Refreshment Mgmt. Serv. Corp. v Complete Off. Supply Warehouse Corp.
2010 NY Slip Op 33845(U)
April 20, 2010
Sup Ct, Nassau County
Docket Number: 015374/2009
Judge: Ira B. Warshawsky
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SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

REFRESHMENT MANAGEMENT SERVICES CORP.,

Plaintiff,

INDEX NO.: 015374/2009
MOTION DATE: 03/30/2010
MOTION SEQUENCE: 001

-against-

COMPLETE OFFICE SUPPLY WAREHOUSE CORP.
d/b/a INTERNATIONAL COFFEE SYSTEMS, INC.
and MARK CORDOVI,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Defendants' Memorandum of Law in Support	2
Affidavit in Opposition of Emilia Baer	3
Memorandum of Law in Opposition to Defendants' Dismissal Motion Pursuant to CPLR Rules 3211(a)(1) & (7) and Consolidation Motion Pursuant to CPLR Section 602(a)	4
Affirmation of Eric H. Gruber in Further Support of Defendants' Motion & Exhibits Annexed	5
Defendants' Reply Memorandum of Law	6
Sur-Reply Memorandum of Law in Opposition to Defendants' Dismissal Motion Pursuant to CPLR Rule 3211(a)(1), (2) & (7) and Consolidation Motion Pursuant to CPLR 602(a)	7

Defendants, Complete Office Supply Warehouse Corp. d/b/a International Coffee Systems, Inc. and Mark Cordovi, move, for an Order of this Court, pursuant to:

(1) CPLR 3211(a)(7), dismissing the second, third, fourth, fifth, sixth and eighth causes of action in the plaintiff, Ira Baer's complaint, for failure to state a cause of action against Complete;

(2) CPLR 3211 (a)(1) and (a)(7), dismissing the entire complaint as against defendant, Mark Cordovi, on the grounds that Mark Cordovi has a complete defense founded upon documentary evidence to each of the causes of action and the complaint fails to state a cause of action against him, individually; and

(3) CPLR 602, to consolidate the instant action with Ira Baer v. Complete Office Supply Warehouse Corp. d/b/a International Coffee Systems, Inc., and Mark Cordovi, Supreme Court, Nassau County Index Number 15373/09.

The motion is determined as herein set forth below.

Insofar as a motion made pursuant to CPLR 3211 requires this Court to accept as true the allegations of the complaint (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]), the underlying facts are as follows:

Plaintiff, Refreshment Management Services Corp. ("RMSC") is a domestic corporation. Defendant, Complete Office Supply Warehouse Corp. d/b/a International Coffee Systems ("Complete"), is a domestic corporation engaged in the business of selling office coffee, beverage services and other allied products. Defendant Mark Cordovi ("Cordovi") is the President of defendant Complete.

On May 31, 2007, RMSC and Complete entered into an "Asset Purchase Agreement" (referred to herein as "APA") pursuant to which RMSC agreed to sell, and the Complete agreed to purchase, substantially all of the assets of RMSC, including all customer lists; all property (including coffee machines) located on its premises; all merchandise inventory; name, website, domain name and telephone numbers; and, all contracts with it's customers. Plaintiff's cash on hands or in the banks, cash equivalents and accounts receivable were expressly excluded from the sale (*Agreement*, §1.2).

Pursuant to the APA, the purchase price for the assets was to be computed according to a formula specified in Exhibit D to the Agreement, plus the value of the inventory (based on its cost). At the closing, $125,000.00 of the purchase price was paid. The balance was to be paid monthly,

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over the 24-month period following the closing, with the payments being made in the priority order specified on Exhibit J to the Agreement.

In addition, RMSC (and its shareholders and Ira Baer) agreed not to solicit the customers and employees of RMSC for a period of five years. Further, Complete agreed to pay the sales tax due on the equipment included in the sale. RMSC and Complete also each made various representations and warranties to the other concerning their business and authority. The representations and warranties were further specified in the schedules to the Agreement.

Pursuant to Section 9.3 of the APA, Complete also had a right to set-off the amount of any obligation of RMSC (not assumed by Complete) against any payments then or thereafter due to RMSC under the Agreement, provided that defendants gave RMSC ten business days written notice of same and provided further that if the plaintiff, RMSC, disagreed with the set-off and sent written notice of its objection to the defendants within ten days of its receipt of notification of the alleged set-off from defendants, the amount of the set-off had to be paid to defendants' attorney and held in escrow pending the resolution of the controversy either by a final judgment in an action or by settlement.

Pursuant to Section 10.3 of the APA, all written notices required to be sent to the plaintiff also had to be sent to its attorney and had to be mailed to the addresses of the plaintiff and its attorney by prepaid, first class, registered or certified mail.

Pursuant to Section 6.13 of the APA, the plaintiff agreed to pay the creditors described on Exhibit "J" to the agreement, but only if, and for so long as, the defendants complied with the APA.

The APA also provided for the parties to indemnify each other in the event of a misrepresentation or breach of the agreement. In addition, RMSC indemnified Complete for all liabilities relating to the business of RMSC prior to closing, and Complete indemnified RMSC for any claims relating the business of RMSC following the closing.

Individual defendant, Mark Cordovi, signed the Asset Purchase Agreement as President on behalf of the corporate defendant, Complete. Non-party, Emilia Baer, signed the Asset Purchase Agreement on behalf of the plaintiff, RMSC, as its president.

In its complaint herein, RMSC alleges that defendants continuously breached the representations and warranties made in the parties' Asset Purchase Agreement, including unilaterally setting off the obligations of the plaintiff, RMSC, under the APA without giving the plaintiff the required ten business days notice of their intent to set off such obligations (thereby depriving the plaintiff of the opportunity to disagree with the set-offs).

Plaintiff sets forth 8 causes of action in its complaint, to wit: (1) breach of contract; (2) fraudulent inducement; (3) breach of covenant of good faith and fair dealing; (4) negligent misrepresentation; (5) breach of fiduciary duty; (6) constructive trust and accounting; (7) unjust enrichment; and (8) constructive fraud.

Plaintiff's complaint forms the basis of defendants' instant pre-answer motion, pursuant to CPLR 3211(a)(1) and (7).

It is noted at the outset the defendants do not seek the dismissal of the first and seventh causes of action sounding in breach of contract and unjust enrichment, respectively, as against the corporate defendant, Complete. Accordingly, the first and seventh causes of action stand as against the corporation.

Furthermore, defendants' motion pursuant to CPLR 3211(a)(1) and (a)(7), for an Order of this Court, dismissing the entire complaint as against Mark Cordovi personally is granted.

It is undisputed in this case that the individual defendant, Mark Cordovi, is the president of the corporate defendant, Complete. Further, the documentary proof submitted herein, including the parties' APA demonstrates that Mark Cordovi was acting at all times in his capacity as the President of the corporate defendant, Complete. The issue here is whether the complaint is sufficient to state a cause of action against Cordovi personally for the alleged wrongs of the corporation with which plaintiff entered into the APA. The complaint names as defendant both Complete and Cordovi. In addition, the complaint asserts causes of action jointly against them, referring to them, for the most part, as "the defendants."

The general rule is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability (*Bartle v. Home Owners Coop.*, 309 NY 103, 106 [1955]; *Seuter v. Lieberman*, 229 AD2d 386, 387 [2nd Dept. 1996]). The concept of piercing the corporate veil is an exception to

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this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation (*Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140-141 [1993]). A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff (*Id.*; *Love v. Rebecca Dev., Inc.*, 56 AD3d 733 [2nd Dept. 2008]; *Millennium Constr., LLC v. Loupolover*, 44 AD3d 1016 [2nd Dept. 2007]).

The complaint here fails in this regard. No where does the plaintiff allege, or even imply, that Cordovi exercised complete "dominion and control" over the corporate defendant, Complete in its dealings with the plaintiff.

Further, the party seeking to pierce the corporate veil must also establish "that the owners, through their domination, abused the privilege of doing business in the corporate form" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, supra at 142; *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141 [2nd Dept. 2009]). Factors to be considered in determining whether the owner has "abused the privilege of doing business in the corporate form" include whether there was a "failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*Millennium Constr., LLC v Loupolover*, supra at 1016-1017; *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, supra).

Notably, even under the liberal "notice pleading" requirements of CPLR 3013, a complaint still must allege, inter alia, "the material elements of each cause of action" asserted. Conduct constituting an abuse of the privilege of doing business in the corporate form is a material element of any cause of action seeking to hold an owner personally liable for the actions of his or her corporation under the doctrine of piercing the corporate veil. Here, nothing in the complaint asserts or suggests that Cordovi, in his dealings with the plaintiff, acted other than in his capacity as president of Complete, or that he failed to respect the separate legal existence of the corporation, or that he treated its corporate assets as his own, or that he undercapitalized the corporation, or that he did not respect corporate formalities, or that he, in any other way, abused the privilege of doing business in the corporate form (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6 [2nd Dept. 2008]; *cf. Gateway 1 Group, Inc. v Park Ave. Physicians, P.C.*, supra). Without any allegation that Cordovi's conduct constituted an abuse of the privilege of doing business in the corporate form, the complaint fails to allege a material element of a cause of action against Cordovi under the theory of piercing the corporate veil (*Lawlor v Hoffman*, 59 AD3d 499 [2nd Dept. 2009]). Thus, plaintiff's complaint as against the individual defendant, Cordovi, is dismissed in its entirety (*Manley v. Pandick Press*, supra).

