

Kenny on Promise Inc. v Luc Cam Senh

2007 NY Slip Op 31453(U)

May 24, 2007

Supreme Court, New York County

Docket Number: 0115889/2006

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

Index Number : 115889/2006

PART 17

KENNY ON PROMISE

vs

SENH, LUC CAM

Sequence Number : 002

DISC

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 2

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

granted as requested

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

FILED

JUN 05 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/24/07

[Signature]
EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; PART 17

-----X
KENNY ON PROMISE INC.,

Plaintiff,

-against-

Index No.: 115889/2006

LUC CAM SENH, KOK HOOI LOOI,
CHUN WEI LI, MAI SENH, LI C. PAO,
KAI WAN CHAN, QUEENIE YU CHAN,
JUN L KUANG, SHUT SHING MAR,
and SENH'S RESTAURANT, INC.,

DECISION AND ORDER

Defendants.

FILED

JUN 05 2007

NEW YORK
COUNTY CLERK'S OFFICE

-----X
EMILY JANE GOODMAN, J.S.C.:

Plaintiff Kenny On Promise Inc. is a supplier of goods to restaurants. Plaintiff seeks recovery against defendant Senh's Restaurant Inc., a Chinese restaurant located in Queens (the Restaurant), and the individual defendants in this action, who are owners and shareholders of the Restaurant. Plaintiff alleges that it sold and delivered goods to the defendants from June 17, 2005 to August 29, 2005, in an aggregate sum of \$76,070.26, but that the sum remains unpaid and owing. The complaint asserts several causes of action: account stated - breach of contract, breach of guaranty and fraud. The complaint also seeks an injunction against defendants, requiring them to cause a non-party escrow agent to forebear from releasing \$80,000 from an escrow account established to hold the sale proceeds of the Restaurant (the Escrow), which took place in December 2005.

Defendants Chun Wei Li, Kai Wan Chan, Queenie Yu Chan, Jun L Kuang and Shut Shing Mar (collectively, the Moving Defendants) filed a motion seeking dismissal of the complaint pursuant to CPLR 3211.¹ For the reasons set forth below, the motion to dismiss is granted.

Background

Prior to the commencement of this action, plaintiff started a separate action in August 2005, against Luc Cam Senh and Kok Hooi Looi d/b/a Senh's Restaurant & Lounge, which was assigned index number 112103/2005 (Prior Action). By decision and order, dated August 1, 2006, this court entered an order permitting plaintiff to amend its complaint and to add, among others, the Moving Defendants as defendants. Certain of the claims against the defendants in the Prior Action were dismissed, without prejudice, by decision and order dated, February 7, 2006. The action was ultimately withdrawn and discontinued, as a result of issues regarding improper commencement of the action. This action, bearing index number 115889/2006, was commenced by plaintiff's new counsel, on October 20, 2006. With limited exceptions, and as discussed more fully below, the claims asserted by plaintiff in this action and the Prior Action are

¹ The record reflects that plaintiff has entered into stipulations with Luc Cam Senh, Kok Hooi Looi, Mai Senh and Li C. Pao, which provided for the dismissal and discontinuance of claims against these individual defendants with prejudice.

substantially similar.

In its complaint, plaintiff alleges that it sold and delivered goods to the Restaurant based on oral requests of the individual defendants, who are shareholders of the Restaurant. Invoices for the goods, which totaled about \$76,000, are attached as exhibits to the complaint. When no payments were made on the invoices, plaintiff commenced the Prior Action. Plaintiff also alleges that the Moving Defendants personally guaranteed the Restaurant's debt, without intending to perform the obligations thereunder. Plaintiff further alleges that the Restaurant's assets, including the unpaid goods delivered to the Restaurant by plaintiff, were sold by the shareholders to the Restaurant's landlord, 83-15 Broadway LLC, in December 2006. The record reflects that the Moving Defendants, as shareholders, agreed among themselves in writing dated March 16, 2006, to deduct \$40,000 from the Escrow to pay plaintiff, as an out-of-court settlement of the dispute between the Restaurant and plaintiff, in the Prior Action. Apparently, when the payment was not made and further negotiations failed, this action followed.

In their motion seeking dismissal of the complaint pursuant to CPLR 3211, the Moving Defendants argue, among other things, that the breach of contract claim fails due to the statute of frauds; the breach of guaranty claim fails because they did not guarantee the corporate debt and cannot be held personally

liable; the fraud claim is conclusory and lacks specificity; and the doctrines of res judicata and/or collateral estoppel bar plaintiff's assertion and/or re-litigation of similar claims.

