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Jones and Trevor Marketing, Inc. v. Financial
Development Services Inc. Jeremy Warburton,
John Neubauer, Jonathan L. Lowry, Nathan
Kinsella, and Esbex.com, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JONES & TREVOR MARKETING, INC.,

Plaintiff/Appellant,

vs.

FINANCIAL DEVELOPMENT
SERVICES, INC., JEREMY
WARBURTON, JOHN NEUBAUER,
JONATHAN L. LOWRY, NATHAN
KINSELLA, and ESBEX.COM, INC.,

Defendants/Appellees.

BRIEF OF APPELLANT

Case No. 20080904

Appeal from the Fourth Judicial District Court, Utah County, State of Utah
The Honorable Derek P. Pullan and The Honorable David N. Mortensen

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JURISDICTIONAL STATEMENT

This Court's jurisdiction rests upon Utah Code Annotated Section 78A-4-103(2)(j) (2009).

STATEMENT OF THE ISSUES

Did the trial court err in granting Defendants/Appellees Jonathan L. Lowry and Nathan Kinsella's Motions for Summary Judgment, holding that Appellees had no personal liability, where there were genuine issues of fact whether Appellees acted as the alter egos of the corporations and whether Appellees committed any torts in connection with the contract?

Standard of Review. De novo. By definition, "a district court does not resolve issues of fact at summary judgment," therefore, this Court "consider[s] the record as a whole and review[s] the district court's grant of summary judgment de novo, reciting all facts and fair inferences drawn from the record in the light most favorable to the nonmoving party." *Poteet v. White*, 2006 UT 63, ¶7, 147 P.3d 439.

Preservation for Appeal. R. at 1292-1322, 1640-1659, 2313-2349.

CONSTITUTIONAL OR STATUTORY PROVISIONS

There is no constitutional or statutory provision material to this appeal.

STATEMENT OF THE CASE

Procedural History

Plaintiff/Appellant Jones & Trevor Marketing (“J&T”) filed this case on August 29, 2002. (R. 33-49.) On June 17, 2004, J&T filed an amended complaint, including Defendants/Appellees Jonathan L. Lowry and Nathan Kinsella (“Lowry and Kinsella”) as defendants and alleging against them theft, fraudulent misrepresentation, constructive fraud, fraudulent non-disclosure, and intentional interference with business relations. (R. 1021-44.)

Lowry and Kinsella filed a joint motion for summary judgment on or about May 20, 2005. (R. 1198-1200.) After hearing oral argument on September 22, 2005 and allowing the parties to redepose John Neubauer, the district court granted the motion on February 1, 2006, holding that the corporate veil could not be pierced under the alter ego doctrine because there was insufficient evidence that Lowry and Kinsella “acted in their personal capacity or took funds improperly.” (R. 1699.) The Honorable Derek P. Pullan signed the order granting the motion on March 31, 2006. (R. 2019-22.) J&T’s claim of fraudulent misrepresentation against Lowry survived the 2005 motion for summary judgment. Lowry filed a motion for summary judgment on that claim on June 23, 2008. (R. 2259-2285.) The Honorable David N. Mortensen granted the motion and issued a final order in the case on October 8, 2008. (R. 2378-2385.) J&T now appeals both orders.¹

¹ Eventually, on September 17, 2007, a final judgment, in the form of a default judgment,

Statement of Facts

This case involves an appeal from a grant of summary judgment as to the personal liability of two of the defendants, Lowry and Kinsella.

The Plaintiff/Appellant, Jones & Trevor Marketing, Inc., is a Nevada corporation engaged in the sale of training courses developed by its owner and principal, Ted Thomas. (R. 1293.) Financial Development Services, Inc., (“FDS”) one of the corporate defendants, was a Utah corporation engaged in sales and telemarketing activities. (R. 1293.) FDS was dissolved on November 3, 2004. (R. 1293.) Esbex.com, Inc., (“Esbex”) the other corporate defendant, was originally a dba of FDS and was eventually incorporated as a wholly owned subsidiary of FDS. (R. 1294-95.) Esbex was dissolved on November 29, 2004. (R. 1295.) At all relevant times, Lowry and Kinsella were the sole shareholders and directors of FDS and Esbex. (R. 1296, 1300.) Though FDS and Esbex were legally distinct entities, in practice, Lowry and Kinsella operated FDS and Esbex as a single entity. (R. 1294-95.)

On or about January 31, 2002, J&T entered into a Sales and Marketing Agreement with FDS. (R. 1299.) Under the agreement, J&T provided to FDS training courses and the names, addresses, and phone numbers of sales leads. (R. 1294.) In exchange, FDS was to market and sell J&T’s training courses and provide coaching services, earning a commission of 60% of the gross sales. (R. 1023, 1299.) Esbex, though not in privity of

was entered against Defendants Financial Development Services, Inc. and Esbex.com, Inc. (R. 2215-17.)

contract with J&T, provided coaching services to purchasers of the J&T courses. (R. 1295.) After the relationship between the parties soured, J&T brought suit against FDS and Esbex and eventually against Lowry and Kinsella personally. (R. 33-49, 1021-44.)

In its opposition and supplemental opposition to Lowry and Kinsella's motion for summary judgment, J&T presented the following evidence regarding Lowry and Kinsella's direction and use of FDS and Esbex with regard to the J&T contract.

- Lowry and Kinsella were, at all times relevant to this appeal, the sole shareholders, officers, and directors of FDS and Esbex. (R. 1296, 1300.)
- Lowry and Kinsella ran FDS and Esbex as if the two corporations were one entity. (R. 1294-95.)
- Lowry and Kinsella were both aware and in control of all of the financial transactions that took place at FDS and Esbex. (R. 1301, 1305, 1642-43.)
- Lowry and Kinsella took money from the businesses whenever they wanted, regardless of the other commitments or responsibilities of the corporations. (R. 1300-02.)
- When customers returned J&T products, Lowry and Kinsella kept the refund from J&T and, instead of sending the product back to J&T, resold the product to new customers. (R. 1300, 1303-04, 1642.)
- Lowry and Kinsella knew that they were taking money earmarked for J&T customer refunds. (R. 1301, 1643-44.)
- Lowry and Kinsella repeatedly hid payments from J&T. (R. 1300-04.)

- Lowry and Kinsella treated customers who purchased J&T products poorly by failing to appropriately process refunds, by using “hard sell” tactics, and by charging unauthorized amounts to the customers’ accounts. (R. 1303-05.)
- After FDS terminated the agreement with J&T, Lowry and Kinsella made the decision to continue selling coaching, to instruct their employees not tell J&T about it, and to keep the money derived from the sales. (R. 1300, 1302, 1641-42.)
- Lowry and Kinsella took thousands of dollars of company proceeds for personal use, such as hunting trips, without proper documentation or accounting. (R. 1301, 1643.)
- Kinsella took money from FSD without telling Lowry. (R. 1302, 1644-45.)
- Lowry and Kinsella took money from FDS and Esbex to fund their personal interests, in disregard of the money needed to run the corporations. (R. 1300-03, 1642-46.)

Despite the above evidence, the trial court held that there was no genuine issue of fact as to whether Lowry and Kinsella were the alter egos of the corporations or whether Lowry and Kinsella committed torts in connection with the contract with J&T. J&T appeals that decision.

SUMMARY OF ARGUMENT

This case involves questions of fact regarding the personal liability of two corporations' owners and directors. Though the corporate shield is an important economic tool, "to permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others, and then shield himself from liability behind his vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations." *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶20, 70 P.3d 35 (quoting *Snowden v. Taggart*, 17 P.2d 305, 307 (Colo. 1932)). Observing the corporate shield and precluding the personal liability of the Appellees, Lowry and Kinsella, would sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations.

In its opposition to Lowry and Kinsella's joint motion for summary judgment, J&T presented evidence that Lowry and Kinsella were the alter egos of the two corporations. There is evidence that Lowry and Kinsella disregarded corporate formalities and used the corporations to fund their personal interests, regardless of the necessities and obligations of the corporation. Further, there is evidence that observing the corporate structure in this case would sanction the fraud committed by Lowry and Kinsella and would result in an unjust, inequitable result. J&T also presented evidence that Lowry and Kinsella personally participated in several torts in connection with the performance of the contract at issue.

J&T should have had the opportunity to present all of the evidence to a factfinder to resolve the question of whether Lowry and Kinsella were personally liable for the torts committed. This Court should therefore reverse the grant of summary judgment and remand this case back to the trial court for further proceedings.

ARGUMENT

The trial court in this case incorrectly granted Lowry and Kinsella's motion for summary judgment. Under the Utah Rules of Civil Procedure, a court may not grant summary judgment unless the moving party establishes "[1] that there is no genuine issue as to any material fact and [2] that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c).

When a court addresses a motion for summary judgment, the court's function is not to weigh disputed evidence or to decide which side has the stronger case. Rather, the court's "sole inquiry should be whether material issues of fact exist." *Draper City v. Est. of Bernardo*, 888 P.2d 1097, 1100 (Utah 1995). On a motion for summary judgment, the nonmoving party is not required to "prove" its case in order to defeat the motion. Instead, the nonmoving party is only required to submit evidence "sufficient to raise a genuine issue of fact." *Kleinert v. Kimball Elevator Co.*, 854 P.2d 1025, 1028 (Utah Ct. App. 1993). In addition, if there is "any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party [and] the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment." *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982).

This Court reviews a trial court's grant of summary judgment de novo, *Poteet v. White*, 2006 UT 63 at ¶7, and should therefore reverse the trial court's decision because numerous questions of fact existed with regard to both J&T's alter ego theory and J&T's

tort allegations. J&T presented sufficient evidence to the trial court to prevent the trial court from discarding its alter ego theory of liability.

First, J&T presented evidence that Lowry and Kinsella failed to observe corporate formalities, that they freely took money from the corporations' accounts without proper accounting, and that they used the businesses for personal advantage. Further, it is clear from the facts that failing to allow J&T to proceed under its alter ego theory would work a substantial injustice on J&T. Both FDS and Esbex were undercapitalized because of the actions of Lowry and Kinsella. Refusing to pierce the corporate veil in this case would sanction their fraud and deprive J&T of a remedy.

Second, the trial court should not have granted summary judgment to Lowry and Kinsella because personal liability on a corporate contract lies where officers or directors commit torts in the process of performing on the contract. J&T presented sufficient issues of facts as to whether Lowry and Kinsella acted tortiously in carrying out the contract at issue. Thus, this Court should reverse the grant of summary judgment and remand this case back to the trial court for resolution of the issues of fact.

I. SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE GENUINE ISSUES OF FACT EXISTED WHETHER LOWRY AND KINSELLA WERE THE ALTER EGOS OF THE CORPORATIONS.

The trial court incorrectly found that there were no issues of material fact as to whether Lowry and Kinsella were the alter egos of FDS and/or Esbex. In order to successfully oppose a motion for summary judgment, a plaintiff need not prove its alter ego theory. A plaintiff must merely show facts in controversy. *Salt Lake City Corp. v.*

James Constructors, Inc., 761 P.2d 42, 47 (Utah Ct. App. 1988).

Under Utah law, a court will pierce the corporate veil and hold individuals liable under the equitable alter ego doctrine where

(1) there [is] such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow.

Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028, 1030 (Utah 1979). One of the defining characteristics of the alter ego doctrine is that “it is an equitable doctrine requiring that each case be determined upon its peculiar facts.” *See James Constructors*, 761 P.2d at 47 (citing *Nat’l Bond Fin. Co. v. Gen. Motors Corp.*, 341 F.2d 1022, 1023 (8th Cir. 1965)).

In this case, J&T presented enough disputed facts to prevent the district court from properly granting Lowry and Kinsella’s motion for summary judgment as to J&T’s alter ego theory. First, there is a unity of interest and ownership between the corporations, FDS and Esbex, and Lowry and Kinsella. Lowry and Kinsella repeatedly ignored corporate formalities and treated the corporations as personal banks. Second, allowing Lowry and Kinsella to hide behind the corporate shields in this case would work an injustice on J&T and sanction the fraud committed by Lowry and Kinsella.

A. There Is a Unity of Interest and Ownership Between FDS / Esbex and Lowry / Kinsella.

The trial court incorrectly found that there was no evidence, and therefore no issue of fact, that Lowry and Kinsella used the corporations inappropriately. In order to

determine whether the individual and the corporate form have merged, Utah courts generally consider the following significant, if not conclusive, factors:

(1) undercapitalization of a one-man corporation; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) siphoning of corporate funds by the dominant stockholder; (5) non-functioning of other officers or directors; (6) absence of corporate records; (7) the use of the corporation as a façade for operations of the dominant stockholder or stockholders; and (8) the use of the corporate entity in promoting injustice or fraud.

Colman v. Colman, 743 P.2d 782, 786 (Utah Ct. App. 1987) (citing *Ramsey v. Adams*, 603 P.2d 1025, 1028 (Kan. Ct. App. 1979); *Amoco Chems. Corp. v. Bach*, 567 P.2d 1337, 1341-42 (Kan. 1977)). In determining whether this “formalities” prong of the alter ego doctrine is met, courts “look[] through form to substance and ha[ve] often disregarded the corporate form when it was fiction in fact and deed and was merely serving the personal use and convenience of the owner.” *Colman*, 743 P.2d at 786 (quoting *Lyons v. Lyons*, 340 So. 2d 450, 451 (Ala. Civ. App. 1976)).

In considering the above factors, some factors tend to weigh more heavily in favor of piercing the corporate veil. In *Colman*, the court found that many of the above factors were met and commented particularly on the seventh, façade, factor: “[f]ailure to distinguish between corporate and personal property, the use of corporate funds to pay personal expenses without proper accounting, and failure to maintain complete corporate and financial records are looked upon with extreme disfavour.” *Id.* at 786 n.3 (citing *Roylex, Inc. v. Langson Bros. Constr. Co.*, 585 S.W.2d 768, 772 (Tex. Civ. App. 1979)). The *James Constructors* court, too, placed emphasis on the “extent to which the corporate

formalities . . . are observed.” *James Constructors*, 761 P.2d at 47.

Courts frequently disregard the corporate form where only a few of the above elements are present in the case. In *Lyons*, the court disregarded the corporate form and held a shareholder personally liable for, among other things, commingling corporate funds with his own and failing to keep proper corporate records. *Lyons*, 340 So. 2d at 451.

In this case, Lowry and Kinsella completely disregarded the corporate form when it suited their needs. Though FDS and Esbex were struggling to meet their financial responsibilities, Lowry and Kinsella often took money from the corporations for their personal use. (R. 1295, 1300-03, 1642-46.) For example, the former CFO of FDS and the accountant for both entities, John Neubauer, testified that “[i]f [Lowry and Kinsella] needed money, they took it regardless of what the rest of the circumstances were” and that Lowry and Kinsella often took “\$5,000 or 10,000 extra out of the company for a hunting trip or some reason.” (R. 1301, 1642-43.) Mr. Neubauer further testified that Lowry and Kinsella used the corporations “to fund all their personal interests” and that they did so “in spite of the fact that there were significant obligations that had already been incurred.” (R. 1301-02, 1646.)

J&T presented the above evidence to the trial court in support of its alter ego theory. Standing alone, the above evidence is sufficient to raise a question of fact as to whether Lowry and Kinsella disregarded corporate formalities to the extent that there was a unity of interest and ownership to satisfy the first prong of the alter ego doctrine. Even

if the evidence were not conclusive, the issues presented should have proceeded to trial.

B. The Observance of the Corporate Forms of FDS and Esbex Would Sanction Fraud, and an Unjust, Inequitable Result Would Follow.

The trial court incorrectly failed to consider whether the observance of the corporate form in this case would work an injustice or sanction fraud. There is no indication in the trial court's ruling that the trial court considered the prong prior to granting Lowry and Kinsella's motion for summary judgment. (R. 1690-1703.) For this second "fairness" prong of the alter ego doctrine, a plaintiff need not "prove actual fraud, but must only show that failure to pierce the corporate veil would result in an injustice." *Colman*, 743 P.2d at 786 (citing *United States v. Healthwin-Midtown Convalescent Hosp. & Rehab. Ctr. Inc.*, 511 F. Supp 416, 420 (D. Cal. 1981)).

In *Colman*, the court found that use of the corporate entity in that case would result in an injustice because it would convert marital assets into untouchable corporate assets and therefore deprive the wife of a remedy. *Id.* at 788. In *Salt Lake City Corp. v. James Constructors, Inc.*, the court held that genuine issues of fact existed as to whether the alter ego doctrine was satisfied and noted that observance of the corporate shield in that case was unfair and unjust because the corporation was undercapitalized:

It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege.

James Constructors, 761 P.2d at 47 (quoting David Barber, *Piercing the Corporate Veil*, 17 Willamette L. Rev. 371, 386 (1981) (quoting Henry W. Ballantine, *Ballantine on*

Corporations 303 (1946))).

In this case, there was sufficient evidence to demonstrate that allowing Lowry and Kinsella to hide behind the corporate shield would result in an injustice to Plaintiff. Observing the corporate form in this case would sanction the fraud committed by both Lowry and Kinsella. Both FDS and Esbex were clearly undercapitalized, as demonstrated by the short life spans of the two entities, the admission that the two entities were insolvent, and Lowry and Kinsella's penchant for taking money from the corporation without first satisfying the corporations' financial obligations. (R. 1300-04.) Further, since FDS and Esbex were dissolved several years ago, Plaintiff has no other recourse for the wrongs he suffered as a result of the actions of Lowry and Kinsella. In any event, there was sufficient evidence of potential injustice, combined with the above failure to observe corporate formalities, to prevent the court from granting Lowry and Kinsella's motion for summary judgment.

II. SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE ISSUES OF FACT EXISTED WHETHER LOWRY & KINSELA COMITTED FRAUD OR OTHER TORTS IN CONNECTION WITH THE CONTRACT.

The trial court incorrectly held that no personal liability could attach to Lowry and Kinsella for the torts they allegedly committed. Under Utah law, a director or officer may have personal liability under a corporation's contract if he "assumed personal liability, acted in bad faith or committed a tort in connection with the performance of the contract." *Reedeker v. Salsibury*, 952 P.2d 577, 582 (Utah Ct. App. 1998) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1177 (2d Cir. 1993)). This kind of personal liability is

unrelated to piercing the corporate veil: “holding an officer or director personally liable for corporate torts in which they participate is distinct from the piercing the veil doctrine.” *d’Elia v. Rice Dev., Inc.*, 2006 UT App 416, ¶39, 147 P.3d 515. In *d’Elia*, the court found that the alter ego did not apply, but held that personal liability attached to the defendant where he participated in tortuous activities. *Id.* at ¶¶34, 44-45.

The Utah Supreme Court recently clarified that “an officer or director of a corporation is not personally liable for torts of the corporation or of its other officers and agents merely by virtue of holding corporate office, but can only incur personal liability by participating in the wrongful activity.” *Harrison*, 2003 UT 14 at ¶19 (quoting 3A William Meade Fletcher et al., *Fletcher Cyclopedic of the Law of Private Corps.* § 1137 (rev. ed. 2002)). Finally, the court noted with regard to fraud: “a director or officer of a corporation is individually liable for fraudulent acts or false representations of his own or in which he participates, even though his action in such respect may be in furtherance of the corporate business.” *Id.* (quoting 37 Am. Jur. 2d *Fraud and Deceit* § 322 (1968)). The *Harrison* court held that Harrison, a corporate officer, could be held personally liable for “fraudulent acts that she personally committed or in which she participated, but she cannot be held liable for fraudulent acts that she did not know of or participate in that were committed . . . by the corporation itself.” *Id.* at ¶20.

J&T presented issues of fact as to whether Lowry and Kinsella personally committed the following torts in connection with the J&T contract: theft by conversion, constructive fraud, fraudulent nondisclosure, intentional interference with business

relations, and fraudulent misrepresentation. (R. 1021-44.)

A. Theft by Conversion

J&T presented evidence sufficient to withstand summary judgment with respect to its theft by conversion claim against Lowry and Kinsella. Under Utah law, conversion “is an act of willful interference with property, done without lawful justification, by which the person entitled to property is deprived of its use and possession.” *Bennett v. Huish*, 2007 UT App 19, ¶31, 155 P.3d 917 (citing *Jones v. Salt Lake City Corp.*, 2003 UT App 355, ¶9, 78 P.3d 988).

Among other things, J&T presented evidence that Lowry and Kinsella willfully interfered with J&T’s property by the following actions:

- When customers returned J&T products, Lowry and Kinsella kept the refund from J&T and, instead of sending the product back to J&T, resold the product to new customers. (R. 1300, 1303-04, 1642.)
- Lowry and Kinsella knew that they were taking money earmarked for J&T customer refunds. (R. 1301, 1643-44.)
- Lowry and Kinsella repeatedly hid payments from J&T. (R. 1300-04.)

The above evidence creates a question of fact and precludes the trial court’s entry of summary judgment.

B. Constructive Fraud/Fraudulent Nondisclosure

J&T presented evidence sufficient to withstand summary judgment with respect to its constructive fraud and fraudulent nondisclosure claims against Lowry and Kinsella.

Under Utah law, a constructive fraud claim consists of “two elements: (i) a confidential relationship between the parties; and (ii) a failure to disclose material facts.” *d’Elia v. Rice Dev., Inc.*, 2006 UT App 416, 51, 147 P.3d 515 (quoting *Jensen v. IHC Hosps.*, 944 P.2d 327, 339 (Utah 1997)). Utah courts have held that a “fiduciary or confidential relationship may be created by contract” *Wardley Corp. v. Welsh*, 962 P.2d 86, 90 n.5 (Utah App. 1998) (quoting *Hal Taylor Assocs. v. Unionamerica, Inc.*, 657 P.2d 743, 748 (Utah 1982)).

Under Utah law, the elements of fraudulent nondisclosure are very similar to those for constructive fraud: (1) the nondisclosed information is material, (2) the nondisclosed information is known to the party failing to disclose, and (3) there is a legal duty to communicate.” *Hermansen v. Tasulis*, 2002 UT 52, ¶24, 48 P.3d 235 (citing *Mitchell v. Christensen*, 2001 UT 80, ¶ 9, 31 P.3d 572). A legal duty to communicate arises where there is a relationship between the parties. *See Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶17, 143 P.3d 283.

J&T presented evidence to support its constructive fraud and fraudulent nondisclosure claims. J&T asserted that Lowry and Kinsella had a confidential relationship with it through the contract and therefore a legal duty to communicate. Further, J&T presented evidence that Lowry and Kinsella failed to disclose material facts known to Lowry and Kinsella to J&T such as (1) income from coaching fees and some other sales (R. 1300, 1302-03, 1641-42.); (2) actual volume of sales (R. 1303.); (3) the retention and resale of refunded products (R. 1300, 1303-04, 1642.); and (4) receipt of

customer payments (R. 1300-04.). This evidence created material issues of fact and precluded the entry of summary judgment on J&T's claims of fraudulent nondisclosure and constructive fraud.

C. Intentional Interference with Contractual Relations

J&T presented evidence sufficient to withstand summary judgment with respect to its intentional interference with contractual relations claim against Lowry and Kinsella. Under Utah law, the elements of the claim are "(1) . . . the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶20, 116 P.3d 323 (quoting *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982)).

Among other things, J&T presented evidence that Lowry and Kinsella intentionally interfered with J&T's existing and potential economic relations by the following actions:

- When customers returned J&T products, Lowry and Kinsella kept the refund from J&T and, instead of sending the product back to J&T, resold the product to new customers. (R. 1300, 1303-04, 1642.)
- Lowry and Kinsella treated customers who purchased J&T products poorly by failing to appropriately process refunds, by using "hard sell" tactics, and by charging unauthorized amounts to the customers' accounts. (R. 1303-05.)

- After FDS terminated the agreement with J&T, Lowry and Kinsella made the decision to continue selling coaching, to instruct their employees not tell J&T about it, and to keep the money derived from the sales. (R. 1300, 1302, 1641-42.)

These actions harmed J&T by jeopardizing its relationship with its existing and future customers. The above evidence establishes a question of material fact and therefore precluded summary judgment on J&T's intentional interference with contractual relations claim.

D. Fraudulent Misrepresentation

J&T presented evidence sufficient to withstand summary judgment with respect to its fraudulent misrepresentation claim against Lowry and Kinsella. Under Utah law, the elements of a claim for fraudulent misrepresentation are: “(1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.” *Larsen v. Exclusive Cars, Inc.*, 2004 UT App 259, ¶7, 97 P.3d 714 (citing *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980)).

In fact, the District Court originally found that Lowry's statements made in conjunction with the termination of the contract created a question of fact precluding

summary judgment on the fraudulent misrepresentation claim. (R. 1702.) Specifically, J&T presented evidence that Lowry represented that FDS canceled its contract with J&T and that FDS was ceasing to sell J&T's products as of July 19, 2002. (R. 2342-2343.) The contract provides that upon termination, FDS is to "immediately cease: (i) any contact with Jones' leads; (ii) selling Jones' products; (iii) in any way representing to any party that it is a seller of Jones products; and (iv) the use of Jones' trademarks service marks or other Confidential Information." (R. 2348-2349.) Additional evidence was presented that showed that Lowry and Kinsella completely disregarded this representation and continued to sell J&T's products and use J&T's leads. (R. 1323-1567.) The district court acknowledged this evidence. (R. 1702.) Later, on Lowry's second motion for summary judgment, a different district court judge found that the above statement did not "satisfy the element that there be a misrepresentation of a currently existing material fact." (R. 2381-2382.)

Particularly in light of the evidence and the two different interpretations made by two different judges, there is a question of material fact that precludes the entry of summary judgment on J&T's fraudulent misrepresentation claim.

In sum, J&T presented evidence that Lowry and Kinsella personally committed fraud and other torts with respect to the contract with J&T. Such evidence was sufficient to present a genuine issue of material fact as to whether Lowry and Kinsella should be held personally liable under a tort theory of liability.

The trial court clearly erred in granting Lowry and Kinsella's motion for summary

judgment. There was an issue of fact as to whether Lowry and Kinsella were alter egos of the corporations. There was also an issue of fact as to whether personally liability such attach to Lowry and Kinsella under a tort theory of liability. Summary judgment is inappropriate under such circumstances.

CONCLUSION

Therefore, in light of the foregoing, this Court should reverse the trial court's grant of partial summary judgment in Lowry and Kinsella's favor and remand this case back to the trial court.

RESPECTFULLY SUBMITTED this 8th day of April 2009.

HILL, JOHNSON & SCHMUTZ, LC

/s/ Jessica Griffin Anderson

Stephen Quesenberry

Jessica Griffin Anderson

Attorneys for Plaintiff/Appellant

PROOF OF SERVICE

I hereby certify that, on the 8th day of April 2009, two true and correct copies of the foregoing **BRIEF OF APPELLANT** were hand-delivered to the following:

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SMITH HARTVIGSEN, PLLC
215 South State Street, Suite 650
Salt Lake City, Utah 84111

/s/ Jessie Francom

ADDENDA

Addendum A - Ruling Granting in Part Defendants Lowry's and Kinsella's
Motion for Summary Judgment (February 1, 2006)

Addendum B – Order Granting Defendant Jonathan L. Lowry's Motion for
Summary Judgment (October 8, 2008)

FILED IN
4TH DISTRICT COURT
AMERICAN FORK DEPT
STATE OF UTAH
UTAH COUNTY

2006 FEB -11 P 3:27

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

<p>JONES & TREVOR MARKETING, INC.</p> <p>Plaintiff,</p> <p>v.</p> <p>FINANCIAL DEVELOPMENT SERVICES, INC., JEREMY WARBURTON, JOHN NEUBAUER, JONATHAN L. LOWRY, NATHAN KINSELLA and ESBEX, LLC,</p> <p>Defendants.</p>	<p>RULING GRANTING IN PART DEFENDANTS LOWRY'S AND KINSELLA'S MOTION FOR SUMMARY JUDGMENT</p> <p>Case No. 050100038</p> <p>Judge Derek P. Pullan</p>
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This matter came before the Court on Defendants' Jonathan L. Lowry's and Nathan Kinsella's ("Defendants") Motion for Summary Judgment, filed on May 21, 2005. Plaintiff Jones & Trevor Marketing ("Plaintiff" or "J & T Marketing") filed a Memorandum in Opposition on June 24, 2005. On July 21, 2005, Defendants' filed their Memorandum in Reply in conjunction with a motion to strike the bankruptcy deposition of John Neubauer. Plaintiff opposed the motion to strike on August 1, 2005. The Court heard oral argument on both motions on September 22, 2005. The Plaintiff was represented by Mr. Stephen Quesenberry, the Defendants were represented by Mr. Benjamin T. Wilson.

At the hearing, the Court granted Defendants' motion to strike, but allowed J&T Marketing the opportunity to depose Mr. Neubauer again, this time in the presence of Defendants' counsel. On

November 22, 2005, subsequent to the taking of Mr. Neubauer's deposition, Plaintiff filed a Supplemental Memorandum in Opposition to Defendants' Motion for Summary Judgment. On December 12, 2005, Defendants filed a Supplemental Memorandum in Support of their motion for summary judgment. Both parties filed notices to submit for decision, and neither request asked the Court to hear oral argument again on the matter.

UNDISPUTED FACTS

After careful review of the pleadings, the Court finds the following facts are not in dispute:

1. Plaintiff J&T Marketing is a Nevada corporation that sells training courses developed by its owner and principal, Ted Thomas. These courses offer information to those who purchase them about how to buy tax lien certificates and engage in other similar activities to make money. (Amd. Cpl. ¶¶ 1, 10).
2. Defendant FDS was a Utah corporation from June 22, 1998 until November 3, 2004 when it was dissolved. (Amd. Cpl. ¶ 2; Dept. of Commerce Record). During its existence, FDS was engaged in sales and telemarketing activities. (Amd. Cpl. ¶ 11; Lowry Aff. ¶ 2).
3. In late 2001 or early 2002, an employee of FDS, Steve Bullpit, contacted Ted Thomas (President of J&T Marketing) on behalf of FDS to explore the potential for a business relationship. (Thomas Depo. p. 20-22).
4. On January 31, 2002, J&T Marketing entered into a "Sales and Marketing Agreement" with FDS whereby J&T Marketing supplied FDS with the names, addresses and phone numbers of sales leads and FDS marketed and sold Ted Thomas courses through telemarketing and other sales efforts. (Amd. Cpl. ¶ 12, 28; Sales and Marketing Agreement; Lowry Aff. ¶ 12).

5. The Contract provided, among other things that FDS could enroll purchasers of Ted Thomas courses in a program to provide coaching services for \$99 per month. (Amd. Cpl. ¶ 13; Sales and Marketing Agreement).
6. The Agreement allowed FDS to sell its coaching program and charge monthly on-going service fees. (Thomas Aff. ¶ 2H). The Agreement also required Jones to pay FDS a “commission equal to 60% of all gross sales made by Seller.” (*Id.* at ¶ 5(a)(i)).
6. Defendant Esbex.com was created in September 2000 by Defendants Lowry and Kinsella as a product fulfillment company to fulfill product and service orders received through the sales and telemarketing efforts of FDS and other telemarketing companies (Kinsella I Depo. 11:19-25; Neubauer Depo. p. 43)
7. Esbex.com was a DBA of FDS until June 2002, when it became Esbex.com, Inc., a Utah corporation. (Amd. Cpl. ¶ 7; Dept. of Chamber of Commerce Record). Esbex.com provided coaching/mentoring services to purchasers of the Ted Thomas courses. (Amd. Cpl. ¶¶ 11, 14). Esbex.com was dissolved on November 29, 2004. (Dept. Of Commerce Record).
8. Defendant John Neubauer is a former employee and the Chief Financial Officer and Chief Operating Officer of FDS. From the time Mr. Neubauer took over responsibility for the finances of FDS in February 2002 until he left a year later, FDS struggled and found it difficult to make payroll for its approximately 40 employees. (Neubauer Depo. p. 16-17, 40-41; Lowry Depo. 9:19-21).
9. Neubauer was FDS’s principal agent in dealing with J&T Marketing. All communications with J&T Marketing came through Neubauer. He was FDS’s point person and ran the business on a

day-to-day basis. (Neubauer 16:19-21; Lukas Depo. p.17). Neubauer left FDS in early 2003. (Kinsella I Depo. 18:1-2; Lowry Depo. 29:11-13).

10. Defendant Jeremy Warburton was a former employee of FDS and manager of FDS's telemarketing department. In that position, Mr. Warburton helped coordinate FDS's sales and marketing efforts. (Amd. Cpl. ¶¶ 3, 17; Lowry Aff. ¶ 7).
11. Defendants Lowry and Kinsella were the only two shareholders, officers, and directors of FDS and Esbex.com, until those companies dissolved in 2004. (Amd. Cpl. ¶¶ 5-6; Kinsella I Depo. 8:10-15, 11:19-25; Lowry Depo. pp. 17-18).
12. Esbex.com provided product fulfillment services for not only FDS, but also for other companies. (Delia Kinsella Depo. II 9:11, 15-20).
13. FDS experienced trouble using its Visa and MasterCard merchant accounts to clear money on purchases. Because the credit card purchases were expensive and transacted over the phone, they resulted in a large number of refunds and charge backs and, occasionally, frozen merchant accounts. (Neubauer Depo. 18: 10-22).
14. FDS's problems with its merchant accounts culminated when a major merchant account containing credit card charges for Plaintiff's Ted Thomas courses was frozen. (Neubauer 35:11-25, 39:22-25, 40:1-24; Lowry Aff. ¶ 13).
15. Plaintiff J&T Marketing delayed or halted some shipments of its Ted Thomas courses for a number of reasons, including: J&T Marketing would delay shipment of the product if payment was delayed (Lukas Depo. 26:25-27:1, 63:10-22), J&T Marketing employed temporary shipping clerks to assist with product shipment, which resulted in staff turnover and ongoing training and

supervision issues. (Lukas Depo. pp. 65-73; Neubauer Depo. p. 34)

16. J&T Marketing also ceased shipping its Ted Thomas courses due to the dispute over payment. (Lowry Aff. ¶ 13). Failure to receive the courses they had purchased with their credit cards resulted in dissatisfied customers, and charge backs on FDS's credit card merchant accounts. (Neubauer 25:10-18, pp. 33-34, 93:11-17; Lowry Depo. p. 39-40).
17. J&T Marketing withheld delivery on orders because FDS had not timely paid J&T Marketing. FDS withheld payment to J&T Marketing because a percentage of its sales would not go through resulting in charge backs. (Lowry Depo. 49:6-23; Thomas 263: 13-17).
18. On or about July 19, 2002, FDS communicated to J&T Marketing that FDS believed that J&T Marketing was in breach of the Sales and Marketing Agreement. (Lowry Aff. ¶ 14). Lowry, FDS's President, sent J&T Marketing the letter canceling the Agreement.
19. On or about August 29, 2002, J&T Marketing filed suit against FDS and several of its officers and employees (Amd. Cpl.) and on or about November 15, 2002 FDS filed a counterclaim. (Answer, Counterclaim and Jury Demand 11/15/2002).
20. J&T Marketing's Amended Complaint, dated June 17, 2004, alleges the following causes of action:
 - a. Breach of Contract against FDS for selling courses after the contract had been terminated.
 - b. Theft by Conversion against Lowry, Kinsella, Neubauer and FDS by willfully interfering with J&T Marketing's chattel.
 - c. Fraudulent Misrepresentation against Lowry, Kinsella, Neubauer and FDS related to FDS's performance of the contract.

- d. Breach of Duty of Good Faith and Fair Dealing against FDS
 - e. Accounting against FDS.
 - f. Injunctive Relief against Lowry, Kinsella, Warburton, FDS and Esbex.com to enjoin them from future sales and marketing of the Ted Thomas courses.
 - g. Constructive Fraud against Lowry, Kinsella, Warburton and FDS because they “shared a confidential relationship based on their business activities” and “failed to disclose material facts to J&T Marketing.”
 - h. Fraudulent Non-Disclosure against Lowry, Kinsella and FDS related to Defendants’ activities vis-a-vis Plaintiff’s customers and clients.
 - i. Intentional Interference with Business Relations against Lowry, Kinsella and FDS for interfering with Plaintiff’s existing and potential economic relations with clients and sales leads.
- 21. On or about November 3, 2004, FDS and Esbex.com determined that they were insolvent and dissolved. (Lowry Aff. ¶ 18).
 - 22. FDS and Esbex.com considered the coaching services to not be included under the Sales and Marketing Agreement.
 - 23. FDS received refunded Ted Thomas products, and turned around and shipped them out to its customers. (Bankruptcy Depo 62:14-22; Oct. 18 Depo. 16:4-8).
 - 24. The owners, Lowry and Kinsella took money out of the business. (Neubauer Bankruptcy Depo. 92:3-13).
 - 25. Lowry and Kinsella determined the allocation of monies of FDS and Esbex. (Bank. Depo. 93:13-

14, 94:9-12.

CONCLUSIONS OF LAW

Defendants move for summary judgment on J&T Marketing's second cause of action for conversion, third cause of action for fraudulent misrepresentation, seventh cause of action for fraud, eighth cause of action for fraudulent non-disclosure, and ninth cause of action for intentional interference with business relations.

A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). The court is to view all the facts and all reasonable inferences that can be drawn therefrom in the light most favorable to the non-moving party. Bowen v. Riverton City, 656 P.2d 434, 426 (Utah 1982). In opposing a motion for summary judgment, the plaintiff still has the ultimate burden of proving elements of his or her cause of action. "When a party fails to make a sufficient showing of an element essential to the party's case...there can be no genuine issue of material fact since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Celotex Corp v. Catrett, 477 U.S. 317, 321 (1986).

The Alter Ego Doctrine and Piercing the Corporate Veil

A corporation is a legal entity separate and apart from its shareholders. Dockstader v. Walker, 510 P.2d 526, 528 (Utah 1973); see also, Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24, 26 (Utah 1990). The limited liability afforded to shareholders permit them to make capital contributions to business enterprises without placing personal assets at risk. David H. Barber, Piercing the Corporate Veil, 17 Willamette L. Rev. 371, 371-373 (1981); accord Salt Lake City Corp. v. James

Constructors, 761 P.2d 42, 46 n.9 (Utah Ct. App. 1988).

The alter ego doctrine is an exception to this rule. Shareholders can be personally liable if there is "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter ego of one or a few individuals." Colman v. Colman, 743 P.2d 782, 786 (Utah Ct. App. 1987). Additionally, the court must find that observing the corporate form under such circumstances would "sanction a fraud, promote injustice, or result in an inequity." Id.

Courts will "only reluctantly and cautiously pierce the corporate veil." Schafir v. Harrigan, 879 P.2d 1384, 1389 (Utah Ct. App. 1994) (quoting Salt Lake City Corp. v. James Constr., Inc., 761 P.2d 42, 26 (Utah Ct. App. 1988)). "A key feature of the alter ego theory is that it is an equitable doctrine requiring that each case be determined upon its peculiar facts." Salt Lake City Corp., 761 P.2d 42, 26 (Utah Ct. App. 1988); (quoting National Bond Fin. Co. v. General Motors Corp., 341 F.2d 1022, 1023 (8th Cir. 1965)). The Court should examine the following factors to determine whether there is such unity of interest that the corporate veil should be pierced:

(1) undercapitalization of a one-man corporation; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) siphoning of corporate funds by the dominant stockholder; (5) nonfunctioning of other officers or directors; (6) absence of corporate records; (7) the use of the corporation as a facade for operations of the dominant stockholder or stockholders; and (8) the use of the corporate entity in promoting injustice or fraud.

Colman v. Colman, 743 P.2d 782, 786 (Utah Ct. App. 1987). Many of Plaintiff's causes of action against Defendants rest on the alter ego doctrine.

Defendants argue that there is no evidence in the record that would allow Plaintiff to pierce the

corporate veil. Defendants were at all times acting in their corporate capacities and not personally. Defendants also argue that many of Plaintiff's causes of action are really summed up in the breach of contract claim, which would not implicate the Defendants personally. Limited liability to encourage investment is the purpose of a corporation, and as noted, the corporate veil should be reluctantly pierced.

Plaintiff contends that there are material issues of fact in dispute as to whether FDS and Esbex.com were merely the alter egos of Defendants. Plaintiff cites to the Neubauer depositions to demonstrate that Kinsella and Lowry failed to observe corporate formalities, siphoned corporate funds for personal use, and used the corporate entity to promote an injustice or fraud. Neubauer's bankruptcy deposition has been stricken in its entirety, and is only reliable inasmuch as it is corroborated by the October 18, 2005 deposition.

Plaintiff's citation to the Neubauer depositions does not create an issue as to a material fact as to whether FDS and Esbex.com were the alter egos of Defendants. Plaintiff points to Neubauer's statements regarding the decision to continue selling coaching, and to keep the money derived from these sales. Neubauer testified that he understood proceeds from the coaching services to not be covered under the Sales and Marketing Agreement, so that these funds were not supposed to be remitted to J&T Marketing, whether it was before or after the cancellation of the Agreement (the timing of which is unclear from the deposition). Plaintiff's claim is properly characterized as breach of contract based on its interpretation of the contract, and does not implicate the Defendants personally.

Plaintiff cites to Neubauer's testimony that "FDS received refunded Ted Thomas products, and turned around and shipped them out to its customers." While Neubauer testified that he would consult with one of the Defendants before sending out these products, the statement is that FDS performed these

activities. There is no indication that the Defendants were acting outside the scope of their positions within the corporations.

While Neubauer states that Kinsella and Lowry took money from the businesses, he does not state that it was done improperly. In fact, Neubauer states that he doesn't remember how the money was taken out by Kinsella and Lowry, whether by official paycheck or otherwise. (Neubauer Oct. Depo. 40:3-14). He also testified that he did not have information with regards to whether the Defendants acted fraudulently with respect to J&T Marketing, and that he thought FDS and Esbex.com were legitimate companies. (Neubauer Oct Depo. 42:4-15). Significantly, Plaintiff acknowledges that it was Neubauer who ran the day-to-day operations of the businesses and handled communication with J&T Marketing.

Without evidence to show that the Defendants acted in their personal capacity or took funds improperly, Plaintiff cannot sustain its allegation of alter ego.

Conversion

Theft by conversion requires the "willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession." State v. Twitchell, 832 P.2d 866, 870 (Utah Ct. App. 1992).

The Defendants argue that there is no evidence in the record that they converted the property of J&T Marketing to their own use. FDS allegedly failed to remit 40% of sales to J&T Marketing, but even accepting this fact as true, it does not show the Defendants converted J&T Marketing property to Defendants' personal use. Failure to remit is a claim for breach of contract, not conversion.

Plaintiff contends that FDS and Esbex.com were merely the alter egos of Defendants. Plaintiff contends that Kinsella and Lowry failed to observe corporate formalities, siphoned corporate funds for

personal use, and used the corporate entity to promote an injustice or fraud. The Court has already decided that the alter ego doctrine does not apply to the acts of Defendants, and the corporate veil should not be pierced. The Court grants Defendants motion for summary judgment as to the conversion claim.

Fraudulent Misrepresentation

In order to prove fraud, the Plaintiff must show (1) that a representation was made, (2) concerning a presently existing material fact, (3) which was false, (4) which the representor knew to be false or made recklessly, knowing that he had insufficient knowledge upon which to base such representation, (5) for the purpose of inducing the other party to act upon it, (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it, (8) and was thereby induced to act, (9) to his injury and damage. Prince v. Bear River Mutual Ins. Co., 56 P.3d 524, 536 (Utah 2002).

The Defendant argues that contractual promises are not statements of presently existing material facts, unless a party makes those promises without any intent to perform.

The Plaintiff argues that the Defendants made fraudulent statements by inducing J&T Marketing to enter into the contract with FDS without any intention to fully perform. Plaintiff contends that Defendants misrepresented sales and refunds in weekly reconciliation reports and used Ted Thomas' name after the Agreement had been canceled.

There is no evidence at the time of the contract the Defendants had a present intent not to perform. Whether the Sales and Marketing Agreement entitled J&T Marketing to a percentage of the sales from the coaching services is a question of contract interpretation. The Court has already found that Plaintiff cannot pierce the corporate veil. Any misrepresentations as to weekly reconciliation reports or regarding the volume and type of sales made, do not implicate the Defendants personally. There is

also no evidence that either Defendant made statements of presently existing material facts that were false.

One exception is Lowry's written statement that on termination of the contract "FDS would cease selling Thomas's product and cease using Thomas's name and leads." There is evidence in the record that FDS disregarded this representation completely. Drawing all reasonable inferences in favor of the Plaintiff, the Court denies Defendant Lowry's motion for summary judgment as to this claim against Lowry.

Constructive Fraud

Constructive fraud requires Plaintiff to establish by clear and convincing evidence that Plaintiff reposed trust in the Defendants based on an existing fiduciary relationship. Von Hake v. Thomas, 705 P.2d 766, 770 (Utah 1985).

Defendants argue that no fiduciary relationship existed between the parties. Plaintiff contends that FDS had confidential customer lists and that this is the basis for finding a confidential relationship.

As a matter of law, there was no confidential relationship between J&T Marketing and FDS which extended to its officers and directors. Both businesses negotiated a commercial contract at arms length. That contractual relationship did not grant to FDS the exclusive control over J&T Marketing's interests that would give rise to a confidential relationship. See, Kuhre v. Goodfellow, 69 P.3d 286, 291 (Utah 2003). Nothing in the record demonstrates that the Defendants as officers and directors were responsible for failures to disclose.

Fraudulent Non-disclosure

A party alleging fraudulent non-disclosure must prove the following three elements, (1) the

nondisclosed information was material, (2) the nondisclosed information is know to the party failing to disclose, and (3) there is a legal duty to communicate. Hermansen v. Tasulis, 48 P.3d 235, 241-242 (Utah 2002).

The Plaintiff cites no case law supporting its argument that the Defendants had a legal duty to speak. Absent a relationship that would give rise to this duty, Defendants did not have a duty to communicate to Plaintiff. Moreover, there is nothing in the record to demonstrate that the Defendants should be personally liable under this cause of action.

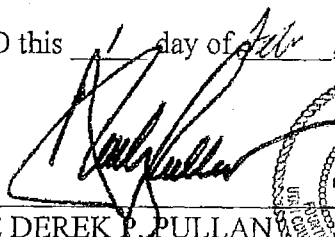
Intentional Interference with Contractual Relations

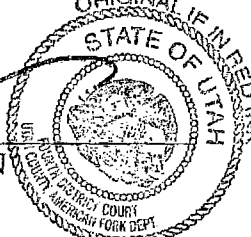
Defendant argues that this is merely a restatement of J&T Marketing's claims for breach of contract and fraud. There is no evidence that Defendants interfered with one of Plaintiff's current or prospective business relationships.

Plaintiff argues that it was FDS that interfered with J&T Marketing's business relationships, but that the corporate veil should be pierced.

Without piercing the corporate veil, this cause of action cannot implicate the Defendants personally.

DATED this 1 day of Feb, 2006


JUDGE DEREK P. PULLAN



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4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR UTAH COUNTY, STATE OF UTAH

JONES & TREVOR MARKETING, INC.,

Plaintiff,

vs.

FINANCIAL DEVELOPMENT SERVICES,
INC., JEREMY WARBURTON, JOHN
NEUBAUER, JONATHAN L. LOWRY,
NATHAN KINSELLA and ESBEX.COM,

Defendants.

ORDER GRANTING DEFENDANT
JONATHAN L. LOWRY'S MOTION
FOR
SUMMARY JUDGMENT

Case No. 050100038
Division 9 – American Fork

Judge: ~~Howard Maertani~~

Mo Jensen

The individual Defendants Jonathan L. Lowry and Nathan Kinsella jointly moved for Summary Judgment on the allegations of the Amended Complaint on May 20, 2005; the matter was briefed and argued; and, in February 2006, the Court ruled, granting the motion completely as to Defendant Kinsella and granting the motion partially as to Defendant Lowry, reserving solely the issue of a claim for a specific alleged fraudulent misrepresentation on the part of Mr. Lowry under the Third Cause of Action of the Amended Complaint. (The February 1, 2006 Ruling Granting in Part Defendants Lowry's and Kinsella's Motion for Summary Judgment is referred to herein as "Ruling".) The reservation went to only Mr. Lowry's alleged

misrepresentation that "FDS would cease selling Thomas's (Plaintiff's) product and cease using Thomas's name and Leads."

On October 9, 2007, Plaintiff appealed the February 2006 Ruling and the attendant Order entered in March 2006, but Plaintiff voluntarily dismissed the appeal in February 2008 on the ground that the appeal had been taken before a final order had been entered, *i.e.*, the remaining issue of fraudulent misrepresentation had not been disposed of. Upon remand, the Court held a scheduling conference on May 5, 2008, and a discussion was had at the conference among the Court and counsel for Plaintiff and Defendant Lowry about the remaining issue. At the conclusion of the conference the Court represented that the Court would exercise its discretion to revisit the remaining issue on a Motion for Summary Judgment. Accordingly a briefing schedule was established at the conference.

Subsequently, Defendant Jonathan L. Lowry, the only remaining individual Defendant, filed a Motion for Summary Judgment with supporting memorandum and submissions dated June 23, 2008, on the sole remaining issue. Plaintiff responded with its memorandum and submissions on July 16, 2008. Defendant filed a reply memorandum on July 28, 2008.

Defendant Jon Lowry's Motion for Summary Judgment came on regularly for hearing on Friday August 22, 2008, at 1:30 p.m. Earl Jay Peck of the law firm of Smith Hartvigsen, PLLC, appeared on behalf of Defendant Jon Lowry. Jessica Griffin Anderson of the law firm of Hill, Johnson and Schmutz, LC appeared on behalf of Plaintiffs.

NOW THEREFORE, the Court having heard the arguments of counsel and considered the respective memoranda and submissions, the Court finds, concludes and orders as follows:

1. The Court has exercised its discretion to re-examine the remaining claim of fraudulent misrepresentation against individual Defendant Jonathan Lowry.

2. The Court finds and concludes that Plaintiff has failed to show evidence of a disputed material fact, *i.e.*, that the alleged statement was made.

a. As stated in its Ruling of February 1, 2006, “[i]n order to prove fraud, the Plaintiff must show (1) that a representation was made, (2) concerning a presently existing material fact, (3) which was false, (4) which the representor knew to be false or made recklessly, knowing that he had insufficient knowledge upon which to base such representation, (5) for the purpose of inducing the other party to act upon it, (8) and was thereby induced to act, (9) to his injury and damage. *Prince v. Bear River Mutual Ins. Co.*, 2002 UT 68, ¶ 41, 56 P.3d 524, 536.

b. Mr. Lowry argues that he did not make the alleged representation. Plaintiff argues that the contract contains a provision that upon termination FDS would stop selling Plaintiff’s product and cease using its name and leads.

c. By its very nature a contractual promise to perform in the future is not a statement of a presently existing material fact unless the promise is made with out any intent to perform, that is, “a promise of future performance, when made with a present intent not to perform and made to induce a party to act in reliance on that promise, constitutes actionable deceit and fraud,” *Von Hake v. Thomas*, 705 P.2d 766, 770 (Utah 1985).

d. The Court finds and concludes that Plaintiff neither presented nor proposed any evidence or argument that would allow a reasonable person to

conclude that Mr. Lowry had no intent to perform the obligations in the contract between the parties when he signed the contract between FDS and Plaintiff.

e. Nothing was submitted to cause the Court to change its conclusion found in the prior Ruling that “[t]here is no evidence at the time of the contract the Defendants had a present intent not to perform. (Ruling at 11.) The Court concludes, therefore, that as a matter of law the statements in the contract between the parties do not satisfy the requirement that the alleged misrepresentation purport to be a statement of a currently existing material fact.

f. Plaintiff also argues that Mr. Lowry made the subject alleged misrepresentation in a letter he signed and sent to Plaintiff dated July 19, 2002. In the July 16, 2001, letter, however, Mr. Lowry does not state that “FDS would . . . cease using Thomas’s name and leads.” (*C.f.* Ruling at 12.) In the July 19, 2002, letter Mr. Lowry does state that “We [FDS] are no longer selling any more Ted Thomas product effective today.” (Exhibit B to Memorandum in Support of Defendant Jonathan L. Lowry’s Motion for Summary Judgment (“Defendant’s. Memorandum”).) As stated in Paragraph 2.c. above, in order for this representation to support or satisfy the requirements of a misrepresentation of a presently existing material fact, the statement would have had to have been made with an intention on Mr. Lowry’s part that FDS would not cease selling the Ted Thomas product. As to this latter statement, Defendant Lowry states in his declaration that he believed that his representation was true when he made it. (Lowry Decl. at Para. 15-16.) Mr. Neubauer who was FDS’s Chief Operating

Officer and Chief Financial Officer at the time states in his declaration that he had received instructions from Mr. Lowry to cease selling Plaintiff's product effective July 19, 2002. (Neubauer Decl. at Paras. 8, 13-14; Lowry Decl. at Paras. 13-16)

g. The only claimed evidence of "no presently existing intent to perform" is the argument put forth in Plaintiff's Memorandum that Mr. Lowry hid evidence of sales of Ted Thomas product after the July 19th letter. (Plaintiff's Opposition to Defendant Jonathan L. Lowry's Motion for Summary Judgment ("Plaintiff's Memorandum") at p. 12). This allegation is made in Plaintiff's Memorandum, but is not supported by any submission. On the other hand, it is undisputed that Mr. Lowry never rescinded this instruction not to sell Ted Thomas products. (Neubauer Decl. at Para. 10.)

h. The only remaining argument that Plaintiff makes in support of its argument that a misrepresentation occurred is that by sending the July 19, 2002 letter, Mr. Lowry intended to terminate the contract and by terminating the contract he was in effect representing what FDS would do upon termination, as stated in the contract between the parties. The Court rejects this argument and finds that Plaintiff has submitted nothing that would directly or by implication refute Defendant's submissions which contained sworn statements that he fully intended that FDS would cease selling Ted Thomas products when he sent his letter of July 19, 2002. The Court concludes that the July 19, 2002 letter does not constitute a current representation that the termination terms would all be

complied with and does not satisfy the element that there be a misrepresentation of a currently existing material fact.

3. Defendant Lowry also argues that he is entitled to Summary Judgment on the ground that Amended Complaint fails to plead the essential elements of fraud. In this regard the Court finds and concludes that:

a. The Amended Complaint makes no allegation that, and no submission is offered by Plaintiff that, would support a finding that Plaintiff was induced to rely upon the alleged misrepresentation. This is particularly important because given the nature and content of the alleged misrepresentation as well as the circumstances under which it was alleged to have been made it is difficult to imagine how reliance could have been induced. Thus, the context in which the alleged misrepresentation was allegedly made does not either infer reliance or allow for a finding of implied reliance. Utah courts hold that "mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude...summary judgment." *Franco v. Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 36, 21 P.3d 198. In the instant case, Plaintiff has failed both to allege induced reliance and failed to offer evidence by submission that would support a finding of induced reliance.

b. Similarly, and for the same reasons set forth above in Para. 3.a above, the Court finds and concludes that the Amended Complaint fails to contain allegations, and Plaintiff fails to otherwise support the necessary element that its reliance on the representation was reasonable.

c. Finally, Plaintiff fails to allege the essential element of damages. Paragraph 52 of the Amended Complaint contains the allegation that "Defendants' fraudulent conduct has injured Plaintiff in an amount no less than \$100,000 by withholding from [Plaintiff] its contractual percent of compensation, by ruining [Plaintiff's] reputation and relationship with its clients, by continuing to use [Plaintiff's] name, Product, leads, etc., by continuing to associate itself with [Plaintiff] and Thomas, and in other ways." This allegation of damages, however, does not describe damages of the type and nature that one could infer would flow from the alleged fraudulent representation here. On the contrary, the referenced damages appear to be contract damages or damages related to some other cause of action. Again the decision in the *Franco v. Church of Jesus Christ of Latter-day Saints*, is applicable: "mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude...summary judgment." 2001 UT 25 at ¶ 36

4. All of the foregoing must be examined in light of the burden of proof that a fraud claimant faces. "As a general rule, fraud is not presumed. When it is alleged, each element of fraud must be established by clear and convincing evidence." 37 *Am. Jur.* 2d Fraud and Deceit, Section 471. "For the evidence to be clear and convincing, it must at least have reached the point where there remains no substantial doubt as to the truth or correctness of the conclusion based upon the evidence." (MUJI 2.19.) In other words, as to the burden to show induced reliance, *i.e.*, that the Defendant made the representation for the purpose of causing the plaintiff to take some action, or causing the Plaintiff not to act, Plaintiff would have to show that there is no substantial

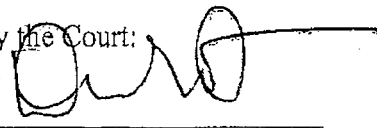
doubt as to the truth or correctness of the allegation of induced reliance. The Court finds and concludes that based upon the parties' submissions to the Court that reasonable minds could not reasonably conclude that Plaintiff would be able to establish any of the elements of fraud in this case by clear and convincing evidence.

5. For the foregoing reasons and the additional reasons set forth in Defendant's Memoranda,

IT IS HEREBY ORDERED that Defendant's Motion for complete Summary Judgment is hereby granted in favor of Defendant Jonathan L. Lowry on the Third Cause of Action of the Amended Complaint; the Court hereby modifies and amends any previously entered judgment or ruling herein which is inconsistent with the findings and conclusions hereinabove; and, Defendant Jonathan Lowry is awarded his costs.

DATED this 8th day of Sept., 2008

By the Court:


Honorable Howard Macfarlane

APPROVED AS TO FORM:

Stephen Quesenberry
Jessica Griffin Anderson
Attorneys for Plaintiff