

Firoru Intl. Corp. v Empire State Med.Testing, P.C.

2010 NY Slip Op 32391(U)

August 25, 2010

Supreme Court, Nassau County

Docket Number: 003164-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
FIRORU INTERNATIONAL CORP.,

Plaintiff,

-against-

**EMPIRE STATE MEDICAL TESTING, P.C. and
WILLIAM TODD PORDY,**

Defendants.
-----x

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Index No: 003164-10

**Motion Seq. Nos: 1 & 2
Submission Date: 7/6/10**

The following papers having been read on these motions:

- Notice of Motion, Affirmation in Support, Affirmations (2) and Exhibits....x**
- Notice of Cross Motion, Affirmation in Opposition/Support,**
- Affidavit in Opposition and Exhibits.....x**
- Plaintiff's Memorandum of Law in Opposition.....x**
- Affirmation in Reply, Affirmation and Exhibit.....x**

This matter is before the Court for decision on 1) the motion filed by Defendant William Todd Pordy ("Pordy") on May 26, 2010, and 2) the motion filed by Plaintiff Firoru International Corp. ("Plaintiff") on July 1, 2010, both of which were submitted on July 6, 2010. For the reasons set forth below, the Court 1) grants Defendant Pordy's motion to dismiss the fifth and sixth counts of the Verified Complaint and otherwise denies the motion; and 2) denies Plaintiff's motion in its entirety.

BACKGROUND

A. Relief Sought

Defendant Pordy moves for an Order 1) pursuant to CPLR § 3211, dismissing the

Verified Complaint (“Complaint”); and 2) pursuant to 22 NYCRR § 130-1.1, imposing sanctions against Plaintiff and Plaintiff’s attorneys for allegedly frivolous litigation.

Plaintiff Firoru International Corp. (“Firoru” or “Plaintiff”) moves for an Order, pursuant to 22 NYCRR § 130-1.1, imposing sanctions against Pordy and his counsel for filing an allegedly frivolous motion to dismiss.

B. The Parties’ History

The Complaint (Ex. A to Schwartz Aff.) alleges that this is an action is to recover damages for financing provided by the Plaintiff to the Defendants for purposes of funding the start up costs of a medical professional corporation, which funds were not repaid.

The Complaint further alleges as follows:

Plaintiff and Defendant Empire State Medical Testing, P.C. (“Empire”) are New York corporations, and Pordy is a physician licensed to practice medicine in the State of New York. Pordy was the sole stockholder, director and officer of Empire. Empire was formed on October 19, 2009 for the purpose of providing medical services and treatment, including various forms of medical testing, at offices in the New York City metropolitan area.

Between on or about August 20 and December 4, 2009, Plaintiff agreed to provide financing to Empire and Pordy to fund its start-up costs and expenses, including subletting office space and purchasing/leasing equipment. Financing payments were made payable to Empire, Pordy and other persons and entities, including Defendants’ employees and landlords, on behalf of Defendants. In accordance with the parties’ agreement, Plaintiff lent Defendants money, which loans were to be repaid on demand with interest of nine percent (9%) per annum. In addition, the parties agreed that Plaintiff would be reimbursed, in part, through Empire’s accounts receivable. Without notice to its creditors, Empire filed a certificate of dissolution on January 21, 2010. Plaintiff alleges that Empire owes Plaintiff the sum of \$165,000.00 and is in default of its loan obligations.

The Complaint contains six (6) causes of action: 1) against Empire for breach of the loan agreement, 2) against Empire for unjust enrichment due to its breach of the loan agreement, 3) against Pordy for breach of the loan agreement, 4) against Pordy for unjust enrichment due to his breach of the loan agreement, 5) against Pordy, personally, for breach of the loan agreement by Empire, and 6) against Pordy, personally, for unjust enrichment due to Empire’s breach of the

loan agreement. Plaintiff seeks damages in the sum of \$165,000.00.

In his Affirmation dated May 5, 2010, Pordy affirms as follows:

In August of 2009, Anatoly Potik (“Potik”) proposed a business opportunity to Pordy involving the creation of a medical testing facility. Pordy advised Potik that, as a condition to his becoming involved with the proposed professional corporation (Empire), Potik would have to arrange and pay for Pordy’s medical malpractice insurance coverage (“Insurance Coverage”).

During the formation of Empire, Pordy repeatedly inquired about the status of the Insurance Coverage as well as other pertinent issues including independent contractor agreements and professional corporate accounting. Those inquiries included e-mails from Pordy to Potik in August and December of 2009.

On October 21, 2009, Pordy received an e-mail from a paralegal employed by Plaintiff’s counsel that attached copies of the Filing Receipt, Department of Education Consent and Certificate of Incorporation regarding the formation of Empire. The e-mail was copied to Plaintiff’s counsel. Pordy affirms that (1) the signature on the Certificate of Incorporation purporting to be his signature is not, in fact, his signature, (2) he never signed the Certificate of Incorporation and (3) he does not know who signed that document with his name. This assertion is supported by counsel for Pordy who, in his Affirmation in Support, affirms that “[t]he Certification of Incorporation bears the forged signature of Defendant PORDY, a fact admitted by Plaintiff’s counsel to your affirmant” (Schwartz Aff. at ¶ 10).

On October 23, 2009, Pordy met with Potik and Plaintiff’s counsel to discuss the formation of Empire. During this meeting, Plaintiff’s counsel advised Pordy that, should any issues arise, he “could and should close the Corporation” (Pordy Aff. at ¶ 6).

On December 1, 2009, Pordy e-mailed Potik and Plaintiff’s counsel reiterating the Insurance Coverage requirement, as well as other requirements including the tax status of Empire’s employees. On December 2, 2009, Pordy again e-mailed Potik and Plaintiff’s counsel to advise them that he would not continue to operate Empire without Insurance Coverage and if they failed to provide that Coverage, he would close Empire and its bank account (“Bank Account”). On December 4, 2009, Pordy advised Potik and Plaintiff’s counsel by e-mail (Ex. F to Ds’ motion) that he would be closing Empire, and had already closed the Bank Account. Pordy also advised them that there was \$3,098.05 left in the Account which would be used to

pay taxes and prepare the final tax return for Empire. Plaintiff's counsel asked Pordy to come to his office that day to wind down Empire, but Pordy advised him that the process was already completed. Pordy officially dissolved Empire on January 21, 2010 but submits that Plaintiff was aware of Pordy's intention to dissolve Empire as a result of his prior e-mails.

Pordy affirms that he closed the Bank Account after discovering certain irregularities. Specifically, his review of the Bank Account records on December 4, 2009 revealed 1) a transfer of \$15,000 into the Account on November 19, 2009 from an unknown source, and 2) tens of thousands of dollars subsequently paid to unknown sources, one of which the New York Police Department identified as Medfilm Services, a medical billing company that received two checks for \$12,900. Pordy affirms that a medical billing company customarily receives 2% of collectibles, which would suggest that Empire had received \$645,000 in payments that were not identifiable or traceable. Pordy avers that Empire only received \$15,804.29 in payments.

Pordy denies that the parties discussed or reached any loan agreement that would require Pordy or Empire to repay any amount and submits that Plaintiff has not produced a contract or other writing reflecting any such agreement. Pordy affirms that he and Potik agreed that Pordy would be paid \$50,000 annually, or \$4,166.00 per month. Pordy received payment in October of 2009 but received no payment in November or early December of 2009. Pordy submits that, at the time of Empire's dissolution, he was its only known creditor. Pordy also affirms that his colleague Dr. Jaime Uribarri ("Uribarri") has information regarding the parties' discussions, and received threats from Potik directed at Pordy.

In his Affirmation, Uribarri affirms as follows:

Uribarri is a medical doctor and colleague of Pordy, to whom he speaks regularly. Uribarri has a physician/patient relationship with Potik. In the summer of 2009, Potik approached Uribarri about a business venture that would involve opening and directing a medical professional corporation to treat premature ejaculation. Uribarri declined to participate but referred Pordy, who he knew to be trustworthy, to Potik. While Uribarri was in discussions with Potik regarding the potential business venture, Potik never raised the issues of 1) a loan, 2) Uribarri's potential responsibility to repay him for any expenses incurred in opening the medical corporation, or 3) any potential financial arrangement between Uribarri and Potik other than employer-employee. After Pordy closed the Bank Account, he "received threats regarding

[Pordy] from [Potik]” (Uribarri Aff. at ¶ 10). Uribarri does not specify the nature of those threats.

In his Affidavit in Opposition dated June 28, 2010, Potik affirms as follows:

Potik is the president of Plaintiff. In the summer of 2009, Potik approached Pordy about opening a medical testing facility limited to performing “diagnostic modalities such as basic nerve conduction studies and somatosensory evoked potential testing” (Potik Aff. at ¶ 3). Pordy would be the sole principal of the proposed entity (“Entity”). As Pordy was “cash poor” (*Id.*), Plaintiff would lend money to both Pordy and the Entity that would be used to fund the Entity’s initial start-up costs which would be repaid through the accounts receivable of Pordy and the Entity. Thereafter, Plaintiff would purchase an interest in the Entity’s denied no-fault claims, together with the right to pursue those claims from the first-party no-fault benefit providers. Potik concedes this agreement was oral.

Pordy willingly supplied the credentials required for the formation of a professional corporation that will provide medical services. Those credentials, which included documentation reflecting Pordy’s service as a Senior Resident in Internal Medicine and a Fellow in Renal Diseases, are annexed as Exhibit B. After Empire’s incorporation, Pordy met with Potik and his attorney on October 23, 2009 to discuss certain issues, at which time Pordy participated in a telephone call with the Internal Revenue Service (“IRS”) regarding Empire’s tax identification number.

In September of 2009, prior to the formation of Empire, Pordy traveled to Florida to participate in a workshop regarding issues in which Empire would be involved. Empire reimbursed Pordy for his expenses, including airfare and lodging. Potik provides documentation, annexed as Exhibit C, relating to Pordy’s participation in this workshop.

In addition, Plaintiff lent over \$135,000 to Empire and Pordy, consisting in part of approximately \$119,000 in checks (“Checks”) from Plaintiff’s account, payable to Empire, Pordy, employees of Empire and Pordy, medical billing companies employed by Empire and Pordy and landlords of buildings in which Empire rented space. Potik provides a spreadsheet (Ex. D) setting forth the Check numbers, amounts of these Checks and payees. Some of these Checks were issued before Empire was officially created in October of 2009 because Pordy required funds to operate the business which was already ongoing. In addition, on

November 19, 2009 Plaintiff made a wire transfer to Empire in the amount of \$15,000, as reflected on an Empire bank statement annexed as Exhibit E.

Potik alleges that on October 21, 2009, Pordy acknowledged the loan in writing by authorizing Plaintiff's attorney to endorse his name and deposit into counsel's IOLA checking account several insurance checks totaling \$7,547.74. In support, Potik provides a copy of a letter ("Letter") dated October 21, 2009 from Pordy to Plaintiff's counsel (Ex. F) that read as follows:

Dear Mr. Friedman,

This letter authorizes [Plaintiff's counsel] to endorse my name to and deposit into their IOLA account the checks, copies of which are appended hereto, in the total sum of \$7547.74 and to pay over the gross proceeds of same to [Plaintiff] on account for outstanding loans from [Plaintiff] to myself.

Very truly yours,

[Pordy]

Potik affirms that the insurance checks were made payable to Pordy because they were issued for services performed prior to the official formation of Empire on October 19, 2009.

Potik avers that, almost immediately after commencing Empire's business operations, Pordy "developed cold feet" (Potik Aff. at ¶ 11) and advised Potik in December of 2009 of his desire to terminate Empire. Pordy filed for the dissolution of Empire on or about January 21, 2010 as reflected by the certificate of dissolution (Ex. G).

Potik affirms that, prior to its dissolution, Empire had substantial assets. In addition, pursuant to the parties' alleged oral agreement, Plaintiff had a right to purchase an interest in denied no-fault claims. Potik submits that, in light of the parties' agreement as supported by Pordy's written acknowledgment of the loan, the Court should deny Pordy's motion to dismiss the Complaint.

In his Reply Affirmation dated July 6, 2010, Pordy affirms that 1) he has never seen, acknowledged or affixed his signature to the Letter; 2) he is not familiar with the address on the Letter and has never worked or lived there; and 3) he does not know what an IOLA account is, and would never authorize another person to endorse his name. Pordy suggests that Plaintiff copied his signature from checks endorsed on behalf of Empire, and then forged his signature on the Letter. Pordy also submits that it would have been illogical for him to incur debt in excess of

\$100,000 when he was earning a salary of only half that amount.

C. The Parties' Positions

Pordy submits that he is entitled to dismissal of the Complaint and the imposition of sanctions against Plaintiff and its attorney based on the facts that 1) the Complaint does not make reference to or specify any contract created between Plaintiff and Pordy; 2) the Complaint falsely alleges the existence of a loan agreement between the parties; 3) the Complaint falsely alleges that Plaintiff was unaware of the imminent dissolution of Empire, which Plaintiff in fact knew about as a result of the e-mail correspondence between the parties and their counsel; and 4) Plaintiff's counsel was aware, at the time of the filing of the Complaint, that these allegations were untrue.

Plaintiff opposes Pordy's motion, and submits that the Court should impose sanctions against Pordy's counsel, in light of the evidence before the Court that substantiates Plaintiff's claims, including 1) the supporting affidavit of Potik, and 2) documentary evidence, including the October 21, 2009 letter from Pordy, supporting Plaintiff's claim that it lent money to Pordy and Empire.

In his Reply Affirmation, counsel for Pordy submits, first, that the Court may not grant Plaintiff's motion for sanctions because Plaintiff's counsel has failed to submit 1) authority for his position, 2) an Affirmation of Counsel or 3) specifics regarding the amounts requested.

Counsel for Pordy also submits that there is no evidence to support Plaintiff's claim of a loan, noting, *inter alia*, that 1) the e-mails provided make no mention of a loan; 2) the Letter, which Pordy submits is forged, makes no reference to a loan agreement and contains no relevant attachments; 3) the alleged itemization of Checks provided by Plaintiff contains no dates for those Checks; and 4) Plaintiff fails to provide copies of those Checks.

Counsel for Pordy also contends that the alleged loan violates the Statute of Frauds because, as Plaintiff allegedly loaned Pordy over \$100,000 but was only paying him \$50,000 per year, repayment of the loan could not be performed within one year.

RULING OF THE COURT

A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

In addition, it is well settled that a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Statute of Frauds

General Obligations Law (“GOL”) § 5-701(a)(1) provides as follows:

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime;

For a written memorandum or note to meet the requirements imposed by the Statute of Frauds, it must be subscribed by the party to be charged therewith and must contain substantially the whole agreement, and all its material terms and conditions, so that one reading it can understand from it what the agreement is. *Currier v. Prudential Insurance*, 266 A.D.2d 596, 598 (3d Dept. 1999), citing GOL § 5-701(a) and *HPSC, Inc. v. Matthews*, 179 A.D.2d 974, 975 (3d Dept. 1992), quoting *Mentz v. Newwitter*, 122 N.Y.491, 497 (1890), *reh. den.*, 26 N.E. 758

(1891).

C. Piercing the Corporate Veil

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 884 N.Y.S.2d 94, 98 (2d Dept. 2009), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability on owners for the obligations of their corporations. *East Hampton*, 884 N.Y.S.2d at 98, citing *Matter of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton*, 884 N.Y.S.2d at 98, citing, *inter alia*, *Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has "abused the privilege of doing business in the corporate form," the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal use. *East Hampton*, 884 N.Y.S.2d at 99, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

D. Frivolous Conduct

22 NYCRR § 130-1.1(a) authorizes the court, in its discretion, to award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. Section 130-1.1(c) provides that conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

E. Application of these Principles to the Instant Action

The Court grants Defendant's motion to dismiss counts five (5) and six (6) of the Complaint, which seek to hold Pordy responsible for the alleged obligations of Empire. As

Plaintiff has elicited no facts demonstrating that Porody abused the privilege of doing business in the corporate form, and the documentary evidence before the Court refutes Plaintiff's allegation in those counts that Empire "informally dissolved without giving notice to its creditors, including Firoru," the Court dismisses those counts of the Complaint.

The Court is mindful of the almost glaring weaknesses of Plaintiff's case including 1) the absence of any reference to a loan in relevant correspondence, 2) the absence of any loan documents, 3) the suspicious convenience of the Letter, whose authenticity Porody disputes, to provide some writing evidencing the alleged loan, and 4) Plaintiff's failure to produce the Checks. The Court, however, is constrained to deny Defendant's motion to dismiss the remaining counts of the Complaint. With respect to the Statute of Frauds, Porody argues that Plaintiff alleges that it loaned Defendant over \$100,000 but was only paying Defendant \$50,000 per year and, therefore, repayment of the loan could not be performed within one year. While it is Porody's position that he was to receive \$50,000 annually, however, Plaintiff does not concede that agreement in its supporting papers. Finally, the Letter does provide at least some evidence that the loan existed. Thus, there are disputed issues of fact that prevent the Court from voiding the purported agreement based on the Statute of Frauds and dismissing the remaining counts of the Complaint.

In light of the disputed issues of fact, the Court denies the motions by Plaintiff and Defendant Porody for the imposition of sanctions.

All matters not decided herein are hereby denied.

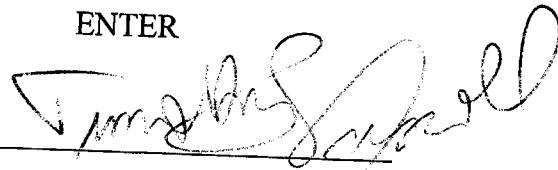
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on September 23, 2010 at 9:30 a.m.

DATED: Mineola, NY

August 25, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

AUG 31 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE