Rasolli Footwear Corp. v COD Capital Corp.
2019 NY Slip Op 30252(U)
January 30, 2019
Supreme Court, New York County
Docket Number: 655554/2017
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

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RASOLLI FOOTWEAR CORP.,

Plaintiff,

- v -

COD CAPITAL CORP., also known as COD FRIENDLY, and LOWELL BURK

Defendant.

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INDEX NO. 655554/2017

MOTION DATE 12/18/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 30, 31, 32, 33, 34

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action to recover damages for breach of contract and conversion, the plaintiff moves pursuant to CPLR 3025(b) for leave to amend its complaint to add a cause of action against the defendant, COD Capital Corp., also known as COD Friendly (hereinafter COD), alleging a violation of General Business Law § 349(h) and a cause of action against the defendant Lowell Burk based on piercing COD's corporate veil. In the interest of judicial economy, the court holds in abeyance that branch of the motion to add the cause of action against Burk and, to aid in determining that motion, Burk is directed to appear for a deposition and produce documentation in accordance herewith. The motion otherwise is denied.

In its initial complaint, the plaintiff alleges that it entered into a written agreement with COD, pursuant to which COD agreed to purchase all checks, drafts, money orders, and other non-cash remittances paid to the plaintiff by its customers. It further alleges that COD agreed to deposit a certain percentage of those collections into the plaintiff's bank account and retain a certain percentage of those collections as its fee. The plaintiff asserts that, beginning in

December 2016, COD failed to make the required deposits, and instead, permitted Burk, its sole shareholder and officer, to retain all such collections for his own use.

On September 25, 2018, the court granted Burk's CPLR 3211(a)(7) motion to dismiss the complaint insofar as asserted against him, albeit without prejudice for the plaintiff to seek leave to amend the complaint to properly assert breach of contract and conversion causes of action against him based on piercing COD's corporate veil. The plaintiff now makes that motion, and also seeks to add a cause of action against COD alleging a violation of General Business Law (GBL) § 349(h).

In general, "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay" (*Murray v City of New York*, 51 AD3d 502, 503 [1st Dept 2008] [internal quotation marks and citations omitted]). Nonetheless, "leave should be denied where the proposed claim is palpably insufficient" (*Pasalic v O'Sullivan*, 294 AD2d 103, 104 [1st Dept 2002] [citations omitted]) or patently devoid of merit (*see JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc.*, 107 AD3d 643 [1st Dept 2013]). Stated another way, "when a proposed amendment is devoid of merit or fails to state a cause of action, leave to amend should be denied" (*Corman v LaFountain*, 38 AD3d 706, 707 [2d Dept 2007]; *Mohan v Hollander*, 303 AD2d 473 [2d Dept 2003]). Allegations involving the piercing of the corporate veil must be more than conclusory (*see Board of Mgrs. of 325 Fifth Ave. Condominium v Continental Residential Holdings, LLC*, 149 AD3d 472 [1st Dept 2017]; *Board of Mgrs. of Gansevoort Condominium v 325 W. 13th, LLC*, 121 AD3d 554 [1st Dept 2014]; *20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733 [1st Dept 2013]).

Nevertheless, it is generally inappropriate to resolve a claim based on piercing the corporate veil pursuant to a pre-answer or pre-discovery motion (*see Oxford Health Plans (NY), Inc. v BetterCare Health Care Pain Mgt. & Rehab P.C.*, 305 AD2d 223, 225 [1st Dept 2003]; *Kralic v Helmsley*, 294 AD2d 234, 236 [1st Dept 2002]). The internal workings of a closely held corporation usually are within the sole province of the shareholders, officers, and directors of

that corporation; hence, the facts necessary to establish whether a shareholder, officer, and director misused or ignored the corporate form, dominated the corporation to commit a wrong, treated the corporation as an alter ego, or commingled personal and corporate assets are within their province as well. Whether a motion is one to dismiss for failure to state a cause of action or one for leave to amend a complaint to assert such a cause of action, resolution of whether a plaintiff's allegations state such a cause of action is fact-laden and specific to each individual case (*see Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30 [2018]).

New York, however, does not recognize a separate cause of action to pierce the corporate veil (*Chiomenti Studio Legale, LLC., v. Prodos Capital Mgt., LLC*, 140 AD3d 635 [1st Dept 2016). Rather, the concept of piercing the corporate veil only is "a way to hold an individual liable for a corporation's tort or other wrongdoing, here breach of contract and conversion. Thus, the complaint need only contain some allegations reflecting on the individual's liability for the corporation's wrongdoing" (*ARB Upstate Communications, LLC v R.J. Reuter, LLC*, 93 AD3d 929, 931 [3d Dept 2012]). Moreover, there is no bar to holding a corporation liable in tort and piercing the corporate veil in the same action that seeks to hold an individual liable for the same tort (*see Samsung Am. v Yugoslav-Korean Consulting & Trading Co.*, 248 AD2d 290, 670 [1st Dept 1998]). Thus, for purposes of this motion, the newly added allegations that are set forth in the proposed fourth cause of action are deemed to be additional allegations in the first and second causes of action, both of which already assert that both of the defendants are liable for breach of contract and conversion.

The court, therefore, must determine whether the allegations in the proposed amended complaint reflect on Burk's liability for COD's wrongdoing. Since the court must essentially determine whether the proposed amended complaint states a cause of action, and the facts necessary to show that the plaintiff has a cause of action based on piercing the corporate veil are unavailable to it, the court may invoke CPLR 3211(d) to ascertain whether to grant the motion for leave to amend. That provision authorizes the court to "order a continuance to permit

further affidavits to be obtained or disclosure to be had and may make such other order as may be just" (*see generally Peterson v Spartan Industries, Inc.*, 33 NY2d 463 [1974]). The plaintiff's allegations that Burk personally converted funds entrusted to COD by virtue of his position as COD's sole officer and shareholder presents a close question as to whether the proposed amended complaint sufficiently alleges facts supporting the contention that Burk dominated COD and treated it is as his alter ego (*see e.g. State of New York Workers' Comp. Bd. v Wang*, 147 AD3d 104 [3d Dept 2017]; *ARB Upstate Communications, LLC v R.J. Reuter, LLC*, 93 AD3d 929 [3d Dept 2012]; *Thompson v Cooper*, 24 AD3d 203 [1st Dept 2005]). To determine whether these allegations are more than merely conclusory, the court deems it appropriate, in the interest of judicial economy, to direct Burk to submit to a deposition and to produce COD's bank accounts, cancelled checks, and corporate records for 2016 and 2017. In this manner, the court will be able to determine whether the plaintiff has a cause of action against Burk based on piercing the corporate veil and thereafter decide that branch of the motion that seeks to add such a cause of action.

With respect to that branch of the motion which seeks to add a cause of action alleging a GBL § 349(h) violation, parties claiming the benefit of that statute "must, at the threshold, charge conduct that is consumer oriented" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]; *see Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 334, [1999]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25, [1995]; *see also Genesco Entertainment, a Div. of Lymutt Indus., Inc., v Koch*, 593 F Supp 743, 752 [SD NY 1984]). "Private contract disputes, unique to the parties . . . [do] not fall within the ambit of the statute" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 25; *see New York Univ. v Continental Ins. Co.*, 87 NY2d at 320; *Loeb v Architecture Work, P.C.*, 154 AD3d 616 [1st Dept 2017]). The "'single shot transaction'" (*Genesco Entertainment, a Div. of Lymutt Indus., Inc. v Koch*, 593 F Supp at 752), which is "tailored to meet the purchaser's wishes and requirements" (*New York Univ. v Continental Ins. Co., 87 NY2d at 321*), does not,

without more, constitute consumer-oriented conduct for the purposes of this statute (*see Biancone v Bossi*, 24 AD3d 582, 583 [2d Dept 2005]; *Lynch v McQueen*, 309 AD2d 790, 792 [2d Dept 2003]; *Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 145 [2d Dept 1995]).

On the other hand, conduct has been held to be sufficiently consumer-oriented to satisfy the statute where it involved "an extensive marketing scheme" (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d at 344), where it involved the "multi-media dissemination of information to the public" (*Karlin v IVF Am.*, 93 NY2d 282, 293 [1999]), and where it constituted a standard or routine practice that was "consumer-oriented in the sense that [it] potentially affect[ed] similarly situated consumers" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 27; *see Wilner v Allstate Ins. Co.*, 71 AD3d 155, 164 [2d 2010]; *Cruz v NYNEX Info. Resources,* 263 AD2d 285 [1st Dept 2000]). Simply put, "[the] defendant's acts or practices must have a broad impact on consumers at large" (*New York Univ. v Continental Ins. Co.*, 87 NY2d at 320; *see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 25; *Gomez-Jimenez v New York Law Sch.*, 103 AD3d 13 [1st Dept 2012]; *see also North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5 [2d Dept 2012]).

The proposed amended complaint does not allege that COD's business was consumer-oriented; rather, it alleges that the plaintiff was a business and that COD's services were provided only to businesses that shipped consumer products to customers. Hence, the proposed GBL § 349(h) cause of action is patently devoid of merit.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to amend the complaint is granted to the extent that the branch of the motion which seeks to add allegations against the defendant Lowell Burk based on piercing the corporate veil of the defendant COD Capital Corp., a/k/a COD Friendly, is held in abeyance pending the completion of the disclosure directed herein, and the motion is otherwise denied; and it is further,

ORDERED that the defendant Lowell Burk shall appear for a deposition within 45 days of this order, limited to the issues of whether he dominated COD Capital Corp., a/k/a COD Friendly, whether he used his domination of that corporation to commit a wrong against the plaintiff, whether he commingled personal assets with those of the corporation, whether he employed that corporation to pay personal debts, and whether he disregarded the corporate form or dispensed with requirements of the corporations law of the state of incorporation of COD Capital Corp., a/k/a COD Friendly; and it is further,

ORDERED that the defendant Lowell Burk shall, prior to the deposition, produce bank accounts, cancelled checks, corporate records, and financial records of COD Capital Corp., a/k/a COD Friendly, for 2016 and 2017; and it is further,

ORDERED that the failure of Lowell Burk to comply with this order may result in the granting, upon default, of that branch of the plaintiff's motion which seeks to add allegations against him based on piercing the corporate veil, and the imposition of other sanctions.

1/30/2019
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[x]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE