

Alter v Audio-Rite Corp.
2011 NY Slip Op 33713(U)
May 5, 2011
Supreme Court, New York County
Docket Number: 150154/10
Judge: Judith J. Gische
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PRESENT: HON. JUDITH J. GISCHE
J.S.C.

PART 10

Index Number : 150154/2010

ALTER, SIMA

INDEX NO. _____

vs
AUDIO-RITE CORPORATION

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. 002

DISMISS

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

PC scheduled for July 14, 2011 at 9:30am.

Dated: 5/5/11

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

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

-----X
SIMA ALTER, LIBA GELTZER, LINDA HARARI,
DANIEL HESS, NEIMA HOCHST ADTER, RACHAEL
ABROMOWITZ-BELLER, HANNAH KRAUSZ,
HENRY TRESS, SHIFRA KAHAN, PERRI KOBE,
SHERI FISHMAN, individually and on behalf of all
other similarly situated current and former students.

Decision/Order
Index No.: 150154/10
Seq. No.: 001, 002

Plaintiff,

-against-

Present:
Hon. Judith J. Gische
J.S.C.

AUDIO-RITE CORPORATION, LEX REPORTING
SERVICE, INC., CLAIRE BLOCK, JERRY BLOCK,
GAIL HOCHMAN, and DOES 1 through 10, inclusive,

Defendants.

----- X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers - Motion Seq 001	Numbered
Def AUDIORITE's n/m dismiss, ABS affirm, exhs.....	1
CG affirm in opp, exhs.....	2
ABS reply affirm.....	3

Papers - Motion Seq 002	Numbered
Pltf's n/m DJ, CG affirm, exhs.....	1
Lex n/x-mot, JMG affirm, exhs.....	2
CG reply affirm.....	3

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

In a prolix 137-page complaint containing 84 causes of action, the plaintiffs
allege that they were enrolled in a voice-writing instruction program operated by
defendants Audio-Rite Corporation ("Audio") and Lex Reporting Service, Inc. ("Lex").

They also allege that Audio owns, manages, controls, operates, etc., Lex, and vice versa. They further allege that the individual defendants, *inter alia*, own, manage, control, operate and are employees of each of the corporate defendants.

Styling this case as a class action, the plaintiffs generally allege that:

[the] Defendants made materially false and misleading representations to current and former voice writing program students including, but not limited to: (i) selectivity of admissions; (ii) income opportunity; (iii) career services and job placement; (iv) and reputation; Plaintiff (sic) seek to recover tuition, lost earnings, prejudgment interest, attorney's fees, costs and expenses and any other damages as permitted by applicable law.

In their respective affidavits, defendant Jerry Block maintains that he is a shareholder and officer of Audio and Claire Block maintains that she is a shareholder and officer of defendant Lex. The defendants state that Audio and Lex are two separate corporate entities with no specific relationship to one another.

In motion sequence number 001, defendants Audio, Lex, Jerry and Claire Block move, preanswer, to dismiss the complaint (CPLR § 3211) on the following grounds: documentary evidence; failure to state a cause of action; and failure to allege fraud with specificity. The plaintiffs oppose the motion.

In motion sequence number 002, the plaintiffs move for entry of a default judgment against Lex (CPLR § 3215). In turn, Lex cross-moves for an extension of its time to appear, plead, or compel plaintiffs' acceptance of an answer. The plaintiffs oppose the cross-motion as well.

Defendant Gail Hochman has not answered or otherwise appeared in this action.

Since the issues raised and relief requested in each motion impact one another, the court hereby consolidates them for its consideration and disposition in this single

decision/order. The court will first address motion sequence number 002.

The default judgment motion

The plaintiffs move for a default judgment against Lex, even though Lex jointly moved to dismiss, preanswer, along with the other appearing defendants in motion sequence number 001. In their motion, the plaintiffs plainly state that they served Lex pursuant to BCL § 306, and that thirty days have passed without an answer or appearance by Lex.

Defendant Lex, through the affidavit of Claire Block, its principal, paints a very different picture of the events that transpired. First, she claims that Lex never received a copy of the summons and complaint in this action because it moved, more than ten years earlier, to a different address from the one registered with the Department of State. However, she asserts that since she was individually served, and noticed that Lex was a named defendant, she forwarded a copy of the summons and complaint to an attorney, Frederic Abramson, "who was authorized to protect the interests of all Lex, Audio, Jerry Block and Claire Block."

Mr. Abramson entered into a stipulation extending the time of Audio, Claire Block and Jerry Block to answer, but apparently failed to do so for Lex. This was apparently an oversight on the part of Mr. Abramson, according to Claire Block. Based thereupon, Lex requests that this court excuse its "inadvertent" default.

The plaintiffs' motion for a default judgment must be denied because the plaintiffs have failed to establish their compliance with additional notice requirements of CPLR § 3215 (4) (l). The letter that plaintiffs' attorney sent to Lex on August 27, 2010 does not meet their burden.

Since the motion is defective and must be denied, and in light of Lex's reasonable excuse for the default given Mr. Abramson's inadvertent error, the court grants Lex's cross-motion for an extension of its time to answer or otherwise appear in this action. Further, the court finds that since Lex joined in the pre-answer motion to dismiss, the court will *nunc pro tunc* deem Lex to have appeared in this action.

The motion to dismiss

Applicable law on a motion to dismiss

On a motion to dismiss, the court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]).

Under CPLR § 3211 (a) (1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law" (Leon, supra). In addition, in asserting a motion under CPLR § 3211 (a) (7), the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (id., quoting Guggenheimer v Ginsburg, 43 NY2d 268 [1977]).

Discussion

The complaint asserts seven causes of action on behalf of each plaintiff under

four different legal theories: [1] breach of contract; [2] negligent misrepresentation; [3] [1] fraud-based (actual, constructive and fraud in the inducement); and [4] deceptive trade practices under GBL § 349. The plaintiffs have also asserted a claim for attorneys fees.

Breach of contract

The defendants have provided a copy of an invoice and contract of sale dated 10/25/06 and signed by plaintiff Daniel Hess, which incorporates by reference a "disclaimer" page (the "Contract"). Defendant Jerry Block states in his affidavit that every person who enrolled with Audio was required to execute the Contract in the form annexed to the defendants' moving papers as Exhibit "E".

The contract provides as follows:

[AUDIO] MAKES NO WARRANTIES, EXPRESS OR IMPLIED .. WITH RESPECT TO THE PRODUCTS AND/OR SERVICES. IN NO EVENT SHALL [AUDIO] BE LIABLE FOR ... DAMAGES FOR THE BREACH OF ANY OF THESE WARRANTIES. UNDER NO CIRCUMSTANCES SHALL [AUDIO] BE LIABLE TO ANY BUYER ON ACCOUNT ON ACCOUNT OF THAT BUYER'S USE OR MISUSE OF OR RELIANCE ON PRODUCTS OR SERVICES PROVIDED BY [AUDIO] ARISING FROM ANY CLAIM RELATING TO THIS AGREEMENT OR THE SUBJECT MATTER HEREOF. SUCH LIMITATION OR LIABILITY SHALL APPLY TO PREVENT RECOVER OR ... DAMAGES WHETHER SUCH CLAIM IS BASED ON WARRANTY, CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE...

...

BUYER EXPRESSLY AND SPECIFICALLY WAIVES ANY CLAIM FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES AND AGREES TO HOLD ... [AUDIO] HARMLESS FROM ANY AND ALL SUCH CLAIMS. (Emphasis in the original.)

Based upon the Contract, the defendants argue that the plaintiffs' contract claims

must be dismissed. First, the plaintiffs claim that the defendants have failed to submit a signed contract. This argument is rejected, since the defendants have clearly annexed the Contract signed by Daniel Hess as Exhibit "E" to their moving papers.

The plaintiffs further maintain that the aforementioned contract provisions are unenforceable in light of the defendants "intentional or grossly negligent conduct." However, this general legal principle is unavailing, since the complaint, when read in a light most favorable to it, does not allege that the defendants were grossly negligent.

Contractual limitations of liability are generally enforceable in the absence of gross negligence (see David Gutter Furs v. Jewelers Protection Services, Ltd., 79 NY2d 1027 [1992]). In the context of exculpatory clauses, the term "gross negligence" contemplates conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing (see Colnaghi, U.S.A. v. Jewelers Protection Services, 81 NY2d 821 [1993]). Here, the complaint does not contain a claim for gross negligence. Accordingly, the claims sounding in breach of contract must be dismissed.

Negligent misrepresentation

Insofar as the plaintiffs seek to recover for ordinary negligence, those claims must also be dismissed because they are an unsuccessful attempt to turn an action for breach of contract into one for tort. In an action sounding in breach of contract, a tort claim does not lie unless a legal duty independent of the contract itself has been violated (see Clark-Fitzpatrick, Inc. v. Long Island R. Co., 70 NY2d 382 [1987]; see also Parisi v. Metroflag Polo, LLC, 51 AD3d 424 [1st Dept 2008]). Since the plaintiffs only engaged in an arms-length transaction with Audio, and have otherwise failed to allege the existence of an independent legal duty owed to them by any of the defendants, the

negligence claims are severed and dismissed. These claims also fail to meet the pleading requirements set forth in CPLR 3016 (see decision *infra*).

Fraud-based claims

The plaintiffs have asserted three fraud-based claims. In support of these claims, the plaintiffs allege the following:

Defendants marketed its voice writing program to [the] plaintiff[s] through an extensive advertising campaign. Defendant's advertising campaign included advertisement in print, online and direct solicitation.

Defendant's (sic) advertising campaign induced [the] plaintiff[s] to apply to and enroll in defendant's voice writing program.

In order to induce [the] plaintiff[s] to apply and enroll in and remain in defendant's voice writing program, defendant made at least one or more, if not all, of the following materially fraudulent, materially false and misleading representations, including but not limited to:

- a. Defendant's voice writing program will increase a graduate's income;
- b. Defendant's voice writing program will increase a graduate's opportunity for employment, particularly in the court reporting industry; therefore attorneys and/or law firms refuse to retain court reporters who utilize voice writing technology;
- c. Defendant will assist students in obtaining reporting employment during enrollment in and following graduation from defendant's voice writing program;
- d. Defendant's voice writing program possesses a highly-touted reputation;
- e. Defendant's voice writing program's reputation will enable students to obtain better, higher paying reporting jobs than if students did not have a voice writing program degree;
- f. Defendant's voice writing program's reputation will enable students to obtain better, higher paying reporting jobs than if students attended a traditional stenographic reporting program;
- g. Defendant's voice writing program maintains an extremely high employment placement rate in reporting jobs;

h. Defendant's voice writing program maintains extremely high salaries in reporting jobs;

i. Defendant's voice writing program can be financed through student loans which defendant will arrange for the benefit of students;

j. Student loans arranged by defendant will result in a reasonable and manageable debt burden in light of the employment and economic opportunities available to defendant's voice writing program graduates;

k. Defendant's voice writing program is a fully-accredited court reporting school;

l. Defendant's voice writing program is better than any other court reporting school;

m. Graduation from defendant's voice writing program guarantees numerous employment opportunities through defendant, Lex.

To state a cause of action for fraud, the plaintiffs must show: (1) that the defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to the defendants; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to the plaintiffs (Held v. Kaufman, 91 NY2d 425 (1998)). General allegations that defendants entered into a contract while lacking the intent to perform it are insufficient to support a cause of action sounding in fraud (Rocanova v. Equitable Life Assur. Soc. of U.S., 83 NY2d 603 [1994]).

To state a cause of action for fraudulent inducement, it is sufficient that the claim alleges a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment (Channel Master Corp. v Aluminium Ltd. Sales, 4 NY2d 403, 406-408 [1958]; Megarix Furs v Gimbel Bros., 172 AD2d 209, 213 [1991]).

Although corporate officers may not be held liable for the mere negligent failure

to discover misrepresentations made on the company's behalf, liability will attach if they participate in or have actual knowledge of the fraud (Polonetsky v Better Homes Depot, Inc., 97 NY2d 46 [2001]; People v Apple Health and Sports Clubs, Ltd., Inc., 80 NY2d 803 [1992]; Marine Midland Bank v John E. Russo Produce Co., Inc., 50 NY2d 31 [1980]).

Under CPLR 3016 (b), “[w]here a cause of action or defense is based upon misrepresentation [or] fraud ..., the circumstances constituting the wrong shall be stated in detail.”

Even accepting plaintiffs’ allegations as true and affording them every favorable inference, the plaintiffs cannot meet their burden with respect to some of these allegations on this motion (see i.e. Brualdi v. IBERIA 79 AD3d 959 [2d Dept 2010]; see also Moore v. Liberty Power Corp., LLC, 72 AD3d 660 [2d Dept 2010]; Franklin v. Winard, 199 AD2d 220 [1st Dept 1993]). First, none of the allegations identify which defendant committed the allegedly fraudulent conduct and how. Therefore, the complaint does not comply with CPLR 3016. Nor do the plaintiffs argue that circumstances exist here, where the facts are “peculiarly within the knowledge of the party against whom the [fraud] is being asserted” (Jered Contr. Corp. v New York City Tr. Auth., 22 N.Y.2d 187, 194 [1968]), so that it is impossible at this stage for the plaintiffs to state the circumstances in more detail (Grumman Aerospace Corp. v Rice, 196 AD2d 572 [2d Dept 1993]).

To the extent that the court can discern these allegations, they merely relate to Audio’s breach of the Contract and generally, a separate cause of action for fraud does not arise from a defendant’s breach of a contract (see, e.g., Tierney v. Capricorn

Investors, 189 AD2d 629 [1st Dept 1993]; Garwood v. Sheen & Shine, 175 AD2d 569 [4th Dept 1991] lv. denied 78 NY2d 864).

GBL § 349

GBL § 349 provides a remedy to consumers who have been subject to deceptive or misleading acts or business practices (Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 NY2d 20 [1985]). The defendants have not specifically addressed this claim in their motion to dismiss. Regardless, at this stage, the plaintiffs have met their pleading burden with respect to this claim.

The defendants' remaining arguments

The individual defendants generally seek dismissal of all claims against them on the theory that plaintiffs cannot pierce the corporate veil. In order to prevail on this cause of action against the individual defendants, the plaintiffs must pierce the corporate defendant's "corporate veil." Although the corporate form permits a principal to avoid personal liability (Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp., 296 AD2d 103 [1st Dept 2002]), a court may, in certain situations, pierce the corporate veil where: (a) the owner exercised complete dominion over the corporation; (b) such dominion was utilized to cause a wrong against the plaintiff; (c) the corporation was under capitalized; and (d) personal use of corporate funds (Hyland Meat Co., Inc. v. Tsagarakis, 202 AD2d 552 (2d Dept 1994)).

The plaintiffs have not pled any facts that support a cause of action against the individual defendants based upon their disregarding the corporate form. Therefore, any cause of action to impose personal liability on them, based upon a theory of piercing the corporate veil fails, and must be dismissed. Since all of the claims against the

individual defendants can only impose personal liability on the individual defendants by piercing the corporate veil, all claims against Claire Block and Jerry Block are hereby severed and dismissed.

Attorneys fees

If the plaintiffs prevail on the GBL § 349 claim, they may recover attorneys fees.

Therefore, this claim survives the motion to dismiss.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the defendants' preanswer motion to dismiss the complaint (001) is granted only to the following extent:

[1] the complaint against defendants Claire Block and Jerry Block, individually, is hereby severed and dismissed;

[2] plaintiff's causes of action sounding in fraud, constructive fraud, negligent misrepresentation, breach of contract, and fraud in the inducement are hereby severed and dismissed;

and it is further

ORDERED that the defendants' motion to dismiss is otherwise denied; and it is further

ORDERED that the plaintiffs' motion for a default judgment (002) is denied; and it is further

ORDERED that defendant Lex's cross-motion to extend its time to answer or otherwise appear (002) is granted and the court hereby deems it to have appeared in

this action via its motion to dismiss (001) *nunc pro tunc*; and it is further

ORDERED that the remaining defendants are directed to serve an answer to the remaining causes of action as identified herein within 20 days of the date of this decision.


The court hereby schedules a preliminary conference to be held on July 14, 2011 at 9:30 a.m. in Part 10. All remaining parties are directed to appear at that time.

Any requested relief which has not been addressed herein has been considered and is hereby expressly denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 5, 2011

So Ordered:



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