# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

***Justice***

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BRAGARD, INC.,

Plaintiff,

- v -

HOSPITALITY UNIFORMS USA, INC.,SANTA FE APPAREL, INC.,SANTA FE APPAREL, LLC INDIVIDUALLY AND D/B/A HOSPITALITY UNIFORMS USA, INC.

Defendants.

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**INDEX NO.** 654498/2019

**MOTION DATE** N/A

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 51

were read on this motion to/for DISMISSAL.

The motion by defendants Hospitality Uniforms USA, Inc., Santa Fe Apparel, LLC individually and dba Hospitality Uniforms USA, Inc. ("Moving Defendants") to dismiss the claims against defendant Santa Fe Apparel, LLC ("Santa Fe LLC") is denied. The cross-motion by plaintiff for a default judgment against Hospitality is denied.

**Background**

Plaintiff manufactures and sells "high-end" uniforms, typically for the food and hospitality industries. It claims that in May 2018, it obtained a large order for uniforms for a casino in Las Vegas. Plaintiff contends that after it got the order, it contracted with defendants for manufacture, fulfillment and delivery. Plaintiff alleges that after the casino received the delivery, it complained that washing the uniforms caused the colors to bleed.

It adds that an officer of defendants (Mr. Tano) admitted there was a defect in the uniforms and agreed to fix it. Replacement uniforms were provided in January 2019, but plaintiff received complaints about those uniforms as well. Plaintiff complains that the casino eventually ended its relationship with plaintiff and demanded a refund for payments made to plaintiff.

Moving Defendants seek dismissal of the claims against Santa Fe LLC on the ground that the orders were exclusively between plaintiff and Hospitality USA. They deny plaintiff's alter ego theory that posits that Santa Fe LLC is another name for Hospitality USA. Moving Defendants also point out that defendant Santa Fee Apparel, Inc. is an "unknown company." They claim that plaintiff's amended complaint fails to state a cause of action against Santa Fe LLC and that its affidavits establish that this entity was never a party to any agreements, contracts or payments with plaintiff. Moving Defendants point out that pleading an alter ego theory of liability requires satisfaction of a heightened pleading standard and there is nothing in plaintiff's allegations that satisfies this burden.

Plaintiff cross-moves for a default judgment against Hospitality Uniforms USA, Inc. It asserts that it was Santa Fe LLC's president (Mr. Tano) that interacted with plaintiff's principal and that Santa Fe LLC's employees worked on plaintiff's order. It points out that the Moving Defendants shared an office, email system and phone number. Plaintiff theorizes that the Moving Defendants are hiding behind a "shell game of corporations."

Plaintiff points to the Administrative Services Agreement ("ASA") submitted by the Moving Defendants in support of their motion which details the relationship between Hospitality and Santa Fe LLC. It claims this agreement is so vague that it permits the parties to define its scope in their favor. It argues that this document does not utterly refute plaintiff's allegations.

In reply, the Moving Defendants complain that plaintiff owes them about $31,000. They point out that plaintiff has not denied the fact that the contract was between Hospitality and plaintiff and the ASA submitted supports dismissal of the claims against Santa Fe LLC. Moving Defendants also seek dismissal of claims against Hospitality because the casinos are allegedly using the purportedly unfit uniforms.

**Discussion**

A Court considering a motion to dismiss for failure to state a cause of action "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint" (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

A motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]).

As an initial matter, the Court observes that Moving Defendants' request that the claims against Hospitality be dismissed is denied because it was raised for the first time in reply. Any documents submitted in support of that request (including the photos of employees wearing the uniforms [NYSCEF Doc. No. 44]) were not considered. The notice of motion only seeks to dismiss the complaint against Santa Fe LLC (NYSCEF Doc. No. 7).

Therefore, the focus of this motion is whether plaintiff has stated a cause of action against Santa Fe LLC. There is no doubt that the contract was between plaintiff and Hospitality (NYSCEF Doc. No. 10). That means that Santa Fe LLC can only face liability under an alter ego theory. "In order to state a claim for alter-ego liability plaintiff is generally required to allege complete domination of the corporation in respect to the transaction attacked and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. Because a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no definitive rules governing the varying circumstances when this power may be exercised" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407, 997 NYS2d 67 [1st Dept 2014] [internal quotations and citations omitted]).

Here, plaintiff has pled a valid alter-ego theory of liability against Santa Fe LLC. Its president claims that "[d]uring the course of plaintiff's relationship with Hospitality, I dealt with Joe Tano, President of defendant Santa Fe Apparel, LLC" (NYSCEF Doc. No. 25, ¶ 11). And he attaches emails demonstrating his communications with Tano. Plaintiff's president says that there was "no part of plaintiff's relationship with Hospitality and Wynn, whether it involved placement, order review, good selection and review, communications with the manufacturing facility, shipping, delivery, and payments, that was not directly addressed with Mr. Tano, acting for Santa Fe, and many other Santa Fe employees. In retrospect, I do not believe that Hospitality had employees" (*id.* ¶ 13).

The submission of the ASA (an agreement between Hospitality and Santa Fe LLC) by the Moving Defendants also does not compel the Court to grant Moving Defendants' motion at the

motion to dismiss stage. It does not constitute conclusive evidence that plaintiff's alter ego theory must fail.

The ASA is a one-page agreement that states, in part, that "Service Provider shall perform such administrative services, back office clerical and occasionally place to meet with clients. Certain officers, employees and personnel of Service Provider [Santa Fe LLC] may also provide services for and hold officer titles in the Company" (NYSCEF Doc. No. 16 [Duties, Rights and Responsibilities section]). This vague and unclear language requires denial of the motion. There must be discovery as to whether Hospitality and Santa Fe LLC operated as two separate entities or whether this agreement meant that, in practice, Hospitality and Santa Fe LLC were really the same entity.

It may be that Hospitality contracted with Santa Fe to help out with plaintiff's orders, but there is a valid allegation that Santa Fe had complete dominion and control over Hospitality. The documents submitted on this motion support the contention that plaintiff entered into a contract with Hospitality but that Santa Fe LLC actually handled the contract.

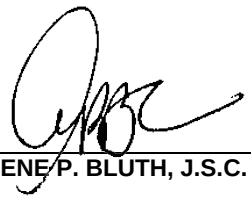
Although plaintiff is correct that Hospitality did not answer, the Court declines to enter a default judgment against this entity. Hospitality brought the motion along with Santa Fe LLC. Rather than grant plaintiff's cross-motion for a default judgment against Hospitality, the Court finds that the Moving Defendants can answer pursuant to the "for such other and further relief" clause contained in the notice of motion.

Accordingly, it is hereby

ORDERED that the motion by defendants Hospitality Uniforms USA, Inc., Santa Fe Apparel, LLC individually and dba Hospitality Uniforms USA, Inc. to dismiss is denied and these defendants must answer pursuant to the CPLR; and it is further

ORDERED that the cross-motion by plaintiff is denied.

Conference September 8, 2020 at 10 a.m. Please consult the part's rules and the docket concerning whether the conference will take place virtually. The parties are free to upload a preliminary conference order for the Court's approval, signed by both parties, prior to the conference.



06/03/2020
DATE

ARLENE P. BLUTH, J.S.C.

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