

**Jason Evans Assoc. LLC v D.V.H. Indus., Inc.**

2013 NY Slip Op 33338(U)

April 8, 2013

Sup Ct, New York County

Docket Number: 652565/2011

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 652565/2011
JASON EVANS ASSOCIATES, LLC,
vs.
D.V.H. INDUSTRIES, INC.,
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. 1052565/11
MOTION DATE 9/12/12
MOTION SEQ. NO. 003

The following papers, numbered 30, 31, 32, 33, 34, 35, 36, were read on this motion to/for

- Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 30, 31
Answering Affidavits — Exhibits No(s) 35, 36
Replying Affidavits No(s)

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

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

Dated: [Signature]

SHIRLEY WERNER KORNREICH
J.S.C. [Signature]

- 1. CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [ ] GRANTED [ ] DENIED [X] 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 54

-----X  
JASON EVANS ASSOCIATES LLC,

Plaintiff,

Index No.: 652565/2011

-against-

DECISION & ORDER

D.V.H. INDUSTRIES, INC., a/k/a DVH INDUSTRIES,  
INC., BEST INDUSTRIES (PVT), LTD., RAJESH  
KUMAR, HASMUKH KHATRI, LILAWATI KHATRI,  
& MARK PRESS,

Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J.:

In this breach of contract case, plaintiff, Jason Evans Associates LLC (Jason Evans), seeks to recover approximately \$233,939 in sales commissions and additional damages. Defendants move to dismiss the third through seventh causes of action for failure to state a claim [CPLR 3211(a)(7)] or, alternatively, for summary judgment pursuant to CPLR 3211(c). Jason Evans opposes.

*I. Background*

*A. Verified Complaint*

According to the complaint, David Kraut, the principal of Jason Evans, an apparel sales representative who had a long-term, strong relationship with Burlington Coat Factory (BCF), contracted with D.V.H. Industries, Inc. (DVH), in May 2009, to be its exclusive sales representative to BCF (the Agreement) commencing on May 5, 2009. The 2-page Agreement, on Jason Evans letterhead, was signed by Mr. Kraut on behalf of Jason Evans and Hasumukh Khatri (H. Khatri) on behalf of DVH. It provided that Jason Evans was to act as an independent contractor and would:

- 2. ... be the sole representative for the new production contracts, and private label orders of the accounts on the attached list for Men's, Ladies [sic] and Children [sic] clothing, and any subsequent account of orders submitted by us and shipped by DVH Industries, Inc. The Men's, Ladies [sic] and Children [sic] clothing divisions of [BCF] will be exclusive to [Jason Evans].

The Agreement then provides for the payment to Jason Evans of a 10% commission "on

the net invoice amount shipped for all [Jason Evans] orders regardless of how the order is obtained or received” by DVH. Additionally, the Agreement requires DVH to maintain accurate records of commissions due and paid, of invoices and of account statements and to send these to Jason Evans by the 10th day of the month after payment of the invoice. Also, copies of the invoices are to be sent to Jason Evans within 5 days after shipment.

The Agreement runs through May 15, 2014 and cannot be “shortened without the express written consent of both parties.” Similarly, the Agreement may not be modified without a writing and signed by both parties.

The complaint alleges that in late 2010, DVH hired defendant Mark Press as a salesman and Press, who “upon information and belief” knew of the Agreement, was in contact with BCF in May of 2011 “attempting to include himself in the process of BCF’s upcoming purchases from DVH.” Further, the complaint claims that DVH was complicit in Press’s conduct and beginning on June 3, 2011, demanded that Jason Evans reduce the percentage of its commission.

According to the complaint, “defendants caused Best Industries (PVT), Ltd. (Best), to be incorporated in Nevada. Meantime, in June 2011, DVH had received purchase orders from BCF in the amount of \$409,192, which “defendants caused BCF to cancel.” The complaint alleges that, thereafter, those orders were reissued by Best. \$239,544 of the purchase orders have been shipped. Plaintiff states that “defendants” informed Jason Evans that Best would take over DVH’s business.

The complaint further contends that Best employs defendant Rajesh Kumar, a longtime employee of DVH and Best’s president and treasurer, and Press and continues to occupy the DVH offices and use the DVH-specific apparel style numbers. Moreover, the complaint contends that DVH, not Best, appears on the tenant directory of the office building.

The complaint alleges the following causes of action: 1) breach of contract against DVH and Best for \$23,954.44 in commissions for the June 2011 BCF orders; 2) breach of contract against DVH and Best for \$13,020 in commissions for September 2011 BCF orders shipped by

Best; 3) breach of contract against DVH and Best for \$180,000 which plaintiff assumes it would have collected in commissions for the remaining three years of its contract based on approximately \$5,000 per month it claims it earned in the first two years; 4) fraudulent conveyance under the Debtor and Creditor Law by DVH, Best, H. Khatri, Lilawati Khatri (L. Khatri), who is H. Khatri's wife and Best's corporate secretary, and Kumar, the president and treasurer of Best, in the amount of \$233,939; 5) "alter ego" against H. Khatri, L. Khatri and Kumar in the amount of \$233,939; 6) a declaratory judgment declaring that DVH, Best, H. Khatri, L. Khatri and Kumar are jointly and severally liable to plaintiff in the amount of \$233,939; and 7) tortious interference with contract against Press.

*B. Answer & Counterclaims*

Defendants, in their answer, assert the following affirmative defenses: failure to state a claim; misrepresentation; mutual mistake; frustration of purpose; failure to perform; material breach; agreement to modify; lack of contractual relationship; failure to mitigate; speculative damages; laches; waiver; release; estoppel; unclean hands; in pari delicto; election of remedies; and adequate remedy at law; set-off; recoupment; the collateral source rule and/or accord and satisfaction; negligence; and wrongly named parties.

In its counterclaim, DVH alleges that in the early 2000s, it had an agreement with Jason Evans "whereby they would obtain orders from Burlington . . . , equally fund the costs of production, and share in the net profits or losses from all such sales." It contends that as a result, in 2004 through 2006, they equally funded orders for Burlington bearing the "Undeclared" mark and were sued in April 2006 for trademark infringement in connection with that mark. DVH paid \$300,000 to defend and settle the action and Jason Evans has paid nothing, in spite of a demand from DVH.

*C. The Motion*

In support of its motion to dismiss or for summary judgment, defendants submit an affidavit of Kumar. Kumar attests that: he alone incorporated Best and is its president; he was an

employee of DVH from 1997 to 2011 and worked as H. Khatri's assistant; H. Khatri is 73 years old and has no financial interest in Best; Best has neither purchased DVH's assets or assumed its obligations; Press was employed by DVH and is now employed by Best; based on the prices BCF was willing to pay, DVH could not afford to accept orders from Burlington "against a 10% commission payable to plaintiff"; plaintiff would not accept a lower commission or go back to their prior arrangement of sharing costs and risks; DVH "is willing to accept any order procured by the plaintiff from Burlington where the price and commission payable (be it the contract commission or less) allows a fair profit for DVH"; "It could only be argued that DVH intended to evade payment of the plaintiff's commission if DVH or Mr. Khatri himself profited from any transactions between Best and Burlington; but that is not the case."

In opposition, Jason Evans submits an affidavit of David Kraut with exhibits. He contends that Best is manufacturing the same clothing styles as did DVH, using the same Indian factories and customs brokers as DVH had used. Additionally, he claims that the garments sold are labeled with the same trademark DVH had used. Further, Kraut states that Press had a pre-existing relationship with BCF when he came to DVH. Kraut also alleges that he worked with Kumar, not H. Khatri, at DVH and that Kumar was involved in the production, costing, shipping and invoicing of BCF. Finally, Kraut alleges that defendants' actions have injured his reputation and his ability to obtain orders from BCF.

## *II. Discussion*

CPLR 3026 mandates that "[p]leadings shall be liberally construed [and] defects shall be ignored if a substantial right of a party is not prejudiced." On a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone*, 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003). "However, factual allegations that do not state a viable cause of action, that consist

of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, L.L.C. v Brody*, 1 AD3d at 250.

"[T]he criterion [on a dismissal motion] is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Rovello, supra*, 40 NY2d at 636. The test is whether the pleadings give adequate notice to the court and the adverse party of the transactions or occurrences intended to be proved. *Two Clinton Sq. Corp. v Friedler*, 91 AD2d 1193, 1194 (4th Dept 1983); see *Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 666 (1st Dept 1993).

CPLR 3211(c) provides, in relevant part, that "the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment." CPLR 3212(b) provides:

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

Summary judgment will be granted if it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 (1979). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact. *Alvarez, id.*; *Zuckerman, id.* Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman, id.*; see also *Ellen v Lauer*, 210 AD2d 87, 90 (1st Dept 1994) (it "is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case.

Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . . [citations omitted]).

*A. Declaratory Judgement (6th Cause of Action) & Tortious Interference (7th Cause of Action)*

The court dismissed the declaratory judgment cause of action and the tortious interference cause of action at argument. “Declaratory judgment “is generally appropriate only where a conventional form of remedy is not available and a declaratory judgment will serve some practical and useful purpose”” *Automated Ticket Systems, Ltd. v Quinn*, 90 AD2d 738, 739 (1st Dept 1982). Here, the declaratory judgment is duplicative of the third cause of action for breach of contract and should be dismissed. *See Watson v Sony Music Entm’t, Inc.*, 282 AD2d 222 (1st Dept 2001) (declaratory judgment cause of action dismissed where adequate remedy in breach of contract).

Plaintiff’s tortious interference cause of action was brought only against Press, an employee of DVH and then Best. The crux of the action is that Press, who had a relationship with BCF, was selling to BCF and, therefore, tortiously interfering with DVH’s contract with plaintiff.

The elements of tortious interference with contract are: 1) the existence of a valid contract, 2) defendant’s knowledge of the contract, 3) the defendant’s intentional procurement of the breach by the third party, and 4) damages caused by defendant’s actions. *Chung v Wang*, 79 AD3d 693, 694 (2d Dept 2010). As the court noted on the record, plaintiff cannot demonstrate that Press’s actions caused him any damages. Plaintiff’s contract with DVH provided that he would get a 10% commission on all orders from BCF, no matter who sourced the business. Therefore, the fact that Press may have been the salesman of DVH/Best goods would have no impact on plaintiff’s commission under the contract.

*B. Breach of Contract (3d Cause of Action)*

The Third Cause of Action seeks future damages in the form of “further commissions amortizable over the remaining thirty six months of the Contract.” Complaint, ¶47. Plaintiff

avers that he realized approximately \$5,000 in monthly commissions in the first two years of his contract and infers that future damages will be “at least . . . \$180,000.” ¶ 48. This is not sufficient.

Loss of future profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law. First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes.

*Kenford Co. v County of Erie*, 67 NY2d 257, 261 (1986). *See also Griffin v Colver*, 16 NY 489, 491 (1858) (damages must “be shown with certainty, and not left to speculation or conjecture”); Restatement (Second) Contracts § 352.

The Contract obligates DVH to pay Jason Evans a 10% commission “on the net invoice amount shipped for all Jason Evans[‘ . . .] orders.” There is no certain way of predicting the amount and value of orders from BCF that have not yet been made or even that BCF will continue to place orders with DVH/Best. *See Hirsch Elec. Co. v Community Servs., Inc.*, 145 AD2d 603, 605 (2d Dept ) (breach of contract damages must be more than mere speculation and not based upon inference). Where an anticipated profit requires the approval of a party over which the defendant has no control, they are too speculative to permit recovery. *Hoeffner v Orrick, Herington & Sutcliffe*, 20 Misc.3d 1139(A)(Sup. Ct. N.Y. Co. 2008), modified on other grnds. 61 AD3d 614 (1st Dept 2009) (earnings plaintiff would have received if retained by law firm other than defendant not recoverable); sub appeal, 85 AD3d 457 (1st Dept 2011) (reiterating prior holding). The claim is dismissed.

#### C. *Fraudulent Conveyance (4th Cause of Action)*

In its fourth cause of action, plaintiff alleges that: DVH conveyed its assets, without consideration, to Best and, thereby, was rendered insolvent; this conveyance was accomplished

with intent to defraud DVH's "creditors; the conveyance occurred "when [DVH] was about to incur debts, including its debts to Plaintiff set forth herein, and [DVH] has repudiated its present and future debts to Plaintiff; and "plaintiff is entitled to a judgment setting aside the conveyances or a judgment directly, jointly and severally against defendant Best in the total sum of \$233,939." Additionally, plaintiff seeks attorney's fees and costs under this cause of action.

The court interprets this cause of action as one seeking to set aside a fraudulent conveyance by DVH to Best of the debt owed to plaintiff as a creditor at the time of the alleged fraudulent conveyance. A debt is defined in Debtor & Creditor Law (Dr & Cr) 270 as "any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." A creditor is defined in Dr & Cr 270 as "as a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

Dr & Cr 273 provides that a conveyance by a person who will be rendered insolvent thereby is fraudulent as to creditors without regard to the conveyer's intent if the conveyance is incurred without fair consideration. There is fair consideration when assets are sold in good faith for a fair equivalent. Dr & Cr 272. Further, Dr & Cr 274 provides that a conveyance made without fair consideration is fraudulent as to creditors without regard to actual intent. Similarly, "[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors." Dr & Cr 275. Finally, where actual intent to hinder or defraud present or future creditors is present when such a conveyance is accomplished, the conveyance is fraudulent as to both present and future creditors. Dr & Cr 276.

The allegations in the Fourth Cause of Action, as supplemented by the affidavit of David

Kraut, plaintiff's President<sup>1</sup>, are sufficient to establish a claim for fraudulent conveyance. However, plaintiff is entitled only to have the conveyance set aside to the extent necessary to satisfy his claim. Dr & Cr 278(1), 279. Here, that would amount only to the extent of his commissions from goods already purchased and paid for by BCF, or goods so purchased and paid for by BCF through May 15, 2014 pursuant to the Agreement.

*D. Piercing Corporate Veil & Fraud (5th Cause of Action)*

As stated by the court in *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 (2d Dept 2009):

The general rule, of course, is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability. The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation. 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. [citations omitted].

The key component to determining whether veil piercing should take place is complete domination by the corporate owner such that he uses the corporation to further his personal rather than his business interests. *Shisgal v Brown*, 21 AD3d 845, 848 (2d Dept 2005). Factors to be considered in determining whether the owners of a corporation abused the privilege of doing business in the corporate form are: the absence of corporate formalities, inadequate capitalization, intermingling of personal and corporate funds and overlap of ownership. *Id.*

Here, plaintiff fails to allege any factors supporting veil piercing -- that the defendants

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<sup>1</sup>*See, e.g., Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 (1976) (ruling that on motion to dismiss under CPLR 3211(a)(7), "court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint").

operated DVH and/or Best for their personal benefit by using funds for their personal use, without adhering to the corporate form, and with inadequate capital. *See Superior Transcribing Serv., LLC v Paul*, 72 AD3d 675 (2d Dept 2010) (discussing factors). Indeed, there are no allegations that defendant L. Khatri has any control over either corporation. Her familial and spousal relationships with the other defendants and her position as an officer of Best, without more, are not enough.

Defendants' alternative motion for summary judgment is denied. Defendants failed to support their request with admissible evidence. The Answer and Counterclaim was verified by counsel, who has no direct knowledge of the facts and circumstances. For the same reason, an affirmation by counsel is not sufficient to support the motion. Accordingly, it is hereby

ORDERED that the motion of defendants to dismiss the Third through Seventh Causes of Action in the Verified Complaint is granted as to the Third, Fifth, Sixth and Seventh Causes of Action, and denied as to the Fourth Cause of Action; and it is further

ORDERED that the Third, Sixth and Seventh Causes of Action are dismissed with prejudice; and it is further

ORDERED that since all claims against the individual defendants, Rajesh Kumar, Hasmukh Khatri, Lilawawati Khatri, and Mark Press are dismissed with prejudice, the complaint is dismissed entirely as to said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the first, second and fourth causes of action are severed and continued against the remaining defendants; and it is further

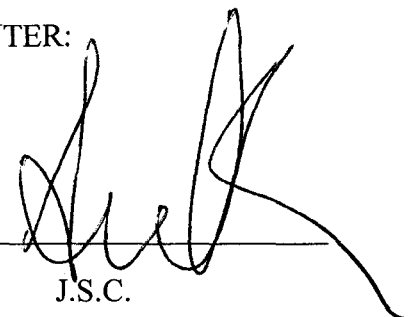
ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office

(Room 158M), who are directed to mark the court's records to reflect the change in the caption;  
and it is further

ORDERED that the action is transferred to trial support for reassignment to a non-commercial part since the remaining actions seek damages in an amount less than the Commercial Division limit.

Dated: April 8, 2013

ENTER:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right. The signature is written over a horizontal line.

J.S.C.