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| National Convention Servs., LLC v Showtime on the Piers, LLC |
| 2020 NY Slip Op 34313(U) |
| December 23, 2020 |
| Supreme Court, New York County |
| Docket Number: 655321/2018 |
| Judge: Barry Ostrager |
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER, PART IAS 61EFM

Justice

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NATIONAL CONVENTION SERVICES, LLC and EXSERV, INC.,

Plaintiffs,

- v -

SHOWTIME ON THE PIERS, LLC., *et al.*,

Defendants.

-----X

SHOWTIME ON THE PIERS, LLC,

Counterclaim Plaintiff,

-v-

NATIONAL CONVENTION SERVICES, LLC, EXSERV, INC., ANTHONY MARINO, JAMES ANGELLINO, *et al.*,

Counterclaim Defendants.

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| INDEX NO. | 655321/2018 |
| MOTION DATE | |
| MOTION SEQ. NOS. | 005, 007, 008 & 009 |

DECISION AND ORDER ON MOTIONS

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HON. BARRY R. OSTRAGER

Before the Court are four motions made by various parties on various grounds seeking various forms of relief. All of the motions have been marked submitted on default. Plaintiffs National Convention Services, LLC (“NCS”) and Exserv, Inc. (“Exserv”) commenced this action in October of 2018 against Showtime on the Piers LLC (“Showtime”), 16 other entities, and Charles D. Newman, individually, seeking \$856,261.58 for services allegedly rendered by plaintiffs in connection with certain trade shows. The case has been litigated extensively, with two amendments of the Complaint, the assertion of twelve counterclaims, and multiple motions to dismiss, and a cost that appears to outpace the recoverable value of the claims in the case.

Most recently, by decision and order dated August 18, 2020 (NYSCEF Doc. No. 151), this Court relieved counsel for defendants Showtime and Mr. Newman and twelve other corporate defendants (mot. seq. 006). Two subsequent conferences were held by the Court on

October 7 and October 22, 2020, after defendants were given an opportunity to retain new counsel (NYSCEF Doc. Nos. 155 and 160). Although new counsel was not retained, Mr. Newman appeared representing himself, and the Court authorized the parties to proceed with the instant motions. A Note of Issue is presently due on January 31, 2021, and a trial is scheduled for April 26, 2021. The four motions are granted to the extent provided herein.

In the first motion (seq. 005), three counterclaim defendants NCS and Exserv (who are also the named plaintiffs) and James Angellino move for an order dismissing the claims against them for failure to state a cause of action, pursuant to CPLR § 3211(a)(7). According to defendant/counterclaim plaintiff Showtime, Angellino was the “owner, manager and/or operator of plaintiffs/counterclaim defendants NCS and Exserv.” (NYSCEF Doc. No. 133, ¶ 53). The motion is granted based on the papers submitted and Showtime’s default.

Turning first to the request for relief by the corporate entities, NCS and Exserv seek to dismiss eight of the nine counterclaims asserted against them: the Second, Third, Fourth, Fifth, Seventh, Tenth, Eleventh and Twelfth. They do not seek dismissal of the First Counterclaim for breach of contract in this motion, although that claim is addressed in other motions. Nor do they seek dismissal of the Sixth, Eighth or Ninth counterclaims, as the movants are not named in those claims.

The Second and Third Counterclaims, which are quasi-contract claims sounding in unjust enrichment and money had and received, are dismissed as barred by the existence of a valid contract between the parties. *Clark-Fitzpatrick v. Long Island R. Co.*, 70 NY2d 382, 389 (1987). Similarly, the Fifth Counterclaim, sounding in conversion, is dismissed, as it simply seeks as damages the monies due under the parties’ agreement. The Fourth and Seventh Counterclaims, sounding in fraud and civil conspiracy to defraud, are dismissed, as these claims lack the

specificity required by CPLR § 3016(b) and also duplicate the contract claim. The Tenth Counterclaim, sounding in aiding and abetting breach of fiduciary duty, is dismissed due to insufficient allegations regarding the required elements of actual knowledge and substantial assistance related to the alleged underlying breach. *See Kaufman v. Cohen*, 307 AD2d 113, 125 (1st Dep't 2003). The two RICO claims asserted in the Eleventh and Twelfth Counterclaims are dismissed due to a lack of specific allegations to state the claims. Nor is there any basis for punitive damages, as none of the alleged conduct rises to the level of wanton conduct. *Walker v. Sheldon*, 10 NY2d 401, 404-405 (1961).

The motion is also granted to the extent it seeks the dismissal of all claims asserted against Angellino individually. As noted above, the counterclaim plaintiffs vaguely allege that Angellino had a relationship with NCS and Exserv. To the extent Angellino may be a principal of the corporate entities, the allegations against him are insufficient to pierce the corporate veil and impose individual liability. *See Port Chester Electrical Constr. Corp. v. Atlas*, 40 NY2d 652, 657 (1976) (role as a corporate principal is insufficient to pierce the corporate veil); *WorldCom v. Segway Mktg.*, 262 AD2d 164, 164-165 (1st Dep't 1999) (affirming the dismissal of fraud claims against a corporate officer based on insufficient allegations of individual conduct).

In their next motion (seq. 007), NCS, Exserv and Angellino seek three types of relief: (1) an order holding the corporate defendants in default based on their failure to obtain counsel after the Court relieved defense counsel; (2) striking the pleadings of the corporate defendants based on their default; and (3) awarding plaintiffs NCS and Exserv a judgment in the amount of \$856,261.58 plus interest and attorney's fees. The motion is granted in part and denied in part.

A corporation is required by law to appear by counsel. See CPLR § 321(a). As indicated above, this Court relieved counsel for the corporate defendants on August 18, 2020 (NYSCEF

Doc. No. 151), and none of the corporate defendants has obtained new counsel since that time. Therefore, the corporate defendants are in default, and the Court strikes defendants' Answer, including the counterclaims asserted by defendant/counterclaim plaintiff Showtime, on default, to the extent any counterclaim (specifically, the First for breach of contract) was not previously dismissed in motion sequence 005.

In support of their request for a money judgment, the movants rely on the affidavit on personal knowledge from James Angellino and the various invoices attached to the affidavit (NYSCEF Doc. No. 172). As the invoices name only Showtime as the party being charged for services rendered only by NCS, the Court awards a money judgment only as between those parties; i.e., in favor of NCS and against Showtime in the amount of \$856,261.58. The claims in favor of Exserv and against the other defendants are denied without prejudice due to insufficient proof. NCS is entitled to interest on the monies due. As the invoices range from April through July and Angellino claims multiple demands beginning in June, the Court awards statutory interest as of June 1, 2018, which is also the midpoint date of the invoices. The request for attorney's fees is denied, as no contractual or statutory basis has been stated to support such a request.

In their final motion (seq. 009), NCS, Exserv and Angellino seek the same three types of relief sought in motion sequence 007, except the basis is CPLR § 3126 and alleged noncompliance with discovery orders, and the requested relief is also sought against defendant Charles D. Newman, who appeared representing himself after counsel was relieved. Although the motion is superfluous with respect to the corporate defendants, the Court adds CPLR § 3126 as an additional basis for the relief granted in connection with motion sequence 007. This motion, however, is the first request for relief as against defendant Charles D. Newman,

individually. Although plaintiffs have established Newman's noncompliance with discovery obligations, that noncompliance is insufficient to support a money judgment against Newman individually. As was the case with the claims against Angellino, the claims against Newman are insufficient to support the piercing of the corporate veil so as to impose on Newman liability for the invoices sent to Showtime. Therefore, that aspect of the motion is denied.

The fourth and final motion before the Court at this time is by the counterclaim defendant Anthony Marino a/k/a Joe Nasti a/k/a Joe Oddo (mot seq. 008). Marino seeks an order (1) holding the counterclaim plaintiff¹ Showtime in default based on its failure to obtain counsel after the Court relieved its counsel; (2) striking the pleadings of the counterclaim plaintiff based on its default; and (3) for other relief. As the Court indicated in its analysis of motion sequence 007, Showtime, as a corporate entity, was required to obtain counsel but failed to do so. Therefore, Marino is entitled to an order finding that Showtime is in default and striking Showtime's pleadings with respect to Marino. As no other relief is warranted based on the papers submitted, the motion is otherwise denied.

The trial remains scheduled for April 25, 2016, and a status conference remains scheduled for January 26, 2021 at noon via a dial-in number to be provided by plaintiffs in an efiled letter no later than January 11, 2021. It is unclear whether any party has any claim remaining after this decision that will be pursued. If plaintiffs do not intend to pursue any other claims, they may file an appropriate notice and the conference and trial will be cancelled, as this decision establishes that Showtime may not pursue any of its counterclaims against any of the parties not addressed in the motions due to its failure to obtain counsel.

¹ Marino actually seeks relief against all the defendants, defining them as counter plaintiffs. However, the only counterclaim plaintiff, and the only party that has asserted claims against Marino, is Showtime. The Court will therefore limit Marino's motion to Showtime.

Accordingly, it is hereby

ORDERED that the motion by plaintiffs/counterclaim defendants National Convention Services, LLC and Exserv, Inc., joined in by counterclaim defendant James Angellino (mot. seq. 005) is granted, and the Clerk is directed to enter judgment dismissing the Second, Third, Fourth, Fifth, Seventh, Tenth, Eleventh, and Twelfth Counterclaims against plaintiffs/counterclaim defendants National Convention Services, LLC and Exserv, Inc. and further dismissing all counterclaims asserted against counterclaim defendant James Angellino pursuant to CPLR § 3211(a)(7) for failure to state a cause of action; and it is further

ORDERED that the motion by plaintiffs/counterclaim defendants National Convention Services, LLC and Exserv, Inc., joined in by counterclaim defendant James Angellino (mot. seq. 007), is granted to the extent of holding all the named corporate defendants and the counterclaim plaintiff Showtime on the Piers LLC in default and striking their pleadings for failure to obtain counsel pursuant to CPLR § 321(a), and the motion is further granted to the extent of directing the Clerk to enter judgment in favor of plaintiff National Convention Services, LLC against defendant Showtime on the Piers LLC in the sum of \$856,261.58 plus interest at the statutory rate of 9% per annum from June 1, 2018 through the entry of judgment, as calculated by the Clerk of the Court upon plaintiff's e-filing of a Proposed Judgment directed to the County Clerk, and the motion is otherwise denied; and it is further

ORDERED that the motion by plaintiffs/counterclaim defendants National Convention Services, LLC and Exserv, Inc., joined in by counterclaim defendant James Angellino (mot. seq. 009), is granted to the extent of holding all defendants and the counterclaim plaintiff Showtime on the Piers LLC in default and striking their pleadings pursuant to CPLR § 3126 based on noncompliance with discovery obligations, and is otherwise denied; and it is further

ORDERED that the motion by counterclaim defendant Anthony Marino a/k/a Joe Nasti a/k/a Joe Oddo (mot. seq. 008) is granted to the extent of holding the counterclaim plaintiff Showtime on the Piers LLC in default and striking its pleadings pursuant to CPLR § 3126 based on noncompliance with discovery obligations, and is otherwise denied; and it is further

ORDERED that a status conference remains scheduled for January 26, 2021 at noon via a dial-in number to be provided by plaintiffs consistent with the terms of this decision.

Dated: December 23, 2020

Barry R. Ostrager
BARRY R. OSTRAGER, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| | <input type="checkbox"/> GRANTED | <input checked="" type="checkbox"/> GRANTED IN PART |
| | <input type="checkbox"/> DENIED | <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT |
| | | <input type="checkbox"/> REFERENCE |