

**Sports Legends, Inc. v Carberry**

2008 NY Slip Op 30718(U)

March 10, 2008

Supreme Court, New York County

Docket Number: 0110262/2007

Judge: Joan Madden

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SCANNED ON 3/13/2008

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

PRESENT: Hon. Joan A. M. d. Lw.

PART 11

Index Number : 110262/2007

SPORTS LEGENTS, INC.

vs

CARBERRY, PAUL B.

Sequence Number : 001

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE 11/8/07

MOTION SEQ. NO. \_\_\_\_\_

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

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum Decision + Order.

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

**FILED**  
MAR 13 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: March 13, 2008

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 11

-----X Index No. 110262/07  
SPORTS LEGENDS, INC.

Plaintiff,

-against-

PAUL B. CARBERRY

Defendant.

-----X  
JOAN A. MADDEN, J.:

Defendant moves, pursuant to CPLR 3211(a)(7), to dismiss the complaint and for sanctions. Plaintiff opposes the motion, and requests sanctions. For the reasons below, the motion is granted, and both requests for sanctions are denied.

**FILED**  
MAR 13 2008  
NEW YORK  
COUNTY OF NEW YORK

Background

Plaintiff Sports Legends, Inc. ("Sports Legends") is a New York corporation established, owned and controlled by Joseph Cusenza ("Cusenza") and Paul Carberry ("Carberry"). Sports Legends was engaged in the business of buying and selling sports memorabilia.

The unverified complaint, which asserts a single cause of action, alleges that Carberry and Cusenza pooled their funds to purchase sports memorabilia and other similar items to sell to the public and that Cusenza's contribution was more than 50%. It further alleges that Carberry "took merchandise belonging to [Sports Legends] and...refused to return [it] despite continuous demands made by Cusenza," and that Carberry "did not have a right to arrogate to himself the memorabilia and merchandise belonging

to [Sports Legends]" and as a result "[Sports Legends] has suffered damages." The complaint seeks "the return of the [Sports Legends'] items wrongfully possessed and converted to the extent that they are in [Carberry 's] possession."

The record contains a letter dated July 19, 1999 from Cusenza to Carberry demanding the return of his share of inventory. Carberry refused the request and in 2001, Sports Legends commenced an action against Carberry based on the same events that form the basis for this action. That action was dismissed by the trial court for failure to prosecute, and the Appellate Division affirmed the dismissal. Sports Legends, Inc. v. Paul B. Carberry, 38 AD3d 470 (1<sup>st</sup> Dept. 2007). The current action was commenced on July 26, 2007.

Carberry moves to dismiss the complaint on several grounds. First, Carberry argues that the sole claim asserted in the complaint, which is for conversion, is time-barred as the action was commenced more than three years after the date of the alleged conversion and Cusenza's July 1999 demand letter.

Carberry also argues that Cusenza cannot authorize this action on behalf of Sports Legends since, as he stated in his affidavit, both he and Cusenza own 50% of the shares of Sports Legends. Carberry also asserts that Sports Legends lacks capacity to sue because it was dissolved for failure to pay taxes in 1999. Lastly, Carberry argues that the prior lawsuit has

preclusive effect on this action.

Sports Legends opposes the motion, arguing that the claim is not time-barred as Carberry's actions amount to a "continuing tort" where each interference with plaintiff's right of possession gives rise to a new cause of action. Sports Legends next argues that Cusenza holds a controlling interest in Sports Legends based on his greater capital contribution and thus Cusenza may authorize Sports Legends to sue Carberry. Notably, Sports Legends submits no evidence refuting the statement in Carberry's affidavit that he and Cusenza each own a 50% interest in Sports Legends. Finally, Sports Legends asserts that, even assuming it is a dissolved corporation, it retains the right to sue for claims existing before dissolution.

#### Discussion

The first issue is whether the claim asserted in the complaint is time-barred based on the three-year statute of limitations applicable to claims for conversion. CPLR 214(3). There is no dispute that this action was commenced more than three years after the alleged taking of the sports memorabilia by Carberry and the 1999 letter from Cusenza to Carberry seeking the return of inventory belonging to Sports Legends. Sports Legends asserts, however, that Carberry's actions constitute a "continuing tort" whereby each interference with Sports Legends' right to the property gives rise to a new cause of action.

According to this argument, Carberry's conduct amounts to a failure to account for the property - a failure which is continuing.

Contrary to Sports Legends' argument, the continuing tort theory does not apply to its claim alleging that Carberry took property belonging to Sports Legends. The continuing tort theory is limited to actions where "the defendant merely interfered with the plaintiff's property...If, however, the conduct the plaintiff seeks to recover for amounts to the destruction or taking of the property, then the action is properly deemed one for conversion." Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 488 (1983).

Furthermore, the cases relied on by Sports Legends are inapposite as they involved the breach of continuing obligations which were found to constitute continuing wrongs. See e.g. Barash v. Estate of Sperlin, 271 AD2d 558, 559 (2<sup>nd</sup> Dept 2000) (plaintiff's claims against defendants based on defendants' wrongful withholding of profits were not time barred as "a continuing wrong ... accrued anew each time the defendants collected income and profits from the allegedly co-owned property and failed to give a proper percentage thereof to the plaintiff"); Butler v. Gibbons, 173 AD2d 352, 353 (1<sup>st</sup> Dept 1991) (finding that the complaint was improperly dismissed on statute of limitations grounds as allegations "clearly [made] out a continuing wrong [based on defendants'] repeated and continuing

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failure to account and turn over proceeds earned from renting the properties [at issue].")

In contrast to allegations in these cases, the instant complaint alleges no continuing wrong by Carberry but rather a wrongful taking of items and Cusenza's continuous demands for their return. Moreover, that the property at issue is owned by a closely held corporation does not require a different conclusion. See Elghanayan v. Elghanayan, 265 A.D.2d 262 (1<sup>st</sup> Dept 1999) (affirming trial court's application of a three-year statute of limitations applicable to conversion claims when defendant allegedly took possession of assets owned by a partnership). Accordingly, the continuing wrong theory does not apply to Sports Legends' conversion claim against Carberry for the wrongful taking of sports memorabilia.

Generally, the accrual date for conversion is the date on which the chattel was removed from the true owner's possession. Sporn v. MCA Records, Inc., 58 N.Y.2d at 487. However, Carberry, as an owner of Sports Legends has a lawful right to possession of the property, and any claim against him would thus not accrue until there was a demand for return of the property, and he refused. See, Solomon Guggenheim Foundation v. Lubell, 77 N.Y.2d 311 (1991); Martin v. Briggs, 235 A.D.2d 192 (1<sup>st</sup> Dept 1997); Berman v. Goldsmith, 141 A.D.2d 487 (2<sup>nd</sup> Dept 1988). In this case, Cusenza sent a letter demanding return of the property in

July 1999. Moreover, while the complaint does not allege the date of Carberry's refusal to return the property, it is clear from the record that such refusal occurred prior to the commencement of the 2001 action. As this action was not commenced until 2007, or approximately eight years after the demand was made and at least 6 years after the refusal to return the property, it must be dismissed as untimely.

In addition, even if it were timely, this action would be dismissed on the grounds that Cusenza lacks the authority to bring this action on behalf of Sports Legends. It is firmly established that "where there are only two stockholders each with a 50% share, an action cannot be maintained in the name of the corporation by one stockholder against another with an equal interest and degree of control over corporate affairs."

Executive Leasing Company, Inc. v. Leder, 191 A.D.2d 199, 200 (1<sup>st</sup> Dept 1993). Here, while it is alleged in the unverified complaint that Cusenza's contribution to the funds used for the corporation were greater than 50%, there is no allegation that Cusenza was issued more than 50% of the corporation's stock.

Thus, even assuming arguendo that Cusenza contributed more capital to Sports Legends, such contribution would not give him standing to bring this suit on behalf of the corporation. The rule at issue here applies based on equal stock ownership, not the relative amounts of capital contributions made by such



shareholders. See, Abelow v. Grossman, 91 A.D.2d 553 (1<sup>st</sup> Dept 1982), appeal dismissed, 58 NY2d 1112 (1983); Tidy-House Paper Corp. v. Adlman, 4 A.D.2d 619 (1<sup>st</sup> Dept 1957). Accordingly, since Sports Legends does not deny that Carberry and Cusenza each owned 50% of the shares of Sports Legends, Cusenza cannot maintain this action in the name of the corporation.

As the action is time-barred and Cusenza lacks the authority to sue on behalf of Sports Legends, this court need not reach whether the dissolved status of the plaintiff corporation for failure to pay taxes affects its capacity to sue or whether the prior litigation bars Sports Legends from bringing this action.

Conclusion

In view of the above, it is

ORDERED that the Carberry's motion to dismiss is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the complaint in its entirety; and it is further

ORDERED that Carberry's request for sanctions is denied but the court admonishes Sports Legends and Cusenza that further attempts to pursue similar claims may result in the imposition of sanctions.

DATED: March 10, 2008

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**FILED**  
MAR 13 2008  
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