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Mme. Pirie'S Inc. v Keto Ventures, LLC
2016 NY Slip Op 50159(U)
Decided on February 5, 2016
Supreme Court, Albany County
Platkin, J.
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Decided on February 5, 2016

Supreme Court, Albany County

Mme. Pirie's Inc. and ROSA BELLEVILLE, Plaintiffs,

against

Keto Ventures, LLC, VALERIE KETO, as Administrator of the Estate of Jessica Keto, Deceased; and JACKLYN KETO, Defendants.

3792-14

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Richard M. Platkin, J.

Plaintiffs Mme. Pirie's Inc. ("Mme. Pirie's") and Rosa Belleville move pursuant to CPLR 3212 for an order granting them summary judgment on their complaint and striking the answer [*2]with affirmative defenses and counterclaims filed by defendants Keto Ventures, LLC ("Keto Ventures"), Valerie Keto, as Administrator of the Estate of Jessica Keto ("Estate"), and Jacklyn Keto. Defendants oppose the motion and cross-move for summary judgment on their counterclaims.

BACKGROUND

The background to this action is set forth in two prior decisions of this Court: the Decision and Order dated October 14, 2014 that granted plaintiffs' application for an order of seizure ("Seizure Decision"); and the Decision and Order dated March 3, 2015 that denied as premature the parties' first set of cross motions for summary judgment ("Prior SJ Decision"). Briefly, Mme. Pirie's is a corporation that owned and operated Mme. Pirie's Famise Corset and Lingerie Shop ("Shop"). Rosa Belleville ("Belleville") is the president and sole shareholder of Mme. Pirie's. Jessica Keto ("Keto"), now deceased, was a part-time employee at the Shop who formed defendant Keto Ventures to purchase the Shop.

In January 2014, Mme. Pirie's entered into an asset purchase agreement ("Purchase Agreement") with Keto Ventures to sell "certain equipment, inventory and personal property" for a total price of $512,500. About one-half of the purchase price was paid by the closing, with the remaining balance of $268,750 taking the form of a promissory note ("Note") payable to Belleville. The same parties executed a Security Agreement by which Belleville was granted a security interest in all inventory, goods, equipment, appliances, furnishings and fixtures on the premises of the business, as well as any trademarks, trade names and contract rights in which Keto Ventures and Jessica Keto have an interest ("Collateral").

Following the January 16, 2014 closing on the transaction, Keto and Keto Ventures took possession of the Shop and timely made the first monthly installment payment due under the Note. However, on March 18, 2014, Keto unexpectedly passed away. Keto's mother, Valerie Keto, was appointed administrator of the Estate, and her sister Jacklyn Keto took over operation of the Shop.

Defendants defaulted under the Note by failing to make the monthly installment payments due on April 1, 2014 and each month thereafter. As a result, Belleville declared a default on July 17, 2014, demanded immediate repayment of the Note, and requested that defendants turn over the Collateral to her. Defendants refused, and this

action followed.

Plaintiffs' complaint alleges three causes of action: (1) breach of contract (Note); (2) breach of contract (Purchase Agreement); and (3) replevin of collateral (Security Agreement). Through a Verified Answer with Affirmative Defenses and Counterclaims ("Answer"), defendants allege affirmative defenses sounding in fraud, unclean hands, estoppel, impossibility of performance and unconscionability, along with counterclaims sounding in fraud, constructive fraud, breach of a non-competition agreement and breach of fiduciary duty.

Upon the commencement of this action, plaintiffs moved for an order of seizure directing the Sheriff to take possession of the Collateral. The Court granted the application, finding that it was "highly likely that plaintiffs will succeed on the merits of their complaint seeking recovery under the Note, notwithstanding the various affirmative defenses and counterclaims alleged by defendants" (Seizure Decision, at 6). Thereafter, both Jacklyn Keto and plaintiffs opened new stores in close proximity, selling essentially the same products that were sold at the Shop.

