

**Cohen v HDS Trading Corp.**

2013 NY Slip Op 32067(U)

August 23, 2013

Supreme Court, New York County

Docket Number: 157995/2012

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

X

Index No.: 157995/2012

ADAM COHEN and ASC SALES  
AND IMPORTS, LLC,

Plaintiffs,

**NOTICE OF ENTRY**

-against-

HDS TRADING CORP,

Defendant.

X

**PLEASE TAKE NOTICE** that the annexed is a true and correct copy of the Decision and Order made by the Honorable Joan A. Madden of the Supreme Court of the State of New York, dated August 23, 2013, and filed with the Clerk of the Supreme Court of the State of New York for the County of New York on September 3, 2013.

Dated: Brooklyn, New York  
September 3, 2013

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SOLOMON E. ANTAR**

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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 : 157995/2012  
COHEN, ADAM  
vs  
HDS TRADING CORP.  
Sequence Number : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

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*  
*ANNEXED Memorandum Decision & Order.*

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

Dated: August 23, 2013

[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

-----X  
ADAM COHEN and ASC SALES  
AND IMPORTS, LLC.,

Index No.: 157995/2012

Plaintiff,

-against-

HDS TRADING CORP, FRED GUINDI,  
VICTOR GUINDI, and HENRY GUINDI,

Defendants.

-----X  
**JOAN A. MADDEN, J.:**

In this action seeking unpaid commissions, defendants move, pursuant to CPLR 3211(a)(7), to dismiss the second, third, fourth and fifth causes of action and to strike plaintiffs' demand for punitive damages. Plaintiffs oppose the motion, which is granted for the reasons below.

**Background**

Plaintiffs are in the business of providing independent, third party sales brokerage services. The amended verified complaint alleges that defendants "engaged" plaintiff Adam Cohen ("Cohen") as an independent sales person to broker deals for goods and products that defendants sold to third parties, including sales to a retail store called Menard's located in the Midwest. It is alleged that for these services, defendants were obligated to pay a "commission fee between 8% and 5% dependent upon the transaction and size of the order." (Amended Verified Complaint ¶ 12). It is further alleged that Cohen was "to be paid based on the gross value of the orders [and that] for many years

defendants paid for such orders [and that] the percentage paid is generally between 6% and 7% from 2008 through 2011 and part of 2012.” (Id. ¶ 15).

It is alleged that Cohen, who is president of the plaintiff corporation, brokered a number of deals with Menard’s for defendant HDS Trading Corp. (“HDS”) beginning in 2011, and that HDS accepted and processed the orders through its manufacturers. However, HDS asked Cohen to “accept a lesser commission of 5% if the gross sales on these orders [and] Cohen agreed to accept a lesser commission of 5% of gross sales due to the relationship and volume of work.” (Id. ¶ 16). It is also alleged that Cohen, having sold the order has no further obligation to HDS, [but that] HDS is required to pay full commission on the order, whether it is a one-time order or ongoing order” (Id. ¶ 17). It is further alleged that in March 2012, “HDS *de facto* terminated the relationship unilaterally by demanding commission be based on net [rather than gross] and [by] refusing to pay as agreed which it did not have the right to do.” (Id. at ¶ 18). “HDS did so, upon information and belief to ‘cut out’ the middleman, Cohen, and to date has failed to pay even net commissions on continuing programs” (Id. ). The amended verified complaint seeks \$41,804, plus interest and costs, in damages for payments owed, lost business, damage to business reputation, specific performance and punitive damages.

Defendants now move to dismiss the claim for fraud as duplicative of the breach of contract claim, and for failure to plead the claim with particularity as required by CPLR 3016(b). Defendants also argue that the allegations in the complaint are insufficient to state a cause of action against the individual defendants based on a theory of piercing the corporate veil, since there are no allegations of abuse of the corporate form and injury resulting from such abuse. Defendants also argue that the complaint

does not adequately plead a cause of action against the individual defendants under the theory of piercing the corporate veil, and that as there is no basis for recovering of punitive damages, plaintiffs' request for this relief must be stricken.<sup>1</sup>

