

<b>Itria Ventures LLC v Provident Bank</b>
2019 NY Slip Op 32695(U)
September 9, 2019
Supreme Court, New York County
Docket Number: 653667/2018
Judge: Andrew Borrok
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK

PART

IAS MOTION 53EFM

*Justice*

-----X

ITRIA VENTURES LLC,

Plaintiff,

- v -

PROVIDENT BANK,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for

INDEX NO. 653667/2018MOTION DATE 03/25/2019MOTION SEQ. NO. 003

## DECISION AND ORDER

DISMISS

Upon the foregoing documents and for the reasons set forth on the record (9/6/2019), Itria Ventures LLC (**Itria**), Biz2Credit Inc. (**Biz2Credit**), and Ramit Arora (collectively, the **Itria Defendants**)'s motion to dismiss is granted solely to the extent that (i) the first counterclaim is dismissed as against Biz2Credit and Mr. Arora and (ii) the third, fourth, and fifth counterclaims are dismissed without prejudice.

### The Relevant Facts and Circumstances

Reference is made to a Revolving Credit and Security Agreement (the **Agreement**), dated January 19, 2017, by and between Provident and Lotus Exim pursuant to which Lotus Exim received a revolving line of credit of up to \$17 million (the **Loan**) to refinance an existing loan obligation and apply to working capital (NYSCEF Doc. No. 48, ¶ 27). Provident alleges that Biz2Credit and Mr. Arora acted as broker for Lotus Exim in the application and closing of the Loan (*id.*, ¶¶ 10, 37, 77, 127, 135, 148). Mr. Arora is an officer of both Itria and Biz2Credit (*id.*,

¶ 3). Pursuant to the Agreement, Lotus Exim pledged certain collateral as security for the Loan and provided Provident a first lien on Lotus Exim's accounts receivable, inventory, equipment, fixtures, and general intangibles (the **Collateral**) (*id.*, ¶ 28). The terms of the Loan prohibited junior liens on the Collateral, required that all sales of inventory be made by Lotus Exim, and that Provident maintain its first lien on the Collateral (*id.*, ¶ 36). Provident thereafter perfected its security interest in the Collateral by filing a UCC-1 financing statement (*id.*, ¶ 28).

Between March 2017 and February 2018, Provident alleges that Lotus Exim breached the Agreement by entering into 22 new future receivables sales agreements (FRSAs) with Itria, pursuant to which Lotus Exim and/or its affiliates sold their accounts receivable to Itria, and in turn, Itria recorded UCC-1 financing statements for the same (*id.*, ¶¶ 48-50). After Provident identified certain irregularities regarding Lotus Exim's deposit of account receivable proceeds, Provident alleges that it contacted Biz2Credit and Mr. Arora for assistance in collecting its proceeds (*id.*, ¶¶ 73-79). Provident further alleges that the Itria Defendants pretended to assist Provident while Itria continued its collection of accounts receivable from Lotus Exim (*id.*, ¶¶ 81-82).

In July 2017, Provident alleges that Itria also financed Lotus NS's purchase of a building in Wayne, New Jersey, whereby Itria required Lotus Exim's guaranty and pledge of the Collateral, in further violation of the Agreement (*id.*, ¶¶ 96-98). By February 2018, Lotus Exim defaulted on the Loan, which resulted in the First Amendment to Revolving Credit and Security Agreement (the **Amendment**), dated March 15, 2018, by and between Provident and Lotus Exim (*id.*, ¶ 87). Pursuant to the Amendment, Lotus NS was added as a guarantor of the Loan. On

March 27, 2018, Lotus Exim, Lotus NS and its affiliates filed for bankruptcy in the United States Bankruptcy Court in the District of New Jersey (*id.*, ¶ 102).

Itria commenced this action on July 23, 2018 for (1) promissory estoppel (first cause of action), (2) negligent misrepresentation (second cause of action), and (3) unjust enrichment (third cause of action). In a decision and order, dated January 23, 2019, the court granted Provident's motion to dismiss the complaint solely to the extent of the second cause of action for negligent misrepresentation because there was no special relationship between Itria and Provident (NYSCEF Doc. No. 46, 36:17-38:9).

Provident filed its answer on February 14, 2019 and asserted counterclaims for: (1) conversion (first counterclaim), (2) tortious interference with performance of a contract (second counterclaim), (3) fraud and civil conspiracy (third counterclaim), (4) negligent misrepresentation (fourth counterclaim), and (5) claim against Joe Doe Corporations (fifth counterclaim).

Provident now moves to dismiss the Itria Defendants' counterclaims pursuant to CPLR § 3211 (a)(7).

### **Discussion**

Under CPLR § 3211 (a) (7), a party may move to dismiss a cause of action on the basis that the pleading fails to state a cause of action. The pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87

[1994]). The issue to resolve is “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*id.*, at 86).

