

COPY

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Hamptons Expo Group, LLC,

Plaintiff,

-against-

Max Fishko and Jeffrey Wainhouse, individually
and doing business as artMRKT, ARTMRKT, Inc.
and "XYZ Corp. No 1 through No. 10", inclusive,
the names of the last 10 defendants being fictitious,
the true names of said defendants being unknown
to plaintiff,

Defendants.

Motion Sequence No.: 001; MOT.D

Motion Date: 3/14/11

Submitted: 4/6/11

Index No.: 45640/2010

Attorney for Plaintiff:

Esseks, Hefter & Angel, LLP
108 Main Street, P.O. Box 279
Riverhead, NY 11901

Attorney for Defendants:

Farrell Fritz, P.C.
2488 Montauk Highway
P.O. box 1980
Bridgehampton, NY 11932

Clerk of the Court

In an action arising from a business relationship, the defendants Max Fishko and Jeffrey Wainhouse, individually and doing business as artMRKT, move to dismiss the complaint pursuant to CPLR §3211(a)(1) and (7). Plaintiff opposes the motion.

This action was commenced on December 17, 2010. The instant motion for dismissal is a pre-answer motion. The complaint contains ten causes of action. The first through third causes of action seek injunctive relief. The fourth cause of action seeks an accounting; the fifth cause of action seeks damages based on a theory of breach of fiduciary duty; the sixth cause of action seeks damages based on the defendants' alleged concealment and misappropriation of plaintiff's confidential information; the seventh cause of action seeks damages based on the theory of unjust enrichment; the eighth seeks damages based on alleged wrongful interference with, *inter alia*, contractual relations; the ninth seeks damages for defendants' alleged unfair, unlawful competition and/or

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interference with plaintiff's business; the tenth seeks damages for alleged conversion. The essential factual thrust of the instant complaint is that defendants Fishko and Wainhouse and the owner/operator of plaintiff, Richard Friedman, had worked together for a period of time and that said defendants, during their involvement with plaintiff, formed a competing enterprise engaged in the same business as the plaintiff, to wit, the planning and production of art fairs at various locations nationally. The complaint alleges, *inter alia*, that the business started by defendants Fishko and Wainhouse immediately prior to the commencement of this action in December, 2010, was predicated on the information and property upon which plaintiff's business was based.

The defendants' motion is based on certain "1099" forms for defendants Fishko and Wainhouse for the years 2009 and 2010. Their attorney avers in support of this motion that this documentary proof that the defendants were "treated as independent contractors by plaintiff" (affirmation in support, at ¶4) warrants dismissal. Upon a CPLR §3211 motion generally, the pleading is to be afforded a liberal constriction and the facts alleged are accepted as true for purposes of the motion; plaintiff is accorded the benefit of every possible favorable inference (see, Leon v. Martinez, 84 NY2d 83 [1994]; EBCI, Inc. v. Goldman, Sachs & Co., 5 NY3d 11 [2005]). Under §3211(a)(1) specifically, "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the claims asserted as a matter of law" (see *ibid.*; see also, Goshen v. Mutual Life Insurance Company of New York, 98 NY2d 314 [2002] ("... such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]."); Uzzle v. Nunzie Court Homeowners Association, 70 AD3d 928 [2nd Dept., 2010]; Jones v. OTN Enterprises, Inc., 84 AD3d 1027 [2nd Dept., 2011]). The documentary proof submitted by plaintiff, certain 1099 forms, does not establish a defense to any of the claims in the complaint as a matter of law and the §3211(a)(1) branch of the motion is therefore denied (see, Hernandez v. Chef's Diet Delivery, LLC, 81 AD3d 596 [2nd Dept., 2011] ("Contrary to the determination of the Supreme Court, the defendants failed to submit documentary evidence conclusively establishing that the plaintiffs were independent contractors and not employees [citations omitted]. Initially, the federal income tax documents submitted by the defendants which identified some of the plaintiffs as independent contractors were insufficient to conclusively establish that the plaintiffs and the other drivers in the putative class were independent contractors. "While the manner in which the relationship is treated for income tax purposes is certainly a significant consideration, it is generally not singularly dispositive" [citations omitted].").

On a motion pursuant to CPLR §3211(a)(7) (failure to state a cause of action) "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint . . . and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one [citation omitted]" (see, Leon v. Martinez, 84 NY2d 83 [1994]). In light of the proof adduced by the respective parties upon this motion, the Court finds that the plaintiff has adequately pled its claims "sufficient to withstand ... a CPLR 3211(a)(7) challenge" (Goshen v. Mutual Life Insurance Company of New York, 98 NY2d 314 [2002]; cf., Jones v. OTN Enterprises, Inc., 84 AD3d 1027

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[2nd Dept., 2011]). Accordingly, the branch of defendants' motion for dismissal pursuant to CPLR §3211(a)(7) is denied.

So ordered.

Dated: July 6, 2011



HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION _____ X _____ NON-FINAL DISPOSITION