SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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CAPSTONE BUSINESS FUNDING, LLC.,

Plaintiff,

-against-

SANITAS PARTNERS V.I., LLC, TIMOTHY HODGE, and GEOFFREY STARIN,

Defendants.

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DECISION AND ORDER
Index No.: 652784/2018

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. FACTS AND ARGUMENTS

As this is a motion to dismiss, these facts are taken from the Verified Complaint (Complaint, NYSCEF Doc. No. 2).

Individual defendants Timothy Hodge and Geoffrey Starin were members of entity defendant Sanitas Partners VI, LLC (Sanitas). Hodge was the president. Starin was Chief Administrative Officer. Sanitas entered into several purchase and sale agreements with plaintiff Capstone Business Funding, LLC (Capstone) in 2016 (the Agreements). Sanitas was to perform work for the Virgin Islands Waste Management Authority (VIWMA) and sell Capstone certain invoices, so that funds paid on those invoices would go directly to Capstone (or be held in trust for Capstone, if the funds were paid to Sanitas).

Capstone asserted seven claims for breach of contract against Sanitas for its failure to turn funds related to various invoices over to Capstone, as required by the Agreements. It also alleged a claim for breach of contract against Hodge and Starin, pursuant to a veil-piercing theory. As discussed below, the complaint has been superseded by an amended complaint containing a single cause of action against Hodge and Starin only.

Defendants Hodge and Starin move to dismiss or to stay this action. Moving defendants explain that Sanitas has filed for bankruptcy protection in the United States District Court for the Virgin Islands, and that case covers the same facts and issues, so this case should be stayed (Memo at 7-8). Moving defendants also contend the plaintiff's allegations, made upon information and belief, are fabricated and fail to allege breach of contract, as plaintiff fails to specify what sections of the Agreement; were breached. Moreover, the veil piercing claim is insufficient because the

allegations supporting piercing the veil are vague and conclusory. Further, without a viable entity defendant, a veil-piercing claim may not stand (Memo at 6).

Plaintiff discontinued the action against Sanitas (Notice of Discontinuance, NYSCEF Doc. No. 27) and moved for leave to amend the complaint to reassert the claims against the individual defendants and to remove allegations against Sanitas as well as alter ego and corporate veil piercing claims (Opp at 3, NYSCEF Doc. No. 29).

Plaintiff claims now to have stated a claim for fraud because as officers of Sanitas, Hodge and Starin reassured plaintiff the VIWMA payments would be returned, while intentionally withholding those funds (*id.* at 5-6). Corporate officers and directors can be held personally liable for participation in fraud, even without personal benefit (*id.* at 7, *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 55 [2001]). While Sanitas has filed for bankruptcy protection, the stay should not apply to the individual defendants (*id.* at 8). Stays are limited only to debtors, and not to non-debtor co-defendants.

The amended complaint contains a single cause of action against Starin and Hodge for failure to turn over the funds. Plaintiff asserts they "used their complete control of Sanitas and their roles as executive officers of Sanitas to commit a fraudulent act in connection with entry into the PSAs and receipt and retention of misdirected funds from VIWMA" (NYSCEF Doc. No. 28, ¶ 87).

In reply, defendants argue the amended complaint should be dismissed because the claims arise out of the PSAs and the fraud claim is just a façade to the true breach of contract claim, making Sanitas (plaintiff's counterparty) a necessary party, and subject to the bankruptcy stay. Further, the amended complaint brings the same insufficient alter ego allegations as the original complaint, which should fail (Reply at 1).

As far as plaintiff claims this is a now a direct fraud claim, the claim is based on failure to perform under the PSAs, a breach of contract claim, which does not give plaintiff an end-run around the bankruptcy stay. Further, the fraudulent statement alleged is about defendants' intention to have Sanitas perform the contract, which is insufficient to support a fraud claim (*id.* at 6-7). Nor is the fraud claim adequately or specifically pled. The allegations are made vaguely, and only upon information and belief (*id.* at 7). Nor does the amended complaint allege the other elements of a fraud claim (*id.* at 8).

Plaintiff filed a sur-reply, attaching several documents, and asked the court to consider it. Plaintiff argues the facts underlying the fraud claim are solely known to defendants at this point,

so the lack of specificity should be excused (Sur-Reply, NYSCEF Doc. No. 32, at 3). Plaintiff makes allegations that defendants were the signatories on the PSAs, knew about misdirected payments (*id.* at 4), and had admitted Sanitas had received funds that should have gone to Capstone (*id.* at 5), but Sanitas had sent the funds elsewhere (*id.*).

II. DISCUSSION

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

According to CPLR 3025, "[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires." As defendants have not yet answered the complaint, plaintiff may amend. Accordingly, the amended complaint is the relevant complaint. Remaining defendants may then opt to file a new motion to dismiss, or reply and apply the instant motion to the amended complaint. They have chosen to continue with the instant motion.

Plaintiff claims the sole cause of action in the amended complaint is for fraud brought directly against the individual defendants only in their personal capacity[1]. "To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made,

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[1] A claim brought against them based on a veil piercing theory would fail, as

> "An action to pierce the corporate veil requires that the purported dummy corporations be parties, even if the parent corporation is alleged to be the one which unjustly retains the funds" (*Popowich v Korman,* 73 AD3d 515, 517 [1st Dept 2010], quoting **5 *Stewart Tenants Corp v Square Indus. Inc,* 269 AD2d 246, 248 [1st Dept 2000] *see also Boczar v Greene,* 2008 NY Slip Op 30138[U], at *6-7 [Sup Ct NY County January 16, 2008] ["[f]urther, an action to pierce the corporate veil requires that the controlled corporation(s) be named as defendants in the action"]).

Mannucci v The Missionary Sisters of the Sacred Heart of Jesus, 2011 N.Y. Slip Op. 34250[U], 4-5 [N.Y. Sup Ct, New York County 2011], *affd sub nom. Mannucci v Missionary Sisters of Sacred Heart of Jesus*, 2012 N.Y. Slip Op. 02580 [1st Dept, null 2012].

justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). Plaintiff has failed to allege justifiable reliance on the defendants' representations that they intended to return the funds to Capstone. Further, a misrepresentation must be one of present fact, and not of one's intent to perform (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] ["[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]). Accordingly, this claim fails. It is hereby

ORDERED that the motion to dismiss the amended complaint is GRANTED in its entirety and the amended complaint is hereby DISMISSED; and it is further

ORDERED that the clerk of the court is directed to enter judgment against Capstone Business Funding, LLC and in favor of Timothy Hodge and Geoffrey Starin together with costs upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: April 11, 2019

ENTER,

O. PETER SHERWOOD J.S.C.