

McKesson Med.-Surgical Inc. v Sawhney

2015 NY Slip Op 32431(U)

December 22, 2015

Supreme Court, New York County

Docket Number: 650792/2014

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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

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MCKESSON MEDICAL-SURGICAL INC.,

Plaintiff,

Index No. 650792/2014

-against-

DECISION/ORDER

DR. RAMESH SAWHNEY, DR. JOSEPH GORUM,
DR. DANIEL DRAPACZ and DR. ANDREW BLACK,
individually and d/b/a IRVING PLACE SURGERY &
WELLNESS CENTER,

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.....	<u>1</u>
Notice of Cross-Motion and Affidavits Annexed.....	<u>2, 3</u>
Answering Affidavits.....	<u>4</u>
Replying Affidavits.....	<u>5</u>
Exhibits.....	<u>5</u>

Plaintiff commenced the instant action asserting claims for an account stated, goods sold and delivered and collection and attorney’s fees. Although it is not clear from its motion papers, it appears that plaintiff now moves for an order pursuant to CPLR § 3212 granting it summary judgment on each of its causes of action against three individual defendants, Dr. Ramesh Sawhney (“Dr. Sawhney”), Dr. Daniel Drapacz (“Dr. Drapacz”) and Dr. Andrew Black (“Dr. Black”). Dr. Sawhney cross-moves for an order dismissing plaintiff’s complaint as against Dr. Sawhney individually. Dr. Drapacz cross-moves for an order granting summary judgment dismissing plaintiff’s complaint as against Dr. Drapacz individually. For the reasons set forth

below, plaintiff's motion is denied, Dr. Drapacz's cross-motion is granted and Dr. Sawhney's cross-motion is granted except as to the portion seeking sanctions against plaintiff, which is denied. Moreover, the court *sua sponte* grants summary judgment dismissing plaintiff's complaint as against Dr. Black.

The relevant facts are as follows. On or about July 24, 2012, defendant Irving Place Surgery & Wellness Center ("Irving Place") submitted a customer application to plaintiff, signed by Dr. Sawhney, Irving Place's sole owner, and Ritishea Zied, Irving Place's office manager. Plaintiff claims that defendants ordered medical supplies, that it sent defendants invoices for the supplies and that defendants never paid for the supplies. All of the invoices submitted by plaintiff were addressed to Irving Place. Plaintiff further claims that, on or about April 30, 2013, it sent a statement of account to defendants, to which defendants failed to object. However, Dr. Sawhney claims that these orders were unauthorized and placed by Ms. Zied and that, once he discovered that Irving Place was in possession of medical supplies it had no intention to purchase, he telephoned plaintiff and plaintiff came to Irving Place's premises and removed the supplies.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his

claim.” *Id.* “Bare, conclusory allegations” are insufficient to raise genuine questions of fact. *Oates v. Marino*, 106 A.D.2d 289, 291 (1st Dept 1984).

Under a cause of action for an account stated, a plaintiff must establish that invoices were sent to the defendant. *See Dreyer & Traub v. Rubinstein*, 191 A.D.2d 236 (1st Dept 1993) (“An action based on an account stated may exist where the defendant has received a statement of account...without objecting to it within a reasonable time”). Under a cause of action for goods sold and delivered, a plaintiff must establish that the plaintiff sold and delivered goods to the defendant, through proof which can include invoices sent to the defendant describing the goods. *See Crocker Commercial Services, Inc. v. Safdie*, 111 A.D.2d 34, 34-35 (1st Dept 1985). Where invoices are sent to a corporate defendant rather than to an individual defendant, the plaintiff can only recover against the individual defendant if the plaintiff establishes that the corporate veil should be pierced. *See Sound Communications, Inc. v. Rack and Roll, Inc.*, 88 A.D.3d 523, 523-24 (1st Dept 2011) (finding that, as all of the plaintiff’s invoices were addressed to the corporate defendant only, the complaint failed to state an account stated cause of action against the individual defendants and that the complaint did not allege facts sufficient to pierce the corporate veil). “Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.” *TNS Holdings v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998). Moreover, the complaint must allege particularized facts to warrant piercing the corporate veil. *See Siegel Consultants, Ltd. v. Nokia, Inc.*, 85 A.D.3d 854 (1st Dept 2011).

In the present case, plaintiff has failed to establish its *prima facie* right to summary

judgment on its claims for an account stated, goods sold and delivered and collection and attorney's fees against the individual defendants. In addition, the court finds that Dr. Sawhney, Dr. Drapacz and Dr. Black are entitled to summary judgment dismissing the claims against them. The invoices for the medical supplies at issue were only addressed to "Irving Place Surgery & Wellness Center" and not to any of the individual defendants. The only evidence other than these invoices submitted by plaintiff is the affidavit of Lonnie T. May, plaintiff's Assistant Director of Credit, who merely repeats the allegations in plaintiff's complaint that a statement of account and invoices were rendered to all defendants, who failed to object or pay, but does not address how the individual defendants, rather than the corporate defendant listed on the invoices, are responsible for payment for the goods. Further, plaintiff has failed to sufficiently allege facts to pierce the corporate veil and hold any of the individual defendants individually liable. Therefore, the court denies plaintiff's motion for summary judgment, grants Dr. Sawhney's and Dr. Drapacz's cross-motions and *sua sponte* grants summary judgment dismissing plaintiff's complaint as against Dr. Black pursuant to CPLR § 3212(b).

The portion of Dr. Sawhney's cross-motion requesting that the court impose sanctions on plaintiff pursuant to Uniform Civil Rules § 130 is denied as Dr. Sawhney has failed to provide a sufficient basis for such relief.

Accordingly, plaintiff's motion for summary judgment is denied, and it is hereby

ORDERED that the motion of defendant Dr. Sawhney to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion of defendant Dr. Drapacz for summary judgment dismissing

