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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

ENMARK TRADING, INC., a California corporation,

Plaintiff,

vs.

ROBERT VALONE, an individual; and DOES 1 to 100, inclusive,

Defendants.

CASE NO. BC 333773

~~[PROPOSED]~~ ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Date: December 12, 2006
Time: 9:00 a.m.
Dept: 16

Assigned to Hon. Rita Miller, Dept. 16

Action Filed: May 20, 2005
Trial Date: February 27, 2007

The motion of Defendant Robert Valone for summary judgment came on for hearing on December 12, 2006, in Department 16 of this Court. Defendant Valone was represented by his counsel Stephen D. Treuer, and Plaintiff Enmark Trading, Inc. was represented by its counsel Craig J. Stein.

Having considered the moving, opposition, and reply papers, including the declarations and other evidence, the additional papers filed with leave of the Court, and the arguments of counsel, the Court GRANTS Defendant Valone's motion for summary judgment on the grounds that there is no triable issue of material fact and Valone is entitled to judgment as a matter of law. Specifically, the Court concludes that Valone is entitled to summary judgment because he has met his burden of showing based on undisputed

a motion for summary judgment to provide an unequivocal response of "disputed" or "undisputed" to each fact. If a fact is disputed, there must be a citation to evidence controverting the fact. Plaintiff was reminded of these requirements on 11/22/06, but has failed to cure all the problems of this type in the papers. To the extent these problems have not been cured, plaintiff's claim that certain facts are "disputed" has not been credited. In particular, facts 42, 43, 44 + 47 are unsupported by evidence. Facts 2, 5, 6, 7, 12, 20, 35, 42, 43, 44, 45 + 64 are treated as undisputed, as they contain no citation to evidence.

evidence that Enmark cannot establish the essential elements of fraud and negligent misrepresentation.[1]

Plaintiff's Second Amended Complaint

Enmark filed a Second Amended Complaint for Damages: Intentional Misrepresentation; Negligent Misrepresentation ("2nd AC") against Valone. Enmark is in the business of importing and selling linens. (2nd AC ¶ 2.) Valone was at all relevant times the President of Strouds Acquisition Corporation. (2nd AC ¶ 5.) Strouds operated retail stores and was a customer and debtor of Enmark. (2nd AC ¶¶ 8-9.) In late 2002 or early 2003, Strouds stopped paying its trade creditors, including Enmark. (2nd AC ¶ 9.) On January 15, 2003, Strouds met with its trade creditors to discuss "proposals for [Strouds'] future survival." (2nd AC ¶ 12.) Both Valone and Enmark's President and CEO, Allan Gordon, attended the meeting. (2nd AC ¶¶ 12-13.) At the meeting, Valone allegedly provided Enmark "written financial information" about Strouds' "financial condition and prospects."

On January 17, 2003, Strouds sent Enmark a letter proposing a workout agreement between Strouds and its trade creditors under which the participating creditors would receive partial payment for their existing claims in exchange for continued sales to Strouds and their agreement to reduce their claims. (2nd AC ¶¶ 14.) A copy of the letter is attached

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[1] The motion was originally noticed for hearing on November 9, 2006. The notice of motion was timely pursuant to the July 12, 2006 Stipulation and Order to Shorten Notice Period for Summary Judgment Motion and the August 21, 2006 minute order of this Court entered upon the stipulation of the parties on that date. (See Declaration of Stephen D. Treuer dated October 5, 2006.) On October 20, 2006, the Court granted Enmark's ex parte application to extend the hearing date to allow Enmark additional time to file its opposition papers. On Enmark's application, the Court continued the hearing date to November 22, 2006. At the hearing on November 22, 2006, the Court determined that Enmark's opposition papers were deficient because they failed to comply with the requirements of C.C.P. §437c(b)(3) and C.R.C. 342(h). The Court granted Enmark leave to correct the deficiencies pursuant to *Parkview Villas Ass'n, Inc. v. State Farm Fire & Cas. Co.* (2005) 133 Cal. App. 4th 1197, and continued the hearing to December 12, 2006. The motion was submitted after oral argument on that date.

to Enmark's second amended complaint. Among other things, the January 17, 2003 letter stated, "**Please note that the Company has not filed for bankruptcy protection and, subject to the Company's ability to stabilize its financial situation and receipt of the requisite creditors' acceptance of the repayment proposal outlined herein, has no intention of doing so.**" (Exhibit A to 2nd AC, emphasis in original.)

Following the January meeting, Valone allegedly told Enmark that Strouds would be receiving new capital. (2nd AC ¶¶ 18-24.) On March 6, 2003, Valone sent Enmark an e-mail that said, "Funding occurred today! Your the first to hear. We are recapitalized." (2nd AC ¶ 25, and Exhibit F to 2nd AC.) After receiving the e-mail, Enmark allegedly instructed its overseas vendors to ship goods to Enmark to fill Strouds' purchase orders. (2nd AC ¶¶ 26.) Enmark did not deliver the goods to Strouds until "on or about April 11, 2003." (2nd AC ¶ 28.) Before delivery, on March 19, 2003, Enmark received an e-mail announcing that "the first phase in the recapitalization of Strouds by Fog Cutter Capital Group Inc. occurred on Thursday, March 6." (2nd AC ¶ 27 and Exhibit I to 2nd AC.)

On May 21, 2003, Strouds declared bankruptcy. (2nd AC ¶ 4.) As a result of Strouds' bankruptcy, Enmark was not paid for the goods delivered in April 2003. (2nd AC ¶ 46.)

Applicable Law

The elements of fraud are (1) misrepresentation, (2) knowledge of falsity, (3) intent to defraud (induce reliance), (4) justifiable reliance, and (5) resulting damage. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal. 4th 167, 173.) The elements of negligent misrepresentation are "misrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another's reliance on the fact misrepresented; ignorance of the truth and justifiable reliance." (*Shamisian v. Atlantic Richfield Co.* (2003) 107 Cal. App. 3d 967, 983.) Negligent misrepresentation cannot be based on suppression of a fact. (*Id.* at 984.)

A defendant's motion for summary judgment "necessarily includes a test of the sufficiency of the complaint." (*American Airlines, Inc. v. County of San Mateo* (1996) 12

Cal. 4th 1110, 1117.) In a fraud action, plaintiff must specifically plead facts comprising each element of fraud. (*Committee on Children's Television, Inc. v. General Foods Corp.*, (1983) 35 Cal. 3d 197, 216.) The same pleading rules apply to negligent misrepresentation. (*Murphy v. BDO Seidman LLP* (2003) 113 Cal.App.4th 687, 701.) The plaintiff must plead facts "which show how, when, where, to whom, and by what means the [allegedly untrue] representations were tendered." (*Murphy*, 113 Cal.App.4th at 692 (*quoting Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 645).) In opposing the defendant's motion, "the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers." (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal. App. 4th 95, 98 n.4.)

Discussion

I. Burden of Defendant as Moving Party

Valone is entitled to summary judgment if he shows that Enmark cannot establish an essential element of each cause of action on which the complaint is based. C.C.P. 437c(p)(2). As discussed below, based on the undisputed material facts, Enmark cannot establish the elements of fraud and negligent misrepresentation.[2]

II. Alleged False Representations of Fact

A. The Forecast of Future Sales

At the meeting on January 15, 2003, Valone gave Enmark a spreadsheet forecasting Strouds' projected sales and its available bank credit (Exhibit E).[3] Valone's SUF 17

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[2] Many of Enmark's responses to Valone's separate statement of facts are equivocal and fail to comply with CRC 342(f) because they fail to state the fact in dispute, the nature of the dispute, and describe the evidence that creates a factual dispute. Review of the evidence cited by Enmark shows that none of it creates a genuine material dispute as to an issue for which Valone's separate statement of facts are cited.

[3] Unless otherwise noted, exhibits identified by letter (e.g., Exhibit E) are exhibits in support of Valone's motion for summary judgment.

(undisputed).[4] The spreadsheet was not a misrepresentation of fact because it was a prediction about the future: the amount of future sales and the amount of bank credit that would be available based on assumptions about future events. Valone's SUF 18.[5] A statement about a future event is merely an opinion, not an actionable statement of fact. (*San Francisco Design Center Associates v. Portman Companies* (1995) 41 Cal. App. 4th 29, 44.)

Furthermore, although Enmark's opposition papers assert that the spreadsheet "overstated inventory," the spreadsheet is not alleged in Enmark's complaint and therefore cannot be raised in opposition to the motion for summary judgment. The second amended complaint does not even mention the forecast of future sales and bank credit availability, much less allege facts that Enmark contends make the forecast false.

In addition, Enmark does not cite evidence in its opposition papers that supports its assertion that the spreadsheet overstated inventory. See Enmark's SUF 3. Enmark cites the declaration of Scott Zehner, ¶¶ 10-16, but Zehner's declaration does not mention the forecast of future sales and bank credit availability. Enmark also cites the declaration of Allan Gordon, ¶ 19, which simply states that the value of the inventory was overstated without providing any basis for the assertion.[6]

Furthermore, Enmark cannot establish that if the forecast overstated the value of the inventory, Valone knew it was false or lacked reasonable grounds to believe it was true.

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[4] "Valone's SUF" refers to Valone's Separate Statement of Undisputed Facts and Supporting Evidence. "Enmark's SUF" refers to the Enmark's Statement of Undisputed Facts, which is pages 28 to 34 of Enmark's Amended Response to Defendant's Separate Statement, dated November 30, 2006.

[5] Enmark's response to Valone's SUF 18 does not cite evidence contradicting the fact that Gordon understood that the spreadsheet (Exhibit E) contained projections, as Gordon admitted in the cited portions of his deposition.

[6] Valone's evidentiary objection to ¶19 of Gordon's declaration (lack of foundation) is ~~sustained because Gordon's declaration fails to establish that he had personal knowledge of the value of Strouds' inventory.~~ overruled.

Valone did not prepare the forecast. Valone's SUF 19. Valone also was not specifically responsible for maintaining the financial books and records, and Strouds' Chief Financial Officer reported directly to the Chairman of the Board of Directors, rather than Valone. Valone's SUF 3 and 4.

Finally, Enmark cannot establish that it relied on the forecast as a representation of fact, because Enmark's President, Allan Gordon, has admitted that he understood the spreadsheet was a forecast rather than a representation of fact:

> Q So you understood that this is a forecast of what their plans were in terms of sales?
>
> A Yes. (Gordon Depo., page 99, lines 20-22.)
>
> * * *
>
> Q Okay. Let me ask you to look at Exhibit 9 and tell me if there's anything in that document -- it's the spreadsheet, the forecast. Is there anything in that that you believe is a misrepresentation?
>
> A Not that I can think of. Again, these are projections. (Gordon Depo., page 140, lines 2-11.)

Valone's SUF 18. Allan Gordon also admitted that he did not attempt to compare the forecast to Strouds' actual sales. Valone's SUF 61.

B. <u>The Liquidation Analysis</u>

At the January 15, 2003 meeting, Valone also gave Enmark a liquidation analysis (Exhibit D). Valone's SUF 17 (undisputed). The liquidation analysis was not a misrepresentation of fact because it estimated Strouds' hypothetical recovery in a hypothetical liquidation some time in the future. Valone's SUF 20 and 21.[7] (*See San Francisco Design Center*, 41 Cal. App. 4th at 44 (a statement about a future event is merely an opinion, not a statement of fact); *Assizadeh v. California Federal Bank, FSB*

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[7] Enmark does not cite evidence to dispute Valone's SUF 20 and 21 but merely refers to its evidentiary objections to the liquidation analysis, which have no merit because Enmark admits that the liquidation analysis (Exhibit D) was distributed at the January 15, 2003 meeting.

(2000) 82 Cal. App. 4th 399, 412 (matters of opinion are not statements of fact).) Furthermore, although Enmark contends that the liquidation analysis overstated Strouds' inventory, the liquidation analysis is not alleged in Enmark's second amended complaint and therefore cannot be raised in opposition to the motion for summary judgment.

In addition, Enmark cites no evidence supporting its assertion that the liquidation analysis overstated Strouds' inventory. See Enmark's SUF 6. Enmark cites the declaration of Scott Zehner, ¶ 13, which merely notes a discrepancy between the inventory valuation used in the liquidation analysis and other records he examined. Zehner does not state which was correct. Zehner also does not question the estimate that in a liquidation the recovery from a sale of the inventory would be $25 million or less. Exhibit D.

For the reasons discussed above, Enmark cannot establish that Valone knew any of the estimates in the liquidation analysis were false or even that he lacked reasonable grounds to believe it was true. Valone did not prepare the liquidation analysis (Valone's SUF 22) and was not responsible for maintaining Strouds financial books and records. Valone's SUF 3 and 4.

Finally, even if the liquidation analysis overstated the value of Strouds' inventory, Enmark could not have reasonably relied on the analysis to conclude that Enmark would be paid, because the point of the analysis was that Strouds' assets, including its inventory, were insufficient to satisfy Strouds' obligations. Exhibit D and Valone's SUF 20 and 21. The liquidation analysis disclosed that Strouds had secured claims of more than $23 million but that the liquidation value of all of its inventory was only $25 million. Exhibit D. The analysis estimated that the trade creditors, who where unsecured, would recover only 5.5% in a liquidation. The January 17, 2003 letter explained that in a liquidation "unsecured creditors would receive a very small return (5%), *if any*, on their obligations sometime in the far off future." Exhibit F, emphasis added. The liquidation analysis therefore gave Enmark no reason to believe that the value of Strouds' inventory (which secured the claims of Strouds' secured creditors) was sufficient to satisfy its obligations to its unsecured trade creditors.

C. The Representations of Future Investments and Valone's March 6, 2003 E-Mail to Allan Gordon

Enmark's second amended complaint alleges that between the January 15, 2003 meeting and March 6, 2003, Valone made representations to Enmark about future investment in Strouds. (2nd AC ¶¶ 18-24.) Enmark's own Statement of Undisputed Facts does not identify any of the alleged representations, and Valone has shown that the alleged statements before March 6, 2003, were not representations of fact because they were statements about future actions by third parties: "Statements as to future actions by some third party are deemed opinions, and not actionable fraud." (*Nibbi Brothers, Inc. v. Brannan Street Investors* (1988) 205 Cal. App. 3d 1415, 1423, *quoting* 4 Witkin, Summary of California Law (8th ed. 1974) Torts, § 447, p. 2712.)

It is undisputed that at the meeting on January 15, 2003, the Chairman of Strouds' Board of Directors, Walter Cruttenden, stated that he intended to make a further investment ("a few million") in the company. Valone's SUF 25; Gordon Depo., page 95, line 20 to page 96, line 8. The January 17, 2003 letter to trade creditors (Exhibit F) stated, "All of this will become feasible by virtue of a significant investment by our majority shareholder."[8] Valone's SUF 30 (undisputed). The February 10, 2003 letter (Exhibit H) predicted that the "company's recapitalization and new capital infusion" would take place the following week. The February 20, 2003 letter (Exhibit I), however, announced that the additional investment in the company "has taken longer than originally planned." The letter also made it clear that the exact amount of the new investment had not been determined. Exhibit I.[9]

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[8] Valone did not prepare the January 17, 2003 letter. Valone's SUF 31. The evidence that Enmark cites in opposition to Valone's SUF 31 does not contradict Valone's assertion. Although the cited deposition testimony states that Valone may have been consulted about advertising plans described in one letter, it does not say he was consulted about the statement about the investment by Walter Cruttenden. Valone Deposition, Vol. II, p. 236.

[9] Enmark cites no evidence to contradict Valone's representation that he did not prepare the February 10 and 20, 2003 letters. Valone's SUF 34 and 36. The statement by Valone (footnote continued)

Although paragraph 23 of Enmark's second amended complaint alleges that on March 5, 2003, Gordon met with Valone "at [Strouds'] offices" and that they discussed Strouds' orders and "Valone assured Gordon that financing was imminent," Gordon testified in deposition that the meeting was cancelled and they only passed in the parking lot. Valone's SUF 38. See also Gordon Decl. ¶27, 7:13-14 (admitting the meeting was cancelled). In his deposition, Gordon described a very brief encounter and admitted that he and Valone did not "get into a lot of details." *Id.*

The first alleged representation about an existing fact took place on March 6, 2003. On that day, Valone sent Gordon an e-mail that stated, "Funding occurred today! Your the first to hear. We are recapitalized!" Valone's SUF 40; Exhibit K. Enmark contends that the e-mail was a misrepresentation that the contemplated financing was "complete" on March 6, 2003, and that Strouds was "fully" capitalized. There is no dispute about the content of the e-mail, but contrary to Enmark's assertion, it did not represent that the financing was "complete" or that Strouds was "fully" capitalized.

Moreover, Enmark cannot establish that it reasonably relied on the March 6, 2003 e-mail in the mistaken belief that Strouds was completely or fully capitalized. Gordon responded to the e-mail with a request for notification of the "official thing." Valone's SUF 41 (undisputed). On March 7, 2003, Enmark received the "official thing," a press release (Exhibit M) that announced that Fog Cutter Capital Group had acquired a controlling interest in Strouds the previous day as part of a "two-stage infusion of working capital." Valone's SUF 43 and 44. Enmark waited until it received the press release to order the goods for Strouds' orders shipped from China. Valone's SUF 45.[10] If Enmark

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following Strouds' bankruptcy that he "ran" the company does not mean that he was involved in the new capital investments or that he prepared the letters regarding the investments. It also does not mean that he was personally involved in every aspect of the corporation's business, as Enmark contends.

[10] Enmark disputes Valone's SUF 45 on the grounds that the cited deposition testimony does not identify the press release as the Fog Cutter press release. But Gordon's (footnote continued)

mistakenly believed the re-capitalization of Strouds was complete on March 6, the Fog Cutter press release corrected that misunderstanding by informing Enmark that the investment on March 6 was part of a two-stage investment. (Exhibit M.) Gordon did nothing after receiving the press release to find out more about the two-stage investment described in the press release. Valone's SUF 48.

Enmark also cannot establish reliance on Valone's March 6, 2003 e-mail because Enmark's alleged interpretation of the e-mail was corrected a second time by the March 19, 2003 e-mail Enmark received from Strouds (Exhibit O). The March 19, 2003 e-mail announced that the "first phase in the recapitalization of Strouds by the Fog Cutter Capital Group, Inc. occurred on Thursday, March 6." Valone's SUF 50 (undisputed). Gordon admitted that when he received the e-mail, he understood that the first phase of the recapitalization took place on March 6 and he made no assumptions about whether the second stage had taken place:

> Q Now, when you received this e-mail on March 19th --
>
> A Uh-huh.
>
> Q -- you understood that that was only the first phase; right?
>
> A Right.
>
> Q And you made no assumption at this time about whether the second phase had taken place?
>
> A That is correct. (Gordon Deposition, page 202, line 18, to page 203, line 1.)

Enmark controlled the goods until they were delivered on April 11, 2003. Valone's SUF 59 and 60. Enmark admits that it relied on the March 19, 2003 e-mail in making its decision to deliver the goods to Strouds. 2nd AC ¶ 27. Because the e-mail informed

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deposition transcript at pages 177 to 187 makes it clear that the press release was the Fog Cutter press release (Exhibit M). In its amended opposition papers, Enmark withdrew its initial evidentiary objection to the Fog Cutter press release (Exhibit M). Moreover, Gordon admitted that he relied on a press release and Valone's March 6, 2003 e-mail was not a press release. It was a private e-mail from Valone to Gordon.

Enmark that only the first phase occurred on March 6, Enmark cannot establish that it delivered the goods based on a reasonable belief that the financing was complete on that date.

D. Mere Statements of Opinion Are Not Misrepresentations of Fact

Enmark's second amended complaint also alleges that at unspecified times Gordon was told by unspecified persons "that [Strouds] would be adequately funded, properly capitalized, properly managed, and that it would be safe to continue to sell its goods to [Strouds]." 2nd AC ¶ 29. The allegation fails to plead fraud or negligent misrepresentation because it does not allege the statements with particularity. Because they are not properly pleaded, Valone has no obligation address the claims. *FPI Development, Inc. v. Nakashhima*, 231 Cal. App. 3d 367 (1991). Moreover, neither Enmark's separate statement of facts nor its opposition papers provide evidence of the alleged statements. Furthermore, even if evidence of the alleged statements existed, they would not constitute fraud or negligent misrepresentation because they are mere statements of opinion about the future, not actionable misrepresentations of fact. *Seeger v. Odell* (1941) 18 Cal.2d 409, 414.

III. Alleged Fraudulent Concealment

A. The Alleged Concealment of the Bankruptcy Trustee's Preference Claim

Enmark claims that Valone fraudulently failed to disclose that partial payment by Strouds to Enmark would be subject to recapture as a preference by Strouds' bankruptcy trustee. Valone had no duty to disclose the purported fact because at the relevant times, Valone did not know that Strouds would declare bankruptcy. Valone's SUF 64.[11] Also, Enmark has admitted that although the bankruptcy trustee asserted a preference claim based on Strouds' partial payment to Enmark in April 2003, the bankruptcy trustee has

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[11] In response to Valone's SUF 64, Enmark originally admitted in Valone did not know Strouds would declare bankruptcy before May 2003. In its amended response, Enmark claimed to dispute that fact, but cited no evidence contradicting it.

now dismissed his claim against Enmark without requiring payment by Enmark. (See Gordon's Declaration, ¶ 50, page 13:5-8.) Also, even if Valone could have foreseen the bankruptcy and the future actions of the bankruptcy trustee, Valone (not an alleged lawyer) had no obligation to give Enmark advice amounting to a legal opinion about the legal consequences of the transaction between Strouds and Enmark.

B. The Alleged Concealment of the Diminishment of Valone's Decision-Making Role

Enmark contends that Valone failed to disclose that his decision-making role within Strouds was reduced. Enmark's SUF 14 and 25. However, a duty to disclose is discharged by the disclosure of basic facts that put an interested person on notice of the need to investigate further. (*Assizadeh v. California Federal Bank, FSB* (2000) 82 Cal. App. 4th 399, 416-417). The March 19, 2003 e-mail informed Enmark of some of the management changes at Strouds, including the appointment of a new CEO, Susan Storey, and a redefinition of Valone's role as President, "focusing on sales and merchandising." Exhibit O and Valone's SUF 53. Enmark does not allege that it made any inquiry regarding Valone's role within the company after receiving the email.

Enmark also claims that if Valone had disclosed the reduction of his decision-making role and his purported sale of stock, Gordon would have "turned to better-informed personnel at SAC and would likely have withdrawn from the VFA." Enmark's SUF 17. The allegation that Enmark would "likely" have withdrawn from the Vendor Forbearance Agreement with Strouds does not properly allege a causal relation between the alleged concealment and Enmark's alleged damages. Furthermore, Gordon admits that in April 2003 he did talk to Strouds' new CEO, Susan Storey, and that she told him "the same thing that Valone had been telling me for months . . . that SAC was financially sound" and that Enmark would "get paid for its goods." (Gordon Decl., 34, page 8, line 27, to page 9, line 7.) Therefore, Valone's alleged failure to disclose the reduction of his decision-making role did not cause Enmark's alleged damages.

C. The Alleged Concealment of Strouds' Previous Borrowing

Enmark contends that Valone failed to tell Gordon that Strouds' acquisition of assets in 2001 (i.e., two years before the relevant time period) from the predecessor corporation was financed by debt. Enmark's SUF 21. Enmark, however, does not allege any facts suggesting that Enmark had any reason to believe that Strouds' acquisition of assets in 2001 was *not* financed by debt. Also, Enmark does not allege any facts giving rise to any duty by Valone to discuss the subject with Enmark. The financial details of the acquisition had been reported in the trade press two years earlier, so Valone had no reason to know that Gordon was unaware of the fact. Valone's SUF 1 and 2. Although Enmark objects to the April 27, 2001 press release attached to the declaration of Rober Valone (Exhibit A), its evidentiary objections have no merit because a copy of the same press release is attached as Exhibit A to the declaration of Allan Gordon. Furthermore, Gordon had an M.B.A. and more than 30-years experience in the trading business, and he understood it was customary for a retailer's bank debt to be secured by inventory. Valone's SUF 9 and 10. Also, the liquidation analysis told Gordon that Strouds had more than $23 million in secured debt. Exhibit D. Gordon therefore had reason to inquire, if it was important to him, about the circumstances under which that debt arose. He also could have learned from the April 27, 2001 press release that Strouds drew $23.5 million on its line of credit to acquire the inventory from the predecessor corporation. SUF 2. Finally, the liquidation analysis that Gordon received at the January 15, 2003 meeting told Gordon that Strouds' liabilities exceeded its assets by approximately $23 million. Exhibit D. The liquidation analysis therefore informed Enmark that Strouds had significant debt and financial problems.

D. <u>The Alleged Concealment of Cruttenden's Ability to Make Additional Investments</u>

Enmark contends that Valone did not tell Enmark that Walter Cruttenden, the Chairman of Strouds' Board of Directors, lacked the financial ability to make a $5 million investment in Strouds and that Cruttenden planned to get the money from the sale of his property. Enmark's SUF 22. For three reasons, the contention fails to create a triable

issue of fact. First, Enmark presents no evidence that Valone knew the purported facts were true. The basis of the contention is solely Gordon's declaration, paragraph 51(b), but there is no foundation for the purported facts and no evidence that Valone would have known them if they were true.[12] Second, Valone had no duty to give Enmark an opinion about whether Cruttenden's assets were sufficiently liquid to make the investments. A person has no duty to disclose matters of opinion or facts that he does not know. (*Assizadeh*, 82 Cal. App. at 412 (matters of opinion); *Kovich v. Paseo del Mar Homeowners' Association* (1996) 41 Cal. App. 4th 863, 866) (unknown facts).) Third, Gordon knew that Cruttenden was the expected source of the funds and made no investigation even after a new investor, Fog Cutter, acquired a controlling interest in Strouds. See Valone's SUF 25.[13] The purported facts were not concealed because Gordon knew that the money had to come from somewhere, does not allege any actual misrepresentation, and alleges no attempt to find out anything about the source of the funds. Reliance is justifiable only when "circumstances were such to make it reasonable for plaintiff to accept defendant's statements without an independent inquiry or investigation." *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal. App. 3d 1324, 1332.) .

E. The Alleged Concealment That Strouds' Financial Position Was Tenuous

Enmark contends ~~the~~ that Valone failed to inform Enmark that Strouds' financial condition was "extremely tenuous" and that it would be unable to survive economically. SUF 23 and 24. As a matter of law, Valone had no duty to offer his opinion on those issues, and the basic facts were disclosed to Enmark. As early as January 2003, Enmark knew that Strouds had stopped paying its trade creditors, including Enmark (Valone's SUF

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[12] Gordon Decl., page 13, lines 18-22. Gordon simply declares that he "learned" the facts without stating how he learned them.

[13] Although Enmark disputes SUF 25, it improperly fails to state the nature of the dispute. Its response makes it clear that Enmark expected Cruttenden to put in "a few million."

13) and that Strouds' liability exceeded its assets by $23 million. (Exhibit D.) Enmark therefore knew facts suggesting that a financial recovery for Strouds with a new investment of only $3 million or $5 million was far from certain. Gordon admittedly was so alarmed when Strouds suspended payments that he fired one of his employees because he could not pay the employee "if Strouds wasn't going to be in business anymore." SUF 15. The January 17, 2003 letter (Exhibit F) also informed Enmark that Strouds did not intend to declare bankruptcy as long as it could "stabilize its financial situation." The letter offered no guarantee that Strouds could stabilize its finances and therefore avoid bankruptcy. Accordingly, the letter informed Enmark that Strouds' financial condition was tenuous.

CONCLUSION

For the foregoing reasons, the motion of Defendant Robert Valone for summary judgment is GRANTED.

DATE: January, ~~2007~~ 12 2007

Rita Miller
Superior Court Judge

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1925 Century Park East, Suite 350, Los Angeles, California 90067.

On December 28, 2006, I served the following document(s) described as **[PROPOSED] ORDER GRANTING MOTION FOR SUMMARY JUDGMENT** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Craig J. Stein
Gelfand Stein & Wasson, LLP
11755 Wilshire Blvd., Ste: 1230
Los Angeles, CA 90025

BY MAIL: I am "readily familiar" with Barbanel & Treuer's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid at Los Angeles, California, on that same day following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 28, 2006, at Los Angeles, California.

Deb Greenwood