Universal Home & Garden, Inc. v Hero Enters., Inc.
2017 NY Slip Op 33225(U)
December 13, 2017
Supreme Court, Orange County
Docket Number: EF004233/2017
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at the 1841 Court House located at 101 Main Street, Goshen, New York 10924 on the day of December, 2017.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

UNIVERSAL HOME AND GARDEN, INC.,
PLAINTIFF,

-AGAINST-

HERO ENTERPRISES, INC.,d/b/a HERO SOURCING;
DEFENDANT.

DECISION & ORDER
INDEX #EF004233/2017
MOTION DATE: 7/24/17
MOTION SEQ. #1

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 19 were read on Defendant's motion to dismiss the entire action or in the alternative, the first, second, third and fifth causes of action pursuant to CPLR §3211(a)(7) and (8);

Notice of Motion/Affirmation of Eli Kaufmann dated 7/20/17/Exhibits A - D/ Memorandum of Law in support	1 - 7
Affirmation in Opposition of Hershel Spitzer dated 9/6/17/Affirmation of Joel Spitzer dated 9/6/17/Exhibits A - I	8 - 18
Reply Affirmation of Robert Zausmer, Esq., dated 9/15/17	19

This contract action was commenced on June 7, 2017. The verified complaint alleges five causes of action, to wit: 1) Fraud, for multiple misrepresentations to induce the purchase of goods, 2) Violation of GBL §349 for deceptive trade practices; 3) Piercing the Corporate veil; 4)Breach of contract; and 5) Unjust enrichment. No Answer has been filed and Defendant moves for a pre-answer dismissal under CPLR §3211(a)(7) and (8).

FACTUAL BACKGROUND

Plaintiff is a New York Corporation in the business of distributing gardening and landscaping goods. The current owner of the business is brother to the previous owner, Joel

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Spitzer, who purchased the company from Jacob Silverstein. Mr. Silverstein's business was known as "Fantasy Fountains". Between 2006 and 2009 Fantasy Fountains conducted business with Defendant. Plaintiff purchased a large number of garden cans from Defendant which were defective. Plaintiff claims that Defendant promised to cure the defect and thus enticed Plaintiff into further purchases. The further purchases also ended with defective products from the Asian manufacturers.

Defendant is a California Corporation, which provides a sourcing service for products manufactured in China/Asia. In essence they are the middleman who connects a purchaser with the manufacturer/seller of goods in Asia. Defendants aver they have no office for the transaction of business in New York State, do not exist under Delaware or New York Law, and do not regularly conduct business in the State of New York. Defendant avers that Plaintiff contacted his company in California and the contracts were drafted and sent, from the California site, via e-mail. Defendant also submits a Google web search which indicates that Plaintiff may have found a different Hero Enterprises, Inc., existing in New York which is unrelated to Defendants' company.

Plaintiff alleges that Defendant is "a corporation organized and existing under the Laws of the State of Delaware, which is authorized to regularly conduct business in the State of New York". However, Plaintiff shows no proof of this statement. Defendants refute Plaintiff's claim, and submit their Articles of Incorporation from the State of California, to support their position that they are a California company with no connection to New York other than the business conducted with Plaintiff. Defendants claim they have no other New York clientele and do not specifically target New York business owners on their website. Defendants further aver that Plaintiff originally contacted the Defendant after seeing an advertisement on a website. Defendant's website does not allow orders to be placed directly, nor does it list the Asian companies which are used as sources.

There is no competent proof that the parties ever met in New York to negotiate or sign the contract for the goods at issue, and the order for the goods was placed online. According to a bill of lading dated March 23, 2013, the products are shipped directly from the Asian manufacturer to Plaintiff at a New York address.

The only connection to New York appears to be that the contract was with a New York company and the goods were delivered directly from China to a New York address. The parties have had a working relationship since Plaintiff purchased the store, and the prior owner had a business relationship with purchases from Defendant as well.

Dismissal for Lack of Personal Jurisdiction:

Defendant moves for a dismissal of the entire action under subdivision (8) of CPLR 3211, alleging that there is no New York jurisdiction. Defendants submit that they are residents of California and that their business does not have a sufficient nexus with New York to satisfy the long arm jurisdiction statute.

Analysis-Personal Jurisdiction:

Plaintiff's allegation in the complaint, that Defendant is a corporation organized and existing under the laws of the State of New York is not supported by the evidence. Moreover, Defendant's allegation and supporting papers support the conclusion that Plaintiff erred in alleging New York jurisdiction, and Plaintiff has not refuted this proposition in the opposition papers submitted. Therefore the Court must only consider whether jurisdiction lies as a non-domiciliary defendant.

"In 1979, the New York State Legislature amended New York's own long-arm statute in order to permit the courts in this State to exercise personal jurisdiction over a non-domiciliary who "contracts anywhere to supply goods or services in the State" (CPLR 302[a][1]). The legislative

intent was "to abrogate the 'mere shipment' rule established by prior case law (see, e.g., *Kramer v. Vogl*, 17 N.Y.2d 27, 267 N.Y.S.2d 900, 215 N.E.2d 159) and * * * to extend New York long-arm jurisdiction to its constitutional limits" (citing *Island Wholesale Wood Supplies, Inc. v. Blanchard Inds.*, 101 A.D.2d 878, 879). Under prior case law, personal jurisdiction did "not extend to non-domiciliaries who merely ship[ped] goods into the State without ever crossing its borders". (citing *McGowan v. Smith*, 52 N.Y.2d 268). However, the amended CPLR 302(a)(1): "is a 'single act statute ' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*citing Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467, 527 N.Y.S.2d 195, 522 N.E.2d 40 [emphasis added]). *People v Concert Connection, Ltd.*, 211 AD2d 310, 315 [2d Dept 1995].

"Due process requires that to exercise jurisdiction over a nonresident defendant, the nonresident defendant must have "minimum contacts" such that maintenance of the action does not offend traditional notions of fair play and substantial justice (see e.g. International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95). Due process is not offended "[s]o long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there ..."(citing *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 466–467, [internal quotations and citations omitted])." *Zottola v AGI Group, Inc.*, 63 AD3d 1052, 1053 [2d Dept 2009].

"A foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of doing business here that a finding of its presence in this jurisdiction is warranted " (*Goel v. Ramachandran*, 111 A.D.3d 783, 786, [2d Dept 2013] *quoting Landoil Resources Corp. v. Alexander & Alexander Servs.*, 77 N.Y.2d 28, 33 [1990]

[internal quotation marks omitted]).

"To satisfy the "transacting business" requirement under CPLR 302(a)(1), a nonresident defendant must purposefully avail itself of the privilege of conducting activities in New York, thus invoking the benefits and protections of New York law (see *McGowan v. Smith*, 52 N.Y.2d 268, 271, 437 N.Y.S.2d 643, 419 N.E.2d 321). The totality of the nonresident defendant's activities within the forum state is considered in order to determine whether its contacts satisfy the "transacting business" requirement (see *Longines–Wittnauer Watch Co. v. Barnes & Reinecke,* 15 N.Y.2d 443, 457–458, 261 N.Y.S.2d 8, 209 N.E.2d 68). *Zottola v AGI Group, Inc.*, 63 AD3d 1052, 1054 [2d Dept 2009].

Applying this law to the facts of this case, the Court finds that the Plaintiff has made a prima facia showing of minimum contacts to satisfy jurisdiction. Although Defendants do not maintain an office or have a bank account in New York State, the Defendants' activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted. Defendants are availing themselves of the benefit of the state by continuously selling products to at least two New York business owners, causing products to be delivered to a New York address, and continuing a business relationship for approximately 13 years. The totality of these activities, which resulted in over $400,000.00 in sale of goods, satisfy the minimal contacts test and do not offend due process.

Motion to Dismiss the 1st, 2nd, 3rd and 5th Causes of Action:

Having found that jurisdiction is proper, Defendant also seeks a dismissal of Plaintiff's fraud, deceptive trade practices, piercing the corporate veil and unjust enrichment claims. Defendants submit that these claims are duplicative of the breach of contract claim and therefore must be dismissed. Plaintiff opposes this motion and argues that there is no duplication.

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]). Giving a liberal construction to the pleadings and according Plaintiff the benefit of every inference, this Court agrees with Defendant and finds that all claims, except the breach of contract claim, must be dismissed.

Plaintiff alleges fraud under the first cause of action. The fraud claim is based upon a series of misrepresentations allegedly made by the Defendant to Plaintiff after the defective product was delivered. Plaintiff alleges these misrepresentations were made to induce Plaintiff to purchase more cans by promising to replace the defective ones. However, "a cause of action premised upon fraud cannot lie where it is based on the same allegations as the breach of contract claim" (*Heffez v L & G Gen. Constr., Inc.*, 56 AD3d 526, 527 [2008]; see *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 757 [2009]). Where a claim to recover damages for fraud is premised upon an alleged breach of contractual duties, and the allegations with respect to the purported fraud do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie (see *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d at 757)." *Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950, 951 [2d Dept 2013]. In this action, the fraud claim arises from the breach of contract action and may not be pled as a separate claim.

Under General Business Law §349, a complaint must allege that the defendant engaged in a deceptive act or practice, that the challenged act or practice was consumer-oriented, and that the plaintiff suffered an injury as a result of the deceptive act or practice (see *Stutman v Chemical*

Bank, 95 NY2d 24, 29 [2000]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]). These allegations rely upon the same factual predicate used in the breach of contract claim and do not contain the public element necessary in a GBL§349 action. Plaintiff "...must demonstrate that the acts or practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute." *Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]. Accordingly, the deceptive trade practices claim must be dismissed and punitive damages and attorneys fees are not recoverable.

The third cause of action under the doctrine of piercing the corporate veil, is also insufficient. The complaint fails to contain specific allegations sufficient to state a cause of action holding each individual defendant personally liable for the actions he took as an officer, director or board member. The general rule, of course, 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 (*see Bartle v Home Owners Coop.*, 309 NY 103[1955]; *Seuter v Lieberman*, 229 AD2d 386 [2d Dept. 1996]). The concept of piercing the corporate veil is an exception to the general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation (*see Matter of Morris v Mew 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 dominion 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.; see Love v Rebecca Dev. Inc.*, 56 AD3d 733 [2d Dept. 2008]; *Milennium Constr., LLC v Loupolover*, 44 AD3d 1016 [2d

Dept. 2007]). A plaintiff seeking to pierce the corporate veil must also establish that the owners through their domination abused the privilege of doing business in the corporation form. (*Morris v New York State Dept. Of Taxation & Fin*, 82 NY2d at 142), or that they intentionally "hinder[ed], delay[ed] or defraud[ed] present or future creditors" (Debtor and Creditor Law §276; *see Galgano v Ortiz*, 287 AD2d 688, 689 [2d Dept. 2001]).

Affording the complaint a liberal construction, accepting as true all facts alleged therein, and according the plaintiff the benefit of every possible inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703 [2008]; *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408 [2005]), the plaintiff has not sufficiently pleaded a cause of action to recover against the individual defendant for the alleged wrongs committed by the corporate defendant pursuant to the piercing the corporate veil theory. 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 corporation under the doctrine of piercing the corporate veil. Here, nothing in the complaint asserts or suggests that Eli Kaufmann acted other than in his capacity as director, officer or board member of the corporations or that he failed to respect the separate legal existence of the corporation, or that he treated the corporate assets as his own, or that he, in an other way, abused the privilege of doing business in the corporate form.

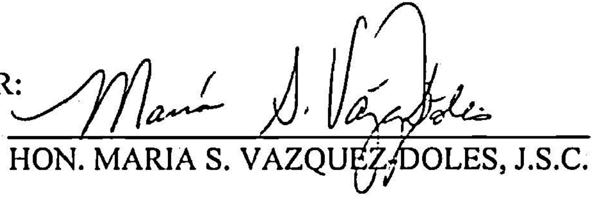
As to the fifth cause of action for unjust enrichment, this too must be dismissed as it is duplicative of the breach of contract cause of action. When a cause of action for unjust enrichment seeks damages for events "... arising from the same subject matter that is governed by an enforceable contract...", this action must be dismissed. *Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 470 [2d Dept 2002]. Plaintiff's fifth cause of action arises from the same series of events of the breach of contract claim as is therefore duplicative. Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss for lack of personal jurisdiction is denied, and it is further

ORDERED that Defendant's motion to dismiss the first, second, third and fifth causes of action is granted, leaving for trial only the breach of contract claim. Defendants time to answer or otherwise respond to the Complaint is extended to ten days after service of notice of entry of this order.

The foregoing constitutes the Decision and Order of this Court.

Dated: December 13th, 2017
Goshen, New York

ENTER: 
HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Meyer,Suozzi, English & Klein, P.C. Via NYSCEF
Joshua A. Scerbo, Esq. Via NYSCEF