#### **A. First Counterclaim (Conversion)**

The Itria Defendants argue that Provident fails to state a counterclaim for conversion against Biz2Credit and Mr. Arora because there are no allegations that either party was specifically involved, in their individual capacity, with the inventory financing or accepted payments from Lotus Exim. The Itria Defendants assert that in New York, an officer or director is only liable when acting for personal, rather than corporate interests (citing *Hoag v Chancellor*, 246 AD2d 224, 230 [1st Dept 1998]). In opposition, Provident argues that the position taken by the Itria Defendants contradicts established law, citing to the proposition that a corporate officer who commits a tort “may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced” (*Rajeev Sindhwani, M.D., PLLC v Coe Bus. Serv., Inc.*, 52 AD3d 674, 677 [2d Dept 2008], citing *American Express Travel Related Servs. Co. v North Atl. Resources, Inc.*, 261 AD2d 310, 311 [1st Dept 1999]). In *Rajeev*, the Second Department upheld a jury’s verdict imposing personal liability against a corporate officer because, there, the evidence indicated that she “was responsible for the determination to withhold the subject records from the plaintiff” (*id.*). The cases cited by the parties are not actually contradictory because both *Hoag* and *Rajeev* recognize that that there must be some element of personal responsibility by a corporate officer before liability may be imposed. This is consistent with the New York Court of Appeals’ decision in *Hinkle Iron Co. v Kohn*, where the Court held that a corporate officer must personally participate in the act of conversion and have knowledge of such an act before any liability may

attach (*Hinkle Iron Co. v Kohn*, 229 NY 179, 183-184 [1920]). Thus, as an initial matter, Mr. Arora and Biz2Credit *may* be liable for conversion if Provident can establish that they personally participated in the conversion. However, this issue is academic because Provident fails to allege the requisite elements of conversion.

The well-established 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 (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Here, the crux of the conversion counterclaim is that the Itria Defendants converted Provident's interests in the Collateral by causing Lotus Exim to sell inventory in the name of its affiliates and by having Itria enter into FRSAs with Lotus Exim and its affiliates, resulting in Itria's receipt of over \$1,000,000 of proceeds that Provident had a right to under the Agreement (NYSCEF Doc. No. 47, ¶¶ 103-111). However, the pleadings specify that it was Itria that received and wrongfully possessed the collateral, rather than Biz2Credit or Mr. Arora. Thus, Provident does not have a cause of action for conversion against Biz2Credit or Mr. Arora because neither party exercised dominion over the Collateral. Accordingly, the first cause of action for conversion is dismissed as against Biz2Credit and Mr. Arora.

#### **B. Second Counterclaim (Tortious Interference with Contract)**

The Itria Defendants argue that the second counterclaim should be dismissed because (i) neither Biz2Credit nor Mr. Arora entered into the FRSAs, received security interests, or accepted any payments, and (ii) there are no allegations that Mr. Arora sought to obtain a personal benefit, rather than a benefit for the corporation. A claim for tortious interference with contract requires

that the plaintiff show the existence of a valid contract with a third party, defendant's knowledge of that contract, defendant's intentional improper procuring of a breach, and damages (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 402 [1st Dept 2014]). Tortious interference by an officer or director requires additional allegations that the acts in question were performed with malice and calculated to impair the plaintiff's business for personal profit (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 110 [1st Dept 2002]).

According to Provident every favorable inference, Provident has sufficiently alleged that Biz2Credit was aware of the Agreement and interfered with the same by orchestrating certain misrepresentations by Itria, which constituted a breach of the Agreement (NYSCEF Doc. No. 48, ¶¶ 31-32, 133, 119). With respect to Mr. Arora, the pleadings state that he orchestrated certain misrepresentations, acted with malice and benefited from the transactions (NYSCEF Doc. No. 48, ¶¶ 116-117, 120, 130). Accordingly, the Itria Defendants' motion to dismiss the second counterclaim for tortious interference as against Biz2Credit and Mr. Arora is denied.

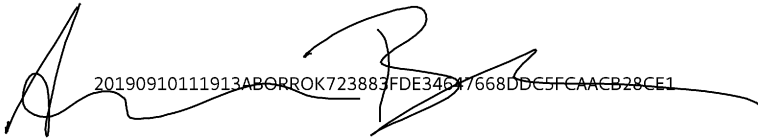
**C. Third, Fourth, and Fifth Counterclaims (Fraud and Civil Conspiracy, Negligent Misrepresentation, and Joe Doe Corporations)**

As discussed on the record, Provident's third, fourth, and fifth counterclaims are dismissed with leave to replead.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted solely to the extent that (i) the first counterclaim is dismissed as against Biz2Credit and Mr. Arora and (ii) the third, fourth, and fifth counterclaims are dismissed with leave to replead; and it is further

ORDERED that Provident Bank shall file an amended answer and counterclaims within 20 days of this decision and order.

<p><u>9/9/2019</u> <b>DATE</b></p>	 <div style="font-family: monospace; font-size: small; color: gray;">20190910111913ABORROK723883FDE34647668DDC5FCAACB28CE1</div> <p><b>ANDREW BORROK, J.S.C.</b></p>	
<p>CHECK ONE:</p>	<div style="display: flex; justify-content: space-between;"> <div> <input type="checkbox"/> CASE DISPOSED  <input type="checkbox"/> GRANTED  <input type="checkbox"/> SETTLE ORDER  <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN                 </div> <div> <input type="checkbox"/> DENIED                 </div> </div>	<div style="display: flex; justify-content: space-between;"> <div> <input checked="" type="checkbox"/> NON-FINAL DISPOSITION  <input checked="" type="checkbox"/> GRANTED IN PART  <input type="checkbox"/> SUBMIT ORDER  <input type="checkbox"/> FIDUCIARY APPOINTMENT                 </div> <div> <input type="checkbox"/> OTHER  <input type="checkbox"/> REFERENCE                 </div> </div>