SCAN

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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FPL SERVICE CORP., d/b/a, TAYLOR BUSINESS SYSTEMS, J.M.E. CONSULTING CORP. and DIRECT RESPONSE LIST STRATEGICS, INC,

Plaintiff,

-against-

INTERNATIONAL SWEEEPS REVENUE SERVICES, INC., CHARLES KAFETTI and LAUREN EDELMAN

Defendants.

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TRIAL PART: 16

NASSAU COUNTY

INDEX NO: 018363/08

MOTION SEQ. NO: 1,2

SUBMIT DATE: 12/21/09

The following papers having been read on this motion:

Notice of Motion..... 1
Opposition..... 2
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Opposition..... 4
Reply.....5

Motion pursuant to CPLR §3025[b] by the plaintiffs FPL Service Corp., d/b/a, Taylor Business Systems, J.M.E.. Consulting Corp. and Direct Response List Strategics, Inc., for leave to amend their verified complaint so as to (1) add codefendants Charles Kafetti and Lauren Edelman as parties to the first twelve causes of action set forth in the complaint; and (2) to add CSRL, Inc. as a new defendant to the action.

Cross motion pursuant to CPLR §3212 by the defendants Charles Kafetti and Lauren Edelman for dismissal of the plaintiff's verified complaint insofar as asserted against them.

In July of 2007, defendant International Sweeps Revenue Services, Inc ["ISRS"] – which sells "sweepstakes reports" and supplies sweepstakes information to its customers – entered into separate, oral contracts with plaintiffs FPL Service Corp ["FPL"], J.M.E. Consulting Corp ["JME"] and Direct Response List Strategics, Inc. ["DRLS"]. In accord with the terms of the contracts, the plaintiff-corporations were allegedly to provide certain sweepstakes-related goods and services to ISRS (Cmplt., ¶¶ 9-1; Sigler Dep., 13, 34).

Within a year of the parties' initial agreements, their relationship soured when ISRS allegedly failed to make payment for various goods and services provided by the plaintiffs (Cmplt., ¶¶ 18, 21, 25-26, 31).

By summons and verified complaint dated October, 2008, the plaintiffs commenced the within action against codefendants ISRS, Charles Kafetti, ISRS' sole shareholder and president, and Lauren Edelman – an ISRS employee who is also Kafetti's fiancee (Ans., ¶ 143; Kafetti Dep., 7).

The plaintiffs have asserted twelve, separately captioned causes of action against the ISRS, all of which essentially derive from the same basic factual predicate (Cmplt., ¶¶ 15-92). The complaint also contains two additional claims – the thirteenth and fourteenth causes of action – which are interposed solely against the two individual defendants, Kafetti and Edelman. These individual claims are grounded upon: (1) Edelman's alleged written, personal guarantee of ISRS' contract obligations; and (2) fraud, as purportedly committed by both of individually named defendants (Cmplt., ¶¶ 79-89; 90-92).

The defendants have answered, setting forth various affirmative defenses and interposing eight counterclaims sounding in fraud, conversion, rescission, breach of contract and unjust enrichment.

Discovery has proceeded and the parties now move and cross move for stated relief in connection with their respective claims.

Specifically, the plaintiffs request for leave to amend their verified complaint so as to, *inter alia*, interpose the first twelve causes of action against the individual defendants, Kafetti and Edelman on "alter ego" and/ or piercing the corporate veil theories (Prop. A. Cmplt., ¶¶ 16-22) and for leave to add a new party to the action, *i.e.*, C.S.RL., Inc ["CSLR"], an entity allegedly owned by codefendant Kafetti.

A proposed supplemental summons and amended complaint reflecting the changes have been annexed to the plaintiffs' moving papers (Pltffs Exh., "F"). The defendants oppose the application and cross move for summary judgment dismissing the complaint insofar as interposed against the individual defendants Kafetti and Edelman have. The plaintiffs' motion is granted. The defendants' cross motion is granted to the extent indicated below.

It is settled that "[l]eave to amend pleadings should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (*Schuyler v. Perry*, ___AD3d___, 886 NYS2d 228 [2nd Dept. 2009]; CPLR

3025[b] *see, Edendale Contr. Co. v. City of New York*, 60 NY2d 957, 959 [1983]; *DeMato v. Mallin*, 68 AD3d 711 [2nd Dept. 2009]; *Bolanowski v. Trustees of Columbia University in City of New York*, 21 AD3d 340). The decision whether to grant leave to amend a pleading rests within the court's discretion, the exercise of which will not be lightly disturbed (*Schuyler v. Perry, supra; Pergament v. Roach*, 41 AD3d 569, 572).

With respect to the plaintiffs' piercing the corporate veil claim, "[a] party * * * must show that the owners of the corporation exercised complete domination over it in the transaction at issue, and that such domination was used to commit a fraud or wrong against the plaintiff under circumstances that constitute an abuse of the privilege of doing business in the corporate form" (*Shkolnik v. Krutoy*, 65 AD3d 1214, 1215 *see also, TNS Holdings, Inc. v. MKI Securities Corp.*, 92 NY2d 335, 338-339 [1998]; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 [1993]; *AHA Sales, Inc. v. Creative Bath Products, Inc.*, 58 AD3d 6, 24; *Matter of Goldman v. Chapman*, 44 AD3d 938, 939; *Millennium Constr., LLC v. Loupolover*, 44 AD3d 1016).

More particularly, the "[f]actors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*Millennium Constr., LLC v. Loupolover, supra*, 44 AD3d at 1016-1017, *John John, LLC v. Exit 63 Dev., LLC.*, 35 AD3d 540, 541). "Other relevant factors that must be included in the calculus are the use of "common office space, address and telephone numbers of corporate entities * * *[and] the amount of business discretion displayed by the allegedly dominated corporation" (*Shisgal v. Brown*, 21 AD 3d 845, 848 *see also*, *Gateway I Group, Inc. v. Park Ave. Physicians, P.C.*, 62 AD3d 141, 146-147).

"The concept is equitable in nature, and the decision whether to pierce the corporate veil in a given instance will depend on the facts and circumstances" (*Gateway I Group, Inc. v. Park Ave. Physicians, P.C., supra*, 62 AD3d at 146-147, *quoting from*, *Hyland Meat Co. v. Tsagarakis*, 202 AD2d 552, 553). Indeed, the decision is "fact-laden" and therefore "not well-suited for summary judgment resolution" (*WBP Cent. Associates, LLC v. DeCola*, 50 AD3d 693, 695; *Ledy v. Wilson*, 38 AD3d 214, 215 *see, East Hampton Union Free School Dist. v. Sandpebble Builders, Inc.*, 66 AD3d 122, 130).

With these principles in mind, the Court agrees that the proposed amendment cannot be viewed as "patently devoid of merit" with respect to the alleged piercing the corporate veil theory advanced by the plaintiffs.

Although the parties' claims are hotly disputed and conflicting at this juncture, the plaintiffs have alleged *inter alia*, that Kafetti – with Edelman's aid and assistance – purportedly commingled the assets of ISRS with those of another entity (CSLR) which he solely owned (*see*, Horz [Dec. 3, 2009] Aff.,¶ 18); that he made fund transfers to that entity when the plaintiffs' invoices remained outstanding and unpaid; and that he allegedly engaged in a series of suspect transactions by which he and/or Edelman diverted and/or received "corporate funds for personal use," thereby allegedly supporting an inference that the defendants may have abused the corporate form with respect to the transactions underlying the plaintiffs' claims (*see generally, Gateway I Group, Inc. v. Park Ave. Physicians, P.C., supra; Shkolnik v. Krutoy*, 65 AD3d 1214; *NPR, LLC v. Met Fin Management, Inc.*, 63 AD3d 1128).

Further, the plaintiffs' claims with respect to the extent and scope of codefendant Edeleman's purported complicity in the transactions complained of – while disputed – are not "patently devoid of merit" for the limited purposes of sustaining the currently proposed amendments (*see generally, DeMato v. Mallin*, 68 AD3d 711[2nd Dept. 2009]; *Gitlin v. Chirinkin*, 60 AD3d 901, 902). Nor have the defendants shown that they would suffer relevant prejudice or surprise if leave to amend were to be granted (*Tyson v. Tower Ins. Co. of New York*, 68 AD3d 977 [2nd Dept. 2009]; *Peerless Ins. Co. v. Micro Fibertek, Inc.*, 67 AD3d 978).

Similarly, and viewing the evidence "in the light most favorable to * * * [the plaintiffs], as is appropriate in the context of * * * [a] motion for summary judgment" (*Fundamental Portfolio Advisors, Inc. v. Tocqueville*, 7 NY3d 96, 106 [2006]; *Mosheyev v. Pilevsky*, 283 AD2d 469), the Court agrees that upon conflicting allegations advanced by the parties, triable issues of fact exist with respect to the plaintiffs' fraud and fraudulent inducement claims, *i.e.*, the plaintiffs' claims that, *inter alia*, the defendants knowingly made false statements with the intent to deceive the plaintiffs regarding the funding of certain subsequently dishonored, postage reimbursement checks (*see generally, Channel Master Corp. v. Aluminum Ltd. Sales,* 4 NY2d 403, 407 [1958]; *McGowan*, 40 AD3d 583; *Auguston v. Spry*, 282 AD2d 489, 490).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Mosheyev v. Pilevsky*, 283 AD2d 469). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v. Robbins*, 191 AD2d 488, 489).

However, the defendants have established their *prima face* entitlement to judgment with

respect the plaintiffs' fourteenth (personal guarantee) cause of action, interposed solely against Lauren Edelman (Cmplt., ¶¶ 90-92).

Specifically, the defendants have submitted: (1) Edelman's affidavit denying that any such guarantee was provided; and (2) attached Paul Sigler's deposition testimony in which he admitted he has been unable to locate the document (Edelman Aff., ¶¶ 7-9; Sigler Dep., 35). Nor has a copy of the instrument been produced in opposition to the defendants' motion.

It is settled that a "special promise to answer for the debt, default or miscarriage of another" must be in writing (General Obligations Law § 5-701[a][2] *see e.g., CDJ Builders Corp. v. Hudson Group Const. Corp.*,67 AD3d 720; *Perini v. Sabatelli*, 52 AD3d 588, 589).

The Court disagrees with the plaintiffs' suggestion that the foregoing cause of action should be dismissed "without prejudice" at this juncture, based upon the speculative assertion that the plaintiffs might possibly locate the document at some point prior to trial (Leiser Reply Aff., ¶28)(*cf.*, 3212[f] *see generally, Williams v. D & J School Bus, Inc.*, ___AD3d___, 2010 WL 27865 [2nd Dept. 2010]; *Shectman v. Wilson*, 68 AD3d 848 [2nd Dept. 2009]).

The Court has considered the parties' remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED that the motion pursuant to CPLR §3025[b] by the plaintiffs FPL Service Corp., d/b/a, Taylor Business Systems, J.M.E.. Consulting Corp. and Direct Response List Strategics, Inc., for, *inter alia*, leave to amend their verified complaint in the form annexed to their motion papers, is granted in accordance herewith, and it is further,

ORDERED that the cross motion pursuant to CPLR §3212 by the defendants Charles Kafetti and Lauren Edelman for dismissal of the plaintiffs' verified complaint insofar as asserted against them, is granted to the extent that the fourteenth cause of action interposed against co-defendant Lauren Edelman is dismissed, and the cross motion is otherwise denied.

This constitutes the decision and order of this Court.

DATED: January 27, 2010

ENTER

HON. ARTHUR M. DIAMOND
J. S.C.

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