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Order on Motions to Dismiss (UNITED
COMMUNITY BANK)

John Goger

Superior Court of Fulton County

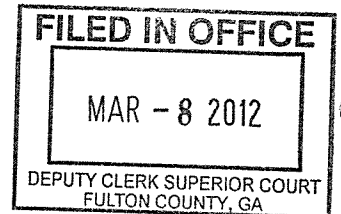
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



UNITED COMMUNITY BANK,)
)
Plaintiff,)
)
v.)
)
MCDIAPERS, INC., RICHARD J. WIELER,)
GAEL COAKLEY, JR., and COLLIN)
BROWN, III,)
)
Defendants.)
)

Civil Action File No.
2011CV207946

ORDER ON MOTION TO DISMISS

This matter is before the Court on the Motion to Dismiss by Defendants McDiapers, Inc. (“McDiapers”), Richard J. Wieler (“Wieler”) and Gael Coakley, Jr. (“Coakley,” together with McDiapers and Wieler, “Moving Defendants”). Upon consideration of the motions, the briefs submitted on the motion, and the record of the case, this Court finds as follows:

Plaintiff United Community Bank (“UCB”) contends that Defendants McDiapers, a company that manufactured disposable baby diapers exported for overseas sale, its owners, Wieler and Coakley, and Collin Brown, III, owner of Softee Supreme, LLC, scammed UCB by falsely inducing it to make advances under a line of credit granted to McDiapers, when in fact the loan proceeds were used by another company, Softee Supreme LLC, or by the Defendants, personally.

On March 17, 2006, UCB first extended an operating line of credit to McDiapers. The line of credit was subsequently renewed and modified several times between March 17, 2006 and Sept. 24, 2008, after which point it was converted into a term loan most recently renewed pursuant to a promissory note dated June 28, 2010, in the amount of \$361,423.71. Each time,

according to UCB, McDiapers was identified as the borrower. Weiler and Coakley personally guaranteed the loan. As collateral for the loan, McDiapers gave UCB a security interest in, among other things, its customer accounts and proceeds of those accounts, as well as proceeds under an export credit insurance policy with Export-Import Bank (“Ex-Im Bank”), which covered the risk of a foreign buyer’s failure to pay for goods.

Purportedly unbeknownst to UCB, McDiapers transferred its assets to Softee Supreme, LLC, on Oct. 3, 2007. Following the sale, McDiapers was no longer a growing concern. UCB contends that Defendants concealed the asset sale from it and continued to request draws under the McDiapers’ credit line by submitting false draw requests. Specifically, UCB contends that Defendants submitted 202 false advance requests that wrongfully identified McDiapers as the entity taking and filling the customer’s purchase order, when in fact it was Softee Supreme. Now, according to UCB, McDiapers has defaulted on the loan and owes more than \$340,000, exclusive of attorneys’ fees and costs.

UCB also seeks recovery of approximately \$361,000, which it contends Softee Supreme’s owner, Defendant Collin Brown, wrongfully withdrew from deposit accounts in which UCB held a security interest. UCB alleges that Wieler wrongfully transferred control and use of the account to Brown by disclosing the user identification and password associated with the bank account.

UCB asserts the following claims against Defendants: 1) Fraud; 2) Conversion; 3) Civil Conspiracy; 4) Punitive Damages; 5) Treble Damages and Attorneys’ Fees Under Georgia RICO; 6) Punitive Damages Under Georgia RICO; 7) Unjust Enrichment (against Defendant Brown); 8) Expenses of Litigation; 9) Breach of Contract—Promissory Note (against

McDiapers); 10) Breach of Contract—Guaranty (against Wieler); 11) Breach of Contract—Guaranty (against Coakley) and 12) Attorneys’ Fees and Expenses of Litigation.

Moving Defendants seek dismissal of UCB’s claims for Conversion (Count 2), Punitive Damages (Counts 4 and 6), and Treble Damages under Georgia Rico (Count 5).

1. Standard

A court should grant a motion to dismiss when a plaintiff “would not be entitled to relief under any state of facts that could be proven in support of his claim.” Northeast Georgia Cancer Care, LLC v. Blue Cross & Blue Shield of Georgia, Inc., 297 Ga. App. 28, 29 (2009). In ruling on such a motion, the Court must accept as true all of plaintiff’s well-pleaded factual allegations, and draw all reasonable inferences in plaintiff’s favor. Baker v. McIntosh County Sch. Dist., 264 Ga. App. 509, 509 (2003).

2. Conversion

Moving Defendants move to dismiss UCB’s conversion claim, arguing that UCB failed to allege that Moving Defendants, as opposed to Brown, exercised any ownership, dominion or unauthorized appropriation of the funds, an element they contend is necessary to set forth an actionable conversion claim.

Conversion consists of an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation. Any distinct act of dominion wrongfully asserted over another's property in denial of his right, or inconsistent with it, is a conversion.

Glisson v. Freeman, 243 Ga.App. 92, 104-105, (2000).

Construing the pleadings in favor of UCB, the Court finds that UCB has adequately pled a conversion claim. In the First Amended Complaint, UCB alleges that Moving Defendants exercised unauthorized dominion and control over the account by intentionally providing the

password associated with the account to Brown. With this password, Brown purportedly liquidated \$361,000, from the account, which UCB says it was entitled to under the factoring agreement. To state a conversion claim, “[i]t is unnecessary to show that the defendant applied [the converted property] to his own use, if he exercised dominion over it in defiance of the owner's right, or in a manner inconsistent with it.” Glisson, 243 Ga.App. at 105. Accordingly, Moving Defendants’ motion is **DENIED** with respect to UCB’s conversion claim.

3. Punitive Damages

Moving Defendants contend that UCB’s claims for punitive damages fail due to a “Limitation of Remedies” provision (“LOR Provision”) contained in the promissory note and guaranties executed by Moving Defendants in favor of UCB. The LOR Provision provides:

LIMITATION OF REMEDIES: Lender and I agree that neither party shall have a remedy of punitive or exemplary damages against the other in any dispute and hereby waives any right or claim to punitive or exemplary damages we have now or which may arise in the future in connection with any Dispute whether the Dispute is resolved by arbitration or judicially. Further, Lender and I agree to limit damages to actual compensatory damages flowing directly from the claimed breach, specifically excluding damages for lost profits, wages and/or income.

Moving Defendants contend that this language expressly bars UCB’s attempts to recover punitive damages associated with its claims against Moving Defendants. UCB counters by arguing that the LOR Provision is limited to breach of contract claims, citing the last sentence in the paragraph that limits damages to “actual compensatory damages flowing directly from the *claimed breach*.” (emphasis added).

The Court is unpersuaded by UCB’s position. The plain language of the LOR Provision expressly waives punitive or exemplary damages “in any dispute.” Moreover, the use of the word “breach” could equally apply to tort or contract disputes. As such, Moving Defendants’ motion is **GRANTED**.

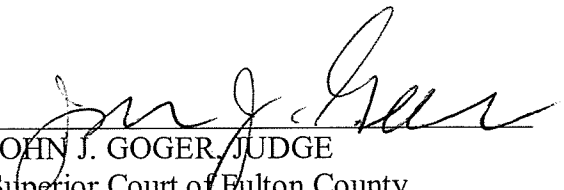
4. Georgia RICO Treble Damages

Moving Defendants also seek dismissal of UCB's Georgia RICO claims for treble damages based on the LOR Provision because they contend that the right to treble damages is foreclosed by the parties' agreement to limit claims to "actual compensatory damages."

In contrast with the express waiver in the LOR Provision of punitive or exemplary damages, the LOR Provision does not specifically reference treble damages. Rather, Moving Defendants argue that treble damages, such as those available under Georgia's RICO statute, are waived by implication in light of the fact that the parties agreed to limit recourse to only "actual compensatory damages."

The Court finds that the LOR Provision provides no basis upon which to dismiss Plaintiff's claim for RICO damages. As explained by the United States Supreme Court, "the treble-damages provision contained in RICO itself is remedial in nature.... RICO...[is] designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorneys' fees." Pacific Health Sys., Inc. v. Brook, 538 U.S. 401, 405-406 (2003). In contrast with punitive damages, which are awarded in addition to compensatory damages in certain extenuating circumstances and specifically distinguished from treble damages in the RICO statute, see O.C.G.A. § 16-14-6(c) ("Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages"), the Georgia legislature has specifically proscribed treble damages as the measure of damages appropriate to remedy the wrong done to a victim of a Georgia RICO violation. Accordingly, the Court **DENIES** Moving Defendants' motion with respect to Count Five, finding treble damages under the RICO statute compensatory in nature and therefore, not waived under the LOR Provision.

SO ORDERED this 8 day of March, 2012.


JOHN J. GOGER, JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

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