Fellone v D.P. Consulting Corp.
2021 NY Slip Op 30310(U)
January 29, 2021
Supreme Court, New York County
Docket Number: 452038/2018
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42
--x
FRANK FELLONE and LAURA FELLONE,

Plaintiffs,

DECISION AND ORDER

- v -

Index No. 452038/2018

D.P. CONSULTING CORP., THOMAS PEPE,
KATHERINE MAURER

MOT SEQ 003

Defendants.
--x
NANCY M. BANNON, J.:

I. INTRODUCTION

In this action for, *inter alia*, breach of a stock purchase agreement, only the corporate defendant D.P. Consulting Corp. (DPC) answered the complaint. All three defendants, DPC, Thomas Pepe and Katherine Maurer, jointly move to dismiss the amended complaint pursuant to CPLR 3211(a)(1),(5)and(7). As per the Notice of Motion, the defendants move (1) pursuant to CPLR 3211(a)(7) to dismiss the entire complaint as against individual defendants Thomas Pepe (Pepe) and Katherine Maurer (Maurer); and (2) pursuant to CPLR 3211(a)(5)and(7) to dismiss the second and third causes of action against all defendants, and (3) pursuant to CPLR 3211(a)(1) to dismiss the fourth and fifth causes of action against all defendants. The plaintiffs oppose the motion. The motion is granted in part.

II. BACKGROUND

According to the plaintiff's amended complaint, DPC was a closely held corporation formed in 2005 to perform restoration work. Frank Fellone (Frank) and Maurer were the two shareholders of DPC. Maurer served as president, Frank served as vice-president, plaintiff Laura Fellone (Laura) served as treasurer, and Pepe served as secretary. After approximately seven years working together, in October 2012, Frank and Laura left DPC. Prior to his departure, Frank and DPC entered into a stock purchase agreement whereby Frank would transfer his shares to DPC and DPC would pay him up to $250,000, including reimbursements for certain tax payments.

Specifically, the agreement provided:

> "[A]s consideration for the purchase and sale of the Seller's Stock . . . D.P. Consulting Corp. shall contribute to Seller's debt obligations to the Internal Revenue Service ("IRS") in the amounts of $139,827.50 and $15,797.00) and to the New York State Department of Taxation and Finance ("NYS Tax") in the amounts of $48,016.00 and $7,890.00) only up to the maximum total gross contribution towards the IRS and NYS Tax obligations of two hundred and fifty thousand ($250,000.00) dollars, payable up to a maximum of five (5) years at no more than a total of $4,166.66 per month. D.P. Consulting Corp. shall have no obligation to Fellone for any IRS and/or NYS Tax payments, claims or obligations beyond the payment of a total of $250,000.00. Fellone shall not seek any additional monies from D.P. Consulting Corp. for said payment beyond D.P. Consulting Corp.'s maximum contribution of $250,000.00 (which includes a contribution towards principal, penalties, interest, and/or fees)."

The plaintiffs allege that DPC has paid only $228,592.69 under the agreement, leaving a remaining balance of $21,407.31. The plaintiffs further allege that throughout their time working at DPC, and at Pepe's request, they used their personal credit cards to pay for certain business-related expenses on behalf of DPC, and that Pepe promised that they would be reimbursed for such payments, totaling approximately $65,000.00.

The amended complaint also alleges that on or about October 8, 2012, Pepe and Maurer created a second entity, DPC New York, which shared the same bank accounts, phone number, and location as DPC, and transferred DPC's funds to DPC New York in an attempt to avoid paying, *inter alia*, the plaintiffs' claims under the stock purchase agreement and for reimbursement. Defendant DPC ceased doing business on January 1, 2014. Despite demands by the plaintiffs, no payments have been made since June 2017. This action ensued.

The amended complaint includes twelve causes of action. The *first* cause of action is for breach of the stock purchase agreement against all defendants.

The *second through fifth* causes of action concern an alleged oral agreement to reimburse the plaintiffs for business-related expenses. The *second* cause of action alleges breach of the oral agreement; the *third* cause of action is for promissory estoppel; the *fourth* cause of action is for quantum merit; the *fifth* cause of action is for unjust enrichment.

The *sixth*, *seventh*, and *eighth* causes of action seek to set aside fraudulent transfers to DPC New York pursuant to Debtor Creditor Law §§ 273, 274, 276.

The *ninth* cause of action is for attorneys' fees under Debtor Creditor Law § 276-a. The *tenth*, *eleventh*, and *twelfth* causes of action assert alter ego, de facto merger, and successor liability, respectively.

