

Vue Mgt., Inc. v Photo Assoc.

2009 NY Slip Op 31922(U)

August 17, 2009

Supreme Court, New York County

Docket Number: 602886/08

Judge: Marcy S. Friedman

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

PRESENT: **MARCY S. FRIEDMAN, J.S.C.**

PART _____

Index Number : 602886/2008
VUE MANAGEMENT, INC.,
VS.
PHOTO ASSOCIATES
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

Justice

INDEX NO. 602886-08

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for summary judgment

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits Cross-Motion

Replying Affidavits _____

1
2

Cross-Motion: Yes No

Memos of Law M1-M3

Upon the foregoing papers, it is ordered that this motion

cross-motion are determined as per summary order dated 8-17-09.

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

FILED

AUG 26 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8-17-09

MJF

J.S.C.

MARCY S. FRIEDMAN, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

VUE MANAGEMENT, INC.,

Plaintiff,

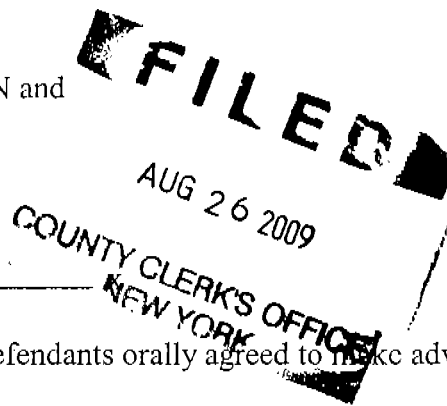
- against -

PHOTO ASSOCIATES, FRED KAUFMAN and
CHARLES ABRAMOVITZ,

Defendants.

Index No.: 602886/08

DECISION/ORDER



In this action, plaintiff alleges that defendants orally agreed to make advances to plaintiff on its accounts receivable in exchange for commissions. The complaint alleges causes of action, among others, for breach of an oral contract and an accounting. Defendants move for summary judgment dismissing the complaint as against the individual defendants, and to quash a subpoena. Plaintiff cross-moves to amend the complaint.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b].)” (Zuckerman, 49 NY2d at 562.)

Here, defendants make a prima facie showing that they were not properly sued in their individual capacity. In support of their motion, they submit documentation from the New York State Department of State that Photo Associates Inc. is an active corporation, that they repeatedly made payments of amounts due to plaintiff by Photo Associates Inc.'s check, and that plaintiff signed written assignments of accounts receivable to Photo Associates Inc. (Motion, Ex. H.) Defendants also submit the affidavit of Charles Abramovitz attesting that defendants never personally agreed to the contract at issue.

In opposition, plaintiff fails to raise a triable issue of fact as to defendants' individual liability. Plaintiff's opposition is supported only by the affidavit of its principal Gina Lengyel, who states in wholly conclusory terms that "Defendants orally agreed to provide Vue with advances on its accounts receivable." (Lengyel Aff., ¶ 12.) The affidavit does not contain any details as to the date or place where defendants allegedly individually made the agreement or any other specifics of the agreement. To the extent that Ms. Lengyel suggests that she did not sign the documents assigning the receivables to the corporate defendant, her vague affidavit is insufficient to raise a triable issue of fact in this regard.

The complaint will therefore be dismissed against the individual defendants. In view of this holding, the subpoena, which seeks bank records, including personal records of the individual defendants, will be quashed as overbroad.

In dismissing the action as against the individual defendants, the court rejects plaintiff's request, on its cross-motion, for leave to amend the complaint to add causes of action for fraud and piercing of the corporate veil. It is well settled that leave to amend "shall be freely given" absent prejudice or surprise resulting directly from the delay." (McCaskey, Davies & Assocs., Inc. v New York City Health & Hosps. Corp., 59 NY2d 755, 757 [1983]. See CPLR 3025[b].) It

is now also settled, however, that, “in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted” (Non-Linear Trading Co. v Braddis Assocs., Inc., 243 AD2d 107, 116 [1st Dept 1998] [internal quotation marks and citations omitted]), and leave to amend will be denied when the proposed pleading “is palpably insufficient as a matter of law.” (Davis & Davis, P.C. v Morson, 286 AD2d 584, 585 [1st Dept 2001]; Bankers Trust Co. v Cusumano, 177 AD2d 450 [1st Dept 1991], lv dismissed 81 NY2d 1067 [1993].) “Therefore, a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment.” (Non-Linear Trading Co., 243 AD2d at 116 [internal quotation marks and citations omitted].)

Here, plaintiff fails to show the potential merit of the proposed amendments. Plaintiff alleges in substance that defendants have failed to account for the receivables they have collected and have engaged in overly aggressive collection tactics that have caused plaintiff to lose accounts. (See Lengyel Aff., ¶¶ 15, 32-33.) These allegations do not plead independently tortious conduct that would be required to impose liability on defendants in their personal capacity. (See Murtha v Yonkers Child Care Assoc., Inc., 45 NY2d 913 [1978].) Moreover, the allegations of fraud are duplicative of the allegations of breach of contract, and therefore are not maintainable. (Metropolitan Transp. Auth. v Triumph Adv. Prods., Inc., 116 AD2d 526, 527 [1st Dept 1986]; Krantz v Chateau Stores of Canada Ltd., 256 AD2d 186, 187 [1st Dept 1998]; Rubinberg v Correia Designs, Ltd., 262 AD2d 474 [2d Dept 1999].)

Plaintiff also fails to plead conduct sufficient to support a veil piercing claim. “Mere conclusory statements that a corporation is ‘dominated or controlled’ by a shareholder are insufficient to sustain a cause of action against the shareholder in his individual capacity.”

[* 5]
(Itamari v Giordan Dev. Corp., 298 AD2d 559, 560 [2d Dept 2002]; Metropolitan Transp. Auth., 116 AD2d at 528.)

The branch of plaintiff's cross-motion to amend the caption to name Photo Associates Inc. in lieu of Photo Associates should be granted in the absence of any showing of prejudice by the corporate defendant.

It is accordingly hereby ORDERED that defendants' motion is granted to the extent of dismissing the complaint as against Fred Kaufman and Charles Abramovitz, and quashing a subpoena duces tecum to Chasc Bank dated January 3, 2009; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that the cross-motion of plaintiff is granted to the extent that Photo Associates Inc. is substituted as a defendant in this action in the place and stead of Photo Associates; and it is further

ORDERED that the caption of this action is amended accordingly, and it is further

ORDERED that movant shall serve a copy of this order with notice of entry on the Clerk of the Court and on the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that the parties shall appear for a preliminary conference on Thursday, September 17, 2009 at 11:00 a.m. in Part 57 (Room 328 at 80 Centre St.).

This constitutes the decision and order of the court.

Dated: New York, New York
August 17, 2009

FILED
AUG 26 2009
COUNTY CLERK'S OFFICE
NEW YORK


MARCY FRIEDMAN, J.S.C.