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

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AGA AD MEDIA, LLP,

Plaintiff,

- v -

ANDREW MOSKOWITZ, BLUEMEDIA PPC, LLC and 2BLUE MEDIA GROUP, LLC,

Defendants.

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Index No. 160886/2015

DECISION and ORDER

Mot. Seq. 003

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

Plaintiff AGA Ad Media, LLP ("AGA") commenced this action against entity defendants BlueMedia PPC, LLC ("BlueMedia"), 2Blue Media Group, LLC ("2Blue Media") (collectively, the "BlueMedia Defendants"), and individual defendant Andrew Moskowitz ("Moskowitz") (together with the BlueMedia Defendants, the "Defendants") to collect on alleged unpaid invoices totaling $68,292.00 for "services related to tracking and reporting for advertisers and pay-per-click payment models for publishers." In the complaint filed on October 23, 2015, Plaintiff asserts claims for breach of contract, account stated, and piercing the corporate veil.

Plaintiff served BlueMedia and 2Blue Media with the summons and complaint on October 28, 2015. Moskowitz was served on November 4, 2015, and proof of service was filed on November 10, 2015. On January 29, 2016, Moskowitz filed a motion to dismiss the complaint and defendants BlueMedia and 2Blue Media filed a joint answer. On March 4, 2016, Plaintiff attempted to file an amended complaint and supplemental summons, which was subsequently rejected by the Court Clerk on March 7, 2016.

On March 11, 2016, Plaintiff and defendants entered a stipulation withdrawing defendant Moskowitz's motion to dismiss, and setting the deadline for Moskowitz to answer or otherwise respond to any pleading for either (a) 20 days after the filing of an amended complaint following the resolution of plaintiff's motion to amend and add TwistFire Media, LLC; or (b) 20 days after the denial of such motion.

On March 31, 2017, Plaintiff moved for an order, pursuant to CPLR 1001(a), 1002(b), 1003, and 3025(a), to amend the complaint and to add Twistfire Media, LLC ("Twistfire") as a defendant. By Decision and Order dated August 31, 2016, the Court granted Plaintiff's motion to amend the complaint to add Twistfire as a defendant.

Presently before the Court is Moskowitz's motion pursuant to CPLR 3211(a)(7) dismissing the Amended Complaint as against him individually. Defendants oppose.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't 2003] [internal citations omitted]; CPLR § 3211[a][7]). The court must "accept the facts as alleged in the Complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory." (*Leon v. Martinez,* 84 NY2d 83[1994]).

The doctrine of piercing the corporate veil is typically employed to "circumvent" the corporate form in order to hold an individual owner liable for a corporate obligation. (*Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140-41 [1993]). "The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed. . . . Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners." (*Id.*).

Piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and

(2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 A.D.3d 35, 40 [1st Dep't 2012] *quoting Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 [1993]). In order to prevail on a veil-piercing theory, "the party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 140, 142 [1993]). In determining the question of control, courts have considered various factors, including: the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity. (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 A.D.3d 167, 174 [1st Dep't 2013]). No one factor is dispositive. (*Id.*).

Evidence of domination alone is insufficient, without more, to warrant piercing the corporate veil. (*TNS Holdings v MKI Sec. Corp.*, 92 N.Y.2d 335, 339 [1998] [finding that, "additional showing that [domination] led to inequity, fraud, or malfeasance" required to meet "heavy burden" for piercing corporate veil]). For this reason, allegations of control, "unaccompanied by allegations of consequent wrongs", are insufficient to plead a cause of action as against the individual owners. (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 A.D.3d 35, 40 [1st Dep't 2012]).

In the Amended Complaint, Plaintiff alleges, "This action arises from Andrew Moskowitz's fraudulent use of three different companies – BlueMedia PPC, LLC, 2Blue Media Group, LLC, and TwistFire – to obtain valuable services from AGA without paying for them in full."

Plaintiff alleges AGA "is in the business of helping online publishers and advertisers measure performance and increase revenue." Defendants "BlueMedia, 2Blue Media and TwistFire are media companies that provide services to online publishers and advertisers, including services related to tracking and reporting for advertisers and pay-per-click payment models for publishers." The Amended Complaint alleges that "AGA entered into two agreements (the 'Agreements') - the O&O Publisher Agreement (the 'Publisher Agreement') and the Late Payment Agreement (the 'Late Payment Agreement') - to provide these services to Defendants in return for certain fees."

Plaintiff alleges that despite its performance of these services, Defendants have failed to pay for the services rendered. Count One of the Amended Complaint entitled "Breach of the Publisher Agreement" alleges breach by Defendants of an undated "Publisher Agreement" entered into between AGA and BlueMedia. Count Two ("Breach of the Late Payment Agreement") alleges breach by Defendants of a "Late Payment Agreement," dated March 25, 2015. Count Three ("Account Stated") alleges that Defendants are liable for the payment of certain invoices sent to 2Blue Media as to which no objection was allegedly made. Count Four ("Unjust Enrichment") alleges that Defendants were unjustly enriched as a result of the provision of services to Blue Media by Plaintiff.

