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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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FLANAGAN & ASSOCIATES, PLLC,

Index No. 112019/04

Plaintiff,

DECISION/ORDER

-against-

BRANDON ROTH, JOAN L. ROTH, WAYNE SCHUMER, AMERIBUILD CONSTRUCTION MANAGMENT, INC., ALL UNION, INC., AMERIBUILD CONSTRUCTION MANAGEMENT, INC, a Florida Corporation, and other companies referred to herein as JOHN DOE COMPANIES NOS. 1 THROUGH 5,

Defendants.

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HON. CAROL EDMEAD, J.S.C.

In this action to recover legal fees, defendants move pursuant to CPLR §§ 3211 [a] [7] and [8] for an order (1) dismissing plaintiff's fourth cause of action for piercing the veil of the corporate defendants for failure to state a cause of action and for lack of particularity, (2) dismissing the complaint in its entirety as against defendant Wayne Schumer ("Schumer") for failure to state a cause of action, (3) dismissing the complaint in its entirety as against defendant Ameribuild Construction Management, Inc. a Florida corporation ("Ameribuild Florida") for lack of personal jurisdiction, and (4) dismissing plaintiff's third cause of action for *quantum meruit* for failure to state a cause of action.

This action arises out of plaintiff law firm's alleged representation of the three individual defendants and three corporate defendants in numerous legal matters over a period of more than three years. Plaintiff's first three causes of action, asserted against all named defendants, allege claims for *quantum meruit*, account stated, and breach of contract, respectively. Plaintiff's fourth cause of action is to pierce the veil of the corporate defendants and is asserted against individual

defendants Brandon Roth ("Roth") and Schumer.

In moving to dismiss plaintiff's fourth cause of action, defendants argue that the complaint fails to allege any facts establishing the elements of a piercing the corporate veil claim. Defendants argue that in order to pierce the corporate veil, plaintiff must establish that owners of a corporation exercised complete domination of the corporation in respect to the transaction under attack and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. According to defendants, the complaint not only fails to allege that Roth and Schumer, through their domination of the corporate defendants, abused the privilege of doing business in the corporate form, but more importantly, fails to allege with the requisite particularity that Roth and Schumer used the corporations to perpetrate a wrong or injustice against plaintiff with the intent to defraud.

Defendants further contend that upon dismissing plaintiff's fourth cause of action, the Court should also dismiss the complaint in its entirety as against Schumer because it makes no other allegations that Schumer is in any way obligated to plaintiff for the legal fees its is allegedly owed.

With respect to Ameribuild Florida, defendants argue that the Court lacks personal jurisdiction over this defendant because of the corporation's insufficient contacts to New York State. Relying upon the affidavit of defendant Roth, the president of Ameribuild Florida, who states that Ameribuild Florida is a Florida corporation which is not authorized to do business in New York and which does not do business in New York, defendants contend that Ameribuild Florida neither does business here, as required by CPLR § 301, nor transacted business with plaintiff here, as required by CPLR §302.

Moreover, arguing that a claim for *quantum meruit* cannot lie where the existence of an agreement is alleged or actually governs the subject matter of an action, defendants also contend that plaintiff's third cause of action must be dismissed because plaintiff has alleged in its complaint that an express contract governed its retention by defendants.

In opposition, plaintiff contends that it has satisfied the standard for pleading a claim for piercing the corporate veil by alleging, *inter alia*, that (1) Roth and Schumer had and have diverted funds from the defendant corporations to other businesses and personal enterprises, thereby dissipating the corporations' assets; (2) the defendant corporations had and have failed to follow proper corporate procedures and were and are merely vehicles for Roth and Schumer; (3) the defendant corporations have no means of capitalizations; and (4) at no time did the defendant corporations have sufficient operating revenue. Plaintiff contends that theses allegations, as pleaded, place defendants on notice of both the series of transactions plaintiff intends to prove at trial and the material elements of a piercing the corporate veil claim. Richard Flanagan ("Flanagan"), a member of the plaintiff law firm, avers in his affidavit in opposition that he was made personally aware during plaintiff's representation of defendants that defendants had great difficulty paying their creditors in the normal course of business, despite the fact that defendants were operating a successful construction management and general contracting company. Flanagan claims that the substantial profitability of the corporate defendants was evidenced by the lifestyles of defendants Roth and Schumer and by the fact that he was personally advised by Schumer that the defendants had contracts of over $30 million. Nevertheless, Flanagan claims that he heard "the frequent complaint that Mr. Roth and Mr. Schumer had disregarded normal payables while using revenues for their personal use."

As to defendants' argument that upon dismissing the piercing the corporate veil claim the Court should also dismiss the complaint in its entirety as against defendant Schumer, plaintiff contends that there is no basis for dismissing any of its claims as alleged against Schumer. Plaintiff argues that its claims for *quantum meruit*, account stated and breach of contract are each alleged against "defendants" in plural, and that all defendants, including Schumer, are liable on these causes of action.

Plaintiff also contends that personal jurisdiction has been acquired by this Court over Ameribuild Florida. According to the Flanagan affidavit, plaintiff reviewed only one contract for defendants in Florida but had many contacts with defendant Roth by telephone to the "Florida office." Moreover, Flanagan claims that the business cards of "Ameribuild Construction Management" list offices in both Florida and New York, as does "Ameribuild Construction Management's" corporate wesbite, www.ameribuild.com. Flanagan also avers that from 1998 until early 2004, all of the principals of the corporate defendants, as well as the majority of their employees, resided and worked in New York State. Plaintiff argues that Roth's conclusory statement that Ameribuild Florida is neither authorized to do business in New York nor does business in New York cannot be dispositive at this stage of the litigation and contends that the acts of Schumer and Roth in New York and the lack of any real distinction between the New York corporation and Ameribuild Florida makes the two corporations "alter egos." Plaintiff further contends that the discovery process will more fully reveal the connection between the two corporate defendants. Specifically, plaintiff believes that discovery will show that the principles of both corporations are identical, that both corporations possess the same assets and customer base, and that both corporations engage in the same line of work. Moreover, based upon the

allegations in the complaint, which plaintiff argues are properly pleaded and which this Court must accept as true, plaintiff contends that it has made out the requisite *prima facie* showing that Ameribuild Florida either did business in New York pursuant to CPLR § 301 or transacted business in New York pursuant to CPLR § 302 [a] [1].

Plaintiff also argues that the fact that it may only recover on one claim, either in contract or in quasi contract, does not preclude it from pleading both breach of contract, and, in the laternative, *quantum meruit*.

In reply, defendants contend that plaintiff has ignored the fact that the heightened pleading requirement of CPLR § 3016 [b] is applicable to plaintiff's piercing the corporate veil claim. According to defendants, plaintiff's vague allegations that the individual defendants lived a luxurious lifestyle while their companies were late in making unspecified payments to unspecified creditors during an unspecified time period do not provide any detail of the alleged wrong perpetrated by the individual defendants through a fraudulent corporate entity. Defendants also argue that plaintiff cannot, as a matter law, prove a fraudulent diversion or commingling of corporate funds by the individual defendants because of Flanagan's averment in his affidavit that he had knowledge of Roth and Schumer's alleged abuse of the corporate form.

With respect to the complaint as it is asserted against Schumer, defendants argue that because there is no allegation that Schumer engaged plaintiff or that Schumer guaranteed the corporate defendants' obligation to pay plaintiff, plaintiff cannot asserted a contract claim against Schumer. Similarly, as there is no allegation that plaintiff sent Schumer an invoice, plaintiff cannot assert a cause of action for account stated against Schumer. Defendants also reiterate their argument that plaintiff's *quantum meruit* cause of action as a whole must be dismissed on

the ground that a claim sounding in quasi contract cannot be pleaded where an express contract governs the parties' dispute.

As to the Ameribuild Florida, defendants contend that plaintiff is required to give more than mere notice pleading of jurisdictional grounds; plaintiff is required to plead evidentiary facts showing Ameribuild Florida had sufficient contacts with the State. Claiming that telephone calls from Florida to New York are insufficient to support a finding that Ameribuild Florida purposefully transacted business in this state, defendants argue that plaintiff has failed to reveal, in either its complaint or in the Flanagan affidavit, a single transaction by Ameribuild Florida in New York or that Ameribuild Florida did business here. Moreover, defendants contend that plaintiff's "alter ego" argument in support of personal jurisdiction fails because vague allegations of unnamed Ameribuild Florida employees working or living in New York is insufficient to confer personal jurisdiction over the corporation.

Analysis

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026) and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and

determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). Where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether the claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

I. Plaintiff's Piercing the Corporate Veil Claim

It is well settled that "a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners" (*Joan Hansen & Co. v Everlast World's Headquarters Boxing Headquarters Corp.*, 296 AD2d 103, 109, 744 NYS2d 384 [1st Dept 2002] *quoting Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140, 623 NE2d 1157, 603 NYS2d 807 [1993]). Piercing the corporate veil requires a showing that (1) the owner exercised complete domination over the corporation with respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the plaintiff, resulting in plaintiff's injury (*First Capital Asset Mgmt. v N.A. Partners, L.P.*, 300 AD2d 112, 116, 755 NYS2d 63 [1st Dept 2002]). Here, even when liberally construed and viewed in the light most favorable to plaintiff, plaintiff's complaint makes neither the conclusory statement that Roth and Schumer used their alleged

domination of the corporate defendants to perpetrate a fraud, nor allegations of fact from which this conclusion could be drawn (*see Lichtman v Estrin*, 282 AD2d 326, 328, 723 NYS2d 185 [1st Dept 2001]). Other than alleging that, upon information and belief, (1) Roth and Schumer dominated and controlled all of the assets and cash flow of the defendant corporations, (2) defendant corporations had and have no separate corporate identity and were and are used by Roth and Schumer as fronts or conduits for one or more of their several business and personal enterprises, (3) Roth and Schumer have diverted funds from defendant corporations to other business and personal enterprises which has resulted in a dissipation of the defendant corporations' assets, (4) defendant corporations have failed to follow proper corporate procedures and are merely vehicles for Roth and Schumer and their related business and personal enterprises, (5) defendant corporations have no means of capitalization, (6) defendant corporations at no time had sufficient operating revenue, and (7) Roth and Schumer are not entitled to protection from the corporate shield of the defendant corporations and are individually liable for the obligations of defendant corporations, the complaint is silent as to how Roth and Schumer committed a fraud or wrong against plaintiff warranting equitable intervention (*see Spectra Secs. Software, Inc. v MuniBEX.com, Inc.*, 307 AD2d 835, 836, 763 NYS2d 313 [1st Dept 2003]; *compare M & A Oasis, Inc. v MTM Assocs., L.P.*, 307 AD2d 872, 874, 764 NYS2d 9 [1st Dept 2003] [IAS court properly sustained plaintiff's cause of action to pierce the corporate veil because plaintiff alleged that defendants dominated the corporation and used their control to perpetrate a fraud upon plaintiff]). Thus, plaintiff has failed to allege facts which, if proved, would justify taking the extraordinary measure of disregarding the corporate form (*Harrogate House Ltd. v Jovine*, 2 AD3d 108, 767 NYS2d 613 [1st Dept 2003]). Accordingly, defendants'

motion to dismiss plaintiff's fourth cause of action is granted.

II. The Complaint as Asserted Against Defendant Schumer

Plaintiff's breach of contract cause of action against Schumer must be dismissed because plaintiff has failed to allege that Schumer, in his individual capacity, contracted with plaintiff. Moreover, there is no allegation that Schumer personally guaranteed payment of plaintiff's fees on behalf of the corporate defendants.

Similarly, plaintiff has also failed to state a cause for account stated against Schumer as there is nothing in the complaint to indicate that Schumer ever expressly or impliedly agreed that he personally owed plaintiff anything (*Armienti & Brooks, P.C. v Acceleration Nat'l Ins. Co.*, 274 AD2d 319, 320, 710 NYS2d 74 [1st Dept 2000]). Likewise, plaintiff's *quantum meruit* claim must be dismissed to the extent it is asserted against Schumer because plaintiff has not alleged that it was retained to represent Schumer personally. While the complaint alleges that plaintiff represented defendant Ameribuild Construction Management, Inc. and defendants Brandon and Joan Roth in numerous matters in federal and New York State court, there is no allegation that plaintiff rendered legal services to defendant Schumer, as an individual, in any legal matter.

Plaintiff's argument that it has pleaded each of these claims against "defendants" in plural and that all "defendants" are liable does not satisfy plaintiff's duty to plead with "sufficient particularity to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action" (CPLR § 3013).

III. Personal Jurisdiction Over Ameribuild Florida

The relevant inquiry under CPLR § 301, which provides that "[a] court may exercise jurisdiction over persons, property, or status as might have been exercised heretofore," is whether Ameribuild Florida, as a nonresident corporation, has had business contacts with this jurisdiction sufficiently regular and continuous so as to justify the conclusion that it is "doing business" in New York and is by reason of that "presence"subject to the jurisdiction of New York's courts (*Duffy v Grand Circle Travel, Inc.*, 302 AD2d 324, 756 NYS2d 176 [1st Dept 2003]). The "doing business" test is a simple and pragmatic one which varies in its application depending upon the particular circumstances of each case (*Landoil Resources Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28, 33, 565 NE2d 488, 563 NYS2d 739 [1990]). Essentially, "[t]he court must be able to say from the facts that the corporation is "present" in the State "not occasionally or casually, but with a fair measure of permanence and continuity" (*id.*) [internal citations omitted]. Plaintiff's allegations that it reviewed a contract for a project in Florida and had many of its contacts with Ameribuild Florida's president, Roth, "by telephone to the Florida office" may serve to establish *plaintiff's* ties to the state of *Florida*, but are useless for the purposes of establishing *Ameribuild Florida's* presence *here*. However, the fact that both its business cards and its website indicate that "Ameribuild Construction Management" maintains offices in Florida and New York, a fact which defendants do not dispute, provides the indicia that Ameribuild Florida was "doing business" here at the time plaintiff's action was brought and is more than sufficient to allow the Court to say that Ameribuild Florida is "present" in New York "not occasionally or casually, but with a fair measure of permanence and continuity" (*Landoil Resources Corp.*, 77 NY2d at 33). Thus, Ameribuild Florida is amenable to suit in this State

under CPLR § 301 and the motion to dismiss the complaint against it for lack of personal jurisdiction is denied[1].

IV. Plaintiff's *Quantum Meruit* Cause of Action

Quantum meruit has been described "as a legal obligation imposed in order to prevent a party's unjust enrichment" (*Tesser v Allboro Equip. Co.*, 302 AD2d 589, 591, 756 NYS2d 253 [2d Dept 2003] *quoting Clark-Fitzpatrick, Inc. v Long Is. R.R.*, 70 NY2d382, 388, 516 NE2d 190, 521 NYS2d 653 [1987]). The general rule regarding a claim for *quantum meruit* is that "[i]t is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties" (*Leroy Callender, P.C. v Fieldman*, 252 AD2d 468, 468-69, 676 NYS2d 152 [1st Dept 1998] *quoting Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389, 516 NE2d 190, 521 NYS2d 653 [1987]). However, because neither party has submitted the alleged retainer agreement either in support of or in opposition to this motion, the Court cannot say that alleged contract even exists, much less that its scope covers the parties' dispute (*compare SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 356, 777 NYS2d 62 [1st Dept 2004] [because Citibank's fees were set forth in the administration and financial management agreements and the administrative committee members' reimbursement are set forth in the administration agreement, plaintiff's claim of unjust enrichment based upon defendants' receipt of fees for services allegedly not performed is barred]; *Sailsman Graphics Co. v Verizon Yellow Pages Co.*, 5 AD3d 317, 773 NYS2d 559 [1st

[1] Having resolved the personal jurisdiction issue under CPLR § 301, it is unnecessary for the Court to address CPLR § 302.

Dept 2004] [plaintiff's claim for unjust enrichment is not supportable where the unambiguous terms of the contract governs the dispute]). Moreover, a holding that plaintiff may not assert both a *quantum meruit* cause of action and a breach of contract claim would fly in the face of CPLR § 3014, which expressly provides that "[c]auses of action or defenses may be stated alternatively or hypothetically" (*Auguston v Spry*, 282 AD2d 489, 491, 723 NYS2d 103 [2d Dept 2001] [causes of action for breach of contract and unjust enrichment may be pleaded alternatively] *citing Joseph Sternberg, Inc. v Walber 36th Street Assoc.*, 187 AD2d 225, 594 NYS2d 144 [1st Dept 1993] [in New York, where a litigant fails to establish the right to recover upon an express contract he may, in the same action, recover in *quantum meruit*]). Thus, defendants' motion to dismiss plaintiff's third cause of action is denied.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss pursuant to CPLR §§ 3211 [a] [7] and [8] is granted to the extent that plaintiff's fourth cause of action for piercing the corporate veil and plaintiff's complaint in its entirety as asserted against defendant Schumer are dismissed; and it is further

ORDERED that the parties are to appear for a preliminary conference before Justice Carol Edmead, 60 Centre Street, New York, New York, Room 543 on February 15, 2005 at 2:15 p.m.; and it is further

ORDERED that defendants are to serve plaintiff with a copy of this order, with notice of entry, within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 15, 2004

Hon. Carol R. Edmead, J.S.C.