SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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HANTMAN & ASSOCIATES,

Plaintiff,

Index No. 162715/14

-against-

DECISION/ORDER

FLORIDA FAMILY OFFICE LLC, JAMES NUCKEL, individually and JOHN DOES 1-3,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Hantman & Associates ("Hantman") commenced the instant action against defendants Florida Family Office LLC ("FFO"), James Nuckel, individually and John Does 1-3 to recover damages arising out of defendants' alleged breach of a retainer agreement between the parties. Defendants now move for an Order pursuant to (1) CPLR § 3211(a)(4) dismissing the complaint on the ground that another action is pending between the same parties for the same causes of action; (2) CPLR § 3211(a)(5) dismissing the complaint on the ground that an arbitration is pending between the same parties for the same causes of action before the American Arbitration Association ("AAA"); (3) CPLR § 3211(a)(7) dismissing the complaint on the ground that it fails to state a claim; and (4) CPLR § 3211(a)(8) dismissing the complaint as against defendant FFO on the ground that this court lacks personal jurisdiction over said defendant. Defendants' motion is resolved as set forth below.

The relevant facts according to the complaint are as follows. In or around June 2009, defendant Nuckel filed a lawsuit against certain borrowers to recover on an unpaid loan (the "2009 Case"). During the litigation of the 2009 Case, Nuckel was represented by the firm of McElroy, Deutsch, Mulvaney & Carpenter LLP ("MDMC"). The 2009 Case resulted in a Final Default Judgment, dated February 16, 2010, against all named defendants in the sum of $1,337,588.57, plus additional losses and expenses incurred by Nuckel (the "Judgment").

When it became to clear to Nuckel that he would not be able to collect on the Judgment from the borrowers, in or around February 2014, he approached plaintiff about helping him collect on the Judgment from the guarantors of the loan. After several in-person meetings and e-mail conversations, on or about March 21, 2014, plaintiff sent Nuckel a proposed Retainer Agreement (the " March 21st Agreement"), pursuant to which Nuckel was to pay plaintiff a $10,000 retainer fee, plaintiff's legal fees were to be capped at $100,000 and that Nuckel could pay reduced hourly fees. The March 21st Agreement further provides that plaintiff "is entitled to a one third contingency on any money received from the [guarantors of the loan]" and that any monies paid by Nuckel to plaintiff would be credited against this contingency. Finally, the March 21st Agreement advised Nuckel to consult independent counsel to the extent the terms therein were unclear.

On or about March 25, 2014, Nuckel accepted the Agreement by e-mail stating as follows:

> Robert,...
> The retainer is great - accepted. As far as a payment, as you may now know, I like to pay by check and would like to get this to you on Monday next week when I am back in the main office. Until then, please PDF this version as you suggested and I will get it out to you. In the meantime, again, retainer is accepted.
> Best regards,
> James Nuckel

In response thereto, on or about March 31, 2014, plaintiff e-mailed to Nuckel a PDF version of the Agreement with what plaintiff alleges are merely grammatical changes (the "March 31st Agreement"). On April 7, 2014, defendants acknowledged receipt of the March 31st Agreement and sent an initial check.

In or around June 2014, plaintiff drafted a complaint and filed a lawsuit against the guarantors of the loan on behalf of Nuckel and FFO titled *Florida Family Office LLC v. Estate of John J. Cali, John R. Cali and Brant B. Cali* (the "2014 Case"). Over the course of the next nine months, plaintiff represented Nuckel and FFO in the litigation and engaged in settlement talks with opposing counsel. As a result of plaintiff's efforts, the parties were able to come to a settlement agreement, at which time Nuckel allegedly repudiated the Agreement and sought to substitute McCarter & English LLP ("M&E") as counsel, which was the firm that represented Nuckel in the underlying transaction giving rise to the 2009 Case. Plaintiff further alleges that Nuckel never intended to pay plaintiff pursuant to the terms of the Agreement and only retained plaintiff to avoid paying a much larger retainer fee that would have been required by both M&E and MDMC.

Prior to commencing the instant action, plaintiff filed a Motion to Impose and Enforce a Charging Lien (the "Motion") in the 2014 Case pending in New Jersey seeking to recover its fees from defendants based on the March 31st Agreement. Defendants cross-moved for a declaration that plaintiff was not entitled to any fees on the ground that Nuckel did not agree to be bound by the March 31st Agreement but only the March 21st Agreement. Further, plaintiff commenced an arbitration proceeding before AAA as per both retainer agreements for a determination as to which of the agreements governs. Based on the parties' representations to this court, both the Motion and the arbitration are still pending.

Thereafter, plaintiff commenced the instant action asserting causes of action for breach of contract, fraud, prima facie tort and aiding and abetting. Plaintiff later amended the complaint as of right. Defendants now move to dismiss the amended complaint on several grounds.

As an initial matter, defendants' motion for an Order pursuant to CPLR § 3211(a)(8) dismissing the complaint as against defendant FFO on the ground that this court lacks personal jurisdiction over said defendant is granted. It is undisputed that Nuckel, the principal and owner of FFO, resides in New York and thus, this court has personal jurisdiction over him. It is also undisputed that FFO is an LLC with its principal place of business located in Florida and that FFO has not transacted business in New York and is not domiciled in New York for personal jurisdiction purposes. However, plaintiff maintains that this court has personal jurisdiction over FFO on the ground that it is the alter-ego of Nuckel. "Where personal jurisdiction exists over a defendant, jurisdiction over his alter-ego is proper as well." *Transasia Commodities Ltd. v. Newlead JMEG, LLC*, 45 Misc.3d 1217 (Sup. Ct. N.Y. County 2014)(citing *So. New Eng. Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 138 (2d Cir. 2010)(finding that the allegation that each of the appellants was an "alter ego," if established, "would clearly support a finding of personal jurisdiction.") "It is also well established that the exercise of personal jurisdiction over an alter ego corporation does not offend due process." *Transfield ER Cap Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221, 224 (2d Cir. 2009). Thus, to determine whether the court has personal jurisdiction over FFO, the court need only determine whether plaintiff has sufficiently alleged an alter-ego relationship between Nuckel and FFO. *See Transasia Commodities Ltd.*, 45 Misc.3d 1217. "In order to state a claim for alter-ego liability plaintiff is generally required to allege 'complete domination of the corporation in respect to the transaction attached' and 'that such domination was used to commit a fraud or wrong against plaintiff which resulted in plaintiff's injury.'" *Baby*

Phat Holding Co., LLC v. Kellwood Co., 123 A.D.3d 405, 407 (1st Dept 2014) (quoting *Morris v. New York State Dep't. of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993)).

In the instant action, this court finds that defendants' motion to dismiss the complaint as against FFO on the ground that this court lacks personal jurisdiction over FFO is granted as plaintiff has failed to sufficiently allege an alter-ego relationship between FFO and Nuckel. The amended complaint alleges only that "[u]pon information and belief, FFO is no more than a shell entity whose alter ego, managing and sole member is Nuckel." Further, the affidavit of Robert Hantman, the attorney and managing partner of the plaintiff, which may be used to amplify the pleadings on a motion to dismiss, merely states that "[u]pon information and belief, FFO does not perform any business function and is merely utilized as the corporate alter ego of Nuckel." However, such statements are insufficient to assert a claim for liability on a theory of alter-ego status as it is well-settled that "[t]he mere claim that the corporation was completely dominated by the defendant[], or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil." *Damianos Realty Group, LLC v. Fracchia*, 35 A.D.3d 344 (2d Dept 2006). Thus, as plaintiff has failed to sufficiently plead an alter-ego relationship between FFO and Nuckel, the complaint must be dismissed as against FFO on the ground that this court lacks personal jurisdiction over FFO.

Defendants' motion for an Order pursuant to CPLR §§ 3211(a)(4) and (5) dismissing the amended complaint on the ground that there is another action pending between the parties for the same causes of action and that there is an arbitration pending between the parties is granted to the extent that this action is stayed pending the resolution of the Motion made by plaintiff in the 2014 Case and the arbitration pending before the AAA. Pursuant to CPLR § 3211(a),

> a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> 4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or
>
> 5. the cause of action may not be maintained because of arbitration and award....

Further, pursuant to CPLR § 2201, "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just."

This court finds that the instant action should be stayed pending the resolution of the Motion made by plaintiff in the 2014 Case and the arbitration pending before the AAA. Indeed, in both the 2014 Case and the arbitration, the issue of what retainer agreement governs this action will be resolved. Thus, in order to avoid duplicative litigation and inconsistent determinations, the instant action must be stayed.

Accordingly, it is hereby

ORDERED that the instant action is dismissed as against defendant FFO on the ground that this court lacks personal jurisdiction over said defendant; and it is further

ORDERED that the action is stayed pending the resolution of the Motion and the arbitration. This constitutes the decision and order of the court.

Dated: 4/27/15

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.