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

PRESENT: MELVIN L. SCHWEITZER Justice

PART 45

ABAX LOTUS LTD. et al

-v-

CHINA MOBILE MEDIA TECHNOLOGIES INC. et al

INDEX NO. 650047/2013

MOTION DATE _____

MOTION SEQ. NO. 002

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 by defendant Dr. Zhang Zhengyu to dismiss claims against him individually and as Chairman and Founder of China Mobile Media Technology Inc. is DENIED per the attached Decision and Order.

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

Dated: October 30, 2013

MELVIN L. SCHWEITZER

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 45

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| ABAX LOTUS LTD. and ABAX NAI XIN A LTD., Plaintiffs, | Index No. 650047/2013 |
| -against- | DECISION AND ORDER |
| CHINA MOBILE MEDIA TECHNOLOGIES INC., MAGICAL INSIGHT INVESTMENTS LIMITED and ZHANG ZHENGYU, Individually and as Chairman and Founder of China Mobile Media Technology, Inc., Defendants. | Motion Sequence No. 002 |

**MELVIN L. SCHWEITZER, J.:**

This matter arises out of an investment transaction. Abax Lotus Ltd. and Abax Nai Xin A Ltd. (collectively, Abax) are the sole holders of Notes issued by Magical Insight Investments Limited (Magical). In connection with the purchase of the Notes, Abax entered into a series of agreements with Magical, its parent company, China Mobile Media Technology Inc. (CMM), and the controlling shareholders of CMM. Magical has defaulted on the Notes and CMM's stock has been delisted from the exchange on which it traded, rendering its stock worthless. Abax brings claims of breach of contract against Magical, CMM and Zhang Zhengyu (Dr. Zhang), one of the controlling shareholders, chairman, and founder of CMM. Dr. Zhang has moved to dismiss the complaint against him individually, and as a chairman and founder of CMM, arguing that (1) service on him was improper, (2) that the complaint is deficient because it fails to allege damages resulting from the alleged contract breach, and (3) that Abax failed to make necessary allegations in order to sue Dr. Zhang individually.

**Background**

The complaint's following factual allegations are accepted as true for purposes of this motion. On December 28, 2007, Abax, Magical, and CMM entered into a Securities Purchase Agreement pursuant to which Abax purchased RMB 150,000,000[1] of Magical's Guaranteed Senior Notes Due 2014 (the Notes). CMM is the guarantor of the Notes.

On the date of the Note purchase, Abax is the sole holder of the Notes. Abax entered into the Investors Rights Agreement (IRA) with CMM, Magical, and Dr. Zhang (as controlling shareholder), as well as with certain other companies and controlling shareholders. Dr. Zhang owns 35.9% of the outstanding voting power of CMM's capital stock and is CMM's Chief Executive Officer and Chairman of CMM's Board of Directors. While Abax's claims against CMM and Magical arise out of breaches of several agreements (an Indenture, the IRA, and a Registration Rights Agreement), its claim against Dr. Zhang arise only out of the IRA.

Abax alleges the following violations by Dr. Zhang of the IRA: (1) breach of Section 2.1 of the IRA by failing to submit an annual budget, (2) breach of Section 2.1 of the IRA by failing to submit a business plan, (3) breach of Section 2.2(e) of the IRA by failing to retain a firm of independent public accountants approved by Abax, and (4) breach of section 2.2(g) of the IRA by failing to ensure that the companies did not enter into activities outside of their ordinary course of business.

Under section 7.1 of the IRA, CMM covenanted to redeem certain unexercised Warrants tendered by Abax for a redemption price of $1.00 per warrant in the event of default under the

[1] RMB refers to the lawful currency of the People's Republic of China. As of July 1,2013 RMB 1 was equal to approximately USD $.016. At the time that Abax agreed to purchase the Notes, 150,000,000 RMB equaled approximately $20,500,000.

Indenture. The warrants have a minimum value of $4,500,000 and have not been redeemed by CMM.

CMM's stock has been delisted from the exchange on which it traded.

Magical has defaulted on the Notes, which have a value of over $35 million. CMM has not paid under its guaranty of the Notes.

**Discussion**

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable reference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

A motion to dismiss based on CPLR 3211 (a) (8) is grounded on lack of jurisdiction due to improper service of process. CPLR 3211 (a) (8).

Service

Abax filed its Summons and Complaint on January 7, 2013. Abax made multiple attempts at substantial cost to serve Dr. Zhang with the Summons and Complaint, which is reflected in the Affidavit of Service filed by Abax on March 28, 2013, affidavits submitted by Celeste Ingalls, dated May 24, 2013, by James Perry, dated June 21, 2013, and by Kent Stout, dated June 20, 2013. The documents were mailed to Dr. Zhang's last known address in China, and forwarded for service to the Central authority in China, pursuant to the Hague Service Convention, to which the United States and China are both signatories.

Finally, on March 21, 2013, a process server gave the documents to Joney Jones (Ms. Jones), a receptionist at the building that houses the offices of Legend Silicon, a company for which Dr. Zhang serves as CEO and Chairman. The summons and complaint were also firmly affixed to the door of Legend Silicon pursuant to CPLR 308 (4).

Dr. Zhang argues that he was not properly served, pursuant to CPLR 308 (2) because the receptionist that received the documents, Ms. Jones, was not a person of suitable age and discretion. Dr. Zhang argues Ms. Jones was not a receptionist of Dr. Zhang's actual place of business, but merely a receptionist at the building housing the offices of Legend Silicon with no authority to accept service on Dr. Zhang's behalf. Dr. Zhang argues that Ms. Jones' position is akin to that of a security detail, making the service attempt insufficient. *See Summitbridge Credit Inv., LLC v FT, LLC,* No. 10-27231, NY Misc LEXIS 1741 (Sup. Ct. Suffolk, 2013).

New York Courts have routinely held that a receptionist, including a receptionist for an office complex at which the defendant rents space, constitutes a person of suitable age and

discretion for service under CPLR 308(2). *See Albilia v Hillcrest Gen. Hosp.*, 124 AD2d 299 (1st Dept 1986), *Townsend v Hanks,* 140 AD2d 162, 163 (1st Dept 1988). Dr. Zhan does not dispute that Legend Silicon is his actual place of business, or that Ms. Jones is a receptionist at the building housing its offices.

The court in *Summitbridge* held service upon a building security guard as improper because the server could have accessed the defendant's apartment. *Summitbridge*, NY Misc LEXIS at *4 (2013). In *Maine v Jay St. Realty Assocs.,* the court held service upon doorman of defendant's building proper where process server lacked access to defendant's apartment. *Maine v. Jay St. Realty Assoc.,* 187 Misc 2d 376, 377 (Sup Ct NY Cty 2001). Here, the process server made repeated attempts to serve Dr. Zhang, and then decided to leave the documents with Ms. Jones, who screened the process server and represented to him that she was authorized and would pass the papers to Dr. Zhang.

Ms. Jones, as a receptionist in Dr. Zhang's actual place of business, is a person of suitable age and discretion for service under CPLR 308 (2). There is no need to explore Abax's alternative arguments of proper service under CPLR 308 (4) and (5).

Breach of Contract Damages

The following elements must be adequately plead to establish a breach of contract claim: (1) a valid and enforceable contract; (2) plaintiff's performance of the contract, (3) breach by the defendant, and (4) damages. *See Noise in Attic Prods., Inc. v London Records*, 10 AD3d 303, 307 (1st Dept 2004).

Dr. Zhang argues that Abax has failed to adequately plead damages because it has failed to allege how the breaches of the IRA caused Abax's loss on the Notes and Warrant investments, for which they now seek damages.

The court must "construe the complaint liberally, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion, and accord plaintiffs the benefit of every possible favorable inference." *Richbell Info. Serv. Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003). At this stage of the proceeding, Abax need only plead facts from which damages could be reasonably inferred. *Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg*, 199 AD2d 45 (1st Dept 1993); *InKine Pharmaceutical Co. v Coleman*, 305 AD2d 151 (1st Dept 2003). New York courts tend to grant motions to dismiss on the question of inadequately pled damages in cases where breach could not have resulted in any damages. *See Faulkner v Beer,* No. 603597/05, 2007 NY Misc LEXIS 8829, at *21 (Sup. Ct. NY CTY Dec. 21, 2007); *Gordon v Dino De Laurentis Corp.*, 141 AD2d 435 (1st Dept 1998).

Abax alleges the following damages:

> Under Section 8 of the IRA, Defendants covenanted to pay half of or reimbursed Abax Lotus for any loss, cost, damage, including reasonable attorneys' fees and expenses and all reasonable amounts paid in investigation, defense or settlement which Abax Lotus may suffer as a result of Defendants' breach of its covenants under the IRA. Exhibit E(IRA) at § 8 (1) (ii).

Compl. ¶ 37.

> Including because CMM's stock has been delisted from the exchange on which is traded and is worthless, Plaintiffs have suffered losses amounting to additional millions of dollars.

Id. ¶ 41.

> As consequence of Defendants' failures to meet their obligations under the IRA, Plaintiffs suffered losses in connection with the further breaches of Indenture and Notes described above.

Id. ¶ 63.

> As a result of these breaches, plaintiffs have been damaged at least in the amount of $4,500,000 with respect to the Warrants, and upon information and belief, in additional amounts potentially in excess of $35 million.

Id. ¶ 64.

Abax has sufficiently alleged damages under a liberal reading of the complaint. Defendants' failure to keep listed CMM's stock, provide a business plan, retain an approved accounting firm, and submit an annual budget could have contributed to Abax's losses. Dr. Zhang signed the IRA as a "warrantor"; it is not unreasonable to infer that violations of the IRA caused CMM's stock to be delisted and prevented Abax from exercising the Warrants, worth $4.5 million. In addition, Abax claims that if it can prove Magical engaged in activities not in the ordinary course of business causing the failure to make Note payments, then Dr. Zhang would be liable for Magical's default on the Notes. Whether Dr. Zhang actually breached the IRA, or whether those breaches caused Abax's damages are issues of fact that cannot be determined at this stage of the proceedings.

Abax has sufficiently alleged a claim of breach of contract as against Dr. Zhang.

Ability to sue Dr. Zhang individually

Dr. Zhang argues that Abax has failed to state a claim sufficient to hold him personally accountable for Abax's damages. Dr. Zhang claims that he signed the IRA as a "controlling shareholder" of CMM, not as an individual and that as owner of 35.9% of CMM's stock, he also lost substantially when it failed. Dr. Zhang claims that Abax has not plead the elements of corporate veil piercing necessary to hold him responsible for CMM's losses in disregard of the corporate form and, therefore, the claim against him should be dismissed.

Abax has not attempted to pierce CMM's corporate veil in their complaint against Dr. Zhang. The plaintiff's claims rest on a theory of breach of contract for violations of the IRA. The doctrine of piercing the corporate veil is used 'in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation." *Matter of Morris*

*v New York State Dept. of Taxation and Fin.*, 82 NY2d 135 (1993). Abax is basing Dr. Zhang's liability not for the underlying corporate obligations, but Dr. Zhang's obligations under the IRA, for which there is no need to pierce the corporate veil of the corporations involved.

The language of the IRA clearly separates the covenants and agreements from the corporate entities and that of each controlling shareholder. Section 1.4 of the IRA describes the roles of the parties to the contract, "each of the Group Companies and the Controlling Shareholders (each of the foregoing, a "warrantor")", which makes it likely that Dr. Zhang undertook his obligations under the IRA in his personal capacity, not as an officer of the corporation. Further, the IRA is signed separately by each corporation and each controlling shareholder.

Section 8 of the IRA requires that "each Controlling Shareholder shall jointly and severally indemnify each Investor . . . for any loss" as a result of breach of its covenants under the IRA. In the absence of any statement limiting Dr. Zhang's liability under the IRA, and due to the fact that he signed the IRA as a warrantor, Abax has properly plead a claim for Dr. Zhang's breach of the IRA.

Accordingly, it is

ORDERED that Dr. Zhang's motion to dismiss claims against him, individually and as Chairman and Founder of CMM, is denied.

Dated: October 30, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER