One Step Up, LTD. v H.A. Tekstil Sanayi Ve Ticaret Ltd. Sti.
2015 NY Slip Op 31555(U)
August 17, 2015
Supreme Court, New York County
Docket Number: 652987/2013
Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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ONE STEP UP, LTD.,

Plaintiff,

-against-

H.A. TEKSTIL SANAYI ve TICARET LTD STI, and HILAL AÇIKBAŞ,

Defendants.

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DECISION AND ORDER

Index No.: 652987/2013
Mot. Seq. No.: 002

O. PETER SHERWOOD, J.:

In motion sequence 002, plaintiff One Step Up, Ltd. ("OSU") moves for default judgment against defendants H.A. Tekstil San. Ve Tic. Ltd. Şti. ("Tekstil") and Hilal Açikbaş ("Açikbaş"). The Court denied the motion from the bench at oral argument on May 19, 2015. The Court now writes separately to further elucidate the reasons for denying the motion.

I. Background

A. Facts

The instant action arises from Tekstil's alleged failure to repay loans and deliver goods to plaintiff. The bare bones complaint provides little factual detail. The affidavits submitted in connection with the instant motion, which incorporate the complaint's recitation of the facts, add little to the factual background. Plaintiff alleges that it loaned defendant Tekstil a total of $397,000 between March 9, 2006, and October 18, 2011.[1] Plaintiff admits receipt of payments from Tekstil in the amount of $349,713.73 (*see* Choi aff, Ex. 1, NYSCEF Doc. No. 35). Plaintiff further alleges that it contracted to purchase goods from defendants. Pursuant to the contract, plaintiff alleges that it advanced payments of $219,034 and $92,996 to Tekstil on February 20, 2009 and April 14, 2009, but that Tekstil failed to deliver the goods. Plaintiffs additionally contend in conclusory fashion that Açikbaş, Tekstil's "owner and principal", "exercised dominion and control over Tekstil" (*see* Compl. ¶6), and misrepresented to plaintiff that Tekstil would repay the plaintiff's loans (*see id.*, ¶ 42).

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[1] Count 1 of the complaint actually asserts that the plaintiff made six loans to Tekstil totaling $709,030. However, count 2 and plaintiff's motion papers categorize two of those loans, in the amounts of $219,034 and $92,996, as payments on an alleged contract for sale of goods described hereinafter.

B. Procedural Posture

Plaintiff commenced the instant action on August 26, 2013. Plaintiff served the summons and verified complaint on Tekstil on November 12, 2013 (*see* Lazarus aff, Exs. B, F, NYSCEF Doc. Nos. 25, 29). Although it did submit a letter to the Court on December 30, 2013 written entirely in Turkish without an accompanying English translation (thus violating CPLR 2101[b]), Tekstil failed to answer or otherwise respond to the complaint. On February 5, 2014, plaintiff moved Justice Schweitzer for an order granting default judgment against Tekstil on the first through fourth causes of action. Also on February 5, plaintiff moved to permit alternate service of the summons and complaint on Açikbaş through email pursuant to CPLR 308(5).

On April 7, 2014, Justice Schweitzer granted the motion for alternate service on Açikbaş, but denied the motion for default judgment for the following reasons: (1) the affidavit of service was entirely in Turkish, and required translation into English; (2) the translated documents submitted in support of the motion required an affidavit of a translator; (3) the motion papers did not establish service on an individual authorized to accept service; and (4) the motion papers failed to set forth grounds for personal jurisdiction (*see* Decision & Order dated April 7, 2014, NYSCEF Doc. No. 15). Plaintiff served Açikbaş by email on April 14, 2014 by first class mail and email (*see* Lazarus aff, Ex. H, NYSCEF Doc. No. 31).

Following denial of the prior motion for default judgment, Justice Schweitzer set the matter down for a preliminary conference on October 14, 2014. Counsel for plaintiff appeared, but defendants did not. Accordingly, the Justice Schweitzer ordered a telephone conference be held on November 13, 2014. Defendants again failed to appear. Plaintiff now renews its motion for default judgment, after purporting to have resolved the deficiencies in the prior motion.

Defendants have not formally opposed this motion, nor appeared in this action. They have, however, submitted several documents to the Court by mail. The first was submitted to the Court in December 2013, and is written entirely in Turkish without an accompanying translation (*see* NYSCEF Doc. No. 2). The second document was received on March 31, 2015 (*see* NYSCEF Doc. No. 38). Although unclear, the second appeared to contest this Court's in personam jurisdiction by virtue of improper service of process. Thus, the Court scheduled the motion for oral argument to give defendants an opportunity to appear and respond to the motion.

Although none of the defendants appeared at oral argument on May 19, 2015, the Court nonetheless denied the motion from the bench. Accordingly, for the reasons outlined at oral argument on May 19, 2015 as further clarified in this Decision and Order, the motion is DENIED.

II. Discussion

At the outset, the Court declines to reach the issue of whether plaintiff has cured the jurisdictional, service and other defects identified by Justice Schweitzer in his Decision and Order dated April 7, 2014. Even assuming plaintiff has cured those defects, the motion suffers from additional infirmities on the merits preventing entry of default judgment. CPLR 3215(a) provides that "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, . . . the plaintiff may seek a default judgment against him" (CPLR 3215[a]). A judgment by default requires "proof of the facts constituting the claim, the default and the amount due by affidavit made by the party", or a verified complaint (CPLR 3215[f]; *Zelnik v. Bidermann Indus. U.S.A., Inc.*, 242 AD2d 227, 228 [1st Dept 1997]).

Plaintiff seeks judgment on each count of the complaint. Counts 1 through 4 are asserted against Tekstil only. Count 1 of the complaint seeks recovery on a series of loans to Tekstil totaling $1,121,906.65. Count 2 asserts a claim for breach of contract demanding judgment in the amount of $312,030. Count 3 asserts a cause of action for unjust enrichment for $1,121,906.65. Count 4 asserts a claim for money had and received in the amount of $709,030. Counts 5 and 6, asserting causes of action for fraud and alter-ego liability, are asserted against Açikbaş only.

A. Counts 1 and 2 - Repayment of a Loan and Breach of Contract against Tekstil

Counts 1 and 2 of the complaint, which seek repayment of a series of loans and damages for breach of contract, are partially overlapping. Count 1 asserts Tekstil's non-payment of a series of loans in the following amounts advanced by plaintiff on the indicated dates: (1) $250,000 on March 9, 2006; (2) $100,000 on March 25, 2006; (3) $219,034 on February 20, 2009; (4) $92,996 on April 14, 2009; (5) $30,000 on December 10, 2010; and (6) $17,000 on October 18, 2011. Count 2 asserts a claim for breach of contract with regard to the third and fourth of these "loans", instead claiming that such were payments on a contract for the sale of goods which plaintiff never received. Additionally, plaintiff's renewed motion for default judgment recognizes and credits defendants payments in the amount of $349,713.73 on the loans. Accordingly, plaintiff's motion seeks judgment against Tekstil in the amount of $718,752.59.

To sustain a breach of contract cause of action in New York, plaintiffs must allege facts showing each of the following elements: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages sustained by plaintiff as a result of the breach (*see Kraus v Visa Intl Serv Assn*, 304 AD2d 408 [1st Dept 2003]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

Plaintiff has failed to establish prima facie entitlement to entry of default judgment on counts 1 and 2. Although at oral argument plaintiff's counsel expressly represented that the alleged loans underlying count 1 were memorialized in writing (*see* Hrg. Tr., NYSCEF Doc. No. 39, 3:3-11), neither plaintiff's complaint nor motion papers attach any such documentation. Indeed, plaintiff's counsel expressly represented that such writings "may not have been executed" (*id.*, at 3:13). With regard to the alleged contract underlying count 2, counsel represented at oral argument that she could not recall whether the purported contract was written or oral (*id.*, at 3:18-26). Although later contending that she believed there may have been draft versions of the contract, she could not represent whether the contract had indeed been executed (*id.*, at 4:4-24). Indisputably, neither the complaint nor plaintiff's motion papers attach a copy of an executed contract.

Instead, plaintiff submits only an affidavit from Youn Choi, who purports to be plaintiff's Chief Financial Officer. Mr. Choi's affidavit attaches a self-prepared, revised "schedule" purporting to set forth the amounts due to plaintiff from defendant. The revised schedule attached to Mr. Choi's affidavit replaces the original schedule attached to the complaint to reflect certain payments that defendants had allegedly made not credited on the original schedule. This conclusory, self-serving document, which seemingly was prepared by Mr. Choi solely for purposes of this litigation, fails to evince that there was any agreement by the defendants to repay any of the amounts purportedly loaned (much less that the funds were in fact loaned), or that a contract for the sale of goods existed. Without clarity as to whether writings exist memorializing the parties' agreements, it is impossible for this court to enforce the terms of those agreements. Accordingly, plaintiff has failed to sustain its burden on this motion.

Moreover, plaintiff's complaint, motion papers, and representations at oral argument are rife with internal inconsistencies. For example, as noted above, the various counts of the complaint partially overlap in an inconsistent manner. Count 1 asserts defendants' non-payment of a series of

loans in the following amounts advanced by plaintiff on the indicated dates: (1) $250,000 on March 9, 2006; (2) $100,000 on March 25, 2006; (3) $219,034 on February 20, 2009; (4) $92,996 on April 14, 2009; (5) $30,000 on December 10, 2010; and (6) $17,000 on October 18, 2011. Count 2 inconsistently alleges that the third and fourth of these "loans" were instead pre-payments on a contract for the sale of goods. Without the underlying documentation (if indeed, such documentation exists), on the current record, it is impossible for this court to resolve these inconsistencies.

Additionally, counsel at oral argument represented that the individual defendant was also directly personally liable on certain of the loans (*see* Hrg Tr., NYSCEF Doc. No. 39, at 9:6-10 ["The loans were paid to the individual I believe, and then the later loans were paid and related to goods that were supposed to be shipped to One Step Up that were never shipped"]). However the complaint seeks to hold the individual defendant liable on an alter-ego theory (*see* Compl. ¶¶ 50-53). Again, without clarity as to whether documentation exists underlying the loans and the contract, it is impossible for the Court to determine which, if either, of the two defendants is liable to plaintiff and for what amounts. Accordingly, plaintiff has failed to meet its burden on both counts 1 and 2 of the complaint.

B. Counts 3 and 4 - Unjust Enrichment, and Money Had and Received against Tekstil

Counts 3 and 4 of the complaint, for unjust enrichment and money had and received, sound in quasi-contract.[2] To establish a claim for unjust enrichment, a plaintiff must show: "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*id.* at 182 [citations omitted]). "The essential elements of a cause of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money" (*Goel v Ramachandran*, 111 AD3d 783, 790 [2d Dept 2013]).

Claims sounding in quasi-contract, such as these, only lie in the absence of an express agreement governing the dispute at issue (*see Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 N.Y.2d

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[2] Count 3 demands damages amounting to the principal amounts of the loans and contract payments plus interest, while count 4 demands damages amounting to the principal amounts only without interest.

382, 388 [1987]). Thus, a plaintiff is precluded from recovering on a theory of unjust enrichment or money had and received by the existence of a valid enforceable contract (*see, e.g., Melcher v Apollo Med. Fund Mgt. LLC*, 105 AD3d 15, 27 [1st Dept 2013]; *Universal/MMEC, Ltd. v Dormitory Auth. of State of NY*, 50 AD3d 352 [1st Dept 2008]; *Cornhusker Farms v Hunts Point Coop. Mkt*, 2 Ad3D 201, 206 [1st Dept 2003]). Plaintiffs here expressly contend that a contract exists governing at least some portion of defendants' alleged indebtedness to plaintiffs. However, as noted above, no written contract, other writing or terms of an oral contract governing the defendants' alleged indebtedness has been produced. Without clarity as to whether a contract exists governing some or all of the amount allegedly due from plaintiff, plaintiff cannot be awarded default judgment on its quasi-contractual claims.

C. Count 5 - Fraud against Açikbaş

Count 5 of the complaint asserts fraud against Açikbaş. To sustain a fraud claim, the plaintiff must demonstrate that "(1) the defendant made a material false representation, (2) the defendant intended to defraud the [plaintiff] thereby, (3) the [plaintiff] reasonably relied upon the representation, and (4) the [plaintiff] suffered damage as a result of their reliance" (*J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389, 390 [1st Dept 2005]). If the fraud claim is based upon a fraudulent omission, the plaintiff must also prove that the defendant had a duty to disclose material information based upon a confidential, special or fiduciary relationship, and failed to fulfill that duty (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006] ["Although a cause of action for fraud may be predicated on acts of concealment, there must first be proven a duty to disclose material information."]).

Here, plaintiff alleges that defendant Açikbaş, the owner and principal of Tekstil, falsely represented that Tekstil would repay the loans described above. However, an insincere promise of future performance, such as this, cannot form the basis for a fraud claim (*see HSH Nordbank AG v UBS AG*, 95 AD3d 185, 206 [1st Dept 2012] ["[I]f the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract"]). Further, plaintiff has not demonstrated that the alleged representation was made by Açikbaş acting in her personal capacity. Instead, it appears from the complaint that Açikbaş made these representations acting in her capacity as president and/or principal of Tekstil. Accordingly, the fraud claim asserted here is duplicative of the breach of contract claim asserted above.

D. Count 6 - Alter-Ego Liability against Açikbaş

Count 6 asserts a cause of action against Açikbaş for "alter-ego liability". As a preliminary note, "alter-ego liability" is not recognized as a standalone cause of action in New York State (*Hart v. Jassem,* 43 AD3d 997, 998 [2d Dept 2007]). Instead, it is a theory of liability meant to hold the principals of a corporation responsible for the acts of the corporation under very specific circumstances. Here, plaintiff has not established entitlement to default judgment as against the corporation on any of the counts asserted in the complaint. Accordingly, plaintiff is not entitled to judgment as against Açikbaş on an alter-ego theory.

Regardless, imposition of alter-ego liability requires plaintiff to demonstrate Açikbaş' "'complete domination of the corporation [here Tekstil] in respect to the transaction attacked' and 'that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury'" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014], *quoting Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). While it is true that by failing to answer the complaint, defendants have admitted all traversable allegations in the complaint, no such traversable allegations exist with regard to Açikbaş' domination or control of Tekstil, nor any acts that Tekstil committed constituting fraud. The verified complaint merely lays out the legal conclusion that "Açikbaş used her dominion and control over Tekstil to engage in the fraudulent conduct set forth above to cause harm to Plaintiff, and Plaintiff has suffered harm as a result of such harmful conduct" (Compl. ¶ 51; *see also* Compl. ¶ 6).[3] Defendants are not required to admit or deny such legal conclusions. With regard to the fraud element, plaintiffs merely allege Açikbaş' insincere promise of performance under the contract. Accordingly, even despite defendants' default, plaintiff has not demonstrated entitlement to default judgment against Açikbaş on an alter-ego theory of liability.

Accordingly, it is hereby

ORDERED that the motion for a default judgment is DENIED; and it is further

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[3] The "fraudulent conduct set forth above" relates to Açikbaş' purported misrepresentations of future performance under the loans (*see* Compl. ¶¶ 41-49).

ORDERED that all counsel for the respective parties shall appear for a preliminary conference on Tuesday, September 22, 2015 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this Decision and Order together with notice of entry on the defendants within fourteen (14) days thereof.

This constitutes the decision and order of the Court.

DATED: August 17, 2015

E N T E R,

O. PETER SHERWOOD
J.S.C.

8/17/15