Discussion

In considering a CPLR 3211 motion to dismiss, the court is to determine whether a plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings are to be afforded a "liberal construction," and the court is to accord the plaintiff "the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Although factual allegations in a plaintiff's pleading may be accorded favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). Moreover, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the plaintiff has a cause of action, not whether [he or] she has stated one". *Asgahar v Tringali Realty*,

Inc., 18 AD3d 408, 409 (2nd Dept 2005).

The Account Stated - Breach of Contract Claim

In its complaint, plaintiff alleges that invoices were sent to and received by defendants, and since no objections were ever raised as to the validity of these invoices, an account has been stated in its favor and against defendants. Plaintiff also argues that defendants' statute of fraud defense does not bar its claim, because § 2-201 of the New York Uniform Commercial Code provides an exception when goods have been "received and accepted" by a defendant merchant. UCC § 2-201 (c) (3).

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 of the other." *Shea & Gould v Burr*, 194 AD2d 369, 370 (1st Dept 1993). Because a party receiving a statement must examine it and make all necessary objections, an agreement to pay a debt may be implied if the party keeps the statement and fails to object to it within a reasonable time, unless fraud, mistake or other equitable considerations are shown. *Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745 (1st Dept 1983).

Here, the invoices are for goods sold and delivered to the Restaurant, each addressed from plaintiff to "Senh's Restaurant Bar & Lounge 8315-8317 Broadway Elmhurst, NY 11373 1-718-271-

7888." Thus, the account stated claim is validly pleaded against the Restaurant, as the buyer and account debtor. However, the Restaurant is a corporate entity with a separate existence from its shareholders, who are generally not liable for the debts of the corporation. *Billy v Consolidated Machine Tool Corp.*, 51 NY2d 152, 163 (1980). Hence, Moving Defendants, as shareholders, cannot be held liable for the corporate debt, unless they bound themselves personally, such as by means of personal guarantees. *Key Bank v Grossi*, 227 AD2d 841, 843 (3d Dept 1996). The fact that one or more of the Moving Defendants may have signed the invoices to acknowledge the Restaurant's receipt of goods is of no moment, because the business of a corporation, a fictional legal entity, can only be conducted through its agents and officers, who are individuals. *Nevin v Citibank, N.A.*, 107 F Supp 2d 333, 350 (SD NY 2001) ("a corporation can only act through an individual"). The Moving Defendants cannot be liable for the Restaurant's breach of contract, unless they acted in bad faith or outside of their corporate capacity, which is not what is alleged here. *Maranga v McDonald & T. Corp.*, 8 AD3d 351, 352 (2nd Dept 2004).

In paragraphs 5 and 14 of the Complaint, plaintiff alleges that "[b]etween June 17, 2005 and August 5, 2005, Plaintiff sold and delivered good upon the oral request by Defendants to pay the amount agreed upon." Although plaintiff is entitled to the

benefit of all favorable inferences, bare legal conclusions are insufficient. *Sud v Sud*, 211 AD2d at 424. Thus, to the extent that plaintiff alleges that the Moving Defendants orally contracted for delivery in their capacity as individuals, the allegations are bare legal conclusions not entitled to weight (e.g., there are no facts indicating who made the oral requests, the basis for inferring that the requests were made in an individual capacity, when the requests were made, or who signed the invoices). Accordingly, the complaint fails to state a claim for account stated or breach of contract against the Moving Defendants and that claim is dismissed.²

The Breach of Guaranty Claim

Plaintiff also alleges that the Moving Defendants have executed personal guarantees with respect to the debts owed by the Restaurant to plaintiff, and thus should be held liable for the breach of guaranty claim, when they failed to perform the obligations thereunder. Copies of the alleged personal guarantees, in certified English translation and Chinese original, are attached to the parties' pleadings.

When a motion to dismiss is based on documentary evidence, dismissal is warranted only if the documentary evidence "utterly refutes" plaintiff's claim, and "conclusively" establishes a

²Because the invoices are writings that evidenced plaintiff's agreement to sell the goods to the Restaurant, statute of frauds is inapplicable.

defense as a matter of law. See *Paul A. Goshen v Mutual Life Ins. Co.*, 98 NY2d 314 (2002). Section 5-701 of the General Obligations Law provides that a "promise to answer for the debt, default or miscarriage of another person" must be in writing and subscribed by the party to be charged, or his lawful agent. GOL § 5-701.a.2. An agent for a disclosed principal "will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal." *Savoy Record Co., Inc. v Cardinal Export Corp.*, 15 NY2d 1, 4 (1964), quoting *Mencher v Weiss*, 306 NY 1, 4 (1953); *Worthy v New York City Housing Authority*, 21 AD3d 284, 286 (1st Dept 2005) (same).

The alleged guarantees are: (1) a document entitled "Shareholders meeting minutes and resolution," providing, in relevant part, that "shareholders further agree that after the sale of the restaurant, to pay back Kenny's eighty thousands US Dollars debt owed from June to August 2005" (document dated 9/25/05); (2) declarations by Kai Wan Chan and Jun L. Kuang, as "witnesses," providing, in relevant part, that "We didn't pay Plaintiff Kenny On Promise Inc. \$75,867.14 value of goods which Kenny On Promise Inc. sold to Defendant Senh's Restaurant during the period of June 17 to August 5, 2005. On Sept. 25, 2005, all shareholders agreed and signed in a meeting for paying back the above debt to Kenny On Promise Inc" and "Mai Senh and Kok Hool

Looi of Senh's Restaurant Inc. promised orally to Plaintiff for several times that Senh's Restaurant Inc. would surely pay back the money for buying good owed" (document dated 12/23/2005); (3) corporation resolutions by Kai Wan Chan and Jun L. Kuang stating, in relevant part, that "The more important thing is that having Senh's Restaurant be sold, all of the shareholders agreed that Senh's Restaurant Inc. Inc. must pay off in one lump sum of about \$80,000.00" and that "all shareholders of Senh's Restaurant Inc. Have to collect money (even if we have to do it) for paying back money for buying goods owed him" (document dated 12/19/2005); (4) an agreement among the Moving Defendants, as shareholders, that \$40,000 would be deducted from the Escrow to pay plaintiff, as an out-of-court settlement "reached between **Senh's Restaurant Inc.** and **Kenny On Promise Inc**" (document dated 3/16/2006); and (5) an agreement between the shareholders of the Restaurant and its landlord, with respect to the general terms for the sale of the Restaurant to the landlord (undated document).

The document referenced as 1 above is conclusively not a guaranty because it is not a writing subscribed by the party to be charged, or his or her lawful agent, pursuant to GOL Section 5-701.³ The document referenced as 2 above is conclusively not

³Although the document referenced as 2 above recites that the document referenced as 1 above was "agreed and signed in a meeting," the English translation of the document referenced as 1 above does not indicate that it was signed by anyone.

an individual guaranty because it merely recites that the document referenced as 1 above was signed, and, that two other shareholders previously promised plaintiff that the Restaurant would pay the debt. The document referenced as 3 above is conclusively not an individual guaranty because it merely recites that it is important that plaintiff be paid, even if the shareholders have to raise money to do so. The document referenced as 4 above is conclusively not an individual guaranty because it references a settlement between the Restaurant and plaintiff and the document referenced as 5 is irrelevant as agreement involving the landlord. Accordingly, the motion to dismiss the breach of guaranty is granted.

The Fraud Claim

In its complaint, plaintiff alleges that the defendants "maliciously and willfully entered into said guarantee fully intending to not perform, and, additionally, keep plaintiff's good [sic] and sold them and the business asset to the other and, thus, fraud [sic] plaintiff." Complaint, paragraph 22.

Under New York law, to state a prima facie fraud claim, a plaintiff must show: (1) misrepresentation of a material fact made by defendant; (2) defendant knew of its falsity and intended to defraud plaintiff; (3) plaintiff's justifiable reliance on such misrepresentation; and (4) resulting damages to plaintiff. *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996);

Richmond Shop Smart, Inc. v Kenbar Development Center, LLC, 32 AD3d 423, 424 (2d Dept 2006). Further, under CPLR 3016 (b), in a fraud claim, "the circumstances constituting the wrong shall be stated in detail." Also, the courts have held that "[e]ach of the foregoing elements [for a fraud claim] must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR 3016 (b)." *Cohen v Houseconnect Realty Corp.*, 289 AD2d 277, 278 (2nd Dept 2001) (citations omitted). Moreover, a fraud claim does not arise when the alleged fraud only relates to a breach of contract. *Caniglia v Chicago Tribune - New York News Syndicate, Inc.*, 204 AD2d 233 (1st Dept 1994).

Here, plaintiff's conclusory assertion that the Moving Defendants did not intend to honor the alleged personal guarantees does not state a fraud claim. Also, the fraud claim is simply a duplicate of the breach of contract and breach of guaranty claims already asserted against the Moving Defendants. In any event, the fraud claim lacks specificity and is unsupported by details, as required by CPLR 3016 (b). Based on the foregoing, the fraud claim should be dismissed.

However, in its opposition to the motion to dismiss, plaintiff asserts that it seeks to supplement its fraud claim with additional allegations, including: (1) the Restaurant was undercapitalized when it was formed by the defendants; (2) the

defendants used the Restaurant as their alter ego and for the purpose of stealing goods while hiding behind a corporate shield; (3) corporate formalities were not followed by the defendants; and (4) the corporate veil should be pierced to hold the defendants personally liable for the debts of the Restaurant. Plaintiff also asserts that these claims are collateral and extraneous to its breach of contract and guaranty claims, and it should be allowed to amend the complaint to reflect these additional allegations. A copy of the proposed amended complaint is attached as an exhibit to plaintiff's opposition papers.

The law is clear that, in order to properly assert a fraud claim, the alleged representation must be collateral or extraneous to the parties' contract. *Krantz v Chateau Stores of Canada, Ltd.*, 256 AD2d 186, 187 (1st Dept 1998). While the proposed additional allegations of fraud may arguably be viewed as "collateral and extraneous" to the breach of contract and guaranty claims, in order to pierce the corporate veil based on an alter ego theory, a plaintiff is required to show that the defendant "exercised complete domination over the corporation with respect to the transaction attacked" and that "such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury." *First Capital Asset Management, Inc. v N.A. Partners, L.P.*, 300 AD2d 112, 116 (1st Dept 2002). There are no facts supporting plaintiff's new

allegations that the Moving Defendants exercised complete domination over the Restaurant, and used the Restaurant as a front to "steal" goods of vendors and defraud trade creditors. Plaintiff was afforded an opportunity to conduct discovery in this case. Yet, the proposed amended complaint fails to set forth factual grounds to support plaintiff's claim of veil piercing and therefore, plaintiff's request for leave to amend the complaint is denied. *Norte & Co. v The New York And Harlem Railroad Co.*, 222 AD2d 357 (1st Dept 1995) (upholding court's exercise of discretion in denying leave to amend, when questions could be raised as to the sufficiency of the proposed amendment, and permitting amendment would lead to needless litigation).

Plaintiff's Request For Injunction

Plaintiff also seeks a permanent injunction against the defendants "and anyone acting in concert therewith from releasing the \$80,000.00 being held after closing by the escrow agent." Complaint, paragraph 27. The injunctive relief sought in the complaint is identical to that sought in the Prior Action. For the reasons stated in the order of this court, dated August 1, 2006 and entered in the Prior Action, the requested relief is denied with prejudice, particularly where, as here, plaintiff has failed to show any entitlement to what is tantamount to a

prejudgment attachment under CPLR 6201 (3).⁴

Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint by defendants Chun Wei Li, Kai Wan Chan, Queenie Yu Chan, Jun L Kuang and Shut Shing Mar is hereby granted; and it is further

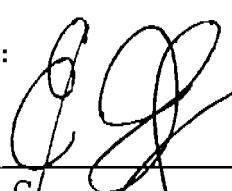
ORDERED that the claim against Sehn's Restaurant, Inc. is severed and shall continue; and it is further

ORDERED that the Clerk enter judgment in favor of defendants Chun Wei Li, Kai Wan Chan, Queenie Yu Chan, Jun L Kuang and Shut Shing Mar dismissing plaintiff's complaint as against them; and it is further

ORDERED that plaintiff's request for leave to amend the complaint is hereby denied.

This constitutes the Decision and Order of the court.

Dated: May 24, 2007

FILED ENTER: 
 JUN 05 2007
 NEW YORK
 COUNTY CLERK'S OFFICE
 J.S.C.
EMILY JANE GOODMAN

⁴ Based on the discussions set forth herein, it is unnecessary for the court to address the res judicata and collateral estoppel issues raised by the Moving Defendants to dismiss the complaint. To the extent that the court, in the Prior Action declined to dismiss the breach of guaranty claim against Luc Cam Sehn and Kok Hooi Looi, that determination is not binding on the Moving Defendants, who were later added as defendants in the Prior Action, subject to whatever defenses they had. See decision and order dated February 7, 2006.