

Elite Investigations, Inc. v Normal Ears, Inc.
2016 NY Slip Op 30588(U)
April 5, 2016
Supreme Court, New York County
Docket Number: 653506/2015
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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ELITE INVESTIGATIONS, INC.,

Plaintiff,

Index No. 653506/2015

-against-

DECISION/ORDER

NORMAL EARS, INC., NIKKI KAUFMAN,
Individually, DIANA SIMMONS, Individually,
JOHN DOE, MARY DOE and DOE CORPORATION,

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>
Affirmation in Opposition	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action asserting causes of action for breach of contract, unjust enrichment and breach of the covenant of good faith and fair dealing against defendants. Defendants Normal Ears, Inc. (“Normal”), Nikki Kaufman (“Kaufman”) and Diana Simmons (“Simmons”) now move for an Order pursuant to CPLR § 3211(a)(7) dismissing the complaint in its entirety as against Kaufman and Simmons and dismissing plaintiff’s cause of action for breach of the covenant of good faith and fair dealing as against Normal. For the reasons set forth below, defendants’ motion is granted in its entirety.

The complaint alleges as follows. In August 2014, plaintiff and Normal entered into a contract wherein plaintiff agreed to provide security services. Pursuant to the terms of the contract, plaintiff billed Normal for the services on a weekly basis. In or around December

2014, Normal “became delinquent with their [sic] payments.” Plaintiff spoke with Simmons, who assured plaintiff that the bills would be paid in a few weeks. “Plaintiff took this response as a guarantee of payment” and thus continued to provide the services. In or around May 2015, plaintiff stopped providing security services because it was owed \$35,395.36. Simmons apologized for the nonpayment and asked plaintiff to agree to a payment plan. Although plaintiff drafted a payment plan, it was never agreed to by Normal. Simmons informed plaintiff that Normal was unable to pay the money owed to plaintiff. Thus, plaintiff commenced the instant action.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, “a complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, “conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

The portion of defendants’ motion for an Order dismissing plaintiff’s cause of action for breach of contract as against Kaufman and Simmons is granted as plaintiff does not allege that Kaufman or Simmons entered into a contract with plaintiff. Instead, plaintiff only alleges that it entered into a contract with Normal.

The portion of defendants’ motion for an Order dismissing plaintiff’s cause of action for

breach of the covenant of good faith and fair dealing as against Kaufman and Simmons is granted. “A cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties.” *Duration Mun. Fund, L.P. v. J.P. Morgan Sec. Inc.*, 77 A.D.3d 474, 474-75 (1st Dept 2010). Thus, an individual defendant is not liable for breach of the covenant of good faith and fair dealing where the plaintiff has a contract with a corporate defendant, not the individual defendant. *See Ahead Realty LLC v. India House, Inc.*, 92 A.D.3d 424, 425 (1st Dept 2012) (holding that a cause of action for breach of the covenant of good faith and fair dealing was properly dismissed as against the individual defendants since no contract existed between the plaintiff and the individual defendants).

In the present case, plaintiff’s cause of action for breach of the covenant of good faith and fair dealing must be dismissed as against Kaufman and Simmons as plaintiff has not alleged the existence of a contractual obligation between plaintiff and Kaufman and Simmons. Instead, the complaint only alleges that plaintiff entered into a contract with Normal, the corporate defendant.

The portion of defendants’ motion for an Order dismissing plaintiff’s cause of action for unjust enrichment as against Kaufman and Simmons is granted as the complaint does not state a cause of action for unjust enrichment against these individual defendants. To state a cause of action for unjust enrichment, a plaintiff must allege “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. Ralph Rieder*, 86 A.D.3d 406, 408 (1st Dept 2011). Moreover, a plaintiff must allege that the services were performed for and enriched the particular defendant, not merely “that the defendant received a benefit from the activities of the plaintiff.” *Joan Hansen & Co., Inc. v. Everlast World’s Boxing Headquarters Corp.*, 296 A.D.2d 103, 108 (1st Dept 2002) (holding that there was no cause of

unjust enrichment where the plaintiff acted under contract with the corporate defendant and did not show performance of any service for the individual defendant). “[I]f services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery.” *Id.*

In the present case, plaintiff’s cause of action for unjust enrichment must be dismissed as against Kaufman and Simmons as the complaint does not allege that plaintiff performed any services for Kaufman and Simmons. Instead, the complaint only alleges that plaintiff provided security services for Normal pursuant to its contract with Normal.

Plaintiff’s argument that Kaufman and Simmons should be held individually liable because the court should pierce the corporate veil is without merit as the complaint does not sufficiently allege that Kaufman and Simmons are liable for the above claims on an alter-ego theory. “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).

In the present case, plaintiff has not alleged any facts justifying piercing the corporate veil of Normal to impose individual liability on Kaufman and Simmons. Plaintiff has only alleged that Kaufman is the owner of Normal “and maintained or should have maintained supervisory authority over” defendants and that Simmons is the authorized agent or representative of Normal and Kaufman, which allegations are not sufficient to justify piercing the corporate veil.

In addition, plaintiff’s assertions that defendants previously agreed to a settlement and that this settlement is a written guarantee of Kaufman and Simmons to pay Normal’s corporate

