

**Chiomenti Studio Legale, L.L.C. v Prodos Capital
Mgt. LLC**

2015 NY Slip Op 30319(U)

March 5, 2015

Supreme Court, New York County

Docket Number: 653047/11

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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CHIOMENTI STUDIO LEGALE, L.L.C.,

Plaintiff,

-against-

Index No.

PRODOS CAPITAL MANAGEMENT LLC and
DOUGLAS SONG,

653047/11

Defendants.

-----X
ANIL SINGH, J. :

For convenience, the following motions are consolidated.

In motion sequence number 007, defendants move for summary judgment dismissing all causes of action against defendant Douglas Song (Song), and for sanctions. Plaintiff cross-moves for summary judgment on its sixth cause of action. In motion sequence number 008, plaintiff moves for summary judgment on its second cause of action, and for dismissal of, or summary judgment dismissing defendants' affirmative defenses and counterclaims.

Plaintiff is the New York affiliate of an Italian law firm. Defendant Prodos Capital Management LLC (Prodos) is a merchant bank that seeks to arrange and participate in business transactions. Song is the sole manager of Prodos. The complaint alleges that defendants sought legal advice from plaintiff regarding the possible acquisition of the business assets of Giancarlo Feere S.p.A. (Feere), an Italian fashion house then undergoing an insolvency proceeding in Italy. Song, as Prodos's principal, executed a retention letter concerning plaintiff's services. During a proceeding in which Feere's assets were being auctioned, Prodos won the bidding for those assets. Plaintiff claims that it was due to plaintiff's advice that Prodos acquired the assets.

Plaintiff brings this action because defendants have failed to pay for all of plaintiff's

services. Plaintiff alleges that Song made false reassurances to plaintiff's partner Salvo Arena (Arena) about Prodos's financial backers, who failed to support defendants' bidding or finance the payment of plaintiff's legal fees. Plaintiff also alleges that it delivered bills to defendants which described in reasonable detail the time charges and disbursements, which totaled \$470,000. Plaintiff states that during a nine-month period, neither defendant disputed any item in the bills, and that defendants paid only \$20,000 to plaintiff. Plaintiff seeks the recovery of the unpaid fees and expenses, holding Song personally liable for Prodos's obligations to plaintiff.

The complaint contains six causes of action: the first, breach of contract (against Prodos); the second, account stated (against Prodos); the third, quantum meruit (against Prodos and Song); the fourth, unjust enrichment (against Prodos and Song); the fifth, fraud (against Song); and the sixth, a claim against Prodos and Song to pierce Prodos's corporate veil to hold Song individually liable. The court dismissed the fraud cause of action in a decision and order, dated April 25, 2012.

Defendants' motion

Defendants move for summary judgment to dismiss all causes of action brought against Song, which include quantum meruit, unjust enrichment and the claim to pierce Prodos's corporate veil, which they contend is not a viable claim in New York. Defendants also seek, pursuant to Part 130 of the Administrative Rules of the Unified Court System, costs and sanctions against plaintiff for its alleged harassing of Song in this suit.

Defendants argue that Song cannot be held individually liable for any of the causes of action brought by plaintiff. Despite the fact that he is the sole manager and officer of Prodos, a limited liability company, defendants state that Song cannot be held personally accountable for

Prodos's conduct.

Plaintiff claims that the court must pierce Produs's corporate veil in order implicate Song individually for claims in quantum meruit and unjust enrichment. Defendants contend that plaintiff has failed to demonstrate a justification for piercing Produs's corporate veil.

Defendants also seek dismissal of the quantum meruit and unjust enrichment causes of action on the ground that the existence of an express agreement, the retention agreement between the parties, renders the claims invalid.

Defendants seek sanctions against plaintiff for the alleged harassment of Song. In a Notice to Admit response, Arena allegedly admitted that he said to Song that he would "go" after Song if Produs failed to pay plaintiff's bills. Defendants argue that Arena personally threatened Song and that he has prolonged the litigation for malicious reasons, despite having no legitimate reason for holding Song individually liable. Due to Arena's allegedly hostile conduct, defendants seek the imposition of sanctions against plaintiff.

In opposition, plaintiff contends that Song was the sole owner of Produs and the sole beneficiary of the purchase of Feere's assets. Plaintiff also contends that Song acted fraudulently when he told Arena of Produs having long-term relationships with various firms, and thus, being financially functional. Plaintiff claims that such allegedly misleading statements led it to assume that defendants were capable of paying for its legal services.

Plaintiff states that this court should apply Delaware law to the issue of piercing the corporate veil, since Produs is incorporated in Delaware, and pursuant to conflicts law, the law of the state of incorporation should prevail. Plaintiff contends that Delaware has a less rigid standard for piercing the corporate veil.

Plaintiff asserts the following: Song deliberately kept Prodos undercapitalized while pursuing its business transactions; Song manipulated the funding of Prodos by shuttling money into and out of it; Song arranged the finances of Prodos so that plaintiff would only be paid if the transaction involving Feere was successful; Song siphoned money from Prodos for his own personal use, despite Prodos's indebtedness to plaintiff; and Song failed to maintain the structural formalities of Prodos as required by law and the LLC agreement. Plaintiff avers that it has proven with sufficient evidence that Song maintained complete control over Prodos in order to defraud plaintiff and avoid plaintiff's demand for payment.

Plaintiff cross-moves for summary judgment on its veil-piercing cause of action, holding that Song is personally liable for defendants' failure to pay plaintiff for past legal services.

Alternatively, plaintiff argues that further discovery is necessary, precluding summary judgment. According to plaintiff, defendants failed to provide evidence regarding the Feere transaction. Plaintiff seeks a model which would provide an estimate on its fees in that transaction, together with projections of value ascribed to the Feere assets and of the profits Prodos would receive from its investment. Plaintiff claims that this information will provide the context in which plaintiff's fees were incurred. It is plaintiff's contention that the evidence submitted by defendants is incomplete and inaccurate. Plaintiff argues that a lack of access to relevant information undermines its opposition to defendants' motion. Therefore, plaintiff seeks further access to defendants' records through discovery.

Plaintiff opposes the motion for sanctions. First, plaintiff states that the alleged threat from Arena occurred prior to the commencement of this action, and was reasonable, in that plaintiff was then seeking a fee settlement with defendants, who were unresponsive. Second,

plaintiff avers that its filing of this suit is meritorious, and defendants' pursuit of sanctions in reaction to this lawsuit is frivolous.

In reply, defendants contend that it does not matter whether New York or Delaware law is applied in this case, since they aver that Song cannot be held personally liable for any misconduct. Defendants continue to insist that plaintiff has failed to show adequate proof that Song's actions make it permissible to pierce Prodos's corporate veil. Thus, defendants also oppose the cross motion on similar grounds. Defendants claim that plaintiff misrepresented the model meant to represent the value of the Feere assets in the subject transaction, which is alleged to have no relevance to the issue of payment. Defendants state that this is an issue that plaintiff raised in order to needlessly prolong the litigation of this case. Defendants claim that the motion for sanctions is not frivolous and that the commencement of this action against Song is frivolous.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v Hyman*, 43 AD3d 374, 375 (1st Dept 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [internal quotation marks and citation omitted]." *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008). "Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law." *Flores v City of New York*, 29 AD3d 356, 358 (1st Dept 2006). "Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the

granting of summary judgment.” *Id.*

The main issue, which involves both the motion and cross motion for summary judgment, is the personal liability of Song in this action. Plaintiff argues that, in matters concerning the piercing of the corporate veil, this court should apply the standard used by Delaware courts, rather than New York courts, because Prodos is a Delaware corporation. Defendants contend that the state of incorporation is not the sole determinant in choice of law matters concerning this case. They assert such factors as the nature of the subject contract or transactions are as important in deciding the proper choice of law. The court agrees that the law of New York, rather than the defendant’s state of incorporation should prevail where the corporation has meaningful contacts with the state. *See Serio v Ardra Ins. Co.*, 304 AD2d 362, 362 (1st Dept 2003).

Here, there is proof that Prodos has its principal place of business in New York and that the retention agreement was executed in New York. Plaintiff is a New York affiliate of an Italian law firm. Although Prodos is incorporated in Delaware, there is no indication that it has substantive contacts in that state. Thus, it appears that New York has significant contacts with this case which supports the application of New York law.

