

Rubinoff v Yunatanov
2018 NY Slip Op 33482(U)
December 12, 2018
Supreme Court, Queens County
Docket Number: 708280/2017
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4
Justice

EDWARD RUBINOFF, MR. FLAWLESS INC.,
and FLAWLESS JEWELRY & TIMEPIECES,
INC.,

Index
Number: 708280 2017

Plaintiff(s)

Motion
Date: August 21, 2018

-against-

Motion Cal. No.: 43

GREGORY YUNATANOV,

Motion Seq. No. 7

GREGORY YUNATANOV,

Third-Party Plaintiff(s)

-against-

ILANIT RAFAELOV A/K/A ILANIT RUBINOFF
A/K/A ILANA RUBINOFF A/K/A ILANA
RAFAELOV, MICHAEL RUBINOFF, DAVID J.
BRODERICK, PC, DAVID J. BRODERICK, ESQ.,
ADAM L. SHAPIRO, ESQ. and ADAM L. SHAPIRO
AND ASSOCIATES.

Third-Party Defendant(s)

_____ X

The following papers numbered EF 132-149 read on this motion by third-party defendant Michael Rubinoff and plaintiffs Flawless Jewelry & Timepieces, Inc, Mr. Flawless, Inc., and Edward Rubinoff for an Order: (1) dismissing the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Tenth causes of action as asserted against Michael Rubinoff in the third-party complaint and dismissing all of the causes of action asserted against the plaintiffs in the third-party complaint.

FILED
DEC 19 2018
COUNTY CLERK
QUEENS COUNTY

	Papers
	<u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	EF 131-139, 152, 153
Answering Affidavits - Exhibits	EF 147, 148
Memorandum of Law	EF 132, 149

Upon the foregoing papers it is ordered that the motion is granted.

The complaint alleges the following: Plaintiff Edward Rubinoff (Edward) wholly owned plaintiff Flawless Jewelry & Timepieces, Inc. (Flawless), a company engaged in the manufacture and sale of fine jewelry and timepieces. In or about December 2010, Flawless hired defendant Gregory Yunatov as a salesperson. Acting within the scope of his employment, Yunatov and Edward opened and/or created social media accounts (e.g., Twitter and Instagram) which were used to advertise the merchandise and products of Flawless and Mr. Flawless, Inc. (Mr. Flawless). In or about 2012, defendant Yunatov expressed his desire to develop a street wear brand to be called Mr. Flawless, and in or about 2012, he registered a trademark for Mr. Flawless. In December, 2012, Yunatov filed articles of incorporation for Mr. Flawless with the intention of using the corporation to manufacture and sell the street wear brand. On December 30, 2013, Edward and Yunatov executed a stock purchase agreement pursuant to which Yunatov sold half of the shares in Mr. Flawless and the Mr. Flawless trade mark to Edward. Only Flawless and Edward provided capital for Mr. Flawless. After the sale of shares, both Edward and Yunatov managed Mr. Flawless. On or about May 15, 2017, Edward learned that Yunatov had leased store and office space on the block where Flawless had its place of business with the purpose of opening a competing business venture. Edward was also informed by his suppliers that Yunatov had called them to order merchandise. When confronted by Edward, Yunatov replied by text that “his job was done” and that “ it was time for [him] to spread his wings.”

The plaintiffs began the instant action by the filing of a Summons with Notice on June 15, 2017, and they subsequently filed a complaint on June 22, 2017. The plaintiffs’ first cause of action, which is for conversion, alleges that Yunatov converted the Mr. Flawless trademark and other things for his own personal use and for use in his new business venture. The Second cause of action, which is for, *inter alia*, breach of fiduciary duty, alleges that Yunatov, in violation of his fiduciary duty as a shareholder and officer of Mr. Flawless, diverted corporate opportunities for his own personal gain and committed other acts of unfair competition and, moreover, in violation of his duty of good faith and loyalty as an employee of Flawless, committed acts of unfair competition. The Third cause of action, which is for unjust enrichment, alleges that defendant Yunatov was unjustly enriched by the capital investment made by Edward and Flawless in Mr. Flawless.

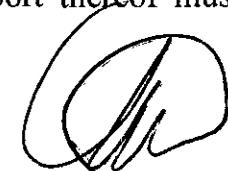
Defendant Yunatov filed an answer with counterclaims on April 30, 2018. Defendant Yunatov also began a third party action on May 29, 2018. The counterclaims against the plaintiffs and the additional counterclaim defendants are similar, if not identical, to the causes of action asserted in the third party complaint. The third-party complaint alleges the following: Gregory Yunatov is a “world renowned lifestyle influencer, creative director, jewelry designer, manufacturer and salesperson with an avid customer base.” He founded Mr. Flawless and registered a trademark for the company, He did not enter into an employment agreement or non-competition agreement with Flawless, and he did not assign his name, likeness, trademark or any of his intellectual property rights to the plaintiffs. Third-party defendant Michael Rubinoff is the father Edward and the uncle of defendant Yunatov. Third-party defendant Ilanit Rafaelov is the wife of Edward and an attorney associated with third-party defendant David J. Broderick, PC, a law firm. The First cause of action in the third-party complaint is brought under the Fair Labor Standards Act (FLSA)(29 USC 201 et seq) for an alleged failure to pay Yunatov minimum wages and commissions. The Second cause of action is brought pursuant to the New York State Labor Law for an alleged failure to pay minimum wages and commissions. The Third cause of action is brought pursuant to the FLSA for an alleged failure to pay overtime wages. The Fourth cause of action is brought under the common law of New York State for an alleged failure to pay overtime wages. The Fifth cause of action alleges breach of contract for an alleged failure to pay commissions. The Sixth cause of action is brought in quantum meruit for the value of the services Yunatov rendered. The Seventh cause of action is for unjust enrichment, the Eighth cause of action is for fraud, the Ninth cause of action is for attorney misconduct and deception, the Tenth cause of action is for an equitable accounting, the Eleventh cause of action is for conversion, the Twelfth cause of action is for trademark infringement and dilution, and the Thirteenth cause of action is for violations of the General Business Law.

The moving third-party defendant and plaintiffs submitted the instant motion for an Order dismissing the third-party complaint on the ground that it is procedurally improper. CPLR §1007, “ When third-party practice allowed,” provides in relevant part: “After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff’s claim against that defendant, by filing pursuant to section three hundred four of this chapter a third-party summons and complaint with the Clerk of the Court in the county in which the main action is pending ***” In the case at bar, the third-party complaint does not adequately allege that Michael Rubinoff or the plaintiffs are liable to Yunatov in whole or in part for the claims against Yunatov. The interposition of the third-party complaint is procedurally improper for that reason. The “third-party claim must be sufficiently related to the main action to at least raise the question of whether the third-party defendant may be liable to defendant-third-party plaintiff, for whatever reason, for the damages for which the latter may be liable to plaintiff” (*Zurich Ins. Co. v. White*, 129 AD2d 388, 390 [1987] [internal quotation marks omitted]; *Qosina Corp.*

v. *C & N Packaging, Inc.*, 96 AD3d 1032 [2012]). “The precept is that the liability sought to be imposed upon a third-party defendant must arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action ****” (*Loch Sheldrake Beach & Tennis Inc. v. Akulich*, 141 AD3d 809, 811–12,[2016][internal quotation marks and citations omitted]). In other words, the third party defendant must be under some type of claim over liability that is dependent upon the defendant’s liability to the plaintiff. “The liability must be one rooted in indemnity or contribution.” (*BRC Elec. Corp. v. Cripps*, 67 AD2d 899, 900 [1979; *Galasso, Langione & Botter, LLP v. Liotti*, 81 AD3d 880, 883 [2011]). Finally, CPLR §1007 states that a third-party action may be maintained against “a person not a party.” The third-party complaint brought against the plaintiffs¹, who are already parties and the subject of counterclaims, is not proper for this additional reason.

Yunatov’s arguments that there is a danger of a waste of judicial resources or inconsistent results if his third party complaint is dismissed have no merit. CPLR §3019, “Counterclaims and cross-claims,” provides in relevant part: “(a) Subject of counterclaims. A counterclaim may be any cause of action in favor of one or more defendants ***against one or more plaintiffs ***or a plaintiff and other persons alleged to be liable” (*see, Linzer v. Bal*, 184 Misc.2d 132[N.Y. City Civil Ct. 2000]). Indeed, Yunatov has already served an answer containing counterclaims against the plaintiffs and at least some other parties alleged to be liable. Moreover, multiple cases involving common questions of law and fact may be consolidated (*see, CPLR §602; Lombardi v. Lombardi*, 164 AD3d 665 [2018]), and set-offs may be raised in the defendant’s answer (*see, Herrick v. Second Cuthouse, Ltd.*, 64 NY2d 692[1984]; *Killian v. Captain Spicer's Gallery, LLC*, 140 AD3d 1764, 1765 [2017] [“Whether setoff is an affirmative defense (CPLR §3018[b]) or is more akin to a counterclaim (CPLR §3019 [a]), the facts in support thereof must be pleaded in the responsive pleading”]).

Dated: **DEC 12 2018**



 J.S.C.
FILED
 DEC 19 2018
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¹Neither the Third-Party Summons and the Verified Third-Party Complaint name the plaintiff as Third-Party defendant. However, the Third-Party complaint alleges claims against the plaintiffs.