SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PENSMORE INVESTMENTS, LLC,

Index No.: 650002/2014

Plaintiff,

DECISION & ORDER

-against-

GRUPPO, LEVEY & CO., GRUPPO, LEVEY HOLDINGS, INC., CLAIRE GRUPPO, HUGH LEVEY, and WILLIAM SPRAGUE,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 003 & 004 are consolidated for disposition.

Plaintiff Pensmore Investments, LLC (Pensmore) moves for summary judgment against defendant William Sprague pursuant to CPLR 3212. Seq. 003. Defendants Gruppo, Levey & Co. (GLC), Gruppo, Levey Holdings, Inc. (GLH), Claire Gruppo (Claire), and Hugh Levey move, pursuant to CPLR 3211, for dismissal of the second cause of action against GLC and to limit Levey's liability to the amount of his personal guaranty. Seq. 004. Plaintiff's summary judgment motion against Sprague is granted and the remaining defendants' motion to dismiss is granted in part and denied in part for the reasons that follow.

I. Factual Background & Procedural History

This is an action to enforce the settlement of a previous case before this court, styled *Pensmore Investments, LLC v Gruppo, Levey Holdings, Inc.*, Index No. 653628/2011 (the Prior Action), in which Pensmore sued GLH to collect money due under several notes which were in default. The court assumes familiarity with the details of that action, which are set forth in an order dated September 7, 2012 (the SJ Order), granting summary judgment on liability to

Pensmore and referring the calculation of damages to a Special Referee. *See* Index No. 653628/2011, Dkt. 21. In opposition to the summary judgment motion, GLH argued that the notes were orally modified, such that Pensmore could only seek payment on the notes from the proceeds of a transaction between GLH and "entities referred to as 'DMRA and KBM'" (the DMRA Contract). SJ Order at 3. The court held that such defense was an alleged accord and satisfaction and since satisfaction had not occurred, GLH owed the full amount under the notes. SJ Order at 6. In an order dated December 11, 2012, the Special Referee found that Pensmore's damages totaled $1,647,450.74, an amount stipulated to by the parties. *See* Index No. 653628/2011, Dkt. 34.

On February 19, 2013, Pensmore and GLH executed a Settlement Agreement, which provides that: (1) GLH acknowledged it owed Pensmore $1,701,222.26; (2) in lieu of Pensmore enforcing a judgment, GLH would pay off the amount owed according to a schedule; (3) GLH would make a payment of $187,634.63 on March 1, 2013 and another on April 1, 2013; (4) Pensmore would receive 12.5% of fees generated by defendants' business (the Finder's Fees); (5) the balance of the amount owed would be due on September 30, 2013 (the Final Payment); (6) Levey and Sprague would jointly and severally personally guaranty $625,000 of GLH's debt (the Guaranty); and (7) as further consideration for the settlement, Pensmore, GLH, Claire, Levey and Sprague would release all claims against each other upon GLH making the Final Payment. The Guaranty was attached as Exhibit D to the Settlement Agreement. The Guaranty, which states that it is "absolute, unconditional, irrevocable," was signed by Levey and Sprague. It provides that Levey and Sprague waive "any defense based on claims of election of remedies."

GLH made none of its scheduled payments and only made two $25,000 payments on May 1 and May 29, 2013. Pensmore demanded the full amount owed under the Settlement Agreement after the September 30, 2013 deadline. Defendants did not pay. Instead, they

averred that a slew of supposedly imminent transactions would result in payment. No further payments were made.

Pensmore commenced the instant action on January 2, 2014. The Complaint asserts six causes of action: (1) fraud and conspiracy to defraud against all defendants; (2) breach of contract against all defendants; (3) breach of the implied covenant of good faith and fair dealing against GLC, GLH, Levey and Claire; (4) fraud in the inducement against GLC, GLH, Levey and Claire; (5) veil piercing against GLC, GLH, Levey and Claire; and (6) aiding and abetting fraud against GLC, GLH, Levey and Claire. In a stipulation dated February 14, 2014, Pensmore withdrew its first, fourth, and sixth causes of action for fraud without prejudice. Pensmore now seeks summary judgment on the Guaranty against Sprague, whose only defense is lack of consideration.

In the dismissal motion, defendants argue that veil piercing is not properly pled and, thus, liability is limited against the contracting parties in the amount set forth in the contracts. In opposition, Pensmore argues that it has pled sufficient facts regarding GLH's disregard of corporate formalities. Specifically, Pensmore alleges that: (1) GLC and GLH are located at the same address; (2) Claire is the CEO of both companies; (3) GLC and GLH commingle assets;[1] (4) GLH promised to pay the Finder's Fees from GLC's business; (5) GLC is granted a release in the Settlement Agreement, even though it was not liable in the Prior Action; and (6) contrary to GLH's sworn statement in the Prior Action, GLC, and not GLH, was the signatory to the

[1] The seven promissory notes from the Prior Action include cover letters containing wiring instructions. The notes were signed by GLH and the bank account belonged to GLH. But, four of the letters contain GLC's letterhead, while the other three contain GLH's letterhead.

DMRA Contract, evidenced by GLC's pleadings in a federal lawsuit, styled *Gruppo, Levey & Co. v RabidBuyr, Inc.*, No. 13-cv-02109 (SDNY Mar. 29, 2013) (Pauley, J.).[2]

II. Summary Judgment Against Sprague (Seq. 004)

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon 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, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

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[2] GLH appears to be faced with a catch-22. Either there is no real difference between GLH and GLC, and, therefore, GLH's allegation that it was a party to the DMRA Contract is immaterial; or if the companies are indeed distinct, then GLH may have committed perjury in the Prior Action. It is quite plausible that GLH was merely arguing that Pensmore agreed to be paid from the DMRA Contract, even though GLH was not the contracting party, since Claire controls both companies and could direct GLC to pay off GLH's debt to Pensmore. However, if this is true, it bolsters veil piercing.

Summary judgment is warranted against Sprague. It is undisputed that Sprague signed an absolute, unconditional guarantee of GLH's agreement and that GLH defaulted. Consequently, Sprague must pay the guarantee amount – $625,000. Sprague has no legitimate defenses or offsets, nor is there any reason to delay enforcement of his liability, especially given how long Pensmore has been forced to wait to collect its debt. Sprague's sole defense – that the Guaranty is unenforceable for lack of consideration – is meritless.

It is well settled that "[a]bsent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny." *Robinson v Day*, 103 AD3d 584, 586 (1st Dept 2013), quoting *Apfel v Prudential-Bache Secs. Inc.*, 81 NY2d 470, 476 (1993); *Laham v Chambi*, 299 AD2d 151, 152 (1st Dept 2002), quoting *Dafnos v Hayes*, 264 AD2d 305, 306 (1st Dept 1999) ("The general rule that 'the adequacy of consideration is not a proper subject for judicial scrutiny' applies when 'some benefit' was received"). Where, as here, plaintiff established a *prima facie* entitlement to summary judgment on the enforceability of the contract, the defendant must do more than make "conclusory allegations" regarding lack of consideration to create a question of fact. *Carlin v Jemal*, 68 AD3d 655, 656 (1st Dept 2009).

In any event, a settlement contingent on a guaranty constitutes valid consideration for the guaranty. *Sun Oil Co. v Heller*, 248 NY 28, 32-33 (1928) ("where one party agrees with another party that, if such party for a consideration performs a certain act for a third person, he will guarantee payment of the consideration by such person, the act specified is impliedly requested by the guarantor to be performed and, when performed, constitutes a consideration for the guaranty"); *Michelin Mgmt. Co. v Mayaud*, 307 AD2d 280, 281 (2d Dept 2003). The law presumes that a guarantor receives a benefit by guaranteeing a contract since, if there were no benefit to the guarantor, he would not execute the guaranty absent fraud or duress. Sprague does

not allege fraud or duress. Additionally, beyond the general presumption that consideration exists, Sprague was granted a release in the Settlement Agreement. Summary judgment on the guaranty is granted to Pensmore as against Sprague.

III. Motion to Dismiss the Veil Piercing Claim (Seq. 003)

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "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*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

The doctrine of piercing the corporate veil is an exception to the rule that corporate owners are not normally liable for the debts of the corporation. *See Morris v NY State Dep't of*

Taxation & Finance, 82 NY2d 135, 140 (1993). It is employed by third parties to hold the corporate owners liable for the corporation's obligations. *Id.* To establish liability on the theory of veil piercing, a party must show "that the owners of the entity, through their domination of it, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party asserting the claim such that a court in equity will intervene." *Tap Holdings, LLC v Orix Finance Corp.*, 109 AD3d 167, 174 (1st Dept 2013). "In order to pierce the corporate veil, a plaintiff must show that the dominant corporation exercised complete domination and control with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong causing injury to the plaintiff." *Fantazia Int'l Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 (1st Dept 2009), citing *Morris, supra.*

"Factors to be considered include the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity. No one factor is dispositive." *Id.*, citing *Freeman v Complex Computing Co.*, 119 F3d 1044 (2d Cir 1997). "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance." *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 (1st Dept 2012), quoting *TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 (1998).

Though none of Pensmore's allegations, on its own, suffice to plead veil piercing against GLC, collectively they establish a plausible inference that GLC and GLH do not adhere to corporate formalities and may be used to defraud creditors, such as Pensmore. Indeed, the

totality of defendants' alleged malfeasance (e.g., how the funds from the original Madison Williams Holdings, LLC loan were distributed) suggest that Pensmore may well have been defrauded. Pensmore, as a result, may take discovery from defendants in order to potentially seek payment from GLC for GLH's obligations under the Settlement Agreement. However, veil piercing, for now, is a theory limited to GLC, since Pensmore has not pleaded the particularized facts required to extend GLH's liability to the individual defendants. Pensmore's veil piercing allegation against Levey and Claire are dismissed without prejudice with leave to replead if discovery from GLH and GLC reveals facts supporting a veil piercing claim against them.

Finally, Pensmore's good faith and fair dealing claim is dismissed as duplicative of its breach of contract claims. Pensmore is limited to recovering the amount due under the contracts. GLH defaulted on the Settlement Agreement and owes Pensmore a debt that is long overdue. A good faith claim is unnecessary and would not entitle Pensmore to further damages. *See Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433 (1st Dept 2013). Accordingly, it is

ORDERED that the motion by plaintiff Pensmore Investments, LLC for summary judgment against defendant William Sprague is granted, and the Clerk is directed to enter judgment in favor of said plaintiff and against said defendant in the amount of $625,000 plus 9% statutory interest from September 30, 2013 to the date judgment is entered; and it is further

ORDERED that such judgment is hereby severed from the claims against the remaining defendants; and it is further

ORDERED that the motion to dismiss by defendants Gruppo, Levey & Co., Gruppo, Levey Holdings, Inc., Claire Gruppo, and Hugh Levey is granted in part as follows: (1) the third cause of action for breach of the implied covenant of good faith and fair dealing is dismissed as

duplicative of the breach of contract claim; (2) the veil piercing allegations are dismissed without prejudice against Levey and Claire; and (3) the motion is otherwise denied; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on April 29, 2014 at 10:30 in the forenoon.

Dated: April 8, 2014

ENTER:

J.S.C.