

Iconix Inc. v OEM Group, Inc.
2020 NY Slip Op 30520(U)
February 20, 2020
Supreme Court, Kings County
Docket Number: 507479/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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ICONIX INC.

Plaintiff/Counterclaim Defendant,
Decision and order

- against -

Index No. 507479/19

OEM GROUP, INC., ICONICS TRADING INC,
MOBILEPPI, INC, d/b/a MOBILEPPI CORP,
MOBILEPPI INCORPORATED d/b/a MOBILEPPI CORP,
PARDIL & ELIMELICH GROUP CORP,
d/b/a P & E GROUP, AMERICAN TELECOM
TRADERS GROUP INC, EYTAN IZYAGUYEV
a/k/a EITAN IZYAGUYEV a/k/a EYTAN
ISIAGUEV a/k/a EITAN ISIAGUEV
a/k/a NATHAN MOORE a/k/a EITAN MOORE,
RAMILYA ZEYNALOVA a/k/a RAMILYA IZYAGUYEV
AND IZIBO IZYAGUYEV a/k/a IZIBO
ISIAGUEV a/k/a ISAAC IZYAGUYEV

February 20, 2020

ms # 192

Defendants/Counterclaim Plaintiffs,

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PRESENT: HON. LEON RUCHELSMAN

The defendants Mobileppi Inc., P & E Group, American Telecom and Ramilya and Izibo Izyaguyev have moved seeking to dismiss the complaint on the grounds the court does not have jurisdiction over them. Moreover, all the defendants move seeking to dismiss the complaint on the grounds it fails to state any cause of action. The plaintiff Iconix Inc., has cross-moved seeking to dismiss counterclaims filed by the defendants. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The Verified Complaint alleges that between April 1, 2017 until December 5, 2017 the plaintiff engaged in various business transactions with the defendants. The plaintiff alleges that he

is owed \$63,518.76 which comprise his share of profits yielded as a result of the transactions. The Verified Complaint further alleges the defendants owe plaintiff \$146,638 which is an amount the defendants have failed to pay back as part of loan given by the plaintiff. The Verified Complaint further alleges the defendants defrauded plaintiff out of \$77,400 by inducing him to wire that amount to a fictitious account when in fact the account belonged to the defendants. Based upon these three events the plaintiff commenced this action and has asserted eight causes of action including breach of contract, fraud, RICO violations and unjust enrichment. The defendants answered the complaint and asserted various counterclaims including breach of contract, an accounting, indemnification and breach of fiduciary duty. These motions have now been filed wherein each party seeks to dismiss the claims asserted against it. Further, some of the defendants have raised jurisdictional claims.

First, it is well settled that pursuant to BCL §1312 a foreign corporation not authorized to do business in the state of New York may not maintain any actions within the state (Pergament Home Centers, Inc. v. Net Realty Holding Trust, 171 AD2d 736, 567 NYS2d 292 [2d Dept., 1991]). The precise definition of 'doing business' is fact specific, and must be decided on a case by case basis (Highfill Inc., v. Bruce and iris Inc., 50 AD3d 742, 855 NYS2d 635 [2d Dept., 2008]). There are no precise activities

that demonstrate 'doing business' and the party relying on the statute must demonstrate that the activities of the foreign corporation were systematic and regular and manifested a continuity of activity within the jurisdiction (Construction Specialists, Inc., v. Hartford Insurance Company, 97 AD2d 808, 468 NYS2d 675 [2d Dept., 1983]). Thus, in Uribe v. Merchants Bank of New York, 266 AD2d 21, 697 NYS2d 279 [1st Dept., 1999] the court held that the foreign corporation was not 'doing business' in New York where there was no evidence that the foreign corporation maintained any business office, maintained a business telephone number, owned real estate and had any employees in the state. The court found the activities of the foreign corporation consisted of "solicitation of business and facilitating the sale and delivery of its merchandise incidental to its business in interstate and international commerce" and the court concluded that was insufficient to demonstrate the foreign corporation was 'doing business' in New York. Moreover, without evidence of doing business there is a presumption that the corporation then does business in its area of incorporation (Household Bank (SB), NA v. Mitchell, 12 AD3d 568, 785 NYS2d 116 [2d Dept., 2004]). To rebut that presumption the party seeking to prevent the foreign business from avoiding jurisdiction has the burden of demonstrating the business activities of the foreign corporation were systematic and regular as to manifest

continuity of activity within New York (Gemstar Canada Inc., v. George A. Fuller Co., Inc., 127 AD3d 689, 6 NYS3d 552 [2d Dept., 2015]).

In this case, the plaintiff argues that jurisdiction over the three corporate defendants, namely Mobileppi Inc., P & E Group, American Telecom has been satisfied because they are subsidiaries or alter egos of other corporations registered in New York. Thus, the status of the corporations must be examined to determine whether alter ego status has been conferred.

It is well settled that to demonstrate two corporations are really the same and that obligations flowing from one are incumbent upon the other a "heavy burden" of evidence must be presented (Etex Apparel Inc., v. Tractor International Corp., 83 AD3d 587, 922 NYS2d 315 [1st Dept., 2011]). The Second Department in explaining the definition of an 'alter ego entity' held that a party must demonstrate that one entity controls the "day to day" activities of the other (Constantine v. Premier Cab Corp., 295 AD2d 303, 743 NYS2d 516 [2d Dept., 2002]). The language "day to day" activities was borrowed from another area of corporate law, namely the doctrine of piercing the corporate veil. The standard espoused in that context was that a parent corporate entity's veil could be pierced if it controlled the daily activities of the subsidiary such that it was "the true prime movers behind the subsidiary's actions" (Pebble Cove

Homeowners' Association Inc. v. Fidelity New York FSB, 153 AD2d 843, 545 NYS2d 362 [2d Dept., 1989]). Thus, the court held that joint stock ownership and interlocking directors and officers was insufficient to fuse the two companies together to pierce all corporate veils, rather control of the daily activities was required. Whether one entity controls another's day to day activities is obviously a factual question. Therefore, in Mournet v. Educational & Cultural Trust Fund of Electrical Industry, 303 AD2d 474, 756 NYS2d 433 [2d Dept., 2003], the court concluded that where insufficient evidence was presented whether two companies were alter egos of each other it was proper to resolve that issue in a motion for summary judgement.

At this juncture the plaintiff has adequately demonstrated that Mobileppi Inc., P & E Group, American Telecom, Ramilya Izyaguyev and Izibo Izyaguyev are alter egos of the other defendants upon whom jurisdiction was not contested. The complaint and other documentation submitted demonstrates that all the defendants, even those not registered in New York and the two individuals, all possess commingled ownership such that the five non registered and domiciled defendants control the day to day activities of the other defendants or are thus alter egos of each other. Therefore, at this time the motion seeking to dismiss the defendants for lack of jurisdiction is denied.

Turning to the motions seeking to dismiss the claims and

counterclaims, upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Dauids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the party (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

It is further well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). The defendants seek to dismiss this cause of action on the grounds there were no oral agreements with every party. However, as noted, the parties are alter egos of each other and further discovery will narrow the reach of any oral agreements. Therefore, the motion seeking to dismiss this cause of action is denied. Likewise, the motion seeking to dismiss the first counterclaim alleging the plaintiff also breached any contracts is denied. As noted, discovery will explore the rights of all parties and whether any breaches by either party occurred.

Concerning the second counterclaim, it is well settled that "the right to an accounting is premised upon the existence of a

confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (see, Palazzo v. Palazzo, 121 AD2d 261, 503 NYS2d 381 [2d Dept., 1986]). In this case there is no confidential relationship. Rather, the relationship is one whereby there is a claim of money owed. Consequently, the counterclaim seeking an accounting is dismissed.

The third counterclaim seeking indemnification is dismissed. Indeed, the counterclaim does not truly seek 'indemnification' from the plaintiff rather the counterclaim seeks a set-off. That is already included in the breach of contract claim and counterclaim and is consequently, redundant.

The last counterclaim alleging a breach of duty is dismissed. To succeed on a claim for breach of a fiduciary duty, a plaintiff must establish the existence of the following three elements: (1) a fiduciary relationship existed between the parties, (2) misconduct, and (3) damages that were directly caused by the misconduct (Kurtzman v Bergstol, 40 AD3d 588, 835 NYS2d 644, 646 [2d Dept., 2007], see, Birnbaum v. Birnbaum, 73 NY2d 461, 541 NYS2d 746 [1989] stating individuals jointly managing a limited liability corporation creates a fiduciary duty among the members analogous to that of partners). As already explained the parties were not in a fiduciary relationship.

Therefore, the final counterclaim is dismissed.

So ordered.

ENTER:

DATED: February 20, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC

KINGS COUNTY CLERK
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