

**Cicconi v McGinn, Smith & Co., Inc.**

2004 NY Slip Op 30051(U)

June 4, 2004

Supreme Court, New York County

Docket Number: 0601463/4632

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ  
Justice

PART 03

-----x  
KETHE CICCONI,

Plaintiff,

- against -

McGINN, SMITH & CO., INC. and INTEGRATED  
ALARM SERVICES GROUP, INC. (f/k/a M&S PARTNERS),

Defendants.  
-----x

INDEX NO. 601463/2003

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	
Answering Affidavits — Exhibits _____	
Replying Affidavits _____	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is

ORDERED that the motion is decided in accordance with the accompanying Decision and Order.

FILED

JUN 10 2004

CITY CLERK'S OFFICE  
NEW YORK

Dated: June 04, 2004

KARLA MOSKOWITZ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 3

-----X  
KETHE CICCONI,

Plaintiff,

Index No. 601463/2003

- against -

McGINN, SMITH & CO., INC. and INTEGRATED  
ALARM SERVICES GROUP, INC. (f/k/a  
M&S PARTNERS),

**DECISION and ORDER**

Defendants.  
-----X

Moskowitz. J.:

Defendants McCinn, Smith & Co., Inc. (McGinn Smith) and Integrated Alarm Services Group, Inc. (IASG), move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the third and fifth causes of action asserted in the complaint. Plaintiff, Kethe Cicconi (Cicconi), cross-moves, pursuant to CPLR 3212, for partial summary judgment on his second cause of action.

Background

In 1998, Cicconi, along with various other professionals whom he retained and oversaw, founded Mercer Partners, a broker-dealer. Mercer Partners created and developed IPOsyndicate.com, an online financial network that had a domain name/website that allowed individual investors to participate in an IPO opportunity historically unavailable to many investors. IPOsyndicate.com also had various databases that consisted of information on more than 70,000 IPOsyndicate.com members and a history of IPO filings dating back to 1996.

Timothy McCinn (McCinn) and David Smith (Smith) are the owners of McGinn Smith, a privately held New York corporation that operates as a full-service investment banking and brokerage firm. Until November 2002, M&S Partners (M&S) was a New York general partnership that McGinn and Smith owned equally. In November 2002, M&S merged with LASG, a Delaware corporation authorized to do business in New York. Its office is at the same

location as McGinn Smith - 99 Pine Street, Albany, New York. The principal shareholders of IASG are McCinn and Smith. As a result of the merger, IASG remained as the surviving entity. According to its prospectus, IASG is a fully integrated security company servicing the needs of security alarm dealers and monitoring companies. IASG acts as a principal and advances capital to alarm dealers and monitoring companies.

In early 2001, McGinn approached Cicconi and proposed a buy-out of certain assets of Cicconi and Mercer Partners to bolster McGinn's retail brokerage and financial business and to provide a platform to secure the financial backing which IASG needed. On or about July 19, 2001, McGinn and Cicconi and Mercer Partners executed a series of interrelated agreements, that included two Asset Purchase Agreements, attendant promissory notes and a five-year Employment Agreement, pursuant to which Cicconi was made the Director of Retail Sales, including McGinn Smith's New York City and Atlanta branch offices.

As part of the Asset Purchase Agreement, McGinn purchased certain computer software, databases, domain names, 50% of IPOsyndicate.Com, and plaintiff's computer technology for \$150,000, payable \$50,000 in cash and \$100,000, by way of a promissory note dated July 19, 2001, payable to plaintiff, plus interest at the rate of 7% per annum, payable in consecutive monthly payments of \$1,985.06, due on the first day of each month beginning September 1, 2001, through August 1, 2006. The promissory note contained an acceleration provision in the event of a default of any payment. Plaintiff alleges that McGinn failed to pay the installment due on January 1, 2003 and that he sent a notice of default to McGinn, who also defaulted on the subsequent payments.

On December 11, 2002, McGinn terminated Cicconi's employment, alleging that it was "for cause" and "performance based." Plaintiff disputes this, contending that he had surpassed expectations and that McCinn had wanted him to accept a severe diminution in both

compensation and share of revenue. On or about December 30, 2002, McGinn filed with the National Association of Securities Dealers (NASD) a Form U-5 Termination Notice for Securities Industries Registration, stating that the reason for Cicconi's termination was "Performance Based."

Plaintiff commenced this action by filing the summons and complaint on May 9, 2003. The complaint asserts five causes of action, as follows: (1) breach of the Employment Agreement and of the implied covenant of good faith and fair dealing; (2) breach of the \$100,000 Note; (3) defamation (based upon the Form U-5); (4) a declaratory judgment that he was terminated without "cause;" and (5) alter ego liability against JASC. He seeks \$10 million in compensatory damages, \$5 million in punitive damages, plus attorney's fees and statutory penalties of 25% of unpaid wages under New York Labor Law, as well as \$100,000, plus interest, on the Note.

Defendants made this pre-answer motion to dismiss the second and fifth causes of action in the complaint.

#### Dismissal Standards

On a motion to dismiss a complaint for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff (Guggenheimer v Ginzburg, 43 NY2d 268, 275). The court must accept each and every allegation, and reasonable inferences, as true, and, if plaintiff is entitled to recovery based upon any reasonable view of the stated facts, the complaint as a pleading is legally sufficient (219 Broadway Cop. v Alexander's, Inc., 46 NY2d 506, 509; McGill v Parker, 179 AD2d 98, 104). The court's inquiry is limited to ascertaining whether the pleading states any cause of action, not whether there is evidentiary support for the complaint (Guggenheimer v Ginzburg, 43 NY2d 208, supra). Because the court has not elected to treat this as a motion for summary judgment, the court will consider the

affidavits plaintiff submitted for the limited purpose of remedying any defects in the complaint, to establish that plaintiff has a cause of action (Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 035-630).

A defense based upon documentary evidence can succeed if the documents resolve all of the factual issues as a matter of law (Gephardt v Morgan Guaranty Trust Co. of New York, 191 AD2d 229 [1st Dept], lv denied 82 NY2d 656). Dismissal of a complaint pursuant to CPLR 3211 (a) (1) is inappropriate if the documents **do** not "definitively dispose of the claim" (Devlin v Video Services Acquisition, 188 AD2d 370, quoting Demas v 325 West End Ave. Corp., 127 AD2d 476,477). To warrant dismissal, a defense grounded on documentary evidence must be a complete one, leaving no genuine triable issues of fact (Expocorp v Hyatt Management Corp. of New York, 134 AD2d 234).

#### Defamation Claim

Plaintiff claims that the negative Form U-5 filed by McGinn Smith, that states that defendant fired him for cause and for poor performance effectively blacklists him from finding work in the securities industry and that statements in a Form U-5 enjoy only a conditional privilege that can be overcome by a showing of actual malice (see e.g. Dawson v New York Life Ins. Co., 135 F3d 1158, 1164 [7<sup>th</sup> Cir 1998]; Acciaro v Millennium Sec. Corp., 83 F Supp 2d 413, 419 [SD NY 2000]). However, New York State courts have consistently held that statements contained in a Form U-5 are *absolutely* privileged and, therefore, cannot be the predicate for a defamation action (Dunn v Ladenburg Thalmann & Co., 259 AD2d 544; Hertzfeld & Stern, Inc. v Beck, 175 AD2d 689, 691). Moreover, intermediate and lower federal court decisions are not binding in state court proceedings (Matter of Seltzer v New York State Democratic Committee, 293 AD2d 172, 174; Cox v Microsoft Corp., 290 AD2d 206, 207).

Accordingly, that branch of the motion seeking dismissal of the third cause of action is

granted and it is dismissed.

#### Alter Ego Liability

The fifth cause of action employs an alter ego theory to impose liability on IASG for what is basically McGinn Smith's breach of employment contract and failure to repay a promissory note.

