

Utility Audit Group v Flanagan

2010 NY Slip Op 33584(U)

December 17, 2010

Sup Ct, Nassau County

Docket Number: 016605/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

UTILITY AUDIT GROUP and
JOHN L. O'KELLY,

Plaintiffs,

-against-

MICHAEL FLANAGAN, BERNARD
CONNAUGHTON, KEVIN CONNAUGHTON
and PATRICK MACMENAMIN,

Defendants.

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 016605/09

MOTION DATE: Oct. 5, 2010
Motion Sequence # 001, 002

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affirmation in Opposition..... X
- Affidavit in Support..... X
- Reply Affirmation/Affidavit..... XXX
- Memorandum of Law..... XX
- Reply Memorandum of Law..... XX

Motion by defendants for summary judgment dismissing the complaint is **granted** in part and **denied** in part. Cross-motion by plaintiffs for summary judgment is **denied**.

Plaintiff Utility Audit Group is in the business of providing consulting services to commercial tenants with regard to alleged overcharges by their landlords. Defendant

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Michael Flanagan is the owner of 33 1/3 % of the shares of defendant Apple Mac & R Corp. and 50 % of the shares of defendant Roslu Corporation. Defendants Bernard Connaughton, Kevin Connaughton, and Patrick Macmenamin are also stockholders of the corporations. Apple Mac was dissolved by proclamation of the Department of State on September 28, 1994.

Despite being dissolved, Apple Mac entered into an agreement with Utility Audit Group on December 30, 2003. The agreement provided that Utility Audit would review Apple Mac's rent charges, including charges for taxes and utilities, and negotiate with the landlord. The agreement was signed by Flanagan as president of Apple Mac.

A settlement with the landlord was reached on July 16, 2004. Roslu Corporation had been dissolved by proclamation on June 30, 2004. Nevertheless, pursuant to an amendment of the lease dated July 16, 2004, Roslu Corporation was added as a tenant. After the dispute with the landlord was settled, Utility Audit submitted a bill to Apple Mac for its services in the amount of \$367,612.

Plaintiffs commenced an action against Apple Mac and Roslu to recover for its services (Index No 2194/05). By order dated August 30, 2005, the court granted Utility Audit summary judgment on the issue of liability on its breach of contract cause of action against Apple Mac. The court further granted Utility Audit summary judgment on the issue of liability on its quantum meruit cause of action against Roslu Corporation.

On August 18, 2009, plaintiffs commenced this action against defendants Michael Flanagan, Bernard Connaughton, Kevin Connaughton, and Patrick Macmenamin on the theory that they were personally liable for Utility Audit's fee. By order dated June 25, 2010, the court granted a joint trial of the two actions.

Defendants Michael Flanagan, Bernard Connaughton, and Kevin Connaughton move for summary judgment dismissing the complaint. Defendants argue that the Department of State's reinstatement of Apple Mac *nunc pro tunc* shields them from personal liability on the contract with Utility Audit. Defendants argue that they cannot be personally liable for services performed for Roslu because almost all of the work was done before Roslu was dissolved. In opposition, plaintiffs note that while a printout from the Department of State website shows that Apple Mac's status was "active" as of July 2, 2010, it does not set forth the reinstatement date.

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Plaintiffs cross move for summary judgment with respect their third, fourth, ninth, tenth, thirteenth, fourteenth, and sixteenth causes of action. The third cause of action alleges Michael Flanagan's personal liability for services performed for Roslu by Utility Audit. The fourth cause of action alleges Michael Flanagan's personal liability for legal services performed for Roslu by plaintiff John Kelly. The ninth cause of action asserts a claim against Michael Flanagan for unjust enrichment based upon services performed by Utility Audit for Roslu. The tenth cause of action asserts a claim against Michael Flanagan for unjust enrichment based upon legal services performed for Roslu by Kelly. The thirteenth cause of action alleges Kevin Connaughton's personal liability for services performed for Roslu by Utility Audit. The fourteenth cause of action alleges Kevin Connaughton's personal liability for legal services performed for Roslu by John Kelly. The sixteenth cause of action asserts claims against Michael Flanagan and Kevin Connaughton for services performed for Roslu on a "piercing the corporate veil" theory.

A person entering into a contract on behalf of a nonexistent corporate entity may be held personally liable on the contract (*Spring Valley Improvements v Abajian*, 40 AD3d 619 [2d Dept 2007]). The theory of liability is that because the principal did not exist the agent has breached his implied warranty of authority (*Metro Kitchenworks Sales v Continental Cabinets*, 31 AD3d 722 [2d Dept 2006]). This warranty has been breached even if the corporation is subsequently reinstated. However, an individual who has no actual knowledge of the dissolution, and thus has not fraudulently represented the corporate status of the dissolved entity, will not be personally liable for the obligations undertaken by the corporation while it was dissolved (*Lodato v Greyhawk North America*, 39 AD3d 496 [2d Dept 2007]). Nevertheless, an individual shareholder of the revived corporation may be liable for acts taken in bad faith (*Spinnell v JP Morgan Chase*, 59 AD3d 361 [1st Dept 2009]).

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

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On their motion for summary, it is defendants' burden to establish prima facie that they had no knowledge of Apple Mac's dissolution or their actions in entering into the contract with Utility Audit were taken in good faith. Defendants have failed to make the required showing. Accordingly, defendants' motion for summary judgment dismissing plaintiffs' claims against defendants for personal liability on the Apple Mac contract is **denied**.

The theory of unjust enrichment lies as a quasi-contract claim (*IDT Corp. v Morgan Stanley*, 12 NY3d 132, 142 [2009]). It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned (Id). Where there is no actual agreement between the parties, the agent makes no implied warranty of his authority. Thus, there can be no personal liability of the agent for the unjust enrichment of the principal because no implied warranty of authority has been breached.

Plaintiffs' claims against Roslu are based on a theory of unjust enrichment. As a matter of law, defendants cannot be personally liable for the unjust enrichment of Roslu on a theory of breaching the implied warranty of authority or "piercing the corporate veil." Accordingly, defendants motion for summary judgment is **granted** to the extent of dismissing plaintiffs' claims based on those theories. Defendants' motion for summary judgment is **denied** to the extent that plaintiffs assert claims against defendants for unjust enrichment in their own right.

Plaintiffs move for summary judgment on their claims against defendants based upon services performed for Roslu. To the extent that plaintiffs' claims are based upon defendants' breach of the implied warranty of authority or "piercing the corporate veil," plaintiffs' motion for summary judgment is **denied**. As plaintiffs have failed to establish prima facie that they conferred benefits on defendants individually, plaintiff's motion for summary judgment with respect to their direct claims against defendants for unjust enrichment is **denied**.

So ordered.

ENTERED

DEC 29 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Stephen A. Bucara
J.S.C.

Dated DEC 17 2010