

CFG Enterprises, Inc. v Chen

2005 NY Slip Op 30250(U)

September 27, 2005

Supreme Court, New York County

Docket Number: 0601141/2005

Judge: Richard B. Lowe

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

PRESENT: RICHARD B. LOWE III

PART 56

Justice

Index Number : 601141/2005

CFG ENTERPRISES INC

vs

ESTHER CHEN LLC

Sequence Number : 001

*DISMISS ACTION

DEX NO. _____

OTION DATE _____

OTION SEQ. NO. _____

OTION CAL. NO. _____

C

The following papers, numbered _____ 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 this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

OCT 11 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/27/2005

RICHARD B. LOWE III J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : IAS PART 56

-----X
 CFG ENTERPRISES, INC.,

Index No. 601141/05

Plaintiff,

- against -

**DECISION
 AND ORDER**

ESTHER CHEN, LLC AND ESTHER CHEN,
 Individually and as agent of ESTHER CHEN, LLC,

Defendants.
 -----X

RICHARD B. LOWE, III, J.:

Defendant Esther Chen (“Chen”) moves, pursuant to CPLR 3211(a), to dismiss the Complaint in this action as against her individually for breach of contract, account stated, and for piercing the corporate veil, and further applies for sanctions against CFG Enterprises, Inc. (“CFG”) for false accusations. CFG opposes the motion to dismiss and also requests for sanctions against defendant Chen for Chen’s application for sanctions.

BACKGROUND

Defendant Chen is sole shareholder, officer, director, and head designer of Esther Chen LLC (“Chen LLC”), a limited liability company formed in 2000 to design and sell assorted ladies sweaters and knits to upscale stores and clothing boutiques. CFG is a manufacturer and supplier of ladies’ apparel.

Since 2001, Chen LLC and CFG have entered into various contractual agreements for CFG to manufacture garments each spring for the upcoming fall delivery season and each fall for the upcoming spring delivery season. Chen would design the clothing and provide “cut ticket” purchase order forms with the letterhead “Esther Chen” (without the letters “LLC”) to CFG. In turn, CFG

would use these forms to manufacture the clothing style as indicated. CFG would bill to “Esther Chen” at the Chen LLC address, and Chen would pay CFG through wire transfers from Chen LLC’s account. On two separate occasions, in 2003, Chen used an account other than the regular Chen LLC account to pay CFG’s invoices.

Chen LLC and CFG entered into one such agreement in 2004 for CFG to manufacture 5,210 pieces of ladies clothing to Chen LLC, which would in turn sell to various stores and businesses. Over the course of two months, from July 11, 2004 to August 18, 2004, CFG sold and shipped 3773 pieces of clothing to Chen LLC, totaling \$213,136.56, with shipping costs of \$50,586.95. Chen LLC allegedly informed CFG of the non-conforming goods, but nonetheless shipped the non-conforming articles of clothing to its customers to meet contractual orders. Customers refused and returned the goods. When Chen LLC contacted the plaintiff to return the clothes, CFG purportedly advised Chen LLC to dispose of the clothing in any manner possible.

CFG invoiced and made repeated demands payment of the goods shipped to Chen LLC, to which CFG avers that to this date Chen LLC has not paid. As of December 20, 2004, CFG alleges that Chen LLC owes CFG \$263,723.51 from those sales.

CFG filed a summons and complaint on March 29, 2005 against Chen LLC and against Chen, individually and as agent for Chen LLC, for breach of contract (first cause of action) and accounted stated (second cause of action), and against Chen personally for piercing the corporate veil (third cause of action). Chen LLC brings counterclaims for breach of contract and for bailment against CFG for allegedly providing non conforming goods and for damages caused from the loss of reputation due to CFG’s breach.

Defendant Chen brings this motion to dismiss all causes of action against her individually based on the plaintiff’s failure to state a cause of action. Furthermore, Chen brings an application

for sanctions against CFG for false accusations. CFG, in opposing plaintiff's motion to dismiss, asserts that because Chen is the sole shareholder, officer, and director of Chen LLC, she exercises sole control and dominion. Further, CFG alleges that Chen LLC was an undercapitalized shell corporation used to facilitate Chen's wrongful acts. The plaintiff urges the court to deny Chen's motion and also requests sanctions against Chen for bringing her application for sanctions against CFG.

DISCUSSION

In a motion to dismiss pursuant to CPLR 3211(a), the court takes the facts as alleged in the Complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 634 [1976]). Because, as against Chen individually, the first cause of action for breach of contract and second cause of action for accounted stated are inextricably linked to the third cause of action for piercing the corporate veil against Chen, the court decides the issue of piercing the corporate veil first in order to determine whether the other causes of action against Chen are moot.

A. *Piercing the Corporate Veil*

Defendant Chen moves to dismiss the Complaint as to all causes of action against herself individually because Chen claims that the allegations against her are legally insufficient to pierce the corporate veil. The plaintiff argues that: (1) the letterhead on which Chen LLC handles its orders, (2) CFG's billing statements to "Esther Chen" at the Chen LLC address, and (3) two prior wire transfers that were of an account different from the usual Chen LLC account are sufficient evidence to show that there is no separation between the corporate entity and the individual and that Chen should be liable for Chen LLC's breach. This court disagrees.

It is well settled that those seeking to pierce a corporate veil “bear a heavy burden,” (*TNS Holdings Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]), in 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” (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141[1993]). Though total domination “is the key” to piercing the corporate veil, evidence of control alone does not suffice “without an additional showing that it led to inequity, fraud or malfeasance” (*TNS Holdings Inc.*, 92 NY2d at 339). Plaintiff must allege, with the requisite “particularized statements detailing fraud or other corporate misconduct,” facts that would warrant piercing the corporate veil (*Sheinberg v. 177 E. 77*, 248 AD2d 176, 177 [1998], *lv dismissed in part & denied in part* 92 NY2d 844 [1998]). After all, a court will not lightly disregard the corporate form (*see Rapid Transit Subway Const. Co. v City of New York*, 259 NY 472, 487-88 [1932]), unless the plaintiff demonstrates not only complete control, but also the use of that authority to commit fraudulent acts or misconduct against others.

In reading the complaint favorably and liberally for plaintiff, CFG provides sufficient evidence to show that defendant Chen had complete domination over Chen LLC with respect to the attacked transaction. Chen does not dispute that she is the sole shareholder, officer, director and head designer of Chen LLC. Chen also agrees that she was acting on behalf of Chen LLC, in this transaction with CFG. Finally, there is no dispute that Chen LLC is the namesake for and its clothes the product of Chen. Accordingly, CFG provides sufficient evidence to show Chen dominated Chen LLC regarding this transaction with CFG.

However, though the plaintiff sufficiently asserts that Chen dominates Chen LLC, CFG fails to provide any evidence that Chen’s domination was used to commit a fraud or wrong against the

plaintiff which resulted in plaintiff's injury. CFG alleges that Chen LLC is an "undercapitalized 'shell' corporation" and that Chen, exercising sole control and dominion, "used the 'shell' corporation as a vehicle to facilitate her wrongful acts against plaintiff" (Compl. ¶¶ 33-35). As evidence, the plaintiff provides "cut tickets" used in designing clothing from Chen LLC, which shows in its letterhead "Esther Chen" without the letters "LLC." As further evidence, CFG provides its own billing invoices and debit notes, establishing that CFG billed Chen, the individual, instead of Chen LLC. Finally, CFG gives its bank statements as evidence that Chen used a different account to reimburse CFG for payments due.

The court finds that such allegations do not sufficiently show that Chen perpetuated fraud or malfeasance. Even if the court accorded the benefit of inference to the plaintiff, the provided evidence only shows that Chen dominated the company. There is no indication that Chen misused the corporate form for her own personal business. There is no dispute that Chen and CFG had a business relationship for more than three years prior to this dispute. If there was any fraud or misconduct on the part of Chen, CFG should be able to provide the "particularized statements detailing fraud or other corporate misconduct" required for showing that Chen used her domination of Chen LLC in committing injury against CFG (*Sheinberg*, 248 AD2d at 177).

Instead, in its complaint, the plaintiff alleges that Chen LLC is a "shell corporation" and that Chen used Chen LLC as a "vehicle to facilitate her wrongful acts against plaintiff." These statements are not particularized statements detailing fraud or other corporate misconduct. In fact, they are conclusory and, as such, are "insufficient to warrant piercing the corporate veil" (*Metropolitan Transp. Authority v Triumph Advertising Productions, Inc.*, 116 AD2d 526, 528 [1st Dept 1986]).

In addition, the "cut ticket" forms used by Esther Chen for its orders of clothing may also

show dominance of the company, but does not show that Chen misused the corporate form for her personal business. The fact that the letters “LLC” are not on these forms does not change the status of the company. If letterhead using only the name of the designer without the letters “LLC” was enough to pierce the corporate veil, those individuals whose names have become the name of a clothing line or brand could also potentially be drawn into litigation and could be held personally liable for any breach of contract. This is an insufficient reason to disregard the corporate form.

Furthermore, the court does not find the plaintiff’s own invoices or debit notes to Chen in any way persuasive in its determination of whether Chen perpetuated fraud or other mismanagement. Indeed, the court agrees with defendant that the use of such statements are “self serving” (Reply at 3), and are not suitable evidence in showing fraud or mismanagement on behalf of the defendant. Finally, there is no evidence that the two wire transfers to CFG in 2003 were made from Chen’s “personal” account instead of Chen LLC’s account. Even if it were from Chen’s “personal” account, it is not enough to allege fraud where a vast majority of the wire transfers came from the Chen LLC account (*accord Retropolis, Inc. v. 14th Street Development LLC*, 17 AD3d 209 [1st Dept 2005])[finding that where vast majority of checks were deposited in LLC’s account and a few were deposited in other accounts, it was not enough to pierce the corporate veil]).

Because the plaintiff has failed to show that Chen used her complete domination of Chen LLC to commit a fraud or wrong against CFG, the plaintiff has failed to state a valid cause of action for piercing the corporate veil and, accordingly, Chen’s motion to dismiss the Complaint as to this cause of action is granted.

B. *Breach of Contract and Account Stated*

Defendant Chen moves to dismiss the Complaint as to the first and second causes of action against her individually for failure to state a cause of action. The court need not decide the

remaining counts as they are moot. Since the plaintiff may not pierce the corporate veil against Chen, the plaintiff may only pursue Chen LLC for breach of contract and for account stated. As such, the motion to dismiss the first cause of action alleging breach of contract and the second cause of action for account stated against Chen is granted.

C. *Motions for Sanctions*

Defendant Chen asks the court to for sanctions against plaintiff for false accusations. Plaintiff CFG in turn requests sanctions against Chen for bringing her application for sanctions. The court may, in its discretion, impose sanctions pursuant to 22 NYCRR § 130-1.2 for frivolous conduct. At this time, the court has not found the behavior by either party to be so frivolous or egregious to warrant sanctions. Therefore, defendant Chen's application for sanctions and plaintiff's petition for sanctions are denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion to dismiss the causes of action against Esther Chen individually and as agent to Esther Chen LLC is granted; it is further

ORDERED that Defendant Esther Chen's application for sanctions against CFG Enterprises, Inc. for false accusations is denied; it is further

ORDERED that Plaintiff CFG Enterprises, Inc.'s application for sanctions is denied; and it is further

ORDERED that Plaintiff CFG Enterprises, Inc. is directed to serve an answer to the counterclaims within 10 days after service of a copy of this order with notice of entry.

Dated: September 27, 2005

ENTER:



RICHARD B. LOWELL III
RICHARD B. LOWELL III
J.S.C.

FILED
OCT 11 2005
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NEW YORK