

**Saladax Biomedical, Inc. v Jina Partners, LLC**

2007 NY Slip Op 31440(U)

May 29, 2007

Supreme Court, New York County

Docket Number: 0602605/2006

Judge: Judith J. Gische

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

PRESENT:  
Index Number : 602605/2006  
SALADAX BIOMEDICAL  
vs  
JINA PARTNERS, LLC  
Sequence Number : 001  
DEFAULT JUDGMENT

PART 10

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~

motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

**FILED**

JUN 04 2007

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 5/29/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X

SALADAX BIOMEDICAL, INC.,

Plaintiff,

-against-

JINA PARTNERS, LLC, RAJ PAMNANI,  
SUNNY GAZAHI, ABC ENTITIES 1 through  
10 (fictitious names) and J. DOES 1 through  
10 (fictitious names),

Defendants.

-----X

**Decision/Order**

Index No.: 602605/06

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**Papers**

**Numbered**

Pltf's motion [d j/mt] w/ASF affirm in support, exhs ..... 1

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*Upon the foregoing papers, the decision and order of the court is as follows:*

Saladax Biomedical, Inc. ("Saladax" or plaintiff) now moves, pursuant to CPLR § 3215, for an order directing the Clerk of Court to enter a default judgment in favor of plaintiff and against Jina Partners, LLC (the "LLC"), Raj Pamnani and Sunny Gazahi (the "Individual Defendants.") The motion itself has been submitted to the court on default.

**Discussion**

On July 28, 2006, plaintiff served all three defendants by delivering the Summons and Verified Complaint to Cindy Gustan ("Gustan") at the Individual

Defendant's place of business and the principal place of business of the LLC. Gustan is described by plaintiff as "a person of suitable age and discretion as representative and/or authorized agent to receive legal documents." Plaintiff thereafter mailed an additional copy of the Summons and Verified Complaint bearing the legend "Personal and Confidential" to each defendant on July 31, 2006. CPLR 3215.

While plaintiff's description of Gustan is sufficient to find that plaintiff properly served the Individual Defendants [CPLR 308], plaintiff has not complied with either CPLR 311-a or LLC Law 303. Therefore, plaintiff has not properly served the LLC. Accordingly, plaintiff's motion for a default judgment against the LLC is hereby denied and this action is hereby severed and dismissed as to the LLC.

Based on the sworn affidavit of Adrienne Choma ("Choma") in support of entry of judgment, a written term sheet ("Term Sheet") dated November 15, 2005, which discloses plaintiff's financial information in the context of a proposed sale of stock, and a copy of plaintiff's bank statement, plaintiff avers the following. Choma and the Individual Defendants signed a signature page attached to the Term Sheet, whereby plaintiff agreed to furnish the LLC with \$25,000 (the "Advance") to cover the LLC's professional fees, travel costs and other out-of-pocket expenses related to travel to India in connection with the sale of plaintiff's stock. The Term Sheet was signed by Choma, on behalf of Saladax, and the Individual Defendants, on behalf of the LLC.

The Term Sheet further provided that if the sale of stock did not occur, the LLC shall repay plaintiff the full amount of the Advance. According to plaintiff, the LLC never purchased plaintiff's stock and now plaintiff claims that the LLC has failed to repay the Advance. For a first cause of action, plaintiff generally claims breach of contract.

Plaintiff alternatively alleges: fraudulent representation (second cause of action); conversion (third cause of action); violation of the duty of good faith and fair dealing (fourth cause of action); that this court should pierce the corporate form of the LLC based on the Individual Defendants alleged misuse of the corporate form (fifth cause of action); and unjust enrichment (sixth cause of action).

Since a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom [Rokina Optical Co., Inc. v. Camera King, Inc., 63 N.Y.2d 728 (1984)], plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a prima facie cause of action [Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3<sup>rd</sup> Dept. 2001)].

#### First Cause of Action

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2<sup>nd</sup> Dept. 1990). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Termianl Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

By the terms of the Term Sheet, the LLC was obligated to return the Advance. While the Individual Defendants signed a signature page obligating the LLC to repay plaintiff, plaintiff cannot maintain an action for breach of contract against the Individual Defendants where they do not create any binding obligations on themselves under the

alleged agreement. It is well established that a member of a limited liability company is statutorily exempted from individual liability for the contractual obligations of the limited liability company. LLC Law 609; Retropolis, Inc. v. 14th Street Development, LLC, 17 AD3d 209 (1<sup>st</sup> Dept. 2005).

### Second Cause of Action

For its second cause of action, plaintiff claims that the Individual Defendants represented the LLC in connection with the negotiation of the Term Sheet, and thereby made the false representation that the LLC would return the Advance if the LLC did not purchase plaintiff's stock in connection with the Term Sheet.

To state a cause of action for fraud, plaintiff must show: (1) that defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to plaintiff. Held v. Kaufman, 91 N.Y.2d 425 (1998). General allegations that defendants entered into a contract while lacking the intent to perform it are insufficient to support a cause of action sounding in fraud. Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603 (1994).

Here, plaintiff attempts to convert a contract action into an action for fraud by alleging that the defendants did not intend to meet its contractual obligations. Nonetheless, this contract did not impose any obligations on the Individual Defendants. Accordingly, plaintiff's motion for default judgment on the second cause of action is denied and the second cause of action is hereby severed and dismissed.

### Third Cause of Action

In its third cause of action, plaintiff claim that defendants failure to return the Advance constitutes conversion. Conversion is the wrongful interference with the property of another. Republic of Haiti v. Duvallier, 211 AD2d 379 (1<sup>st</sup> dept. 1995). In order to assert a cause of action for conversion, a plaintiff must demonstrate an ownership interest in the property alleged to have been converted State v. Seventh Regiment Fund, Inc., 98 NY2d 249 (2002). Plaintiff alleges that it tendered the Advance to defendants. Therefore, plaintiff is unable to establish, *prima facie*, a cause of action for conversion because the defendants did not wrongfully take the Advance. Accordingly, plaintiff's motion for default judgment on the third cause of action is denied and the third cause of action is hereby severed and dismissed.

#### Fourth Cause of Action

Plaintiff claims that the defendants violated their duty of good faith and fair dealing to plaintiff. Every contract contains and implied covenant of good faith and fair dealing, which is breached when a party "acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153 (2002). Thus, such a claim is tantamount to a cause of action for breach of contract and is therefore redundant. In any event, the Individual Defendants cannot be obligated under the Term Sheet given that they are members of the LLC. LLC Law 609; Retropolis, *supra*. Accordingly, plaintiff's motion for default judgment on the fourth cause of action is denied and the fourth cause of action is hereby severed and dismissed.

#### Fifth Cause of Action

New York does not recognize a separate cause of action to pierce the corporate

veil. Matter of Morris v. New York State Dept. of Taxation and Fin., 82 N.Y.2d 135 (1993).

Accordingly, plaintiff's motion for default judgment on the fifth cause of action is denied and the fifth cause of action is hereby severed and dismissed.

Even assuming there is a valid breach of contract claim that could have been asserted against the LLC (had they been properly served), this application contains no facts from which to conclude that the individuals were the alter egos of the LLC and/or that they were not entitled to the limited liability protection of the LLC. Albstein v. Elany Contracting Corp., 30 A.D.3d 210 (1<sup>st</sup> Dept. 2006).

Sixth Cause of Action

A claim of unjust enrichment must fail in the face of a valid contract. Clark-Fitzpatrick v. L.I.R.R., 70 N.Y.2d 382 (1987). Accordingly, plaintiff's motion for default judgment on the sixth cause of action is denied and the sixth cause of action is hereby severed and dismissed.

CONCLUSION

In accordance with this decision, it is hereby:

**ORDERED** that plaintiff's motion is denied in all respects; and it is further


**ORDERED** that the complaint in this action is hereby dismissed.

Any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
May 29, 2007

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**

JUN 04 2007

NEW YORK  
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