SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice

PART 45

MPEG LA, L.L.C.

-v-

GXI INTERNATIONAL, LLC et al

INDEX NO. 653689/12

MOTION DATE

MOTION SEQ. NO. 002

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~~ by defendants to dismiss the complaint is GRANTED per the attached Decision and Order.

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

Dated: September 18, 2013

J.S.C.
MELVIN L. SCHWEITZER

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 45

MPEG LA, L.L.C., Plaintiff, -against- GXI INTERNATIONAL, LLC; GXI OUTDOOR POWER, LLC; GXI PARTS & SERVICE, LLC; ACCESS HD, LLC; and GORDON JACKSON, Defendants.	Index No. 653689/12 DECISION AND ORDER Motion Sequence No. 002

MELVIN L. SCHWEITZER, J.:

This case arises out of an attempt to collect $3.8 million of royalties under a contract between MPEG LA, L.L.C. (MPEG) and GXI International, LLC (International). MPEG alleges that a number of other defendants, including Gordon Jackson (Mr. Jackson), are subject to alter ego liability. Mr. Jackson and the other defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (7).

Facts

The facts are as taken from the complaint and supporting affidavit.

MPEG seeks to collect nearly $4 million in royalty payments due it under the ATSC Patent Portfolio License (the licensing agreement) between MPEG and International. The licensing agreement provides that International will pay a $5 royalty to MPEG for each ATSC Receiver Product made or sold by International in a country that issued one or more of the existing ATSC patents covered by the licensing agreement. The ATSC Receiver Products made

and sold by International consist of five different models (*i.e.* 1020, 1020A, 1030, 1050, and 1080) of ATSC converter boxes.

Pursuant to the licensing agreement, International is required to pay royalties and submit a royalty report semiannually. In the royalty report submitted on April 19, 2010, Mr. Jackson reported that International owed MPEG $4,943,140 in outstanding royalties for the period September 1, 2008 to January 31, 2010. Since that time, International has paid only $1,125,000 of the self-reported royalties due and owing, leaving a balance of $3,818,140. Mr. Jackson claimed in 2012 that International could not make payments toward the outstanding royalty amounts if it had no funds. As shown by the royalty report, moreover, International has been unable to pay these ongoing business debts from the very commencement of its business operations selling ATSC converter boxes.

Mr. Jackson also stated in 2012 that International was in the process of winding down, and that its only activities were collections, payments, and providing warranty and service. Significantly, however, International's assets – the five different model converter boxes – are now for sale by *Gxi Parts & Service* on the *Gxi Outdoor Power* website under the *Access HD* brand with International still providing the warranty service.

MPEG asserts its complaint and supporting affidavit set forth numerous factual allegations in support of an alter ego claim, including:

> "Jackson and his wife are the sole members and managers of each company defendant, and Jackson is the president of at least Gxi International and Gxi Outdoor Power;
>
> All defendants share common office space and facilities at 7868 US Business Highway 70, Suite C, Clayton, North Carolina 27520, and all share a principal office at Jackson's residence at 222 Parkridge Drive, Clayton, North Carolina;

All defendants share a common telephone number and facsimile number;

A lack of independent business discretion displayed by Gxi International in that Jackson decided for his own benefit whether Gxi International would abide by its contractual obligations and whether Gxi International would cease operations;

Gxi International is inadequately capitalized in that it has been unable to pay its ongoing business debts since the very commencement of its operations selling ATSC converter boxes and is now defunct, which misuse of the company form constitutes a wrong or injustice against plaintiff; and

Upon information and belief, Alter Ego Defendants stripped Gxi International of its assets consisting of the five models of ATSC converter boxes and now sell them as their own, which abuse of the company form constitutes a wrong or injustice against plaintiff."

Discussion

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

Under the New York law a corporate veil may only be pierced if a plaintiff shows that (1) "the owners exercised complete domination of the corporation in respect to the transaction attacked," and (2) "such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v N.Y. State Dept of Taxation and Finance*, 82 NY2d 135, 141 (1993). The key factor, as the New York Court of Appeals recently reiterated, is

the element of fraud. The Court of Appeals emphasized that under New York law, "the party seeking to pierce the corporate veil ha[s] the burden to show that the individual defendants '*abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against' them.*" *James v Loran Realty V Corp.*, 20 NY3d 918, 919 (2012). Indeed, the Court of Appeals has applied this standard to the dismissal of claims similar to MPEG's:

> Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer such as Canseco personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in "bad faith" while representing the corporation. *In this case, plaintiff failed to allege any facts indicating that Canseco engaged in acts amounting to an abuse or perversion of the corporate form*, much less that the [plaintiff] was harmed as a result of such actions. Under the circumstances, the Appellate Division did not err in failing to direct that plaintiff be permitted to file an amended complaint as the record affords no basis to conclude that the deficiency could have been cured by repleading.

East Hampton Union Free Sch. Dist. v Sandpebble Bldrs, Inc., 16 NY3d 775, 776 (2011) (emphasis added).[1]

In *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335 (1998), the Court of Appeals also specifically rejected the notion that control alone is sufficient to tie a nonsignatory to contractual obligations:

> Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences. *Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance.*

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[1] Under the CPLR, all of the elements of a claim involving elements of fraud must be supported by factual allegations containing the specific details constituting the wrong in order to satisfy the pleading requirements of CPLR 3016 (b). *See e.g. Megaris Furs, Inc. v Gimbel Brothers, Inc.*, 172 AD2d 209 (1st Dept 1991) (CPLR 3016 (b) "imposes a more stringent standard of pleading than the generally applicable "notice of the transaction" rule of CPLR 3013, and complaints based on fraud which fail in whole or in part to meet this special test of factual pleading have consistently been dismissed."). Here, MPEG's allegations do not meet the heightened standard of 3016 (b).

Id. at 338 (emphasis added; citations omitted). Accordingly, cases following *TNS Holdings* have dismissed complaints seeking to hold a parent liable for the contractual obligations of its subsidiary or affiliate "unaccompanied by allegations of consequent wrongs." *UMG Recs., Inc. v FUBU Records, LLC*, 34 AD3d 293, 294 (1st Dept 2006).

MPEG's claims are fatally deficient under New York law because nothing alleged shows any facts that any domination of International was designed to be an instrument of fraud or injustice against MPEG.

Furthermore, the bulk of MPEG's facts are generic and would describe many, if not all, small family-run limited liability companies. MPEG dedicates many pages of argument to discuss shared office space, common telephone and fax numbers, and the assignment of the Access HD trademark.

These alleged facts are, of course, quite ordinary for small, family-run limited liability companies. To impose corporate veil piercing or alter ego liability based on such ordinary circumstance would undermine the fundamental protections afforded to members of limited liability companies and the limited liability company statutes that authorize their formation. This is because most limited liability company statutes allow members to manage the limited liability companies and these provisions illustrates a strong legislative intent to allow small one-person and family owned business the freedom to operate their companies themselves, and still enjoy freedom from personal liability. To hold that these facts were sufficient for a plaintiff to proceed on an alter ego liability theory would turn on its head the protection of limited liability companies.

Under New York law, the party seeking to pierce the corporate veil must do more than allege domination and control; it must show that that behavior was done in an effort to commit an injustice or fraud to be perpetrated upon them. The facts that MPEG alleges that purport to show domination and control of International – even if true – do not show an injustice or fraud committed against MPEG. The meager marketing of left-over standing inventory of converter boxes on the internet does not show causation of non-payment and an injustice or fraud against them. If anything, together with International's emails, it shows an attempt to try to recoup as much as possible under the circumstances.

New York law is clear that the inability to pay is not sufficient injustice to give rise to alter ego liability. *Prichard v 164 Ludlow Corp.*, 49 AD3d 408 (1st Dept 2008). Because MPEG has offered nothing more, this alone warrants dismissal of MPEG's claims.

MPEG's claim that International was undercapitalized is totally conclusory and apparently based solely on the fact that it cannot pay the royalties imposed by MPEG. Even if it were true, that claim is legally insufficient to show that a fraud or injustice had been perpetrated on MPEG. To pierce the corporate veil, MPEG must not only show that the company was undercapitalized, but also that the financial setup of the corporation is only a sham and caused an injustice.

MPEG cannot possibly meet its burden by showing that undercapitalization caused an injustice or fraud to be perpetrated against them because MPEG's complaint and other documents that it submitted confirm that International actually paid MPEG $1.125 million in royalties under the Licensing Agreement. MPEG's argument that International "has been unable to pay its business debts since commencement of its operations selling ATSC converter boxes in

2008" is false, as demonstrated by the chronology of payments set forth in Exhibit N to its supporting affidavit. As a result, MPEG has not alleged and cannot allege that the formative capitalization of International was a sham designed to perpetuate fraud and impose an injustice on MPEG. *James v Loran Realty V Corp.*, 20 NY3d 918 (2012).

Defendants' motion to dismiss is granted.

ORDERED that defendants' motion to dismiss is granted.

Dated: September 18, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER