

Rehm v RMS Ins. Brokerage, LLC

2012 NY Slip Op 32686(U)

October 19, 2012

Sup Ct, Suffolk County

Docket Number: 2292-2011

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

COPY

**Present: HON. EMILY PINES
J. S. C.**

Original Motion Date: 08-07-2012
Motion Submit Date: 08-07-2012
Motion Sequence No.: 001 MOTD

FINAL
 NON FINAL

R. JEFFREY REHM AND LINDA REHM,

Plaintiff,

-against-

**RMS INSURANCE BROKERAGE, LLC., RMS
HOLDINGS, INC, DIANE KRAUSE, AND MARK D.
DERRENBERGER,**

Defendants.

Attorney for Plaintiff/Counterclaim
Defendants
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**RMS INSURANCE BROKERAGE, LLC., RMS
HOLDINGS, INC., DIANE KRAUSE, and MARK D.
DERRENBERGER**

Counterclaim Plaintiffs,

-against-

**R. JEFFREY REHM, LINDA REHM and JOHN
KRAMER,**

Counterclaim Defendants.

_____X

ORDERED that the branch of the motion (Mot. Seq. # 001) by defendants/third-party plaintiffs (1) pursuant to CPLR 3025(b) for leave to serve amended counterclaims and an amended third-party complaint is granted in part and denied in part, as set forth herein; and it is further

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RLO

ORDERED that the defendants/third-party plaintiffs are directed to serve the amended pleadings as authorized herein within 30 days of the date of this order; and it is further

ORDERED that the branch of the motion (Mot. Seq. # 001) by defendants/third-party plaintiffs pursuant to CPLR 3211 dismissing the complaint as asserted against defendants Diane Krause and Mark D. Derrenberger is denied; and it is further

ORDERED that the branch of the motion (Mot. Seq. # 001) by defendants/third-party plaintiffs pursuant to CPLR 3211 dismissing the second cause of action insofar as asserted against defendant RMS Holdings, Inc. is denied; and it is further

ORDERED that a preliminary conference before the Court is hereby scheduled for November 19, 2012, at 10:00 a.m.

CPLR 3025(b) provides that “[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.” “In the absence of prejudice or surprise resulting from the delay in seeking leave, [applications for leave to amend a pleading pursuant to CPLR 3025(b)] are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Lucido v. Mancuso*, 49 AD3d 220, 221 [2d Dept. 2008]). “[A] plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance” (*Id.* at 227). “No evidentiary showing is required under CPLR 3025(b)” (*Id.* at 229). Additionally, whether to grant or deny leave to amend is committed to the court’s discretion (*Edenwald Contracting Co., Inc. v. City of New York*, 60 NY2d 957, 959 [1983]).

In the proposed amended counterclaim and proposed amended third-party complaint, the defendants/third-party plaintiffs seek, in effect, to add new causes of action for fraud, unjust enrichment, and recovery of attorneys’ fees and expenses pursuant to the Asset Purchase Agreement. “A cause of action based upon fraud must be commenced within six years from the time of the fraud or within two years from the time the fraud was discovered, or with reasonable diligence, could have been discovered,

whichever is longer” (*Oggioni v. Oggioni*, 46 AD3d 646, 648 [2d Dept 2007] citing CPLR 203[g], 213[8]). “A cause of action based upon fraud accrues, for statute of limitations purposes, at the time the plaintiff ‘possesses knowledge of the facts from which the fraud could have been discovered with reasonable diligence’” (*Id.* quoting *Town of Poughkeepsie v Espie*, 41 AD3d 701, 705 [2d Dept 2007]). In opposition to this branch of the motion, the plaintiffs have not established that such claims are time-barred as their argument that the counterclaim based upon fraud accrued on October 1, 2005, when the Asset Purchase Agreement was signed, is without merit. Therefore, the defendants/third-party plaintiffs are granted leave to amend their pleadings to assert a cause of action for fraud.

Additionally, the defendants/third-party plaintiffs may amend their pleading to add the proposed fourth counterclaim/fourth third-party cause of action, seeking recovery of attorneys’ fees and expenses, as such claims are based on Article Six of the Asset Purchase Agreement (*see Parsoff v. Muss*, 171 AD2d 782 [2d Dept 1991][party must pay own attorneys’ fees and disbursements unless award is authorized by agreement between parties, statute, or court rule]).

However, no cause of action for unjust enrichment lies against the plaintiffs and/or third-party defendant because the parties do not dispute the existence of the Asset Purchase Agreement, its validity, or that the scope of the Asset Purchase Agreement “clearly covers the dispute between the parties” (*Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382 [1987]). “An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim” (*Corsello v. Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]).

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7):

[T]he complaint must be liberally construed and the plaintiff given the benefit of every favorable inference (citations omitted). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (citations omitted). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (citations omitted). While factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth (citations omitted).

(*Symbol Tech., Inc. v. Deloitte & Touche, LLP*, 69 AD3d 191, 193-195 [2d Dept 2009]).

“Where a party offers evidentiary proof on a CPLR 3211(a)(7) motion, the focus of the inquiry turns from whether the complaint states a cause of action to whether the plaintiff actually has one” (*East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 AD3d 122, 125 [2d Dept 2009]).

“A member of a limited liability company ‘cannot be held liable for the company’s obligations by virtue of his [or her] status as a member thereof’” (*Matias v. Mondo Props. LLC*, 43 AD3d 367, 367-368 [2007], quoting *Retropolis, Inc. v. 14th St. Dev. LLC*, 17 AD3d 209, 210 [2005]; see also Limited Liability Company Law §§ 609, 610). However, a party may seek to hold a member of an LLC individually liable despite this statutory proscription by application of the doctrine of piercing the corporate veil (see *Matias v. Mondo Props. LLC*, 43 AD3d 367 [2007]; *Retropolis, Inc. v. 14th St. Dev. LLC*, 17 AD3d 209 [2005]).

(*Grammas v. Lockwood Assoc., LLC*, 95 AD3d 1073, 1074 [2d Dept 2012]).

Recently, in *East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.* (supra), the Appellate Division, Second Department discussed the concept of piercing the corporate veil. The Court stated, in relevant part:

A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff.

* * *

[I]f, standing alone, domination over corporate conduct in a particular transaction were sufficient to support the imposition of personal liability on the corporate owner, virtually every cause of action brought against a corporation either wholly or principally owned by an individual who conducts corporate affairs could also be asserted against that owner personally, rendering the principle of limited liability largely illusory. Thus, the party seeking to pierce the corporate veil must also establish “that the owners, through their domination, abused the privilege of doing business in the corporate form.” Factors to be considered in determining whether the owner has “abused the privilege of doing business in the corporate form” include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use.”

(*East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, supra at 126-127 [internal citations omitted]).

Here, the complaint, as supplemented by the affidavit of plaintiffs submitted in opposition to the motion to dismiss, adequately alleges that defendants Krause and Derrenberger abused the privilege of doing business in the limited liability company form relative to the transaction at issue so as to cause injury to the plaintiffs. Specifically, the plaintiffs allege that company funds were used for personal use and that commission payments due the company were diverted to a separate corporation owned by Krause and Derrenberger, thereby depriving plaintiffs of payment of funds due from the company pursuant to the Asset Purchase Agreement. Notably, the complaint is not required to meet any heightened level of particularity in its allegations regarding piercing the company veil (*East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, supra at 125). Thus, plaintiffs have sufficiently stated a cause of action against the individual defendants personally for the wrongs of the company under the doctrine of piercing the company veil (*see Grammas v. Lockwood Assocs., LLC*, supra). However, whether the plaintiffs will ultimately be able to prove these allegations is an entirely different matter which may very well be the subject of a motion for summary judgment following the completion of discovery.

Finally, although the defendants/third-party plaintiffs move under CPLR 3211 to dismiss the second cause of action for conversion, in reality they improperly seek summary judgment on this cause of action. In support of this branch of their motion, defendants/third-party plaintiffs rely exclusively on Krause's affidavit and argue that the cause of action for conversion should be dismissed because defendant RMS Holdings, Inc. did not take, transfer or use any monies allegedly owing to plaintiffs. Such an argument is not properly made on a pre-answer motion to dismiss pursuant to CPLR 3211. In any event, the plaintiffs have sufficiently pled a cause of action for conversion against RMS Holdings, Inc.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: October 19, 2012
Riverhead, New York



EMILY PINES
J. S. C.

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 NON FINAL