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| Demonstrated Tech, LLC v Greene |
| 2012 NY Slip Op 31307(U) |
| May 14, 2012 |
| Sup Ct, NY County |
| Docket Number: 601637/06 |
| Judge: Joan A. Madden |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 113473/2011
DEMONSTRATED TECK, LLC
vs.
GREENE, MATTHEW
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 3-8-12
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the answers
Memorandum Decision + Order.

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

FILED

MAY 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 14, 2012

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 11

-----X
DEMONSTRATED TECH, LLC,

Decision and Order

Plaintiff,

Index No. 601637/06

-against-

MATTHEW GREENE, KOTA GLOBAL SECURITIES,
and KOTA GLOBAL HOLDINGS,

FILED

MAY 17 2012

Defendants.

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JOAN A. MADDEN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this breach of contract action, defendants Matthew Greene (Greene), Kota Global Securities (KGS) and Kota Global Holdings (KGH) (collectively, defendants) move, pursuant to CPLR 3211 (a) (1) and (a) (7) to dismiss the second through fifth causes of action in the complaint.

The complaint alleges that in July 2010, plaintiff Demonstrated Tech, LLC (Demonstrated or plaintiff), a company that installs and services telephone and computer systems for businesses, entered into two contracts with KGS whereby Demonstrated agreed to provide KGS with telephone and computer equipment and services (Mitchell Aff., Ex. A [hereinafter, Compl.], ¶ 5). According to Demonstrated, it fulfilled all of its obligations under those contracts but, despite due demand, KGS has failed to pay for more than \$43,900 in charges that are now due and owing (Compl., ¶¶ 6-10).

Moreover, Demonstrated alleges that in July 2011, Greene, the CEO and principal of both KGS and KGH, instructed plaintiff to begin billing KGH for some of the contract charges. Demonstrated claims that it has submitted invoices to both KGS and KGH but

that both of those entities have refused to pay those charges despite due demand (Compl., ¶¶ 11-14).

Demonstrated also alleges that, although Greene repeatedly assured it that the bills would be paid and that “the check was in the mail,” Greene never intended to pay the bills (Compl. ¶¶ 23-27).

The first cause of action in the complaint alleges breach of contract against KGS and KGH. The second cause of action pleads quantum meruit against KGS and KGH, and the third cause of action states a claim for account stated against KGS and KGH. The fourth and fifth causes of action state claims against Greene for fraud and to pierce the corporate veil.

In support of the motion to dismiss the second through fifth causes of action, the defendants argue that the quantum meruit and account stated causes of action are precluded by the existence of valid and enforceable contracts with both KGS and KGH; that the cause of action for fraud is not pleaded with the requisite particularity and/or that it simply duplicates the breach of contract claim; and that the claim for piercing the corporate veil must be dismissed because there is no evidence of fraud and plaintiff fails to plead factual allegations tending to show that KGS and KGH were not bona fide corporate entities or that Greene exercised complete dominion and control.

In opposition to dismissal, Demonstrated argues that it is permitted to plead quantum meruit in the alternative, that it has adequately stated all the elements of a claim for an account stated, that its fraud cause of action contains detailed and specific allegations of fraud, i.e., that Greene repeatedly promised to pay, and even falsely represented that the check was in the mail, and that the cause of action for piercing the

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corporate veil is sufficient in that it specifically states that Greene intentionally undercapitalized KGS; that Greene withdrew money from KGS, leaving insufficient capital to pay its creditors; that he shuffled his personal funds in and out of KGS to suit his convenience and disregarded corporate formalities, and that plaintiff was damaged thereby.

DISCUSSION

It is well settled that on a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. “We . . . determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A motion to dismiss must be denied, “if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotations marks and citations omitted]).

On the other hand, while factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible allegations are not entitled to preferential consideration (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). In addition, dismissal based on documentary evidence may only result when the documentary evidence “utterly refutes [a] plaintiff’s allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N. Y.*, 98 NY2d 314, 326 [2002]).

A. Quantum Meruit

It is well established that a plaintiff may include alternative causes of action in the complaint (*see* CPLR 3014). While the existence of an undisputed, valid and enforceable contract precludes plaintiff from recovery under a quasi-contract theory, like quantum meruit (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]), this rule does not apply where, as here, there is a question about whether a contract exists between defendant KGH and Demonstrated and/or whether Demonstrated, in actuality, has two contracts with KGS (*Wilmoth v Sandor*, 259 AD2d 252, 254 [1st Dept 1999] [“Where, . . . a bona fide dispute as to the existence or application of a contract is demonstrated, a plaintiff generally will not be required to elect his or her remedies” (quotation marks and citation omitted)]).

Here, the complaint alleges that Demonstrated signed two contracts with KGS (Greene Aff., Ex. A, ¶ 5). However, Greene contends, in his affidavit, that KGS and KGH each entered into separate contracts with Demonstrated (Greene Aff., ¶ 3), but he submits only one contract with KGS as documentary evidence (Greene Aff., Ex. B).¹ Moreover, the complaint refers to “the parties’ contracts” but it is not clear whether this reference is for two contracts with KGS or contracts with both KGS and KGH (Greene Aff., Ex. A, ¶¶ 13, 18). At this stage in the litigation, the defendants have established that Demonstrated had a valid and enforceable contract with KGS and therefore, a cause of action for quantum meruit will not lie against that entity. However, because it is not

¹ Under CPLR 3211 (c) a trial court may use affidavits in its consideration of a motion to dismiss, “to preserve inartfully pleaded, but potentially meritorious, claims” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]).

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clear whether, in fact, Demonstrated entered into a written agreement with KGH, Demonstrated will not be required to elect its remedies regarding KGH, and the motion to dismiss the cause of action for quantum meruit is denied as to KGH, only.

B. Account Stated

“An account stated is an agreement between [the] parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance” (*American Express Centurion Bank v Cutler*, 81 AD3d 761, 762 [2d Dept 2011][quotation marks and citations omitted]). Where a defendant retains bills without objecting to them in a reasonable period of time or makes some payment on the account, an agreement may be implied (*id.*; see also *Cohen Tauber Spievak & Wagner, LLP v Alnwick*, 33 AD3d 562, 563 [1st Dept 2006]).

Here, the complaint alleges that Demonstrated invoiced KGS and KGH on a monthly basis, that those defendants received the invoices and did not object to them, and that, despite due demand, the invoices have not been paid. These allegations are sufficient to state a claim for an account stated.

C. Fraud

The fraud cause of action against Greene is dismissed, as duplicative of the contract claim, because the fraud cause of action does “not allege a breach of any duty collateral to or independent of the parties’ agreements,” and it is therefore duplicative and redundant of the contract claim (*Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 589 [1st Dept 2011]).

Here, the contract delineates KGS’s obligation to pay certain fees for the products and services that Demonstrated supplied. The breach of contract cause of action alleges

* 7]

that KGS and KGH did not pay those agreed-upon fees. In the fraud cause of action, plaintiff alleges that Greene fraudulently stated that he would pay the fees due under the contracts and that he falsely stated that “the check was in the mail” when it was not. Here, the fraud cause of action does not allege that Greene breached any duty that was collateral or independent to the parties’ contracts. Rather, the fraud alleged is that Greene did not pay what was due. Accordingly, those allegations do not support a separate cause of action for fraud (*see, HSH Nordbank AG v UBS AG*, __AD3d__, 2012 NY Slip Op 02276 [1st Dept 2012]).

D. Pierce the Corporate Veil

In order to “pierce the corporate veil,” the plaintiff must show that the individual defendant exercised domination with respect to the transaction in question and that “such dominion and control [was used] to commit a fraud or wrong against the plaintiff which resulted in injury” (*Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344, 344 [2d Dept 2006]). Under the doctrine of piercing the corporate veil, “equity will intervene to pierce the corporate veil and permit the assertion of claims against the individuals who control the corporation, in order to avoid fraud or injustice” (*id.*).

“The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances” (*Weinstein v Willow Lake Corp.*, 262 AD2d 634, 635 [2d Dept 1999]). “‘Veil Piercing is a fact-laden claim’ that is not well suited for resolution upon a motion to dismiss” (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1st Dept 1999]). Plaintiffs are entitled to conduct discovery to determine whether grounds exist to pierce the corporate veil (*Aubrey Equities, Inc. v SMZH 73rd Assoc.*, 212 AD2d 397, 398 [1st Dept 1995]).

Here, Demonstrated has adequately alleged a basis for piercing the corporate veil by pleading that Greene disregarded the corporate form by intentionally undercapitalizing the businesses so that they were unable to pay their bills as they became due and by withdrawing money from KGS to enrich himself personally and shuffling money in and out of KGS to suit his immediate convenience, all to the detriment of Demonstrated, and that Demonstrated was damaged thereby. The question of whether Greene so dominated KGS and/or KGH as to justify piercing the corporate veil of those companies is not ripe for determination at this early stage of the litigation when the facts regarding such domination, if any, are exclusively in the possession of the defendants and Demonstrated has not had an opportunity to conduct discovery (*First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d at 294; *Aubrey Equities v SMZ 73rd Assoc.*, 212 AD2d at 398; *see also, Ledy v Wilson*, 38 AD3d 214, 215 [1st Dept 2007]).

Accordingly, it is

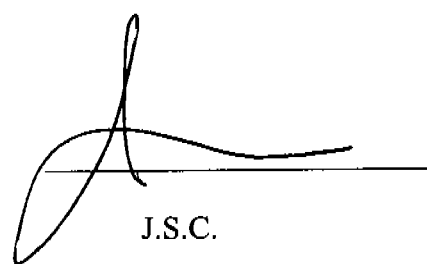
ORDERED that defendants Matthew Greene, Kota Global Securities and Kota Global Holdings' motion to dismiss the second through fifth causes of action in the complaint is granted to the extent that the second cause of action alleging quantum meruit is dismissed as against Kota Global Securities and the fourth cause of action sounding in fraud is dismissed in its entirety; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 30 days of the date of this decision and order; and it is further

ORDERED that the preliminary conference scheduled for May 31, 2012 is adjourned to June 28, 2012 at 9:30 to be held in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: May 17, 2012



J.S.C.

FILED

MAY 17 2012

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