Plaintiffs oppose the motion, arguing that defendants misread the first cause of action, asserting that as the first cause of action is not based on the existence of an express written contract, all equitable causes of action are available, including the first cause of action which seeks to recover in quasi-contract, the second cause of action for unjust enrichment, and the fourth cause of action "for costs and attorneys' fees as a result of defendants' outrageous and unjust conduct." As to the third cause of action for fraud, plaintiffs state that it is adequately pleaded and that the statements in Cohen's affidavit, "correct" any pleading defects. As to the fifth cause of action to pierce the corporate veil, plaintiff argues that defendants do not submit an affidavit of personal knowledge that "sufficiently sets forth a valid defense."<sup>2</sup>

In support of their opposition, plaintiffs submit Cohen's affidavit in which he states *inter alia*, that he never had an express contract with HDS and that over the years HDS and his company ASC work deal to deal with commissions normally between 6 and 7% of gross sales for each deal brokered, and that each time a deal was renewed or re-ordered he would get the same percentage for the gross sale. He further states that after

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<sup>1</sup>While the notice of motion indicates that defendants are also seeking to dismiss the second cause of action for unjust enrichment, defendants provide no arguments in support of such dismissal, which is without merit at this stage of the action in any event. See Wilmoth v. Sandor, 259 A.D.2d 252, 254 (1<sup>st</sup> Dept 1999).

<sup>2</sup>Plaintiffs also argue that the moving papers are insufficient as they are not supported by an affidavit. However, as defendants point out ~~that~~ an affidavit of merit is not required to support a motion to dismiss

doing business successfully HDS, through its principals, Fred, Henry and Victor Guindi, decided to cut his commissions to 5% of net sales instead of the customary 6% to 8% percent of gross invoice value.

He submits emails which he asserts show that defendants and in particular, Henry Gundi, made false representations about defendants' intention to continuing paying him on his commission and their unilateral decision to cut his commission to 5% of net sales. He also states that in telephone calls, Henry Guindi and Victor Gundi, assured him that he would to be paid the customary 6% to 8% percent of gross invoice value on continuing programs, until such time as the client discontinued such programs. However, subsequently a de facto termination occurred when HDS failed to pay him his customary commission. Cohen states that "it his belief that HDS is merely an alter ego of Victor Guindi and his sons, Fred and Henry, and that fraudulent misrepresentations were made by Henry Guindi and Victor Guindi on multiple occasions [and that] it is clear to me that these false representations were made with their knowledge of the falsity and the intention to harm me for their own personal gain." (Cohen Aff. ¶ 10). He further states that he "does not believe that corporate formalities were observed [and that] the corporate veil is used merely to shield the personal liability of these defendants" (Id., ¶ 11).

In reply, defendants assert that the first cause of action appears to be based on a contract, but even if Plaintiff is relying on a quasi contract theory, the fraud claim should still be dismissed as duplicative of the quasi contract claim.

#### **Discussion**

On a motion pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be interpreted liberally, construed in the light most favorable to the

plaint, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977) Morone v. Morone, 50 NY2d 481 (1980). However, “[a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b).” Eurycleia Partners, L.P. v. Seward & Kissel, L.L.P., 12 NY3d 553, 559 (2009). CPLR 3016(b) requires that claims for fraud set forth “the circumstances constituting the wrong...in detail.” Thus, “[a]lthough there is certainly no requirement of unassailable proof at the pleading stage, the complaint must allege basic facts to establish the elements of the cause of action.” Eurycleia Partners L.P. v. Seward & Kissel, L.L.P., 12 NY3d at 559.

#### Fraud Claim

Plaintiffs’ third cause of action seeks to recover damages for fraud based on allegations that defendants “in seeking profit from the plaintiffs... intentionally and fraudulently misrepresented to plaintiffs that it would compensate [Cohen] adequately based on specific sales numbers for the orders, [and that] defendants also misrepresented that it would pay commissions on all such orders it had in the past.” (Amended Verified Complaint ¶ 41-44). It is further alleged that such misrepresentations were “done intentionally and solely in order to induce plaintiffs to broker a deal [and that] defendants knew or should have known the plaintiffs would rely on these misrepresentations.” (Id.).

To plead a viable cause of action for fraud, it must be alleged that the defendant made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendant when made, for the purpose of inducing reliance, justifiable reliance on the alleged misrepresentation or omission by the victim of the fraud, and injury. Lama Holding Company v. Smith Varney Inc., 88 NY2d 413, 421 (1996).

Even assuming arguendo, that the fraud claim, when considered with the statements in Cohen's affidavit, is adequately pleaded it must be dismissed as duplicative of the breach of contract claim and/or quasi contract cause of action. "A fraud based cause of action is duplicative of a breach of contract claim 'when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract.'" Manas v. VMS Associates, LLC, 53 AD3d 451, 454 (1st Dept 2008) (quoting First Bank of the Americas v. Motor Car Funding, 257 AD2d 287, 291 (1st Dept 1999). In other words, "[a] cause of action for fraud does not arise when the only fraud charged relates to a breach of contract." Id. See also, Linea Nuova, S.A. v. Slowchowsky, 62 AD3d 473 (1st Dept 2009). However, a fraudulent inducement claim may be based on allegations that a defendant made "a misrepresentation of present facts [that] is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of a duty." First Bank of the Americas v. Motor Car Funding, 257 AD2d at 291-292. The same principles apply when a plaintiff seeks to recover based on a theory of quasi contract. Mid Atlantic Perfusion Assoc., Inc., v. Westchester County Health Care Corp., 54 AD3d 831 (2d Dept. 2008) (holding that plaintiff's fraudulent inducement claim was duplicative of its quasi contract cause of action and must be dismissed).

Here, the alleged misrepresentations, that defendant would compensate plaintiff between 6% and 8% gross sales involve representations of future intent that arise out of defendant's contractual obligations and not an obligation collateral to the contract. Manas v. VMS Associates, LLC, 53 AD3d at 454; compare First Bank of the Americas v. Motor Car Funding, 257 AD2d 287 (finding that the complaint stated a cause of action for

fraudulent inducement when misrepresentations related to present facts regarding the quality of the collateral and individual's credit rating that allegedly induced plaintiff to enter into agreement). Thus, these alleged misrepresentations are insufficient to state a claim for fraudulent inducement of contract.

Furthermore, when, as here, the damages sought in connection with the purported fraud claim are the same as those sought in connection with the breach of contract claim, the fraud claim must be dismissed as duplicative of the breach of contract claim. Manas v. VMS Associates, LLC, 53 AD3d at 454 (noting that fraud claim cannot be maintained when plaintiff failed to allege that she sustained any damages that would not be recoverable under the breach of contract claim); See, Orix Credit Alliance, Inc. v. R.E. Hable Co., 256 AD2d 114, 115 (1st Dept. 1998) (same). Accordingly, the fraudulent inducement claim must be dismissed on this ground as well.

#### Costs and Attorneys' Fees

The fourth cause of action seeks attorneys' fees, costs, and expenses of this action "which [were] necessitated by Defendants' bad faith actions in failing to properly, adequately, and legally adhere to the contracts made with the Plaintiffs" (Amended Verified Complaint ¶ 49). Generally, "attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule." Mount Vernon City Sch. Dist. v. Nova Cas. Co., 19 NY3d 28, 39 (2012) (quoting Matter of A.G. Ship Maintenance Corp. v. Lezak, 69 NY2d 1, 5 (1986)). Here, plaintiffs do not allege any such basis for recovering attorneys' fees. Moreover, to the extent the claim is for

sanctions, there is no independent cause of action for such relief. See 360 W. 11<sup>th</sup> LLC v. ACG Credit Co., II, LLC, 90 AD3d 552 (1st Dept. 2011).

Individual Defendants' Liability Under the Theory of Piercing the Corporate Veil

The fifth cause of action seeks to pierce the corporate veil to hold defendants Fred Guindi, Victor Guindi, and Henry Guindi individually liable for the conduct alleged in the complaint. The amended verified complaint alleges that “Victor Guindi is the sole owner, principal, operator and shareholder of HDS Trading Corp., and exercise complete control and domination over HDS [and that] Fred Guindi is [...] an officer and employee of the corporation.” (Amended Verified Complaint ¶ 51-52). It is further alleged that “Victor Guindi controlled the corporation [...] and used the corporate shields and structures created in order to perpetrate a wrongful, fraudulent and unjust act against Plaintiffs, which resulted in damages to Plaintiffs [and that] Guindi did so for his own personal and fiduciary gain.” (Id. at ¶ 53-54).

To pierce the corporate veil it must be shown that (1) the owners of the corporation exercised complete domination of the corporation in respect to the transactions at issue; and (2) such domination was used to commit a fraud or otherwise resulted in wrongful or inequitable consequences causing plaintiff's injury. TNS Holdings, Inc. v MKI Securities Corp., 92 NY2d 335, 339-40 (1998); Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 141-42 (1993). However, “[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance” TNS Holdings, Inc. v MKI Securities Corp., 92 NY2d at 339, *citing* Morris v New York State Dept. of Taxation and Fin., 82 NY2d at 141-42. Furthermore, “while the courts are empowered to pierce the corporate veil in

appropriate circumstances [...] the corporate form is not lightly to be disregarded”

Treeline Mineola, LLC v. Berg, 21 AD3d 1028, 1029 (2d Dept. 2005) quoting Bowles v. Errico, 163 AD2d 771 (3d Dept 1990).

In this case, the complaint’s conclusory allegations that the individual defendants’ controlled the corporate defendant and used the corporate shields and structures to perpetuate wrongful conduct are insufficient to provide a basis for piercing the corporate veil. In addition, Cohen’s statements in his affidavit that he believes that HDS is merely an “alter ego” for the individual defendants and that he believes corporate formalities were not followed are insufficient to cure this pleading defect. See Semigram Enterprises, Inc. v. Noren, 285 AD2d 409 (1<sup>st</sup> Dept 2001)(no basis for individual liability when plaintiff did not particularize allegations regarding defendant’s use of the defendant corporation as his alter ego). Furthermore, there are no allegations that the domination of the corporation or other abuse of the corporate form led to the purported “inequity, fraud or malfeasance” TNS Holdings, Inc. v MKI Securities Corp., 92 NY2d at 339.

Accordingly, the fifth cause of action must be dismissed.

Finally, in the absence of allegations of wrongful conduct directed at the public, punitive damages are not recoverable in connection with the remaining causes of action which seek contract-type relief. See, New York Univ. v. Continental Ins. Co., 87 NY2d 308 (1995); Varveris v. Hermitage Ins. Co., 24 AD3d 537, 538 (2d Dept. 2005).

Accordingly, plaintiffs’ request for punitive damages is stricken.

### **Conclusion**

In view of the above, it is

ORDERED that the motion to dismiss is granted to the extent of dismissing the third cause of action (fraud), the fourth cause of action (attorneys' fees and costs), the fifth cause of action (to pierce the corporate veil),, and striking plaintiffs' request for punitive damages; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendants Fred Guindi, Victor Guindi and Henry Guindi, and the Clerk is directed to enter judgment dismissing the complaint as against these defendants; and it is further

ORDERED that the action is severed and continued against defendant HDS Trading Corp. with respect to the remaining causes of action; and it is further

ORDERED that the caption is amended to reflect the dismissal of Fred Guindi, Victor Guindi and Henry Guindi as defendants, and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry upon the County Clerk (room 141B) and the Clerk of Trial Support (Room 158) who are directed to mark the court's records to reflect the change of caption herein; and it is further

ORDERED that defendant HDS Trading Corp. shall serve and file an answer to the amended verified complaint within 30 days of this decision and order; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street, on October 24, 2013 at 9:30 am.

DATED: August 23, 2013

  
\_\_\_\_\_  
J.S.C.

AFFIDAVIT/AFFIRMATION OF SERVICE

STATE OF NEW YORK, COUNTY OF KINGS, SS.:

I, LEOPOLD GROSS, an attorney duly admitted to practice before the Courts of the State of New York, affirm that: I am not a party to the within action and maintain my offices for the practice of law at 146 Spencer Street, Suite 4004, Brooklyn, New York 11205.

On **September 3, 2013**, I served the within Notice of Entry with the Decision and Order,

OVERNIGHT DELIVERY SERVICE

by depositing a true copy thereof, enclosed in a wrapper addressed as shown below, into the custody of Federal Express Company for overnight delivery, prior to the latest time designated by that service for overnight delivery.

SERVICE BY MAIL

by depositing a true copy thereof enclosed in a post paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known addresses set forth after each name:

To: HELBRAUN LEVEY &  
O'DONOGHUE, LLP.  
Attn: Kevin Sean O'Donoghue  
110 William Street, Ste. 1410  
New York, N.Y. 10038

Affirmed to September 3, 2013,  
at Kings County, New York.

  
\_\_\_\_\_  
LEOPOLD GROSS

Index No. 157995-2012  
Supreme Court of the State of New York  
County of New York

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ADAM COHEN and ASC SALES  
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Plaintiffs,

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HDS TRADING CORP.,

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**NOTICE OF ENTRY**

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