

<b>Vergara v Bibhu, LLC</b>
2017 NY Slip Op 31692(U)
August 10, 2017
Supreme Court, New York County
Docket Number: 655395/2016
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: JENNIFER G. SCHECTER Justice

PART 57

VERGARA, ALICIA

INDEX NO. 655395/2016

MOTION DATE

- v -

BIBHU, LLC

MOTION SEQ. NO. 001

Table with 2 columns: Description of papers and No(s). Rows include: The following papers, numbered 1 to 5, were read on this motion to/for stay & x-mot to sever; Notice of Motion/Order to Show Cause - Affidavits - Exhibits (1); Answering Affidavits - Exhibits (2 (x-mot)); Replying Affidavits (3, 4, 5); Cross Motion (Yes).

Upon the foregoing papers, it is ordered that this motion is

GRANTED and the cross-motion is denied.

Plaintiff Alicia Vergara loaned money to Bibhu LLC (the Company). The loan was memorialized in a May 2014 promissory note signed by Bibhu Mohapatra as "CEO/Creative director" of the Company (NYSCEF Doc No 1 [Complaint], Ex A). It is undisputed that no one personally guaranteed the loan. The Company defaulted.

In May 2016, plaintiff commenced an action against the Company based on breach of the promissory note and moved for summary judgment pursuant to CPLR 3213 (see Vergara v Bibhu, LLC, 652474/16). In November 2016, the court granted plaintiff's motion on default and directed entry of a judgment against the Company in the amount of \$225,101.68 exclusive of interest (Vergara v Bibhu, LLC, 652474/16, NYSCEF Doc. No. 12). That judgment, however, was not entered.

Meanwhile, in October 2016, plaintiff commenced this action against the Company (despite the pendency of the earlier action) and against Bibhu Mohapatra (Mohapatra) as well as Robert Roane Beard (Beard). She alleges that Mohapatra "exercises complete dominion and control over the finances and business operations" of the Company (Complaint at ¶ 3) and that Beard is "Mohapatra's partner in the business endeavors of [the Company] and is legally married to Mohapatra" (id. at ¶ 4).

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In the Complaint, plaintiff claims that:

- she was induced by the Company, “Mohapatra and Beard, personally, and through a financial employee of [the Company] . . . to lend to Mohapatra and the Company the sum of \$250,000” (*id.* at ¶ 5);
- “Mohapatra agreed in writing to cause [the Company] to repay” the loan along with interest as evidenced by the promissory note (*id.* at ¶ 6);
- “\$250,000 was loaned to Mohapatra and [the Company] by [plaintiff] Vergara” (*id.* at ¶ 7);
- defendants Mohapatra and Beard, and their financial employee . . . wrote numerous emails to plaintiff, and upon information and belief, conspired together in order to induce” plaintiff to make the loan to the Company and “in order to induce plaintiff to believe that she had a senior lien on the accounts receivables and assets of the [the Company] as security” for the loan (*id.* at ¶ 8);
- plaintiff transferred \$250,000 to a bank account “entitled Bibhu Mohapatra/Bibhu LLC” between May and July 2014 (*id.* at ¶ 9)
- defendants misrepresented that the loan “would be used solely for production costs incurred by [the Company] in filling actual Fall Line 2014 orders of \$710,000.00 to be received by [the Company] from existing sales so as to ensure that the principal would be repaid, whereas upon information and belief a substantial portion was used to pay salaries and consulting fees of [Company] employees and members” (*id.* at ¶ 10[a]);
- plaintiff was induced to make the loan based on assurances that she would be repaid from the Company’s accounts receivable though defendants were aware that the loan could not be senior to other company obligations (*id.* at ¶ 13); and
- only \$24,898.32 was repaid leaving a balance of \$225,101.68 exclusive of interest (*id.* at ¶ 17).

Plaintiff’s complaint contains causes of action for fraud, breach of contract and unjust enrichment, which are asserted against all of the defendants, and a cause of action seeking recovery based on conversion as against the Company and Mohapatra.

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In January 2017, counsel for defendants filed a notice of appearance and a “notice of bankruptcy filing and automatic stay” setting forth that the Company had filed for chapter 11 bankruptcy (see NYSCEF Doc No 11).

Defendants now move for a stay of the entire action based on the pendency of the Company’s bankruptcy. In response, plaintiff cross-moves, among other things, to discontinue the action against the Company or sever those claims, to “voluntarily dismiss the breach of contract claims against the two individual defendants” (notice of cross-motion at ¶ [c]) and to direct Mohapatra and Beard to answer within 20 days. Plaintiff acknowledges that she is attempting to pierce the Company’s corporate veil but, at the same time, denies pleading an “alter ego” theory of liability (see Memorandum of Law in Opposition and in Support of Cross Motion [Opp] at 6). She urges that the “abuse of the corporate form to commit or facilitate fraud or certain other wrongdoing, the commingling of funds, the neglect of requisite corporate formalities, violation of certain fiduciary duties and more all provide a basis for holding individuals personally responsible for misconduct in a corporate context” (*id.*).

Plaintiff “further submits that, because her claims implicate the doctrine of piercing the corporate veil, she [should be permitted] to voluntarily dismiss the breach of contract claims against the two individual defendants” (*id.* at 7).

Based on plaintiff’s allegations, this action must be stayed. It is axiomatic that the corporation must be a defendant in an action in which plaintiff is seeking to pierce the corporate veil (see *Mannucci v Missionary Sisters of the Sacred Heart of Jesus*, 2011 NY Slip Op 34250 [Sup Ct New York County 2011], *affd* 94 AD3d 471 [1st Dept 2012]; see also *Matter of Morris v New York State Dept of Taxation & Fin*, 82 NY2d 135, 140-141 [1993] [“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”]). Therefore, plaintiff cannot proceed on a veil-piercing theory without the Company and it would be inefficient to allow plaintiff to proceed on such a theory later in another separate action after going forward with any potentially-viable related individual/personal claims in this one.

Indeed, plaintiff acknowledges the existence of a contract with the Company and that promises were made related to its accounts receivables. There should be one action that resolves all of the factually-related issues between the parties. If plaintiff plans to proceed against the Company on any causes of action in the future, then the case against all of the defendants must be stayed in the interests of efficiency and economy.

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Accordingly, it is ORDERED that defendants' motion for a stay is granted and this action is stayed until further order of this court. If the bankruptcy stay is lifted to allow this litigation to proceed or if there is a change in the scope of this litigation that is consistent with the reasoning underlying this order,\* plaintiff may move to have the action restored or may present a stipulation to have the action restored to be so-ordered if the parties agree that a motion is unnecessary; it is further

ORDERED that the cross-motion is denied.

\* If plaintiff voluntarily discontinues all of her claims in this action against the Company pursuant to CPLR 3217 with prejudice (including, of course, claims based on veil-piercing), represents that she will not proceed against the Company on any claims in the future and proceeds against Mohapatra and Beard solely in their individual, personal capacities based on theories entirely independent of the promissory note and the Company, she may move to have the action restored based on the Company not being a defendant and the Company not being susceptible to further future related litigation. At that point, the parties can potentially litigate the viability of any individual, personal claims against Mohapatra and Beard.

DATED: 8/10/2017



JENNIFER G. SCHECTER, J.S.C.

- 1. CHECK ONE :  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE : MOTION IS :  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE :  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE