American Media, Inc. v Bainbridge & Knight Labs., LLC
2014 NY Slip Op 32481(U)
September 19, 2014
Supreme Court, New York County
Docket Number: 650230/2013
Judge: Eileen Bransten

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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AMERICAN MEDIA, INC. and ODYSSEY MAGAZINE PUBLISHING GROUP, INC.,

Plaintiffs,

-against-

BAINBRIDGE & KNIGHT LABORATORIES, LLC and CARL RUDERMAN,

Defendants.

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Index No. 650230/2013
Motion Seq. No. 003
Motion Date: 5/14/2014

EILEEN BRANSTEN, J.:

In this action, plaintiffs American Media, Inc. ("AMI") and Odyssey Magazine Publishing Group, Inc. ("Odyssey") seek $1,299,900 for advertising services allegedly performed for defendant Bainbridge & Knight Laboratories, LLC ("Bainbridge"). Defendant Carl Ruderman is Bainbridge's owner, chief executive officer, president, chairman, secretary, treasurer, and director. The four-count amended complaint asserts causes of action for breach of contract and unjust enrichment against Bainbridge and Ruderman (first and second causes of action, respectively), and common-law fraud and violations of the Debtor and Creditor Law against Ruderman only (third and fourth causes of action, respectively).

The amended complaint alleges that, between March 2011 and July 2012, Bainbridge, through Ruderman, issued 184 "insertion orders" to AMI for the publication of advertisements in magazines owned by AMI and Odyssey. (Am. Compl. ¶ 10.) The advertisements were allegedly for health and fitness products manufactured by

Bainbridge, and the total price for the advertising services was allegedly $2,270,725. Plaintiffs claim that they published all of the requested advertisements and invoiced Bainbridge for the services, requiring payment within 30 days of each invoice. Plaintiffs concede that Bainbridge paid 16 of the invoices, an amount totaling $970,825, leaving unpaid invoices owed by Bainbridge in the amount of $1,299,900.

In motion sequence 003, Ruderman seeks dismissal of the amended complaint for lack of personal jurisdiction, failure to state a cause of action, and based upon documentary evidence. Bainbridge submits no papers in connection with Ruderman's motion.[1]

I. Personal Jurisdiction Under CPLR 302(a)(1)

Ruderman argues that personal jurisdiction over a corporate officer cannot be established by his authorized acts as an agent of the company. According to Ruderman, all of his New York acts were conducted on behalf of Bainbridge, not on his own behalf. Plaintiffs argue that the court has long-arm jurisdiction over Ruderman under CPLR 302(a)(1).

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[1] Based upon the County Clerk's records, plaintiffs have moved for a default judgment against Bainbridge (in motion sequence number 004). That motion is neither fully submitted nor before the court presently.

CPLR 302(a)(1) "authorizes the court to exercise jurisdiction over nondomiciliaries for tort and contract claims arising from a defendant's transaction of business in this State." *Kreutter v McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988). 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." *Id.* "In order to obtain jurisdiction under this statute, the following conditions must be met: (1) the defendant must transact business in the State; and (2) the cause of action must be directly related to, and arise from, the business so transacted." *Storch v. Vigneau*, 162 A.D.2d 241, 242 (1st Dep't 1990). "The key inquiry is whether defendant purposefully availed itself of the benefits of New York's laws." *Courtroom Tel. Network v. Focus Media*, 264 A.D.2d 351, 353 (1st Dep't 1999) ("[j]urisdiction may be predicated on a transaction conducted by means of telephone calls, faxes, and the acts of an in-State agent").

> If a court determines that a defendant has transacted business pursuant to CPLR 302 (a) (1), then it must further ascertain whether the exercise of jurisdiction comports with due process. Due process is not offended '[s]o long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there . . . even if not "present" in that State.' In order to satisfy the minimum contacts requirement, it is essential that there be 'some act by which the defendant purposefully avails itself of the privilege of conducting

> activities within the forum State, thus invoking the benefits and protections of its laws.'

Deutsche Bank Sec., Inc. v. Montana Bd. of Invs., 21 A.D.3d 90, 94 (1st Dep't 2005) (internal citations omitted), *aff'd* 7 N.Y.3d 65 (2006).

For jurisdictional purposes, the burden of proof is on the plaintiffs. *Ying Jun Chen v. Lei Shi*, 19 A.D.3d 407, 407 (2d Dep't 2005). "That burden, however, does not entail making a prima facie showing of personal jurisdiction; rather, the plaintiffs need only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant." *Id.* at 407-408.

Bainbridge is a Florida company with its principal place of business in New York. *See* Affidavit of Carl Ruderman ("Ruderman Aff.") ¶¶ 6, 14. Ruderman does not dispute the affidavits of AMI's officers, stating that Ruderman lived in Manhattan at the time of the transactions that are the subject of the instant action, and that Ruderman negotiated these transactions with plaintiffs in Bainbridge's New York office. Specifically, AMI's officers state that, from January 2011 to October 2012, Ruderman owned and lived in a condominium in Manhattan, and he maintained an office at Bainbridge's Manhattan office. *See* Affidavit of David Pecker ("Pecker Aff.") ¶ 5; Ruderman Aff. ¶ 4 (stating that "[o]n October 5, 2012, I sold my apartment in New York City"). According to AMI's officers, Ruderman met with plaintiffs at Bainbridge's Manhattan office, and at a Manhattan restaurant, on February 3, 2011, October 18, 2011, November 2011, March 23,

2012, and April 26, 2012. *See* Pecker Aff. ¶¶ 7, 17-18; Jackson Aff. ¶¶ 3, 9-10. It was during these personal meetings in New York that Ruderman allegedly represented that Bainbridge was "'very well capitalized,' could well afford the projected advertising campaign, and that he himself, had loaned Bainbridge & Knight $6,000,000.00 which would amply cover any bills that might be sent by AMI." See Pecker Aff. ¶ 10.

By April 2012, Bainbridge allegedly owed AMI approximately $1 million for advertising services, and Ruderman informed AMI that Bainbridge was having cash flow problems. Ruderman allegedly represented that he intended to "'catch up' and pay all of what [Bainbridge] owed if AMI/Odyssey would continue the ad campaign," and that Bainbridge "and Ruderman himself fully intended to pay all of AMI's bills." *See* Pecker Aff. ¶ 17. Ruderman allegedly represented at these meetings that "there existed a 'solid account receivable from Walgreen's of $850,000.00' which was 'in the process of being paid' and which $850,000.00 would be dedicated to the 'payment' of most of what was then owed to AMI." *Id.* ¶ 17. Ruderman allegedly represented at these meetings that he would "'shortly put more capital into Bainbridge & Knight sufficient to cover monies still owed for the advertising campaign.'" *Id.* ¶ 19. According to plaintiffs, Ruderman knew that these statements concerning Bainbridge's capitalization and funding were false, and Ruderman made the statements to induce plaintiffs to continue AMI's advertising campaign on behalf of Bainbridge.

Generally, "claims against a corporate defendant, if jurisdictionally viable, do not provide a basis for personal jurisdiction over a corporate official or employee who acts on behalf of the corporation." *Pramer S.C.A. v. Abaplus Int'l Corp.*, 76 A.D.3d 89, 95-96 (1st Dep't 2010). Here, however, plaintiffs do not seek the exercise of personal jurisdiction over Ruderman based upon the exercise of jurisdiction over Bainbridge. Rather, plaintiffs' jurisdictional arguments are based upon Ruderman's alleged misrepresentations made to plaintiffs in New York while he was a New York resident, all for the purpose of transacting business in New York by inducing plaintiffs to do business with Bainbridge and to continue that business once Bainbridge's account with AMI became delinquent. In short, it is "abundantly clear" that the alleged misrepresentations that support plaintiffs' fraud cause of action "*are* directly related to, and arise from, the 'business' that [Ruderman] 'transacted' in New York." *State of New York v. McLeod*, 12 Misc.3d 1157(A), at *20 (Sup. Ct. N.Y. Cnty. 2006) (emphasis in original), and that Ruderman purposefully availed himself of the benefits of New York's laws. *Courtroom Tel. Network*, 264 A.D.2d at 353. Accepting the facts as alleged in the amended complaint as true and according plaintiffs the benefit of every possible favorable inference, as is required on a motion to dismiss, *see Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994), plaintiffs have set forth sufficient facts to establish personal jurisdiction over Ruderman under CPLR 302(a)(1). These facts also satisfy the requirements of

federal due process. *Bradley v Staubach*, 2004 WL 830066, at *6 (S.D.N.Y. 2004) ("[c]ontacts sufficient to establish jurisdiction under C.P.L.R. § 302(a)(1) are sufficient to meet the minimum contacts requirements of the Due Process clause").

Although not argued by plaintiffs, the court notes that these facts also appear to support the exercise of personal jurisdiction over Ruderman based upon CPLR 302(a) (2), as they allege that Ruderman committed the "tortious act" of making fraudulent misrepresentations in New York. *See, e.g., Tucker v. Sanders*, 75 A.D.3d 1096, 1097 (4th Dep't 2010) (upholding personal jurisdiction over the defendant based upon the defendant's alleged misrepresentations made in New York, and in subsequent email and mail correspondence sent to the plaintiff's New York address). In fact, Ruderman concedes that "[w]here intentional conduct is committed by a corporate agent, it can be plausibly argued that he is acting *ultra vires*," and that "the acts of an individual beyond the authority vested in him can establish personal jurisdiction." (Def.'s Reply Br at 4-5 (emphasis in original)). This is precisely plaintiffs' allegation with respect to the fraud claim, as plaintiffs allege that Ruderman's misrepresentations in New York were made in order to induce AMI to enter into, or continue, its business relationship with Bainbridge. To this end, plaintiffs have alleged that Ruderman conducted business, and committed a tortious act, in New York, sufficient to exercise personal jurisdiction over him.

For the foregoing reasons, Ruderman's motion to dismiss for lack of personal jurisdiction is denied.

II. Failure to State a Cause of Action

Ruderman seeks dismissal of the amended complaint for failure to state a cause of action and based upon documentary evidence. For the following reasons, his motion is granted.

A. *Breach of Contract & Unjust Enrichment*

The amended complaint alleges that Bainbridge's corporate veil should be pierced – and that Bainbridge and Ruderman should be held jointly and severally liable – on plaintiffs' claims for breach of contract and unjust enrichment. Specifically, plaintiffs claim that Ruderman dominated and controlled Bainbridge's finances, ignored corporate formalities, used Bainbridge's funds for his own personal use, and commingled Bainbridge's funds with his own personal funds. (Am. Compl. ¶¶ 27-36.) Ruderman also allegedly "misrepresented capital investments in Bainbridge amounting to no less than $6,000,000.00 as loans to Bainbridge with the intent of defrauding creditors and forcing Bainbridge into insolvency before its creditors can collect legitimate debts owed to them." *Id.* ¶ 32.

However, these facts fail to "indicat[e] that [Ruderman's] degree of control over [Bainbridge] made it his *alter ego*," and plaintiffs' "conclusory allegations that the corporate structure is a sham are insufficient to warrant piercing the corporate veil." *Metropolitan Transp. Auth. v. Triumph Adver. Prods.*, 116 A.D.2d 526, 528 (1st Dep't 1986). Plaintiffs fail to explain how Ruderman's alleged misrepresentation concerning his $6 million investment in Bainbridge shows his domination over that entity. Moreover, as discussed below, plaintiffs' fraud claim against Ruderman – which is based, in part, upon the same alleged misrepresentation – fails to state a claim. In short, other than plaintiffs' conclusory allegations, the amended complaint fails to allege "a wrongful or unjust act toward plaintiff[s]," or that Ruderman, "through [his] domination [of Bainbridge], abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against [plaintiffs] such that a court in equity will intervene." *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 142 (1993).

Significantly, the breach of contract and unjust enrichment claims pertain to Bainbridge's failure to pay for advertising services, not any misrepresentation concerning Bainbridge's capitalization. As the Court of Appeals stated in *Murtha v. Yonkers Child Care Assn.*:

> A director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps

> that resulted in the corporation's promise being broken. [A] corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith as an officer *** [and did not commit] independent torts or predatory acts directed at another.

45 N.Y.2d 913, 915 (1978) (internal quotation marks and citations omitted); *see also East Hampton Union Free School Dist. v. Sandpebble Builders, Inc.*, 66 A.D.3d 122, 128-129 (2d Dep't 2009) ("[t]he policy inherent in allowing individuals to conduct business in the corporate form so as to shield themselves from personal liability would be seriously threatened were we to allow an insufficient cause of action to survive, at least to the summary judgment stage, merely on the plaintiff's hope that something will turn up"), *affd* 16 N.Y.3d 775 (2011).

Here, the amended complaint makes clear that all of plaintiffs' claims are based upon Bainbridge's alleged breach of contract. The pleading alleges that "[t]his is an action seeking payment for services rendered. During the past two years, Plaintiffs have provided over $2.2 million in advertisement services to defendants of which nearly $1.3 million remains unpaid." (Am. Compl. ¶ 1.) Plaintiffs claim that "[d]efendants' failure to pay for the advertisement services gives rise to this action for breach of contract and unjust enrichment." *Id.* However, plaintiffs fail to identify any independent tort or predatory act that would support piercing the corporate veil in connection with their breach of contract or unjust enrichment causes of action.

Moreover, in opposition, plaintiffs fail to address their breach of contract cause of action as it applies to Ruderman. Nor do plaintiffs address Ruderman's arguments or legal authority concerning piercing the corporate veil, other than in a footnote of their opposition brief, where plaintiffs speculate that Bainbridge may have been "undercapitalized to begin with" and may have shared office space with Ruderman's other companies. *See* Pls.' Opp. Brief at 17. Rather, they argue that the claims for fraud and violations of the Debtor and Creditor Law should not be dismissed, rendering the motion to dismiss the breach of contract cause of action unopposed.

For the foregoing reasons, plaintiffs' allegations fail to support piercing the corporate veil. As piercing the corporate veil is plaintiffs' sole basis for asserting claims against Ruderman for breach of contract and unjust enrichment (first and second causes of action, respectively), those claims are dismissed against Ruderman. Although not addressed by the parties, the court notes that the unjust enrichment cause of action is dismissed for the additional reason that it is "duplicative of the contract claim." *Benham v. eCommission Solutions, LLC*, 118 A.D.3d 605, 607 (1st Dep't 2014).

B. *Fraud*

The fraud claim is based upon Ruderman's alleged "representations . . . made to induce Plaintiffs to provide advertising services to Bainbridge." (Am. Compl. ¶ 49.)

Ruderman allegedly stated that he was "'very wealthy,'" that "Bainbridge was 'very well capitalized and could well afford the projected advertising campaign,'" and that "he had 'loaned' Bainbridge $6,000,000.00, which it could use to pay for expenses such as Plaintiffs' advertising services." *Id.* ¶ 50. Ruderman's alleged misrepresentations also included his statements that Bainbridge was awaiting payment from Walgreen's of $850,000 which would be used to pay plaintiffs, and that Ruderman himself would put more capital into Bainbridge. *Id.* ¶¶ 52, 54.

Ruderman's alleged statements were "not collateral to the contract for [advertising] services entered into between plaintiff[s] and the corporate defendant," but rather, they "concern[ed] the corporate defendant's performance of the contract itself." *Cole, Schotz, Meisel, Forman & Leonard, P.A. v. Brown*, 109 A.D.3d 764, 765 (1st Dep't 2013). Thus, "the fraud claim against the individual defendant[, Ruderman,] is duplicative of the breach of contract claim asserted against the corporation." *Id.*; *see also Sass v. TMT Restoration Consultants Ltd.*, 100 A.D.3d 443, 443 (1st Dep't 2012) (fraud claim dismissed where "the only harm alleged . . . relate[d] to plaintiff's claim for breach of contract"). "Moreover, a general allegation that a party entered into a contract while lacking the intent to perform is insufficient to state a cause of action . . . for fraud." *Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 791 (2d Dep't 2013); *see also Financial Structures Ltd. v. UBS AG*, 77 A.D.3d 417, 419 (1st Dep't

2010) ("plaintiffs allege a misrepresentation of future intent rather than a misrepresentation of present fact, which is not sustainable as a cause of action separate from breach of contract"). Plaintiffs' opposition papers fail to respond to any of these authorities and legal theories cited by Ruderman.

Furthermore, "[a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it." *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 194-195 (1st Dep't 2012) (internal quotation marks and citation omitted). Here, AMI alleges that it publishes well-known magazines, including "the *National Enquirer*, *Star Shape*, *OK!*, *Reality Weekly*, *Men's Fitness*, and *Natural Health*." (Am. Compl. ¶ 2.) Plaintiffs fail to explain how they justifiably relied upon any representations concerning Ruderman's capitalization of Bainbridge, without verifying Bainbridge's capitalization or accounts receivable. *HSH Nordbank AG*, 95 A.D.3d at 194-195; *see also Valassis Communications v. Weimer*, 304 A.D.2d 448, 449 (1st Dep't 2003) (same).

For the foregoing reasons, plaintiffs' fraud cause of action is dismissed.

C. *Debtor and Creditor Law*

The amended complaint alleges that Ruderman withdrew millions of dollars from Bainbridge for his own personal use, or for use by companies owned and controlled by him. (Am. Compl. ¶ 58.) According to plaintiffs, "Ruderman's own statements that Bainbridge was capitalized with $6,000,000.00, if true, warrant a finding that Ruderman – who completely controlled and controls Bainbridge – took out millions of dollars from Bainbridge instead of paying creditors such as Plaintiffs." *Id.* Ruderman also allegedly arranged for Bainbridge's repayment of a $4 million loan to the Small Business Administration, in order to cancel personal guarantees of Ruderman, his wife, and other companies owned by Ruderman, at a time when Bainbridge was insolvent or thereby rendered insolvent. *Id.* ¶¶ 59-60. Plaintiffs claim that the capital Ruderman placed in Bainbridge was "carried on the books and records of Bainbridge as 'loans,' repayable to Ruderman." *Id.* ¶ 61. These loans were allegedly repaid at a time when Bainbridge was either insolvent or rendered insolvent. *Id.* ¶ 63. Plaintiffs claim that all of these payments constituted "insider payments," actionable under sections 273 and 275 of the Debtor and Creditor Law. *Id.* ¶¶ 60, 63.

Under section 273 of the Debtor and Creditor Law, "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or

the obligation is incurred without a fair consideration." Under section 275, "[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." Under section 272, "fair consideration" includes "payment of an antecedent debt." *Ronga v. Chiusano*, 97 A.D.2d 753, 753 (2d Dep't 1983).

Here, plaintiffs merely speculate that Ruderman withdrew funds from Bainbridge for his personal use, or for use by other companies owned by him, but such speculative and conclusory allegations fail to support their claim under the Debtor and Creditor Law. *Riback v. Margulis*, 43 A.D.3d 1023, 1023 (2d Dep't 2007) ("speculative and conclusory allegations of the complaint failed to state a cause of action pursuant to Debtor and Creditor Law § 273"). Moreover, the repayment of the Small Business Association loan, as alleged, constitutes fair consideration, as it was payment of an antecedent debt. Furthermore, "[a]s a general rule, the relief to which a defrauded creditor is entitled in an action to set aside a fraudulent conveyance is limited to setting aside the conveyance of the property which would have been available to satisfy the judgment had there been no conveyance." *Joslin v. Lopez*, 309 A.D.2d 837, 839 (2d Dep't 2003). Here, however, plaintiffs do not seek to set aside any purported fraudulent conveyance, but rather, they demand judgment for the same amount claimed to be owed under their breach of contract

cause of action. In essence, plaintiffs' claim under the Debtor and Creditor Law merely seeks to hold Ruderman "individually liable in the event that plaintiffs succeed in their breach of contract claim against [Bainbridge] but fail in their attempt to pierce the corporate veil," rendering this claim duplicative of plaintiffs' breach of contract cause of action. *Ervine v. Laurence*, 2010 WL 4530244 (Sup. Ct. N.Y. Cnty. 2010). For these reasons, plaintiffs' fourth cause of action for violations of the Debtor and Creditor Law is dismissed.

(*Order follows on next page.*)

III. Conclusion

Accordingly, it is hereby

ORDERED that the motion of defendant Carl Ruderman to dismiss the amended complaint herein is granted and the amended complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is direct to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant.

Dated: New York, New York
September 19, 2014

ENTER:

Hon. Eileen Bransten, J.S.C.