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

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XPAL POWER INC. and TENNRICH INTERNATIONAL CORPORATION,

Plaintiffs,

-against-

UNIVERSAL POWER INDUSTRY CORPORATION, XPAL TECHNOLOGY INC., and ROBERT LENG,

Defendants.

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DECISION AND ORDER
Index No.: 656154/2017

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

On this motion for default judgment pursuant to CPLR 3215, plaintiffs TennRich International Corporation (TIC) and its subsidiary XPAL Power Inc. (XPAL) allege XPAL was a licensed distributor of the Energizer power bank for the US market. Defendant Robert Leng approached TIC in late 2015, offering his US sales channels to promote the Energizer power bank. The parties entered into a Stock and Asset Acquisition Agreement on April 20, 2016 (the Agreement), by which plaintiffs were to transfer their assets and intellectual property as to Energizer products to defendant Xpal Technology, Inc (XTI). Defendant Universal Power Industry Corp (UPIC) guaranteed XTI's license payments. Defendants were to pay plaintiffs $6.5 million and promote the sale of the Energizer power bank in the US. Leng and the defendant entities, which plaintiffs claim are his alter egos and between which, plaintiffs argue, the corporate veil should be lifted, failed to pay plaintiffs, leading plaintiffs to file this suit. Plaintiffs allege six causes of action: (1) fraud; (2) conversion, regarding $105,000, which was sent by XPAL to be sent on to a non-party to settle a dispute but was taken by XTI; (3) fraud in the inducement of the Agreement; (4) breach of contract; (5) to pierce the corporate veil; and (6) for an accounting.

The summons and complaint were served on the entity defendants, UPIC and XTI on October 31, 2017, and on Leng on December 15, 2017 (Affidavits of Service, attached as Exhibits 11-13 to the Bruce Aff, NYSCEF Docs. No. 26-28). No party filed an answer or otherwise responded. Plaintiffs then filed this motion for default judgment on February 21, 2018. On March 29, 2018, newly-retained counsel for defendant Leng filed an affirmation requesting an extension

of time to respond to the motion for default (NYSCEF Doc. No. 43). Leng (but not the entity defendants) filed opposition papers on April 26.

According to CPLR 3215(f), "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party." Plaintiffs have provided affidavits of service of the summons and complaint upon all three defendants. Leng does not dispute service. The court will consider each claim, as follows.

Claim 1) "To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], *lv. denied* 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). In the complaint, the plaintiffs premise this claim on the injury they suffered upon entering into the Agreement with the entity defendants (Complaint, ¶ 34). Accordingly, this is, in essence, truly a claim for fraud in the inducement, and is duplicative of claim number 3. Therefore, this claim fails.

Claim 2) "The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). The elements of conversion are (1) plaintiff's possessory right or interest in certain property and (2) defendant's dominion over the property or interference with it in derogation of plaintiff's rights (*Colavitov New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *see also Employers' Fire Ins. Co. v Cotton,* 245 NY 102 [1927]). A plaintiff need only allege and prove that the defendant interfered with plaintiff's right to possess the property. The defendant does not have to have taken the property or benefitted from it (*Hillcrest Homes, LLC v Albion Mobile Homes, Inc.*, 117 NYS2d 755 (4th Dept 2014). A conversion claim may not be maintained where damages are merely sought for a breach of contract (*see Sutton Park Dev. Trading Corp. v Guerin & Guerin*, 297 AD 2d 430, 432 [3d Dept 2002]). Here, plaintiffs allege XPAL wired $105,000 to XTI's attorney, which money was to be paid to another entity, PMF Bancorp, to settle a litigation between XPAL and that entity, but that those funds were transferred

to XTI, instead. As evidence, plaintiffs provide the affidavit of Shih-Hui Chen, chairperson of TIC and director of XPI (NYSCEF Doc. No. 29, ¶¶ 19-20), a bank statement showing the wire (attached as Exhibit 6 to Chen aff, NYSCEF Doc. No. 35), and a letter from XTI's attorney, admitting to receiving the wired funds and releasing them to XTI (attached as Exhibit 7 to Chen aff, NYSCEF Doc. No. 36). Plaintiffs have made a prima facie case for conversion against defendant XTI. While plaintiffs' complaint alleges Leng converted these funds for his own use (¶41), plaintiffs provide no evidence that he took funds in his personal capacity, only that they were transferred to XTI. Accordingly, this claim fails as directly brought against Leng.

Claim 3) "In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] ["[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]). Representations of opinion, even as to matters of fact, are not representations and are not actionable unless guaranteed (*see Lanzi v Brooks*, 54 AD2d 1057 [1976], *affd* 43 NY2d 778 [1977]; *Mun. Metallic Bed Mfg. Corp. v Dobbs*, 253 NY 313 [1930]).

Plaintiffs claim Leng falsely represented his experience in the US market with raising funds for start-up companies, and in similar ventures (Complaint, ¶ 18). Leng also falsely told plaintiffs that UPIC, XTI's parent, was publicly traded and had many interested investors, and misrepresented the value and transferability of the UPIC shares which he put up as a guarantee for XTI's payment under the Agreement (*id.*). Plaintiffs allege they entered into the Agreement and its amendments in reliance upon these misrepresentations, and were injured when XTI failed to make its payments. As evidence, plaintiffs rely on the Chen affidavit. That affidavit makes broad statements, and does not specify how statements were made, when, or to whom (*see* Chen aff, ¶ 9 ["Leng falsely representing that he had extensive commercial success in the United States market for over 20 years and had personally successfully raised funds for new start-up companies in order to induce Plaintiffs to enter the acquisition agreement. Robert Leng also misrepresented that XTI's parent company UPIC is a publicly traded company in which many bankers, investors and venture capitalists had already interested in [sic]"]). Pursuant to CPLR 3016, causes of action sounding in

fraud must be stated with particularity, and this claim has neither been stated nor substantiated with the required detail. Furthermore, plaintiffs cannot reasonably rely on misrepresentations where the facts are readily available on reasonable inquiry, as are many of the alleged misrepresentations here (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010] quoting *Schumaker v Mather* (133 NY 590, 596 [1892] ["[I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations"]). Accordingly, this claim also fails.

Claim 4) To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]).

Plaintiffs have alleged and provided the Agreement (attached as Exhibit A to the Complaint), and have brought evidence of their performance by "transferring all operational control and assets to Robert Leng" and XTI (Chen aff, ¶ 12). Plaintiffs have also provided evidence XTI failed to make the required payments (*id.*, ¶14). Accordingly, plaintiffs have made a prima facie case for breach of contract against XTI.

As to UPIC, the guarantor, plaintiffs have not made a prima facie case for breach of contract. The Agreement was amended on August 11, 2016, and the guarantee established in the Agreement was amended, and the guarantee was then to be shares of UPIC stock (Amendment #2 to Agreement, attached to Complaint). Plaintiffs do not present evidence, or even argue, that the shares were not provided, only that their value was not as promised (Chen aff, ¶ 16). Accordingly, the claim fails against UPIC. Leng was not a party to the Agreement, so the claim also fails as against him, directly.

Claim 5) A claim based on piercing the corporate veil is not a separate claim as the "attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). Accordingly, this court will consider whether the plaintiffs have established the veil should be pierced and Leng should be held liable on the other claims brought in this action.

New York law disfavors disregard of the corporate form. "Generally, . . . piercing 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 NY2d 135, 141 [1993]). "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" (*TNS Holdings v MKL Sec. Corp.*, 92 NY2d 335, 339 [1998]). New York courts also reject veil-piercing allegations that are "unaccompanied by allegations of consequent wrongs" (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept 2012]).

The Chen affidavit states that Robert Leng acted for the defendants, but the plaintiffs provide no proof that he "exercised complete domination of the corporation in respect to the transaction attacked [or] that such domination was used to commit a fraud or wrong against the plaintiff[s] which resulted in plaintiff[s'] injury" (*Morris*, 82 NY2d at 141). Accordingly, plaintiffs have not made a prima facie case that the corporate veil may be lifted and Leng may be held liable for the actions of the entity defendants.

Claim 6) "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Palazzo v Palazzo*, 121 AD2d 261, 265 [1st Dept 1986]). "To be entitled to an equitable accounting, a claimant must demonstrate that he or she has no adequate remedy at law" (*Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011], *see Kastle v Steibel*, 120 AD2d 868, 869 [3d Dept 1986]). As plaintiffs have established a claim for breach of contract, they have established a remedy at law. Accordingly, the separate claim for an accounting also fails.

As far as defendant Leng opposes the motion for default judgment, it is moot, as plaintiffs have failed to make a prima facie case for any of the claims against him personally, either directly, or by virtue of piercing the corporate veil.

Accordingly, this motion is hereby GRANTED in part and DENIED in part. Default judgment is granted as to the conversion and breach of contract claims against XTI, and otherwise denied.

Counsel shall appear for a preliminary conference on July 31, 2018, at 9:30 am.

This constitutes the decision and order of the court.

DATED: July 2, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.