

Smart Trike v Piermont Prods. LLC
2014 NY Slip Op 31306(U)
May 22, 2014
Supreme Court, New York County
Docket Number: 650376/2012
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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SMART TRIKE, MNF, PTE, LTD.,

Index No.: 650376/2012

Plaintiff,

DECISION & ORDER

-against-

PIERMONT PRODUCTS LLC f/k/a SMART
TRIKE, LLC, ROBERT KRAMER and
JOSEPH JANOWSKI,

Defendants.

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PIERMONT PRODUCTS LLC,

Third-Party Plaintiff,

-against-

OFEK ONE MARKETING, LTD.,
YORAM BARON, and ERAN BLIZOVSKY,

Third-Party Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Third-party defendants Ofek One Marketing, Ltd. (Ofek), Yoram Baron, and Eran Blizovsky (collectively, the Third-Party Defendants) move to dismiss the Third-Party Complaint (the TPC) for lack of personal jurisdiction and failure to state a claim. CPLR 3211(a)(7) & (8). The motion is granted for the reasons that follow.

I. Factual Background & Procedural History

The court assumes familiarity with its order dated January 22, 2013 (the 2013 Order),¹ which sets forth the procedural history and allegations in this case. *See* Dkt. 53. In short, Smart Trike, a Singapore company based in Israel, sued Piermont, a New Jersey company, to recover money allegedly owed under an agreement (the 2010 Agreement) governing Piermont's

¹ All capitalized terms have the same meaning as in the 2013 Order.

distribution of Smart Trike's products in the United States and Canada. The 2013 Order made clear that this is a breach of contract case that will not be sidetracked by tort claims or claims against non-contracting parties.

On February 5, 2013, Piermont filed its answer, asserting counterclaims against Smart Trike for breach of the 2010 Agreement. Piermont also filed the TPC, which has five causes of action: (1) veil-piercing against Ofek and Baron to impose liability on them for Piermont's counterclaims against Smart Trike; (2) breach of contract against Ofek and Baron; (3) violation of the New York Labor Law against Ofek and Baron; (4) conversion against Ofek, Baron, and Blizovsky; and (5) tortious interference with contract against Ofek and Baron.

Baron, who lives and works in Israel, is the head of both Smart Trike and Ofek. Baron negotiated and signed the 2010 Agreement on behalf of Smart Trike. Ofek, an Israeli company, shares office space and provides certain services to Smart Trike. Blizovsky, who also lives in Israel, works in Ofek's finance department.

Piermont contends that Smart Trike is a sham company and that Ofek and Baron are its alter egos. To support these claims, Piermont alleges that: (1) Smart Trike and Ofek share employees and office space; (2) all employees are controlled by Baron; and (3) Ofek markets itself to the public as Smart Trike, such as by using Smart Trike's domain name.² Piermont's knowledge about Smart Trike/Ofek's Israeli operations comes from its principal, Robert Kramer, who recounts a December 2010 business trip to Israel in an affidavit filed in opposition to the

² Piermont also makes much of Smart Trike not having any real presence in Singapore, and that its Asian corporate operation consists merely of a few Chinese nationals who serve as nominal directors. This is not only legally irrelevant, it is a common business practice. Optimizing international corporate structure for tax and regulatory purposes is not a basis to pierce the corporate veil. Actual, particularized relevant veil-piercing factors, discussed below, must be alleged. Piermont does not allege facts about any actual financial improprieties or any actual undercapitalization designed to frustrate creditors.

instant motion. *See* Dkt. 117. Kramer provides intricate details of Smart Trike/Ofek's office. Kramer remembers that only Smart Trike's logo was displayed, that the employees worked in cubicles, and that Baron had the largest office, where meetings with Baron took place. Kramer even remembers the shape of the meeting table. What Kramer does not explain, and what is fatal to Piermont's veil-piercing claim, is how Smart Trike/Ofek's corporate structure was designed to defraud its creditors.

Moreover, aside from the deficient veil piercing allegations, Ofek, Baron, and Blizovsky contend that they are not subject to personal jurisdiction in New York. Smart Trike and Ofek do not conduct business in New York. Smart Trike's only U.S. directed conduct was in New Jersey, where Piermont and Toys "R" Us are located. The only New York nexus that is alleged to apply to Blizovsky is that his actions from Israel caused financial harm in New York. Baron, however, was personally served in New York when he attended a trade fair in February 2013. Baron's deposition in this case was scheduled to take place then, since an extra trip to New York was hoped to be avoided. That deposition was cancelled due to Piermont's discovery deficiencies. Nonetheless, Baron still came to New York for the conference and was served. Baron lives and works in Israel and has no other connection to New York. In fact, the only nexus that any of the parties have to New York is the 2010 Agreement's forum selection clause. If not for that clause, it is undisputed that this court would lack jurisdiction over this action.

II. Discussion

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, L.L.C. 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).

A. Personal Jurisdiction

Before the court can assess the merits of the claims against the Third-Party Defendants, personal jurisdiction must be established. This is a two-step inquiry that requires a showing that the CPLR confers jurisdiction over the defendants and that the exercise of jurisdiction comports with due process. *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 (2000); see generally *Daimler AG v Bauman*, 134 SCt 746, 754 (2014) (“The canonical opinion in this area remains [*Int’l Shoe Co. v Washington*, 326 US 310 (1945)], in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has

‘certain minimum contacts with [the State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”).

The burden of proof is on the party asserting jurisdiction. *Copp v Ramirez*, 62 AD3d 23, 28 (1st Dept 2009). However, even if jurisdiction cannot be established, the plaintiff is entitled to jurisdictional discovery if its allegations make a “sufficient start” to warrant further discovery. *HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665 (1st Dept 2011), accord *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 (1974). Piermont has not done so.

The Third-Party Defendants are not subject to general jurisdiction under CPLR 301. “A foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of ‘doing business’ here that a finding of its ‘presence’ in this jurisdiction is warranted.” *Landoil Resources Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28, 33 (1990). “The court must be able to say from the facts that the corporation is ‘present’ in the State ‘not occasionally or casually, but with a fair measure of permanence and continuity.’” *Id.* at 33-34.³ Ofek has no permanent nexus to New York. Piermont does not and cannot argue that general jurisdiction exists over Blizovsky.

However, Piermont avers that personal jurisdiction exists over Baron because he was served in New York. Baron invokes “the doctrine of immunity, which provides generally that a nonresident witness or party who voluntarily appears in this state solely to attend legal

³ As Justice Friedman recently noted, “*Daimler* significantly narrows the parameters for the exercise of general personal jurisdiction, and calls into question the validity of the doing business doctrine and, arguably also, the mere department doctrine.” *Deutsche Zentral-Genossenschaftsbank AG v UBS AG*, 2014 WL 1495632, at *5 (Sup Ct, NY County 2014). This court also believes that the “mere department” doctrine, where fraud need not be alleged for jurisdiction purposes [see generally *Hale Capital Mgmt., LP v Royal Standard Minerals Inc.*, 2013 WL 2110832, at *5 (Sup Ct, NY County 2013)], may no longer be Constitutional. The court will not reach this issue in this case because Piermont failed to properly allege the non-fraud elements of a veil-piercing claim.

proceedings is not amenable to service of process.” *Brause 59 Co. v Bridgemarket Assocs.*, 216 AD2d 200, 200-01 (1st Dept 1995). Baron argues that he came to New York for his deposition, and, thus, he is entitled to immunity from service. Baron is wrong. Baron was originally scheduled to come to New York for his deposition, but that deposition was cancelled, albeit due to Piermont’s fault. Nonetheless, Baron chose to come to New York to attend a trade conference. In fact, Baron was always planning on coming to New York in February 2013 for that conference. The very reason his deposition was scheduled for that time was to accommodate Baron’s travel plans. Baron’s claim that he was only in New York for his deposition contradicts his previous representations to the court. Jurisdiction over Baron, however, is of no moment since the claims against him are dismissed for the reasons explained below.

Next, Piermont argues that long-arm jurisdiction exists over the Third-Party Defendants under CPLR 302(a)(1) and 302(a)(3). CPLR 302(a)(1) provides jurisdiction over a non-domiciliary that “transacts any business within the state or contracts anywhere to supply goods or services in the state.” *See Johnson v Ward*, 4 NY3d 516, 519 (2005). CPLR 302(a)(1) “is a ‘single act statute’ and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.” *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988).

Ofek did not transact any business in New York. Neither did Smart Trike. Smart Trike is only subject to this court’s jurisdiction because of the 2010 Agreement’s forum selection clause. Ofek is not a party to that contract. Thus, the only basis to assert jurisdiction over Ofek

is that it allegedly is an alter ego of Smart Trike, a claim this court finds has not been sufficiently pled. To the extent there is an agency relationship between Smart Trike and Ofek, it is that Ofek may have acted as Smart Trike's agent with respect to the 2010 Agreement. But this would only serve to create jurisdiction over Smart Trike by virtue of Ofek's actions, not the other way around. In any event, long arm jurisdiction cannot be exercised over Ofek because it lacks the requisite minimum contacts with New York. *See generally Walden v Fiore*, 134 SCt 1115, 1122-23 (2014), accord *Burger King Corp. v Rudzewicz*, 471 US 462 (1985). All Ofek is alleged to have done is make contact with people in New Jersey, where Ofek (via Baron and Blizovsky) allegedly caused the transmission of funds (only 3.5% of which were Piermont's commission) from Toys "R" Us to Smart Trike. This conduct, which was not targeted at New York, is insufficient to justify the exercise of jurisdiction over the Third-Party Defendants.

Likewise, there is no jurisdiction under CPLR 302(a)(3)(ii), which provides jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state ... if he ... expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." *See LaMarca*, 95 NY2d at 214. No injury was caused to Piermont in New York, since "the critical events associated with the dispute" did not occur in New York nor was any financial loss suffered in New York. *See Polansky v Gelrod*, 20 AD3d 663 (3d Dept 2005); *see generally Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez*, 171 F3d 779, 793 (2d Cir 1999).

For these reasons, no personal jurisdiction exists over the Third-Party Defendants. In any event, as explained below, the claims in the TPC are legally deficient.

B. Veil Piercing and Alter Ego Liability

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) (emphasis added), 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)

(emphasis added), quoting *TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 (1998).

The facts Piermont alleges about how Smart Trike and Ofek operate show nothing more than an overlap of personnel and resources. Piermont's contentions about Smart Trike's supposed non-compliance with Singapore law is not compelling and, in any event, arguments based on Singapore law cannot be considered by the court due to Piermont's failure to comply with CPLR 3016(e) and 4511(b). Regardless, Piermont's veil-piercing claim is not viable due to the failure to plead facts showing how Ofek is being used to defraud Piermont. Specifically, Piermont made no showing that Smart Trike's operation through Ofek is done for the purpose of frustrating Piermont's ability to collect a judgment from Smart Trike. Indeed, in this case, Smart Trike sued Piermont to obtain a monetary judgment against Piermont. If Piermont prevails on its counterclaims, it can set off any recovery from the amount owed to Smart Trike. Consequently, even if Smart Trike is judgment proof (and there is no evidence to support that contention), Piermont will not be prejudiced. And, even if Smart Trike lacks assets, Piermont could always seek to commence a post-enforcement proceeding against Ofek either in New York or in Israel to enforce its judgment. Piermont cannot, however, seek to directly proceed on liability against Ofek without raising a reasonable factual inference that Smart Trike is a sham company.

Finally, the rest of the TPC's claims fail as a matter of law. No breach of contract or New York Labor Law claim can be maintained against Ofek and Baron because Piermont only contracted with Smart Trike. The conversion claim fails because the legality of the alleged conversion is governed by the 2010 Agreement.⁴ See *Goldman v Metropolitan Life Ins. Co.*, 5

⁴ If Smart Trike's taking of the portion of the Toys "R" Us funds belonging to Piermont (its commission) was wrongful, Piermont's breach of contract counterclaim is sufficient to recover this money. In any event, since the alleged conversion was an Israel-New Jersey transaction, no

NY3d 561 (2005). The tortious interference with contract against Ofek and Baron is not viable because Piermont cannot establish causation since it cannot plausibly allege that Smart Trike would not have breached but for Ofek's actions. *See Sun Gold, Corp. v Stillman*, 95 AD3d 668, 669 (1st Dept 2012). As Piermont admits, Baron makes decisions for both companies. Hence, any breach caused by Ofek would naturally be one Smart Trike was intending anyway.⁵

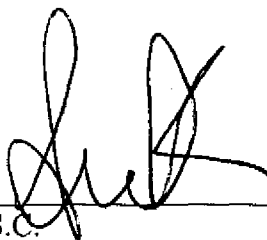
Accordingly, it is

ORDERED that the motion by third-party defendants Ofek One Marketing, Ltd., Yoram Baron, and Eran Blizovsky to dismiss the Third-Party Complaint is granted; 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 status conference on May 29, 2014 at 10:00 in the forenoon.

Dated: May 16, 2014

ENTER:



J.S.C.

jurisdiction in New York exists for this claim. Piermont cannot argue that the contract's New York forum selection clause creates jurisdiction over the conversion while also arguing that the conversion claim is not duplicative.

⁵ The economic interest doctrine might also bar this claim. *See Savage v Galaxy Media & Marketing Corp.*, 2012 WL 2681423, at *8 (SDNY 2012), quoting *White Plains Coat & Apron Co., v Cintas Corp.*, 8 NY3d 422, 426 (2007) ("defendant may assert ... 'that it acted to protect its own legal or financial stake in the breaching party's business.'").