East Coast Petroleum, Inc. v F&M Funding LLC
2016 NY Slip Op 30230(U)
January 5, 2016
Supreme Court, Bronx County
Docket Number: 309692/12
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 309692/12**

East Coast Petroleum, Inc.,
Plaintiff,

-against-

DECISION and ORDER

F&M Funding LLC, et al.,

Present:

Defendants.

Hon. Julia I. Rodriguez
----------X Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of defendants' motion to dismiss the causes of action asserted against F&M Funding LLC and Frank Palazzolo.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1**
Affirmation in Opposition & Exhibits	**2**
Memorandum of Law in Opposition	**3**

In the instant action, Plaintiff asserts causes of action against defendants F&M Funding LLC ("F&M") and Frank Palazzolo for breach of contract, fraud in inducement, unjust enrichment/quantum meruit, alter-ego, account stated, and goods sold and delivered. The defendants now move, pursuant to CPLR 3211(a)(7), for an order dismissing all causes of action asserted against them.

The Amended Complaint alleges, *inter alia,* that Plaintiff delivered fuel oil to nineteen properties, owned separately by nineteen corporations ("the Realty Companies") located in Bronx, New York, in accordance with "various agreements" and that full payment has not been received for those deliveries. The Amended Complaint also alleges that defendant Palazzolo is the "actual and/or de-facto owner, managing member and/or principal of all the Realty Companies" and that he personally guaranteed payment, "in the presence of Plaintiff East Coast principals, John Knief and Anthony Milanese." The Amended Complaint further alleges that, premised upon the payment by two checks issued by F&M to Plaintiff, one on July 2, 2010 in the amount of $100,000.00 and the other on September 28, 2010 in the amount of $50,000.00 ("the Checks"), there is a balance due and owing of $132,411.14.

In support of the motion, the moving defendants contend that each of the causes of action asserted against them "seeks recovery from Palazzolo premised upon the alleged personal guaranty . . . or otherwise seeks recovery from F&M premised upon its delivery of the checks." The moving defendants argue that the causes of action asserted against them should be dismissed because: (1) the oral promise to guarantee the debt of another is unenforceable, (2) any alleged part performance is not unequivocally referable to an oral agreement and therefore unenforceable, (3) Plaintiff has no cause of action for fraudulent inducement against them as a matter of law because Plaintiff cannot establish allegations beyond a breach of contract, (4) Plaintiff fails to allege any basis for individual liability against Palazzolo and (5) there cannot be any liability ascribed to F&M premised upon the two payments made.

In opposition to the motion, plaintiff submitted the affidavit and attached exhibits of Anthony Milanese, its President. In his affidavit, Milanese states the following: Plaintiff has had a business relationship with Palazzolo dating back "some thirteen years, to around 2001." In January of 2009, Milanese attended a meeting at Palazzolo's office at which Chayim Kirschenbaum and Mark Shapiro were also in attendance. Milanese understood that Kirschenbaum and Shapiro were in attendance on behalf of defendant Treetop Development, LLC ("Treetop"). During the meeting, the parties discussed that Plaintiff would become the heating oil supplier for "various residential buildings around New York City ("the residential properties")." Milanese "was informed" that Palazzolo and Treetop had an ownership interest in those buildings. "At all relevant times," Milanese understood that Palazzolo maintained either an ownership interest in the residential properties or an ownership interest in the entities which owned the residential properties. During the 2009 meeting, Palazzolo "promised to personally guarantee payment to Plaintiff for heating oil deliveries to the various residential properties." In the presence of Kirschenbaum and Shapiro, Palazzolo said to Milanese "I will pay you." Therefore, Palazzolo "made an unequivocal promise to Plaintiff which represented a personal obligation by him to pay any debts owed for heating oil deliveries by Plaintiff to the residential properties." Because a prior heating oil supplier, Castle Oil, was "unwilling to extend further credit . . . Palazzolo knew Plaintiff would not agree to extend credit if . . . Palazzolo did not

personally guarantee payment for heating oil." Plaintiff "reasonably relied on" Palazzolo's promise and extended credit to Palazzolo "and his property holdings." Payment for heating oil is due upon delivery. Plaintiff sent Palazzolo periodic statements of account with respect to the heating oil deliveries. "None of these statements of account was ever disputed." Palazzolo made two payments toward the amount due to Plaintiff for heating oil deliveries, by two checks "drawn from F&M." "Both checks appear to say 'On Acct' in the memo line." For one of the checks, "the payee appears to be East Coast Fuel, and for the other check, the payee appears to read, 'East Coast Bills.'" Milanese "understand[s]" Palazzolo to be the principal of F&M and "believe[s]" the signature on the checks is that of Palazzolo. "These check payments in furtherance of the debt owed to Plaintiff clearly relate back to . . . Palazzolo's promise to me, where he said 'I will pay you.'" Milanese attached a copy of the two checks to his affidavit. "In reliance on . . . Palazzolo's prior promise and the 2 check payments, Plaintiff continued to extend credit." The "statement" attached to Milanese's affidavit contained, among other things: "An indication that it was directed to 'Frank P;' that a balance due remained due to Plaintiff; and recognition of the 2 check payments made toward the balance due." Milanese's office transmitted the statement to Palazzolo "via fax, to his home fax, to ensure receipt, as this was his personal obligation." Milanese's office "simultaneously transmitted via fax statements showing deliveries for the various residential properties." The fax log attached to the "statement" indicates that the transmission was "OK." At no time did "Palazzolo, anyone acting on his behalf, or anyone else, dispute the statement, its contents, or any amounts due to Plaintiff by Defendant Palazzolo." According to Milanese, Palazzolo "does not dispute that a debt is owed to Plaintiff" but is "merely trying to get around his personal obligation" and that, to date, the sum of $132,411.14 remains due to Plaintiff.

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In deciding a motion to dismiss directed at the sufficiency of the pleadings, pursuant to CPLR 3211(a)(7), a court must accept the allegations as true, according them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal theory. *See Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314 (1976).

The law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability. *See Walkovszky v. Carlton,* 18 N.Y.2d 414, 417, 276 N.Y.S.2d 585 (1966). However, the courts will disregard the corporate form whenever necessary to prevent fraud or to achieve equity. *See International Aircraft Trading Co. v. Manufacturers Trust Co.,* 297 N.Y. 285, 292, 79 N.E.2d 249, 252 (1948). To state a claim for alter-ego liability, the plaintiff is generally required to allege complete domination of the corporation in respect to the transaction attacked, and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury. *See Baby Phat Holding Company, LLC, v. Kellwood Company,* 123 A.D.3d 405,407, 997 N.Y.S.2d 67 (1st Dept. 2014). Because a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no definitive rules governing varying circumstances when this power may be exercised. *See id.* The Amended Complaint, as supplemented by Milanese's affidavit, alleges lack of corporate formalities, commingling of funds, and self-dealing. Viewed in the light most favorable to the plaintiff, it cannot be said that the complaint is totally devoid of solid, nonconclusory allegations regarding Palazzolo's use of F&M and/or any of the Realty Companies as his corporate alter-ego. *See International Credit Brokerage Co., Inc. v. Agapov,* 249 A.D.2d 77, 78 671 N.Y.S.2d 64,65 (1st Dept. 1998). Nor is the court inclined to dismiss this fact-specific claim prior to any discovery having taken place. Plaintiff may, therefore, continue its properly pleaded breach of contract claims against Palazzolo individually.

To be enforceable, a promise to answer for the debt of another must be evidenced by writing, or plaintiff must prove it is supported by a new consideration moving to the promisor and beneficial to him, and that the promisor has become in the intention of the parties a principal debtor primarily liable. *See Martin Roofing v. Goldstein,* 60 N.Y.2d 262, 469 N.Y.S.2d 595 (1983). The Amended Complaint, as supplemented by Milanese's affidavit, alleges that Plaintiff entered into contracts with each of the Realty Companies for the delivery of oil to various residential buildings, that Palazzolo is the owner, managing member or principal of each of the Realty Companies which own the residential buildings, that Plaintiff continued to deliver oil to the properties notwithstanding that it had not been fully paid based upon Palazzolo's promise

that he would pay the debt. This is sufficient, at the pleading stage, to state a cause of action for breach of the alleged oral guarantee made by Palazzolo to the Plaintiff.

The moving defendants also contend that no liability may be ascribed to F&M "premised upon" the payment to Plaintiff by two checks drawn on F&M because "the mere delivery" of the checks by F&M made it, "at best, a volunteer for the obligations of the Realty Companies." However, given the allegations that all of the Realty Companies and F&M are alter-egos of Palazzolo, viewed in the light most favorable to the Plaintiff, the allegations against F&M are properly pleaded.

To state a cause of action for fraudulent inducement, it is sufficient that the claim alleges a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment. *See Channel Master Corp. v. Aluminum Ltd. Sales,* 4 N.Y.2d 403, 406-408, 176 N.Y.S.2d 259 (1958). Here, the Amended Complaint, as supplemented by Milanese's affidavit, alleges that Palazzolo represented that he was capable of paying for all of the fuel deliveries in order to secure delivery by Plaintiff on credit and that, in reliance upon this representation which Palazzolo knew to be false when made, Plaintiff delivered, and continued to deliver notwithstanding that it had not been paid, fuel oil to the residential properties. These allegations are sufficiently detailed to fairly apprise the moving defendants of the circumstances constituting the wrong. CPLR 3016(b). Notwithstanding the moving defendants' argument to the contrary, a misrepresentation of present fact, i.e., Palazzolo's ability to pay for all fuel deliveries, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to enter into the contract, and therefore involves a separate duty. *See GoSmile, Inc. v. Levine,* 81 A.D.3d 77, 81, 915 N.Y.S.2d 521 (1st Dept. 2010) citing *Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.,* 68 N.Y.2d 954, 956, 510 N.Y.S.2d 88 (1986). As such, Plaintiff properly alleges both a breach of contract claim and a claim of fraudulent inducement. For the same reasons, the Amended Complaint sufficiently states a cause of action for unjust enrichment/quantum meruit against the moving defendants.

Finally, as the Amended Complaint, as supplemented by Milanese's affidavit, alleges that heating fuel was delivered to and accepted by the residential properties and that periodic statements of account with respect to those deliveries were sent to Palazzolo which were not disputed, the Amended Complaint sufficiently states causes of action against the moving defendants for account stated and goods sold and delivered.

Accordingly, the moving defendants' motion to dismiss the causes of action asserted against them, pursuant to CPLR 3211 (a)(7) is **denied** in its entirety.

Dated: Bronx, New York
~~December , 2015~~
Jan. 5, 2016

Hon. Julia I. Rodriguez, J.S.C.