Therefore, this Court is left to determine the adequacy, under CPLR 3211(a)(7) of plaintiff's second, third, fourth, fifth, sixth and eighth causes of action against the corporate defendant, Complete. For the sake of clarity, this Court will address each remaining cause of action against Complete separately.

Third Cause of Action: Breach of Covenant of Good Faith and Fair Dealing

Defendant maintains that plaintiff's first and third causes of action, for breach of contract and breach of covenant of good faith and fair dealing, respectively, are duplicative of a simple breach of contract claim and complain of the same acts and demand the same identical relief. Defendants submit that there is no basis to maintain *two* separate causes of action; rather, only a simple breach of contract claim is warranted. This Court agrees.

Based upon a plain and simple reading of the allegations advanced to support these two causes of action, this Court finds that plaintiff's first and third causes of action allege, albeit with differing specificity, nothing more than a breach of the APA. Specifically, the first cause of action complains that the defendant, Complete, breached various provisions of the APA including Article 9.3 (*Complaint*, ¶17) , Section 6 of Exhibit D to the APA (*Id.* at ¶18) , Section 3 of Exhibit D to the APA (*Id.* at ¶19) , Section 1 of Exhibit D to the APA (*Id.* at ¶20) , and Section 6.13 of the APA (*Id.* at ¶¶21-22) and demands judgment against the "defendants for the sum of $13 Million, together with prejudgment interest at the legal rate of nine percent per annum from May 22, 2007 and the plaintiff's costs, disbursements and legal fees" (*Id.* at ¶¶15-23). Similarly, the third cause of action alleges the exact same breaches as those alleged in the first cause of action including at paragraph ¶42, plaintiff alleges that the breach of the covenant of good faith and fair dealing included "the acts and failures to act set forth in the plaintiff's causes of action herein and Exhibit B [to the Complaint]." Exhibit B is a month by month recitation of Complete's alleged breaches. It repeatedly references alleged breaches of Section 6 of Exhibit D to the APA, Article 9.3 and Article 6.13, i.e., the same breaches complained of in the first cause of action. The allegations in the third cause of action are indistinguishable from the allegations contained in the first cause of action. There are no new facts alleged in the third cause of action to differentiate it any way from the first cause of action.

Obviously, on the instant motion to dismiss under CPLR 3211(a)(7), the issue is not the sufficiency of plaintiff's pleadings with respect to a breach of contract claim against Complete; rather, whether the misconduct alleged as a basis for plaintiff's third cause of action is the same as his first cause of action for breach of contract. This Court finds that they are and therefore, this Court dismisses the third cause of action as duplicative of the breach of contract claim.

Second Cause of Action: Fraudulent Inducement

Plaintiff RMSC alleges that Complete made knowingly false representations of material facts to it and intentionally concealed material facts from it, intending that it would rely on such false representations, be deceived by such concealment and be thereby induced into signing the parties' APA. Plaintiff's fraudulent inducement claim is dismissed however as duplicative of his breach of contract claim (causes of action #1 and #3, *supra*). Plaintiff alleges that the defendant Complete compelled the plaintiff, RMSC, to execute the parties' APA based upon false and fraudulent promises and representations that they made to the plaintiff at a January 14, 2007 meeting and at no time subsequent to the execution by the parties of the APA, did the defendants ever, timely or accurately abide by the representations and agreements that they made (*Complaint*, ¶¶26-27). Thus, the gravamen of plaintiff's allegations in his second cause of action is that the defendant's representations, relating to the sale and purchase of substantially all of RMSC's assets were breached and not subsequently performed by Complete. This is yet again a breach of contract claim.

Notably, it is undisputed by and among the parties herein that the negotiations, terms and conditions surrounding the APA were incorporated therein vis a vis a merger provision spelled out in Article 10.1. Pursuant to this merger provision, plaintiff agreed and acknowledged that the

APA contained the entire agreement between the parties and superseded all prior agreements, letters, communications and understandings of the parties.