Following the completion of some discovery, but prior to the taking of party depositions, [*3]plaintiffs moved for summary judgment on their complaint. Defendants opposed the motion and cross-moved to renew their opposition to plaintiffs' application for an order of seizure and for summary judgment on certain counterclaims. The motion for renewal was denied based upon "the absence of persuasive proof in admissible form supporting their claims of Belleville's wrongdoing", and the cross motions for summary judgment were denied as premature (Prior SJ Decision, at 7, 9).

Discovery now is complete, a note of issue has been filed, the action has been assigned a day certain for a jury trial, and the parties again cross-move for summary judgment. This Decision & Order follows.

DISCUSSION

On a motion for summary judgment, the moving party must "make a prima facie

showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Sillman v Twentieth-Century Fox Film Corp.*, 3 NY2d 395 [1957]). If the moving party satisfies this initial burden, the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of any factual issue requiring a trial of the action (*see Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman*, 49 NY2d at 562).

Plaintiffs seek a money judgment on their claims for breach of the Note and Purchase Agreement and a judgment of replevin with respect to the Collateral. In support of their motion, plaintiffs submit the Note, Purchase Agreement and Security Agreement, as well as competent proof of defendants' defaults thereunder and plaintiffs' own performance. Plaintiffs also submit evidence and argument to show that the affirmative defenses and counterclaims alleged by defendants lack merit as a matter of law.

In opposition to plaintiffs' motion and in support of their cross motion, defendants contend principally that plaintiffs fraudulently induced Keto and Keto Ventures ("defendants") to enter into the Purchase Agreement, Note and Security Agreement by misrepresenting: (1) the "owner benefits" historically realized by Belleville from the business; and (2) and the value of the Shop's inventory. Defendants also argue that plaintiffs' claims are barred by the doctrines of unclean hands, estoppel, impossibility of performance and unconscionability.

A.Fraud

For their first affirmative defense and first counterclaim, defendants allege that plaintiffs' claims are "barred by fraud, constructive fraud and other improper conduct committed upon Jessica Keto and [Keto Ventures] by the Plaintiffs and their agents", thereby rendering "[a]ll documents, including the security documents . . ., void and

unenforceable".

"The essential elements of a cause of action for fraud are representation of a material existing fact, falsity, scienter, deception and injury'" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995], quoting *Channel Master Corp. v Aluminum Ltd. Sales Corp.*, 4 NY2d 403, 407 [1958]). There must also be proof of actual and justifiable reliance upon the fraudulent misrepresentation (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). While fraud may be inferred from circumstantial evidence, it nevertheless remains that "the fraud must be proved by clear and [*4]convincing evidence" (*Estate of Sonnelitter v Estate of White*, 115 AD3d 1160, 1162 [4th Dept 2014]; *see Matter of Walther*, 6 NY2d 49, 55-56 [1959]). As the parties seeking the summary dismissal of the counterclaim and defense of fraud, plaintiffs bear the initial burden of demonstrating the absence of any material issues of fact.

1.Fiduciary/Confidential Relationship

As an initial matter, the Court rejects defendants' argument that a confidential and/or fiduciary relationship existed between Belleville and Keto such that the asset purchase, loan and security interest transactions (collectively "the transaction") must be presumed void, subject to plaintiffs affirmatively establishing its fairness. In making this argument, defendants assert that "Keto was a short-term, part-time employee of Ms. Belleville's with no applicable experience at all" who "clearly put her trust and confidence in Ms. Belleville and relied on her 30-plus years of skill to make decisions" concerning the transaction (Defendants' Brief, at 6).

The Court previously stated, however, that "the fact that Belleville, as seller, possessed superior knowledge of her business is not enough to establish a relationship of special trust or confidence or render the transaction anything other than an arm's length business transaction" (Seizure Decision, at 7). Further, it is well settled that "employment relationships do not create fiduciary relationships" (*Rather v CBS Corp.*, 68 AD3d 49, 55 [1st Dept 2009]). And even assuming the truth of defendants' assertion

that Keto subjectively reposed trust and confidence in Belleville, there is no competent proof demonstrating that Belleville assumed "a duty to act for or to give advice for the benefit of [Keto]" as to give rise to a relationship "grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19-20 [2005]).

Accordingly, "this record does not show a confidential [or fiduciary] relationship between [Keto] and [Belleville] that would relieve [defendants] of [their] burden to demonstrate fraud or undue influence on [Belleville's] part" (*Matter of the Estate of Cameron*, 126 AD3d 1167, 1169 [3d Dept 2015]).

2.Owner Benefits

Defendants' principal allegation of fraud pertains to representations made by Belleville to Keto regarding the financial benefit derived from the operation of the Shop. The initial purchase price for the sale was based upon a two-page "owner benefits" document that Belleville provided to Keto. The first page of the document set the initial sale price at $551,550, which was derived by multiplying the "owner's benefits" by four. The second page of the document is a chart with two columns. The first column, labeled "Owner Benefits", set forth seven categories of financial benefit that Belleville derived from the business. The second column, labeled "Annually", set forth a specific dollar amount for each category of financial benefit.

Defendants contend that use of the term "Annually" to describe the second column of the chart constitutes a material misrepresentation of fact. They allege that by using the term "annually", Belleville was representing the financial benefits that she historically derived from the Shop, when, in fact, Belleville knew that she had derived lesser levels of benefits in the years prior to 2012.

In moving for dismissal of this branch of the fraud counterclaim/defense, plaintiffs first contend that the use of the term "annually" on the owner benefits document is not an intentional misrepresentation of fact and, in any event, Keto was not deceived.

Plaintiffs submit affidavits [*5]from Belleville in which she avers that the owner benefits document was intended to represent her income and other financial benefits for only 2012 and into 2013. This testimony is echoed in the affidavit submitted by Belleville's son, Michael Belleville, who avers that he and his brother calculated the initial sale price "as four times the . . . salary and other benefits [his] mother was receiving from the business at that time (i.e., 2012 and 2013)" (Michael Belleville Aff., ¶2). A multiple of four was used "because of [his] and [their] mother's expectation that those benefits would be achieved *prospectively*" (emphasis in original) (*id.*, at ¶4).[FN1]

Plaintiffs further assert that the use of the term "annually" is wholly consistent with Belleville's intent that the document reflect only the income and benefits she received in 2012 and into 2013. Belleville testified at her deposition that she understood the term "annually" to refer to the benefits she derived from the Shop "for that year" (2012 into 2013) and "nothing more" (Belleville Deposition, pp 129, 133). While then expressing some confusion over the distinction, if any, between the terms "annual" and "annually", Belleville insisted that her use of the term "annually" was intended to refer to only the most recent year. Ultimately, Belleville testified: "I remember I showed [Keto] the [owner benefits document] where I explained what was going on. She understood what I said, I understood what I said and my lawyers understood what I said" (Belleville Deposition, p 207).

Belleville's testimony that she intended, and Keto understood, the owner benefits document to reflect only the then-current level of financial benefit derived from the business is further supported by proof that Belleville did not provide Keto with any pre-2012 financial disclosure. Specifically, the record shows that Belleville provided Keto with only her tax return for 2012 and a statement of the Shop's profits and losses from December 2012 to June 2013, but no financial documentation concerning earlier years (Belleville Aff. [Sept. 4, 2015] ¶ 36; Ex. N).

In seeking to raise a triable issue of fact, defendants point to that part of Belleville's deposition testimony in which she agreed that "[a]nnual means one year" and that "annually" means "many years" (Belleville Deposition, pp 133-135). When this testimony is read in its full context, however, it is evident that Belleville conceded

only, when pressed, that "annually" could mean something other than what she intended it to mean. She nonetheless insisted that her use of the term did not, and was not intended to, refer to "many years", and that Keto did not understand it as such. Moreover, while defendants maintain that Belleville should have described the owner benefits as "annual" rather than "annually", the common meanings of both terms are essentially the same.[FN2] And even assuming that Belleville's use of the term "annually" is susceptible to more [*6]than one reasonable construction and could be understood as a representation regarding the historical level of owner benefits realized from the Shop, there simply is no proof that Belleville intended to deceive Keto through use of the term "annually" and no proof that Keto actually was so deceived.

