YM Antiques, Inc. v Monr51, LLC
2011 NY Slip Op 33800(U)
August 16, 2011
Supreme Court, New York County
Docket Number: 103627/2011
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 103627/2011
YM ANTIQUES, INC.
VS.
MONR 51, LLC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. ____
MOTION DATE 8/5/11
MOTION SEQ. NO. ____

otion to/for ____
____ No(s). ____
____ No(s). ____
____ No(s). ____

upon the foregoing papers, it is ordered that this motion is

Motion sequence 001 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion by defendants MONR51, LLC and Michael Kornblum to dismiss the action by YM Antiques, Inc. as to Kornblum pursuant to Limited Liability Company Law (the "LLCL") § 609(a) and based on documentary evidence pursuant to CPLR (a)(1), to dismiss the complaint based on plaintiff's breach and defendants' reasonable reliance on a certain oral agreement, to dismiss the action for plaintiff's failure to plead a cause of action with respect to an account stated, and to dismiss the action as the statement of the account between the parties is inaccurate, is granted to the extent that the action is severed and dismissed as against Michael Kornblum in its entirety, and the second cause of action against all defendants for account stated is severed and dismissed; and it is further

ORDERED that MONR51 LLC shall serve its Verified Answer within 30 days; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on October 25, 2011, 2:15 p.m.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): ____

Dated: 8/16/11

J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

YM ANTIQUES, INC.,

Index No. 103627/2011

Plaintiff,

-against-

DECISION/ORDER

MONR51, LLC AND MICHAEL KORNBLUM,

Defendants.

----------X

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover monies for goods sold and delivered, defendants MONR51, LLC (the "LLC") and Michael Kornblum ("Kornblum") (collectively, "defendants") move to dismiss the action by YM Antiques, Inc. ("plaintiff") as to Kornblum pursuant to Limited Liability Company Law (the "LLCL") § 609(a) and based on documentary evidence pursuant to CPLR (a)(1), to dismiss the complaint based on plaintiff's breach and defendants' reasonable reliance on a certain oral agreement, to dismiss the action for plaintiff's failure to plead a cause of action with respect to an account stated, and to dismiss the action as the statement of the account between the parties is inaccurate.

Factual Background

Plaintiff buys, sells, trades, and appraises antiques and antique furniture.

The LLC engages in real estate development and purchases investment art and antiques, which are utilized in showrooms and sales offices.

In its complaint, plaintiff alleges that from January 2009 through September 2009, Kornblum purchased goods from plaintiff. On August 12, 2009, defendants purchased a "Lalique Glass Table" (the "Table") for $70,000.00, but only $20,000.00 was paid by defendants.

Thus, plaintiff seeks $50,000 under the first cause of action "for goods sold and delivered" and under the second cause of action for account stated.

Plaintiff alleges that for the period in question, Kornblum used the LLC as his alter ego. He has commingled the LLC's funds with his personal funds and the LLC holds no member meetings, issues no annual reports, fails to maintain proper accounting books and records, fails to account to and pay taxes and fails to abide by the requisite LLC formalities.

In support of dismissal, defendants argue that Kornblum cannot be held personally liable to plaintiff. The LLC's Operating Agreement and affidavits of Kornblum and Monica Raspier Kornblum ("Monica"), the sole member and owner of the LLC, demonstrate that Kornblum is the manager and not a member of the LLC. Under LLCL § 609(a), managers of a limited liability company are expressly exempt from personal responsibility for the obligations of such company. Further, LLCL § 409 states that a person who performs his or her duties pursuant to LLCL shall not be liable by reason of being a manager of the limited liability company. Thus, Kornblum may only be personally responsible for the obligations of the LLC upon a piercing of the corporate veil, which has not been sufficiently alleged.

Defendants argue that plaintiff's bald allegations that Kornblum has self-dealt with respect to the LLC and commingled funds from the LLC in order to defraud plaintiff are untrue. Plaintiff does not allege any specific actions taken by Kornblum to support these claims. And, the pleadings lack any indication that the purchase of the Table was dominated by Kornblum with the intent to defraud so as to warrant the piercing of the corporate veil.

Also, defendants argue that plaintiff is estopped from seeking the damages for breach of contract on account of defendants' reasonable reliance on an oral, "standing agreement" under

which plaintiff agreed to repurchase any item the LLC purchased from it at full price paid (the "Buyback Agreement"). Plaintiff assured defendants that the purchases were worthy and valuable investments. From March 2009 to August 2009, Kornblum, as the LLC's managing agent, purchased numerous antique items, including the Table, from plaintiff for use in the LLC's daily operations. Plaintiff made such representations to induce defendants to purchase and continue to purchase items from plaintiff, and Kornblum only agreed to these purchases based upon his reasonable reliance on plaintiff's representations that it would ensure that these investments would sustain their value. But for plaintiff's representations, defendants would not have continued to purchase antique items from the plaintiff. At no time did the parties modify or rescind the Buyback Agreement. Plaintiff's breach of the Buyback Agreement renders the enforcement of the contract between the parties for the Table unjust.

Further, plaintiff never provided appraisals, bills of sale, descriptions, pictures, or provenances which are customarily provided when purchasing antiques. Yet, Kornblum continued to make these purchases as he believed that plaintiff would provide them when necessary. The absence of such documentation renders the items purchased unmarketable, illiquid, and uninsurable.

On June 8, 2011, defendants attempted to offer to return the Table pursuant to the Buyback Agreement. On June 9, 2011, plaintiff denied defendants' offer, and demanded that defendants immediately surrender the Table without providing any compensation under the Buyback Agreement. Plaintiff also advised that it would not provide provenances, appraisals, photos, or descriptions to the defendants for items already purchased, but would provide bills of sale only upon the return of the Table. To now award damages to the plaintiff after its breach of

the Buyback Agreement would be unjust.

Defendants also argue that plaintiff failed to plead the necessary elements to sustain a cause of action for an account stated. Plaintiff does not allege that it provided defendants with regular billing statements or invoices, that defendants retained such statements without objection, or that defendants failed to timely object to the account as stated between the parties.

Furthermore, no account stated exists as there is a legitimate dispute with regard to the correctness of the account stated. Caselaw holds that there can be no account stated where no account was presented or where any dispute about the account is shown to have existed. There is not one transaction between the parties but rather numerous interrelated transactions all due to the defendants' furnishing of a showroom. Plaintiff's attempt to sue on one small transaction while ignoring its own breach of contract in the other transactions is unconscionable. Among defendants' purchases included one Picasso tapestry, one chrome sculptor, and one chrome photo lamp (the "Lamp"), which were paid for in full on August 12, 2009. Pursuant to a letter and check dated on August 12, 2009, Kornblum proceeded to purchase these items on behalf of the LLC. The check used to pay for the items in the August 12, 2009 transaction was drawn from an account held by the LLC. (Exhibit "E"). Despite defendants' payment in full, plaintiff failed to deliver the Lamp, which was valued at $3,000.00 and still refuses to deliver the Lamp to defendants. Furthermore, plaintiff's claim that the amount due on the Table is also inaccurate. Kornblum tendered a $25,000.00 check drawn from the LLC's account (Exhibit F) as a second payment on the Table. As such, the balance due on the Table is $25,000.00 and not $50,000.00 as plaintiff claims. Due to this open and unresolved transaction between plaintiff and the LLC, and plaintiff's failure to account for the additional payment made by defendants, the account

stated by plaintiff is inaccurate, and there can be no account stated between the parties.

In opposition, plaintiff argues that defendants' motion is untimely pursuant to CPLR 3211 (e) as they filed the motion after the dates their respective answers were due, and did not seek an extension of time pursuant to CPLR 3012(a). And, defendants failed to attach a copy of the Complaint. Thus, their motion should be disregarded.

Plaintiff also argues that it states a claim against Kornblum based on its allegations that he purchased good from plaintiff at his special instance and request, and failed to pay the balance of $50,000, and that both defendants are jointly and severally liable. There is a check showing the price of $70,000 with the remaining balance written in Kornblum's own handwriting and signature. An LLC is capable of acting as a joint venturer or partner with an individual person, and joint venturers and partners are jointly and severally liable with each other. LLCL 609(a) is irrelevant. Assuming the truth of these allegations, such facts state a claim.

Nor is the Court bound by any Operating Agreement. There is an issue as to whether the LLC is a sham and whether its corporate veil should be pierced. The Table was delivered to defendants' residence which is the same address that the LLC uses as it primary business address. Plaintiff believes that such residence is prohibited from business usage.

Plaintiff argues that the oral Buyback Agreement did not exist, and that even if it did, defendants' argument that they relied on an oral Buyback Agreement is barred by the Statute of Frauds, General Obligations Law ("GOL") § 5-701(a)(1), warranting sanctions. The alleged BuyBack Agreement covers an indefinite number of years, alleged to go back to at least 2009. While Kornblum claims he is not a principal of the LLC, he claims that he himself made the oral agreement to cover the goods purchased by him. No antique dealing company would agree to

unconditionally buy back any pieces at any time, and no customer buying high priced antiques would reasonably rely on any such agreement. And, issues of credibility cannot be determined on a motion to dismiss.

Further, the Complaint alleges an account stated, as it alleges that "an account was taken and stated between plaintiff" and defendants which shows a balance due of $50,000, no part of which has been paid.

And, while defendants purport that there is no statement of account, they then claim that the stated account was inaccurate. Caselaw holds that the inaccuracy of a statement of account cannot be resolved on a pre-answer motion to dismiss.

Plaintiff also argues that defendants' unclean hands bar them from receiving any discretionary equitable relief from the Court. Defendants failed to advise the Court of the untimeliness of their motion, and the motion lacks any colorable legal basis such that it is in bad faith.

In reply, defendants argue that Kornblum may not be held liable in his individual capacity, as plaintiff does not allege that any payment received was in the name or on behalf of Kornblum. Plaintiff does not provide any proof that the Table was purchased by both defendants. The documentary evidence shows that this transaction was solely between plaintiff and the LLC. The LLC is a legal non-physical entity and cannot facilitate any transactions absent human involvement from its agents or manager. Conclusory allegations by plaintiff's counsel who lacks any personal knowledge that Kornblum uses and continues to use the LLC as his "alter ego," has self-dealt with respect to the LLC, and has commingled funds and goods for the purpose of defrauding plaintiff, is insufficient to raise an issue regarding piercing of a corporate

veil. Nor are there any particularized details of fraud or other corporate misconduct to warrant the piercing of the corporate veil. Plaintiff's claim that defendants sought to defraud the Court are belied by defendants' actual conduct.

Kornblum does not allege that he and plaintiff entered into the Buyback Agreement in his individual capacity. Kornblum states that the Buyback Agreement existed between the LLC and plaintiff (Exhibit "B") and that he was acting in his capacity as the LLC's manager for all of the purchases. Kornblum never states that the purchases were for his benefit or on his behalf as an individual. And, whether a corporation could pledge that it would buy back merchandise is not a prerequisite to sound business judgment or honest business practices. Businesses offer money back guarantees to potential customers all the time. Plaintiff's misrepresentations to defendants are tantamount to deceptive business practices in violation of New York General Business Law ("GBL") § 349(a).

The Statute of Frauds is inapplicable to the Buyback Agreement since, by its terms performance by plaintiff of the Buyback Agreement was capable within one year of the making of the parties' oral agreement. Plaintiff could re-purchase the Table or any other item purchased by defendants within such a time frame.

Defendants also argue that plaintiff's claim that it followed the McKinney's official statutory form for pleading a cause of action for account stated is insufficient. Plaintiff overlooked the portion which requires plaintiff to state that it "furnished certain materials to the defendant, all of which are more particularly set forth in Schedule A hereto annexed, and made part of this complaint, numbering each item of merchandise together with the date of delivery and the agreed price and reasonable value thereof as prescribed by N.Y. C.P.L.R. 3016(f),

totaling sum of dollars ($)." Thus, plaintiff's reliance on the McKinney's form is insufficient.

Documentary evidence also shows that plaintiff's recitation of the alleged account stated, if it existed, is inaccurate due to plaintiff's failure to credit the payment towards the Table on October 30, 2009 and for its failure to deliver the Lamp to defendants for which defendants are entitled to a credit.

Defendants' failure to attach the Complaint to its motion was an oversight which has not prejudiced the plaintiff, and irrelevant due to plaintiff's subsequent amendment of its Verified Complaint. Plaintiff amended its pleadings on July 19, 2011 when the Verified Complaint was verified by plaintiff's President and the time to answer or otherwise move starts anew from the amendment of the Verified Complaint. The Complaint, which was served upon defendants' counsel on July 22, 2011, was unavailable to defendants at the time defendants initially moved to dismiss this action. Pursuant to electronic records of the New York State Court Unified Court System, plaintiff subsequently filed its Complaint on July 26, 2011. Therefore, the motion is timely, and defendants have not misrepresented plaintiff's pleadings.

Even assuming plaintiff did not amend its Complaint, the Court should overlook defendants' default pursuant to CPLR §§ 3211(e) and 3012(a) as they have a valid excuse and meritorious defenses to the instant action. The parties made significant efforts to settle this matter and it was only at the urging of plaintiff's counsel that defendants did not interpose their answer in an effort to resolve this action amicably without protracted litigation. Despite the best efforts of both parties, a mutually agreeable settlement could not be reached, at which point defendants moved to dismiss this action. Further, plaintiff's failure to seek a default under CPLR § 3215 evidences that the parties were engaged in settlement discussions. Should the Court

reject defendants' motion on procedural grounds, defendants will be unduly prejudiced as they will be barred from asserting meritorious defenses to this proceeding. The court may overlook late service of a notice or paper since plaintiff has not suffered any prejudice as a result of the delay. Moreover, the delay was not willful, contumacious, or the result of bad faith. Thus, in the interests of justice, the Court should accept the late service of defendants' motion and deem the pleadings filed *nunc pro tunc*.

And, plaintiff's claim that defendants' are barred from equitable relief based upon the doctrine of unclean hands is baseless.

While defendants provided ample notice of the motion by serving it on July 5, 2011, 20 days prior to the return date, plaintiff failed to serve its answering papers seven days before the return date of the motion, or on July 18, 2011, which was received on the last business day prior to the return date of the motion, in derogation of CPLR § 2214(b). Such sharp practice should not be countenanced. Defendants have not engaged in any of the conduct alleged by plaintiff, and defendants are entitled to seek equitable relief from this Court.

In response, plaintiff seeks leave to submit a sur-reply to add that a party does not amend its pleading by providing a second, additional verification of the pleading, without any change in the body of the pleading itself. CPLR 3020 (a) indicates that a verification is not a pleading. Additionally, plaintiff could not have amended its pleading because the time to do so expired, and plaintiff did not seek leave to amend its pleading. Further, plaintiff's summons and complaint were filed on March 25, 2011, and the claim the subsequent additional submission of plaintiff's complaint on the Court's website in order to comply with the e-filing rules after the case was transferred to this Court does not constitute a new interposing of plaintiff's action.

By letter in response, defendants point out that leave to file the sur-reply was not granted, and that in any event, it is uncontested that plaintiff extended defendants' time to answer while the parties were in settlement negotiations and the verification signed by plaintiff's President occurred on July 19, 2011. Even if the Court considers the sur-reply, dismissal is warranted.

Discussion

As to whether defendants' motion is timely, CPLR § 3211(e) provides:

> (e) . . . . At any time *before service of the responsive pleading is required*, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraph[] one . . . of subdivision (a) is waived unless raised either by such motion or in the responsive pleading . . . .
> (Emphasis added).

A motion to dismiss pursuant to CPLR 3211 will extend the time in which a defendant may serve a responsive pleading only if the motion is made before that pleading was originally due and will not operate to relieve a party's default in pleading (*Wenz v Smith*, 100 AD2d 585, 473 NYS2d 527 [2d Dept 1984] *citing Kirschenbaum v Gianelli*, 63 AD2d 1057, 405 NYS2d 820 [3d Dept 1978] and 4 Weinstein-Korn-Miller, NY Civ Prac, par 3211.49, citing 1 NY Adv Comm Rep 87 [1957]; *Danahy v Meese*, 84 AD2d 670, 446 NYS2d 611 [4th Dept 1981] (finding that defendant's motion to dismiss based on documentary evidence was untimely and properly denied); *Rodriguez v 825 Second Avenue Rest. Corp. d/b/a McFadden's Saloon and 800 Second Avenue Condominium Assn.*, 2004 WL 5325882, *5325882 (Trial Order) (N.Y.Sup. June 22, 2004)).

The Summons and Complaint were served upon Kornblum on March 25, 2011 by delivery of such papers to Laudi Diaz, a person of suitable age and discretion (see CPLR 308 (2))

followed by a mailing to his actual place of business. Service of said pleadings upon the LLC was made by delivery to the Secretary of State (see CPLR 308 (3)) on April 26, 2011. CPLR 3012 (c) provides that "If the complaint is served with the summons and the service is made on the defendant by delivering the summons and complaint to an official of the state authorized to receive service in his behalf or if service of the summons and complaint is made pursuant to . . . paragraphs two, three, four or five of section 308 . . . , service of an answer shall be made within thirty days after service is complete." Therefore, pursuant to CPLR § 3012(c), Kornblum's and the LLC's responsive pleadings were due by April 24, 2011 and May 25, 2011, respectively. It is undisputed that defendants' motion, however, was not served until July 5, 2011. As defendant's motion to dismiss was made more than two months after the time to answer had expired, defendants' motion was untimely.

Contrary to defendants' contention, plaintiff's verification submitted after the pleadings were filed and served, does not constitute an amendment to the pleadings so as to trigger anew defendants' time to file a responsive pleading.

CPLR 3020(a) entitled "Verification" provides:

> (a) Generally. A verification is a statement under oath that the pleading is true to the knowledge of the deponent, except as to matters alleged on information and belief, and that as to those matters he believes it to be true. Unless otherwise specified by law, where a pleading is verified, each subsequent pleading shall also be verified, except the answer of an infant and except as to matter in the pleading concerning which the party would be privileged from testifying as a witness. Where the complaint is not verified, a counterclaim, cross-claim or third-party claim in the answer may be separately verified in the same manner and with the same effect as if it were a separate pleading.

A verification attests to truthfulness of allegations contained in pleading not otherwise sworn to (*Migdalia L. v. George R.*, 113 Misc 2d 1040, 450 NYS2d 696 [1982]; *Kopanski v*

Hawk Sales Co., Inc., 76 Misc 2d 348, 350 NYS2d 533 [Sup. Ct., Herkimer County 1973] ("The purpose of the statute is to require an individual to answer under oath subject to the penalties of perjury, allegations made by the verified complaint")).

The first page of the Complaint, as well as the "blue back" originally filed by the plaintiff was titled "*Verified* Complaint." (Emphasis added). The opening paragraph of the Complaint states that it is a "*Verified* Complaint." (Emphasis added). While no separate verification was included with the filed Complaint, the Court finds that in light of the several references to the Complaint as "Verified," the plaintiff's omission of the verification page was ministerial. Thus, serving the verification, in and of itself, without altering or modifying the allegations in the Complaint, did not transform the Complaint, denominated as a Verified Complaint, to an Amended Complaint (*see e.g., City of New York v Brown*, 119 Misc.2d 1054, 465 NYS2d 388 [N.Y.City Civ Ct., 1982] (finding that where petition was not verified, "Omissions of this nature must be viewed as minor errors, inconsequential in nature, non-prejudicial in substance and correctible at any stage of the proceedings, even on the court's own initiative.")).

Defendants cite no caselaw to support their proposition that the verification, in and of itself, "amended" the Complaint, under the circumstances, so as to trigger anew the time within which to serve a responsive pleading or move pursuant to CPLR 3211.

However, defendants established a meritorious defense (*see infra*, pp. 13-19) and a reasonable excuse for their delay so as to be relieved from its default. It is uncontested that the parties were engaged in settlement efforts to settle this matter and that plaintiff's counsel requested that defendants not interpose their answer during these negotiations (*see Vazquez v Beharry*, 82 AD3d 649, 919 NYS2d 336 [1st Dept 2011] ("the settlement discussions between

plaintiffs and defendants' insurer constitute a reasonable excuse for defendants' delay in answering"); *cf. Rodriguez v 825 Second Avenue Rest. Corp. d/b/a McFadden's Saloon and 800 Second Avenue Condominium Assn.*, *supra* (declining to excuse an untimely motion to dismiss where "defendant would not be able to show, inter alia, that the default did not prejudicially effect plaintiff's case"); *Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.*, 2005 WL 5351322 (Trial Order) [Sup. Ct., New York County] (finding "dismissal motions are untimely, because they were served more than nine months after the time when service of the Moving Defendants' answers was required" and the "Moving Defendants have failed to either offer any reasonable excuse for their failure to move in a timely manner, or to show any "good cause" (CPLR 2004) for an extension of time in which to move")).

Further, the failure of defendants to attach a copy of the Complaint is not fatal to their motion, given that plaintiff submitted the Complaint in opposition.

Turning to the merits of defendants' motion, a party may move pursuant to CPLR 3211 (a)(l), for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Thus, where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]). The test on a CPLR 3211 (a)(1) motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" *(Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d at 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]). Where documentary evidence and undisputed facts negate or dispose of the claims in the

complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211(a)(1) (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]).

However, if any question of fact exists as to the meaning and intent of the document, based on the documentary evidence presented to the court, a dismissal pursuant to CPLR §3211 (a)(1) is precluded (*see Khayyam v Doyle*, 231 AD2d 475 [1st Dept 1996]). And, affidavits do not qualify as "documentary evidence" for purposes of this rule (*see Realty Investors v Bhaidaswala*, 254 AD2d 603, 679 NYS2d 179 [3d Dept 1988]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Sup. Ct., Bronx County 2004]).

Liability of Kornblum

The unambiguous Operating Agreement of the LLC demonstrates conclusively that Kornblum is the manager, and not a member of the LLC.

Pursuant to LLCL § 609(a):

> Neither a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company (including a person having more than one such capacity) is liable for any debts obligations or liabilities of the limited liability company or each other, whether arising out of tort, contract or otherwise, solely by reason of being such member, manager, or agent or acting (or omitting to act) in such capacities or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company.

Furthermore, LLCL § 409 sets forth the duties and liabilities of persons who act as managers of a limited liability company.

Pursuant to LLCL § 409(c):

> A person who so performs his or her duties in accordance with this section shall have no liability by reason of being or having been a manager of the limited liability company. (Emphasis added)

Therefore, contrary to plaintiff's contentions, under LLCL § 609(a), Kornblum, as a manager of a limited liability company, is expressly exempt from personal responsibility for the obligations of such LLC (*see Retropolis, Inc. v 14th Street Development LLC*, 17 AD3d 209, 797 NYS2d 1 [1st Dept 2005]; *Regency Foundation v Robson*, 14 Misc 3d 1209(A), 836 NYS2d 489 [Sup. Ct., New York County 2006]; *Lewis v Proctor & Gamble, Inc.*, 18 Misc 3d 1110(A), 856 NYS2d 24 [Sup. Ct., New York County 2007]; *Collins v E-Magine, LLC*, 291 AD2d 350, 739 NYS2d 15 [1st Dept 2002]).

Nor can defendants maintain their action against Kornblam under the theory of piercing the corporate veil or under the theory that Kornblum is jointly and severally liable as a partner or joint venture of the LLC. The Complaint not only fails to state facts supporting these latter theories, but also includes an unambiguous check for partial payment of the Table written against a bank account of the LLC.

As to plaintiff's attempt to pierce the corporate veil, in order to assert such a claim to impose personal liability upon Kornblum, plaintiff must allege that the corporation was so dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences (*see TNS Holdings v MKI Securities*

Corp., 92 NY2d 335, 680 NYS2d 891 [1998]). "*Indicia* of a situation warranting veil-piercing include:

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own" (*Shisgal v Brown*, 21 AD3d 845, 801 NYS2d 581 [1st Dept 2005]).

