

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

PRESENT: BERNARD J. FRIED  
*Justice*

PART 60

Beryl Zyskind and Joel Gold,

Plaintiffs,

- v -

Facecake Marketing Technologies, Inc.,  
Defendant.

INDEX NO. 651240/2010  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 005  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

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

Plaintiffs Beryl Zyskind and Joel Gold commenced this action by filing a motion for summary judgment in lieu of complaint to recover money due on ten promissory notes issued by defendant FaceCake Marketing Technologies, Inc. (FaceCake). Defendant FaceCake opposed the motion and asserted two counterclaims. By order dated December 14, 2010, I granted the plaintiffs’ motion for summary judgment on the notes and severed FaceCake’s counterclaims. In accordance with my order, the Clerk entered Judgment in favor of the plaintiffs on October 18, 2011.

Plaintiffs Zyskind and Gold then moved to dismiss FaceCake’s counterclaims. By order dated July 5, 2011, I denied the plaintiffs’ motion to dismiss FaceCake’s first counterclaim for breach of contract and granted the motion as to FaceCake’s counterclaim for fraud. On July 29, 2011, the plaintiffs filed and served a pleading called “Answer and Counterclaims” in response to FaceCake’s remaining counterclaim for breach of contract. At the telephone conference on September 14, 2011, I ruled that this pleading was proper and authorized FaceCake to answer or move against the plaintiffs’ pleading by October 26, 2011. These rulings were confirmed by letter dated September 15, 2011, which I so ordered.

Defendant FaceCake now moves to dismiss pursuant to CPLR 3211 (a)(1), (5), and (7), the causes of action asserted in the plaintiffs’ pleading.

On a motion to dismiss made pursuant to CPLR 3211, the complaint “is to be

afforded a liberal construction,” and the plaintiff is afforded the “benefit of every possible favorable inference.” (*Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]). While a plaintiff’s allegations are presumed true on a motion to dismiss, conclusory allegations “consisting of bare legal conclusions” are insufficient to survive a motion to dismiss. (*See Caniglia v. Chicago Tribune-New York News Syndicate Inc.*, 204 A.D.2d 233, 233 [1st Dep’t 1994]). When a motion is based on documentary evidence, pursuant to CPLR 3211(a)(1), dismissal of a cause of action is warranted “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Id.* at 88.). Under CPLR 3211(a)(7), “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Id.*, citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

Briefly, the events giving rise to this action are as follows. On September 28, 2004, Zyskind and Gold each executed separate, identical stock purchase agreements with FaceCake (the “Agreements”). (Affidavit of Linda Smith, Exh. 2). Under the terms of the Agreements, Zyskind and Gold each promised to invest \$625,000 in FaceCake in exchange for corresponding promissory notes and FaceCake stock. (*Id.*). Pursuant to the Agreements, these investments were to be made in installments according to a schedule outlined in the Agreements. (*Id.*, Section 1). Upon execution of the Agreements, each plaintiff was to make an initial investment of \$125,000, and then make ten additional payments of \$50,000 each on October 28, 2004, November 28, 2004, December 28, 2004, January 28, 2005, February 28, 2005, March 28, 2005, April 28, 2005, May 28, 2005, June 28, 2005, and July 28, 2005. (*Id.*).

According to the plaintiffs’ pleading, Zyskind and Gold each made the initial \$125,000 investment on or about September 28, 2004. (Answer and Counterclaims, ¶¶ 91, 94). Thereafter, Zyskind made the following payments to FaceCake: (i) \$50,000 in or about October 2004; (ii) \$50,000 in or about November 2004; and (iii) \$50,000 in or about January 2005. (*Id.*, ¶ 92). Gold also made the following payments to FaceCake following his initial investment: (i) \$50,000 in or about October 2004; (ii) \$50,000 in or about November 2004; (iii) \$50,000 in or about January 2005; and (iv) two \$50,000 payments in or about April 2005. (*Id.*, ¶ 95). In exchange for these payments, FaceCake issued corresponding promissory notes and shares to Zyskind and Gold. (*Id.*, ¶¶ 91, 93, 94, 96).

Zyskind and Gold failed to make any more payments in accordance with the schedule in the Agreements. Following the due date for the final payment, Zyskind made

additional payments in the following amounts: (i) \$25,000 on August 1, 2005; (ii) \$25,000 on August 10, 2005; (iii) \$10,000 on November 10, 2005; (iv) \$10,000 on November 30, 2005; and (v) \$5,000 on January 5, 2006. (*Id.*, ¶ 98). Gold made one additional payment of \$15,000 on January 10, 2006. (*Id.*, ¶ 99). Plaintiffs allege that although FaceCake received and retained these funds, it failed to issue corresponding notes and shares despite due demand by the plaintiffs. (*Id.*, ¶ 100).

On August 24, 2005, FaceCake sent a notice of default to Zyskind and Gold for failure to provide payments in accordance with the Agreements. (Affidavit of Linda Smith, Exh. 4). The letter states that upon receipt of the full payment due under the Agreements, FaceCake would issue notes and stock which had not yet been provided. (*Id.*). By letter dated April 18, 2006, FaceCake terminated the Agreements and requested that Zyskind and Gold return the notes and shares that were previously issued so that FaceCake could cancel them. (*Id.*, Exh. 5).

The plaintiffs assert ten causes of action in their pleading.

In the first cause of action, plaintiffs seek a declaratory judgment based upon FaceCake's alleged failure to comply with the "anti-dilution" provision in the Agreements and FaceCake's unilateral cancellation of the plaintiffs' shares.

With the respect to the anti-dilution issue, the plaintiffs allege that FaceCake breached section 7(e) of the Agreements by issuing shares without first providing the plaintiffs with written notice of the stock issuance, thus reducing the plaintiffs' ownership interests in FaceCake. Section 7(e)(ii) of each Agreement provides that if FaceCake decides to issue shares, FaceCake shall, so long as Zyskind and Gold are not in breach of the Agreements, give written notice of the stock issuance to Zyskind and Gold. (Affidavit of Linda Smith, Exh. 2, Section 7(e)(ii)). Thus, in order for Zyskind and Gold to be entitled to anti-dilution rights under the Agreements, they must not be in breach of the Agreements. Here, Zyskind and Gold concede in their pleadings that they breached the terms of the Agreements by failing to make payments to FaceCake in accordance with the schedule outlined in the Agreements. Accordingly, Zyskind and Gold are not entitled to anti-dilution rights under the Agreements and this portion of the first cause of action is dismissed.

With respect to FaceCake's cancellation of shares, the plaintiffs allege that FaceCake notified them that it had cancelled the shares in August 2005. (Answer and Counterclaims, ¶ 100, n. 5). However, FaceCake's letter dated August 24, 2005, only notifies Zyskind and Gold that they are in default under the Agreements for failure to make the scheduled

payments. (Affidavit of Linda Smith, Exh. 4). FaceCake does not state in this letter that it will cancel the shares that were previously issued to Zyskind and Gold. (*Id.*). In fact, FaceCake states in this letter that it will deliver stock certificates to the plaintiffs upon receipt of full payment under the Agreements. (*Id.*). It was not until FaceCake's letter dated April 18, 2006, that FaceCake stated that it intends to cancel the shares that were previously issued to the plaintiffs. Based on the plaintiffs' pleading and the documentary evidence submitted on this motion, it is unclear if and when the shares were cancelled. In any event, the plaintiffs fail to allege any specific provision in the Agreements that prevents FaceCake from cancelling the shares upon breach of the Agreements or otherwise. Accordingly, this portion of the first cause of action is also dismissed.

In the second cause of action for specific performance, the plaintiffs seek an order directing FaceCake to re-issue the shares that were previously issued to Zyskind and Gold. However, as discussed above, the plaintiffs fail to cite any specific provision in the Agreements that prevented FaceCake from canceling their shares. Accordingly, the second cause of action is dismissed.

In the third and fourth causes of action, the plaintiffs allege that FaceCake breached the Agreements by failing to issue notes and shares corresponding to the plaintiffs' payments to FaceCake between August 2005 and January 2006. FaceCake argues that the Agreements required the plaintiffs to make payments pursuant to a specific schedule and there is nothing in the Agreements which requires FaceCake to issue notes and shares for payments made outside of this schedule. (*See* Affidavit of Linda Smith, Exh. 2, Section 1(b)). However, the plaintiffs allege that FaceCake retained these payments. Therefore, FaceCake is estopped from arguing that it is not obligated to issue notes and shares based on the plaintiffs' failure to comply with the payment schedule. Accordingly, the third and fourth causes of action will remain only in so far as they are based on FaceCake's alleged failure to issue notes and shares for the payments it received between August 2005 and January 2006.

In the third and fourth causes of action, the plaintiffs also allege that FaceCake breached the Agreements by failing to honor the plaintiffs' anti-dilution rights. However, as discussed above, Zyskind and Gold were not entitled to anti-dilution rights under the Agreements because, as they concede in their pleading, they failed to make payments in accordance with the schedule in the Agreements. Accordingly, this portion of the breach of contract claims is dismissed.

In their memorandum of law in opposition to this motion and at oral argument, Zyskind and Gold raised, for the first time, a third basis for their breach of contract claims against FaceCake. The plaintiffs assert that FaceCake breached the Agreements by failing to provide Zyskind and Gold with financial statements, as required under section 4(a) of the promissory notes annexed to the Agreements. However, the plaintiffs failed to include this claim in their pleading, as the plaintiffs' counsel conceded at oral argument on this motion. (February 23, 2012, Tr. 31:19-12). Accordingly, I will not consider this new breach of contract theory.

In the fifth and sixth causes of action for conversion, the plaintiffs allege that FaceCake converted the loans made by Zyskind and Gold between August 2005 and January 2006 without providing consideration for such loans. FaceCake argues that the plaintiffs' conversion claims are barred by the applicable three-year statute of limitations because the claims accrued no later than January 10, 2006, when FaceCake allegedly received the last payment and failed to issue corresponding notes and shares. The plaintiffs argue that their conversion claims did not accrue until September 2008, when the plaintiffs sent a demand letter to FaceCake and FaceCake refused to return the plaintiffs' funds. (Affidavit of Linda Smith, Exh. 6).

A cause of action for conversion is governed by a three-year statute of limitations, CPLR 214(3), and generally accrues when the conversion takes place. (*See Sporn v. MCA Records*, 58 N.Y.2d 482, 487 [1983]). "Where the original possession is lawful, a conversion does not occur until the defendant refuses to return the property after demand or until he sooner disposes of the property." (*Johnson v. Gumer*, 94 A.D.2d 955 [4th Dep't 1983]).

Here, FaceCake's original possession of the funds was lawful and thus the plaintiffs' conversion claim did not accrue until demand was made and refused, in September 2008. The plaintiffs commenced this action by filing a motion for summary judgment in lieu of complaint on August 11, 2010, and asserted their conversion claim in the pleading filed on July 29, 2011. Accordingly, the plaintiffs' conversion claim is timely because it was interposed within the three-year statute of limitations. Although the allegations supporting the conversion claim duplicate the allegations in the breach of contract claim, I will deem the conversion claim as being plead in the alternative to the breach of contract claim. (CPLR 3017(a)). Accordingly, it is not dismissed.

In the seventh and eight causes of action, the plaintiffs allege that FaceCake was

unjustly enriched by the loans made by Zyskind and Gold between August 2005 and January 2006. I will deem the unjust enrichment claim as being plead in the alternative to the breach of contract claim. Accordingly, it is not dismissed.

In the ninth cause of action, Zyskind and Gold seek an accounting of FaceCake's books and records in order to establish the value of their ownership interest in FaceCake. While the plaintiff may be entitled to an accounting, there is no basis for it because their claim is essentially a contract claim. Accordingly, this cause of action is dismissed.

Finally, in the tenth cause of action, Zyskind and Gold allege that as the prevailing parties in this action, they are entitled to attorneys' fees pursuant to the Agreements. As it is not yet known who will be the prevailing party in this action, this claim will be held in abeyance. The parties shall not proceed with discovery on this claim, until this action is resolved on the merits.

In its motion to dismiss, FaceCake also seeks to stay enforcement of the Judgment entered against it on October 18, 2011. As I stated at oral argument on this motion, there is no basis for me to grant this request and it is denied. (February 23, 2012, Tr. 10:6-8).

Accordingly, it is

ORDERED that this motion is granted in part and denied in part; and it is further ORDERED the first, second, and ninth causes of action asserted in the plaintiffs' pleading are dismissed in their entirety; and it is further

ORDERED that the third and fourth causes of action for breach of contract are dismissed only in so far as they are based on FaceCake's alleged failure to provide anti-dilution rights and financial statements to the plaintiffs, and these causes of action shall remain in so far as they are based on FaceCake's alleged failure to issue notes and shares corresponding to the plaintiffs' payments made between August 2005 and January 2006; and it is further

ORDERED that the fifth, sixth, seventh, and eight causes of action for conversion and unjust enrichment shall remain and are deemed to be plead in the alternative to the remainder of the plaintiffs' breach of contract claims asserted in the third and fourth causes of action; and it is further

ORDERED that the tenth cause of action for attorneys' fees shall be held in abeyance and no discovery shall be taken with respect to this claim until it is decided who

the prevailing party in this action is; and it is further

ORDERED that the defendant's request to stay enforcement of the Judgment entered on October 18, 2011, is denied; and it is further

ORDERED that the parties shall appear for a conference on June 6, 2012, at 9:30 am.

Dated: 5/21/2012

  
**HON. BERNARD J. FRIED**<sup>ISC</sup>

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE