noted that Citrin is a very sophisticated investor with extensive real estate holdings, who hired her trial counsel. For her to complain about trial counsel at this juncture is disingenuous.

Punitive Damages

The defendants also argue that punitive damages should not have been submitted th the jury because punitive damages are to be used only in extreme cases where the wrongdoing had been intentional and deliberate, and has the character of outrage associated with crime. Reinah Development Corp.v.Kaaterskill Hotel Corp., 59 N.Y.2d 482 (1983). Given the facts cited above, this is an extreme case where the ongoing wrongdoing was intentional and deliberate. Indeed, it involved twelve different consultants. And, rather than closing down Datalink and declaring bankruptcy, Bernstein and Citrin hatched up a plan for Citrin to recoup her losses at the expense of the consultants. Accordingly, the Court will not set aside the punitive damages. Giblin v. Murphy, 73 N.Y.2d 769 (1988).

Equitable Claims

The Court finds in favor of the plaintiffs on all the equitable claims.[5] First, the Court finds that All Star is liable for Datalink's liabilities under the successor liability claim. A corporation that acquires the assets of another corporation is generally not liable for the torts of its predecessor unless, inter alia, the transaction is entered into fraudulently to escape such obligations or the purchasing corporation was a mere continuation of the selling corporation. Meadows v. Amsted Indus., Inc., 305 A.D.2d 1053 (4th Dept. 2003). Here, for the reasons stated above, this Court finds that All Star was fraudulently formed to escape Datalink's obligations and for Citrin to recoup her $750,000 investment.

Moreover, this Court finds that All Star was a mere continuation of Datalink. To establish "de facto merger," this Court must consider continuity of ownership; cessation of ordinary business by the predecessor; assumption by the successor of liabilities ordinarily necessary for continuation of the predecessor's business; and, continuity of management, personnel, physical location, assets, and general business

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5. The Court will permit the pleading to be conformed to the evidence pursuant to CPLR 3025(c). As plaintiffs note in their brief, "[a]fter two years of discovery, 15 depositions, hundreds of pages of document production, over 15 discovery compliance conferences and dozens of conversations with counsel, the Defendants cannot claims surprise from any of the evidence presented at trial or any of the theories presented. . . ." Plaintiff's Brief at p. 4.

operation. These factors are "analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor." AT&S Transp., LLC v. Odyssey Logistics & Technology Corp., 22 A.D.3d 750 (2nd Dept. 2005). Here, the facts indicate that there was continuity of ownership because Citrin, although not an owner of Datalink, was a major investor and had a special relationship with Bernstein, the owner of Datalink. Once Citrin formed All Star it was Bernstein who ran the day-to-day affairs while Citrin camouflaged involvement as "president" by keeping an office and an e-mail account. Citrin gave Bernstein blanket authority to sign checks, execute contracts and use Citrin's name. In fact, Bernstein conceded that the e-mails sent from Citrin's e-mail account were in fact composed and sent by Bernstein. Likewise, there was a cessation of business by Datalink upon the formation of All Star. All Star also assumed liabilities necessary for the continuation of Datalink, such as the obligations under Datalink's contract with IBM – namely, to provide plaintiff Jennifer Hong as a consultant. Indeed, IBM paid to All Star $25,000 worth of invoices for work done by Datalink. Finally, the continuation of management, personnel and general business operation is undisputed. Accordingly, All Star is liable for Datalink's debt, including the judgment obtained in the Court.

The Court will also allow the plaintiffs to pierce Datalink's and All Star's

corporate veil. A party seeking to pierce the corporate veil and hold shareholders liable for the debts or torts of a corporation, must show complete domination and control by the owner; that this control was used to commit a fraud or other wrong, in contravention of plaintiff's rights; and, that control or misuse of the corporation caused the loss. Megaris Furs, Inc, v. Gimbel Bros., 172 A.D.2d 209 (1st Dept. 1991). Here, the evidence indicates that Bernstein completely dominated and controlled Datalink. Indeed, datalink was a mere alter ego of Datalink, that is Datalink had no corporate formalities (i.e., no board of directors, bylaws or meetings). The evidence also shows that she used this control to loot Datalink with Citrin's knowledge or acquiescence. As noted above, she spent thousands Datalink dollars on adoption cost, children's clothing, beauty treatments and expensive car payments, none of which had any legitimate business purpose. In addition, her looting of the company left Datalink without sufficient cash flow to pay its consultants. Based on this evidence, this Court finds that Bernstein's fraudulent conduct with Citrin's knowledge or acquiescence was the cause of plaintiffs's loss.

This Court will also allow the plaintiffs to pierce All Star's corporate veil and hold Citrin responsible for All Star's debt, including the judgment obtained in this Court. Citrin's argument that she did not have dominion and control over All Star is belied by the facts. She was the incorporator, the sole shareholder and the president. Although Bernstein operated the day to day affairs with Citrin's consent, Citrin

controlled it in that she created it for the express purpose of defrauding the consultants and recouping her $750,000 loan that Datalink owed her. Moreover, Citrin dealt with All Star's factor and contacted All Stars's consultants, such as Hong, to request that they turn in the time sheets in time.

The facts also show that she used this control to commit a fraud – concealing that All Star was a mere continuation of Datalink from the consultants. The evidence also shows that from November 22, 2002 to October 21, 2003, All Star grossed approximately $492,000. Had Citrin not incorporated All Star, a successor corporation to Datalink, these funds would have been generated by Datalink to pay Datalink's debts to the plaintiffs.

Last, this Courts finds that the defendants were unjustly enriched in the amount of $465,338.65. Nakamura v. Fujii, 253 A.D.2d 387 (1st Dept. 1998); Steinmetz v. Toyota Motor Credit Corp., 963 F. Supp, 1294 (E.D.N.Y. 1997)("To plead a claim for unjust enrichment, a plaintiff must show that the defendant was enriched, that such enrichment was at plaintiff's expense, and that the circumstances were such that in equity and good conscience the defendant should return the money or property to plaintiff"). Here, based on the evidence cited above, it would be inequitable for Bernstein and Citrin to retain the benefits of the plaintiff's hard work. Pre-judgment interest (at a rate of 9% per annum) on the $465,338.65 is to be computed from

February 2, 2002. The evidence at trial indicated that Datalink had breached its contracts with each defendant prior to February 2. CPLR § 5001(b); Wechsler v. Hunt Health Systems, Ltd., 330 F. Supp. 2d 383 (S.D.N.Y. 2004)("where damages are incurred at various times after the cause of action accrues, [CPLR 5001] grants courts wide discretion in determining a reasonable date from which to award pre-judgement interest").

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion for a directed verdict pursuant to CPLR § 4401 is DENIED; and it is further

ORDERED that defendants' motion for relief pursuant to CPLR § 4404(a) [judgment notwithstanding the verdict or a new trial (verdict was against the weight of the evidence and interest of justice)] is also DENIED; and it is further

ADJUDGED that defendants are liable under the causes of action based in equity; and it is further

ORDERED that plaintiffs settle judgment.

This constitutes the Decision, Order and Judgment of the Court.

SO ORDERED

Dated: June 13, 2006

Rolando T. Acosta, J.S.C.

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