Alternative, the court finds that the standards regarding the piercing of the corporate veil under Delaware law are not so different from those under New York law. In order to pierce the corporate veil under Delaware law, a plaintiff must demonstrate that the principal in question had such complete control over the corporation that the corporation has no legal or independent significance of its own. *See Wallace ex rel. Cencom Cable Income Partners II, L.P. v Wood*, 752 A2d 1175, 1183-84 [Del Ch 1999]. Moreover, the plaintiff, in showing complete

domination, must also show "fraud, injustice or inequity in the use of the corporate form." *Sears, Roebuck & Co. v Sears pls*, 744 F.Supp 1297, 1304-05 [D Del 1990]. The alleged fraud or inequity must be distinct from the wrong alleged in the complaint. *Id.* at 1305.

Under New York law, in order to pierce the corporate veil, a party must show that (a) the individual defendant exercised complete control and dominion over the company; and (b) the individual defendant used this control and dominion to commit a fraud or other wrong against the plaintiff which resulted in damages. See *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 1414 (1993).

The court finds that New York has a sufficient interest in this action and New York law shall be applied to this action with respect to piercing the corporate veil.

The right to pierce the corporate veil is "established when the facts and circumstances compel a court to impose the corporate obligation on its owners, who are otherwise shielded from liability." *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 (1st Dept 2013). However, it is settled that New York law does not recognize a separate cause of action for piercing the corporate veil. See *Hart v Jassem*, 43 AD3d 997, 998 (2d Dept 2007). Although this theory might make Song liable under other causes of action, piercing the corporate veil, in itself, is not an independent cause of action.

The court shall deny plaintiff's cross motion for partial summary judgment, since the sixth cause of action is not a valid one.

The motion brought by defendants, if granted, would relieve Song of any personal liability for quantum meruit and unjust enrichment. "The elements of a claim in quantum meruit are: the performance of services in good faith, acceptance of the services by the person to whom

they are rendered, an expectation of compensation therefor, and the reasonable value of the services.” *Freedman v Pearlman*, 271 AD2d 301, 304 (1st Dept 2000). “To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor.” *Nakamura v Fujii*, 253 AD2d 387, 390 (1st Dept 1998). These claims are regarded as quasi-contract claims. If there is a valid contract governing the subject matter of the parties’ dispute, recovery in quasi-contract for events arising from the same subject matter is precluded. *See Surge Licensing v Copyright Promotions*, 258 AD2d 257, 258 (1st Dept 1999).

The court finds that plaintiff has failed to provide the evidence to justify piercing Prodos’s corporate veil. The primary reason for this action is defendants’ alleged failure to pay certain debts to plaintiff. Plaintiff is suing Prodos for breach of contract and both defendants for quantum meruit and unjust enrichment. To pierce the corporate veil, a plaintiff must prove that the principal in question had total control over the entity in order to commit a fraud or injustice. Under New York law, a corporation’s breach of contract or failure to pay its debts does not constitute abuse of the corporate form to commit a fraud or wrong. *See Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 947 (2d Dept 2013). Without evidence of a fraud or wrongful conduct, Song cannot be liable even if he had a close relationship with Prodos.

Even if plaintiff had demonstrated a justification for piercing Prodos’s corporate veil to implicate Song, the claims brought against him, quantum meruit and unjust enrichment, would have to be dismissed, due to the existing retention letter, which constitutes an express agreement between the parties, governing the subject matter of this suit.

The court shall grant defendants’ motion for summary judgment dismissing the third,

fourth and fifth causes of action against Song. In fact, the court, in its discretion pursuant to CPLR 3212 (b), shall also dismiss these causes of action against Prodos, since the subject letter covers Prodos and, therefore, all quasi-contract claims against Prodos are precluded.

The last issue concerns sanctions. Defendants contend that plaintiff's counsel should be sanctioned for harassing Song and bringing litigation against him without a legitimate reason. Despite plaintiff's failure to show a justification to pierce Prodos's corporate veil and hold Song personally liable, plaintiff's conduct was not so baseless and extreme as to permit the imposition of sanctions. *See Sorenson v 257/117 Realty, LLC*, 62 AD3d 618, 619 (1st Dept 2009) (sanctions justified where plaintiff's claims were baseless and without merit).

Plaintiff's motion

Plaintiff brings a cause of action for account stated because it argues that defendants have failed, to date, to pay for all of plaintiff's services. Plaintiff also seeks to dismiss the affirmative defenses and counterclaims in the answer. The answer alleges the following: plaintiff represented Prodos via the retention letter in defendants' attempt to purchase the Feere assets. To participate in the auction, Prodos submitted an indication of interest to the Commissioners from the Ministry of Economic Development in Italy (Commissioners). Prodos sought financial support from others, particularly Samsung USA (Samsung). Plaintiff informed Prodos that a major part of the transaction was the posting of a guarantee (Guarantee) amounting to one million euros. Plaintiff assured Prodos that if Prodos's bid was unsuccessful, Prodos would be able to retrieve the Guarantee without penalty. After Prodos's bid was accepted, the Commissioners awarded the deal to Prodos on the condition that Prodos finalized an agreement with Samsung to secure the necessary funding to consummate the transaction. Subsequently,

Samsung failed to provide the financial support.

Defendants claim that although Prodos's bid was not successful, Prodos was still bound to the terms of the Guarantee. The Commissioners declared that Prodos was in breach of the bid acceptance, and proceeded to draw down the Guarantee. Defendants accuse plaintiff of offering contrary advice to Prodos, of failing to properly represent Prodos in the transaction, and of failing to work with Prodos in subsequent legal actions.

The affirmative defenses include the following: unclean hands, defense based on documentary evidence, equitable estoppel, waiver and setoff. The counterclaims include the following: breach of contract, malpractice and breach of fiduciary duty.

In opposing the motion to grant the account stated cause of action, defendants argue that plaintiff has filed this motion while the other separate motions are presently pending before this court. Defendants refer to their motion to dismiss all claims brought against Song and plaintiff's cross motion for partial summary judgment. Defendants claim that this present motion should not be granted because they have not yet begun their discovery. Since this court has already decided on the pending motion, that issue has been rendered moot.

“An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and the balance due (citations omitted).” *Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 (1st Dept 2007).

“An account stated assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as an account stated; it cannot be used to create a liability where none otherwise existed (citations omitted).” *Id.* at 251. “Generally, receipt and retention of the law firm's accounts without objection within a reasonable time, and an agreement to pay a

portion of the indebtedness, give rise to an account stated (citation omitted).” *Scheichet & Davis v Steinger*, 183 AD2d 479, 479 (1st Dept 1992).

Defendants state that there is an issue as to whether they objected to the bills they received. Relying on Song’s deposition testimony, defendants contend that plaintiff had attempted to threaten them into paying the bills, allegedly refusing to perform any more work for them and threatening to bring a suit against them. Defendants argue that duress was the reason why they did not immediately object to the amount of the bills. After a partial payment and a failed attempt at negotiating a settlement with respect to further payments, defendants state that Song attempted to question the bills.

In reply, plaintiff argues that defendants had sufficient time to commence discovery. Plaintiff also argues that defendants have not demonstrated duress to the degree that they lacked the free will to resist plaintiff’s demands. As there is no dispute as to the existence of unpaid bills, plaintiff claims that it was justified in putting some pressure on defendants. Furthermore, plaintiff claims that defendants have not provided proof of any specific objections to its bills prior to the commencement of this action.

Defendants contend that they took issue with the amount of some of the received bills but were precluded from raising a prompt objection due to plaintiff’s conduct, which allegedly resulted in creating a condition of duress for them. “Duress generally speaking, may be said to exist when one is compelled to perform an act which he has the legal right to abstain from performing.” To constitute duress “[t]he compulsion must be such as to overcome the existence of free will (citation omitted).” *Gerstein v 532 Broad Hollow Rd. Co.*, 75 AD2d 292, 297 (1st Dept 1980). “[A] mere threat that does not force the other party to accede to some further

demand does not constitute economic duress (citation omitted).” *Minnelli v Soumayah*, 41 AD3d 388, 389 (1st Dept 2007).

Defendants have failed to provide sufficient grounds for a defense of duress here. They failed to specify the threat asserted by plaintiff, beyond a refusal to continue to legally represent Prodos. Plaintiff was apparently expressing nothing beyond a demand for a recovery for unpaid services, which are not denied by defendants. Defendants also fail to specify the manner in which they later expressed their objection to plaintiff’s invoices.

Plaintiff has made out a cause of action for an account stated. Defendants offer no further defense besides economic duress. Therefore, this court shall grant the motion for summary judgment on this cause of action.

Plaintiff seeks a dismissal or, in the alternative, summary judgment dismissing all of the affirmative defenses and counterclaims raised by defendants. Plaintiff argues that the unclean hands defense should be dismissed because it is unavailable in an action for damages, and because there is no proof of any inequity related to plaintiff’s claim for fees which is founded on illegality or immorality. Plaintiff argues that the defense of documentary evidence should be dismissed because defendants have failed to identify any document which refutes plaintiff’s causes of action. Plaintiff argues that the defense of equitable estoppel should be dismissed because defendants have failed to specify any deceptive act by plaintiff on which defendants detrimentally relied in changing their position. Plaintiff argues that the waiver defense should be dismissed because there is no proof that plaintiff has voluntarily relinquished its right to be paid for services by defendants. Plaintiff argues that the setoff defense should be dismissed because it is without basis.

Regarding the counterclaims, plaintiff contends that by Song's admission, the cause of all the losses in connection with the Ferre transaction was Samsung's failure to financially support Prodos. Plaintiff denies that its representation of Prodos could constitute malpractice in any form. Plaintiff refers to subsequent legal actions brought by Prodos in Italy. Two courts, in a suit commenced by Prodos under an exclusive jurisdiction clause in the agreement, held that Prodos's bid for the Feere assets was validly accepted and that the Commissioners had the legal right to draw down the Guarantee. It is plaintiff's position that these rulings should preclude Prodos from further relitigation of this issue, and that the rulings should be given full effect on the ground of comity. Thus, plaintiff seeks dismissal of the malpractice counterclaim as lacking in merit.

Plaintiff seeks dismissal of the counterclaims for breach of contract and breach of fiduciary duty, because they are duplicative of the malpractice counterclaim.

With respect to a motion to dismiss, particularly for failure to state a cause of action, the court must accept the facts alleged as true, according the party subject to the motion the benefit of every possible favorable inference. *See Collins v Telcoa Int'l. Corp.*, 283 AD2d 128, 131 (2d Dept 2001). However, this motion "must be denied if from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (internal quotation marks and citations omitted)." *Sheila C. v Povich*, 11 AD3d 120, 122 (1st Dept 2004).

In considering plaintiff's motion to dismiss the defenses and counterclaims, the court finds nothing in defendants' opposition papers that challenges or questions plaintiff's arguments. Plaintiff has asserted that these defenses have not been made out or substantiated by defendants.

Defendants have not attempted to demonstrate how plaintiff's conduct constituted "unclean hands," or referred to any documentary evidence that refutes plaintiff's claims, or made out the elements of estoppel or waiver. Regarding the counterclaims, defendants have not responded to plaintiff's argument as to the type of conduct which would rise to the level of malpractice. Defendants have also failed to comment on the rulings of the two courts in Italy where they sought legal redress. Lastly, defendants failed to address the argument that the counterclaims in breach of contract and breach of fiduciary duty are simply duplicative of the malpractice counterclaim.

It is settled that a failure of a party to respond to a fact set forth in a motion may be deemed an admission. *See Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 (1975). Since defendants have not responded to the motion regarding the grounds for the dismissal of the defenses and counterclaims, the court shall deem this as a admission that they lack merit or are insufficiently pleaded. The court shall grant the motion to dismiss them.

Accordingly, it is

ORDERED that defendants' motion for summary judgment (motion sequence no.007) is granted to the extent that the third, fourth and sixth causes of action are dismissed as against Song; and it is further

ORDERED that this action is severed with respect to Song and judgment is entered in his favor; and it is further

ORDERED that, pursuant to CPLR 3212 (b), the third, fourth and sixth causes of action are dismissed as against Prodos; and it is further

ORDERED that defendants' motion for sanctions is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment on the sixth cause of action is denied; and it is further

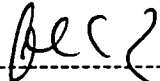
ORDERED that plaintiff's motion for summary judgment (motion sequence no.008) is granted on the second cause of action; and it is further

ORDERED that plaintiff's motion dismissing the affirmative defenses and counterclaims in the answer is granted; and it is further

ORDERED that the remainder of this action shall continue.

DATED: 3/5/15

ENTER:



J.S.C.

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**