Plaintiff alleges that "[a]lthough the Agreements were signed by BlueMedia only, Moskowitz used the Agreements to gain access to AGA's centralized data-management platform for all three of Moskowitz's Companies." Count Five of the Complaint ("Piercing the Corporate Veil") is asserted against Moskowitz only and alleges that, based on his alleged "domination and control" of the corporate Defendants, Moskowitz should be found personally liable to AGA for the entire alleged indebtedness of BlueMedia.

In the Amended Complaint, Plaintiff alleges, "[u]pon information and belief," Moskowitz, a member and manager of BlueMedia, 2Blue Media, and Twistfire (referred by Plaintiff collectively as "Moskowitz's Companies"), "dominates and controls all of Moskowitz's Companies and makes all decisions, including decisions related to Moskowitz's Companies' finances" and "with respect to ongoing discussions between Defendants and AGA, Moskowitz alone has made all decisions with respect to when or whether to pay AGA." Plaintiff further alleges, "Upon information and belief, Moskowitz was responsible for the initial investment of capital into BlueMedia and for its continued undercapitalization." Plaintiff further alleges, "Moskowitz used all three of Moskowitz's Companies interchangeably while intentionally undercapitalizing BlueMedia – the signatory of the Agreements – in order to avoid paying Defendants' debts, including the fees they acknowledge are owed to AGA under the Agreements."

Plaintiff further alleges, "BlueMedia, 2Blue Media and TwistFire each maintain a "main business address" at 11 Heritage Lane, Mahwah, NJ, "which is also the address of Moskowitz's home," with a "second office" at 23 West 36th Street, 6th Floor, New York, NY." Plaintiff further alleges that "Christopher Cyriax ("Cyriax") has simultaneously served as the General Manager and Chief Operating Office of each of Moskowitz's Companies" and maintained email addresses associated with both 2Blue Media and TwistFire, which he used to communicate

with AGA concerning the Publisher Agreement and Late Payment Agreement (the "Agreements"), and Moskowitz "used his 2Blue Media email address to communicate with AGA concerning the Agreements with BlueMedia."

Count Five alleges:

89. Upon information and belief, Moskowitz is the Founder and CEO of each of Moskowitz's Companies.

90. Upon information and belief, Moskowitz controlled and dominated each of Moskowitz's Companies and determined which invoices were paid.

91. Moskowitz failed to observe corporate formalities and commingled assets and liabilities among Moskowitz's Companies.

92. Moskowitz's Companies all maintain a main business address at Moskowitz's home in New Jersey and share the same office in New York.

93. All confirmations of BlueMedia's wire payments listed Moskowitz's home address as the address for BlueMedia.

94. Moskowitz's Companies share employees, email accounts, computers and other resources and are engaged in the same business.

95. Upon information and belief, Moskowitz transferred assets among Moskowitz's Companies in order to defraud creditors.

96. Upon information and belief, Moskowitz transferred funds from BlueMedia to Moskowitz, 2Blue Media and TwistFire in order to defraud AGA and avoid paying its invoices.

97. Upon information and belief, Moskowitz failed to properly capitalize BlueMedia at any time.

98. Upon information and belief, Moskowitz has directed funds to himself that could have otherwise been used to pay Plaintiff's invoices.

99. Upon information and belief, Moskowitz's Companies' funds and accounts are commingled. For example, during periods when Moskowitz had intentionally undercapitalized BlueMedia, Moskowitz

directed AGA to invoice 2Blue Media for services AGA provided to BlueMedia and caused 2BlueMedia to pay the invoices.

100. As a result of Moskowitz's domination and control of Moskowitz's Companies and his abuse of the corporate form, Plaintiff has been defrauded and harmed in an amount to be determined at trial but in no event less than $68,292.

Accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint adequately plead sufficient facts and circumstances to support imposing the corporate defendants' obligations on Moskowtiz, for purposes of surviving a motion to dismiss at this early stage of litigation. (*First Bank of Ams. V. Motor Car Funding*, 257 AD2d 287, 294 [1st Dep't 1999] [finding that veil piercing is a fact-laden issue that is not well suited for resolution at the pleadings stage]).

Plaintiff's complaint pleads overlap in ownership, that defendant corporations were not treated as independent profit centers by Moskowitz, intentional inadequate capitalization by Moskowitz, and that Defendants paid one another's debts. Accordingly, accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff's complaint is sufficient to state a claim as against individual defendant Moskowitz, for purposes of surviving a motion to dismiss at this early stage of litigation.

Wherefore, it is hereby

ORDERED that Moskowitz's motion to dismiss is denied; and it is further

ORDERED that Moskowitz is directed to answer Plaintiff's complaint within 20 days of service of this order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: FEBRUARY 8, 2017

EILEEN A. RAKOWER, J.S.C.