# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

ROBERT W. KASTEN, Plaintiff,

-against-

GERSON GLOBAL ADVISERS LLC, THE GERSON GROUP, LLC and RUSS D. GERSON, Defendants.

INDEX NO. 651871/12
MOTION DATE 08-12-2015
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

The following papers, numbered 1 to 12 were read on this motion to/for summary judgment:

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 - 4 |
| Answering Affidavits — Exhibits _____cross motion _____ | 5, 6 - 9, 10 |
| Replying Affidavits _____ | 11 - 12 |

**Cross-Motion:** Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendants' motion for partial summary judgment, is denied. Plaintiff's motion for partial summary judgment on its account stated claim, filed under Motion Sequence 004, is denied.

Plaintiff brought this action to recover consulting fees, for business generation and analysis services provided to Gerson Global Advisers, LLC. The complaint asserts three causes of action for: breach of contract, account stated, quantum meruit, also a fourth cause of action for unjust enrichment, money due and owing, money had and received and constructive trust. The June 27, 2014 Decision and Order of this Court, permitted the plaintiff to amend his complaint to add The Gerson Group, LLC and Russ D. Gerson as parties to this action, and to increase the ad damnum clause. The Amended Verified Complaint alleges that Russell Gerson is the sole member, officer, and director of both Gerson Global Advisers, LLC (hereinafter referred to as "GGA") and The Gerson Group, LLC and there is a basis to pierce the corporate veil. It is also alleged in the Amended Verified Complaint that GGA and The Gerson Group LLC are alter egos of each other. Defendants motion to reargue this Court's June 27, 2014 Decision and Order filed under Motion Sequence 002, was denied.

Defendants' motion filed under Motion Sequence 003, seeks partial summary judgment, dismissing the causes of action asserted in the Amended Verified Complaint against The Gerson Group, LLC and Russ D. Gerson, to dismiss the increased ad damnum clause, and to dismiss the third and fourth causes of action for unjust enrichment and quantum meruit.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut

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

that prima facie showing, by producing contrary evidence in admissible form, requiring a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

Defendants argue that Russ D. Gerson should be granted summary judgment because the plaintiff has provided no proof of relevant factors necessary to establish Russ D. Gerson's dominion and control of GGA, or that GGA was used by Mr. Gerson to commit any fraud or wrongdoing against the plaintiff . Defendants claim that although Russ D. Gerson loaned GGA one million dollars, the money has not been repaid and the funds he provided were necessary to keep the corporation going. Russ D. Gerson states in his affidavit that after receipt of payment for services he was reimbursed $138,000.00 of the million dollar loan, with a balance owed of $967, 633.00 as of December 11, 2011.

A plaintiff seeking to pierce the corporate veil must establish 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" (Conason v. Megan Holding, LLC, 25 N.Y. 3d 1, 29 N.E. 3d 215,6 N.Y.S. 3d 206 [2015] citing Matter of Morris v. New York State Dept. of Taxation & Fin. 82 N.Y. 2d 135, 623 N.E. 2d 1157, 603 N.Y.S. 2d 807 [1993]). Summary judgment will be denied where issues of fact remain concerning the abuse of corporate form to commit a wrong or fraud (Conason v. Megan Holding, LLC, 25 N.Y. 3d 1, supra). "Factors to be considered in determining whether an owner has abused the privilege of doing business in a 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." (D'Mel & Associates v. Athco, Inc., 105 A.D. 3d 451, 963 N.Y.S. 2d 65 [1st Dept., 2013] citing East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc., 16 N.Y. 3d 775, 944 N.E. 2d 1135, 919 N.Y.S. 2d 496 [2011]).

Plaintiff has raised issues of fact warranting denial of summary judgment on the issue of piercing the corporate veil for GGA. The affidavit of Russ D. Gerson fails to establish a prima facie basis to find the existence of the separation of accounts and his lack of fraud or wrongdoing. The motion papers fail to annex deposition testimony or an affidavit from David Ziegler, the person Russ Gerson alleges to be responsible for internally maintaining finances during the relevant time period, to substantiate Mr. Gerson's claims. Defendants' balance sheets show that both GGA and the Gerson Group were operating at a loss in December of 2011, however Mr. Gerson received $138,000.00 and Gerson Group received $350,000.00 towards previous "loans." There is no explanation for the amounts he received over other creditors and Mr. Gerson admits in his deposition transcript annexed to plaintiff's motion papers that his loans were not formal, and actually constituted "advances." (Mot. Seq. 004, Exhs. E&F).

It is defendants contention that The Gerson Group, LLC (hereinafter referred to individually as "Gerson Group") was founded in 2005, with 400 executive placements and has no connections at all with GGA. GGA was founded in 2010, as a sovereign advisory and investment firm. Defendants argue that although GGA and Gerson Group have the same member and CEO, have shared expenses with transfers from Gerson Group to inject funds into GGA, and they share the same office with some of the same employees, they are still separate entities and not the "alter ego" of each other. Defendants argue that neither the Gerson Group or GGA has a financial interest in the other, acts as a single

economic entity, or has assets integrated. Defendants claim that Gerson Group and GGA have separate bank accounts, books, and records, separate clients and are separately capitalized.

The corporate veil may be pierced when there is complete domination and control by one corporation over another corporation, and the domination is used to commit a fraud or wrong resulting in an injury to a plaintiff (Sass v. TMT Restoration Consultants Ltd., 100 A.D. 3d 443, 953 N.Y.S. 2d 574 [1st Dept., 2012]). Corporations that are intertwined so that they are merely an alter ego of each other are effectively a "single entity" for purposes of piercing the corporate veil (Sumpter v. 5825 Broadway LLC, 19 A.D. 2d 327, 797 N.Y.S. 2d 494 [1st Dept., 2005] and Martinez v. Plaza Prospect Apt., Inc., 25 A.D. 3d 437, 808 N.Y.S. 2d 199 [1st Dept., 2006]). Factors to be considered in determining whether corporations can be called each other's "alter ego" include, "..disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity...no one factor is dispositive" (Tap Holdings, LLC v. Orix Finance Corp., 109 A.D. 3d 167, 970 N.Y.S. 2d 178 [1st Dept., 2013]).

Plaintiff has raised an issue of fact warranting denial of summary judgment on the claims as to piercing the corporate veil of the Gerson Group. Defendants have not denied that GGA and Gerson Group shared the same office, the same member and CEO, and at least some of the same employees. There remain issues of fact concerning whether funds have been transferred from Gerson Group to GGA for legitimate business purposes and that the transfer did not result in fraud or wrongdoing to the plaintiff. Defendants have not establish their claim that there are separate bank accounts, books, and records or that Gerson Group is not the alter ego of GGA.

Defendants seek summary judgment dismissing the increased ad damnum clause, and to dismiss the third and fourth causes of action for unjust enrichment and quantum meruit. It is defendants contention that plaintiff's increased ad damnum clause is based on an incorrect reading of the Consulting Agreement (Aff. of Russ D. Gerson, Exh. C). Defendants argue that plaintiff did not contemplate renewing the agreement for an additional six months as required by Article III on the Consulting Agreement, and invoices sent by plaintiff were not dated past December 31, 2011. Defendants also argue that the third and fourth causes of action for unjust enrichment and quantum meruit are duplicative of the breach of contract claim and should be dismissed.

A valid enforceable written contract governing a specific subject matter prevents recovery events arising out of the same subject matter. In the absence of an express agreement, the relief sought is in "quasi contract" (Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y. 2d 382, 516 NE. 2d 190, 521 N.Y.S. 2d 653 [1987] and Zolotar v. New York Life Ins. Co., 172 A.D. 2d 27, 576 A.D. 2d 850 [N.Y.A.D. 1st Dept., 1991]).

Plaintiffs have correctly stated that the arguments related to the increased ad damnum clause were previously raised in opposition to the motion to amend the complaint and the defendants' motion to reargue which was denied. Defendants have not made out a prima facie basis to dismiss the increased ad damnum clause. Plaintiff has also raised issues of fact concerning the interpretation of Article III of the Consulting

Agreement and the belated notice of termination effective July 15, 2014. Defendants have not stated a prima facie basis to dismiss the third and fourth causes of action for unjust enrichment and quantum meruit as duplicative of the breach of contract claim. Defendants have argued that there is no valid contract between themselves and the plaintiff because the Consulting Agreement was not signed by them. Plaintiff can seek to recover in quasi-contract to the extent there is a finding that the Consulting Agreement is not binding.

Plaintiff under Motion Sequence 004 seeks partial summary judgment for an account stated in the principal amount of $120, 814.82 plus interest, costs and expenses. Plaintiff seeks to obtain summary judgment on the account stated claim simultaneously seeking to pierce the corporate veil and obtain a judgment against Gerson Group and Russ D. Gerson. Plaintiff argues that invoices were sent through December of 2011, that partial payment was made and the invoices were not objected to therefore he is entitled to recover on the principal amount owed of $120, 814.82.

An account stated is an agreement to an account resulting from prior transactions between the parties concerning the correctness of the account items and the amount of the balance due. It cannot be used to create liability where none exists for a business relationship (Ryan Graphics, Inc. v. Bailin, 39 A.D. 3d 249, 833 N.Y.S. 2d 448 [1st Dept., 2007]). To establish a prima facie claim of account stated, the movant is required to demonstrate that it, "generated detailed monthly invoices and mailed them to the defendant on a regular basis in the course of its business"(Stephanie R. Cooper, P.C. v. Robert, 78 A.D. 3d 572, 911 N.Y.S. 2d 63 [N.Y.A.D. 1st Dept., 2010]). Plaintiff is also required to establish that the defendant retained the invoices or made a partial payment without objection for a reasonable period of time (Morrison Cohen singer and Weinstein LLP v. Waters, 13 A.D. 3d 51, 786 N.Y.S. 2d 155 [N.Y.A.D, 1st Dept., 2004]).

Defendants have raised an issue of fact as to whether the account stated claim is being used by the plaintiff to collect disputed sums he would not be entitled to. The remaining issues of fact raised on both defendants' and plaintiff's motions warrant the denial of summary judgment.

Accordingly, it is ORDERED that defendants' motion for partial summary judgment, is denied, and it is further,

ORDERED, that plaintiff's motion for partial summary judgment on its account stated claim, filed under Motion Sequence 004, is denied.

ENTER:

MANUEL J. MENDEZ J.S.C.

MANUEL J. MENDEZ,

Dated: September 1, 2015 *J.S.C.*.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE