

Kasowitz Benson Torres LLP v Villari

2020 NY Slip Op 32595(U)

August 11, 2020

Supreme Court, New York County

Docket Number: 153730/2019

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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INDEX NO. 153730/2019

KASOWITZ BENSON TORRES LLP,

MOTION DATE 08/08/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

WILLIAM VILLARI, CEBV, LLC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISS.

In this action, the plaintiff law firm Kasowitz Benson Torres LLP (the Kasowitz firm) seeks to recover \$93,862.24 in legal fees for services rendered to defendant CEBV LLC (CEBV) pursuant to a retainer agreement executed on the company’s behalf by defendant William Villari (Villari). Villari now moves to dismiss the complaint as against him for lack of personal jurisdiction (CPLR 3211[a][8]) or, in the alternative, for failure to state a claim (CPLR 3211[a][7]). CEBV moves to dismiss the second and third causes of action, for quantum meruit and an account stated, for failure to state a claim.

BACKGROUND

The following facts are taken from the complaint (Dkt. 1)¹, the parties’ affidavits and documentary evidence submitted in connection with this motion. The Kasowitz firm is a limited liability partnership with an office in New York (Compl. ¶ 4). CEBV is a Georgia limited liability company (*id.*, ¶ 6) and Villari is an individual residing in Georgia (*id.*, ¶ 5). Pursuant to a written

¹ References to “Dkt.” followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

retainer agreement dated August 8, 2018 (the Retainer Agreement) (Dkt. 12), CEBV retained the Kasowitz firm to perform professional legal services in connection with a dispute involving potential litigation with an entity called Broad Street Holdings, LLC, and related matters (*id.*; Compl. ¶ 10). The Retainer Agreement provided for payment of an initial \$50,000 retainer and advised CEBV that under New York law, the company would have the option to arbitrate any fee dispute involved between \$1,000 and \$50,000. The Retainer Agreement was signed by Villari on behalf of CEBV.

The Kasowitz firm alleges that it performed the requested legal services and incurred and advanced various expenses and disbursement totaling \$93,862.24 (Compl. ¶ 19). The firm provided defendants with one or more invoices for the services, which were received without objection (*id.*, ¶¶ 17-18). Despite repeated written demands, defendants refused to pay (*id.*, ¶ 19). The complaint asserts claims for breach of contract, quantum meruit and account stated, and seeks to pierce CEBV's corporate veil to hold Villari personally liable for the fees.

DISCUSSION

For the following reasons, defendant Villari's motion to dismiss is granted, and defendant CEBV's motion is granted dismissing the claim for quantum meruit and is otherwise denied.

A. Defendant Villari's Motion to Dismiss

1. Personal Jurisdiction

As a threshold matter, the court finds that it has jurisdiction over defendant Villari. Although he is a resident of Georgia and the law firm was retained by a Georgia company concerning a dispute in that state, he does not dispute that the legal work was performed in New York, that he met with a partner of the Kasowitz firm in New York, and that he regularly

communicated with the firm by telephone and email. Such contacts are sufficient to establish jurisdiction over a corporate principal under New York's long-arm statute, CPLR 302(a)(1) (*see Fischbarg v Doucet*, 9 NY3d 375, 380–84 [2007]; *Millennium Imp., LLC v Reed Smith, LLP*, 63 AD3d 561, 562 [1st Dept 2009]). Villari's argument that he signed the Retainer Agreement solely in his official capacity is unavailing, as that fact bears only upon liability rather than jurisdiction (*see Eaton & Van Winkle LLP v Midway Oil Holdings Ltd.*, 2010 WL 1020087 (Sup Ct, NY Co 2010)). However, "[n]othing in [CPLR §302's] language or the legislative history relating to it suggests that the Legislature intended to accord any special treatment to fiduciaries acting on behalf of a corporation or to insulate them from long-arm jurisdiction for acts performed in a corporate capacity" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 470 [1988]).

2. Piercing the Corporate Veil

The complaint fails to plead a basis to hold Villari liable for CEBV's alleged debt. To pierce the corporate veil, the plaintiff must show that: (1) the defendant exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dep't 2012], *quoting Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). "[T]he 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" (*Matter of Morris*, 82 NY2d 140, 142 [1993]). "In determining the question of control, courts have considered factors such as the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of

discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity . . . [n]o one factor is dispositive” (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013], quoting *TNS Holdings v MKI Sec. Corp.*, 243 AD2d 297, 300, [1st Dept. 1997], *rev'd on other grounds*, 92 NY2d 335 [1998]).

A plaintiff is not required to plead the elements of alter ego liability with the particularity required of a fraud claim by CPLR 3016(b), but must plead them in a non-conclusory manner (see *2406-12 Amsterdam Assocs. LLC v Alianza LLC*, 136 AD3d 512, 512 [1st Dept 2016]; *Art Capital Bermuda Ltd. v Bank of N.T. Butterfield & Son Ltd.*, 169 AD3d 426, 427 [1st Dept 2019]; *Am. Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 477 [1st Dept 2016] [“Plaintiffs' allegations in support of piercing the corporate veil to hold [defendant] liable for [the corporation's] alleged breaches of contract, i.e., that [the corporation ‘ignored corporate formalities’ and was totally dominated by [defendant], are conclusory and therefore insufficient to warrant piercing the corporate veil”]). The plaintiff must supply factual allegations related to the transaction at issue (*Remora Capital S.A. v Dukan*, 175 AD3d 1219, 1220 [1st Dept 2019] and may not merely recite the factors upon information and belief (see *Cornwall Mgmt. Ltd. v Kambolin*, 140 AD3d 507, 507 [1st Dept 2016]; *Flanagan & Associates, PLLC v Roth*, 2004 WL 7336955, *3–4 (Sup Ct, NY Co 2004)). Nonspecific allegations that a defendant dominated a corporation to keep it judgment-proof to avoid the payment of legal fees are insufficient (see *Springut Law PC v Rates Tech. Inc.*, 157 AD3d 645, 646 [1st Dept 2018]). Furthermore, a “corporate defendant's alleged failure to pay legal fees owed under the parties' agreement does not constitute a fraud or wrong sufficient to pierce the corporate veil” (*Chiomenti Studio Legale, LLC v Prodos Capital Mgmt. LLC*, 140 AD3d 635, 636 [1st Dept 2016]).

Here, plaintiff's veil-piercing claim against Villari is pled entirely upon information and belief, and sets forth no concrete facts supporting its theory that he deliberately undercapitalized CEBV to deprive the firm of its fees. Moreover, the theory is belied by the fact that the firm received a substantial, \$50,000 advance on its fees upon the execution of the Retainer Agreement. Accordingly, the complaint must be dismissed as against Villari.

B. Defendant CEBV's Motion to Dismiss

1. *Quantum Meruit*

The claim against CEBV for quantum meruit recovery of the fees is dismissed. Where "it is clear from the record that [the] plaintiff is suing for the outstanding balance on invoices billed in accordance with the parties' retainer agreement, there can be no recovery in quantum meruit" (*Newman v Kalderon*, 189 Misc. 2d 622, 623 [1st Dept, App Term 2001]). Quantum meruit is only available where the existence or enforceability of the retainer agreement is challenged, or the dispute relates to matters outside the scope of agreement (*see Ferst v Abraham*, 140 AD3d 581, 582, 1st Dept 2016]; *Frechtman v Gutterman*, 140 AD3d 538, 538 [1st Dept 2016]). In this case, the validity of the retainer agreement is not in dispute, and plaintiff does not assert that it is seeking fees for work relating to any matter other than the Broad Street Holdings dispute.

2. Account Stated

The motion to dismiss the claim for an account stated is denied. "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept 2007], quoting *Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 [3d Dept 1993]). Such a claim may be established by a showing that the plaintiff regularly sent defendants invoices which were retained without objection within a reasonable time, or that

the defendant made partial payment on the invoices (*see Jaffe v Brown-Jaffe*, 98 AD3d 898, 899, [1st Dept 2012]; *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]). The complaint adequately pleads those elements, and plaintiff has supplemented its pleading with the relevant invoices through January 2019 together with emails requesting payment.

Defendants argue that the complaint is deficient because it alleges that plaintiff began invoicing defendants on or about the same day it began performing legal services, and on reply, note that the first invoice was delayed for two months after the work commenced. Neither of these contentions is relevant to the issue of whether CEBV ultimately acquiesced to the billing at some later date. Although Villari has submitted a reply affidavit alleging that the parties reached an understanding that the fees would be capped at \$50,000 and that he promptly objected to the invoices after seeing that the retainer had been exhausted, those assertions merely raise factual issues outside the scope of the pleading. Furthermore, those claims are undercut by Villari's statement in a March 2019 email, in which he said he could afford to "chip away" at an additional \$30,000 on top of the original \$50,000.

Accordingly, it is

ORDERED that the motion of defendant William Villari to dismiss is granted, and the complaint as against him is dismissed, with costs and disbursements to that defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued against the remaining defendant CEBV, LLC., and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further


ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the motion of defendant CEBV, LLC is granted as to the second cause of action for quantum meruit and otherwise denied, and its is further

ORDERED that defendant CEBV, LLC is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constituttes the diecison and order of the Court.

<u>8/11/2020</u> DATE		 W. FRANC PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE