

E.D. & F. Man Sugar Inc. v ZZY Distrib., Inc.
2016 NY Slip Op 31248(U)
February 11, 2016
Supreme Court, New York County
Docket Number: 653963/2012
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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E.D. & F. MAN SUGAR INC., a Delaware
corporation,

Plaintiff,

-against-

ZZY DISTRIBUTORS, INC., a New York
corporation, d/b/a NEAT N' SWEET, INC.,
ZALE VISHEDSKY, ZACK VISHEDSKY,
YOSEPH STERNBERG a/k/a JOSEPH STERNBURG,
and MARIANA DEUTSCH,

Defendants.

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Mtn Seq. Nos. 003 & 004

DECISION AND ORDER

JEFFREY K. OING, J.:

Motion sequence numbers 003 and 004 are consolidated for
disposition.

Plaintiff E.D. & F. Man Sugar Inc. ("ED&F") commenced this
action to recover the price of sugar it allegedly delivered to
the now defunct defendant ZZY Distributors, Inc. ("ZZY"). ED&F
also seeks to pierce ZZY's corporate veil and to hold the
individual defendants, Zale Vishedsky, Zach Vishedsky, Yoseph
Sternberg a/k/a Joseph Sternburg (Sternberg), and Mariana Deutsch
(Deutsch), personally liable.¹ The nine-count complaint asserts
causes of action for: (1) breach of contract; (2) fraudulent

¹Zack Vishedsky a/k/a Zach Vishedsky, referred herein as Zach
Vishedsky.

inducement; (3) fraud; (4) alter ego; (5) injunctive relief; (6) unjust enrichment; (7) conversion; (8) replevin; and (9) indemnification. With the exception of the first cause of action, alleging breach of contract against ZZY, and the fourth cause of action, seeking to pierce ZZY's corporate veil against Zale Vishedsky, Zach Vishedsky, Sternberg and Deutsch, the remaining claims are asserted against all defendants, collectively.

Defendants ZZY, Zale Vishedsky, Zach Vishedsky and Sternberg interposed an answer, dated December 27, 2012. Deutsch has not appeared.

Defendants ZZY, Zale Vishedsky, Zach Vishedsky and Sternberg move for summary judgement dismissing the second, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action (mtn seq. no. 003).

ED&F moves for summary judgement on the: (1) first cause of action for breach of contract, to the extent of \$705,190.85, plus interest, costs and attorney's fees, and an order severing the remaining portion of the breach of contract claim; (2) fourth cause of action, to the extent it seeks to pierce the corporate veil with respect to defendants Zale Vishedsky, Zach Vishedsky

and Sternberg; and (3) sixth cause of action for unjust enrichment (mtn seq. no. 004).

Background

ZZY was formed in 2008 to purchase an existing business from Deutsch and her fellow shareholders. ZZY was in the business of selling and distributing sugar. Its board of directors was comprised of Sternberg, Devorah Vishedsky, who is married to Zach Vishedsky, and Chava Brod, who is married to Zale Vishedsky. Zale and Zach Vishedsky are brothers and Sternberg is married to Zach and Zale Vishedsky's sister. Each board member owned one-third of ZZY's shares. Zale Vishedsky, as ZZY's manager, purchased and sold sugar. Sternberg was allegedly involved in the financial side of ZZY's business, procuring financing to keep the business afloat. According to defendants, Zach Vishedsky was not originally involved with ZZY and ED&F does not dispute that he had nothing to do with the buying and selling of sugar.

In January 2011, ZZY obtained a credit line of \$1,500,000 from Herald National Bank to be used as additional operating capital. As part of the loan agreement, ZZY was required to maintain a corporate checking account with the bank. Funds from the credit line were deposited into ZZY's corporate account and ZZY used the account to pay ED&F and other creditors.

ED&F and ZZY entered into a business relationship in January 2011. Elizabeth Alper, one of ED&F's account executives, handled ZZY's business for most of the relationship. Angus Topfer ("Topfer") inherited Elizabeth Alper's responsibilities when she left ED&F in the summer of 2013. According to Topfer, it was "ED&F's standard practice ... to require full payment of invoices prior to delivery. However, ED&F [would] allow for an exception ... whereby customers [could] request an extension of credit, allowing for payment to be made 10 days after the date of invoice" (Topfer Aff., ¶ 4). He states that, "[i]n order to determine [ZZY's] eligibility for [this] Credit Accommodation, ED&F required [ZZY to] produce financial documentation ... demonstrating [ZZY's] ability to satisfy any obligation incurred" (Id., ¶ 6). These financial documents consisted of a Bank Reference Form, an Interim Financial Statement, dated June 30, 2010 ("ZZY's Financial Statement"), and two Dunn and Bradstreet credit reports, dated April 24, 2012 and July 20, 2012 (Id., Ex. A). According to Topfer, based on these financial documents, ED&F agreed to provide ZZY with a credit accommodation.

In June 2012, Herald National Bank eliminated ZZY's credit line and called the loan. By this time, Zale Vishedsky ceased to be involved with ZZY and Zach Vishedsky allegedly stepped in to

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help out during ZZY's financial difficulties. Also around this time, ZZY allegedly failed to pay in full for three shipments of sugar. According to ED&F, pursuant to order confirmation S04303, dated May 1, 2012, ZZY ordered 800 metric tons of sugar at \$.49/lb, all of which was allegedly delivered to ZZY's warehouse. ED&F states that, pursuant to order confirmation S04341, dated June 5, 2012, ZZY ordered an additional 1,200 metric tons of sugar at \$.45/lb, of which ED&F allegedly delivered 495 metric tons. ED&F also states that ZZY ordered 120 metric tons of sugar at \$.45/lb, pursuant to order confirmation S04359, dated June 19, 2012, of which all 120 metric tons were allegedly delivered. According to ED&F, ZZY made partial payments on these orders, such that \$790,792.45 remained outstanding.

According to defendants, unlike in the past, ED&F delivered the three shipments of sugar without first requiring ZZY to execute a purchase order or a contract. Zale Vishedsky states that: "this sugar was unilaterally foisted upon Defendant ZZY. The three shipments in question were not ordered by ZZY through a purchase order. It was known to Plaintiff ED&F that the price of sugar was drastically dropping and so they dumped the sugar on ZZY" (Zale Vishedsky 12/27/12 Aff., ¶ 15). According to ZZY, it sold all of the sugar delivered by ED&F, in an attempt to

minimize its losses. By letter dated July 24, 2012, ED&F demanded full payment, which it never received.

Discussion

I. Breach of Contract (First Cause of Action)

ED&F contends that it is entitled to summary judgement on the first cause of action because ZZY has admitted that it accepted delivery of the sugar and resold it, without ever raising any objections about the quality of the sugar. Based on this, ED&F contends that it has established a prima facie case of goods sold and delivered, and is entitled to summary judgment on its breach of contract claim. Moreover, it argues that, according to ZZY's own records, it owes ED&F \$705,190.85.

ZZY counters that ED&F fails to make a prima facie showing because it fails to proffer written contracts or a statement from anyone with personal knowledge to show that ZZY placed the disputed orders.

"To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (Kowalchuk v Stroup, 61 AD3d 118, 121 [1st Dept 2009] [internal citation omitted]). There must be a "meeting of the minds ... on all essential terms" (Id.).

Here, ED&F fails to make a prima facie showing that it entered into an enforceable contract with ZZY given that none of its evidence establishes a "meeting of the minds ... on all essential terms" (Kowalchuk, 61 AD3d at 121, supra). In that regard, ED&F submits three order confirmations, setting forth the quantity of sugar allegedly delivered and amounts due (ED&F's Rule 19-a Stmt, Exs. J, L, M). None of these order confirmations, however, were executed by ZZY. Moreover, ED&F has not submitted any evidence that ZZY agreed to the essential terms contained in these confirmations. The only testimony concerning the origination of these orders came from Topfer, who had no personal knowledge on the subject (Id., Ex. B at pp. 66-71). In addition, although ED&F provides emails, dated May 1, 2012 and June 6, 2012, that it allegedly sent to ZZY, attaching order confirmations S04303 and S04341 (id., Ex. N), ED&F does not provide any evidence that it attempted to provide ZZY with order confirmation S04359. Moreover, while order confirmation S04341 states that it "confirm[s] having sold to [ZZY]" 1,200 metric tons of sugar on June 5, 2012, ED&F states that it actually delivered 495 metric tons and withheld the rest (ED&F's Rule 19-a Stmt, Ex. L; Topfer Aff., ¶ 17). While Zale Vishedsky testified that it was his standard practice to check ZZY's email (Kormann

Affirm., Ex. C at p. 38), he could not recall ever receiving the order confirmations at issue here (Id., at pp. 19-20). In any event, nothing in the record establishes that he accepted the terms contained in these confirmations.

Nonetheless, ED&F points to ZZY's QuickBooks records which indicate that it received \$18,730,095.33 worth of sugar from ED&F, and paid \$18,024,804.47, leaving a balance of \$705,290.86 (ED&F's Rule 19-a Stmt, Ex. Q at EDF 0094 and EDF 0087; Kormann Affirm., Ex. A at pp. 29-31 [Zach Vishedsky explaining that, as stated in ZZY's records, \$18,730,095.33 represented the amount purchased from ED&F and \$18,024,804.47, the amount paid])). ED&F's reliance on these records is misplaced because they do not make any reference to, or in any way establish on their face, ZZY's liability under the disputed order confirmations.

ED&F contends that it is still entitled to summary judgment on its breach of contract claim because it has established a prima facie case of goods sold and delivered. That contention is unavailing because ED&F does not assert a cause of action for goods sold and delivered. Instead, ED&F's motion seeks summary judgment on its first cause of action for breach of contract, a claim distinct from goods sold and delivered (Cf., Farzan v Cassini, 299 AD2d 239, 240 [1st Dept 2002] [affirming dismissal

of breach of contract and unjust enrichment claims, while noting that "any failure by defendants to satisfy any obligation to pay" for products that plaintiff developed "[could] be pursued under a cause of action for goods sold and delivered").

Accordingly, that branch of ED&F's motion, to the extent it seeks partial summary judgment on the first cause of action, is denied.

II. Fraudulent Inducement and Fraud (Second and Third Causes of Action)

ZZY contends that it is entitled to summary judgement dismissing the second and third causes of action for fraudulent inducement and fraud, respectively, because ED&F has failed to identify any false statements made by ZZY and cannot establish reasonable reliance. ED&F does not offer any opposition to these arguments. In any event, any opposition would be unavailing.

A claim for fraudulent inducement requires "a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (GoSmile, Inc. v Levine, 81 AD3d 77, 81 [1st Dept 2010]). "To make a prima facie claim of fraud, a complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable

reliance and resulting injury" (Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 135 [1st Dept 2014]).

"[T]he circumstances constituting the [fraud] shall be stated in detail" (CPLR 3016(b)). Summary judgment dismissing a fraud-based claim is appropriate where "sufficient factual allegations of even a single element are lacking" (Shea v Hambros PLC, 244 AD2d 39, 46 [1st Dept 1998]); see also Global Mins. & Metals Corp. v Holme, 35 AD3d 93, 98 [1st Dept 2006]).

Here, the fraudulent inducement and fraud claims are based on identical allegations that: "defendants knowingly submitted a false and misleading [Bank] Reference Form and financial documentation ... to ED&F that overstated the value of [ZZY's] assets and net worth, with the purpose of inducing ED&F to extend credit to [ZZY]," and that ED&F justifiably relied on these documents (Complaint, ¶¶ 51, 56). The complained of financial documents consisted of the Bank Reference Form, ZZY's Financial Statement, dated June 30, 2010, and two Dunn and Bradstreet credit reports, dated April 24, 2012 and July 20, 2012 (Id., Ex. C).

Based on these allegations and the undisputed facts with respect to the "financial documentation," ED&F fails to state a fraud-based claim. First, ED&F does not identify what, if any,

information contained in these documents was false or misleading. This lack of specificity, alone, warrants dismissal (see Greschler v Greschler, 51 NY2d 368, 375 [1980] ["[p]laintiff's conclusory allegations as to the defendant's misrepresentations concerning his financial status fail to meet the statutory requirement that a cause of action based upon fraud be pleaded 'in detail'"]).

Second, several of the documents upon which ED&F allegedly relied on were documents that ED&F procured from third parties. The Bank Reference Form was sent by ED&F to Herald National Bank, which provided the requested information (ED&F's response to defendants' Rule 19-a Stmt, ¶¶ 18, 19). ED&F's accounting department made additional, independent inquiries as to ZZY's financial health by conducting the two Dunn and Bradstreet credit investigations (Id., ¶ 21). Therefore, ZZY did not make any misrepresentations with respect to these documents.

Lastly, ZZY's Financial Statement, prepared by ZZY's accountants, was two years old when provided and stated that the accounting firm had not "audited or reviewed the accompanying financial statements and, accordingly, [did] not express an opinion or any other form of assurance on them" (Complaint, Ex. C, ZZY's Financial Statement at 1). Therefore, even assuming,

arguendo, that ZZY's Financial Statement contained false or misleading information, ED&F cannot establish that its reliance on this obviously out-of-date, unaudited document was reasonable. This point is particularly so in light of the Dunn and Bradstreet reports, which stated that ZZY posed a "moderate to high credit risk" (ED&F's response to defendants' Rule 19-a Stmt, ¶ 22; Complaint, Ex. C; 4/24/12 Dunn and Bradstreet credit report at p. 3; see HSH Nordbank AG v UBS AG, 95 AD3d 185, 194-95 [1st Dept 2012] ["[a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it"] [internal quotation marks and citations omitted]).

Accordingly, defendants' motion for summary judgment is granted, and the second and third causes of action are dismissed.

III. Alter Ego (Fourth Cause of Action)

ED&F argues that the court should pierce the corporate veil, because the evidence demonstrates that Zale Vishedsky, Zach Vishedsky and Sternberg failed to observe corporate formalities such as issuing board of directors' resolutions, maintaining corporate minutes, or documenting the loans allegedly used to

sustain ZZY's business. According to ED&F, the individual defendants commingled ZZY's funds with personal funds and funds from other entities and made payments to themselves and their friends and relatives before ZZY became defunct, while avoiding payment to ED&F.

Defendants counter that they are entitled to summary judgment dismissing the alter ego claim because corporate records demonstrate that ZZY maintained corporate formalities and that all funds coming in and out of ZZY were used in connection with its business, largely as part of a lifeline of loans that ZZY relied on to stay alive in the volatile sugar market.

"[V]eil-piercing is a fact-laden claim that is not well suited for summary judgment resolution" (First Capital Asset Mgt. v N.A. Partners, 300 AD2d 112, 117 [1st Dept 2002] [internal quotation marks and citation omitted]). To pierce the corporate veil, a plaintiff must demonstrate that: "(1) the owner[s] exercised complete domination over the corporation with respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury" (Id. at 116, citing Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 [1993]). Domination, standing alone, however, is not enough to

pierce the corporate veil, which requires a showing "that the owners, through their domination, abused the privilege of doing business in the corporate form" (East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc., 66 AD3d 122, 126 [2d Dept 2009] [internal quotation marks and citations omitted], affd 16 NY3d 775 [2011]). When determining whether the owners abused the corporate form, the following factors are considered: "a failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purpose, overlap in ownership and directorship, or common use of office space and equipment" (Forum Ins. Co. v Texarkoma Transp. Co., 229 AD2d 341, 342 [1st Dept 1996] [internal citations omitted]). "The determinative factor is whether the corporation is a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends" (Port Chester Elec. Constr. Corp. v Atlas, 40 NY2d 652, 657 [1976] [internal quotation marks and citation omitted]).

Here, the parties rely on essentially the same documents in order to establish their prima facie cases -- ZZY's QuickBooks reports, bank statements and checks -- and, in large part, the following undisputed facts: Sternberg is the sole member of YS LLC d/b/a Medcare; Greenhill Trading is owned by Sternberg's

brother; CC Development is owned by Sternberg's friends; Sternberg is a principal of NYZ Holdings, of which Devorah Vishedsky is a co-owner; Sternberg's mother runs Lubavitch Women and Congregation Karen Ragat (Defendants' response to ED&F's Rule 19-a Stmt, ¶¶ 32-37).

According to ZZY's records, from October 1, 2008 through November 16, 2012, Sternberg deposited \$2,549,795 into ZZY's account (Id., ¶ 38; ED&F's Rule 19-a Stmt, Ex. T). A report defendants generated using ZZY's QuickBooks records shows that each deposit is labeled as "Josef Loan" (ED&F's Rule 19-a Stmt, Ex. T). The supporting bank statements and checks, while confirming the dates and amounts of these deposits, do not contain any notations to indicate that such deposits were intended as a loan (Id.). Between January 8, 2009 and May 8, 2012, ZZY paid out \$2,169,151.91 on behalf of Sternberg (Id., Ex. S). Once again, the QuickBooks report, prepared by ZZY, labels these payments "Josef Loan" (Id.). The recipients for these payments included: Sternberg, Bank of America, YS, LLC, NYZ Holdings, Congregation Karen Ragat, Lubavitch Women and American Express (Id.).

Between October 3, 2008 and June 13, 2011, YS, LLC deposited \$1,197,924.28 (Id., Ex. U). From October 8, 2008 to June 18,

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2012, ZZY paid \$1,099,159.28 on behalf of YS, LLC (Id., Ex. V). These payments were made to YS, LLC, NYZ Holdings, Congregation Karen Ragat, Chabad Jewish Center, Lubavitch Women and Sternberg (Id.). ZZY's QuickBooks report labels each deposit and payment as "YS Loan" (Id., Exs. U and V). One of the checks for one of these deposits, made by Sternberg on June 13, 2011, contains the notation "Loan" (Id., Ex. V at EDF 0430).

From May 18, 2009 through March 21, 2011, CC Development deposited \$949,985 (Id., Ex. W). From April 27, 2010 to November 18, 2012, ZZY paid \$550,000 to CC Development (Id., Ex. X). ZZY's QuickBooks report labels the deposits "Colel Loan" (Id., Ex. W). No such notation, however, is included on the report documenting the payments (Id., Ex. X).

Between August 9, 2010 and April 30, 2012, ZZY's QuickBooks records indicate that four "Zach Loan[s]" were made to ZZY, totaling \$880,500 (Id., Ex. Z). Between June 15, 2011 and May 2, 2012, ZZY made payments of \$459,391 to, among others, Devorah Vishedsky, NYZ Holdings, YS LLC, Lubavitch Women and Chabad Jewish Center (Id.). ZZY's QuickBooks report labels all of these payment "Zach Loan" (Id.).

Between November 14, 2012 and December 22, 2012, Greenhill Trading deposited \$350,000 (Id., Ex. Y). On November 15, 2012,

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ZZY paid Greenhill Trading \$150,000 (Id.). ZZY's QuickBooks records do not indicate that these transactions were in connection with a loan (Id.).

In addition to these transactions, ZZY made numerous payments to various individuals and entities between June 2012 and January 2013 (Defendants' response to ED&F's Rule 19-a stmt, ¶ 50; see e.g. ED&F's Rule 19-a Stmt, Ex. AA at EDF 0516-0519, 0531-0533 and 0537 [ZZY paid to NYZ Holdings: \$100,500 in September 2012; \$108,000 in November 2012; and \$30,000 in December 2012]). The only payment during this period that appears in ZZY's QuickBooks reports is a \$150,000 payment to Greenhill Trading in November 2012 (ED&F's Rule 19-a Stmt, Ex. AA at EDF 0533 and Ex. Y at EDF 0447). None of the checks produced by ZZY indicate that these payments were in connection with ZZY's loan obligations (Id., Ex. AA). By December 2012, ZZY also fully repaid the credit line from Harold National Bank (Defendants' response to ED&F's Rule 19-a Stmt, ¶ 51).

Although ED&F has failed to make its prima facie showing of entitlement to summary judgment on this cause of action, it nonetheless continues to maintain that the lack of board of directors' resolutions and corporate minutes, combined with the fact that money moved around among corporate insiders or entities

owned by them or their relatives and friends, without any underlying loan documentation, serve as strong indicia that ZZY was merely a shell for the individual defendants' personal or unrelated businesses. Absent from the record is any indication that ED&F ever sought ZZY's board of directors' resolutions and corporate minutes in discovery. Moreover, the only testimony offered on the subject is when Sternberg was asked whether he had "any board of director resolutions," to which he responded, "I don't think so" (Kormann Affirm., Ex. B at pp. 42-43). To the extent that there are no underlying loan documents, with the exception of the Harold National Bank's credit line, Sternberg testified: "most of [the loans are] from my money or my friends that I took for a short time or stuff like that. And these loans I don't think that there are any loan documents" (Id. at p. 20). Although this explanation may implicate credibility issues, ultimately, ED&F had to demonstrate that the individual defendants abused the corporate form and, in doing so, harmed ED&F (Matter of Morris, 82 NY2d at 142, supra). On this record, ED&F has failed to do so. While it claims that the individual defendants commingled assets and siphoned off ZZY's funds, ED&F does not demonstrate "what the transfers were for" (ED&F brief in support of motion of summary judgment at 6), i.e., that the money

was being put to the individual defendants' personal use, rather than to pay ZZY's legitimate, corporate obligations. The only undisputed evidence of ZZY funds being used for personal expenses is Sternberg's admission that the April 6, 2011 payment to American Express, in the amount of \$55,000, was for his personal expenses (ED&F's Rule 19-a Stmt, Ex. S; Sternberg Aff. in support of motion for summary judgment at p. 5 n 2). Sternberg states, however, that this payment was done in error when he mistakenly selected the wrong account in making the payment and that he immediately restored this amount to ZZY's account (Sternberg Aff. in support of motion for summary judgment at p. 5 n 2). ZZY's records support this statement (ED&F's Rule 19-a Stmt, Ex. T).

For the foregoing reasons, ED&F fails to show that it is entitled to summary judgment. At most, its motion raises factual issues, which preclude an award of summary judgment. Accordingly, ED&F's motion for summary judgment, to the extent it seeks to pierce the corporate veil, is denied (Compare Port Chester Elec. Constr. Corp., 40 NY2d at 657, supra [holding that it was inappropriate to pierce the corporate veil, where "each corporation was pursuing its separate corporate business, rather than the purely personal business of [defendant]"] with Webmediabrands, Inc. v Latinvision, Inc., 46 Misc 3d 929, 932-933.

[Sup Ct, NY County 2014] [piercing the corporate veil on summary judgment where the undisputed facts established, among other things, that the individual defendant commingled personal and corporate assets, used corporate assets for personal purposes, terming such payments as "loans" and admitting that such "such 'loans' were 'open ended' and that he, unilaterally, was 'expecting to cancel those loans'"]).

Defendants have likewise failed to establish, prima facie, that they are entitled to dismissal of ED&F's alter ego claim. Defendants submit copies of payroll taxes (Zach Vishedsky Aff. in support of motion for summary judgment, Ex. OO); QuickBooks payroll records (Id., Ex. KK), QuickBooks records of ZZY's transactions with ED&F (Id., Ex. P), as well as the QuickBooks records of the numerous alleged loans, discussed above. Defendants contend that, collectively, these documents establish their compliance with corporate formalities. In particular, defendants contend that "[ZZY's] bank statements on their face refute the claim that the individual Defendants treated Defendant ZZY's assets as their own or 'siphoned funds' from Defendant ZZY for 'their own personal gain'" (Id., ¶ 44).

Defendants' contention is unavailing. On their face, however, the bank statements neither prove nor disprove

commingling and/or siphoning of funds (Id., Ex. O). As discussed, supra, the bank records support the amounts and timing of the alleged loans. They do not establish the purpose of any of the transactions. The only evidence that these deposits and payments were loans, used solely to sustain ZZY's business in the volatile sugar market, is a single check containing the notation "Loan," defendants' testimony, and defendant-created QuickBooks records (ED&F's Rule 19-a Stmt, Ex. V at EDF 0430). Considering these points require a weighing of the evidence and credibility determinations, which are not appropriate on summary judgment (Forrest, 3 NY3d at 315, supra; see also Horizon Inc. v Wolkowicki, 55 AD3d 337, 337-338 [1st Dept 2008] ["the court correctly found that factual issues preclude summary judgment dismissing plaintiffs' claim that NYREG's corporate veil should be pierced and its principal ... held personally liable for the corporation's obligations," where the principal "ignored the corporate form by transferring monies in and out of NYREG without any documentation or formalities" and thereby allegedly harmed plaintiff]).

Accordingly, defendants' motion is denied to the extent it seeks summary judgment dismissing the fourth cause of action.

IV. Injunction (Fifth Cause of Action)

Defendants contend that the fifth cause of action is barred by the law of the case given that this Court has already denied ED&F's motion seeking identical relief. ED&F does not oppose this argument. In any event, this cause of action would still be dismissed.

After commencing this action, ED&F moved, by order to show cause (mtn seq. no. 001) for an order "[a]ttaching any and all assets held by each defendant in New York" and "[r]estraining each defendant, its agents, servants, employees and assigns from taking any distributions, in cash or otherwise, from [ZZY]" and restraining the same "from making any sale, assignment, transfer, or removing from this state or permitting any interference with money, assets, or property in its possession, custody or control" (NYSCEF Doc. No. 153 at pp. 1-2).

By decision and order dated February 5, 2013 ("Decision"), this Court denied the motion. In that regard, this Court found that, with respect to attachment, there was no evidence that defendants were secreting assets or seeking to render any judgment unenforceable. Additionally, to the extent ED&F sought a preliminary injunction, ED&F failed, inter alia, to demonstrate irreparable harm, as "the whole case here is money damages" (2/5/13 Tr. at p. 18).

"A party seeking a preliminary injunction must clearly demonstrate (1) the likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the injunction is not issued; and (3) a balance of the equities in the movant's favor" (U.S. Re Cos., Inc. v Scheerer, 41 AD3d 152, 154 [1st Dept 2007]). Because a preliminary injunction is a drastic remedy, it "will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers" (Koultukis v Phillips, 285 AD2d 433, 435 [1st Dept 2001]). No irreparable harm exists where money damages are computable and sufficient to make the movant whole (U.S. Re Cos., Inc., 41 AD3d at 155, supra (finding that "quantifiable remedy precludes a finding of irreparable harm").

Here, ED&F "demands that pending this action, defendants be enjoined from transferring or withdrawing any funds from [their] accounts, or transferring or disposing of any of [their] property" (Complaint, ¶ 75 [emphasis added]). Although ED&F's fifth cause of action is styled as seeking an "injunction," what ED&F seeks is not a cause of action for a permanent injunction, but rather, the provisional remedy of preliminary injunctive relief.

As defendants correctly point out, this Court has already denied ED&F's application for the same provisional remedy in the Decision, supra. There, this Court concluded that ED&F failed, inter alia, to demonstrate irreparable harm, as "the whole case here is money damages" (2/5/13 Tr. at p. 18). This determination "is the law of the case and may not be relitigated" (Stroock & Stroock & Lavan v Beltramini, 157 AD2d 590, 591 [1st Dept 1990]). As the sole relief sought in ED&F's fifth cause of action is preliminary injunctive relief, which was denied in the Decision, defendants' unopposed motion for summary judgment dismissing the fifth cause of action is granted, and it is dismissed.

V. Unjust Enrichment (Sixth Cause of Action)

Defendants contend that they are entitled to summary judgment dismissing the unjust enrichment claim as against the individual defendants because ED&F cannot demonstrate that any benefit flowed to the individual defendants or that there was a relationship between ED&F and the individual defendants.

Although, pursuant to its notice of motion, ED&F seeks summary judgement on the sixth cause of action, it fails to raise the claim in its moving papers. In its reply, ED&F argues, however, that, having repeatedly claimed that ZZY was a "family affair," run as a closely held corporation, defendants may not

now argue that they did not personally receive any benefits from ZZY's transactions (ED&F's Reply Brief at 9). As such, ED&F argues that it can also reach the individual defendants under its alter ego claim.

"The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in equity and good conscience should be paid to the plaintiff" (Corsello v Verizon N.Y., Inc., 18 NY3d 777, 790 [2012] [internal quotation marks and citations omitted]).

Here, neither party has made a prima facie showing of entitlement to summary judgment. ED&F has failed to raise the argument in its moving papers. Defendants' entire argument hinges on Topfer's lack of personal knowledge, to which defendants highlight the deficiencies in Topfer's statements, namely that he: (1) did not know the individual defendants; (2) could not name the officers and directors of ZZY; (3) knew of no contract with the individual defendants; and (4) did not know of any personal gain on the part of the individual defendants from the alleged sale of the sugar by ZZY (ED&F's Rule 19-a Stmt, Ex. B at pp. 50-51, 66, 72-74). Ultimately, because there is a triable issue of fact as to whether the individual defendants were the alter egos of ZZY, such that if the corporate veil is

pierced, they may be held personally liable for ZZY's obligations, dismissal of the unjust enrichment claim would be premature (Horizon Inc., 55 AD3d at 338, supra [affirming denial of summary judgement dismissing unjust enrichment, among other claims, where there were triable issues of fact as to whether the principal was the alter ego of the defendant corporation and could be held personally liable for its debts]).

Accordingly, ED&F's and defendants' motions are denied to the extent that they each seek summary judgement on the sixth cause of action.

VI. Conversion (Seventh Cause of Action)

Defendants contend that the seventh cause of action must be dismissed because where the gravamen of a claim is nonpayment, conversion will not lie. ED&F counters that under New York law conversion of cash is actionable.

"A cause of action for conversion cannot be predicated on a mere breach of contract" (Fesseha v TD Waterhouse Inv. Servs., 305 AD2d 268, 269 [1st Dept 2003]). A conversion claim is properly dismissed where it "allege[s] no independent facts sufficient to give rise to tort liability and, thus, [is] nothing more than a restatement of [the] breach of contract claim" (Id. [internal quotation marks and citations omitted]).

Here, the complaint alleges that “[d]efendants wrongfully converted \$790,792.45 of ED&F’s product and have permanently deprived ED&F of the use of its lawful property” and that payment demand has been made of “the contract price of \$790,792.45” (Complaint, ¶¶ 84, 85). Given the conversion claim “[is] nothing more than a restatement of [the] breach of contract claim,” it must be dismissed (Fesseha, 305 AD2d at 269, supra).

Accordingly, defendants’ motion for summary judgement dismissing the seventh cause of action is granted, and it is dismissed.

VII. Replevin (Eighth Cause of Action)

Defendants contend that the eighth cause of action must be dismissed because a claim for replevin cannot lie in the absence of wrongful possession, and ED&F concedes that it delivered possession of the sugar to ZZY. ED&F does not offer any argument in opposition. Even if opposition were made, it would be unavailing.

“Replevin is strictly a possessory action and plaintiff, to recover, must show a possessory right recognized by law. He must be the owner of the property, or lawfully entitled to its possession. ... The plaintiff, seeking to take property out of the possession of the defendant, [is] bound to show title in

himself, and the defendant could defend itself by showing that [plaintiff] did not have title, and thus did not have the right to take from [defendant] the possession which it had acquired" (Hofferman v Simmons, 290 NY 449, 455-56 [1943] [internal quotation marks and citations omitted]). The Uniform Commercial Code provides that, "[u]nless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods" (UCC § 2-401[2]).

Here, the record does not indicate that the parties explicitly agreed on a time when title would pass. Therefore, according to the terms of the statute, title passed from ED&F to ZZY when the sugar was delivered (Id.). As ED&F does not have a possessory right to the sugar at issue, its replevin claim must be dismissed (Hofferman, 290 NY at 455-556, supra).

Accordingly, defendants' motion for summary judgment dismissing the eighth cause of action is granted, and it is dismissed.

VIII. Indemnification (Ninth Cause of Action)

Defendants contend that they are entitled to summary judgment dismissing the indemnification claim as against the individual defendants because they never had a contractual

relationship with ED&F. ED&F counters that if it prevails on its alter ego claim the individual defendants will be liable for ZZY's obligations. A review of the record indicates that this indemnification claim is essentially one for recovery of attorney's fees.

"The right to indemnification may be created by express contract, or may be implied by law to prevent an unjust enrichment or an unfair result" (Trustees of Columbia Univ. v Mitchell/Giurgola Assoc., 109 AD2d 449, 451-452 [1st Dept 1985]). Each of the order confirmations at issue here stated that "[a]ll orders are subject to [ED&F's] Standard Terms and Conditions" (ED&F's Rule 19-a Stmt, Ex. J, L, M). The instant indemnification claim is based on the "indemnification clause contained in Section 18 of the [T]erms and Conditions" (Complaint, ¶ 93), which provides for "reasonable attorneys' fees, costs and expenses incurred by the prevailing party in connection with [a breach of contract action]" (Complaint, Ex. B). This Court, however, has already determined that "there are no executed contracts with respect to these deliveries" (2/5/13 Tr. at p. 13). In fact, this finding has enabled the parties to maintain this action because it also rendered the arbitration clause unenforceable due to the absence of executed contracts

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(Id.). As such, the indemnification clause is unenforceable on the same grounds. Therefore, defendants' motion for summary judgment dismissing the ninth cause of action is granted, and it is dismissed.

Accordingly, it is hereby


ORDERED that the motion of defendants ZZY Distributors, Inc., Zale Vishedsky, Zach Vishedsky, Yoseph Sternberg a/k/a Joseph Sternburg for summary judgment (motion sequence number 003) is granted to the extent of dismissing the second, third, fifth, seventh, eighth and ninth causes of action, and is denied as to fourth and sixth causes of action; and it is further

ORDERED that the motion of plaintiff E.D. & F. Man Sugar Inc. for summary judgment (motion sequence number 004) is denied in its entirety; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 48, Room 242, 60 Centre Street on April 21, 2016, at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/11/16



HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.