

Domingo v Bidkind, LLC
2018 NY Slip Op 30141(U)
January 23, 2018
Supreme Court, New York County
Docket Number: 653453/2015
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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JULIO SANTO DOMINGO,

Plaintiff,

INDEX NO. 653453/2015

MOTION SEQ. NO. 003

- v -

DECISION AND ORDER

BIDKIND, LLC, HERVE LARREN,

Defendant.

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The following e-filed documents, listed by NYSCEF document number 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 92

were read on this application to/for DISMISSAL

HON. SALIANN SCARPULLA:

In this action to recover on a convertible note, defendant Herve Larren (“Larren”) moves to dismiss the complaint against him, pursuant to CPLR §§ 3211 (a)(1) and (a)(7), and defendant BidKind LLC (“BidKind”) moves to dismiss the third and fourth causes of action against it.

Background

Plaintiff Julio Santo Domingo (“Santo Domingo”) is an entrepreneur. Santo Domingo and Larren were previously personal friends and business partners. In the complaint, Santo Domingo alleges that he loaned Larren more than \$1.8 million to finance Larren’s development of BidKind LLC (“BidKind”).

BidKind is a Delaware limited liability company that was created as an online charity auction to raise funds for nonprofit organizations by offering bidders access to celebrities and other similar experiences in exchange for donations. Santo Domingo alleges that Larren is BidKind's sole member-manager.¹

Santo Domingo alleges that Larren approached him for financing, and he agreed to loan BidKind up to \$3,000,000.00. As an exhibit to the complaint, Santo Domingo submits a term sheet, dated October 1, 2013, setting out the terms of a proposed convertible promissory note ("Term Sheet"). The Term Sheet provides that Santo Domingo would provide BidKind with up to \$3,000,000.00 in financing in exchange for either payment upon maturity with interest or conversion of debt to equity upon specified terms. Although neither BidKind nor Larren executed the Term Sheet, Santo Domingo alleges that as of October 1, 2013, Larren understood that loans made to BidKind were pursuant to the Term Sheet.

Santo Domingo alleges that he ultimately loaned the following amounts to BidKind: (1) \$1,500,000.00 on November 5, 2013; (2) \$560.00 on May 8, 2014; (3) \$160,000.00 on January 14, 2015; (4) \$50,000.00 on February 20, 2015; and (5) \$122,440.00 on May 6, 2015 (collectively, "Loan Proceeds"). By accepting the Loan Proceeds, Santo Domingo alleges that BidKind created a loan agreement with him that

¹ The parties submit conflicting BidKind operating agreements – on one hand, Larren submits an operating agreement, dated May 7, 2013, that identifies Santo Domingo and Larren as equal interest members of BidKind; on the other hand, Santo Domingo submits an operating agreement, dated October 1, 2013, and subsequent amendment, dated June 18, 2015, identifying Larren as the sole member-manager.

imported terms from the Term Sheet, including a 6% interest rate ("Loan Agreement"). According to Santo Domingo, the Loan Agreement requires payment upon Santo Domingo's demand.

Santo Domingo alleges that, on or about October 8, 2015, he made a formal demand that BidKind repay the Loan Proceeds. Santo Domingo further alleges that to date, BidKind failed to repay any amount loaned pursuant to the alleged Loan Agreement, and that \$2,022,886.55 remains due, specifically \$1,833,000.00 in principal and \$189,886.55 in interest.

In his complaint, Santo Domingo alleges four causes of action against Larren and BidKind: (1) breach of contract; (2) unjust enrichment; (3) promissory estoppel; and (4) conversion. Santo Domingo seeks to hold Larren personally liable for BidKind's debt on alter ego/piercing the corporate veil theories.

To reach Larren in his individual capacity, Santo Domingo alleges that Larren exercised complete domination over BidKind and, in doing so, misappropriated the Loan Proceeds to support his lifestyle. Specifically, Santo Domingo alleges that Larren paid himself \$286,004.00 as a member of BidKind and \$222,451.00 in consulting fees. Additionally, Santo Domingo alleges that, between November 6, 2013 and July 22, 2015, Larren charged more than \$350,000.00 on BidKind's corporate American Express card for various travel and other expenses, which were largely not business-related.

Santo Domingo further alleges that BidKind employed Larren's brother for consulting services that were never provided, constituting additional acts of self-dealing. Such misappropriation of the Loan Proceeds, according to Santo Domingo, demonstrates

improper commingling of assets that has left BidKind grossly undercapitalized and unable to repay its debts or otherwise satisfy the damages Santo Domingo seeks in this action.

Larren now moves to dismiss the complaint against him on the basis of documentary evidence and for failure to state a claim. BidKind also moves to dismiss the third and fourth causes of action for promissory estoppel and conversion for failure to state a claim.

