Hill Rosenberg & Thurston LLC v Gerber
2020 NY Slip Op 32439(U)
July 24, 2020
Supreme Court, Kings County
Docket Number: 516400/19
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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HILL ROSENBERG & THURSTON LLC,

Plaintiff, Decision and order

- against - Index No. 516400/19

ETHAN GERBER, GERBER & GERBER PLLC, and ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO, FERRARA, WOLF & CARONE LLP,

Defendants, July 24, 2020

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint on various grounds. The plaintiff has cross-moved seeking to amend the complaint. The motions have been opposed respectively. Papers were submitted by the parties and arguments were held. After reviewing all the arguments this court now makes the following determination.

The plaintiff, a law firm, has filed this lawsuit against the defendants alleging that they performed legal services for the defendants between January 2011 and January 2019 and they have not been paid for such services. The Complaint alleges the defendants owe $250,000 to the plaintiff. Specifically, it is alleged that defendant Ethan Gerber in his individual capacity and on behalf of corporations he manages and as the managing member of Gerber and Gerber PLLC, hired the plaintiff to provide legal services on behalf himself and the corporations. The plaintiff alleges invoices were sent and they have not been paid for those services. In 2016 Ethan Gerber became a partner at

defendant law firm Abrams Fensterman and according to the Amended Verified Complaint, Gerber and Gerber merged with Abrams Fensterman and Abrams Fensterman became the successor of Gerber and Gerber (see, Amended Verified Complaint, ¶¶27,28). Thus, the plaintiff likewise sued Abrams Fensterman.

The defendants have now moved seeking to dismiss the complaint on the grounds service was improper and substantive legal grounds as well. The plaintiff argues the motion should be denied, a cross-motion to amend the complaint should be granted and the parties should engage in discovery.

Conclusions of Law

All three defendants in this case, Ethan Gerber, Gerber and Gerber and Abrams Fensterman were all served by leaving a copy of the Summons and Complaint with Rory Mulholland, a partner at Abrams Fensterman. Although there are four affidavits of service the service of each of the three defendants must now be examined.

First, Mr. Mulholland has submitted an affidavit wherein he asserts he was not authorized to accept service on behalf of Gerber and Gerber. Pursuant to CPLR §311-a service upon a company such as Gerber and Gerber can only be made "to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons

as if such person was a defendant" (id). Mr. Mulholland has submitted an affidavit that he was not authorized to accept service on behalf of that limited liability company. The plaintiff does not and indeed cannot raise any question of fact in this regard and does not dispute Mr. Mulholland's status. Thus, there are no questions of fact necessitating any hearing and the motion seeking to dismiss Gerber and Gerber for lack of jurisdiction is granted (see, Ciafone v. Queens Center for Rehabilitation and Residential Healthcare, 126 AD3d 662, 5 NYS3d 462 [2d Dept., 2015]). Moreover, there is no basis to permit such service pursuant to CPLR §2001. In Ruffin v. Lion Corp., 15 NY3d 578, 915 NYS2d 204 [2010] the Court of Appeals held that a court may only utilize CPLR §2001 to cure a "technical infirmity" (id). The court further explained that "in deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant—notice that must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'" (id). To be sure, the court conceded that mere notice is not dispositive of the issue and that "delivery of a summons and complaint to the wrong person...is a substantial defect" (id). Therefore, CPLR §2001 is not appropriate in this context and any motion seeking to cure the service as to Gerber and Gerber is denied.

Concerning the service on behalf of Ethan Gerber, the process server's affidavit indicates service was effectuated by delivering the summons and complaint to Mr. Mulholland as a person of suitable age and discretion. Generally a process server's affidavit provides prima facie evidence of proper service (Household Finance Realty Corp., of New York v. Brown, 13 AD3d 340, 785 NYS2d 742 [2d Dept., 2004]). To contend that service was improper and that defendant is entitled to a hearing on the matter, the defendant must allege facts to support the contention (Mortgage Electronic Registration Systems, Inc., v. Schotter, 50 AD3d 983, 857 NYS2d 592 [2d Dept., 2008, Hannover Insurance Company v. Cannon Express Corp., 1 AD3d 358, 766 NYS2d 853 [2d Dept., 2003]). The defendant's have sufficiently raised questions challenging the affidavit of the process server by introducing Mr. Mulholland's affidavit wherein it states that he never accepted service on behalf of Mr. Gerber. However, even though there are issues of fact regarding service the substantive issues relating to Mr. Gerber will now be addressed.

The Complaint does not assert any basis upon which to allege personal liability as to Mr. Gerber. The Proposed Amended Complaint likewise fails to establish any facts demonstrating why Mr. Gerber should be held personally liable.

Thus, in order to pierce the corporate veil and find Mr. Gerber individually liabile the plaintiff must demonstrate that

"(1) the owners exercised complete dominion of the corporation in respect to the transaction attacked; and (2) that such dominion was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (Conason v. Megan Holding LLC, 25 NY3d 1, 6 NYS3d 206 [2015]). As the Court of Appeals observed, at the pleading stage "a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in 'bad faith' while representing the corporation" (East Hampton Union Free School District v. Sandpebble Builders Inc., 16 NY3d 775, 919 NYS2d 496 [2011]). Rather, the plaintiff must allege facts demonstrating such dominion over the corporation and that "through such domination, abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice against the plaintiff such that a court in equity will intervene" (Oliveri Construction Corp., v. WN weaver Street LLC, 144 AD3d 765, 41 NYS3d 59 [2d Dept., 2016]). "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to [corporate or] LLC formalities, inadequate capitalization, commingling of assets, and the personal use of [corporate or] LLC funds" (see, Grammas v. Lockwood Associates LLC, 95 AD3d 1073, 944 NYS2d 623 [2d Dept., 2012]). Thus, mere conclusory statements that the individual dominated the corporation are insufficient to defeat a motion to dismiss (AHA

Sales Inc., v. Creative Bath Products Inc., 58 AD3d 6, 867 NYS2d 169 [2d Dept., 2008]).

As noted, neither the Complaint nor the Proposed Amended Complaint provides any basis to even assert the necessary criteria to pierce the corporate veil. Further, the affidavit of Andrea Hill Esq. a partner at the plaintiff law firm does not establish Mr. Gerber acted in any way sufficient to allege piercing the corporate veil. The affidavit of Ms. Hill does assert that some of the legal work was for Mr. Gerber's own medallion taxi cab's (see, Affidavit of Andrea Hill, ¶5) and that he was the controlling shareholder of Gerber and Gerber (see, id at §6). However, those assertions fall far short of the necessary criteria for piercing the corporate veil. Therefore, regardless of any service issues there can be no viable causes of action against Mr. Gerber and consequently, the motion seeking to dismiss the Complaint as to him is granted and the motion to amend the complaint as to him is denied.

Concerning the remaining defendant, Abrams Fensterman, it must be noted that Abrams Fensterman is a limited partnership, thus service upon any of the partners is valid service upon the partnership (Green v. Gross and Levin LLP, 101 AD3d 1079, 958 NYS2d 399 [2d Dept., 2012]. In that case service was effectuated upon Gross a partner at the defendant law firm. The court held that "this service was sufficient to confer personal jurisdiction

over G & L, which is a limited liability partnership, since service was properly effected upon one of G & L's partners" (id). Thus, service upon Mulholland, on behalf of Abrams Fensterman was valid service. Thus, the request to permit service upon Gerber and Gerber via CPLR §306-b is denied since valid service upon essentially the identical party has been held proper.

Turning to the substantive issues, "a motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

First, the Proposed Amended Complaint alleges that the plaintiff was contacted by the defendants directly and hired to perform legal services for himself and corporations he controlled (see, Proposed Amended Complaint, §11). While the defendants dispute that characterization any factual differences cannot be resolved on a motion to dismiss. Consequently, there can be no

basis, at this juncture, to dismiss the entire complaint on the grounds it violates the statute of frauds.

Concerning the breach of contract claim and the account stated claim, first as noted the Proposed Amended Complaint alleges specific contractual arrangements between the plaintiff and defendants. Further, both causes of action carry six year statutes of limitation. The defendants assert such claims can only include alleged breaches that occurred after July 25, 2013 which is six years from the filing date. The doctrine of continuous representation exists where claims of malpractice are presented and do not really involve claims for breach of contract. The case cited by the plaintiff, Luk Lamellen U. Kupplungbau GmbH v. Lerner, 166 AD2d 505, 560 NYS2d 787 [2d Dept., 1990] does not state the continuous representation doctrine applies in breach of contract causes of action. Rather, the court held there that the availability of such cause of action "is limited to instances in which the attorney's involvement in the case after the alleged malpractice is for the performance of the same or related services and is not merely the continuity of a general professional relationship" (id). Therefore, the doctrine of continuous representation has no applicability in this case and consequently the motion seeking to dismiss those causes of action for any claims prior to July 25, 2013 is granted. Likewise, the continuing wrong doctrine is

inapplicable. That doctrine tolls the statute of limitations for continuing unlawful acts (Bulova Watch Company v. Celotex Corp., 46 NY2d 606, 415 NYS2d 817 [1979]). However, the doctrine only applies when the defendants duty under the contract is ongoing (Myers Industries Inc., v. Schoeller Arca Systems Inc., 171 F.Supp3d 107 [S.D.N.Y. 2016]). In this case the plaintiff is not asserting that the defendant's duties under a contract was ongoing. Rather, the Proposed Amended Complaint alleges that the per diem appearances conducted by the plaintiff comprised individual contracts that were billed every two weeks (see, Proposed Amended Complaint, §18). Therefore, the continuous wrong doctrine is inapplicable and the statute of limitations bars any claims that are alleged prior to July 25, 2013. The motion to dismiss is granted to that extent.

For similar reasons any claims for conversion that allege any wrongdoing prior to July 25, 2016 are likewise time barred.

The motion seeking to dismiss the unjust enrichment claim is granted. It is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Since there is a viable claim for breach of contract the claim for unjust enrichment is dismissed.

Thus, the only remaining defendant is Abrams Fensterman and the only remaining viable causes of action are breach of contract, account stated and conversion only for the dates indicated in this order. The motion to amend the complaint is granted to this extent.

So ordered.

ENTER:

DATED: July 24, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC