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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 603610/2008
SCHIANO, NANCY
VS.
MARINA INC.
SEQUENCE NUMBER : # 001
DISMISS

INDEX NO. 603610-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

FILED
JUL 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

and PC Scheduled for
9/17/09 @ 9:30 am in Part 10 @
9:30 am in Room 232

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

JUL 14 2009

Dated: 7/14/09

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Supreme Court of the State of New York
County of New York: IAS 10

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NANCY SCHIANO,

Plaintiff,

Decision/Order

-against-

Index# 60361/08
Motion Seq.: 001

MARINA, INC.; JUMP APPAREL CO. INC.
a/k/a JUMP APPAREL, INC.,
GLENN SCHLOSSBERG and MARK BROWN,

Defendants.

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Present: Hon. Judith J. Gische:

Pursuant to CPLR 2219(A) the following numbered papers were considered by the court on this motion to dismiss:

PAPERS	NUMBERED
Notice of Motion, GS affd. Dated 2/10/09, exhibits	1

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

The defendants have collectively moved for an order pursuant to CPLR §§ 3211(a)(1) and (a) (7) dismissing the first cause of action in its entirety and the second cause of action against Glenn Scholssberg only. Plaintiff Nancy Schiano ("Schiano") opposes the motion. The first cause of action is asserted against defendants Marina, Inc. ("Marina"), Jump Apparel Co. Inc. ("Jump") and Glenn Schlossberg ("Schlossberg") for breach of an employment agreement. The second cause of action is against defendants Schlossberg and Mark Brown (Brown") for breach of a shareholders agreement. In support of their motion, defendants have provided documentary evidence in the form of the subject employment agreement, a one page modification

thereof and the subject shareholders agreement.

Where a motion is directed to the sufficiency of the pleadings, the court must accept the facts alleged in the complaint as true, and the pleading is to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997). Dismissal of a complaint is only warranted if all allegations contained within the four corners of the pleading, if true, nevertheless fail to raise a compensable claim. Guggeheimer v. Ginzburg, 43 NY2d 268, 275 (1977). If a motion is also based upon documentary evidence submitted by the moving party in connection with the motion (*see* Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]), such evidence must definitively dispose of plaintiff's claims (Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 [1st dept. 1995]).

Based upon the complaint and the documentary evidence, the following "facts" are considered on this motion.

Marina is an apparel manufacturing company formed in November 2000. In December 2000, an employment agreement and shareholders agreement were signed. According to its terms, the employment agreement is between Marina and Schiano. Schaino was hired as president of Marina for a base salary, benefits and for a 5% interest in Marina. It was for an initial term of 24 months, except that Schiano could be terminated upon mutual agreement of the parties, her death or disability or if she left employment. Jump guaranteed the payment of Schiano's employment during the two year term of the original employment agreement. The employment agreement is signed by Nancy Schiano. It is also signed by Schlossberg in his capacity as secretary of Marina and then signed again by Scholssberg in his capacity as president of Jump.

The employment agreement was later modified pursuant to a one page writing which extended the term of employment until November 1, 2003, but made clear that the term of Jump's guarantee of Schiano's base salary ended on December 4, 2002. It is signed by Scholssberg as Chairman of the Board and Schiano in her individual capacity.

At or about the same time the original employment agreement was signed, a shareholders agreement was also executed among Schiano, Brown and an entity known as SF Enterprises Corporation ("SF Enterpises"). The shareholders agreement pertained to the formation of Marina. Under the shareholders agreement Schaino was issued 5 shares of stock, Brown was issued 15 shares of stock and SF Enterprises was issued 80 shares of stock. Under the shareholders agreement Marina agreed to employ Schiano so long as she was a shareholder. It also provided that Schaino would share in distributions according to a particular formula. The shareholders agreement is signed by Nancy Schiano in her capacity as president of Marina and then signed again by her in her personal capacity. It is also signed by Brown. It is then signed by Scholssberg in his capacity as president of SF Enterprises.

Schiano claims that after the written employment agreement expired, it was renewed for successive two year terms through October 31, 2009. The alleged renewals of the employment agreement were not in writing. Schiano claims that on August 22, 2008 Schlossberg improperly, and in violation of employment agreement, took action to unilaterally terminate her employment from Marina.

