Ehrhardt v EV Scarsdale Corp.
2012 NY Slip Op 33910(U)
August 23, 2012
Supreme Court, Westchester County
Docket Number: 51856/12
Judge: Gerald E. Loehr
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

FILED AND ENTERED
ON 5/24 2012
WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---X
AMADEUS EHRHARDT,

Plaintiff,

DECISION AND ORDER
Index No.: 51856/12

-against-

EV SCARSDALE CORP., JONATHAN LERNER, and CHASE BANK N.A.,

Defendants.
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LOEHR, J.

The following papers numbered 1-7 were read on motions of Defendants Chase Bank, N.A. ("Chase") and Jonathan Lerner ("Lerner") to dismiss the Complaint as asserted against each as failing to state a cause of action.

	Papers Numbered
Notice of Motion (Chase) - Affirmation - Exhibits	1
Memorandum of Law in Support	2
Affirmation/Affidavit in Opposition - Exhibits	3
Reply Memorandum of Law	4
Notice of Motion (Lerner) - Affidavit - Memorandum of Law	5
Affirmation/Affidavit in Opposition - Exhibits	6
Reply Memorandum of Law	7

Upon the foregoing papers and as alleged in the Complaint filed on February 8, 2012, Ehrhardt is a licensed real estate agent, Defendant EV Scarsdale Corp. ("EV") is a licensed real estate broker and Defendant Lerner is President of EV. By a written Employment Agreement dated December 9, 2008, EV hired Plaintiff to manage EV's office located in Southhampton, New York. The Employment Agreement provided that Plaintiff should receive a salary and specified fringe benefits. EV has admitted the Employment Agreement in its Answer. It is further alleged that on January 18, 2009 EV hired Plaintiff as a Sales Associate to be paid commissions based on sales he arranged pursuant to an Independent Contractor Agreement. EV has denied the Independent Contractor Agreement. In the First, Second and Fifth through Tenth Causes of Action, Plaintiff seeks damages against EV and Lerner for breach of the Employment Agreement and the Independent Contractor Agreement.

Lerner moves pre-answer to dismiss the Complaint as asserted against him pursuant to CPLR 3211(a)(1) and (a)(7). As to the Causes of Action specified above, Lerner notes that the claims are based on the asserted breach of written agreement to which he is not a party. While the Court must generally accept as true the pleaded facts, such is not required where the allegations are contradicted by documentary evidence (*Jean-Baptise v Law Firm of Kenneth B. Mock,* ___AD2d ___, 2012 WL 3204783 [2d Dept]). Here, the Employment Agreement was executed on behalf of EV by Lerner as "President" of EV, and the Independent Contractor Agreement was executed on behalf of EV by Lerner as its representative "Broker".[1] Both Agreements indicated that they were corporate contracts and Lerner did not execute either Agreement in an individual capacity. An individual who signs a corporate contract and indicates the name of the corporation and the nature of his representative capacity on the contract is not subject to personal liability absent a piercing of the corporate veil which has not been sought here (*Metropolitan Switch Board Co. v Amici Associates, Inc.,* 20 AD3d 455 [2d Dept 2005]; *see Salzman Sign Co v Beck,* 10 NY2d 63 1961]). Accordingly, the motion is granted to the extent that the First, Second and Fifth through Tenth Causes of Action are dismissed as asserted as against Lerner.

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[1] In Lerner's Reply papers, his counsel asserts that Lerner, in fact, never executed the Independent Contractor Agreement. As it is inappropriate for a movant to offer in a reply matter that could have been submitted initially, inappropriate to offer oral evidence to contradict the allegations of the Complaint on a CPLR 3211 motion, and inappropriate for counsel to assert as fact things he could not personally know, the Court is assuming, as alleged, that Lerner executed the Independent Contractor Agreement.

In the Complaint it is further alleged that ER and Lerner arranged to have Chase issue a corporate credit card to EV that Plaintiff was authorized to use for corporate expenses, that he so used the credit card, that ER and Lerner have failed to pay the charges submitted so that Chase is seeking to recover same from Plaintiff and has reported his failure to pay to credit reporting agencies damaging his credit rating. The Complaint seeks a declaration that Plaintiff is not liable to Chase for these charges and that Chase should correct the default reports it sent to reporting agencies. In the alternative, it seeks to have ER and Lerner indemnify Plaintiff for these charges and damages.

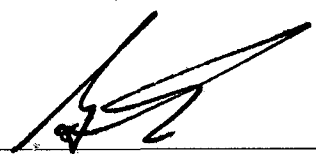
Chase moves pre-answer to dismiss the Complaint as asserted as against it pursuant to CPLR 3211(a)(1) and (a)(7). In support thereof, Chase has submitted evidence that a corporate credit card was issued in December 2008 to ER wherein Plaintiff was an authorized user, that the then existing and amended Cardmember Agreements ("CMA") provided that persons responsible on the account included "the person who applied for the account and the person to whom we address billing statements" and that billing statements were addressed to ER and Plaintiff at ER's corporate office in Southhampton. These documents fail to indisputably establish that Plaintiff agreed to be responsible for ER's credit card charges. While the CMA's may have been provided to ER, the documents fail to establish that they were provided to Plaintiff or that he was even aware of them. Moreover, that billing statements were addressed to both ER and Plaintiff at ER's corporate office is insufficient to put him on notice that he was agreeing to answer to Chase for ER's charges. As the Court of Appeals stated:

"There is a great danger in allowing a single sentence in a long contract to bind individually a person who signs only as a corporate officer."

(*Salzman Sign Co. v Beck,* 10 NY2d 63, 65 [1961]). Here, in fact, there is no evidence that Plaintiff signed anything that would obligate him personally for these charges. Finally, if Plaintiff was not responsible for ER's charges, Chase's report of Plaintiff's default in failing to pay for them was incorrect and should be corrected.

Accordingly, the motion to dismiss is denied. The parties shall appear in courtroom 800 on September 20, 2012 at 9:30 am for the purpose of conducting a Preliminary Conference. This constitutes the decision and order of the Court.

Dated: White Plains, New York
August 23, 2012



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