NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

TRENDHUNTER, INC.,

Plaintiffs,

-against-

LARGETAIL, LLC., CAPTAIN LUCAS, INC., JOSHUA RUBIN, and EVAN ORENSTEN,

Defendants.

Index No.: 653601/2016
DECISION/ORDER
Motion Sequence No. 01

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion to dismiss in lieu of an answer under CPLR 3211 (a) (7).

Papers	**Numbered**
Defendants' Notice of Motion	1
Defendants' Memorandum of Law in Support	2
Plaintiff's Memorandum of Law in Opposition	3
Affirmation of Matthew Wagoner in Opposition	4
Affirmation of Jeremy Gutsche in Opposition	5
Defendants' Memorandum of Law in Further Support	6
Defendants' Reply Affirmation in Further Support	7

The Wagoner Firm, PLLC, New York (Matthew D. Wagoner of counsel), for plaintiff.
Kaufman & Kahn, LLP, New York (Mark S. Kaufman of counsel), for defendants Captain Lucas, Inc., Joshua Rubin, and Evan Orensten.

Gerald Lebovits, J.

Plaintiff, Trendhunter, Inc. (Trendhunter), brought this action against defendants, Largetail, LLC (Largetail), Captain Lucas, Inc. (Captain Lucas), Joshua Rubin, and Evan Orensten alleging 11 causes of action: breach of contract, unjust enrichment, fraud, tortious interference with a contract, piercing the corporate veil, alter ego and successor liability, fraudulent conveyance, insolvency, lack of fair consideration by an insolvent, conveyance by defendant, conveyance by a person about to incur debt, conveyance with intent to defraud, and defendants' abusing its corporate office.

Trendhunter is a Canadian business. Defendants Rubin and Orensten owned and managed Largetail at the time of the agreement and the alleged breach. Rubin and Orensten also own and manage Captain Lucas, a corporation that runs Coolhunting.com, Trendhunter's direct competitor.

Captain Lucas, Rubin, and Orensten now move to dismiss in lieu of an answer under CPLR 3211 (a) (7). Defendant Largetail has not appeared.

According to plaintiff's complaint, on January 6, 2012, plaintiff and defendant Largetail entered into a publishing agreement. (Plaintiff's Amended Complaint at ¶ 23.) Largetail agreed to sell advertisement space on Trendhunter's website to third parties. (Plaintiff's Amended Complaint at ¶ 23.) In return, Largetail would pay 50% of net revenues generated from these sales. (Plaintiff's Amended Complaint at ¶ 30). Trendhunter was aware that Largetail provided a similar service to Coolhunting.com, a venture owned by Orensten and Rubin and a competitor to plaintiff. (Plaintiff's Amended Complaint at ¶ 27.) Plaintiff states in its complaint that during negotiations, defendants portrayed Largetail's relationship with Coolhunting.com as one of "arm's length." (Plaintiff's Amended Complaint at ¶ 28.) As Largetail was falling behind on payments, Rubin and Orensten offered to provide Trendhunter with a promissory note to memorialize what Largetail owed to Trendhunter at the time. (Plaintiff's Amended Complaint at ¶33.) Plaintiff relied on defendants' representation on their solvency and, on November 30, 2014, entered into a promissory note memorializing that Largetail owed $165,000 to plaintiff. (Plaintiff's Amended Complaint at ¶ 39.) After executing the Note, Largetail continued to sell advertising campaigns for Trendhunter and incurred further financial obligations to Trendhunter. (Plaintiff's Amended Complaint at ¶¶ 41-42.)[1] On September 11, 2015, Largetail sent an email to Trendhunter stating that it would not pay what it owed to Trendhunter and other creditors. (Plaintiff's Amended Complaint at ¶ 81.)

Defendants' CPLR 3211 (a) (7) motion to dismiss is granted as to plaintiff's first, second, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh causes of action and denied as to plaintiff's third and fourth causes of action.

On a CPLR 3211 (a) (7) motion, the complaint must be liberally construed, the allegations therein taken as true, and all reasonable inferences must be resolved in plaintiff's favor. (*Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 [1st Dept 2005].) On a pre-answer motion to dismiss brought under CPLR 3211 (a) (7), the court does not determine the truth of the allegations. (*See Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979].) The court "afford[s] the pleadings a liberal construction, take[s] the allegations of the complaint as true and provide[s] plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].) To survive the motion, the complaint must only state a cause of action. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *accord Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]; *W2007 Monday 230 Park Mezz II, LLC v Landesbank Baden-Wuerttemberg*, 38 Misc 3d 1209 [A], *3, 2013 NY Slip Op 50031 [U], *3, 2013 WL 135548, at *3 [Sup Ct, NY County 2013].)

[1] Largetail defaulted on the note, and Trendhunter obtained a judgment in the amount of $165,000 plus interest. (Plaintiff's Amended Complaint at 84.) Largetail has failed to satisfy the judgment. (Plaintiff's Amended Complaint at 85.) Trendhunter brought this action against all defendants to recuperate additional proceed from the continued relation.

1. Breach of Contract

Plaintiff's first cause of action is dismissed. Defendants Rubin, Orensten, and Captain Lucas are not parties to the publishing agreement and therefore could not have breached it.

For a breach of contract action to survive a CPLR 3211 (a) (7) motion, a plaintiff must allege facts showing each of the following elements: (1) an agreement; (2) plaintiff's performance; (3) defendants' breach of that agreement; and (4) damages plaintiff sustained as a result of the breach. (*W2007 Monday 230 Park Mezz II*, 38 Misc 3d 1209 [A], *3, 2013 NY Slip Op 50031 [U], *3, 2013 WL 135548, at *3.)

There is no dispute than an agreement exists, plaintiff's performance, or damages sustained by plaintiff as a result of the breach. Whether Largetail breached the agreement is also undisputed. Orensten, Rubin, and Captain Lucas, however, argue that they are not parties to the contract. Plaintiff alleges that Orensten, Rubin, and Captain Lucas should be held liable for the underlying breach by piercing the corporate veil or thru alter ego.

Orensten, Rubin, and Captain Lucas were not parties to the contact. Their involvement, if any, is through the corporate entity, Largetail. The amended complaint refers to piercing the corporate veil and alter ego as separate causes of action, discussed below. Defendants' motion to dismiss the first cause of action is granted.

2. Unjust Enrichment

Plaintiff fails to allege that defendants were unjustly enriched.

Plaintiff does not allege sufficient facts to support its claim for unjust enrichment. To state a claim for unjust enrichment, "the plaintiff must show that the defendant was enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." (*Castellotti v Free*, 138 AD3d 198, 207 [1st Dept 2016]; *accord Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011].) A plaintiff may not succeed on an unjust-enrichment claim unless it has a sufficiently close relationship with the defendant. (*See Georgia Malone & Co*, 19 NY3d at 516; *Sperry v Crompton Corp.*, 8 NY3d 204, 210 [2007].) But "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987].)

Although plaintiff and Largetail have a written contract, the documents submitted on this motion do not show any contract between plaintiff and Captain Lucas, Rubin, or Orensten. Absent a contract, plaintiff could succeed on an unjust-enrichment claim. But plaintiff fails to assert an unjust-enrichment claim. Plaintiff does not allege any fact explaining how the moving defendants were enriched at plaintiff's expense. In its complaint, plaintiff alleges in conclusory fashion that "defendants were enriched by the provision of services by Plaintiff to Largetail." (Plaintiff's Amended Complaint at ¶ 97.) Plaintiff's conclusory allegation is insufficient. Defendants' motion to dismiss the second cause of action is granted.

3. Fraud

When a plaintiff asserts a fraud claim, "'the circumstances constituting the wrong shall be stated in detail' . . . . 'to inform a defendant of the complained of incidents.'" (*High Tides, LLC v DeMichele*, 88 AD3d 954, 957 [2d Dept 2011] [explaining the heightened requirements of CPLR 3016 [b] [citations omitted].) Asserting a fraud claim "require[s] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].)

Plaintiff alleges that defendants concealed Largetail's insolvency during the signing of the note and induced plaintiff to enter into additional transactions under the agreement. The court finds that the wrong at issue — the non-disclosure of Largetail's insolvency — was stated in sufficient detail in the complaint to inform defendants of the wrong. Defendants' motion to dismiss the third cause of action is denied.

4. Tortious interference with a contract

Plaintiff sufficiently detailed its claim for tortious interference with a contract.

To state a claim for tortious interference with a contract, a plaintiff must allege (1) the existence of a valid contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of the third-party's breach of the contract; (4) the procurement was without justification; (5) actual breach of the contract; and (6) damages. (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996].)

No party denies that an agreement exists between plaintiff and Largetail, defendants knew about the agreement, breach of the agreement, damages. Defendants do not argue on whether they procured Largetail's breach. Defendants claim that they were justified at least in part to procure the breach under the economic-interest defense. Defendants argue that, as significant stockholders of Largetail, they acted to protect their own interest in Largetail's business. A defendant is not liable for interfering with a contract when a defendant acts "to protect its own legal or financial stake in the breaching party's business." (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8NY3d 422, 426 [2007].) Defendants may assert the economic-interest defense. But this defense does not conclusively establish that plaintiff failed to state a claim for tortious interference with a contract. Defendants' motion to dismiss the fourth cause of action is denied.

5. Piercing the Corporate Veil and Alter Ego and Successor Liability

Plaintiff's fifth cause of action — pierce the corporate veil — and sixth cause of action — alter ego liability and successor liability — are dismissed. Plaintiff improperly attempts to pierce the corporate veil or to treat defendants as alter ego. Plaintiff also did not show any merger, consolidation, or purchase of Largetail to apply successor liability.

a. Piercing of the corporate veil and alter ego liability

A party's attempts to pierce the corporate veil "does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners." (*Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135, 141 [1993].) Therefore, a plaintiff may not file a "stand-alone cause of action" to pierce the corporate veil or to have alter ego liability. (*Prac. Bldrs.*

Holdings, LLC v Jack E.N.T. Corp., 2016 NY Slip Op 30359 [U], at *7, 2016 WL 827394, at *7 [Sup Ct, NY County 2016].) Because plaintiff pled piercing the corporate veil and alter ego liability as separate causes of action, these claims are dismissed.

b. Successor liability

A corporation that acquires the assets of another corporation is not liable for its predecessor's torts. Four exceptions to this rule exist. A corporation may have successor liability if "(1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction was entered into fraudulently to escape such obligations." (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983].) The second and third exceptions "are based on the concept that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased." (*Grant-Howard Assoc. v Gen. Housewares Corp.*, 63 NY2d 291, 296 [1984].)

Here plaintiff does not assert that Captain Lucas, Rubin, or Orensten undertook any merger, consolidation, or purchase of Largetail. Successor liability does not apply.

Defendants' motion to dismiss the fifth and sixth causes of action is granted.

6. Debtor Creditor Law: Fraudulent-conveyance claims

Plaintiff's seventh through eleventh causes of action are dismissed. Plaintiff does not assert any conveyance that may be fraudulent in order to claim any fraudulent conveyance.

Plaintiff's seventh through eleventh causes of action are based on defendants' alleged fraudulent conveyance. Plaintiff relies on Debtor and Creditor Law §§ 273, 275, and 276. Section 273 provides that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Section 275 provides that "[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors." Section 276 provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

Plaintiff alleges that defendants fraudulently conveyed assets among each other making Largetail insolvent. As proof, plaintiff presents screenshots of webpages showing a "Macallan Case Study" video on the Largetail website and what seems to be the identical video on Captain Lucas's website with Captain Lucas taking credit for Largetail's work. (Plaintiff's Amended Complaint, Exhibits 5 & 6.)

Although plaintiff alleges that Captain Lucas took credit for the "Macallan Case Study," a screenshot of a web page is insufficient to establish that plaintiff has a cause of action for defendants' alleged fraudulent conveyance. Plaintiff fails to allege any facts to support its claim

of a fraudulent or constructive fraudulent conveyance. Defendants' motion to dismiss plaintiff's seventh, eighth, ninth, tenth, and eleventh causes of action is granted.

Accordingly, it is

ORDERED that defendants Captain Lucas Inc., Evan Orensten, and Joshua Rubin's motion to dismiss is granted in part and denied in part: the amended complaint's first, second, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh causes of action are dismissed; the third and fourth causes of action continue; and it is further

ORDERED that defendants serve a copy of this decision and order with notice of entry on all parties and on the County Clerk's Office, which is directed to enter judgment accordingly; and it is further

ORDERED that defendants must serve and file its answer within 20 days of service of this decision and order with notice of entry; and it is further

ORDERED that the parties appear for a preliminary conference on June 14, 2017, at 11:00 a.m., in Part 7, room 1127A, at 111 Centre Street.

Dated: April 3, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.