In this connection, defendants also offer the affidavits of Kevin Maney, the attorney who represented Keto with respect to this transaction, and Valerie Keto. Attorney Maney's affidavit recites his understanding that Keto did not seek independent financial advice regarding the transaction and, instead, the "deal was based on the financial documents provided by Ms. Belleville" (Maney Aff., ¶¶ 4-5). He also avers that Keto relied upon the opinion expressed by Belleville and her accountant that she "could afford to do [the] deal" (*id.*, ¶ 6). While the foregoing may suffice to demonstrate Keto's reliance on the owner benefits document, Attorney Maney does not claim to have any personal knowledge of the conversations between Belleville and Keto concerning the document, Belleville's intention in using the term "annually", and Keto's understanding of the document and whether she was deceived by the term "annually".

The affidavit of Valerie Keto focuses primarily on her daughter's health and speculates as to Belleville's motive in selling the Shop to her daughter. With respect to the financial aspects of the transaction, the affidavit echoes Attorney Maney's claim that Keto "relied only upon Ms. Belleville and her accountant to decide if she could afford to buy this business" (Valerie Keto Aff., ¶ 9). As with Attorney Maney, Valerie Keto lacks personal knowledge bearing on the elements of scienter and deception.

Based on the foregoing, the Court concludes that the proof adduced by plaintiffs, including the testimony of Belleville, suffices to demonstrate, *prima facie*, that the use

of term "annually" on the owner benefits document was not a misrepresentation of fact, was not used with an intent to deceive Keto and did not deceive Keto. The Court further concludes that defendants have failed to come forward with admissible, non-speculative proof sufficient to raise a triable issue of fact regarding these three essential elements of their fraud counterclaim and defense.

And even if defendants had come forward with clear and convincing evidence that Belleville's use of the term "annually" on the owner benefits document constituted a fraudulent misrepresentation of fact that deceived Keto, plaintiffs have further established that defendants are unable to prove a fourth essential element of the counterclaim and defense: justifiable reliance by Keto upon the alleged fraudulent misrepresentation.[FN3]

In particular, plaintiffs submit proof that Keto accepted the purchase price proposed by Belleville on the basis of the owner benefits document without performing any due diligence regarding the Shop's finances and the historical levels of owner benefits derived from the business. As noted above, Belleville provided Keto with financial documents for 2012 and 2013 [*7]on her own initiative, and Keto did not request any financial documents concerning prior years.[FN4] Even a cursory review of tax returns would have established the historical levels of "self-salary" that had been paid to Belleville, the largest component of the owner benefits derived from the business. Moreover, Keto made no inquiry to Belleville's accountant or her own attorney regarding the owners benefits document and the representations made therein. And even when advised by Keith Daniels, the attorney who represented plaintiffs, to "engage in her own due diligence and consider hiring her own accountant", Keto refused, insisting that she "was fully familiar with the business, and that she had done her own due diligence" (Daniels Aff., 5).While the issue of reasonable reliance often is not a question that can be resolved as a matter of law (*see e.g. Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004]), the record here conclusively establishes that Keto "failed to undertake [any] independent appraisal of the risk [s]he was assuming" (*Lampert v Mahoney, Cohen & Co.*, 218 AD2d 580 [1st Dept 1995]), despite having the benefit of her own counsel and having been specifically advised to do so by

plaintiffs' attorney. Accordingly, to the extent that the use of the term "annually" on the owner benefits document could reasonably be understood to be an intentional misrepresentation of the business's historical financial performance that actually deceived Keto, her failure to undertake even the most basic due diligence renders her reliance unreasonable as a matter of law.

Based on the foregoing, that part of defendants' first affirmative defense and counterclaim sounding in fraud related to the owner benefits document must be dismissed.

3. Value of the Inventory

The second branch of the fraud counterclaim/defense apparently is based upon allegations that the Purchase Agreement misrepresented the value of the Shop's inventory.[FN5] Under the Purchase Agreement, the final purchase price of $512,500 was allocated as follows: (a) $5,000 for equipment; (b) $243,750 for inventory; and (c) $263,750 for the seller's covenant not to compete and for the good will of the Shop. In the Answer, defendants allege that the inventory [*8]was valued in the Purchase Agreement $200,000 more than the value reported in plaintiffs' 2012 tax return (Answer, ¶ 28). Defendants also offer Farber's averment that Belleville "informed [Keto] that there was $500,000 of inventory on hand in the store" (Farber Aff., ¶ 8). Thus, according to defendants, plaintiffs' representations regarding "the inventory value . . . were false and were known to be false" (Answer, ¶ 35).

In moving for dismissal, plaintiffs submit proof that the initial purchase price agreed to by Keto was based solely upon a multiple of the owner benefits Belleville derived from the Shop and that the value of the inventory was not material to the determination of the final purchase price. The record further demonstrates that it was Keto's attorney who drafted the final Purchase Agreement and chose to allocate $243,750 to inventory, apparently based upon tax considerations (Iavarone Aff., ¶¶10-11; Daniels Aff., ¶¶7-8). And it is undisputed that Keto continued to work at the Shop through the closing on the sale and, thus, had access to the inventory on hand at all

pertinent times. In fact, Farber, who is defendants' own witness, avers that she and Keto personally "counted the inventory before the closing".

In opposition, defendants have failed to adduce proof sufficient to raise a triable issue of fact. There is no proof that Keto was deceived by the allocation of value set forth in the Purchase Agreement prepared by her attorney. Further, any claim that Keto was deceived by fraudulent oral representations by Belleville concerning the value of inventory must fail as a matter of law for lack of justifiable reliance. "[W]here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, [she] cannot claim justifiable reliance on [the other party's] misrepresentations" (*Tanzman v La Pietra*, 8 AD3d 706, 708 [3d Dept 2004]). Here, the Shop's inventory was open and available to Keto, and there was nothing that prevented her determining its value. In fact, the record demonstrates that Keto did count the inventory prior to the closing and was aware of its actual value.

Accordingly, plaintiffs are entitled to summary judgment dismissing any claim sounding in fraud with respect to the value of the inventory.

B.Consideration

As a second affirmative defense, defendants allege that because the Purchase Agreement was signed by Keto solely in her capacity as manager/member of Keto Ventures, no consideration existed for her signing the Note in her personal capacity. Thus, according to defendants, "all claims against any person or entity other than Keto Ventures are void and unenforceable for want of consideration." However, Belleville's financing of Keto Venture's purchase at Keto's request constitutes consideration for Keto's agreement to be personally liable under the Note (*see Dunkin' Donuts of Am., Inc. v Liberatore*, 138 AD2d 559, 561 [2d Dept 1988]). As a result, the second affirmative defense must be dismissed.

C.Other Allegations of Improper Conduct

As for a third affirmative defense, defendants claim that "Plaintiffs' claims are barred by unclean hands and estoppel." The fifth affirmative defense alleges that plaintiffs' claims are barred based upon impossibility of performance and the unconscionability of the underlying transaction.

"[A]n unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the [*9]parties together with contract terms which are unreasonably favorable to the other party" (*King v Fox*, 7 NY3d 181, 191 [2006]; *accord Lawrence v Miller*, 11 NY3d 588, 595 [2008]). Relatedly, equitable remedies will be "barred by the doctrine of unclean hands where the party seeking to assert them has committed some unconscionable act that is directly related to the subject matter in litigation and has injured the party attempting to invoke the doctrine" (*Hytko v Hennessey*, 62 AD3d 1081, 1085-1086 [3d Dept 2009] [internal quotation marks omitted]). "Under the rarely imposed theory of impossibility of performance" (*Granger Constr. Co., Inc. v TJ, LLC*, 2015 NY Slip Op 09335, *6 [3d Dept 2015]), a party's performance will be excused "when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible" (*Kel Kim Corp. v Central Mkts., Inc.*, 70 NY2d 900, 902 [1987] [citation omitted]).

As this Court stated at the outset of the litigation:

> At bottom, defendants' principal complaint is that Rosa Belleville induced an unsophisticated young woman with limited business experience and her own personal troubles to improvidently purchase the Shop for an excessive price, thereby depleting her entire inheritance, incurring substantial indebtedness and risking her financial future. While the present record provides some support for this characterization of events, . . . [f]reedom of contract extends even to unwise and ill-conceived ventures, particularly in the context of commercial agreements. Further, plaintiffs' apparent ability to derive substantial economic benefit from the Shop for many years undercuts defendants' claim of economic impossibility.

(Seizure Decision, at 8).The same conclusions follow today. There simply is no record proof establishing that the terms of the Purchase Agreement, Note or Security Agreement are grossly unreasonable or otherwise substantively unconscionable. While defendants firmly believe that Keto paid an excessive price for the business, they have not demonstrated anything conscience-shocking in the sale of an ongoing, profitable enterprise for less than four times the annual income and other financial benefits derivable from the business (*see PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 1112 [3d Dept 2013], *lv dismissed* 23 NY3d 940 [2014]). And defendants' contention that it would have been impossible for Keto to repay the Note by successfully operating the Shop over a period of years is unsupported by objective proof and, instead, rests solely upon speculation.

Nor has there been any showing of unconscionability or undue influence by Belleville that would preclude plaintiffs from enforcing the Purchase Agreement, Note and Security Agreement. Even viewing the evidence in a light most favorable to defendants, it cannot be said that Keto was deprived of meaningful choice with respect to the transaction or that Belleville's influence over Keto rose to the level of "moral coercion" (*Matter of Walther*, 6 NY2d 49, 53 [1959]). And while defendants speculate that Belleville knowingly took advantage of Keto's alleged mental health and substance abuse problems, there is no competent proof that Belleville actually was aware of these issues prior to Keto's death.[FN6] Further, Farber's affidavit testimony [*10]that Keto returned intoxicated from various off-site "meetings" with Belleville lacks probative value because Farber was not present at any of the meetings and lacks personal knowledge as to where and when Keto may have consumed intoxicants, or even if the transaction was discussed at these "meetings".

In sum, while the purchase of the Shop may have been an improvident decision for an unsophisticated young woman with limited business experience and her own personal troubles, the record provides no basis for concluding that Keto's decision to purchase the Shop was anything other than the product of her free and uncoerced will. **[FN7]**

Based on the foregoing, the third and fifth affirmative defenses must be dismissed.

D.Documentary Evidence

Defendants fourth affirmative defense alleges "[a] complete defense exists based upon documentary evidence." Defendants do not identify which documents purportedly provide this defense, and the Court's search of the record fails to disclose any such evidence. Accordingly, this affirmative defense is dismissed.

E.Plaintiff's Breach of the Purchase Agreement

As their third counterclaim, defendants allege that plaintiffs breached the Purchase Agreement by "failing to operate the [Shop] with good practices' . . . because they intentionally allowed inventory to decline substantially before closing". The Purchase Agreement required plaintiffs to "operate the [Shop] in the normal course of business and keep the equipment and other assets made the subject of this sale in good repair until time of closing" (¶ 11). In addition, plaintiffs agreed to "keep inventory stocked in the normal course of business" (¶ 12).

In support of their motion, plaintiffs have submitted evidence that the Shop historically experienced a slow-down in business during the months of January and February, a fact conceded by Farber in her affidavit. Belleville typically prepared for this slow-down by reducing the quantities ordered in the two or three preceding months. In 2013, these two or three months corresponded to the period leading up to the sale of the Shop. The invoices submitted by plaintiffs support Belleville's claim that she did not intentionally deplete or fail to order inventory at the end of 2013, but rather reduced ordering and inventory on hand to prepare for the slow-down.

The foregoing evidence is sufficient to demonstrate, *prima facie*, that Belleville [*11]maintained the Shop's inventory in the normal and ordinary course of business, consistent with her obligations under the Purchase Agreement. In opposition, the conclusory and inadequately supported affidavits of Jacklyn Keto and Farber fail to raise a triable issue of fact.[FN8] Accordingly, the third counterclaim must be dismissed.

F.Non-Competition Agreement

Defendants also assert a counterclaim seeking a declaration that plaintiffs are in violation of a non-competition agreement given in connection with the purchase of the business. The Purchase Agreement includes a covenant that prohibits plaintiffs from "compet[ing] with respect to [defendants'] business operation whether as an owner, shareholder, partner, employee or otherwise", for a period of five years and within a geographic area of 40 miles from the Shop (¶ 14). Additionally, the Bill of Sale accompanying the Purchase Agreement provides that plaintiffs are prohibited from "engag[ing] in the business of ladies clothing within forty (40) miles from" the Shop for a period of five years.

In moving for summary judgment dismissing this counterclaim, plaintiffs argue, among other things, that because defendants are in default of their obligations under the Purchase Agreement and other contracts, they cannot enforce the covenant. The Court agrees. "When a party benefiting from a restrictive covenant in a contract breaches that contract, the covenant is not valid and enforceable against the other party because the benefiting party was responsible for the breach" (*DeCapua v Dine-A-Mate, Inc.*, 292 AD2d 489, 491 [2d Dept 2002] [citations omitted]). Here, the restrictive covenant was given by plaintiffs as partial consideration for defendants' purchase of the business, and defendants are in default of their obligation to pay the agreed-upon purchase price. In fact, the Purchase Agreement itself expressly voids the restrictive covenant where, as here, defendants have been judicially determined to be in default of their repayment obligations under the Note (¶ 14). As a result, plaintiffs have demonstrated that defendants are not entitled to a declaratory judgment prohibiting plaintiffs from operating a competing business, and the counterclaim seeking such relief must be dismissed.

CONCLUSION

Accordingly,[FN9] it is

ORDERED, that plaintiffs' motion for summary judgment is granted; and it is further

ORDERED that defendants' affirmative defenses and counter claims are dismissed; and it is further

ORDERED that defendants' cross motion is denied; and it is finally

ORDERED that plaintiffs shall settle a proposed judgment in accordance with the foregoing, including a supplemental affidavit with respect to attorney's fees, costs and any [*12]expenses associated with this action for which they are seeking recovery. Such submission shall be made to the Court, on notice to defendants, within twenty-one (21) days of the date of this Decision and Order. Defendants shall have ten (10) days from service of such supplemental submission in which to be heard in writing thereon.

This constitutes the Decision and Order of the Court. This Decision and Order is being transmitted to plaintiffs' counsel; all other papers are being returned to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York

February 5, 2016

RICHARD M. PLATKIN

A.J.S.C.

Papers Considered:

Notice of Plaintiffs' Second Motion for Summary Judgment, dated September 4, 2015;

Affirmation of Justin A. Heller, Esq., dated September 4, 2015, with attached Exhibits A-F;

Memorandum of Law in Support of Plaintiffs' Second Motion for Summary Judgment, dated September 4, 2015;

Notice of Cross Motion, dated October 15, 2015;

Affirmation of Allan B. Rappleyea, Esq., dated October 15, 2015, with attached Exhibits 1-17;

Affidavit of Kevin P. Maney, Esq., sworn to August 2015;

Affidavit of Valerie Keto, sworn to October 10, 2015;

Affidavit of Jacklyn Keto, sworn to October 10, 2015;

Memorandum of Law in Opposition to Plaintiffs' Motion and in Support of Defendants' Cross Motion;

Affirmation in Opposition to Defendants' Cross Motion and in Further Support of Plaintiffs' Second Motion for Summary Judgment of Justin A. Heller, Esq., dated November 6, 2015;

Affidavit of Michael Belleville, sworn to November 5, 2015;

Memorandum of Law in Opposition to Defendants' Cross Motion and in Further Support of Plaintiffs' Second Motion for Summary Judgment, dated November 6, 2015.

Footnotes

Footnote 1: While defendants make much of certain alleged inconsistencies in Belleville's statements as to who actually prepared the owner benefits document, they have failed to demonstrate the materiality of any such inconsistencies. There is no dispute that Belleville delivered the document to Keto and was the only person present with Keto during discussions of the purchase price. In any event, Belleville's initial averment in her August 18, 2014 affidavit that she "prepared and delivered" the document to Keto does not differ materially from her later testimony that she caused her sons to prepare the document.

Footnote 2: Merriam-Webster defines "annual" as an adjective meaning "1. covering the period of a year" and "2. occurring or happening every year or once a year". A separate definition for "annually" is not provided. Rather, that word is identified as an adverb derived from "annual" and, thus, has essentially the same meaning. Similarly, the first definition for the term "annual" in Black's Law Dictionary is "[o]ccurring once every year", as in an "annual meeting" (10th ed 2014). Thus, even had Belleville used "annual", as defendants contend she should have done, it may not have fully distinguished between the then-current level of owner benefits and historical levels.

Footnote 3: There is no real dispute as to Keto's actual reliance on the owner benefits document.

Footnote 4: After plaintiffs and Keto agreed to the transaction, Keto attempted to secure a bank loan. At the request of the bank, Keto asked Belleville for financial projections for years 2014 through 2016. At Belleville's request, plaintiffs' accountant prepared the

projections and provided them to Keto (Salvatore Iavarone Aff. [Aug. 15, 2014], ¶ 3). However, these future projections do not bear on the alleged misrepresentation concerning the levels of owner benefits derived from the business prior to 2012. And, to the extent that defendants challenge those projections as fraudulent, they have provided absolutely no proof to support a finding that the accountant's projections were made with the knowledge that they were "false and unreasonable and that they were not based upon [the Shop's] actual financial condition" (*CPC Intl. v McKesson Corp.*, 70 NY2d 268, 286 [1987]). Contrary to defendants' suggestions, the fact that the Shop had not in the past achieved the projected future sales figures is not proof of knowing falsity. Moreover, there is no proof on this record that Keto relied upon the projections. Instead, the record establishes that Keto had agreed to enter into the transaction before the projections were given to her, and that she subsequently requested the projections to satisfy the bank's request.

Footnote 5: While the Answer contains allegations that the value of the inventory was fraudulently represented, defendants have not set forth any specific argument with respect to this issue in their brief. The issue nevertheless is addressed in light of plaintiffs' motion seeking summary judgment dismissing all of defendants' defenses and counterclaims.

Footnote 6: Belleville consistently averred in affidavits that she did not become aware of Keto's substance abuse problems until after her death (Nov. 11, 2014 Aff., ¶12; Sept. 4, 2015 Aff., ¶53). Belleville reiterated this fact at her deposition (Deposition, pp 35-36). Defendants offer nothing more than speculation to the contrary.

Footnote 7: This is not a case where plaintiffs discouraged Keto from conducting due diligence. Indeed, plaintiffs' counsel specifically encouraged Keto to consider retaining her own accountant, advice that Keto declined. Further, Keto did have the assistance of legal counsel with certain aspects of the transaction, but she chose not to avail herself of her attorney's services in negotiating the terms of the transaction or in conducting due diligence. And Keto did seek bank financing for the transaction, and concerns regarding the viability of the financial transaction, at least at the initial purchase price agreed to by Keto, arguably were raised by the bank's denial of her loan application.

Footnote 8: While defendants offer various invoices from the end of 2013, they have not provided invoices from prior years establishing a "normal course of business" from which plaintiffs deviated. Moreover, even the 2013 invoices show that Belleville continued to order inventory prior to the closing. And an email from one vendor to Jacklyn Keto, dated September 8, 2014, establishes that the Shop's purchases from that vendor in 2013 were consistent with 2012.

Footnote 9: The Court has considered defendants' remaining arguments and contentions and finds them to be lacking in merit.

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