Discussion

“On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings [and] ‘[t]he scope of a court's inquiry . . . [is] to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action.’” *1199 Hous. Corp. v Intl. Fid. Ins. Co.*, 14 A.D.3d 383, 384 (1st Dep’t 2005). However, dismissal is proper when the “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Beal Sav. Bank v Sommer*, 8 N.Y.3d 318, 324 (2007).

I. Piercing the Corporate Veil

“[P]iercing the corporate veil requires a showing that: (1) the owners 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” *Morris v New York State Dept. of Taxation and Fin.*, 82 N.Y.2d 135, 141 (1993). Here, regardless of whether Larren was the sole member-manager of

BidKind at the time of the alleged wrongdoing, I find that documentary evidence flatly contradicts Santo Domingo's allegation that Darren exercised complete domination and control over BidKind.

Larren submits a signature card Santo Domingo and Darren both signed as "Managing Member[s]" of BidKind on July 1, 2014 with City National Bank, designating both as authorized signers on BidKind's bank account. The signature card directly disproves an essential premise of Santo Domingo's veil piercing claim, *i.e.*, that Darren exercised complete control over BidKind's finances and bank account when misappropriating corporate funds. *See Igarashi v Higashi*, 289 A.D.2d 128 (1st Dep't 2001) (affirming dismissal of claims where documentary evidence demonstrated that plaintiff was not the sole owner, and the claim was premised on plaintiff being the sole owner). Simply because Santo Domingo exercised control over the bank account after the alleged funds misappropriation does not change the undisputed proof that Santo Domingo had the ability to do so earlier.² *See Joseph Kali Corp. v A. Goldner, Inc.*, 49 A.D.3d 397, 398 (1st Dep't 2008) ("Even though the motive may be to prevent fraud or achieve equity, '[t]hose seeking to pierce a corporate veil ... bear a heavy burden of showing that the corporation was dominated as to the transaction attacked'") (citation omitted) (changes in original).

² Darren submits an email, in which he seeks access to BidKind's bank account, and City National Bank explains that unless he demonstrates revised ownership of BidKind, protocol requires that the bank block an account where a signatory reports a dispute between two signatories. *See* Darren Aff. Ex. L.

Accordingly, to the extent that Santo Domingo seeks to pierce the corporate veil and hold Darren personally liable, I dismiss the complaint as against Darren.

II. Promissory Estoppel

BidKind argues that I should dismiss the third cause of action for promissory estoppel because it is duplicative of the first cause of action for breach of contract. “If, however, there is a bona fide dispute as to the existence of a contract . . . a party will not be required to elect his or her remedies and may proceed on both quasi contract and breach of contract theories[.]” *M/A-Com, Inc. v State*, 78 A.D.3d 1293, 1294 (3d Dep’t 2010). Here, BidKind denies the enforceability of the Loan Agreement and therefore, Santo Domingo may plead promissory estoppel as an alternative theory of recovery.

III. Conversion

BidKind argues that I should dismiss the fourth cause of action for conversion of money because Santo Domingo failed to plead that there is a specific, identifiable fund and an obligation to return, or otherwise treat in a particular manner, the specific fund at issue. Even giving Santo Domingo the most favorable inference, he has not stated a conversion claim. The papers submitted show that the funds at issue were general deposits made in the ordinary course of business and were not segregated from other deposits. *See In re Clark*, 146 A.D.3d 495, 496 (1st Dep’t 2017) (stating that “a conversion claim was not stated since there are no allegations that the money given . . . was specifically identifiable, was obligated to be returned, or otherwise treated in a particular manner”). Accordingly, I dismiss the fourth cause of action for conversion.

IV. Sanctions

I deny BidKind's and Larren's request for sanctions, pursuant to 22 N.Y.C.R.R. § 130-1.1, for frivolous conduct based on Santo Domingo's alleged false statements. BidKind and Larren base their request on statements that are factually disputed, and therefore there is no basis upon which to award sanctions.³

In accordance with the foregoing, it is

ORDERED that defendant Herve Larren's motion to dismiss the complaint is granted as to all causes of action asserted against him; and it is further

ORDERED that defendant BidKind LLC's motion to dismiss the third and fourth causes of action is granted as to the fourth cause of action for conversion, and the motion is otherwise denied;

ORDERED that defendants Herve Larren's and BidKind LLC's motion for sanctions is denied; and it is further

³ I remind the parties that their papers and/or arguments should not contain personalized attacks. Also, counsel for defendants failed to adhere to the page limits provided in Commercial Division Rule 17 in this motion and in another related action, and I request counsel adhere to the page limits in the future.

ORDERED that counsel are directed to appear for a compliance conference in Room 208, 60 Centre Street, on February 28, 2018, at 2:15 p.m.

This constitutes the decision and order of the Court.

1/23/18
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: