Melchior Prods., LLC v Bindra
2021 NY Slip Op 30282(U)
January 29, 2021
Supreme Court, New York County
Docket Number: 650005/2017
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

---X

MELCHIOR PRODUCTIONS, LLC, and
ANTHONY MELCHIOR,

Plaintiffs,

- v -

MIKE BINDRA and LAURA DE PALMA,

Defendants.

---X

INDEX NO. 650005/2017

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 8, 16, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 51, 52, 53, 54, 55

were read on this motion to/for DISMISSAL OF COMPLAINT.

Levites & Associates, LLC, New York, NY (Raymond A. Levites of counsel), for plaintiffs.
Adelman Matz P.C., New York, NY (Sarah M. Matz and Gary Adelman of counsel), for defendants.

Gerald Lebovits, J.:

Plaintiffs, Melchior Productions, LLC ("MPLLC"), and Anthony Melchior, commenced this action seeking to hold defendants, Mike Bindra and Laura De Palma, personally liable for the alleged obligations and wrongs of two limited-liability companies (Made Events, LLC, and EZ Festivals, LLC).

BACKGROUND

Plaintiffs entered into contracts with defendants on behalf of Made Events and EZ Festivals for an event called Electric Zoo to be performed on Randall's Island each year from 2009 through at least 2014. Defendants owned and controlled both Made Events and EZ Festivals until October 31, 2013, when SFX Entertainment Inc. bought Made Events and EZ Festivals.

The New York State tax authorities audited MPLLC from early 2015 to August 2016. Since plaintiffs used MPLLC's Resale Certificate to avoid or minimize sales and use taxes on behalf of defendants, the tax authorities found that plaintiffs had sales and use tax obligations with respect to goods and services requested by and provided to the defendants during 2010 and 2011 for the benefit of EZ Festivals.

On February 1, 2016, SFX Entertainment filed for Chapter 11 bankruptcy protection in the District of Delaware. In April 2016, the bankruptcy court issued a notice that specified May 17, 2016 ("General Bar Date"), as a deadline by which creditors of EZ Festivals, Made Events and SFX Entertainment (collectively, the "SFX Debtors"), had to submit proofs of claim to preserve their claims against the SFX Debtors.

On May 17, 2017, Melchior, one of the creditors, filed a proof of claim form against EZ Festivals without the tax reimbursement claim. On June 8, 2017, the bankruptcy court issued an order granting the SFX Debtors' objections against all creditors except MPLLC. On January 3, 2018, the bankruptcy court granted the SFX Debtors' objection against Melchior's claims.

Plaintiffs thereafter filed the present suit, with causes of action against defendants for unjust enrichment, breach of contract, and quantum meruit. Defendants move to dismiss under CPLR 3211 (a) (1) and (a) (7). Plaintiffs cross-move to amend their complaint. The amended complaint withdraws the claims for breach of contract and quantum meruit. It asserts new causes of action: (i) unjust enrichment premised on piercing of the corporate veil and on defendants' (asserted) personal liability; and (ii) contractual and common-law indemnification.

DISCUSSION

Defendants do not oppose plaintiffs' motion to amend the complaint. (*See* NYSCEF No. 51 at 8.) The motion to amend is granted. Defendants' arguments in favor of dismissal are evaluated based on the amended complaint.

I. Whether Plaintiffs' Alter Ego Claims Can Be Asserted Outside the Bankruptcy Proceedings

Defendants move to dismiss plaintiffs' alter ego claims against them under CPLR 3211(a)(1), relying on documents from the bankruptcy proceeding. Dismissal on CPLR 3211 (a) (1) grounds is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. (*Leon v Martinez*, 84 NY2d 83, 88 [1994].) Judicial records from a bankruptcy proceeding, such as judgments and orders, qualify as documentary evidence. (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.,* 120 AD3d 431, 432 [1st Dept 2014].)

If a plaintiff raises no more than a generalized claim of harm to a defendants' creditors, the proper entity to assert the claim is a bankruptcy trustee appointed to protect the creditors' interests and they are bound by the trustee's decisions. (*St. Paul Fire and Mar. Ins. Co. v PepsiCo, Inc.,* 884 F2d 688, 704 [2d Cir 1989].) If the alter ego allegations of shifting assets and liabilities, intermingling of personal and corporate funds, and undercapitalization of a defendant's company show that "the harm suffered by [a] plaintiff is precisely that suffered by all other creditors of [a] defendant," the allegations should be asserted by the bankruptcy trustee, not by a single creditor. (*Gosconcert v Hillyer,* 158 BR 24, 28-30 [SD NY 1993].)

In this case, the harms suffered by plaintiffs, if any, stem from defendants' failure to observe corporate formalities, the undercapitalization of EZ Festivals and Made Events, and the intermingling of personal and corporate funds. These harms are the type of harms suffered by all of EZ Festivals' and Made Events' creditors. Thus, they should be pursued by the trustee in the bankruptcy proceedings.

Furthermore, plaintiffs failed to file a proof of claim for a tax reimbursement before the General Bar Date of May 17, 2016. (*See* NYSCEF No. 35 at 1.) Plaintiffs argue that no such claim was filed because MPLLC was not assessed by the State of New York for any sales or use taxes until after this date. This argument is not convincing. Plaintiffs could have filed a tax claim by the Bar Date because MPLLC's tax audit began in early 2015. (*See* NYSCEF No. 5 at 18.) The bankruptcy notice allowed the filing of claims—even if contingent, disputed, unliquidated, unmatured, or based on equitable liability. (*See* NYSCEF No. 35 at 2.) Because plaintiffs' tax claims were not filed by the deadline, they are considered forever barred, unless otherwise ordered by the bankruptcy court. (*See* NYSCEF No. 35 at 4.)

Finally, the court-approved settlement agreements show that the bankruptcy trustee has already released and discharged defendants from any claims or liabilities. (*See* NYSCEF No. 43.) Plaintiffs argue that tax liability is "not dischargeable in the bankruptcy," analogizing to *DeChiaro v New York State Tax Comm'n* (760 F2d 432 [2d Cir. 1985].) This court is not persuaded, because *DeChiaro* is materially different from this case. *DeChiaro* involved sales taxes collected by the debtor from their customers that had not been paid when the debtor filed for bankruptcy—*i.e.*, an outstanding tax debt owed to the state tax authorities. Here, on the other hand, plaintiffs paid the taxes due in full and are seeking a simple reimbursement. The amount sought is thus not a tax liability at all, but a debt claim between private parties. As such, it exists within the domain of bankruptcy law, and a bankruptcy court has already declared it uncollectible.

II. Whether Plaintiffs' Alter Ego Claims State a Cause of Action

Defendants also seek dismissal of the complaint under CPLR 3211 (a) (7), arguing that plaintiffs' alter ego claims against them fail to state a cause of action. Under CPLR 3211(a) (7), a court considering a motion to dismiss a complaint for failure to state a cause of action must give the complaint a liberal construction, accept the allegations as true, and provide plaintiffs with the benefit of every inference. (*See Cortland St. Recovery Corp v Bonderman*, 31 NY3d 30, 38 [2018].) But conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss. (*See Barnes v Hodge*, 118 AD3d 633, 633 [1st Dept 2014].)

i. Unjust Enrichment – Piercing the Corporate Veil

To support their claim for unjust enrichment based on piercing the corporate veil, plaintiffs allege that, had the back taxes they paid been contemporaneously imposed upon EZ Festivals and defendants, EZ Festivals and defendants would have been obliged to pay these taxes or reimburse plaintiffs for them. (*See* NYSCEF No. 49 at 9.) Generally, a plaintiff seeking to pierce the corporate veil must show (1) that the corporate owners exercised complete

domination of the corporation with respect to the relevant transaction, and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury. (*Id.* at 47, citing *Conason v Megan Holding, LLC*, 25 NY3d 1, 18 [2015].)

Plaintiffs here only establish the first element of piercing the corporate veil—the domination of the entity by defendants. Plaintiffs fail to establish the second element of abuse of the corporate form to injure plaintiffs (through alleged non-payment of taxes). At most, plaintiffs' upfront payment of taxes for EZ Festivals, subject to later reimbursement, shows a business arrangement that plaintiffs agreed to. It does not show fraud.

ii. Unjust Enrichment – Personal Liability

To support their claim for unjust enrichment based on personal liability, plaintiffs allege that defendants sold EZ Festivals and Made Events without the sales and use tax liabilities on the corporate books, thereby securing a higher price. (*See* NYSCEF No. 49 at 10.) This allegation is not adequate to show that defendants sold EZ Festivals and Made Events with the intent to evade satisfaction of any corporate obligations.

iii. Contractual Indemnification

To support their claim for contractual indemnification, plaintiffs concede that EZ Festivals, in its corporate form, is the entity contractually obligated to indemnify plaintiffs for the sales and use taxes that plaintiffs paid. Plaintiffs still allege that defendants are personally liable for the sums paid by MPLLC to New York State based on the alleged abuse of the corporate form of EZ Festivals and the alleged use of that corporate form as defendants' alter ego. (*See* NYSCEF No. 49 at 11.) These allegations are conclusory with no factual and legal specificity.

iv. Common Law Indemnification

To support their claim for common law indemnification, plaintiffs offer equally inadequate allegations. The statement that the tax obligations "are the personal liability of defendants under New York law" is a legal conclusion with no factual specificity. (NYSCEF No. 49 at 11.)

These conclusory allegation in the amended complaint are not plausibly supported by well-pleaded factual allegations. The amended complaint does not sufficiently set forth the existence of a corporate liability that this court can impose upon defendants under an alter ego theory. The amended complaint is essentially a claim for tax reimbursement, but plaintiffs do not sufficiently allege how defendants are personally liable for the reimbursement. Even assuming that payment of these taxes is indeed a corporate obligation of EZ Festivals and Made Events, the amended complaint fails to sufficiently allege "facts and circumstances which will persuade the court to impose the corporate obligation on its owners." (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993].)

Accordingly, it is hereby

ORDERED that plaintiffs' cross-motion to amend their complaint is granted; and it is further

ORDERED that defendants' motion to dismiss the amended complaint is granted; and it is further

ORDERED that defendants serve a copy of this order with notice of its entry on all parties; on the office of the General Clerk; and on the office of the County Clerk, which shall enter judgment accordingly.

1/29/2021
DATE

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE