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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY

Index Number : 603933/2007

TUDEME, MACDONALD

vs.

WALTERS, DAVID

SEQUENCE NUMBER : 004

VACATE

PART 53

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

RECEIVED

APR 30 2012

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

_____ is decided in accordance with
accompanying memorandum decision and order.

FILED

APR 24 2012

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S): _____

Dated: 4/19/2012

_____, J.S.C.

CHARLES E. RAMOS

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

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MACDONALD TUDEME AND MARGUERITE TUDEME,

Plaintiffs,

Index No. 651396/10

-against-

DAVID WALTERS, MONARCH STAFFING, INC. AND ITECH EXPRESS, INC.,

Defendants.

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Charles Edward Ramos, J.S.C.:

Motion sequences 004 and 005 are consolidated for disposition.

In motion sequence 004, defendants David Walters ("Walters") and Monarch Staffing, Inc. ("Monarch") move pursuant to CPLR 3211(a)(1), (a)(2), and (a)(7) to dismiss the amended complaint (the "Amended Complaint") of Macdonald Tudeme and Marguerite Tudeme (the "Plaintiffs").

In motion sequence 005, defendant iTechExpress, Inc. ("iTech") also moves pursuant to CPLR (a)(1), (a)(2), and (a)(7) to dismiss the Amended Complaint.

Background

This action arises from the exchange of shares of MT Ultimate Healthcare Corporation ("MT"), a publically traded Nevada corporation previously owned and operated by the Plaintiffs as a nurse staffing and home care provider in the New York City metropolitan area. In 2005, when the business began to

experience financial difficulties, the Plaintiffs met with Walters, a self described "investment banker, merchant banker," to discuss the sale of shares of MT. After a series of meetings in New York, the parties entered into a stock exchange agreement dated November 4, 2005 (the "Agreement").

According to the terms of the Agreement, the Plaintiffs exchanged their shares of MT for shares of a newly formed corporation, Newco, that was a wholly owned subsidiary of MT. In exchange, MT agreed to make a cash payment of $30,442.82 to the Plaintiffs and to assume certain liabilities of the Plaintiffs (the "Assumed Tudeme Liabilities").[1] The Agreement provides that MT "shall cause the Assumed Tudeme Liabilities to be satisfied or refinanced, or paid according to their respective terms" and that MT "shall use best efforts to substitute its guarantee and collateral to [the Plaintiffs' creditors] with guaranteed and collateral obligation to such creditors and to cause the lien and security interest relating to such obligations to be removed from [the Plaintiffs] real estate and other assets" (Shapiro Affidavit, Exhibit 11, Section 2[b]-[c]). The Agreement was

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[1] The Assumed Tudeme Liabilities include the following: (1) $205,921.32 to Lisa Stern as it appears on the balance sheet of MT dated September 30, 2005; (2) all obligations of MT on the balance sheet and payable list, each dated September 30, 2005 not otherwise enumerated in Section 3 of the Agreement; and all obligations of MT to NIR Group and its affiliates and the United States Internal Revenue Service (Shapiro Affidavit Exhibit 11, Schedule 1[a]).

executed by the Plaintiffs as officers or representatives of MT and by Walters as "Executive Vice President" (Shapiro Affidavit, Exhibit 11). The record indicates that Walters was employed by Monarch Bay Capital Group and was Executive Vice President of iTech at the time the Agreement was executed, but is unclear as to whether Walters signed in his capacity as a representative of one of these companies or another (Chang Affirmation, Ex. E). The record also indicates that he was a shareholder or majority shareholder of both Monarch and iTech (*id.*).

The Agreement contains mutual release provisions (the "Release Provisions") as follows:

> (d)(i) [MT] hereby fully and unconditionally releases and discharges all claims and causes of action which it, ever had, now have, or hereafter may have against Macdonald and Marguerite, in each case past, present, or as they may exist at any time after this date, whether currently known or unknown, relating to, or arising under, or in connection with, the Assumed Tudeme Liabilities.
>
> (ii) Each of Macdonald, Marguerite, and Newco jointly and severally, hereby fully and unconditionally releases and discharges all claims and causes of action which it, ever had, now have, or hereafter may have against [MT], in each case past, present, or as they may exist at any time after this date, whether currently known or unknown, relating to, or arising under, or in connection with, the Assumed Tudeme Liabilities (Shapiro Affidavit Exhibit 11, Section 3(d)(i)-(ii)).

The Agreement also contains the following choice of law and forum provision (the "Forum Selection Clause"):

> [This agreement] shall be governed by and construed in

> accordance with the laws of the State of New York, without giving effect to conflict of laws. Any action, suit, or proceeding arising out of, based on, or in connection with this Agreement or the transactions contemplated hereby may be brought in the United States District Court for the Southern District of New York and each party covenants and agrees not to assert, by way of motion, defense, or otherwise, in any action, suit, or proceeding, any claim that it or he is not subject personally to the jurisdiction of such court, that its or his proceeding is brought in an inconvenient forum, that the venue of the action, suit, or proceeding is improper, or that this Agreement or the subject matter hereof may not be enforced in or by such court (Shapiro Affidavit, Exhibit 11, Section 7[k]).

Finally, the Agreement notes that "[s]imultaneously with the execution and delivery and delivery [sic] hereof, [MT], iTechexpress, Inc., a Nevada corporation . . . and the stockholders thereof are executing and delivering the Share and Reorganization Agreement, dated as of the date hereof (Shapiro Affidavit, Exhibit 11 at 1)." On November 3, 2005, MT, iTech, and certain iTech shareholders entered into the referenced agreement, the Share Exchange and Reorganization Agreement (the "iTech Agreement"). By way of the iTech Agreement, iTech acquired 88.75% of the fully diluted outstanding MT common stock.[2]

The procedural history for this action is unfortunately quite convoluted. On September 30, 2007, the Plaintiffs initiated the action by filing a summons and complaint for breach of

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[2] The parties subsequently entered into two other related agreements that are not at issue for the purposes of this motion (*See* Shapiro Affidavit, Exhibits 12-13).

contract and fraud in the inducement against Walters, Monarch,[3] and Walters' business partner, Keith Moore ("Moore") (together, the "Original Defendants"). Upon consent of the parties, the case was assigned to Judicial Hearing Officer Ira Gammerman for adjudication.

On April 29, 2008, the Original Defendants filed a motion to dismiss all claims pursuant to CPLR 3211(a)(1), (7), and (8). Following several hearings and a reference to a referee for fact-finding, JHO Gammerman dismissed all claims against Moore and the claim for fraud in the inducement against all defendants.

In February 2010, the Plaintiffs moved for leave to serve and file the "Amended Complaint" that would add iTech as a defendant, assert new claims against Walters, and assert piercing the corporate veil claims to hold Walters and iTech liable for the alleged breach of contract (the "Motion to Amend"). At a hearing on February 24, 2010, JHO Gammerman granted the Plaintiffs leave to amend but noted that the Proposed Amended Complaint had not yet been served on Monarch, Walters, and iTech (the "Defendants"). Despite JHO Gammerman's admonishment regarding service, the Plaintiffs did not subsequently file the Amended Complaint or serve such on the Defendants. Nonetheless, Walters and Monarch filed an answer to the Amended Complaint on June 24, 2010 and iTech filed both an answer to the Amended

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[3] Monarch is the successor in interest of MT.

Complaint on July 8, 2010 and an amended answer on July 28, 2010. After iTech filed its answer to the Amended Complaint, it filed a notice with the clerk's office indicating that it did not consent to adjudication JHO Gammerman. The case was in turn transferred to this Court.

Walters and Monarch filed motion sequence 004 on March 28, 2011, and iTech filed motion sequence 005 on April 4, 2011. At a hearing on June 2, 2011, this Court ordered the Plaintiffs to serve and file a copy of the Amended Complaint. The Amended Complaint, along with certificates of service evidencing service on counsel for the Defendants was subsequently filed on June 15, 2011. The Defendants filed answers on June 23, 2011.

Discussion

The Defendants move this Court to dismiss the Amended Complaint for lack of both subject matter and personal jurisdiction, improper venue, and on the grounds that the Plaintiffs released them from liability related to the Assumed Tudeme Liabilities by way of the Release Provisions.[4] Walters and iTech move to dismiss on the grounds that the Plaintiffs have failed to state a claim for piercing the corporate veil. Finally,

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[4] In making its argument, iTech incorporated by reference the brief of Monarch and Walters. While the Defendants fail to cite CPLR 3211(a)(8) as grounds for dismissal, they nonetheless argue that this Court lacks subject matter jurisdiction. As subject matter jurisdiction is not waivable, this Court is obliged to entertain these arguments (*Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 N.Y.3d 12 [2008]).

iTech moves to dismiss on the grounds that they cannot be held liable for breach of contract because they were not a party to the Agreement.

A. Jurisdiction and Venue

The Defendants first move to dismiss on the grounds that this Court lacks subject matter and personal jurisdiction over them because of the Plaintiffs' delay in service and filing of the Amended Complaint.[5] The Plaintiffs argue that the errors in service and filing are correctable pursuant, citing to *Fry v Village of Tarrytown* (*Fry v Village of Tarrytown*, 89 NY2d 714 [1997]).

As the summons and Amended Complaint were properly served on all Defendants and have been filed with this Court, the operative question at this juncture is whether the errors in filing and service are correctable as a matter of law. *Fry* was superceded by a 2007 amendment to CPLR 2001 which provides for the correction of errors related to filing. The broad language of the statute provides that

> "[a]t any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure

[5] Among the various jurisdictional defects cited by the Defendants, iTech argues that this Court lacks jurisdiction because the Plaintiffs failed to pay an additional filing fee pursuant to CPLR 306-a. This Court notes that the filing fee requirement under CPLR 306-a applies only to third party actions and is therefore inapplicable in this case.

> to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid" (NY CPLR 2001).

In *Ruffin v Lion Corp.*, the Court of Appeals held that CPLR 2001 may be used to correct technical non-prejudicial defects in both filing and service (*Ruffin v Lion Corp*, 15 NY3d 578 [2010]). The Court of Appeals provided the following guidance for determining which infirmities in filing and service are "technical" in nature:

> In deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant–notice that must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Ruffin*, 15 NY3d at 582).

The record indicates that the Amended Complaint was attached to the Motion to Amend which was filed and properly served on at least one defendant, Walters. Walters is or was an officer of both Monarch and iTech and is a shareholder of iTech. Additionally, Monarch and Walters appeared in the case prior to the Motion to Amend and all three parties appeared before JHO Gammerman in opposition to the Motion to Amend. They were, in fact, all represented by the same attorney, Mr. Shapiro. Furthermore, each party submitted answers to the Amended Complaint both after the Motion to Amend was granted and after the Amend Complaint was served. There can be no question that the

parties were on notice of this proceeding and were afforded an opportunity to, and did in fact, present their objections. As such, no party will be prejudiced by disregarding the mistakes in filing and service to be corrected pursuant to CPLR 2001. Therefore, it is the finding of this Court that the technical errors in filing and service are deemed corrected pursuant to CPLR 2001.

The Defendants contend that venue in this Court is improper pursuant to the terms of the Forum Selection Clause, to the exclusive jurisdiction of the United States District Court for the Southern District of New York. New York courts have acknowledged that forum selection clauses may be either permissive or mandatory in nature (*Boss v. American Express Financial Advisors, Inc.*, 6 NY3d 242 [2006]). Mandatory clauses provide that contracting parties both submit to exclusive jurisdiction in a particular forum or forums while permissive clauses provide that contracting parties shall submit to jurisdiction in a particular forum but do not preclude litigation where jurisdiction is otherwise proper. In New York, mandatory clauses are prima facie valid (*Sterling Nat. Bank as Assignee of NorVergence, Inc. v. Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 237 [1st Dept 2006]), and where parties have contracted for exclusive jurisdiction in a particular forum, it is the policy of the Courts to enforce these provisions (*id.*). Where contracting

parties have agreed to a permissive forum selection clause, the general rule is that "[w]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive" (*Fear & Fear, Inc. v N.I.I. Brokerage, LLC*, 50 AD3d 185, 187 [2008])(internal quotations omitted).

Here, the parties' use of the permissive language "may" in the Forum Selection Clause suggests that the clause is permissive rather than mandatory. iTech cites to *Fear & Fear* for the proposition that "[a] provision stating that an action 'may' be brought in a jurisdiction means that the action must be brought in that jurisdiction" (iTech Mem of Law at 10). iTech's reliance on *Fear* is misguided. The forum selection clause at issue in *Fear* provided that suits arising from the contract "may be litigated in any federal or state court of competent jurisdiction located in the Borough of Manhattan" (*Fear*, 50 AD3d at 187). The Appellate Division held that "may" was used to refer to the choice of a state or federal forum and the clause was mandatory to the extent that the parties were bound to bring suit in one of those two forums. Here, the Forum Selection Clause is distinguishable in that it does not offer such a choice. It merely provides that the parties "may" bring suit in the United States District Court of the Southern District of New York and that each party consents to jurisdiction in that forum. There is

no further language that indicates the parties intended the District Court to be the exclusive forum for the litigation of disputes. It is, therefore, the conclusion of this Court that the Forum Selection Clause confers jurisdiction in the designated forum but does not deny the Plaintiffs their choice of forum in this Court.

B. CPLR 3211(a)(1)

Dismissal under CPLR 3211 (a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" *(511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). The Defendants contend that the mutual release provisions in the Agreement release them from liability related to the Assumed Tudeme Liabilities and bar this litigation. "In the absence of fraud, duress, illegality or mistake, a general release bars an action on any cause of action arising *prior to* its execution"(*Hack v United Capital Corp*, 247 AD2d 300, 301 [1998])[emphasis added]). The Assumed Tudeme Liabilities arose from the Agreement, not prior to it. Therefore, the release provisions in the Agreement do not release the Defendants from liability.

C. CPLR 3211(a)(7)

The Plaintiffs move this Court to pierce the corporate veils of both Monarch and iTech and hold Walters personally liable for

the alleged breach of contract. Walters moves to dismiss the Plaintiffs' claim for piercing the corporate veil pursuant to CPLR 3211(a)(7) on the grounds that the Plaintiffs have not alleged facts sufficient to support the claim.

The Plaintiffs also present a threshold issue by asserting that this claim should not be dismissed pursuant to the doctrine of "law of the case" because JHO Gammerman granted their Motion to Amend despite Walters making the "same arguments" in opposition. At the February 24, 2010 hearing where JHO Gammerman granted the Motion to Amend, he stated that with respect to the claim for piercing the corporate veil, "I've indicated to counsel in an off-the-record discussion that if this is going to be tried by a jury, I'll resolve that issue before the matter is submitted to the jury. If it's not going to be tried by a jury, I'll resolve it within the framework of the trial" (Shapiro Affirmation, Ex 6 at 2). These comments indicate that JHO Gammerman did not make a determination on this matter, but rather preserved the issue for a later time. Therefore, it is the determination of this Court that the law of the case doctrine does not apply to this issue.

When determining whether to grant a motion pursuant to CPLR 3211(a)(7), the Court must determine whether the pleadings state a cause of action. The motion must be denied if from the pleadings' four corners "factual allegations are discerned which

taken together manifest any cause of action cognizable at law." (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]. The Court must afford the pleadings a liberal construction, accept the allegations of the complaint and any submissions in opposition to the motion as true, and afford the plaintiffs the benefit of every possible favorable inference (*id.*).

Courts have the authority to look beyond the corporate form "to prevent fraud or to achieve equity" (*Port Chester Elec. Const. Co. v. Atlas*, 40 NY2d 652, 656 [1976]). "In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice'" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 777 [2011]).

To support its claim for piercing the corporate veil, the Plaintiffs assert that "Walters was and is the alter ego" of both Monarch and iTech, both companies were undercapitalized, neither Monarch nor iTech ever had a legitimate business purpose, and neither business ever made a profit (Amended Complaint at ¶ 30-

39), but fail to plead facts to support these conclusory allegations. The claim is, therefore, insufficient to survive a motion to dismiss (*Godfrey v. Spano*, 13 N.Y.3d 358, 373 [2009])["Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss."]).

Finally, iTech moves to dismiss the claims against them on the grounds that it was not a party to the Agreement and therefore cannot be held liable for the alleged breach of contract. Plaintiffs again assert that the law of the case doctrine bars dismissal of the claims against iTech because "[i]n opposing plaintiffs' motion to amend their complaint, iTech's counsel made the same arguments, but plaintiffs' application was granted" and "[n]othing has changed since that time" (Plaintiffs' Memorandum of Law at 6). While JHO Gammerman did grant the Motion to Amend, permitting the Plaintiffs' to plead claims against iTech, the record does not indicate that he made a determination on the merits of the pleadings. Therefore, the law of the case does not apply.

The Plaintiffs assert that iTech is liable for Monarch's debts because the Share and Reorganization Agreement caused iTech and Monarch to become "essentially the same" (Plaintiffs

memorandum of law at 7), but failed to make a claim for successor liability or plead facts beyond a showing that iTech is a major shareholder of Monarch. The Plaintiffs claims against iTech are therefore insufficient to preclude dismissal.

Accordingly, it is

ORDERED that the defendants David Walters and Monarch Staffing, Inc. motion to dismiss (motion sequence 004) is granted in part and the third cause of action (piercing the corporate veil) of the complaint is dismissed; and it is further

ORDERED that the defendant iTechExpress, Inc.'s motion to dismiss (motion sequence 005) is granted in part and the second (breach of contract) and third causes of action (piercing the corporate veil) of the complaint are dismissed.

Dated: April 19, 2012

ENTER:

J.S.C.

CHARLES E. RAMOS

FILED

APR 24 2012

COUNTY CLERK'S OFFICE
NEW YORK