

<b>Dedual Enters., Inc. v So Bella Enters., Inc.</b>
2017 NY Slip Op 32547(U)
December 1, 2017
Supreme Court, New York County
Docket Number: 650178/2014
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 63

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DEDUAL ENTERPRISES, INC.,

Plaintiff,

Index No. 650178/2014

- against -

**DECISION & ORDER**  
(Motion Seq. 004)

SO BELLA ENTERPRISES, INC. and  
ADAM SOMER,

Defendants.

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**ELLEN M. COIN, J.:**

Defendant Adam Somer (Somer) moves pursuant to CPLR 3212 for summary judgment dismissing the amended complaint against him personally. Plaintiff Dedual Enterprises, Inc. cross-moves for summary judgment against defendant So Bella Enterprises, Inc. (So Bella) on its breach of contract claim in the amount of \$105,898.32, and asks the court to pierce So Bella’s corporate veil so as to allow personal liability as against Somer.

Plaintiff Dedual Enterprises, Inc. (plaintiff) is a computer consultancy firm owned and operated by Nicholas Dedual (Dedual). Defendant So Bella Enterprises is a subchapter S corporation wholly-owned by Somer and engaged in the jewelry business. On or about July 3, 2013, So Bella and plaintiff signed a one-year consulting agreement entitled “Independent Contractor Agreement” (the

Agreement). The Agreement provides that plaintiff would provide certain “Technological/Digital/Mobile Development skills, and development necessary to build So Bella’s Platforms and Campaigns” (Am. Cmplt., Ex. 1 at 1). The parties agreed that, in return, plaintiff would be paid a monthly retainer of \$13,333.33 and that the cost of any additional subcontractors needed to do the work would be an expense of So Bella. Somer signed the Agreement as President and CEO of So Bella. Either party was able to terminate the Agreement on two months’ notice, and if So Bella fully abided by its payment obligations to plaintiff, the latter was obligated to turn over the source code for any computer codes it developed for So Bella.

The amended complaint alleges that between July and October 2013, plaintiff and his subcontractors performed a variety of technological services for So Bella and Somer, such as developing three fully functioning websites and creating the framework for other websites. Throughout the course of the engagement, plaintiff allegedly provided Somer with detailed estimates for all of the projects, which Somer approved. The amended complaint further alleges that Somer repeatedly praised the quality of the work and repeatedly promised that plaintiff would be paid in full. However, despite these assurances, defendants failed to pay for more than \$100,000 of plaintiff’s services.

On or about August 21, 2013, a check from So Bella to plaintiff in the amount of \$13,333.33 was dishonored due to insufficient funds. After this incident, plaintiff alleges that So Bella and Somer started using PayPal to pay plaintiff to avoid further bounced checks.

On October 14, 2013, plaintiff sent So Bella a detailed invoice and statement of account in the total amount of \$48,921.66 due immediately (the Invoice). The Invoice detailed plaintiff's services for the period from September 9, 2013 to October 14, 2013, in the sum of \$20,166.66, as well as the services provided by plaintiff's subcontractors from August 26, 2013 to October 6, 2013, in the amount of \$28,755. So Bella and Somer allegedly retained the Invoice without objection, but failed to pay any part of the \$48,921.66. In addition, So Bella and Somer obtained "charge-backs" of \$30,310 for amounts previously paid to plaintiff via PayPal. Since defendants never provided the requisite two months' notice of termination, plaintiff claims to be owed the addition<sup>al</sup> sum of \$26,666.66 (\$13,333.33 per month). In sum, plaintiff claims that So Bella and Somer owe no less than \$105,898.32, plus interest, for the work performed pursuant to the Agreement.

The amended complaint asserts three causes of action against both So Bella and Somer for breach of contract, quantum meruit and account stated. In support of plaintiff's request for a judicial declaration that Somer is personally liable for

the debts of So Bella, the amended complaint alleges that “So Bella was merely an alter ego of Somer, who utterly disregarded the appropriate corporate formalities” (Am. Cmplt., ¶ 47). Plaintiff alleges that “Somer totally commingled personal expenses with So Bella’s, and improperly used So Bella’s funds to pay Somer’s personal expenses to the detriment of So Bella’s creditors” (*id.*, ¶ 48). As an example of this, it alleges that “Somer once informed Dedual that he would need an extension of a payment due date because Somer had just used So Bella’s funds to pay his ‘kids [sic] tuition bill for 20 grand” (*id.*, ¶ 48). Somer also allegedly advised that he was attempting to obtain personal loans from family members to finance So Bella’s operations. The amended complaint alleges that So Bella is operated out of Somer’s personal residence, and that a substantial portion of the work pursuant to the Agreement had nothing to do with So Bella, but related to various of Somer’s personal side projects. By way of example, Somer asked Dedual to create email addresses for So Bella’s use, but then instructed him to forward all emails to or from So Bella’s e-mail account to Somer’s personal Yahoo! Account.

Defendants answered the amended complaint, denying most of the pertinent allegations. Specifically, defendants allege that prior to receiving the Invoice, So Bella had complained to plaintiff that the work had not been performed. Defendants admit that \$19,610.00 in charge-backs occurred, because So Bella

contested plaintiff's charges. Defendants further admit that Somer had asked plaintiff for an extension of time to pay the Invoice for the subcontractors and "may have mentioned his payment of a tuition bill" (Am. Answer, ¶ 31).

Defendants also admit that So Bella's emails were forwarded to Somer's personal email account, but contend that this was requested to be done only because So Bella's email account "was repeatedly not working due to the actions of the plaintiff" (*id.*, ¶ 32). Defendants deny that any attempt to obtain loans for So Bella was for Somer's personal use.

So Bella also asserts a counterclaim against plaintiff for breach of the Agreement by failing to perform the services contemplated therein. It alleges that plaintiff billed So Bella monthly without performing services meriting the amounts billed, and that plaintiff has retained \$18,600 that So Bella paid for work which was not performed. Defendants further allege that plaintiff completed only two projects for So Bella, projects which plaintiff represented would take only three to four hours each. So Bella claims that it suffered unspecified damages as a result of plaintiff's failure to perform and delays in performance of the work requested, and that plaintiff refuses to give So Bella the back-end web development code for which it has paid.

"The concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal

entity, [and] that the owners are normally not liable for the debts of the corporation” (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 140 [1993]). Absent such protections, in order to hold the owners personally liable for the debts of the corporation, a plaintiff “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” (*id.* at 142). The party seeking to pierce the corporate veil bears a “heavy burden” (*see ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 235 [2011])[Read, J., dissenting]. Under New York law, factors to be considered in determining whether the corporate veil can be pierced “include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use” (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127 [2d Dept 2009], *affd* 16 NY3d 775 [2011] [internal quotation marks and citations omitted]; *see also D’Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 452 [1<sup>st</sup> Dept 2013]). An additional factor is the “common use of office space and equipment” (*Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1<sup>st</sup> Dept 1996]).

In support of Somer’s motion for summary judgment, he avers that there is no dispute that So Bella was the only contracting party to the Agreement and that it

was signed by him, solely as President and CEO of So Bella. Somer avers that So Bella was incorporated as a New York corporation in September 2010, almost three years prior to meeting Dedual. The certificate of incorporation for So Bella allows for the corporation to engage in many different types of activities, and not just in the jewelry industry. Thus, Somer claims that all parts of the business relationship with the plaintiff were for projects for So Bella and not for him personally. However, he did testify at his deposition that So Bella's business is limited to representing jewelry designers (Affidavit of Adam Somer sworn to October 26, 2016; ex. 3 at 13).

Somer avers that So Bella maintained a corporate office on West 48<sup>th</sup> Street in Manhattan at the time the Agreement was signed. Somer signed the lease for the corporate office space as CEO and President of So Bella. He avers that the corporation maintains its own checking account, solely used to pay corporate obligations, and that there was never any comingling of any personal funds with the corporation's business checking account. Somer and his wife allegedly maintain their own separate personal bank accounts in a different banking institution, and Somer contends that plaintiff's discovery has failed to uncover any instances of his using the corporate business checking account for any personal reasons, including payment of his children's tuition bills. Somer further avers that

the PayPal account plaintiff refers to is solely a corporate account belonging to So Bella, and that this is the method by which Dedual wanted to be paid.

In short, Somer maintains that he never took any actions to commit a fraud or injustice against the plaintiff, never abused the privilege of doing business in the corporate form, and, therefore, cannot be held personally liable for the debts of So Bella.

In opposition to Somer's motion, Dedual avers that Somer indisputably dominates So Bella, because it has no board of directors, no employees and no shareholders other than Somer. Dedual contends that despite the Manhattan office lease, Somer admitted at his deposition that he has been operating So Bella from his residence since its inception (*see* Somer Dep. at 15-16). Somer also admitted that he, via email on August 1, 2017, told Dedual that he could afford to pay the \$130,000 Dedual quoted to him for various projects, and that So Bella did not, at that point in time, have \$130,000 in available funds (*see id.* at 66-67; Dedual aff., Ex. B). Dedual alleges that So Bella was so undercapitalized that it was unable to pay its creditors, and that Somer, along with his wife and father, has made frequent and poorly-documented "loans" to So Bella whenever it needed money (*see* Somer Dep. at 66-68, 91-96; 145-149). Dedual contends that because So Bella was so undercapitalized and was bouncing checks, Somer paid Dedual with his personal AMEX credit card through PayPal. Dedual also submits documentary evidence

that at least \$13,396.30 of these payments were returned to Somer's personal AMEX credit card (Affirmation of Brian C. Avello dated January 5, 2017; exs. 8 and 9). Dedual further contends that in September 2013, Somer used \$20,000 of So Bella's funds to pay his children's private school tuition, even while telling Dedual that he needed a few more days to pay outstanding invoices (*see* Dedual aff, ¶ 55 & Ex. L thereto). Finally, Dedual submits email correspondence from September and October 2013 in which Somer makes personal assurances that plaintiff and the subcontractors would be paid (*see id.*, exs. B, K, M, N). Dedual avers that without Somer's repeated falsehoods about So Bella's purported ability to pay plaintiff's bills, he would never have agreed to needlessly drive up subcontractor expenses (Dedual aff, ¶¶ 48-51).

Somer's motion for summary judgment dismissing the complaint as against him is denied. Plaintiff has successfully raised issues of fact on its alter ego and veil piercing claim against Somer. Summary judgment is not appropriate where there is conflicting evidence regarding whether plaintiff and his subcontractors were performing work for So Bella or for Somer, personally; whether So Bella was inadequately capitalized and Somer misrepresented the company's ability to pay its bills; whether Somer was personally assuring payment to plaintiff and his subcontractors in order to continue to receive their web development services; and whether there was an overlap between So Bella's corporate funds and the personal

funds and accounts of Somer and his wife (*see e.g. Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d at 342 [fact-laden claim to pierce corporate veil particularly unsuited for resolution on summary judgment]; *Pae v Chul Yoon*, 41 AD3d 681, 682 [2d Dept 2007] [corporate veil pierced where defendant mixed corporate and personal funds]; *Webmediabrands, Inc. v Latinvision, Inc.*, 46 Misc 3d 929, 932 [Sup Ct, NY County 2014] [veil piercing claim successful where defendant appropriated corporate funds for personal use]).

Plaintiff's cross-motion for summary judgment on its breach of contract claims and for dismissal of the counterclaim is also denied due to the presence of disputed issues of fact regarding the quality, timing and amount of work that was performed. According to plaintiff's evidence, Somer never criticized plaintiff's work via email until October 14, 2013, two days after Dedual advised that all development was shut down until all debts were paid (*see Dedual aff*, Ex. S). However, Somer avers in his opposing affidavit that he was very unhappy with the amount of work delegated to subcontractors and was constantly waiting for plaintiff to complete certain work that had been promised, but was afraid to state his true feelings, fearing that it would create unnecessary friction between the parties (*see Somer 3/12/17 aff.*, ¶¶ 4, 6, 7, 8). Summary judgment is not the appropriate vehicle to judge credibility (*Latif v Eugene Smilovic Hous. Dev. Fund*

*Co., Inc.*, 147 AD3d 507, 508 [1<sup>st</sup> Dept 2017]; *Baseball Off. of Commr. v Marsh & McLennan*, 295 AD2d 73, 81 [1<sup>st</sup> Dept 2002]).

However, the allegation in the amended answer that Dedual falsely represented that plaintiff was capable of performing all of the services indicated in the Agreement and without the need for outside contractors (*see* Am. Answer, ¶¶ 43-44) fails as a matter of law. The Agreement clearly and unambiguously provides that plaintiff may be required to hire additional employees and/or contractors, and that these subcontractors would be an expense of So Bella. In addition, the documentary evidence and Somer's deposition testimony establish that Somer was apprised of, and approved, the use of subcontractors before the work was commenced (*see* Dedual aff., exs. A, B, N; Somer Dep. at 65-66).


For these reasons, it is hereby

**ORDERED** that defendant Adam Somer's motion for summary judgment dismissing the complaint as against him is denied; and it is further

**ORDERED** that plaintiff's cross-motion for summary judgment in its favor is also denied.

Dated: December 1, 2017

**ENTER:**



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**Ellen M. Coin A.J.S.C.**

**HON. ELLEN M. COIN**