[*1]

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

PRESENT: HON. PAUL G. FEINMAN Justice PART 12

Index Number : 601190/2008
JOHN E. OSBORN, P.C.
vs
JASPER INT'L BUSINESS INC.
Sequence Number : 001
DISMISS ACTION

INDEX NO. 601190/2008
MOTION DATE 11/10/08
MOTION SEQ. NO. 001
MOTION CAL. NO. 13

his motion to/for DISMISS

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	per attached
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED
JAN 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/12/09

Paul G. Feinman
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☒ Preliminary Conference 3/11/09 9:30 a.m.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

JOHN OSBORN, P.C.,

Plaintiff,

against

JASPER INTERNATIONAL BUSINESS, INC. and AHARON VAKNIN,

Defendants.

----------X

Index Number 601190/2008
Submission Date Nov.10, 2008
Mot. Seq. No. 001
Cal. No. 13

DECISION AND ORDER

For the Plaintiff:
John E. Osborn, P.C.
By: John E. Osborn, Esq.
841 Broadway, Suite 500
New York NY 10003
(212) 576-2670

For the Defendants:
Rivkin Radler LLP
By: Ryan Goldberg, Esq.
926 Reckson Plaza
Uniondale NY 11556-0926
(516) 357-3000

Papers considered in review of this motion to dismiss and cross-motion to amend :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion & Memo of Law	2, 3
Affirmation in Further Support	4
Plaintiff's Reply Memo of Law	5

PAUL G. FEINMAN, J.:

The motion and cross-motion are consolidated for purposes of decision.

Defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (7) and (8). Plaintiff cross-moves to amend the complaint pursuant to CPLR 3025. For the reasons which follow, the motion to dismiss is denied in its entirety, and the cross-motion is granted.

Procedural and Factual History

This is a dispute over legal fees allegedly owed to plaintiff law firm by defendants as of December 2007. Plaintiff was initially hired pursuant to a written retainer in June 2007 by Horizon Global to perform work in connection with two construction development projects in the Dominican

Republic (Mot. Ex. C).[1] In about October 2007, one of the projects was bought by defendant Aharon Vaknin from Horizon, and plaintiff was informed by Project Manager Russell that Vaknin "is now the sole owner" of the project (Cross-Mot. Ex. E, email dated Sept. 18, 2007 from Russell to Goss).[2]

Vaknin established Jasper International as a British Virgin Islands corporation in January 2007, and he is director (Mot. Goldberg Aff. ¶ 3; Vaknin Aff. ¶ 1). There is no retainer agreement signed on behalf of Jasper International or Vaknin as concerns the legal work that plaintiff continued to perform for the project. Plaintiff's attorneys communicated with Russell, and with Vaknin through email (Cross-Mot. Osborn Aff. ¶¶ 5-12). They also periodically met with Vaknin in New York City (Cross-Mot. Osborn Aff. ¶ 12). Although plaintiff's attorneys were led to believe that Jasper International owned an interest in the project, they "never received proof of the fact" (Cross-Mot. Osborn Aff. ¶ 8). However, plaintiff sent invoices via email to Russell, and by letter to Vaknin, at Jasper International, first to an address on West 71st Street, and then to an address on Fifth Avenue, both in New York, New York (Cross Mot. Ex. G, I). At issue is the alleged balance due of $49,077.73.

Plaintiff commenced its action with a complaint containing two claims of breach of contract, one as against each defendant, and two claims of account stated, one as against each defendant.

Defendants move to dismiss the complaint for failure to state a cause of action, and based on jurisdictional grounds. They argue first that Vaknin cannot be held personally liable for the debt of

---

[1]The retainer agreement is signed on behalf of Horizon by Dan Russell, Project Manager, Clear Shore Management LLC..

[2]It is undisputed that Vaknin is a resident of New York City.

the corporation, and that the complaint does not allege that Vaknin agreed or even hinted that he would be personally liable for the contracts. Defendants seek sanctions if plaintiff "does not concede the issue." They also move to dismiss the complaint on the ground that the court does not have jurisdiction over Jasper International, as its offices are registered in the British Virgin Islands. It argues that the corporation does no business in New York, does not maintain "a corporate or any other office in New York," or a corporate bank account, and does not employ any individuals in New York (Mot., Vaknin Aff. ¶¶ 3, 4).

Plaintiff opposes the motion and cross-moves to amend the complaint to add causes of action for breach of contract and account stated as to Vaknin under the theory of piercing the corporate veil. Osborn avers that in the summer and early fall of 2007, plaintiff submitted bills to Dan Russell, Horizon's project manager. Russell informed plaintiff via email in September 2007 that Vaknin was now the sole owner of the project, having bought out Horizon, and that he, Russell, was now working for Vaknin.[3] Russell also said that "It is [Vaknin's] deal . . .he is the decision maker . . . everything has to be run by him" (X-Mot. Osborn Aff. para. 6). Russell stated to Osborn that Vaknin would be "personally responsible" for the legal fees (X-mot Osborn Aff. para 7). Plaintiff was given Vaknin's personal email address at Hotmail.com,[4] and plaintiff's invoices were mailed to what plaintiff claims is Vaknin's apartment on West 71st St. (X-mot. Osborn Aff. para 9,10).[5] Plaintiff billed Vaknin monthly. In December, the amount billed for September-October

---

[3]Russell's later emails were still originated from the Horizon email address.

[4]In contrast, plaintiff communicated to Russell at a Horizon email address.

[5]Defendants' attorney (but not Vaknin) states that this address is not Vaknin's home, but an office space (Goldberg Aff. in Furth. Supp. ¶ 9, n. 3).

($10,219.50), was paid through a check issued from "Clear Shore Management, LLC," with an illegible signature (X-mot Ex. F). Copies of emails between Dan Russell and plaintiff concerning the amounts owing, show that Russell knew the bills were overdue and that he would speak with Vaknin about them; plaintiff subsequently tried to reach Vaknin directly. The balance remains unpaid.

Discussion

On a motion to dismiss pursuant to CPLR 3211, the court accepts as true the facts as alleged in the complaint and submissions in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001], citing *Tenuto v Lederle Labs.*, 90 NY2d 606, 609-610 [1997]; *Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). The test is "whether the proponent of the pleading has a cause, not whether he has stated one." (*Leon v Martinez*).

Defendants' pre-answer motion to dismiss based on jurisdictional grounds must be denied. Despite their arguments to the contrary, the court has jurisdiction over Jasper International, based on the reasoning in decisions such as *Fischbarg v Douchet*, 9 NY3d 375 (2007), in which the Court of Appeals held that the retention of a New York law firm by a non-New York entity, where there are subsequent communications with the law firm in New York and legal work is performed, sufficiently establishes a continuing attorney-client relationship in the State and a transaction of business under CPLR 302 (a) (1).

Defendants also seek dismissal of the complaint as against Vaknin because an officer of the corporation cannot normally be held liable for the debts of the corporation. Plaintiff cross-moves to

amend the complaint to add two causes of action alleging breach of contract based on the theory of piercing the corporate veil so as to reach Vaknin personally.

Defendants argue that plaintiff fails to allege that Vaknin personally agreed to be liable for the fees, other than allegedly through the statements of his project manager, Russell. They point out that plaintiff's invoice of November 17, 2007, addressed to Vaknin care of Jasper International, includes the statement that plaintiff had done legal work for the corporation, and argue that this statement belies any argument by plaintiff that it believed it was working for Vaknin personally. They also argue that the complaint does not proffer particularized statements detailing misconduct, other of course than the failure to pay plaintiff for its legal work.

Veil-piercing is a "fact-laden claim" (*First Bank of Americas v Motor Car Funding*, 257 AD2d 287, 294 [1st Dept. 1999]). To successfully pierce the corporate veil, plaintiff must ultimately establish that an owner or officer exercised complete domination of the corporation in respect to the transaction attacked, and that such domination was used to commit a wrong against the plaintiff resulting in its injury (*Matter of Morris v New York State Dept. of Tax. & Fin.*, 82 NY2d 135, 141 [1993]). The plaintiff must allege that the officer, through his domination, misused the corporate form for his personal ends so as to commit a wrong or injustice on the plaintiff (*Morris v State*, 82 NY2d at 143). A shareholder may be held liable for corporate debts where he used the corporation to transact personal business (*see, Matter of Total Care Health Indus. v Dept. of Social Servs.*, 144 AD2d 678 [2d Dept. 1988]). A corporate officer should disclose he is transacting business purely in a corporate capacity in order to be shielded from personal liability (*Wolberg Elec. Supply Co. v Kwiatkowski*, 235 AD2d 731, 732-33 [3d Dept. 1997]).

Factors that have persuaded courts to find a dominated corporation include allegations such

as: "(1) the absence of corporate formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) use of common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by others of the corporations as if it were its own" (*Wm. Passalacqua Bldrs. v Resnick Developers S.*, 933 F2d 131,139 [2d Cir. 1991]). No one factor is dispositive for a finding of complete domination (*Freeman v Complex Computing Co.*, 119 F3d 1044, 1053 [2d Cir. 1997]).

Here, bearing in mind that this is the pleading stage and not the proof stage, plaintiff sufficiently sets forth allegations that would tend to establish, if true, that Vaknin personally orally contracted with plaintiff for its continued legal services as concerns the development project, and that Vaknin did not explicitly notify plaintiff that he was acting on behalf of the corporation, given that his personal email was used, bills were mailed purportedly to his home address, and the check issued to plaintiff was issued from some other entity under Vaknin's control. The allegations suggest that the theory of veil-piercing is not patently devoid of merit on its face, based on allegations of possible inadequate capitalization and commingling of funds, and a lack of corporate formalities (*see, International Credit Brokerage Co., Inc. v Agapov*, 249 AD2d 77, 78 [1st Dept.

1998]). Accordingly, the motion to dismiss the complaint based on failure to state a cause of action is denied. As there is no prejudice to defendants at this early stage of the litigation, the cross-motion to amend the complaint to add the theory of piecing the corporate veil is granted (CPLR 3025 [b]). It is

ORDERED that the motion to dismiss the complaint is denied in its entirety; and it is further

ORDERED that the cross-motion to amend the complaint is granted, and the proposed amended complaint attached as Exhibit B to the cross-motion should be deemed served on the date of service a copy of this Order with notice of its entry of this Order; and it is further

ORDERED that defendants are directed to serve their answer within 20 days of service of the notice of entry of this Order; and it is further

ORDERED that the parties shall, by February 2, 2009, contact the E-Filing Clerk's Office to discuss conversion of this matter to electronic filing or shall execute the consents previously mailed to them by the Trial Support Office with a copy of the notice of the Administrative Judge's designation of Part 12 as a presumptive electronic filing part; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 12 on March 11, 2009, at 9:30 a..m., at the New York County Courthouse, 60 Centre Street, Room 212, New York, New York 10007.

This constitutes the decision and order of the court.

Dated: January 12, 2009
New York, New York

J.S.C.

(2009 Pt 12 D&O_601190_2008_001_jh)