

Nikon Inc. v White Horn Group, Inc.

2007 NY Slip Op 34166(U)

December 12, 2007

Supreme Court, Suffolk County

Docket Number: 0013132/2007

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 46 SUFFOLK COUNTY

PRESENT: Hon. Emily Pines

MOTION DATE: 07-31-07
SUBMITTED: 10-24-07
MOTION NO.: 002 MOTD

NIKON INC.,

Plaintiff,

-against-

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New York, New York 10173

WHITE HORN GROUP, INC. and CHRISTOPHER
JOHNSON,

Defendants.

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ORDERED that this motion by defendants, White Horn Group, Inc. ("White") and Christopher Johnson ("Johnson"), dated June 15, 2007 seeking dismissal of the complaint pursuant to CPLR 3211 (a) (1) and (7) is granted insofar as it pertains to Johnson; and be it further

ORDERED that this motion is denied as it pertains to White.

Facts

Nikon was a longtime customer of White and on or about May 16, 2006, Nikon and White entered into a contract wherein, White was to design and produce a full line product guide ("FLPG") for Nikon at a cost of \$832,077.00. On June 19, 2006, pursuant to the terms of the contract, Nikon made the first payment on the contract in the amount of \$277,359.00. From June 19, 2006 - through July 3, 2006, Nikon conducted several in-house meetings to evaluate the effectiveness of the FLPG and on June 26, 2006, Nikon notified White that the FLPG was under review along with the possibility that the project might not go forward. White was invited to participate in Nikon's decision making process. On or about July 3, 2006, White met with Nikon to obtain a better understanding of the FLPG and to consider the value of continuing the project. As part of this process, White prepared an

assessment report for Nikon for which White was paid a \$12,000.00 consultation fee.

On or about July 12, 2006 Nikon decided to cancel the FLPG and immediately telephoned White to notify them of Nikon's decision. During this discussion, representatives from both Nikon and White discussed the return of \$277,359.00 deposit previously received by White for this project. It is alleged in the complaint that an agreement to return this deposit, less any charges incurred by White on the FLPG assignment, was reached. Plaintiff relies on an e-mail dated July 13, 2006 sent by a representative of White, which sets forth charges incurred to date totaling \$35,500.00. Plaintiff also relies on an e-mail dated August 14, 2006 from a representative of White which indicates that White suggested two ways in which they would repay the initial deposit, less the expenses incurred. The first repayment method would be issuance of a credit to Nikon against its account; the second, suggests a refund in the amount of \$241,859.00 to be paid on the first of every month at a rate of \$50,000.00 per month beginning September 1, 2006. The complaint alleges that the second option was agreed upon by the parties. Payment was not received by Nikon on September 1. As a result, Nikon placed a call to Johnson, inquiring as to when payment would be made and expressing that Nikon expected payment on the first of every month. Following this call, the payment was received on September 11, 2006. The second installment was made by White on or about October 9, 2006. According to the complaint, no further payments have been made.

Nikon alleges that it made several attempts to resolve this matter, including a suggestion that it deduct other amounts owed to White by Nikon from this refund. On or about April 12, 2007 White rejected this offer and alleged that Nikon owed White for additional services it performed on the FLPG in addition to the \$35,500.00 previously referenced. Nikon then brought this action against White and Johnson individually alleging breach of contract and Unjust Enrichment and seeking a declaratory judgment.

Motion to Dismiss

It is well settled that, in considering a motion to dismiss pursuant to CPLR 3211(a)(7), the Court is to construe the complaint liberally, to accept the alleged facts as true, to give the plaintiff the benefit of every possible favorable inference, and to determine only whether the alleged facts fit within any cognizable legal theory (see, **Leon v Martinez**, 84 NY2d 83; **Guggenheimer v Ginzburg**, 43 NY2d 268; **Rovello v Orofino Realty Co.**, 40 NY2d 633). However, "while the allegations in the complaint are to be accepted as true when considering a motion to

dismiss, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (see, **Salvatore v Kumar**, __AD3d__, ____, 2007 NY Slip Op 08435 [2nd Dept, Nov. 7, 2007]; see also **M.J. & K Co., Inc. v Matthew Bender and Company Inc.** 220 AD2d 488). Under CPLR 3211 (a)(1), dismissal is warranted only if the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (see, **Goshen v Mut. Life Ins. Co.**, 98 NY2d 314, 326; **Leon v Martinez**, *supra* at 88).

Defendants argue that the August 14 e-mail which Nikon refers to as a "Repayment Agreement" does not constitute a contract as a matter of law and should be disregarded as it does not contain the essential elements of a contract; to wit, a promise and consideration. White alleges that Nikon did not give any additional consideration for the agreement, nor were there promises made by defendants to support the existence of a contract. In addition, defendants assert that the existence of the original FLPG agreement defeats plaintiff's claim for unjust enrichment. Furthermore, defendants claim that plaintiff's cause of action seeking a declaratory judgment is an attempt to rewrite the FLPG agreement to allow Nikon unilaterally to terminate the original agreement. Finally, defendants argue that all claims against Johnson in his individual capacity should be dismissed as he, at all times, was acting solely as President of White.

In opposition, Nikon argues that the e-mail of August 14 was evidence of an oral agreement between the parties for the repayment of the initial deposit. Nikon further argues that the mutual promises between the parties are sufficient consideration for the repayment agreement and that White's partial performance of the repayment is additional proof of the existence of an enforceable oral agreement. Nikon contends that it has plead its causes of action for unjust enrichment and declaratory judgment sufficiently to withstand this motion for dismissal.

Upon review of the record before it, the Court finds that dismissal against defendant Johnson in his individual capacity is warranted. The Complaint states that Johnson is the chief executive officer of White, a corporation organized under the laws of the State of New York. The complaint also alleges that Johnson is personally liable for White's contractual obligations because he is the agent, or "alter ego" of White. Although Nikon's Memorandum of Law states that it does not object to the dismissal of its claim against Christopher Johnson, "without prejudice", the Court finds dismissal with prejudice against defendant Johnson warranted. Courts have held that 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 his personal liability for that of his principal, (see, **Salzman Sign Co. v. Beck** 10 NY2d 63). One of the primary purposes of incorporating is to limit or eliminate the personal liability of corporate principals (see, **In the Matter of Jeffrey Goldman v Chapman** 2007 NY Slip OP 8068) Furthermore, a party seeking to pierce the corporate veil must establish that the owners exercised complete domination of the corporation in respect to the transaction attacked and that such domination was used to commit a fraud or wrong against the plaintiff that resulted in the plaintiff's injury (*Id* at 2). The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their "alter ego," without more, will not suffice to support the equitable relief of piercing the corporate veil, (*Id* at 3). Plaintiff offers no agreement by Johnson to be personally liable for the obligations of White. All contracts alleged in the complaint were between Nikon and White with no reference to a personal guarantee by Johnson. Therefore the motion to dismiss the complaint as against defendant Johnson, is granted pursuant to CPLR §3211(a)(7).

However, dismissal of the complaint against White, is not supported by the record currently before the Court. The allegations in the complaint arise out of what plaintiff refers to as a "repayment agreement". The allegations in the complaint not only refer to the alleged oral agreement to repay the downpayment, but rely on both an E-Mail dated August 14, 2006 and the partial payments made by White following the alleged agreement. Courts have held that the doctrine of part performance may be invoked, if the conduct relied upon can be characterized as unequivocally referable to the agreement alleged (**Klein v Jamor Purveyors**, 108 AD2d 344). Construing the facts in a light most favorable to the plaintiff herein, the Court finds that the complaint states a cause of action against White for breach of contract and unjust enrichment. Defendants argue that the claim for unjust enrichment must be dismissed as there is an original FLPG agreement. However, this cause of action arises from an alleged oral agreement by the parties for repayment, not from the original FLPG contract as argued by the defendants. The existence of the original contract has no bearing on plaintiff's unjust enrichment claim. Whether or not the parties entered into a subsequent repayment agreement is an issue of fact to be decided after discovery has moved forward. Therefore dismissal of plaintiff's second cause of action as it pertains to White, is denied.

Plaintiff's third cause of action seeks declaratory judgment. Declaratory relief need not be sought alone and may be joined with demands for any other relief the plaintiff deems itself entitled (**Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3001:5**). Furthermore, both legal and equitable relief may be demanded in the same complaint, (see, **Fine**

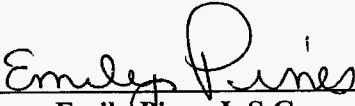
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v **Scheinhaus**, 109 NY2d 307) and the inclusion of a money demand will not necessarily preclude an injunction (see **Credit Agricole Indosuez v Rosslyskiy Kredit Bank** 94 NY2d 541). Therefore the court denies dismissal of the third cause of action as it pertains to White.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: December 12, 2007



Emily Pines J. S.C.