

<b>Zadar Universal Corp. v Lemonis</b>
2018 NY Slip Op 33125(U)
November 26, 2018
Supreme Court, New York County
Docket Number: 650902/2018
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTYPRESENT: HON. GERALD LBOVITS

PART

IAS MOTION 7EFM

*Justice*

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INDEX NO. 650902/2018

ZADAR UNIVERSAL CORP.,

MOTION SEQ. NO. 001 & 002

Plaintiff,

- v -

MARCUS LEMONIS, ML FASHION, LLC, &amp; INKKAS LLC

## DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for

DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for

AMEND CAPTION/PLEADINGS

Gerald Lebovits, J.

On February 26, 2018, plaintiff commenced this action against defendants for breach of contract, fraud, and unjust enrichment in connection with a convertible promissory note that defendants issued to plaintiff.

## BACKGROUND

On November 12, 2014, defendant Inkkas LLC issued a convertible promissory note to plaintiff in the amount of \$250,000, in return for the same amount in cash provided by plaintiff. (NYSCEF Doc #8.) On June 6, 2017, Inkkas LLC entered into a bill of sale and assignment providing for the transfer of certain assets to the non-party company, ML Retail, LLC. (NYSCEF Doc #26.) On October 9, 2017, plaintiff requested that defendant convert the note into stock. (NYSCEF Doc #9.)

In its complaint, plaintiff alleges that Inkkas LLC was sold. If plaintiff's allegation is true, that sale would have triggered a provision in the note allowing plaintiff to claim 1.5 times the outstanding principal plus interest under the note.

In motion sequence 01, defendants move under CPLR 3211 (a) (1) and (7) to dismiss plaintiff's complaint. In motion sequence 02, plaintiff moves under CPLR 3025 (b) and (c) to amend its complaint. Motion sequences 01 and 02 are now consolidated for disposition.

## DISCUSSION

### I. Motion Sequence 001: Defendants' Motion to Dismiss

Defendants' motion to dismiss is denied because they adduce insufficient documentary evidence to refute plaintiff's factual allegations.

Under CPLR 3211 (a) (1), a party may move for judgment dismissing a cause of action on the basis that a defense is founded upon documentary evidence. A court must accept the complaints' factual allegations as true and determine whether the facts as alleged fit within any cognizable legal theory. Dismissal under CPLR 3211 (a) (1) is only warranted if the documentary evidence "utterly refutes plaintiff's factual allegations" and "conclusively establishes a defense to the asserted claims as a matter of law. (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015].) Emails can constitute documentary evidence for the purpose of CPLR 3211 (a) (1). (*Id.*)

Under CPLR 3211 (a) (7), a party may move for judgment dismissing a cause of action on the basis that the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) If a defendant's evidence establishes that documentary evidence flatly rejects a well pleaded claim, dismissal would be appropriate.

Defendants argue that plaintiff may not maintain a cause of action on the note as a matter of law. Accordingly, plaintiff elected to convert the note into equity, and there is no longer a debt evidenced by the note. (NYSCEF Doc #17, at 3-4.) But defendants adduce insufficient evidence to refute plaintiff's factual allegations or establish that the note was converted into equity. Although defendants attach an email exchange confirming plaintiff's request to convert the promissory note (NYSCEF Docs #7, 8), defendants do not provide further evidence showing that they actually converted plaintiff's loan to stock. As a result, defendants' motion to dismiss under CPLR 3211 (a) (1) is dismissed.

Although defendants' evidence is insufficient to show that the note was converted into equity, plaintiff's claim asserts material allegations about the note necessary to support its cause of action. Accordingly, defendants' motion to dismiss under CPLR 3211 (a) (7) is denied.

### II. Motion Sequence 002: Plaintiff's Motion to Amend

Plaintiff's motion to amend its complaint is granted in part.

Under CPLR 3025 (b), a party should be "freely" granted leave to amend a pleading. Permission to amend is within the court's discretion. (*Edenwald Contr. Co. v New York*, 60 NY2d 957, 959 [1983].) When determining whether to grant leave to amend, "a court must examine the underlying merit of the causes of action asserted therein, since, to do otherwise, would be wasteful of judicial resources." (*Wieder v Skala*, 168 AD2d 355, 355 [1st Dept 1990].)

Plaintiff's motion to add allegations against defendants to pierce the corporate veil is denied. Defendants' arguments are persuasive. Plaintiff alleges that Lemonis acquired 100% equity in Inkkas LLC, that Lemonis signed as Chairman and CEO of Inkkas LLC when its assets were sold to ML Retail, LLC, and that Lemonis used Inkkas LLC as an alter ego with the intention to hinder, delay, or defraud plaintiff as creditor. But there is no merit to plaintiff's claims; plaintiff's allegations are insufficient to assert a piercing-the-corporate-veil claim. (*See Musman v Modern Deb*, 50 AD2d 761, 762 [1st Dept 1975] ["It is well settled that there must be complete domination and control of a subsidiary before the parent's corporate veil can be pierced."]; *cf. Gardner v Yanko*, 2011 NY Slip Op 32193 [U], \*10 [Sup Ct, NY County 2011] [granting a motion to amend a complaint to add allegations regarding piercing the corporate veil where the proposed amendments alleged "lack of corporate formalities, that ... [defendant] commingled their personal funds with that of the corporations, and that ... [defendant] dominated the corporate defendants and acted as their alter egos to perpetuate fraud on plaintiffs"].)

Plaintiff's motion to add ML Retail, LLC, as a defendant is denied. Plaintiff alleges that Inkkas LLC, sold all or some of its assets to ML Retail, LLC. But plaintiff has not alleged facts that sufficiently raise a claim for breach of contract, fraud, or unjust enrichment against ML Retail. There is no merit to adding ML Retail to this action.

This court interprets, under CPLR 3025 (c), the remainder of plaintiff's motion to amend its complaint to conform to the evidence. Plaintiff's motion to add details with respect to the note and a bill and sale of assignment between Inkkas and ML Retail is granted. Defendants argue that plaintiff's addition is selective, but whether the bill and sale of assignment triggers payment under the note is a question of contractual interpretation that this court will not resolve on a motion to amend. Because there is merit to plaintiff's proposed amendment, plaintiff's motion to amend the complaint to add details regarding the bill and sale of assignment is granted.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss (sequence 01) is denied; and it is further

ORDERED that plaintiff's motion to amend its complaint (sequence 02) is granted in part and denied in part: it is granted to the extent that plaintiff is permitted to add details regarding the note and a bill and sale of assignment, and is otherwise denied as to paragraphs 1, 6, and 24-26 of the proposed amended complaint; and it is further

ORDERED that, within 20 days of e-filing this decision and order, plaintiff shall serve and file its amended complaint and serve a copy of this order with notice of entry on the County Clerk's Office and the General Clerk's Office, which are directed to amend their records

NYSCEF DOC. NO. 32

RECEIVED NYSCEF: 12/06/2018

accordingly.

11/26/2018

DATE

CHECK ONE:

☐

CASE DISPOSED

☐

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☒

OTHER

☐

REFERENCE

GERALD LEBOVITS, J.S.C.