The defendants now move pursuant to CPLR 3211(a)(1), (5), and (7), arguing that i) the claims for unjust enrichment and quantum meruit are barred as the plaintiffs are attempting to recover under the stock purchase agreement, ii) Pepe's alleged oral promise to reimburse the plaintiffs is unenforceable under the Statute of Frauds, and iii) the plaintiffs fail to sufficiently plead facts warranting the imposition of personal liability against Pepe and Maurer. In opposition, the plaintiffs argue that their claims for unjust enrichment and quantum meruit are not based upon the stock purchase agreement, their claims for reimbursement are not barred by the Statute of Frauds, and that they sufficiently pleaded facts warranting the imposition of personal liability.

III. DISCUSSION

A. CPLR 3211(a)(1)

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014).

Here, the defendants argue that the plaintiffs' fourth and fifth causes of action for unjust enrichment and quantum meruit, respectively, are barred as they are attempting to recover under a contract – the stock purchase agreement. However, contrary to the defendants' argument, the fourth and fifth causes of action seek to recover the amounts allegedly expended by the plaintiffs on their personal credit cards. As the stock purchase agreement does not relate to these separate claims it does not "conclusively dispose" of them. Thus, dismissal pursuant to CPLR 3211(a)(1) is not warranted.

B. CPLR 3211(a)(5)

CPLR 3211(a)(5) provides for dismissal of an action under a contract when the contract alleged in the complaint does not comply with the Statute of Frauds, codified in NY General Obligations Law (GOL) § 5-701. GOL § 5-701(2) provides that:

"[e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith...if such agreement, promise or undertaking...is a special promise to answer for the debt, default or miscarriage of another person." "The purpose of the rule is evidentiary, to avoid perjury, and incidentally to serve as a cautionary measure to avoid ill-considered actions." Martin Roofing, Inc. v Goldstein, 60 NY2d 262 (1983).

The defendants argue that the plaintiffs' second and third causes of action, seeking to recover amounts allegedly paid by them on behalf of DPC using their personal credit cards, are barred by NY GOL § 5-701(2). The amended complaint alleges that Pepe orally promised that the plaintiffs would be reimbursed for expenses incurred on behalf of DPC. Even assuming that Pepe actually promised to reimburse the plaintiffs on behalf of DPC, that promise is one to answer for the debt of another, and thus was required to be in writing. See GOL § 5-701(2). As it was not, the second cause of action for breach of contract against Pepe is barred.

In opposition, the plaintiffs argue that Pepe's alleged promise to reimburse them was independent from DPC, and that such an independent promise is not barred by the Statute of Frauds. However, nothing in the amended complaint alleges that

Pepe's promise was made on behalf of DPC or that Pepe, as DPC's secretary, had any authority to bind DPC to repay any such amounts. Furthermore, the only case law cited by the plaintiffs in support of their position, Nakamura v Fujii, 253 AD2d 387 (1st Dept. 1998) is distinguishable, as it involves undisputed payments made as advances and an express promise to repay the advanced amounts upon demand. Like in Nakamura, an oral agreement is enforceable so long as the terms are clear and definite and the conduct of the parties evinces mutual assent sufficiently definitely to assure that the parties are truly in agreement with respect to all material terms. See Kramer v Greene, 142 AD3d 438 (1st Dept. 2016). That is not the case here, where the defendants dispute that Pepe ever made such a promise and the plaintiffs fail to allege any terms of the agreement such as when repayment was due.

The third cause of action for promissory estoppel is likewise dismissed. Promissory estoppel has been applied to preclude a party from asserting the Statute of Frauds but only where nonenforcement of the contract would be so egregious as to render unconscionable the Statute of Frauds. See Carvel Corp. v Nicolini, 144 AD2d 611 (2nd Dept. 1988); see also Am. Bartenders Sch., Inc. v 105 Madison Co., 91 AD2d 901 (1st Dept. 1983), aff'd, 59 NY2d 716 (1983). Here, the plaintiffs fail to make any allegations of unconscionability in their amended complaint or in their opposition. Rather, they argue that a determination as to unconscionability is an issue of fact that should not be determined on the pleadings. See Castellotti v Free, 165 AD3d 535 (1st Dept. 2018).

However, even if all allegations in the amended complaint were to be taken as true, none are so egregious to warrant the application of the doctrine of promissory estoppel. See Am. Bartenders Sch., Inc. v 105 Madison Co., supra; Carvel Corp. v Nicolini, supra; Swerdloff v Mobil Oil Corp., 74 AD2d 258 (2nd Dept. 1980). This is because an "unconscionable injury" is "injury beyond that which flows naturally ... from the non-performance of the unenforceable agreement." See Bent v St. John's Univ., 2020 NY Slip Op 07343 (2nd Dept. 2020) citing Merex A.G. v Fairchild Weston Sys., Inc., 29 F.3d 821, 826 (2nd Cir. 1994). Here, the only injury sustained by the plaintiffs is that they were not reimbursed for their purported business expenses, which constitutes nothing more than damages for the defendants' nonperformance of an unenforceable agreement.

Although not specifically requested in their Notice of Motion, the defendants are also entitled to dismissal of the plaintiffs fourth and fifth causes of action for unjust enrichment and quantum meruit pursuant to CPLR 3211(a)(5). Here, the fourth and fifth causes of action again seek to recover for the amounts allegedly expended by the plaintiffs on behalf of DPC. It is well settled that litigants may not use such claims to evade New York's Statute of Frauds. See Kocourek v Booz Allen Hamilton Inc., 71 AD3d 511 (1st Dept. 2010) citing J.E. Capital v Karp Family Assoc., 285 AD2d 361 (1st Dept. 2001). The court, in its discretion, may grant relief, other than that specifically asked for, to such extent as is warranted by the facts plainly appearing on the papers on both sides absent prejudice by the moving party's failure to specifically demand it. See Caride v Alonso, 78 AD3d 466 (1st Dept. 2010); Arriaga v Michael Laub Co., 233 AD2d 244 (1st Dept. 1996); Lubov v Berman, 260 AD2d 236 (1st Dept. 1999). That is the case here, as the proof offered demonstrates that the plaintiffs' claims are barred and the plaintiffs are not prejudiced as their opposition papers specifically discussed dismissal of these claims on this ground.

C. CPLR 3211(a)(7)

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See

Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

As the plaintiffs' second through fifth causes of action have been dismissed pursuant to CPLR 3211(a)(5), the court does not reach the portion of the defendants' motion to dismiss those causes of action against DPC pursuant to CPLR 3211(a)(7).

The remaining portion of the motion, seeking to dismiss the amended complaint as against Pepe and Maurer for failure to allege facts sufficient to warrant the piercing of the corporate veil, is denied. Ordinarily, a corporation exists independently of its owners, as a separate legal entity, and its owners are not liable for the actions of the corporation. See Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135 (1993). The doctrine of piercing the corporate veil is a limitation to this rule, "typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation." Id. In order to hold owners of a corporation individually liable a plaintiff must allege that the defendants exercised complete domination or control of the corporation and that such domination was used to commit a wrong against the plaintiff. See Ciavarella v Zagaglia, 132 AD3d 608 (1st Dept. 2015); see also Fantazia Int'l Corp. v

CPL Furs New York, Inc., 67 AD3d 511 (1st Dept. 2009); Queens W. Dev. Corp. v Nixbot Realty Assocs., 121 AD3d 903 (2nd Dept. 2014). However, a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil. See Skanska USA Bldg., Inc. v Atalntic Yards B2 Owner LLC, 146 AD3d 1 (1st Dept. 2016); Bonacasa Realty Co., LLC v Salvatore, 109 AD3d 946 (2nd Dept. 2013).

Here, the amended complaint alleges more than a simple breach of contract. It sufficiently alleges that Pepe and Maurer exercised total control over DPC following Frank's transfer of his shares, and that they used their control over DPC to cause it to transfer its funds to a second entity that they created, DPC New York, in order to render DPC judgment-proof against, *inter alia*, the plaintiffs. The complaint further alleges that, upon Frank and Laura's separation from the company, Pepe and Maurer used corporate funds for their own personal expenses and operated both DPC and DPC New York without regard to corporate formalities. Moreover, the amended complaint alleges many of the factors considered by the court when determining a corporation is dominated or controlled including, *inter alia*, inadequate capitalization, intermingling of funds, overlap in ownership, officers, directors and personnel, and common office space or telephone number. See Matter of Morris v New York State Dept. of Taxation & Fin., supra; Fantazia Int'l Corp. v CPL Furs New

York, Inc., supra. Specifically, "undercapitalization of a corporation and the corporation's owner's personal use of corporate funds, which results in the corporation's being unable to pay a judgment, constitute wrongdoing and injury sufficient to satisfy the second prong of [Matter of Morris v New York State Dept. of Taxation & Fin., supra.]" Ciavarella v Zagaglia, supra at 609.

Based upon these allegations and principles, and affording the amended complaint a liberal construction and accepting the facts alleged therein as true, the amended complaint sufficiently pleads facts that could warrant the imposition of personal liability against Pepe and Maurer. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). While such a theory of liability may not ultimately be successful, dismissal at this juncture is not warranted.

The court has considered the defendants' remaining contentions and finds them to be without merit.

Finally, the court notes that the partial dismissal of the amended complaint leaves only approximately $21,407.31 in dispute in regard to the stock purchase agreement, and all three defendants have liability exposure. The parties are encouraged to engage in settlement discussions.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of the defendants Thomas Pepe, Katherine Maurer, and D.P. Consulting Corp. is granted to the extent that the second, third, fourth, and fifth causes of action in the amended complaint are dismissed pursuant to CPLR 3211(a)(5), and the motion is otherwise denied; and it is further,

ORDERED that the parties shall to confer, proceed with discovery and jointly contact the court on or before March 19, 2021 to schedule a compliance/settlement conference.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

Dated: January 29, 2021