In order to assert a claim for fraud in the inducement, a plaintiff must establish that the defendant made material misrepresentations that were false, the defendant knew the representations were false when made, the misrepresentations were made with intent to deceive the plaintiff, the plaintiff justifiably relied upon these representations and plaintiff was damaged as a result of relying upon these misrepresentations (*Leno v. DePasquale*, 18 AD3d 514 [2nd Dept. 2005]). "[A] contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet its contractual obligations"(*Rocanova v. Equitable Life Assurance Society of the United States*, 83 NY2d 603, 614 [1994]). That is, "[g]eneral allegations that the defendant entered into a contract while lacking the intent to do perform it are insufficient to support the claim" for fraudulent inducement (*New York University v. Continental Ins. Co.*, 87 NY2d 308 [1995]). Defendants' alleged "false promise" surrounding the terms and conditions of the APA, particularly in light of the merger provision contained in the Agreement, is not sufficiently collateral or extraneous to the terms of the underlying "agreement" between the parties so as to provide support for an independent fraud claim (*cf. Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]).

Moreover, even assuming, however, that plaintiff had made out a viable claim based on a "false promise," its fraudulent inducement cause of action could not survive. As stated above, to maintain a cause of action for fraud, plaintiff must allege a representation of a material fact, the falsity of that representation, knowledge of falsity by the party who made the representation at the time that it was made, justifiable reliance by plaintiff, and resulting injury (*Monaco v. New York University Medical Center*, 213 AD2d 167, 169 [1st Dept.1995], *lv. denied* 86 NY2d 882 [1995]). Here, while plaintiff has advanced these allegations, it has failed to demonstrate that it has a legally cognizable cause of action for fraudulent inducement (*Guggenheimer v. Ginzburg*, supra; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). The fact is that plaintiff is unable to point to any material representation concerning an intention to perform a duty, which is collateral or extraneous to the APA. Further, the summary allegations that the alleged information would be relied upon by the plaintiff is belied by Article 10.1 of the APA titled "Complete Agreement" wherein plaintiff expressly agreed that the APA "sets forth the entire agreement between the parties and superseded all prior agreements and understandings of the parties in connection therewith. Additionally, plaintiff acknowledges that the APA had been "extensively negotiated by counsel and deemed prepared by both counsel" (*Agreement*, Article 10.11).

CPLR 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. When deciding such a motion, the court must determine whether the plaintiff has a legally cognizable cause of action and not whether the action has been properly plead (*Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]);*Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]; *Well v. Yeshiva Rambam*, 300 AD2d 580 [2nd Dept. 2002]). The complaint must be liberally construed, and plaintiff must be given the benefit of every favorable inference (*Sitar v. Sitar*, 50 AD3d 667 [2nd Dept. 2008]); *Mitchell v. TAM Equities, Inc.*, 27 AD3d 703 [2nd Dept. 2006]). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (*511 West 232rd Street Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Sokoloff v. Harriman Estates Development Corp.*, 96 NY2d 409 [2001]). If, from the facts alleged in the complaint and the inferences which can be drawn from those facts, the court determines that the pleader has a cognizable cause of action, the motion must be denied (*Sokoloff v. Harriman Estates Development Corp.*, supra; *Stucklen v. Kabro Assocs.*, 18 AD3d 461 [2nd Dept. 2005]). While factual allegations contained in the complaint are deemed true, legal conclusions and facts contradicted on the record are not entitled to a presumption of truth (*In re Loukoumi, Inc.*, 285 AD2d 595 [2nd Dept. 2001]; *Doria v. Masucci*, 230 AD2d 764 [2nd Dept. 1996]).

Therefore, plaintiff's second cause of action for fraudulent inducement is herewith dismissed.

Fourth, Fifth and Eighth Causes of Action: Negligent Misrepresentation; Breach of Fiduciary Duty; Constructive Fraud

Plaintiff's fourth, fifth and eighth causes of action are all premised upon the notion that the defendant owed a fiduciary relationship to the plaintiff, and, as a result, had a fiduciary duty to use reasonable care to impart information to the plaintiff (fourth cause of action), breached the fiduciary duty to the plaintiff by breaching the APA (fifth cause of action), and constructively defrauded the plaintiff by virtue of the alleged fiduciary duty and their alleged failure to disclose information (eighth cause of action). Each of these causes of action fails, however, because the plaintiff has failed to establish an underlying necessary element of each of these legal theories, i.e., the existence of a fiduciary relationship between the plaintiff and the corporate defendant.

A fiduciary relationship exists when one party "... reposes confidence in another and relies on the other's superior expertise or knowledge (citations omitted)" (*WIT Holding Corp. v. Klein*, 282 AD2d 527, 529 [2nd Dept. 2001]). Arm's length business transactions do not give rise to fiduciary relationships (*Id.*; *Wiener v. Lazard Freres & Co.*, 241 AD2d 114 [1st Dept.1998]). The relationship between Complete and RMSC, predicated upon the APA, is contractual.

In this case, RMSC and Complete, sophisticated business entities, entered into the APA after extensive negotiations by the plaintiff and their legal counsel with the defendant (*Agreement,* Article 10.11). The APA sets forth the entire scope of the parties' relationship (*Id.* at Article 10.1) such that no fiduciary relationship was created therein. Further, the complaint does not allege any facts which would support the creation of a fiduciary duty. This admittedly fully negotiated agreement was an arms length transaction.

As there is no fiduciary relationship between the parties, the underlying basis for each of the fourth, fifth and eighth causes of action is absent and each fails to state a cause of action and is therefore dismissed.

<u>Sixth Cause of Action</u>: Constructive Trust and Accounting

Plaintiff claims that it entitled to impress a constructive trust upon the moneys that the defendant wrongfully, unlawfully and illegally withheld from the plaintiff (*Complaint*, ¶79). Plaintiff also demands an accounting.

The four elements of a constructive trust are (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment (*Sharp v. Kosmalski*, 40 NY2d 119 [1976]; *Church of God Pentecostal Fountain of Love, MI v. Iglesia De Dios Pentecostal, MI*, 27 AD3d 685 [2nd Dept. 2006]). Any claim to impose a constructive trust must fail because the relationship between the parties is not confidential or fiduciary, *supra*.

Similarly, in order to maintain an action for an accounting, the party seeking the accounting must establish that a fiduciary or trust relationship exists (*Akkaya v. Prime Time*

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Transport, 45 AD3d 616 [2nd Dept. 2007]; *Darlagiannis v. Darlagiannis*, 48 AD2d 875 [2nd Dept. 1975]).

Again, as the plaintiff has failed to establish that a fiduciary relationship existed between Complete and itself, its sixth cause of action is also dismissed.

Accordingly, the plaintiff's complaint as against the individual defendant Mark Cordovi is dismissed in its entirety. The Plaintiff's second, third, fourth, fifth, sixth and eighth causes of action are dismissed as against the corporate defendant Complete. The plaintiff's first and seventh causes of action stand as against the corporate defendant, Complete.

With respect to defendants' motion to consolidate this action with the action entitled Ira Baer v. Complete Office Supply Warehouse Corp. d/b/a International Coffee Systems, Inc., and Mark Cordovi, Supreme Court, Nassau County Index Number 15373/09, the motion is denied.

Actions may be consolidated or tried jointly when they involve common questions of fact or law (CPLR 602[a]). When the commonality requirement is met, consolidation is favored by the courts, and should be granted "absent showing of substantial prejudice by the party opposing the motion" (*Beerman v. Morhaim*, 17 AD3d 302, 303 [2nd Dept. 2005]). Consolidation avoids unnecessary duplication of trials, unnecessary court costs and the possibility of inconsistent decisions based upon the same facts (*Gutman v. Klein*, 26 AD3d 464 [2nd Dept. 2006]).

The party seeking consolidation bears the burden of establishing the commonality requirement (*Beerman v. Morhaim*, supra). Complete points out that as the discovery will be of the same people and will including substantially the same documents, events and circumstances, there is no prejudice to the plaintiff, RMSC in consolidating this action with the companion action brought by its former general manager, Ira Baer, against the same defendants.

While there are certain characteristics common to both actions, the fact remains that each action is predicated upon the breach of a very different agreement. Baer's agreement with Complete was an Employment Agreement. RMSC's agreement with Complete is an Asset Purchase Agreement. The terms, conditions, promises and representations therein are very unique and the alleged breaches will be decided primarily by interpreting the different contracts. Where evidence with respect to two actions does not overlap, even where the suits arise from the same set of characters and a general overall transaction, motion for consolidation is generally denied

(*RCN Const. Corp. v. Fleet Bank, N.A.*, 34 AD3d 776, 777 [2nd Dept. 2006]; *Aluminum Mill Supply Corp. v. Skyview Metals, Inc.*, 117 AD2d 765, 767 [2nd Dept. 1986]).

In light of Complete's failure to sufficiently show that the two actions present common questions of fact and law under CPLR 602(a), this Court finds that consolidation of these matters is not appropriate.

This shall constitute the decision and order of this Court.

Dated: April 20, 2010

J.S.C.

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