

**BTM Ventures, Inc. v Pier Partners, LLC**

2014 NY Slip Op 32233(U)

August 14, 2014

Supreme Court, New York County

Docket Number: 652483/13

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

BTM VENTURES, INC.,  
Plaintiff

INDEX NO. 652483 /13

- Against -

MOTION DATE 08-13-2014

PIER PARTNERS, LLC, PORT PARTIES, LTD, PORT PARTNERS ON THE HUDSON, LLC, CHARLES NEWMAN, DREW McDOWALL, GARY FISHER AND JEFFREY BANK,  
Defendant.

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion by defendants Port Parties, LTD, Port Partners on the Hudson LLC, Charles Newman, Drew McDowall, Gary Fisher and Jeffrey Bank to dismiss pursuant to CPLR § 3211(a)(1)(5) and (7), on documentary evidence, statute of frauds and for failure to state a cause of action.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-2

Answering Affidavits — Exhibits \_\_\_\_\_

3-4

Replying Affidavits \_\_\_\_\_

5

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers it is Ordered that defendants' Port Parties Ltd, Port Partners on the Hudson, LLC, Charles Newman, Drew McDowall, Gary Fisher and Jeffrey Bank ( hereinafter "defendants") motion for an order pursuant to CPLR §3211(a)(1)(5) and (7) dismissing the complaint on documentary evidence, statute of frauds and for failure to state a cause of action as against them is granted, the complaint is dismissed. Defendants' motion for sanctions is denied.

On or about July 2, 2012 Plaintiff entered into an agreement with defendant Pier Partners, LLC, pursuant to which plaintiff was to provide certain event management, event planning and marketing services. The agreement states that it is between "BTM Ventures, Inc, a New York Corporation ( the "company") and Pier Partners LLC, a New York Limited Liability Company ( "PPL"), together "the parties"; has an Integration Amendment ( at paragraph 11), and was signed by Barry Mullineaux as president of BMT Ventures, Inc., and Charles Newman as President of Pier Partners, LLC.

The defendants were not parties to the agreement. Plaintiff alleges that the defendants including Pier Partners, LLC, breached the agreement by failing to pay for the services provided, and commenced an action against Pier Partners, LLC and all the defendants. Defendants now moves to dismiss the complaint pursuant to CPLR §3211(a)(1) (5) and (7). Defendants allege that the documentary evidence proves that they were not part of the agreement between the parties, that to the extent plaintiff alleges they assured payment it falls within the statute of frauds and that as to plaintiff's alter ego claims the complaint fails to state a cause of action.

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

In order to dismiss an action on documentary evidence, the documentary evidence must unequivocally contradict plaintiff's factual allegations and conclusively establish a defense as a matter of law, resolve all factual issues and conclusively dispose of plaintiff's claim ( *Goshen v. Mutual Life Insurance Company of New York*, 98 N.Y.2d 314, 774 N.E.2d 1190, 746 N.Y.S.2d 858[2002]; *511 West 232<sup>nd</sup> Owners Corp., v. Jennifer Realty Co.*, 98 N.Y.2d 144, 773 N.E.2d 496, 746 N.Y.S.2d 131 [2002]; *Fortis Financial Services v. Fimat Futures USA*, 290 A.D.2d 383, 737 N.Y.S.2d 40 [1<sup>st</sup>. Dept. 2002]).

The agreement between Plaintiff and defendant Pier Partners LLC, conclusively establishes that the defendants were not a part to this agreement. Plaintiff's contractual privity was with Pier Partners LLC and not with the other defendants. As such the breach of contract action against the defendants must be dismissed.

In order to dismiss a complaint for failure to state a cause of action there can be no legally cognizable theory that could be drawn from the complaint. The question is whether the complaint gives rise to a cognizable cause of action. The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law ( *Union Brokerage, inc., v. Dover Insurance Company*, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1<sup>st</sup>. Dept. 1983]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (*Quinones v. Schaap*, 91 A.D. 3d 739, 937 N.Y.S.2d 262 [2<sup>nd</sup>. Dept. 2012]). The complaint must be liberally construed, the factual allegations deemed to be true, and the non-moving party granted the benefit of every possible favorable inference.

Plaintiff alleges in conclusory fashion that the defendants were Pier Partners LLC's alter ego and therefore liable on a theory of piercing of the corporate veil. "The alter ego theory is insufficient to support claims for breach of contract against individuals in the absence of specific factual allegations demonstrating fraud or other corporate misconduct or that the individuals in question conducted business in their personal rather than corporate capacity. There are no factors present here which would justify disregarding the corporate structure and piercing the corporate veil ( *Feigen v. Advance Capital Mgt. Corp.*, 150 A.D.2d 281, 541 N.Y.S.2d 797 [1<sup>st</sup>. Dept. 1989]). Plaintiff has failed to plead any facts to substantiate its conclusory claim, and does not sufficiently allege that the corporate form was used to commit a fraud against it ( *Albstein v. Elany Construction Corp.*, 30 A.D.3d 210, 818 N.Y.S.2d 8 [1<sup>st</sup>. Dept. 2006]).

Finally plaintiff argues that defendants orally assured payment in the event Pier Partners LLC failed to pay. Defendants deny this and argue that this provision falls within the statute of frauds and must be evidenced by a writing subscribed by them.

"An agreement by a party to pay sums owed by another with which the

promisor is not in privity as to that particular agreement falls within the statute of frauds. To satisfy the statute of frauds the promisee must prove a written agreement binding the alleged promisor, who must have subscribed to it. It is unavailing to argue in the absence of a subscribed writing that the obligation was nevertheless incurred.”( I.S. Design, Inc., v. Gasho of Japan International, LTD, 269 A.D.2d 150, 702 N.Y.S.2d 73 [1<sup>st</sup>. Dept. 2000]).

The documentary evidence does unequivocally contradict plaintiff’s factual allegations and conclusively establish a defense as a matter of law, conclusively disposing of plaintiff’s claim as against the defendants. Similarly plaintiff has failed to sufficiently plead that defendants are Pier Partner’s LLC’s alter ego warranting piercing of the corporate veil or that they promised to pay Pier Partners LLC’s debt to plaintiff.

Defendants move for sanctions for plaintiff’s failure to voluntarily discontinue the action against the moving defendants. A motion for sanctions under 22 NYCRR§130-1.1 is addressed to the sound discretion of the court and court will not impose sanctions against a plaintiff’s attorney who advances a legal theory in commencing a suit, or for continuing prosecution of an action where plaintiff, before discontinuing, needs to ascertain the exact relationship of the parties and entities named as defendants ( see Sanders v. Aqua Chlor Enterprises, Inc., 90 A.D.3d 521, 934 N.Y.S.2d 406 [1<sup>st</sup>. Dept. 2011]).

Accordingly, it is ORDERED, that defendants’ motion to dismiss the complaint is granted, and it is further

ORDERED that defendants motion for sanctions is denied, and it is further

ORDERED that the complaint is dismissed as to defendants PORT PARTIES LTD, PORT PARTNERS ON THE HUDSON LLC, CHARLES NEWMAN, DREW McDOWALL, GARY FISHER and JEFFREY BANK, and it is further

ORDERED that the caption is amended to reflect the dismissal of the defendants, and it is further

ORDERED that the new caption be amended to read as follows:

**BTM VENTURES, INC.,**  
Plaintiff  
- Against -  
**PIER PARTNERS, LLC,**  
Defendant.

And it is further


ORDERED that within 30 days from the date of this order defendants serve a copy of this order with notice of entry upon the plaintiff, the county clerk and the General Clerk’s Office( Room 119), who are directed to mark their records to reflect the dismissal of the parties and amendment of the caption, and it is further

ORDERED that the remaining parties appear for a preliminary conference in Part 13 located at 71 Thomas Street, Room 210 New York, N.Y., on October 8, 2014 at 9:30 A.M.

ENTER:

Dated: August 14, 2014

**MANUEL J. MENDEZ**  
J.S.C.

  
\_\_\_\_\_  
Manuel J. Mendez  
J.S.C.

Check one:      FINAL DISPOSITION      X NON-FINAL DISPOSITION

Check if appropriate:       DO NOT POST       REFERENCE