Courts will "pierce the corporate veil" and will disregard the corporate form whenever necessary to prevent fraud or to achieve equity. As a general rule, 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 defendants used this domination to commit a fraud or wrong against a claiming party that resulted in the claiming party's injury (Matter of Morris v New York State Department of Taxation & Finance, 82 NY2d 135). A party seeking to pierce the corporate veil must establish that the owners, through their domination of the corporate entity, abused the privilege of doing business in the corporate form to perpetrate a wrongful act or injustice against a party that a court of equity will intervene. (see Lederer v. King, 214 AD2d 354). The burden of proof is on a party seeking to pierce the corporate veil to demonstrate the complete and total domination of a corporation, especially when the owners, legal or equitable, use the corporation as a mere device to further their personal rather than legitimate corporate business (see Billy v. Consolidated Machine Tool Corp., 51 NY2d 152; Hyland Meat Co., Inc. v Tsagarakis, 202 AD2d 552).

Here, plaintiff contends that IASG is the alter ego of McGinn Smith, and that the former exercised complete domination and control over McGinn Smith and used this corporation to fraudulently, unjustly and inequitably cause it to terminate wrongfully his employment agreement and to fail to repay the Note. However, the complaint asserts bare allegations and conclusions, without stating facts sufficient to show that the court should disregard separate

corporate forms (Horsehead Industries, Inc. v Metallgesellschaft, AG, 239 AD2d 171).

There are no detailed allegations, such as undercapitalization of McGinn Smith, or that its assets were intermingled with those of IASG, or that McGinn and Smith shuttled their personal funds in and out of the corporations without regard to formality and to suit their convenience (see 107 Realty Corp. v National Petroleum U.S.A., Ltd., 181 AD2d 817).

Accordingly, that branch of the motion seeking dismissal of the fifth cause of action is granted and the fifth cause of action is dismissed.

#### Plaintiffs Cross Motion for Partial Summary Judgment

Plaintiff seeks partial summary judgment on his second cause of action to recover the unpaid balance and interest on the \$100,000 promissory note.

Accelerated relief is available, pursuant to CPLR 3213, when a prima facie case is made out by an instrument for the payment of money only and failure to pay, unless defendant raises an issue as to defenses by sufficient evidentiary proof (Interman Industrial Products, Ltd. v R.S.M. Electron Power, Inc., 37 NY2d 151, 155). It is beyond cavil that a promissory note constitutes an instrument for the payment of money only within the purview of the statute (Sexton v Fishman, 184 AD2d 630; Seaman-Andwall Corp. v Wright Machine Corp., 31 AD2d 136, affd 29 NY2d 617).

However, plaintiffs cross-motion is for summary judgment pursuant to CPLR 3212, not 3213. CPLR 3212 (a) provides that such a motion may not be made until after joinder of issue. Such a motion, made prior to joinder of issue, must be denied as premature (Alro Builders & Contractors, Inc. v Chicken Koop, Inc., 78 AD2d 512). Plaintiff cannot seek summary judgment, at this time, based upon CPLR 3211 (c), since the court has not elected to so treat it and has not given appropriate notice to the parties (Four Seasons Hotels Ltd. v Vinnik, 127 AD2d 310).

Accordingly, plaintiffs cross motion for summary judgment is denied as premature, without prejudice to renewal following joinder of issue.

#### Conclusion

Accordingly, it is hereby

ORDERED that defendants' motion for an order dismissing the third and fifth causes of action asserted in the complaint is granted, and they are dismissed, pursuant to CPLR 3211 (a) (7); and it is further

ORDERED that the complaint is severed and dismissed as to defendant Integrated Alarm Services Group, Inc., and is continued as to defendant McGinn, Smith & Co., Inc.; and it is further

ORDERED that the complaint is deemed amended accordingly; and it is further

ORDERED that defendant McGinn, Smith & Co., Inc. is directed to serve its answer to the complaint within 10 days after service of a copy of this order with notice of entry (CPLR 3211 [f]), and the action shall proceed expeditiously; and it is further

ORDERED that plaintiffs cross motion for partial summary judgment on his second cause of action is denied as premature, without prejudice to renewal following joinder of issue.

Dated: June 04, 2004

ENTER:



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J.S.C.