

Umez v Puma
2018 NY Slip Op 30769(U)
March 23, 2018
Supreme Court, Bronx County
Docket Number: 303841/2015
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 02

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BEN UMEZ, MD and BEN UMEZ,

Plaintiffs,

Index No: 303841/2015

-against-

DECISION/ORDER

ANTHONY J. PUMA d/b/a VAP PROPERTIES, CO.,
ANTHONY J. PUMA, JR.,
MARSHALL E. BLOOMFIELD,
MARSHALL E. BLOOMFIELD, ESQ.
and HAYDCE LOPEZ,

Defendants.

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HON. ELIZABETH A. TAYLOR:

Plaintiffs commenced the underlying action seeking damages for breach of the covenant of good faith and fairdealing; fraud; and invasion of privacy. Defendants seek dismissal of the complaint, pre-answer under CPLR 3211(a)(1), (5) and (7).

The motion is determined as follows:

Prior to the commencement of this action, defendants Anthony J. Puma Jr. and Anthony J. Puma (“the Puma defendants) d/b/a VAP Properties Co. (“VAP”) were granted two judgments against Lovina Medical, P.C. a/k/a Lovina Medical Pavilion (“Lovina”), a then-active New York State Domestic Professional Corporation allegedly owned and operated by plaintiffs. The first judgment was entered in favor of VAP in an unrelated landlord/tenant proceeding pursuant to a so-ordered stipulation signed by all parties. The second judgment was entered in favor of VAP in a Civil Court action seeking enforcement of the landlord/tenant judgment.

Plaintiffs brought the underlying action alleging that defendants, in an effort to enforce and collect on the two prior judgments, harassed plaintiffs individually and professionally, without regard to the fact that Lovina, with whom plaintiffs’ medical practice is affiliated, is not the same corporate

entity that executed the original 1993 lease pursuant to which VAP was awarded the judgments. Plaintiffs further allege that, in its current state, the Lovina entity under which his medical practice exists today did not exist at the time the Civil Court action was commenced. Thus, defendants, in seeking to enforce the judgments using the current Lovina's employer identification number and serving various collection instruments on plaintiffs' business associates and financial institutions, has damaged plaintiffs.

"It is settled that a motion for dismissal pursuant to CPLR 3211(a)(7) must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. The pleading is to be liberally construed. The court must accept the facts alleged in the pleading as true and accord the opponent of the motion, here plaintiffs, the benefit of every possible favorable inference [to] determine only whether the facts as alleged fit within any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [2013][internal citations omitted]). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

Plaintiffs' first cause of action alleges that defendants breached an implied duty of good faith and fair dealing. Absent a valid and binding contract between plaintiffs and defendants, no such duty exists (*see Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AS3d 463 [1st Dept 2012]; *Am.-European Art Assocs., Inc. v Trend Galleries, Inc.*, 227 AD2d 170 [1st Dept 1996]). "[B]reach of the implied covenant of good faith and fair dealing is not a tort; rather, it is a contract claim. A claim for breach of the implied covenant of good faith and fair dealing ... may not be used as a substitute for a nonviable claim of breach of contract" (*Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629, 630 [1st Dept 2014][internal citations omitted]; *see Canstar v Jones Constr. Co.*, 212 AD2d 452 [1st Dept 1995][“a breach of an implied covenant of good faith and fair dealing is intrinsically tied to the damages allegedly resulting from a breach of the contract”]).

Because plaintiffs' cause of action for breach of the implied duty of good faith and fair dealing

is not founded upon a contract between the parties, that aspect of defendants' motion seeking dismissal of the first cause of action is dismissed pursuant to CPLR 3211(a)(7).

Plaintiffs' second cause of action alleges that defendants knew plaintiffs were not a party to the prior actions, and that defendants made misrepresentations to plaintiffs' business associates, causing plaintiffs harm. CPLR 3016(b) states "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." Here, plaintiffs' second cause of action alleging fraud contains only bare and conclusory statements, devoid of any supporting detail (*see IndyMac Bank, F.S.B. v Vincoli*, 105 AD3d 704 [2nd Dept 2013]; *Barclay Arms v Barclay Arms Assoc.*, 144 AD2d 287 [1st Dept 1988], *aff'd* 74 NY2d 644 [1989] ["no cause of action for fraud is made out, nor can one be effectively answered and defended, when the subjective element is summarily alleged without supporting factual detail"]; *see also National Westminster Bank v Weksel*, 124 AD2d 144 [1st Dept 1987]). Moreover, plaintiffs failed to plead with specificity the elements of misrepresentation of a material fact and scienter. The complaint did not contain factual allegations showing that any of the defendants made representations concerning a material fact that was false and known by them to be false at the time they were made (*see Nationscredit Fin. Servs. Corp. v Turcios*, 55 AD3d 806 [2nd Dept 2008]; *Maisano v Beckoff*, 2 AD3d 412 [2nd Dept 2003]).

Accordingly, that aspect of defendants' motion seeking dismissal of the second cause of action under CPLR 3211(a)(7) is granted.

Plaintiffs' third cause of action alleges that defendants breached plaintiffs' right to privacy by deceptively obtaining plaintiffs' private and confidential information. Civil Rights Law §§ 50 and 51 "protect against the appropriation of a plaintiff's name or likeness for a defendant's benefit and create a cause of action in favor of any person whose name, portrait, or picture is used for advertising purposes or for trade without the plaintiff's consent" (*Farrow v. Allstate Ins. Co.*, 53 AD3d 563, 564 [2d Dept

2008]; see *Cohen v Herbal Concepts*, 63 NY2d 379 [1984]). Here, plaintiffs' complaint fails to set forth any allegations that comport with the statutory requirements as set forth under Civil Rights Law §§ 50 and 51.

Therefore, that aspect of defendants' motion seeking dismissal of the third cause of action under CPLR 3211(a)(7) is granted.

Plaintiffs have not alleged sufficiently a cause of action as against the Puma defendants, the Bloomfield defendants, and/or Haydce Lopez, a former employee of the Bloomfield defendants. Although not properly alleged as such in the complaint, plaintiffs, in opposition, contend that said defendants were in effect the alter-egos of the respective corporate defendants, and as such, should be held liable in their individual capacities.

As a threshold issue, “[v]eil-piercing is a narrowly construed doctrine limiting the accepted principles that a corporation exists independently of its owners . . . and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners” (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135 [1993]; see *Bartle v Home Owners Coop.*, 309 NY 103 [1955]; *Goldman v Chapman*, 44 AD3d 938 [2nd Dept 2007]). The party seeking to pierce the corporate veil bears the heavy burden of 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” (*Matter of Morris v New York State Dept. of Taxation & Fin.*, supra; see *Sheridan Broadcasting Corp. v Small*, 19 AD3d 33 [1st Dept 2005])” (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1 [1st Dept 2016]).

The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their “alter ego,” without more, will not suffice to support the equitable relief of piercing the corporate veil (see *Matter of Morris v New York State Dept. of*

Taxation & Fin., supra; *Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, supra; *Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344 [2nd Dept 2006]). “The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances” (*Damianos Realty Group, LLC v Fracchia*, supra [internal quotation marks omitted]; see *Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, supra).

Absent any facts or details to support plaintiffs’ overly broad and vague assertions, the complaint does not support any claim as against the Puma defendants, the Bloomfield defendants, and/or Haydee Lopez, a former employee of the Bloomfield defendants. Therefore, that aspect of defendants’ motion seeking dismissal of the claims as against the individual defendants is granted.

The Clerk is directed to dismiss the instant action accordingly.

The foregoing constitutes the decision and order of this court.

Dated: 3/23/2018



A.J.S.C.

Elizabeth A. Taylor