

Counter-Tech Indus., Inc. v Granmarb, Inc.

2010 NY Slip Op 33228(U)

November 9, 2010

Supreme Court, Suffolk County

Docket Number: 7963-2010

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: **HON. EMILY PINES**
 J. S. C.

Original Motion Date: 03-29-2010, 05-18-2010
 Motion Submit Date: 09-07-2010
 Motion Sequence.: 001 MOTD
 Cross Motion Sequence.: 002 MOTD

[] FINAL DISP
 [x] NON - FINAL DISP

_____ X
COUNTER-TECH INDUSTRIES, INC.,

Plaintiff,

Attorney for Plaintiff
 Justin Block, P.C.
 One Suffolk Square, Suite 500
 1601 Veterans Memorial Highway
 Islandia, New York 11749

-against-

**GRANMARB, INC., JOHN GILIBERTI a/k/a
 GIO GILIBERTI, DIANA "JONES", said name
 being fictitious but intended to designate the office
 manager of Defendant GRANMARB, INC., AGC
 STONE WORKS, INC., and ANTHONY
 GILBERETI**

Attorney for Defendants
 Jamie D. Ezratty, Esq.
 Ezrtatty, Ezratty & Levine, LLP
 80 East Old Country Road
 Mineola, New York 11501

Defendants.
 _____ X

ORDERED, that the motion (motion sequence number 001) by plaintiff brought on by Order to Show Cause (MARTIN, J.) dated March 15, 2010, is granted to the extent indicated herein; and it is further

ORDERED, that the cross-motion (motion sequence number 002) by defendants to dismiss the Complaint as against defendants Diana "Jones", AGC Stone Works, Inc., and Anthony Giliberti and for ancillary relief is determined as set forth below; and it is further

ORDERED, that a status conference is scheduled for November 15, 2010 at 9:30 a.m. before the undersigned.

This action arises out of the business relationship between plaintiff, Counter-Tech Industries, Inc. (“plaintiff” or “Counter-Tech”) and defendant, Granmarb, Inc. (“Granmarb”) in the countertop sale and manufacturing industry. Defendant John Giliberti a/k/a Gio Giliberti (“Gio”), is the principal and sole shareholder of Granmarb. In sum, the submissions reflect that plaintiff was in the business of selling countertops and retained Granmarb to manufacture the finished product, which plaintiff would then install for the customers. There were no written agreements governing the parties’ relationship.

Plaintiff commenced this action against all defendants by the filing of a Summons and Verified Complaint on or about March 15, 2010. On that date, plaintiff also moved, by Order to Show Cause (MARTIN, J.) for an Order directing Granmarb to return any materials, remnants and any other property owned by plaintiff in its possession.¹ The gravamen of the Complaint is that in or around August of 2009, plaintiff and Granmarb discussed merging their two corporate entities, and as a result, plaintiff shared certain confidential information with Granmarb. However, Granmarb did not follow through with the merger and plaintiff alleges that it misrepresented its intentions to do so, inducing plaintiff to disclose the confidential information. Plaintiff alleges claims against Granmarb for breach of fiduciary duty, constructive fraud, unjust enrichment and conversion. Defendant Anthony Giliberti (“Anthony”) is the brother of Gio and the owner of property where Granmarb operates. Defendant AGC Stone Works, Inc. (“AGC”) is a corporation owned by Anthony which operates in the same building as Granmarb. Defendant Diana “Jones” is an employee of Granmarb. Plaintiff asserts claims against all defendants sounding in conspiracy to defraud.

Plaintiff now seeks an Order directing defendants to return “any materials, remnants, jobs (whether finished or unfinished) and any other property or thing owned by Plaintiff presently in the Defendants’ possession, to return the same to Plaintiff forthwith, at Defendants’ cost and expense”. Plaintiff submits an affidavit by Tiffany Levich (“Levich”), manager and corporate Secretary of plaintiff

¹Although plaintiff initially also sought certain restraining orders enjoining defendants from contacting any of plaintiff’s customers or vendors and from holding themselves out as being in business with plaintiff, those requests were withdrawn. The Court need not address these issues further in this Decision and Order.

who sets forth, in some detail, the background regarding the alleged proposed merger of plaintiff and Granmarb. She explains that ultimately, Granmarb and Gio discontinued talks of merging with plaintiff and Granmarb also relocated to the building owned by Anthony. At this time, Levich alleges that the work performed by Granmarb deteriorated causing plaintiff to incur additional expenses and lose several customers, which had a negative impact on its reputation. Plaintiff seeks return of certain materials it claims Granmarb has in its possession, which Granmarb is refusing to release without payment it alleges is owed. Plaintiff argues that the materials belong to Counter-Tech and the Court should order the return immediately.

Defendants oppose the motion and cross-move for an Order, *inter alia*, dismissing the action as against defendants Diana “Jones”, AGC and Anthony; awarding sanctions and punitive damages against plaintiff for frivolous conduct in naming the aforementioned defendants; compelling plaintiff to pay all outstanding invoices owed to Granmarb to pay all storage fees; and awarding counsel fees. Defendants submit an affidavit by Gio, president of Granmarb who claims that plaintiff is seeking to retrieve materials Granmarb fabricated, without paying for such materials and, that Granmarb has been storing plaintiff’s materials at great expense. Gio explains that although the parties discussed a possible merger of the companies, there was neither a formal proposal nor written contract. When Granmarb discontinued the discussions, plaintiff began complaining about its workmanship and further refused to pay for certain jobs. Gio further notes that with regard to several jobs, plaintiff’s representative “signed off” that the pieces were inspected and found to be in good condition. Also, Gio states that there are several slabs of granite and/or marble which plaintiff left in Granmarb’s facility and seeks storage fees for these materials because they take up a lot of space. Defendants argue that plaintiff is not entitled to the return of the materials without first paying for (1) work that Granmarb performed for plaintiff; and (2) the storage fees associated with the materials left in Granmarb’s facility.

Turning to the request for dismissal of the action against Diana “Jones”, Anthony and AGC, defendants assert that Diana “Jones” is merely an employee of Granmarb and argues that no allegations have been specifically interposed against this defendant. Further, while AGC occupies the same building as Granmarb, it is a separate entity that shares no common customers or contracts with Granmarb. Finally, Anthony is merely the landlord of the property and the owner of AGC. Thus, defendants urge the Court to dismiss the action as against these defendants.

Plaintiff opposes the cross-motion and submits a reply to its initial motion via an affidavit of Levich, affirmation of counsel and further exhibits. Levich explains the counter top manufacturing and installation process and that plaintiff utilized Granmarb to fabricate stone countertops because it was unable to do so until recently. Levich also reiterates that the parties had discussed merger but Granmarb discontinued the talks and its work began deteriorating. Plaintiff was forced to reorder materials at its own expense and reinstall the countertops and as a result suffered damages including the replacement materials, cost of sending employees out to reinstall countertops, reductions or refunds to the customers and even the loss of a customer, Procida Tile. Plaintiff alleges Granmarb has numerous slabs and remnants which belong to Counter-Tech, and annexes a list to its reply papers. Plaintiff believes that in fact, AGC is using plaintiff's remnants for its own jobs, which is why Granmarb has not returned the materials. Thus, plaintiff seeks an Order directing the return of the materials and further denying the cross-motion to dismiss against AGC and Anthony. With regard to Diana "Jones", plaintiff argues that since she is the office manager of Granmarb, she was aware of the improper conduct and the action should proceed against her as well. Based on the foregoing, plaintiff requests that the Court grant the relief requested in the Order to Show Cause and deny the cross-motion in its entirety.

Defendants submit a further reply to plaintiff's opposition to the cross-motion via affidavits of Gio and Anthony. Gio claims that plaintiff's complaints about its work were only the result of Granmarb's refusal to merge with Counter-Tech and Granmarb had no contractual obligations to Counter-Tech in said regard. Gio further explains that it is the practice of Granmarb to keep remnants separated and has not used any of Counter-Tech's remnants for other customers nor given them to AGC or Anthony. He claims there are over 70 Counter-Tech remnants in Granmarb's possession - more than even claimed by plaintiff. Granmarb has retained the remnants because plaintiff owes it in excess of \$14,000.00 for outstanding work and storage fees. Gio also reiterates that the claims against Anthony, AGC and Diana Jones are frivolous and should be dismissed. In Anthony's affidavit, he again states that he "has not been given or sold any of Plaintiff's granite or marble remnants", and has not "taken them, destroyed them, bought them, used them, stolen them, fabricated them, sold them, or otherwise appropriated them." He further states that he does not have them in his possession and his sole connection to this case is that he is the landlord for Granmarb. Thus, the action should be dismissed against him.

Initially, with regard to the return of plaintiff's materials in the possession of Granmarb, the Court finds that the marble and granite slabs and remnants should be returned to plaintiff. Defendants do not dispute that they have the materials, and in fact, complain that they are heavy and consume a lot of space at Granmarb's facility. Interestingly, the Court notes that Granmarb believes and acknowledges that it has more slabs and remnants of Counter-Tech than plaintiff even claims. Counsel for the parties, upon consultation with plaintiff and Granmarb, shall arrange for the materials to be returned to plaintiff, within thirty (30) days from the date herein. The issue of the amounts Granmarb alleges are due and owing for jobs and storage fees is referred to the trial of this matter.

In addition, defendants' motion to dismiss the Complaint as against AGC, Anthony and Diana Jones is granted. Diana Jones was merely an employee of Granmarb and the Complaint does not set forth any distinct allegations against this defendant. With regard to AGC and Anthony likewise, the Complaint fails to state a cause of action. It is clear that neither of these defendants had a fiduciary relationship with plaintiff and the Complaint fails to comply with the specificity requirements of CPLR §3016, with regard to its claims of fraud against these defendants. Anthony, as landlord, and AGC, as cotenant with Granmarb, were separate entities and operated distinct from Granmarb and plaintiff. The Complaint is thus dismissed as against AGC and Anthony as well.

Counsel are reminded that a status conference is scheduled for November 15, 2010 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: November 9, 2010
Riverhead, New York



EMILY PINES
J. S. C.

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