While plaintiff alleges the absence of the formalities that are part and parcel of the LLC's existence and that the LLC's address is identical to that of Kornblum, plaintiff does not allege any of the eight remaining factors giving rise to a claim to pierce the corporate veil. Plaintiff's allegations that Kornblum has self-dealt with respect to the LLC and commingled funds from the LLC in order to defraud plaintiff are silent as to the transaction at issue. The Complaint lacks any indication that the LLC's *purchase of the Table* was dominated by Kornblum with the intent to defraud so as support a claim to pierce the corporate veil of the LLC.

Nor does the Complaint allege sufficient facts indicating that Kornblum was either a partner or joint venturer with the LLC.

A joint venture is generally a business undertaking by two or more parties engaged in a single project (*Ostad v Nehmadi*, 31 Misc 3d 1211(A), Slip Copy, 2011 WL 1420879 (Table) [Sup. Ct. New York County 2011] *citing Forman v Lumm*, 214 AD 579, 212 NYS 487 [1st Dept

1925] [holding that a joint venture is "an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge"]; Black's Law Dictionary [9th ed. 2009]). Although the mere purchase of something by two or more persons does not constitute a joint business or partnership, "the sharing of profits is a basal ingredient of a joint venture" (*Ostad v Nehmadi*, *supra, citing Mariani v Summers*, 3 Misc 2d 534, 52 NYS2d 750, 754 [NY Sup 1944], *affd* 269 AD 840, 56 NYS2d 537 [1st Dept 1945] [noting that an agreement to share losses is not indispensable to the existence of a joint venture]).

The *indicia* of the existence of a joint venture are: acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses (*Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 765 NYS2d 575 [1st Dept 2003] *citing Tilden of New Jersey v Regency Leasing Systems*, 230 AD2d 784, 785-86, 646 NYS2d 700); *American Business Training Inc. v American Management Ass'n*, 50 AD3d 219, 851 NYS2d 491 [1st Dept 2008] (among the *indicia* of a joint venture are the intention of the parties and acts manifesting their intent to be associated as joint venturers, such as sharing of profits and losses, and ownership of partnership assets) *citing Brodsky v Stadlen*, 138 AD2d 662, 663, 526 NYS2d 478 [1988]).

Giving plaintiff the benefit of every favorable inference, such intent cannot be implied from the Complaint. There is no allegation that Kornblum and the LLC enjoyed a mutual contribution to a joint undertaking through a combination of property, financial resources, effort,

skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses. Therefore, plaintiff's attempt to hold Kornblum jointly and severally liable with the LLC under a "joint venture" theory fails.

Similar to a joint venture, a partnership has been defined as "an association of two or more persons to carry on as co-owners of a business for profit...." (*Ostad v Nehmadi*, 31 Misc 3d 1211(A) [Sup. Ct., New York County 2011] *citing* Partnership Law § 10(1) and *Sherpaco LLC*, 2010 NY Misc. LEXIS, at *11–14 and *Prince v O'Brien*, 234 AD2d 12, 650 NYS2d 157 [1st Dept 1996])). While no individual trait is determinative of partnership's existence, factors to consider are the sharing of profits and losses, parties' intentions, ownership of the assets, joint control, management, and liability to creditors, compensation, contribution of capital and loans to the entity; and an equal sharing of profits, losses and control is not required (*Ostad v Nehmadi, supra, citing Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 298–299, 765 NYS2d 575 [1st Dept 2003]). The Complaint is wholly silent as to Kornblum and the LLC's sharing of any profits and losses, of any intent to operate as a partnership, any ownership of the assets, joint control, management, and liability to creditors, compensation, what the contributions of the parties to the LLC would be. There are no allegations from which it may be inferred that Kornblum and the LLC intended to operate as a partnership, and no evidence of an agreement as to how the partnership would be managed. Therefore, plaintiff's attempt to hold Kornblum jointly and severally liable based on his alleged partnership with the LLC likewise fails.

Account Stated

The Court also finds that the Complaint fails to state a claim for an account stated. An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other (*see* 1 NY Jur, Accounts and Accounting, §§ 5-7). In the case of an existing indebtedness, the agreement may be implied as well as express (*cf. Gurney, Becker & Bourne v Benderson Dev. Co.*, 47 NY2d 995, *revg* 62 AD2d 1165). An agreement may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time, because the party receiving the account is bound to examine the statement or to procure someone to examine it for him, and object if he disputes its correctness (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165, 167, 567 NYS2d 704, 705 [1st Dept 1991]). If he admits it to be correct it becomes a stated account and is binding on both parties (*Rodkinson v Haecker*, 248 NY 480 [1928]). If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown (*Peterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165, 167; *see Rodkinson v Haecker*, 248 NY 480 [1928]). To state a cause of action of account stated, plaintiff must allege defendant's receipt and retention of the subject statement of account without proper objection within a reasonable time (*see, e.g., Loheac v Children's Corner Learning Center*, 51 AD3d 476 [1st Dept 2008]; *Ruskin, Moscou, Evans & Faltischek v FGH Realty Credit Corp.*, 228 AD2d 294, 295 [1st Dept 1996]).

There is no allegation that plaintiff sent defendants invoices or statements, that defendants received any invoices or statements, or that retained any statements of account or

invoices, without proper objection within a reasonable time.[1]

As to the merits of defendants' arguments that plaintiff is estopped from seeking damages from both defendants due to plaintiff's breach of and defendants' reasonable reliance on the Buyback Agreement, it is noted that the alleged BuyBack Agreement does not violate the Statute of Frauds. New York law provides that an agreement will not be enforceable if it is not in writing and "subscribed by the party to be charged therewith" when the agreement "by its terms is not to be performed within one year from making thereof" (GOL § 5-701 (a)(1)). It is well settled that the touchstone of an inquiry under GOL §5-701(a)(1) is whether a contract *by its terms* has absolutely no possibility in fact and law of full performance within one year (*Cron v Hargro*, 91 NY2d 362 [1998]; *D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 [1984]; *Foster v Kovner*, 44 AD3d 23 [1st Dept 2007] (emphasis added)). As long as the agreement may be fairly and reasonably interpreted such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbably that such performance will occur during that time frame (*Cron* quoting *D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454 [1984]). The question is not what the probable, or expected, or actual performance of the contract was, but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year (*D & N Boening*, at 454).

Contrary to plaintiff's assertion, the alleged oral BuyBuy Agreement which, if made as

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[1] The cases defendants cite to support dismissal of the account stated claim on the ground that it is not properly pleaded because there amount claimed is incorrect and disputed are distinguishable, and do not support pre-answer dismissal of this claim on this ground (*Waldman v Englishtown Sportswear*, 92 AD2d 833, 460 NYS2d 552 [1st Dept 1983] (plaintiff's cause of action for an account stated asserted that "there are material errors in these statements of account and request that the statements be corrected"); *Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412, 625 NYS2d 178 [1st Dept 1995] (*summary judgment* on an account stated theory unwarranted where "no account was presented or where any dispute about the account is shown to have existed")).

alleged, was terminable at will and could have been performed within one year.

However, the Court does not reach the merits of defendants' defenses premised on the BuyBack Agreement, as such defenses raise issues as to the existence of an oral agreement, its terms, if any, and whether plaintiff breached such terms, which cannot be determined on a pre-answer motion to dismiss.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants MONR51, LLC and Michael Kornblum to dismiss the action by YM Antiques, Inc. as to Kornblum pursuant to Limited Liability Company Law (the "LLCL") § 609(a) and based on documentary evidence pursuant to CPLR (a)(1), to dismiss the complaint based on plaintiff's breach and defendants' reasonable reliance on a certain oral agreement, to dismiss the action for plaintiff's failure to plead a cause of action with respect to an account stated, and to dismiss the action as the statement of the account between the parties is inaccurate, is granted to the extent that the action is severed and dismissed as against Michael Kornblum in its entirety, and the second cause of action against all defendants for account stated is severed and dismissed; and it is further

ORDERED that MONR51 LLC shall serve its Verified Answer within 30 days; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on October 25, 2011, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: August 16, 2011

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD