SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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SOLOMON SHARBAT and SOLOMON CAPITAL, LLC,

Plaintiffs,

Index No.: 652386/2015

-against-

DECISION AND ORDER

AGS CAPITAL GROUP, LLC, JOHN DOE CORPORATIONS NOS. 1-50, and ALLEN SILBERSTEIN,

Defendants.

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Saliann Scarpulla, J.

In this action to recover damages for, *inter alia*, breach of contract, plaintiffs Solomon Sharbat ("Sharbat") and Solomon Capital, LLC ("Solomon Capital") (collectively "plaintiffs") move to dismiss the counterclaims of defendant AGS Capital Group, LLC ("AGS Capital").

AGS Capital, Solomon Capital, and Sharbat entered into a series of agreements between July 12 and July 23, 2009 for the sale and purchase of shares of SpongeTech Delivery Systems, Inc. ("SpongeTech"), which is a publicly traded company. According to the allegations of the amended complaint, plaintiffs agreed to deliver 5,000,000 shares of SpongeTech to AGS Capital, and AGS Capital agreed to sell them and transfer a portion of the proceeds of sale back to plaintiffs. Of those 5,000,000 SpongeTech shares, 3,000,000 were plaintiffs' shares, and AGS Capital was to act as the plaintiffs' broker and agent to sell those shares and deliver the net sales proceeds to plaintiffs. Plaintiffs

allege that AGS Capital told them that it had an immediate buyer for all 3,000,000 of plaintiffs' SpongeTech shares. Plaintiffs maintain that AGS Capital did not have an immediate buyer, it knew that this representation was false at the time it was made, and that that AGS Capital "deliberately did not deliver the proceeds of that sale [of plaintiffs' SpongeTech securities] to Plaintiffs." In the amended complaint, plaintiffs assert causes of action for (1) breach of contract; (2) attorneys' fees; (3) fraudulent inducement; (4) breach of fiduciary duty; (5) unjust enrichment; and (6) constructive trust.

On March 23, 2016, AGS Capital filed an answer with counterclaims for: (1) breach of contract; (2) conversion; (3) fraud; (4) breach of implied covenant of good faith and fair dealing; (5) unjust enrichment; and (6) a claim based upon alter ego liability. Defendant Allen Silberstein ("Silberstein") also filed an answer but did not assert any counterclaims.

In its counterclaims, AGS Capital alleges that, pursuant to the first SpongeTech Agreement, dated July 13, 2009, plaintiffs agreed to sell 2,000,000 shares of SpongeTech to AGS Capital, for which AGS Capital paid $100,000 to Sharbat. According to AGS Capital, on July 14, 2009, in reliance upon plaintiffs' agreement to deliver the 2,000,000 shares of SpongeTech, it sold 1.9 million shares of SpongeTech to third parties. Pursuant to that same agreement, AGS Capital agreed to sell 1,000,000 SpongeTech shares belonging to Sharbat, and that those shares would be delivered to AGS Capital no later than July 14, 2009.

Subsequently, as set forth in a second SpongeTech Agreement dated July 16, 2009, AGS Capital agreed to sell 2,000,000 SpongeTech shares, and that those shares

would be delivered by Sharbat to AGS Capital no later than July 24, 2009. On July 15-16, 2009, AGS Capital sold 3,000,000 shares of SpongeTech, on behalf of plaintiffs, at an average price of $0.0867 per share. AGS Capital alleges that plaintiffs knew that AGS Capital was "selling the SpongeTech shares for defendant's own account and on behalf of the plaintiffs, and that defendant was in turn relying on plaintiffs to supply the shares to satisfy defendant's obligations to deliver the shares it sold." However, plaintiffs failed to deliver the SpongeTech shares by July 24, 2009.

Finally, AGS Capital alleges that on July 23, 2009, plaintiffs and AGS Capital entered into a third agreement, which "superseded all previous agreements among the parties relating to SpongeTech shares." Pursuant to the third agreement, plaintiffs were obligated to deliver to AGS Capital the entire 5,000,000 shares of SpongeTech stock no later than July 24, 2009. AGS Capital maintains that plaintiffs did not deliver the shares, and, as a result, AGS Capital was "'bought in' in [its] brokerage account for 4,900,000 shares of SpongeTech at a market price of $0.1539 and Defendant's brokerage firm transacted a margin sellout of Defendant's position to cover Defendant's delivery requirements, resulting in a realized loss to Defendant of $329,280."

In its breach of contract counterclaim, AGS Capital alleges that plaintiffs' failure to deliver the entire 5,000,000 shares of SpongeTech stock no later than July 24, 2009, resulted "in a realized loss to Defendant of $329,280. AGS Capital further alleges that it suffered additional damages, because its attempt to purchase 200,000 shares of another company, VirnetX Holding Corp., was rejected for insufficient buying power resulting from plaintiffs' failure to transfer the shares of SpongeTech stock.

With respect to the second counterclaim for conversion, AGS Capital alleges that on July 16, 2009, it transferred "a second payment of $100,000 for the purchase of the additional 2 million shares of SpongeTech." On July 18, 2009, Sharbat advised AGS Capital that the Chief Financial Officer of SpongeTech did not accept this second $100,000 for the issuance of shares. AGS Capital then demanded that the plaintiffs return the second $100,000 payment to it. Plaintiffs returned only $48,000 of the $100,000.

AGS Capital's remaining counterclaims, for fraud, unjust enrichment, conversion, breach of the implied covenant of good faith and fair dealing, and alter ego liability, rest on essentially the same allegations as pled in the breach of contract counterclaim.

On this motion, Plaintiffs argue that AGS Capital's counterclaims for fraud, unjust enrichment, conversion, breach of the implied covenant of good faith and fair dealing, and alter ego liability are duplicative of its breach of contract counterclaim and should be dismissed. Plaintiffs also argue that all the counterclaims must be dismissed as time-barred by the statute of limitations.

Discussion

Plaintiffs first argue that AGS Capital's counterclaims alleging fraud, unjust enrichment, conversion, alter ego liability and breach of the implied covenant of good faith and fair dealing must be dismissed as they are duplicative of AGS Capital's breach of contract counterclaim. Plaintiffs contend that in these counterclaims, defendant seeks nothing more than contract damages, namely, the difference between what plaintiffs owed and what they paid.

In its unjust enrichment claim, AGS Capital alleges that plaintiffs were unjustly enriched because they failed to return AGS Capital's payments for the purchase of SpongeTech shares, which the plaintiffs failed to deliver. "A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter." *Goldstein v. CIBC World Mkts. Corp.*, 6 A.D.3d 295, 296 (1st Dept 2004), citing *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987). Plaintiffs' alleged failure to return AGS Capital's payment is a breach of the obligations set forth in the various agreements, thus this claim is dismissed as duplicative of the breach of contract counterclaim.

Similarly, in the conversion counterclaim, AGS Capital alleges that it transferred $100,000 to Sharbat for the purchase of an additional 2 million shares of SpongeTech, and that Sharbat "advised Defendant that the Chief Financial Officer of SpongeTech did not accept this second $100,000 for the issuance of shares." AGS Capital alleges that it demanded the return of the $100,000 payment, but plaintiffs refused to do so. As AGS Capital's payment for the purchase of shares of SpongeTech, and the delivery of the shares in exchange, were obligations set forth in the various agreements, and are the subject of AGS Capital's breach of contract counterclaim, the conversion claim is dismissed as duplicative of the breach of contract claim.

As to the counterclaim for breach of the implied covenant of good faith and fair dealing, New York courts will dismiss a claim that a party breached the

implied covenant of good faith and fair dealing as duplicative of a breach of contract claim, where both claims arise from the same facts. *See Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dept 2010); *Logan Advisors, LLC v. Patriarch Partners, LLC*, 63 A.D.3d 440, 443 (1st Dept 2009).

In its breach of the implied covenant of good faith and fair dealing counterclaim, AGS Capital alleges that plaintiffs failed to take the "required steps to enable Defendants to take delivery of the SpongeTech shares." Here again, the plaintiffs' alleged failure to deliver the shares is set forth in AGS Capital's breach of contract counterclaim, I therefore dismiss the breach of the implied covenant of good faith and fair dealing counterclaim as duplicative.

In its fraud counterclaim, AGS Capital alleges that, on July 12, 2009, Sharbat represented to Silberstein that he was a registered broker, when "he had not been registered as a securities broker since at least June 12, 2008." Further, AGS Capital claims that, at the time plaintiffs sold the 2,000,000 SpongeTech shares to defendant, they had no intention of delivering those shares. AGS Capital alleges that Sharbat represented on numerous occasions that plaintiffs would deliver the SpongeTech shares by a certain date, with knowledge that this representation was false.

Additionally, AGS Capital alleges that Sharbat represented to Silberstein that plaintiffs would acquire shares directly from SpongeTech, and, further, if there was any "difficulty in obtaining free-trading shares from SpongeTech, he,

Sharbat, had 'millions' of SpongeTech shares in his own brokerage account and would provide the shares from that source." AGS Capital claims that Sharbat did not intend to deliver the shares from his own brokerage account to satisfy the delivery obligation for the shares purchased.

Where a fraud claim is duplicative of a breach of contract claim, in other words, where the claimed breach of duty is one owed based upon alleged contractual obligations, the court will dismiss the fraud claim. *See Rivas v. AmeriMed USA, Inc.*, 34 A.D.3d 250, 250 (1st Dept 2006); *Clark Constr. Corp. v BLF Realty Holding Co.*, 28 A.D.3d 367, 368-369 (1st Dept 2006).

The gravamen of AGS Capital's fraud counterclaim is that plaintiffs misrepresented that they would deliver shares of SpongeTech – a promise which is set forth in the various agreements. Regardless of whether Sharbat falsely represented that he was a broker, or that he was going to deliver the shares from his own account, the alleged harm was the failure to deliver the shares, which is the crux of AGS Capital's breach of contract counterclaim. Therefore, the fraud claim is dismissed as duplicative.

The Counterclaim for Piercing the Corporate Veil

In the sixth counterclaim, AGS Capital alleges that Sharbat "completely dominated" and used Solomon Capital in "disregard of corporate formalities" to "perpetuate the illegal pump and dump of SpongeTech, to the detriment of AGS Capital." Plaintiffs argue that this counterclaim must be dismissed because "New York does not recognize 'piercing the corporate veil' as an independent cause of

action," and because AGS Capital has not sufficiently alleged a claim for veil piercing.

"New York does not recognize a separate cause of action to pierce the corporate veil." *Chiomenti Studio Legale, L.L.C. v. Prodos Capital Mgt. LLC*, 140 A.D.3d 635, 636 (1st Dept 2016) (internal quotation marks and citation omitted). Further, 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." *Sound Communications, Inc. v. Rack & Roll, Inc.*, 88 A.D.3d 523, 524 (1st Dept 2011) (internal quotation marks and citation omitted). "Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." *TNS Holdings v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998). Conclusory allegations regarding piercing the corporate veil are not sufficient to state such a claim. *Albstein v. Elany Contr. Corp.*, 30 A.D.3d 210, 210 (1st Dept 2006).

Here, although AGS Capital alleges that Solomon Capital failed to keep minutes, have corporate meetings or keep corporate records, that it shares office space with other entities controlled by Sharbat, and that Sharbat commingled funds of Solomon Capital with other entities he controlled, AGS Capital does not allege any facts showing that this failure to respect corporate formalities was used

to perpetrate a fraud or injustice upon AGS Capital. As set forth above, AGS Capital has failed to plead a fraud counterclaim separate and apart from its breach of contract counterclaim. Because AGS Capital has failed to plead a sufficient fraud counterclaim, AGS Capital has also failed to plead facts sufficient to support a claim that plaintiffs' alleged failure to respect corporate formalities was used to perpetrate a fraud on AGS Capital. I therefore dismiss the counterclaim for piercing the corporate veil.

The Statute of Limitations

Plaintiffs argue that all the counterclaims are timed-barred. For the reasons set forth above I have dismissed all of AGS counterclaims except for the breach of contract counterclaim, thus I only address the statute of limitations with respect to that counterclaim.

Plaintiffs argue that the breach of contract counterclaim is timed-barred by the six year statutes of limitations. AGS Capital argues that the breach of contract counterclaim is not time-barred, as it is protected by the relation-back doctrine set forth in CPLR 203(d). According to AGS Capital, the claims asserted in the complaint were interposed on July 6, 2015, less than six years after the parties entered into the first of the three related contracts, and less than six years after the alleged breach. It argues that the breach of contract counterclaim relates back to plaintiffs' filing of the complaint, and is, therefore, within the applicable six-year statute of limitations.

CPLR 203(d) provides that:

> "Defense or counterclaim. A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed."

The breach of contract counterclaim, which has a six-year statute of limitations and was based upon the July 2009 agreements, was timely when the complaint was filed in this action on July 6, 2015. Thus, pursuant to the relation back doctrine set forth in CPLR 203(d), AGS Capital's counterclaim for breach of those same agreements is also timely. For this reason, I deny plaintiffs' motion to dismiss the breach of counterclaim as untimely under the Statute of Limitations.

In accordance with the foregoing, it is

ORDERED that plaintiffs Solomon Sharbat's and Solomon Capital LLC's motion to dismiss defendant AGS Capital Group, LLC's counterclaims is granted to the extent that I dismiss the second, third, fourth, fifth and sixth counterclaims, and the motion is denied as the first counterclaim; and it is further

ORDERED that counsel are directed to meet, confer, and inform the Clerk of Part 39 whether they are amenable to mediation of the action. If the parties are unable to agree to mediation, I direct the parties to appear at a conference in Part 39, Room 208, on March 14, 2018 at 2:15 p.m.

This constitutes the decision and order of the court.

Dated: February 23, 2018
New York, New York

J.S.C.