SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Melissa Crane **PART** 15
Justice

Index Number : 653839/2016
NETJETS AVIATION, INC. ET AL
vs.
PHOENIX STAR CAPITAL, LLC ET AL
SEQUENCE NUMBER : 001
ORDER OF DISMISSAL

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

decided in accordance with the accompanying decision and order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/20/2017

HON. MELISSA CRANE, **J.S.C.**

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

NETJETS AVIATION, INC., NETJET SALES, INC. and NETJETS SERVICES, INC.,

Plaintiff,

- against -

PHOENIX START CAPITAL, LLC, RUSS D. GERSON, and ALFRED C. ECKERT III,

Defendant.

Index No. 653839/2016

DECISION & ORDER

MELISSA A. CRANE, J.:

Plaintiff NetJets Sales Inc., ("NetJets Sales"), sells and leases fractional interests in jet aircraft. Defendant Phoenix Star Capital LLC, ("Phoenix Star"), allegedly was, or is, an asset management firm involved in leveraged loan and high yield bond markets. Defendants Alfred Eckert and Russ Gerson allegedly founded Phoenix Star after raising $100 million.

On or about September 20, 2013, defendant Phoenix Star leased a 6.25 percent undivided interest in a Cessna Citation X (the aircraft). Gerson signed the lease as President of Phoenix Star. Plaintiff contends that Phoenix Star failed to pay what it owed under the lease agreement and has sued it along with its principals Eckert and Gerson.

On October 26, 2016, defendant Eckert filed a motion to dismiss the claims against him. On January 27, 2017, plaintiff obtained a default judgment against Phoenix Star and Gerson, these defendants having failed to appear on the action.

This decision and order addresses Eckert's motion to dismiss. For the following reasons the court grants the motion to dismiss to the extent of dismissing count two for breach of the covenant of good faith and fair dealing, and otherwise denies the motion.

According to the complaint, immediately upon Phoenix Star entering into the lease with plaintiff, defendants Gerson and Eckert started using the aircraft for personal pleasure as opposed to the business of Phoenix Star. With specific respect to Eckert, on September 22, 2013, he allegedly used the aircraft to fly from Teterboro airport in New Jersey to Cincinnati, Ohio to attend a Green Bay Packers game. Eckert also allegedly used the plane to attend other Green Bay Packers games on November 24, 2013 in Green Bay, Wisconsin, and December 29, 2013 in Chicago. Eckert also allegedly used the plane for a weekend getaway to the Bahamas having nothing to do with Phoenix Star's business.

Beginning in August 2014, Phoenix Star stopped paying NetJets on outstanding invoices. At no time did any defendant object to any portion of the invoices Netjets issued. Nor did they complain about the services plaintiff provided.

On January 6, 2015, Eckert requested in writing that NetJets terminate Phoenix Star's lease agreement. Eckert also informed Netjets that Phoenix Star: (1) had never become a viable business; (2) its assets were liquidated as of December 31, 2014; (3) it had virtually no liquid assets remaining; and (4) was carrying $200,000 in liabilities.

Defendant Eckert has moved to dismiss claiming, *inter alia*, that as he did not sign the contract with NetJets in any capacity, he cannot be liable. Plaintiff opposes, relying on the allegations in the complaint to support a theory of alter ego/piercing the corporate veil.

To state a claim for liability for breach of contract under a veil piercing theory, the complaining party must allege: (1) the owners of the entity completely dominated and controlled

the corporate entity; (2) the owners used that domination to commit a fraud or wrong; and (3) that wrong injured plaintiff (*see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 (1st Dept 2012); *see also Tap Holdings LLC v Orix Fianance Corp.*, 109 AD3d 167, 174 [1st Dept 2013], citing to *ABN Amro Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011]; *ARB Upstate Communications LLC v R.J. Reuter, LLC et al.*, 93 AD3d 929, 931 [3d Dept 2012]).

Here, plaintiff has alleged sufficient facts to keep Eckert in as a defendant, despite his lack of signature on the lease agreement. Eckert has allegedly admitted that Phoenix never became a viable business and had liquidated all its assets as of December 2014. Meanwhile, Eckert allegedly used the aircraft and services of plaintiff for nonbusiness purposes. To use plaintiff 's services for personal pleasure, and then try to avoid paying for these services by hiding behind a corporation that defendant knew was not viable, and never became viable, certainly rises to the level of abusing the corporate form to commit a wrong against plaintiff (*Cobalt* 97 AD3d at 41 ["[t]o use domination and control to cause another entity to breach a contractual obligation for personal gain is certainly misuse of the corporate form to commit a wrong"). Accordingly, the court denies defendant's motion to the extent it seeks to dismiss the claim for breach of contract (1st cause of action) and account stated (3rd cause of action).

Under the allegations here, unjust enrichment also should remain. Defendant allegedly used plaintiff's services for his own personal activities and did not pay. Meanwhile, defendant challenges his liability for breach of contract. To the extent plaintiff cannot prove veil piercing to hold defendant liable for breach of contract, there may be alternate recovery under a theory of unjust enrichment. Therefore, unjust enrichment is not duplicative of breach of contract.

However, the court dismisses the second cause of action for breach of the covenant of good faith and fair dealing as it is duplicative of the contract claim. Usually, breach of the

covenant of fair dealing lies where the contract itself is not necessarily breached, but the defendant has somehow deprived the plaintiff of the benefits under the contract (*see Refreshment Mgmt Srvs Corp v Complete Office Supply Warehouse Corp.*, 89 AD3d 913, 915 [2d 2011]). Here, we have an alleged failure to pay. This clearly is a breach of contract. Accordingly breach of the covenant of good faith and fair dealing is duplicative.

Finally, Eckert's argument that the early termination fee is an unenforceable penalty is premature. The express terms of the lease (section 3.2[f]) call for an early termination fee. Plaintiff assessed that fee pursuant to those terms. There is no way of knowing without discovery whether the fee is grossly disproportionate to the probable loss or that the amount of loss may be incapable or difficult of precise estimation (*see Truck Rent-A-Ctr, Inc. v Puritan Farms*, 41 NY2d 420, 425 [1977]).

ACCORDINGLY, it is ORDERED THAT defendant's motion to dismiss is granted to the extent of dismissing the second cause of action for breach of the covenant off good faith and fair dealing and is otherwise denied.

The clerk is directed to enter judgment dismissing the second cause of action only. The other claims continue.

This constitutes the decision and order of the court.

DATED: July 20, 2017
New York, New York

ENTER:

MELISSA A. CRANE, J.S.C