SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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WEBMD, LLC,

Plaintiff,

Index No.
651925/2014

DECISION and ORDER

- against -

Mot. Seq. #003

MEDIA BANNER AD SALES INC., STEVEN OLSCHWANGER a/k/a STEVEN SANGER and RENE HERSKOWITZ,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract and account stated arising out of written agreements as between defendant Media Banner Ad Sales, Inc. ("Media Banner" or "MB") and plaintiff WebMD ("Plaintiff" or "WebMD"). Plaintiff alleges that defendants Steven Olshwanger a/k/a Steven Sanger ("Olschwanger") and Rene Herskowitz ("Herskowitz") are partners and operate the business of Media Banner in their individual capacities.

It is alleged that "WebMD operates popular websites that provide health information, which are financed, in part, by online advertising. Defendants prepared and placed ads for clients on WebMD sites, and entered into placement contracts with WebMD for each such placement. . . The terms and conditions for each Placement were memorialized by a Client Advertising Agreement between defendants and WebMD, and MB was thereafter billed by monthly account statement, the terms of which required payment within thirty (30) days. . . .MB breached its obligations under the various Client Advertising Agreements entered into with WebMD for each Placement by failing and refusing to pay the amounts due therefor. . . Defendants accepted and agreed to the amounts reflected on the billing statement."

On July 14, 2015, this Court granted Plaintiff's motion for default judgment against Media Banner and entered judgment in favor of WebMD and against Media Banner in the amount of $235,805.41 ("the Judgment"). Following entry of the Judgment in New York, WebMD domesticated the Judgment in the State of Florida on December 7, 2015 (the "Florida Judgment") (collectively, the Judgment and the Florida Judgment are referred to as the "Judgments"). WebMD thereafter attempted to locate and restrain assets of Media Banner, but was unable to successfully do so. Records maintained by the Florida Department of State, Division of Corporations show that Media Banner was administratively dissolved on September 27, 2013.

Presently before the Court is Plaintiff's motion for an Order, pursuant to CPLR section 3212, directing the entry of judgment in favor of WebMD and against defendant Olschwanger a/k/a Steven Sanger in the amount of $235,805.41, or at a minimum in the amount of $87,124—the amount due under fourteen contracts Olschwanger signed after Media Banner had been administratively dissolved as a corporation by the Florida Department of State, Division of Corporations on September 27, 2013.[1] Defendants do not oppose.

In support, Plaintiff submits the affidavit of Scott Wahlers, Vice President of Finance for WebMD, annexing the post-dissolution contracts between Media Banner and WebMD, emails between clients of Media Banner and Olschwanger regarding WebMD ads, and a WebMD account statement issued to "Steven Sanger, 1440 Coral Ridge Drive #115, Coral Springs, FL 33071", dated April 11, 2014. Plaintiff also submits the attorney affirmation of Jeffrey A. Mitchell, Esq., annexing *inter alia* (i) the Florida judgment against Media Banner; (ii) the Florida Division of Corporations' Detail by Entity Name for Media Banner; (iii) the Articles of Incorporation for Media Banner; (iv) Herskowitz's resignation from Media Banner, dated July 18, 2012; (v) Media Banner's web pages; and (vi) additional Florida Division of Corporations' filings for "Steve Olschwanger, 1440 Coral Ridge Dr. #155, Coral Springs, FL, 33071".

Plaintiff seeks to hold Olschwanger a/k/a Steven Sanger personally liable for the balance of the $235,805.41 Judgment under the theory of piercing the corporate

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[1] On February 28, 2012, defendants Olschwanger and Herskowitz incorporated Media Banner in the State of Florida. Herskowitz was listed as President of Media Banner, and Olschwanger was listed as Vice President of Media Banner in the company's Articles of Incorporation. Less than six months later, Herskowitz resigned as Vice President of Media Banner, leaving Olschwanger as the sole officer.

veil. Alternatively, Plaintiff seeks to hold Olschwanger personally liable for $87,124.00, the total amount due to WebMD under the post-dissolution contracts.

It is alleged in the complaint that "Olschwanger and Herskowitz are partners, and operate the business of MB in their individual capacities. Even though MB was dissolved as a corporation in September 2013, as of the date of this pleading [June 24, 2014], Olschwanger and Herskowitz continue to operate under the name 'Media Banner Ad Sales Inc.' as a fictitious name, including, but not limited to, on the website located at http://www.mediabanneradsales.com."

Plaintiff, through the affidavit of Scott Wahlers, contends that Olschwanger, under the pseudonym of Steven Sanger, used Media Banner to engage in acts of fraud and deception. Plaintiff claims that Olschwanger, hiding behind a corporate front, induced advertisers to pay him for advertising on WebMD sites through Media Banner. Olschwanger then allegedly kept all or a portion of what he collected from Media Banner.

Wahlers states, "As the Media Banner account became past due, WebMD learned that advertisers had paid Olschwanger for the advertising on WebMD sites represented by their respective Placement Agreements, but Olschwanger, in turn, never remitted all or a portion of those funds to WebMD. Some of those advertisers contacted WebMD to complain." Wahlers further states, "These communications not only show Olschwanger was using Media Banner to defraud WebMD and others, but also that he continued to do business in the name of Media Banner well after it had been dissolved." In Exhibits 2 – 5 of his Wahlers' affidavit are copies of the e-mail communications between these advertisers and Olschwanger. Wahlers states that these emails were forwarded to him.

For example, a "Steve Sanger", in the name of Media Banner, solicited business from Dr. Dirk Kancilla, beginning February 20, 2014 (after Media Banner had already been dissolved). In an email attached as Exhibit 2 to Wahler's affidavit, Dr. Kancilla advised Julia Baird, a WebMD employee, that a Steve Sanger approached his office on behalf of WebMD to solicit advertising. Dr. Kancilla wrote that he had paid for advertising services to be run, "never received any confirmation this [advertisement] ran … [but was] sure it never ran," and was "in the process of filing a fraud complaint and action."

On March 27, 2014, Dr. Lawrence Broder emailed Baird, "Are you aware that Steven Sanger (Olshwanger) was selling webmd banner ads that he had no access too? He has taken my money and refused to refund it and you vouched for him? This places you and Webmd in jeopardy for his actions." (Ex. 3 to Wahler's affidavit).

Wahlers states that Dr. David M. Verbelyi reached out to WebMD in April 2014 regarding a similar issue to the one experienced by Dr. Broder. A copy of the email string was submitted by Wahlers as Exhibit 4 to his affidavit. Dr. Verbelyi wrote:

> I have a contract with an outside vendor (Media Banner Sales). Steve Sanger is my representative. The experience has been absolutely frustrating. A year of ads was prepaid but stopped after 30 days and was only picked up by me after contracting Google to double check the problem. I have been in touch with Steve for over two months. He acknowledges the issue but has had a host of personal issues and has resolved absolutely nothing at this time. I have repeated asked for another representative or a contact at WebMD but he has not returned that information.

In a May 1, 2014 email, Dr. Verbelyi further explained:

> I spent over $6000 on a year contract back in October. I have only received one month of service so far. I am looking to get the campaign I paid for fixed and am tired of trying to get Sanger's group to get it done. I have been asking him to fix it for 3 months and all I keep hearing about are medical problems and family issues. He did not even recognized [sic] the issue until after I pointed it out in January.

Wahlers states that on June 16, 2014, he was made aware of another medical provider, Hearing Aid Express, that was having issues with Olschwanger. A copy of the email from Brad Brumback, a representative for Hearing Aid Express, was attached to Wahlers' affidavit as Exhibit 5. Regarding Media Banner, Brumback wrote:

> I want to report a theft by this company. We wrote them a check for $1,200 on 2/10/2014 for WebMD banner ads. They did not run the ads and have still not refunded our money after repeated requests. I want to alert you so this company does not misrepresent themselves to other accounts using the WebMD name.

Wahlers states that WebMD received similar treatment in its dealings with Olschwanger. Exhibit 6 to Olschwanger's affidavit are emails exchanged between MD and Olschwanger in which Steven Sanger blamed lost invoices, medical issues, and other excuses for the lack of payment.

Wahlers states that Olschwanger used an alias when he did business through and as Media Banner – Steven Sanger. Steven Sanger is the name that appeared on

the Media Banner website, the name used by Olschwanger on the advertising contracts he signed with WebMD, and the name to which the WebMD invoices were addressed. Plaintiff states that, throughout the course of their business relationship, WebMD had no reason to believe that Sanger was an alias used by Olschwanger.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986). The moving party must produce sufficient evidentiary proof in admissible form to warrant the direction of summary judgment in their favor. *Kershaw v. Hosp. for Special Surgery*, 114 A.D.3d 75, 81–82 (1st Dep't 2013).

While "[t]he law permits the incorporation of a business for the very purpose of" enabling its proprietors to "escap[e] personal liability," that privilege does have its limits. *Bartle v. Home Owners Co-op.*, 309 N.Y. 103, 106 (1955). Generally speaking, courts will "pierce the corporate veil" when doing so is necessary "to prevent fraud or to achieve equity." *Bartle*, 309 N.Y. at 106, *citing Int'l Aircraft Trading Co. v. Manufacturers Trust Co.*, 297 N.Y. 285, 292 (1948); *see also Morris v. N.Y. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140 (1993) (stating that the general rule is to disregard the corporate form, or in other words, "pierce the corporate veil" whenever necessary to prevent fraud or to achieve equity). Piercing the corporate veil requires a showing that: (1) the owner of the corporation exercised complete domination of the corporation with respect to the disputed transaction; and (2) that said domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury. *Ciavarella v. Zagaglia*, 132 A.D.3d 608, 608–09 (1st Dep't 2015), *citing Morris*, 82 N.Y.2d at 141.

In determining whether liability should be extended to reach assets beyond those belonging to the corporation, an individual should be held personally liable when he uses control of the corporation to further his own, rather than the corporation's, business. *Rapid Tr. Subway Constr. Co. v. New York*, 259 N.Y. 472, 488 (1932); *Ventresca Realty Corp. v. Houlihan*, 41 A.D.3d 707, 709 (2d Dep't 2007). In such cases, an individual will be liable for the corporation's acts "upon the principle of *respondeat superior* applicable even where the agent is a natural person." *Rapid Tr. Subway Constr. Co.*, 259 N.Y. at 488; *Port Chester Electrical Constr. Corp. v. Atlas*, 40 N.Y.2d 652, 656–57 (1976) (stating that an individual using a corporation for his own personal business, separate from the corporate business, shall be held personally liable for acts of the corporation in accordance with the general principles of agency).

Here, Wahler's affidavit and the exhibits thereto, show that Olschwanger exercised domination and control over Media Banner, both in its dealings with WebMD and Media Banner customers. Olschwanger was the only officer of Media Banner, the only signatory for the corporation on the Pre-Dissolution Contracts *and* the Post-Dissolution Contracts, and he received all account statements from WebMD. Furthermore, Wahler's affidavit and the email communications attached show that Olschwanger used his control of the corporation to commit a fraud or wrong that caused WebMD (and others) to sustain damages. In violation of the Client Advertising Agreements signed by both parties, Olschwanger failed to pay unpaid invoices for advertisements that Plaintiff placed on its website.

Plaintiff has shown that Olschwanger used Media Banner to defraud Plaintiff and breached the Client Advertising Agreements for his own personal gain. He received payment from clients for proposed advertising, but failed to remit the portion of those funds that were due to WebMD pursuant to the Client Advertising Agreements. As a result, Olschwanger should be held liable for the full amount of money owed as per the Judgment entered against Media Banner. *Ventresca Realty Corp.*, 41 A.D.3d at 709 (awarding summary judgment and holding corporation's principals personally liable on the ground, among others, that the corporation followed no corporate formalities); *Webmediabrands, Inc. v. Latinvision, Inc.*, 46 Misc. 3d 929, 934 (N.Y. Sup. Ct. 2014) (piercing the corporate veil and holding individual who was the principal shareholder, officer, and director personally liable for judgment against corporate entity where he used corporate funds for personal purposes and ignored several corporate formalities); *Austin Powder Co. v. McCullough*, 216 A.D.2d 825, 826 – 27 (3d Dep't 1995) (awarding summary judgment against corporation's principal where principal was the corporation's sole officer, director, and shareholder; corporation held no corporate meetings and kept no corporate records, and principal used the corporation's bank account for his own personal expenses).

Plaintiff has therefore satisfied the burden of establishing that Olschwanger has, through his domination of the corporation as its sole officer, "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice." *Morris*, 82 N.Y.2d at 141-42 (explaining that the burden of proving domination of the corporation and the use of that domination to perform a wrongful or unjust act against the plaintiff falls on the party seeking to pierce the corporate veil); *Cobalt Partners, L.P. v. GSC Capital Corp.*, 97 A.D.3d 35, 41 (1st Dep't 2012) (explaining that the use of domination and control to breach a contractual obligation for personal gain is a misuse of the corporate form to commit a wrong and grounds for piercing the corporate veil). Olschwanger does not oppose, and as such, fail to raise a triable

issue of fact. Where the movant has established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. (*See generally Access Capital v. DeCicco*, 302 A.D. 2d 48, 53-54 [1st Dept. 2002]).

Wherefore, it is hereby

ORDERED that Plaintiff's motion for summary judgment against defendant, Steven Olschwanger a/k/a Steven Sanger, is granted without opposition; it is further

ORDERED that the clerk enter judgment in favor of Plaintiff, and against defendant, Steven Olschwanger, in the amount of $235,805.41 (at the rate of 9% per annum from April 22, 2016) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: AUGUST 11, 2016

Eileen A. Rakower, J.S.C.