Schiano's first cause of action, breach of the employment agreement, is based upon her claim that she was wrongfully terminated. Schiano's second cause of action

alleges that: she was not compensated in accordance with the shareholders agreement; following her wrongful termination she was not compensated for her shares, and the agreement was breached in connection with the dissolution of SF Enterprises.

Defendants argue that the first cause of action fails because the statute of frauds prohibits two year renewal of employment contracts without a writing. They argue that, in any event, Jump's obligation as a guarantor ended, by it terms, on December 4, 2002. Finally, they argue that Schlossberg never signed in his personal capacity and therefore cannot personally be held accountable for any employment agreement between Schiano and Marina. Likewise, on the shareholders agreement, defendants also argue that Schlossberg cannot be held personally responsible because he did not sign the agreement in his personal capacity.

In opposition, Schiano argues that once the written two year employment agreement expired, it continued on the same terms and conditions, including the subsequent term. Schiano argues that as to Jump, there is successor liability and liability based upon a theory of piercing the corporate veil. Schiano argues that Schlossberg is personally liable for breach of the employment agreement and the shareholders agreement on a theory of piercing the corporate veil. Finally, argues that Schlossberg is personally liable for breaching the shareholder agreement based upon a theory of tortious interference with contract.

Discussion

In general, employment contracts are subject to the state of frauds. GOL § 5-701. Thus, they need to be in writing if the term of employment exceeds one year. Andrews v. Cerberus Partners, 271 AD2d 348 (1st Dept 2000). Where an employee

continues to work beyond the term of the original employment agreement, there is a common law inference that the contract has renewed for an additional one year period. This inference can be rebutted by demonstrating that the parties did not intend to allow the contract to renew automatically. In such event the employee becomes an at will employee. Goldman v. White Plains Center for Nursing Care, 11 NY3d 173 (2008).

The first cause of action claims that the employment contract renewed for two year periods. There are no written renewal contracts employment contracts. Consequently, as a matter of law, the only inference of her continued employment after the expiration of the original written employment contract is that employment was, thereafter, renewed for one year intervals. The first cause of action is, therefore, limited to claiming damages, at most, until November 1, 2008.

Jump was a signatory to the employment contract only as a guarantor. The modification which extended the term of the original employment contract for an additional year, expressly provided that the guarantee expired on December 1, 2002, notwithstanding the continuation of the employment relationship between Marina and Schiano. Thus, there is no cause of action against Jump for breach of the employment contract based upon claims of wrongful termination in August 2008.

Schiano claims that Jump is still a viable defendant because the complaint alleges that there was a *de facto* merger of Marina and Jump, such that Jump assumed the obligations of Marina. In fact the complaint makes no such allegations. At most, the complaint alleges that Marina and Jump shared offices and that "Schlossberg and Brown ignored Marina's corporate entity and, instead, accounted for the business of Marina as a 'division' of Jump." These claims, even if believed, are insufficient to

establish that there was a *de facto* merger. A *de facto* merger requires a showing of certain factors, including: [1] continuity of ownership; [2] cessation fo the ordinary business and dissolution of the predecessor [3] assumption of successor liability necessary for continuity of business and [4] continuity of management, personnel, assets, physical location and general business operation. In re New York City Asbestos Litigation, 15 AD3d 254 (1st dept. 2005). While a de facto merger finding does not necessarily require the presence of all of these factors (In re New York City Asbestos Litigation, supra), the allegations here do not set forth sufficient facts to establish enough of these factors for a trier of fact to reasonably conclude that a *de facto* merger has occurred.

Schlossberg did not sign the employment contract in his personal capacity. In general, a non-party to a contract cannot be sued for its breach. TNS Holdings Inc. v. MKI Securities, 92 NY2d 335 (1998). The court rejects Shiano's contentions that there is some ambiguity abut the way in which Schlossberg signed the contracts. The format of the signatures makes it perfectly clear in what capacity he was signing the document.

Nonetheless, Schiano argues that Schlossberg and Jump should both be held responsible for breach of the employment contract based upon a theory of piercing the corporate veil. New York law permits a litigant to disregard the corporate form where a corporation is shown to be a mere shell dominated and controlled by another for the latter's own purposes. 888 7th Avenue Associates Limited v. Arlen Corporation, 172 AD2d 445 (1st dept. 1991). In order to plead a proper cause of action to impose "alter-ego" liability, a plaintiff must allege that : [1] the owners of the corporation exercised complete domination of the corporation in respect to the transactions at issue and [2]

such domination was used to commit a fraud or otherwise resulted in wrongful or inequitable consequences causing plaintiff's injury. Retropolis , Inc. v. 14th Street Development, LLC, 17 AD3d 209 (1st dept, 2005).

At bar the allegations are that the entities are related and commonly controlled by Schlossberg. It also alleged that under the direction of Schlossberg and Brown, the profits of Marina were recorded as profits of Jump. While the specifics of all of the relationships are not fully known at this time, it would be premature to dismiss the claim at this pleading stage. Ledy v. Wilson, 38 AD3d 214 (1st dept. 2007). The allegations, if true, amount to more than just the principals just making decisions on behalf of Marina. See: Dabrowski v. Abax, Inc., __ AD3d __ , 2009 WL 1885882 (1st dept), 2009 NY Slip Opn. 05639.

While the complaint does not separately assert the claims of piercing the corporate veil, the facts contained therein are sufficient to support such a theory. In reviewing a complaint on a motion to dismiss, the appropriate inquiry is whether the plaintiff has a cause of action, not whether s/he has stated a cause of action. If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail. Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). Piercing the corporate veil is a derivative cause of action which is only reached if the underlying cause of action for breach of the employment contract is established. Morris v. New York State Department of Taxation and Finance, 82 NY2d 135 (1993). Consequently , it may properly be considered in the context of the plead first cause of action for breach of the employment contract.

Defendants also seek to dismiss the second cause of action for breach of the shareholder agreement in so far as it is asserted against Schlossberg personally. They argue that he did not sign such agreement in his personal capacity. It is irrefutable from the document that he did not sign the shareholders agreement in his individual capacity.

Schiano nonetheless argues that her claims against Schlossberg withstand dismissal based upon a theory of piercing the corporate veil. She also claims that the allegations support a claim against Schlossberg for tortious interference with contract. Tortious interference with contract, however, is not the same claim as breach of contract. see: Joan Hansen & Co, Inc. V. Everlast World's Boxing Headquarters Corp., 296 AD2d 103 (1st dept. 2002). It is not even a derivative cause of action from breach of contract. The fact that Schiano now believes she has a claim against Schlossberg personally for interference with contract is not sufficient to have a breach of contract claim survive against him. In any event, no cause of action for tortious interference with contract and the requisite factual allegations required to support such a claim are included in the complaint.

As to piercing the corporate veil, in this second cause of action the claim is asserted only against the shareholders of Marina. SF Enterprises is the only corporate shareholder of Marina and, consequently, the only business entity that can be "pierced." There are insufficient allegations concerning Schlossberg's actions vís-a-vís SF Enterprises that would support a claim to disregard the corporate entity on this second cause of action. The allegations in the complaint state that Schlossberg failed to comply with the terms of the shareholders agreement in connection with the

dissolution of SF Enterprises. These allegations do not support a personal claim against Schlossberg for breach of the shareholders agreement that he did not sign in any individual capacity. Dabrowski v. Abax, Inc., *supra*.

Conclusion

In accordance herewith, the motion to dismiss is granted only to the following extent:

The first cause of action is limited to breach of an employment contract ending no later than November 1, 2008. The second cause of action is dismissed as to Glenn Schlossberg. The motion to dismiss is otherwise denied.

Defendants' time to answer is hereby extended in accordance with CPLR 3211 (f). Furthermore, this case is scheduled for a **Preliminary Conference on SEPTEMBER 17, 2009 at 9:30 a.m. in Part 10, 60 Centre Street, Room 232.** No further notices will be sent.

Any relief requested but not expressly granted herein is denied. This constitutes the decision and order of the court.

Dated: New York, NY
July 14, 2009

SO ORDERED:

J.G. J.S.C.