SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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JSBARKATS PLLC

Index No.
153644/2015

Plaintiff,

DECISION and ORDER

- v -

Mot. Seq. #002

GOCOM CORPORATION INC., BLUCO ENERGY, LLC, and IKE SUTTON, Individually,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, JSBarkats PLLC ("Plaintiff") brings this action to recover legal fees from defendants, GoCom Corporation Inc. ("GoCom"), Bluco Energy, LLC ("Bluco"), and Ike Sutton ("Sutton"), individually.

The Complaint alleges two causes of action: one for an account stated, and the other for work, labor, and services performed or quantum meruit. The Complaint alleges that "[a]t all times hereafter mentioned, contact between Plaintiff and Defendants was in furtherance of three (3) retainer agreements signed by Plaintiff and Defendants to provide legal services for both GoCom and Bluco." The Complaint further alleges that, "On or about November 18, 2014 and December 22, 2014, the Plaintiff entered into three agreements (hereinafter referred to as 'Retainers') to represent GoCom, Bluco, and Sutton in certain legal matters (hereinafter referred to as the 'Matters')." Plaintiff alleges that on November 18, 2104, "Plaintiff commenced legal services in connection with the Matters on behalf of Defendants," services were rendered to Defendants through March 13, 2015, Plaintiff "billed for services provided," Defendants have failed to pay for the services rendered, and Defendants are "indebted to Plaintiff on an open account" in the sum of $68,343.32 and 300,000 shares of common stock pursuant to the terms of the parties' agreement.

As against Sutton individually, the Complaint alleges, "Upon information and belief, the defendant, Ike Sutton, Chief Executive Officer of GoCom (hereinafter referred to as 'Sutton') acting as guarantor, conducts business in the State of New York." Copies of the Retainers are not annexed to the Complaint.

Sutton moves for an Order, pursuant to CPLR 3211(a)(1) and (7), and/or 3212, to dismiss this action against Sutton individually.[1] Sutton submits an affidavit. Plaintiff opposes, and submits the attorney affirmation of Sunny J. Barkats, Plaintiff's managing partner.

CPLR § 3211 provides, in relevant part:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> > (1) a defense is founded upon documentary evidence; or
> >
> > (7) the pleading fails to state a cause of action; or

(CPLR §§ 3211[a][1], [7]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't 2003] [internal citations omitted]; CPLR § 3211[a][7]). On a motion to dismiss pursuant to CPLR § 3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211(a)(1) when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dep't 2007] [citation omitted]). When evidentiary material is considered, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

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[1] Defendants GoCom and Blueco interposed an Answer on August 9, 2015.

Sutton states, "I am named individually as a defendant in [this action] though I signed no retainer agreement in my individual capacity and no services were rendered to me individually. All of the alleged services on which this action is based were rendered to corporate defendants GoCom Corporation or Bluco Energy LLC." Sutton states that he is "aware of two not three written retainer agreements with the Plaintiff law firm." According to Sutton, the first is dated November 18, 2014. Sutton attaches a copy of a retainer letter dated November 18, 2014 which is prepared on JSBarkats PLLC letterhead. The letter is addressed to "GoCom Corporation c/o Ike H. Sutton, CEO." The letter is signed on behalf of JSBarkats. It is not signed on behalf of Sutton or any other entity. The section that reads as follows is left blank:

> Agreed and Accepted: GoCom Corporation
>
> By: _____
> Ike H. Sutton
> Chief Executive Officer

The November 18, 2014 letter states, in relevant part:

> We thank you for choosing JSBarkats, PLLC, and our Securities/Capitals Market group and allowing us to represent GoCom Corporation (the "Company" or "you") in connection with the settlement of (i) litigation between Bluco Energy LLC ("Bluco") and Bayside Fuel Oil Depot Corporation ("Bayside") and (ii) a dispute between Bluco and Vantage Commodities Financial Services ("Vantage") ("Litigation Settlement") and your ongoing reporting obligations under the Securities Exchange Act of 1934 ("1934 Act")(together, the "Matter"). We appreciate the confidence that you have shown our firm by engaging us in connection with the Matter. We are truly committed to the success of your Company.

Sutton also attaches a second retainer letter dated December 3, 2014, which is prepared on JSBarkats PLLC letterhead. The letter is addressed to "GoCom Corporation c/o Ike H. Sutton, CEO." The letter is signed on behalf of JSBarkats. It is not signed on behalf of Sutton or any other entity. The letter states, in relevant part:

> We thank you for choosing JSBarkats, PLLC, and our Securities/Capitals Market group and allowing us to represent GoCom Corporation (the "Company" or "you") in connection with the preparation and filing of a

registration statement on Form 10 under the Securities Exchange Act of 1934 (the "Form 10") and a registration statement on Form S-1 under the Securities Act of 1933 (the "Form S-1") (together, the "Matter"). We appreciate the confidence that you have shown our firm by engaging us in connection with the Matter. We are truly committed to the success of your Company.

In opposition, Sunny J. Barkats states, "Defendant Sutton agreed to be the guarantor while negotiating the terms of the retainer with Plaintiff. His refusal to sign the personal guaranty was a bad faith attempt to avoid potential liability for debts of the corporation in which he is the CEO and sole director." In the alternative, Plaintiff argues that Sutton be held liable under the doctrine of piercing the corporate veil. Barkats states, "Sutton exercised complete domination of the Defendant corporations. He is the CEO of both GoCOM and BluCo. He also happens to be the CEO of Huayue Electronics, Inc., a corporation which is now in the process of purchasing BluCo from GoCOM. Apart from being the CEO, Defendant Sutton is also the sole director of GoCOM." Barkats further states, "Defendant Sutton utilized his dominant position in his clearly dishonest dealing with Plaintiff. He acted to Plaintiff's detriment and continues his fraudulent activity by secluding BluCo's assets in order to avoid satisfying the corporation's creditors."

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dep't 2009]). To prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep't 2011]). Generally speaking, however, "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (*Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]). Nevertheless, "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies." (*Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc.*, 95 A.D.3d 434, 438-39 [1st Dep't 2012]; *Loheac v. Children's Corner Learning Ctr.*, 51 A.D. 3d 476, 476 [1st Dep't 2008]).

"It is well established that officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually." (*Georgia*

Malone & Co. v. Ralph Rieder, 926 N.Y.S.2d 494, 496-97 [1st Dept 2011], *aff'd sub nom. Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511 [2012]).

The doctrine of piercing the corporate veil is typically employed to "circumvent" the corporate form in order to hold an individual owner liable for a corporate obligation. (*Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140-41 [1993]). "The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed. . . . Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners." (*Id.*).

Piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 A.D.3d 35, 40 [1st Dep't 2012] *quoting Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 [1993]). In order to prevail on a veil-piercing theory, "the party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 140, 142 [1993]). In determining the question of control, courts have considered various factors, including: the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity. (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 A.D.3d 167, 174 [1st Dep't 2013]). No one factor is dispositive. (*Id.*).

Evidence of domination alone is insufficient, without more, to warrant piercing the corporate veil. (*TNS Holdings v MKI Sec. Corp.*, 92 N.Y.2d 335, 339 [1998] [finding that, "additional showing that [domination] led to inequity, fraud, or malfeasance" required to meet "heavy burden" for piercing corporate veil]). Where a party seeks to hold a parent corporation liable for the contractual obligations of its subsidiary, therefore, allegations of control, "unaccompanied by allegations of consequent wrongs", are insufficient to plead a cause of action as against the parent. (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 A.D.3d 35, 40 [1st Dep't 2012]).

Here, the documentary evidence produced by Sutton in the form of two retainer agreements flatly contradict the allegations of the Complaint that Sutton acted as a guarantor for any obligations of GoCom and Bluco to pay for legal services rendered by Plaintiff to those corporate entities. As a guaranty must be in writing under the Statute of Frauds (General Obligations Law § 5-701 [a] [2]), and Plaintiff concedes Sutton failed to sign a guaranty, there is no guaranty by Sutton to answer for the debts of the corporation. (*See Rosenheck v. Calcam Assoc. Inc.*, 233 AD2d 553, 554 [3d Dept 1996] ["A promise to pay the debt of another must be in writing and signed by the party to be charged to be enforceable pursuant to the Statute of Frauds."). Furthermore, there are insufficient allegations to hold Sutton liable under the doctrine of piercing the corporate veil.

Wherefore, it is hereby,

ORDERED that defendant Ike Sutton's motion to dismiss the Complaint as against him is granted and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: OCTOBER 26, 2016

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EILEEN A. RAKOWER, J.S.C.