

Pampalone v Matthew C. Bernsohn & Matt Bernson Design, LLC
2016 NY Slip Op 31553(U)
August 8, 2016
Supreme Court, New York County
Docket Number: 156414/15
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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MICHAEL PAMPALONE III d/b/a
PAMPALONE LAW,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 156414/15
Seq. Nos.: 001, 002

MATTHEW C. BERNSOHN &
MATT BERNSON DESIGN, LLC,

Defendants.

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HON. KATHRYN E. FREED:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motions:

PAPERS	NUMBERED
MOT. SEQ. 001	
NOTICE OF MOTION AND MEMO. OF LAW IN SUPPORT	1,2
AFFIRMATION IN OPPOSITION	3
MEMORANDUM OF LAW IN OPPOSITION	4
MOT. SEQ. 002	
NOTICE OF MOTION AND MEMO. OF LAW IN SUPPORT	1,2
MEMORANDUM OF LAW IN OPPOSITION	3
MEMORANDUM OF LAW IN REPLY	

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

This decision and order resolves motion sequences 001 and 002.

In this action by plaintiff Michael Pampalone III d/b/a Pampalone Law to recover allegedly unpaid legal fees from defendants Matthew C. Bernsohn (“Bernsohn”) and Matt Bernson Design, LLC (“MBD”), defendants move (motion sequence 001), pursuant to CPLR 3211(a)(7): 1) to dismiss the complaint in its entirety against Bernsohn; 2) to dismiss the second and third causes of action

against MBD; and 3) for such other and further relief as this Court deems just and proper. Defendants also move, pursuant to CPLR 3211(a)(7) (motion sequence 002), to dismiss the amended complaint against Bernsohn and to dismiss the second cause of action in the amended complaint as against MBD. After a review of the parties' papers, and after a review of the relevant statutes and case law, the motion to dismiss the complaint is **granted in part** and the motion to dismiss the amended complaint is **denied as academic**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was an associate attorney at the firm of Colucci & Umans from 2004 until 2014. Compl., at par. 5. In 2006, defendants hired Colucci & Umans and Pampalone to perform legal services on their behalf in exchange for monetary compensation. Id., at par. 6. Such services were performed for defendants until May 31, 2014, at which time Colucci & Umans assigned to plaintiff all right title and interest in receivables owed to Colucci & Umans by defendants. Id., at pars. 6-7. In June of 2014, defendants hired plaintiff to perform legal services for them in exchange for monetary compensation. Id., at pars. 8-9.

Plaintiff claimed that, although defendants were obligated to pay him \$43,707.47 as a result of the 2014 assignment from Colucci & Umans, and were obligated to pay him \$14,914.04 as a result of the work he performed as a result of his 2014 agreement with defendants, defendants had not paid any of these monies and owed him a total of \$58,621.51. Id., at pars. 13, 14, 18, 22.

On or about June 25, 2015, plaintiff commenced this action against defendants seeking to recover the \$58,621.51 in unpaid legal fees. Summons; Compl., at pars. 22, 28. In the complaint, plaintiff alleged that Bernsohn was "the alter ego of [MBD] and exercise[d] complete dominion and control over [MBD] and such dominion and control was used to commit a fraud/wrong against

[plaintiff], which ha[d] resulted in [plaintiff's] injury." Complt., at par. 4.

The complaint alleged three causes of action. As a first cause of action, plaintiff alleged that defendants breached their contracts to pay him. Id., at pars. 12-18. As a second cause of action, plaintiff alleged a claim for quantum meruit. Id., at pars. 19-23. As a third and final cause of action, plaintiff claimed an account stated. Id., at pars. 24-29.

Defendant now moves (motion sequence 001), pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action. Plaintiff opposes the motion submitting, inter alia, an amended complaint.

Defendant also moves (motion sequence 002), pursuant to CPLR 3211(a)(7), to dismiss the amended complaint for failure to state a cause of action.

THE PARTIES' CONTENTIONS:

Motion Sequence 001

Defendants assert that the complaint must be dismissed against Bernsohn since he cannot be held liable in his individual capacity. They maintain that plaintiff's conclusory allegation that Bernsohn dominated and controlled MBD is insufficient to impose alter ego liability upon him. Defendants further assert that the quantum meruit claim must be dismissed as against MBD since it is duplicative of the breach of contract claim and because such a claim cannot exist where there is a written contract which covers the claim at issue. Last, defendants allege that the account stated claim must be dismissed as against MBD since plaintiff failed to assert all of the elements of the said cause of action or specify the specific invoices for which he seeks payment.

In opposition, plaintiff argues that "the Amended Complaint has pleaded sufficient facts to render dismissal inappropriate at this stage." Plaintiff's Memo. Of Law in Opp., at p. 8. Such facts,

urges plaintiff, provide “a substantial basis to pierce the corporate veil.” *Id.*, at p. 9. Plaintiff further asserts that he has set forth a claim for an account stated since defendants accepted his bills, as well as those sent by Colucci & Umans, and did not object to the same.

Motion Sequence 002

Defendants argue that the amended complaint must be dismissed as against Bernsohn and that the second cause of action in the amended complaint must be dismissed as against MBD and plaintiff opposes the motion.

CONCLUSIONS OF LAW:

Motion Sequence 001

On a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211, the complaint is afforded a liberal construction, the facts as alleged are accepted as true, the plaintiff is accorded “the benefit of every possible favorable inference,” and the court’s role is to determine only “whether the facts as alleged fit within any cognizable legal theory.” *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Viewing the complaint in such a manner, this Court finds that only plaintiff’s claim for an account stated, as set forth in the initial complaint, withstands dismissal.

All Claims Against Bernsohn Must Be Dismissed

A member of a limited liability company may not be held liable for the company’s obligations solely by virtue of his or her status as a member thereof. Rather, in order to pierce the corporate veil, the moving party bears the heavy burden of showing that the company was dominated by the owners or members as to the transaction at issue and that such domination resulted in a wrong. (*Matias ex rel. Palma v Mondo Props. LLC*, 43 AD3d 367 [1st Dept 2007]). A plaintiff must plead detailed allegations of fraud or corporate misconduct. (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331

[1st Dept 2005).

* * *

Conclusory allegations that the individual defendant intermingled his or her assets with those of the corporation or dominated the corporation for his or her own personal benefit, without additional facts or detailed allegations of fraud or corporate misconduct, are insufficient to pierce the corporate veil (*Andejo Corp. v S. St. Seaport Ltd. Partnership*, 40 AD3d 407 [1st Dept 2007]), as is the bare allegation that the corporation acted as the individual's alter ego (*Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344 [2d Dept 2006]).

Board of Managers of the A Building Condominium v 13th & 14th St. Realty, LLC, 2014 NY Slip Op 32509(U) (Sup Ct New York County 2014).

As defendants assert, the claims against Bernsohn individually must be dismissed. In his complaint, as noted above, plaintiff alleges that Bernsohn “is the alter ego of [MBD] and exercises complete dominion and control over [MBD] and such dominion and control was used to commit a fraud/wrong against [plaintiff], which has resulted in [plaintiff's] injury.” Complt., at par. 4. However, the complaint must be dismissed based on the authorities cited above since plaintiff sets forth nothing more than conclusory allegations of wrongdoing by Bernsohn acting on behalf of MBD. Further, to the extent that any acts of fraud are alleged against Bernsohn, such cursory allegations are not alleged with sufficient particularity to withstand dismissal. *See* CPLR 3016(b); *Burry v Madison Park Owner LLC*, 84 AD36 699 (1st Dept 2011).

Although plaintiff's counsel seeks to pierce the corporate veil with the allegations set forth in the “amended complaint” submitted in opposition to defendants' motion, such an attempt is highly improper, as that proffered pleading is clearly a nullity. This is an elementary principle of civil practice about which plaintiff's counsel should be well aware. A party may amend its pleading “once without court leave within twenty days after its service, or at any time before the period for

responding to it expires, or within twenty days after service of a pleading responding to it.” CPLR 3025(a). Here, plaintiff commenced his action on June 25, 2015. NYSCEF Doc. No. 1. Service of process was made upon Bernsohn by substitute service and upon MBD via the Secretary of State on July 27 and August 10, 2015, respectively. NYSCEF Doc. Nos. 2 and 3, respectively. Plaintiff did not serve its amended complaint within any of the time frames set forth in CPLR 3025(a). Rather, on February 5, 2016, months after the expiration of defendants’ period for responding to the complaint, plaintiff simply uploaded an amended complaint as document number 9 to NYSCEF without court leave. Since plaintiff failed to seek leave for this amendment in accordance with CPLR 3025(b), the amended complaint is a nullity and this Court may not consider it. *See Khedouri v Equinox*, 73 AD3d 532 (1st Dept 2010).

The Claims Against MBD

MBD does not move to dismiss the breach of contract claim against it.

MDB correctly asserts that the quantum meruit claim against it must be dismissed. “It is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties (citations omitted).” *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389 (1987). Indeed, plaintiff’s opposition papers do not challenge that branch of defendants’ motion seeking dismissal of this claim.

Finally, although the complaint is cursory, it sufficiently states a cause of action for an account stated against MBD so as to survive a motion to dismiss on this claim. Plaintiff alleges that he and Colucci & Umans and their associates issued bills to defendants for legal services rendered in the total amount of \$58,621.51. Complt., at pars. 25-26. He further asserts that defendants

accepted, retained and never objected to the bills, thereby assenting to the amounts owed. Id., at pars. 27-28. Although defendants assert that plaintiff fails to identify the invoices in question, they cite no authority supporting their contention that the said claim must be granted on this ground.¹

Motion Sequence 002

In motion sequence 002, defendants seek to dismiss the amended complaint. As discussed above, the amended complaint is a nullity. Therefore, the motion to dismiss the amended complaint is denied as academic.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants' motion to dismiss (motion sequence number 001) is granted to the extent of dismissing all claims against defendant Matthew C. Bernsohn; and it is further,

ORDERED that defendants' motion to dismiss (motion sequence number 001) is granted to the extent of dismissing plaintiff's second cause of action sounding in quantum meruit as against defendant Matt Bernson Design, LLC; and it is further,

ORDERED that the branch of defendants' motion to dismiss (motion sequence number 001) seeking to dismiss plaintiff's third cause of action, for an account stated against defendant Matt Bernson Design, LLC, is denied; and it is further,

¹The complaint also sets forth the services rendered by plaintiff to defendants, including trademark protection strategy, litigation, patent applications, and contract drafting and negotiation. Complaint, at par. 15.

ORDERED that defendants' motion to dismiss plaintiff's amended complaint (motion sequence 002) is denied as academic; and it is further,

ORDERED that the caption be amended to reflect the dismissal of defendant Matthew C. Bernsohn from the action and that all future papers filed with the court bear the following caption:

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MICHAEL PAMPALONE III d/b/a
PAMPALONE LAW,

Plaintiff,

-against-

Index No.: 156414/15

MATT BERNSON DESIGN, LLC,

Defendants.

----- X

and it is further,

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further,

ORDERED that plaintiff's claims for breach of contract and an account stated against defendant Matt Bernson Design, LLC will continue; and it is further,

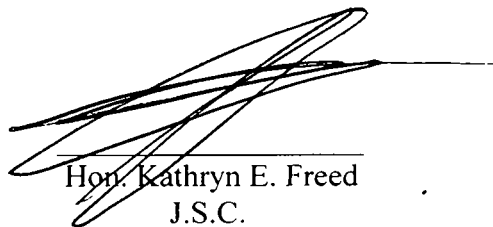
ORDERED that defendant Matt Bernson Design, LLC is directed to serve its answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further,

ORDERED that, within 20 days after issue has been joined, plaintiff is to contact the court to schedule a preliminary conference; and it is hereby,

ORDERED that this constitutes the decision and order of the court.

DATED: August 8, 2016

ENTER:



Hon. Kathryn E. Freed
J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**