RCG Invs. Ltd. v Kikin Ltd.
2014 NY Slip Op 32486(U)
September 22, 2014
Supreme Court, New York County
Docket Number: 652516/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15
---X
RCG INVESTMENTS LIMITED,

Plaintiff,

- v -

KIKIN LIMITED and KIKIN, INC.

Defendants.
---X

Index No. 652516/2013

DECISION and ORDER

Mot. Seq. 002

HON. EILEEN A. RAKOWER, J.S.C.

Defendant Kikin, Inc. ("Kikin") now moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff's claims as against Kikin, on the basis of documentary evidence and failure to state a claim. After oral argument, and for the reasons stated on the record, dated September 22, 2014, and below, Kikin's motion to dismiss Plaintiff's claims against Kikin, Inc., is granted.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (1) a defense is founded upon documentary evidence;
>
> (7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal

conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]). In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't, 2003]) (internal citations omitted) (*see* CPLR § 3211[a][7]).

The doctrine of piercing the corporate veil is typically employed to "circumvent" the corporate form in order to hold an individual owner liable for a corporate obligation. (*Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140-41 [1993]). "The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed. . . . Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners." (*Id.*).

Piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 A.D.3d 35, 40 [1st Dep't 2012] *quoting Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 [1993]). In order to prevail on a veil-piercing theory, "the party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 140, 142 [1993]). In determining the question of control, courts have considered various factors, including: 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 alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity. (*Tap Holdings, LLC*

v Orix Fin. Corp., 109 A.D.3d 167, 174 [1st Dep't 2013]). No one factor is dispositive. (*Id.*).

Evidence of domination alone is insufficient, without more, to warrant piercing the corporate veil. (*TNS Holdings v MKI Sec. Corp.*, 92 N.Y.2d 335, 339 [1998] [finding that, "additional showing that [domination] led to inequity, fraud, or malfeasance" required to meet "heavy burden" for piercing corporate veil]). Where a party seeks to hold a parent corporation liable for the contractual obligations of its subsidiary, therefore, allegations of control, "unaccompanied by allegations of consequent wrongs", are insufficient to plead a cause of action as against the parent. (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 A.D.3d 35, 40 [1st Dep't 2012]).

New York also recognizes "reverse piercing", which flows in the opposite direction and holds the corporation accountable for actions of the owner. "Under either theory, there is a disregard of the corporate form, and the controlling shareholders are treated as alter egos of the corporation and vice versa." (*Harvardsky Prumyslovy Holding, A.S.,-V Likvidaci v. Kozeny*, 117 A.D.3d 77, 83 [1st Dep't 2014]). As with traditional veil-piercing claims, to establish a reverse veil-piercing claim, the plaintiff must allege (1) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (2) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil. (*see American Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 [2d Cir., 1997]; *citing State v. Easton*, 169 Misc. 2d 282, 647 N.Y.S.2d 904, 908-09 [Sup. Ct. 1995]).

As for Plaintiff's unjust enrichment claim, in order to prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep't 2011]). "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." (*Mandarin Trading Ltd. v. Wildenstein*, 65 A.D.3d 448, 451 [1st Dep't 2009]). In addition, "the existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same

subject matter." (*Clark- Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]).

Here, Plaintiff's complaint alleges that Plaintiff loaned money to Kikin's parent company, Kikin, Ltd. ("Limited"). Plaintiff's complaint further alleges that, "Plaintiff transferred $19,970.00 to an account owned or controlled by Kikin Inc. when making the Loan to Kikin Limited" and that Plaintiff made this transfer "based upon a representation that Plaintiff's transfer was being made to Kikin Limited and that this sum was to be an investment in Kikin Limited" and that "Kikin Inc. has retained the benefit of Plaintiff's transfer, at Plaintiff's expense." However, paragraph six of the Convertible Promissory Note Purchase Agreement, dated June 30, 2008, by and among kikin Limited, MCB, Berlin Ventures, Digital Equity, and RCG expressly states: "Use of Proceeds. The Company shall use the proceeds from the transactions contemplated hereby in a manner duly authorized by the Board of Directors of the Company." As Plaintiff's complaint fails to allege that the Board of Kikin Limited lacks authority to invest loan money in its wholly owned subsidiary, Kikin Inc., even if Kikin Inc. received a benefit from Plaintiff, under the facts alleged, Plaintiff has not shown that any such enrichment was unjust, especially since Plaintiff signed a document, Convertible Promissory Note Purchase Agreement, providing Kikin Limited with a carte blanche respecting the proceeds of Plaintiff's loan. (*Mandarin Trading Ltd. v. Wildenstein*, 65 A.D.3d 448, 451 [1st Dep't 2009]). Accordingly, Kikin Inc.'s documentary submissions flatly contradict the legal conclusions and factual allegations asserted in Plaintiff's unjust enrichment claim against it.

Wherefore it is hereby,

ORDERED that Defendant Kikin Inc.'s motion to dismiss is granted and Plaintiff's claims as against Kikin Inc. are dismissed and the clerk is directed to enter judgment accordingly; and it is further

[* 5]

ORDERED that Plaintiff's remaining causes of action as against Kikin Limited are severed and shall proceed.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: September 22, 2014

Eileen A. Rakower, J.S.C.