SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Jaffe Justice PART 12

Print & Mare

-v-

Stenzler, et al.

INDEX NO. 651318/11
MOTION DATE 2/20/13
MOTION SEQ. NO. 001

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

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 ACCOMPANYING DECISION / ORDER

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

Dated: 7/8/13

BJ, J.S.C.
BARBARA JAFFE
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 : IAS PART 12

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PRINT & MORE ASSOCIATES, INC.,

Plaintiff,

-against-

ANDREW STENZLER, RAMMY HARWOOD, KIDVILLE, INC., KIDVILLE, NY, LLC, KIDVILLE UWS, LLC, KIDVILLE TRIBECA, LLC, KIDVILLE PAYROLL, LLC, KIDVILLE PARK SLOPE, LLC, KIDVILLE MEDIA, LLC, KIDVILLE JWT, LLC, KIDVILLE HOLDINGS, LLC, KIDVILLE FRANCHISE COMPANY, LLC, KIDVILLE ENTERTAINMENT, LLC, AND KIDVILLE EAST CHELSEA, LLC,

Defendants.

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Index No. 651318/11

Subm.: 2/20/13
Motion Seq. No. 001

DECISION & ORDER

BARBARA JAFFE, JSC:

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By notice of motion dated August 1, 2011, defendants move pursuant to CPLR 3211(a)(7) for an order dismissing the complaint. Plaintiff opposes, and by amended notice of cross-motion dated October 18, 2011, moves pursuant to CPLR 3212 for an order granting it summary judgment on its breach of contract claim. Defendants oppose.

I. BACKGROUND

On or about November 1, 2010, plaintiff commenced the instant action with the filing of a summons and verified complaint reflecting that "[d]efendants operate a chain of high-end childcare facilities," that defendant Andrew Stenzler is Chief Executive Officer of defendant

Kidville, Inc., and a principal, director and owner of the remaining Kidville defendants, and that defendant Rammy Harwood is President of Kidville, Inc., and also a principal, director, and owner of the other Kidville defendants. (EFD 23). Kidville, Inc. wholly owns the other Kidville defendants, and according to plaintiff, they are operated from the same location, their "finances and business transactions are intermingled [such that] they are effectively operated as a single entity," and they are alter egos of each other and of Stenzler and Harwood. (*Id.*).

Plaintiff alleges that on September 24, 2008, Danielle Kirsner, "Senior Director of Programming and Operations" for "Kidville," ordered Spring/Summer 2009 program guides for Kidville locations in New York and Maryland and establishing a timetable for their production and delivery. (*Id.*). It is also alleged that this "was not the first such transaction between the parties[, that] there was already a pattern and practice established between them as to the price for such materials," and that in November of 2008, defendants paid plaintiff the money they owed it for a "prior printing of guides" before the Spring/Summer 2009 guides were shipped to them. (*Id.*).

Sometime thereafter, defendants ordered Fall 2009 program guides, and in late June 2009, when Jean-Claude Joseph, plaintiff's president, and Harwood discussed payment for them, Harwood claimed that defendants were experiencing financial problems but he "personally assured" Joseph that "the outstanding invoice would be paid." (*Id.*). Between July and December 2009, defendants made a series of partial payments, and "Harwood, on behalf of all [d]efendants, repeatedly promised that the outstanding invoice would eventually be paid in full" and never challenged the legitimacy of plaintiff's invoice. (*Id.*). However, in December 2009, Stenzler informed Joseph that "no further payments would be made on any outstanding invoice," and

there thus remains an outstanding invoice for $49,765.60. (*Id.*).

Plaintiff asserts claims against defendants for breach of contract, violation of the New York Consumer Protection Act, fraud, and conversion. In alleging fraud in its third cause of action, plaintiff asserts that defendants "used promises of payment to induce the shipment of merchandise and the delay of collection actions." (*Id.*).

By affidavit dated September 23, 2011 and submitted in opposition to the instant motion and in support of the cross-motion, Joseph references Kirsner's September 24, 2008 email regarding the Spring/Summer and Fall 2009 program guides and asserts that defendants paid for the guides in installments after they were shipped to them, as per prior custom and practice, and that "Stenzler and Harwood determined not to pay for the Fall 2009 guides prior to the final shipment, but continued to assure [him] of payment in order to secure that shipment and to cause delay in collection efforts." (EFD 41).

In her email, Kirsner states that "[i]t's that time again" and that "[t]he last guide was a huge success." (EFD 42). She also expressed an expectation that they be produced according to an attached timeline. (*Id.*). Emails from Kirsner from March, April, May, and July 2009 reflect that she instructed Joseph as to the content, production, and shipping of the Fall 2009 guides. (*Id.*). Also attached is email correspondence between Joseph and Harwood wherein Joseph repeatedly requested payment for the guides, Harwood sent small payments and promised future ones, and eventually advised Joseph that he could no longer do business with him or pay the outstanding balance. (EFD 43). As are invoices from plaintiff addressed to "Kidville." (EFD 44).

On April 25, 2012, oral argument was held before the justice previously presiding over this part, during which he declined to convert defendants' motion to dismiss to a motion for

summary judgment. He stated that the parties would receive notice if he subsequently decided to do so. (EFD 52).

II. ANALYSIS

A. Breach of contract

Defendants claim that plaintiff's breach of contract claim must be dismissed as plaintiff fails to allege the requisite elements for a breach of contract. (EFD 22).

In opposition, and in support of its cross-motion, plaintiff claims that it is entitled to summary judgment, as Joseph's affidavit and the exhibits annexed thereto demonstrate the existence of a contract between it and Kidville, Inc., and there are no triable factual issues as to its performance under the contract, shipment of the printed materials, and defendants' breach, namely, their failure to pay the outstanding invoices. (EFD 45).

In reply, defendants deny that plaintiff should be permitted to move for summary judgment at this juncture absent notice from the court and an opportunity for the submission of additional evidence and arguments. (EFD 50). They maintain that plaintiff fails to state a cause of action for breach of contract against all of the Kidville defendants as it fails to allege the existence of a contract with each of them. (*Id.*).

1. Consideration of plaintiff's motion for summary judgment

Pursuant to CPLR 3211(c):

> [u]pon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment.

As the previously presiding justice declined to convert defendant's motion to one seeking

summary judgment, and as the parties never received notice to the contrary, the cross-motion is considered solely to the extent that it opposes defendants' motion.

2. Defendants' motion to dismiss

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "Further, [the court] must consider the factual assertions of an affidavit submitted in opposition to the dismissal motion in order to preserve inartfully pleaded, but potentially meritorious, claims." (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 10 [1st Dept 2012]; *accord Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]).

"The essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of the contract, and resulting damages." (*Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 150 [1st Dept 2013]).

Here, notwithstanding the conclusory nature of plaintiff's claim for breach of contract, Joseph's affidavit and the emails and invoices annexed thereto reflect that there existed a contract between plaintiff and Kidville, Inc. whereby plaintiff agreed to produce printed materials and ship them within a specified time frame in exchange for Kidville's payment of a previously agreed-upon price per unit, that plaintiff performed on the contract by producing and shipping the materials, and that Kidville breached the agreement by failing to pay the outstanding invoices.

However, absent any evidence reflecting that plaintiff contracted with any of the other defendants, it fails to state a claim for piercing the corporate veil. (*See infra*, VI.B.; *S. Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC,* 104 AD3d 613 [1st Dept 2013] [breach of contract claims against all but one defendant dismissed as purchase agreements were executed by that defendant only, and there exists no evidence that plaintiff was in privity with other defendants]; *Leonard v Gateway II, LLC,* 68 AD3d 408 [1st Dept 2009] [same]).

B. Consumer Protection Act

Defendants assert that plaintiff has failed to allege that their conduct is consumer-oriented or has the potential to affect the public at large, or to plead the facts underlying the claim with the required specificity. (EFD 22).

In opposition, plaintiff argues that defendants' decision to obtain products for which they did not intend to pay constitutes a matter of public concern. (EFD 45).

In reply, defendants observe that neither the complaint nor Joseph's affidavit contains any facts from which it may be inferred that their failure to pay plaintiff is a matter of public concern. (EFD 50).

General Business Law § 349(a) provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service . . . are [ ] unlawful." To state a claim under this section, a plaintiff must assert, *inter alia*, that a defendant engaged in conduct that was consumer-oriented. (*Koch v Acker, Merrall & Condit Co.,* 18 NY3d 940, 941 [2012]; *Stutman v Chemical Bank,* 95 NY2d 24, 29 [2000]). Conduct is consumer-oriented if it has "a broader impact on the consumer at large in that [it] is directed to consumers or potentially affect[s] similarly situated consumers." (*Cruz v NYNEX Info. Resources*, 263 AD2d 285, 290 [1st

Dept 2000]). Accordingly, private contractual disputes do not give rise to a claim under the statute. (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]).

Here, as plaintiff's claim arises from defendants' alleged breach of a contract between defined parties, absent any facts in the complaint or Joseph's affidavit from which it may be inferred that their conduct impacted any entity other than plaintiff, let alone consumers at large, plaintiff fails to state a claim. (*See Yellow Book Sales & Distrib. Co., Inc. v Hillside Van Lines, Inc.*, 98 AD3d 663 [2d Dept 2012] [alleged misrepresentations arising out of agreement between plaintiff and defendant had no impact on consumers at large and thus provided no basis for section 349(a) claim]; *State of New York Workers' Compensation Bd. v 26-28 Maple Ave., Inc.*, 80 AD3d 1135 [3d Dept 2011] [allegations against broker describing private dispute limited to methods broker used to sell insurance coverage to third-party plaintiff and "demonstrating no means by which those methods could broadly impact any others" insufficient to state section 349(a) claim]).

C. Fraud

Defendants maintain that plaintiff's fraud claim is fatally conclusory in violation of CPLR 3016. (EFD 22). In any event, they maintain that plaintiff's attempt to "dress up" its breach of contract as a claim for fraud is insufficient to state a claim. (*Id.*).

In opposition, plaintiff contends that its fraud claim is properly predicated on defendants' misrepresentation of their ability to pay, as they induced it to continue to produce and ship printed materials by assuring that they would eventually pay when they knew they would not. (EFD 45).

In reply, defendants argue that plaintiff's reliance on Harwood's promises of future payment does not constitute justifiable reliance and observe that plaintiff's opposition demonstrates that its fraud claim is impermissibly based on their alleged breach of contract. (EFD 50).

"A cause of action to recover damages for fraud will not arise where the only fraud alleged relates to a breach of contract." (*Biancone v Bossi*, 24 AD3d 582, 583 [2d Dept 2005]; *accord Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443 [1st Dept 2012]). "Moreover, a general allegation that a party entered into a contract while lacking the intent to perform is insufficient to state a cause of action . . . for fraud." (*Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, __ AD3d __, 2013 NY Slip Op 4328 [2d Dept June 12, 2013]; *accord Fairway Prime Estate Mgt., LLC v First Am. Intl. Bank*, 99 AD3d 554 [1st Dept 2012]). Accordingly, as the only fraud plaintiff alleges relates to defendants' promise to pay for the printed materials, and thus, to perform on the contract, plaintiff fails to state a claim.

In light of this determination, whether plaintiff pleaded the claim with sufficient particularity and whether it justifiably relied on Harwood's promises of future payment need not be addressed.

D. Conversion

Defendants argue that plaintiff's conversion claim is duplicative of his breach of contract claim absent any allegation that it had legal ownership of or an immediate right of possession to the monies allegedly owing to it. (EFD 22).

In opposition, plaintiff asserts that defendants' retention of the printed materials provides a basis for its conversion claim. (EFD 45).

In reply, defendants maintain a claim for money owed does not constitute a claim for conversion. (EFD 50).

As a conversion claim may not be premised on a party's alleged breach of a contract (*Resources Fin. Co. v Cinergy Data LLC,* 106 AD3d 562 [1st Dept 2013]; *Parekh v Cain*, 96 AD3d 812, 816 [2d Dept 2012]), plaintiff fails to state a claim.

E. Piercing the corporate veil

Defendants deny that plaintiff has stated a claim against Stenzler or Harwood, or any of the other Kidville defendants, absent any allegation that they used the corporate form to commit fraud. (EFD 22).

In opposition, plaintiff asserts that it is entitled to discovery to determine how Stenzler and Harwood operated the corporate defendants and whether they did so in a manner giving rise to alter ego liability. (EFD 45).

In reply, defendants note that the complaint contains no allegation of control or domination by Stenzler or Harwood and that plaintiff is not entitled to discovery to remedy its deficient pleading. (EFD 50).

"Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer . . . personally liable [for the corporation's wrongs], a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in 'bad faith' while representing the corporation." (*E. Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]). Accordingly, "it must be established that (1) the[y] . . . exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in

plaintiff's injury." (*Morpheus Capital Advisors LLC*, 105 AD3d at 153). Conclusory assertions of control are insufficient to warrant piercing the corporate veil. (*Vue Mgt., Inc. v Photo Assoc.*, 81 AD3d 569 [1st Dept 2011]; *Itamari v Giordan Dev. Corp.*, 298 AD2d 559 [2d Dept 2002]; *Metro. Transp. Auth. v Triumph Advertising Prod., Inc.*, 116 AD2d 526 [1st Dept 1986]).

Here, having pleaded no facts supporting a claim that Stenzler and Harwood exercised complete domination and control over the Kidville defendants so as to abuse the corporate form, its conclusory allegation that defendants are alter egos of one another by virtue of their co-location and common ownership is insufficient to state a claim for piercing the corporate veil. (*See Sass*, 100 AD3d 443 [although plaintiff "has shown that there is overlapping ownership, a common officer, and common office space and facilities, she has failed to meet her burden of showing complete domination and control and that such domination was used to commit a fraud or wrong causing her injury"]; *see also Allstate ATM Corp. v E.S.A. Holding Corp.*, 98 AD3d541 [2d Dept 2012] [plaintiff failed to state claim against corporate officer where complaint "did not allege that [he] exercised complete domination and control over the defendant corporation, . . . any lack of corporate formalities, commingling of funds, or undercapitalization of defendant corporation, or that [he] made personal use of corporate funds"]). Plaintiff's assertion that discovery may yield evidence substantiating its claims provides no basis for denying the motion. (*See Leonard*, 68 AD3d 408 [plaintiff's claim that discovery is necessary so that she may oppose defendants' motion to dismiss was "based on nothing more than unsubstantiated hope of discovering something relevant to her claims" and was thus insufficient to warrant denial of motion]; *Ravenna v Christie's Inc.*, 289 AD2d 15 [1st Dept 2001] [plaintiff's hope that discovery would yield evidence supporting his claims insufficient to avoid dismissal of his "patently

defective cause of action"]).

VII. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for an order dismissing the complaint is granted to the extent that all claims are dismissed except for plaintiff's breach of contract claim against defendant Kidville, Inc.

ENTER:

Barbara Jaffe, JSC

DATED: July 8, 2013
New York, New York