

Ventnor Beauty Supply Inc. v Primary One LLC

2020 NY Slip Op 34323(U)

November 24, 2020

Supreme Court, Queens County

Docket Number: 721681/2019

Judge: Marguerite A. Grays

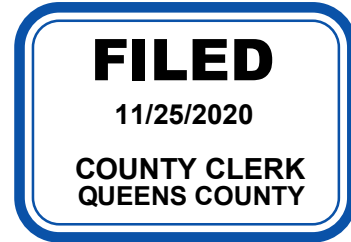
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4
Justice



VENTNOR BEAUTY SUPPLY INC.,

Plaintiff(s)

-against-

PRIMARY ONE LLC, MOHAMMED
AMANOLLAHI A/K/A ALEX AMANOLLAHI
AND UNKNOWN ENTITY

Defendant(s)

Index
Number 721681 2019
Motion
Date August 4, 2020
Motion Cal. No. 20
Motion Seq. No. 1

The following papers numbered EF7 - EF17 read on this motion by defendants pursuant to CPLR §3211(a) (7) to dismiss the complaint on the ground that the complaint fails to state a cause of action upon which relief can be granted and/or in the alternative, pursuant to CPLR §3211(a) (1) on the grounds that a defense is founded upon documentary evidence.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF7-EF12
Answering Affidavits - Exhibits	EF15-EF17

Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff commenced this action against defendant Primary One LLC (Primary One) for breach of contract and account stated seeking to recover \$112,489.03, the amount alleged to be owed to plaintiff from seven separate sales of goods which plaintiff made to defendant Primary One over a five-week period from September 11, 2019 to October 17, 2019. Plaintiff thereafter served a Supplemental Summons and Amended Complaint adding defendant Primary One's alleged owner, Mohammed Amanollahi a/k/a Alex Amanollahi

(Amanollahi), and an “unknown entity,” as defendants, as well as, a third cause of action for fraudulent conveyance under the former Debtor and Creditor Law (DCL).¹

All three causes of action, breach of contract, account stated and fraudulent conveyance, are asserted against defendant Primary One, and the breach of contract and fraudulent conveyance causes of action are asserted against the individual defendant, Amanollahi. With regard to its breach of contract claim as against Amanollahi, plaintiff seeks the court’s use of its equitable powers to intervene and pierce the corporate veil to hold Amanollahi personally liable for Primary One’s breach of contract in the amount of \$112,489.03. With regard to its fraudulent conveyance cause of action pursuant to former DCL §274, plaintiff seeks to set aside the conveyances of the corporation’s property which would have been available to satisfy any judgment plaintiff would obtain against Primary One had there been no conveyances. In the event that the assets transferred have been dissipated by Amanollahi, plaintiff seeks a monetary judgment against Amanollahi and/or the unknown entity up to the amount of any judgment against Primary One.

In the Amended Complaint, plaintiff alleges the following:

The individual defendant, Amanollahi, who is the defendant limited liability company Primary One’s sole owner and manager, completely dominated and controlled Primary One to a degree that Primary One does not have an existence or identity separate or apart from Amanollahi. The identity of defendant “unknown entity” is not currently known by plaintiff but upon information and belief, is associated with defendants Primary One and Amanollahi, and is believed to have contributed to their unlawful activities. Between September 11, 2019 and October 17, 2019, on seven different occasions at Amanollahi’s request, plaintiff furnished certain goods to Primary One totaling \$112,489.03. Despite repeated demands by plaintiff, Primary One failed to pay that balance which constitutes a breach of the seven sales contracts reflected in the seven invoices annexed to the complaint. With respect to the seven transactions, Amanollahi completely dominated and controlled Primary One, and in doing so, has abused the privilege of doing

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The Court notes that on April 4, 2020, Article 10 of the DCL was repealed and replaced with a new statutory scheme. However, the new DCL provisions are not retroactive and only apply to transfers made after April 4, 2020. (*See McKinney's 2019 Session Law News of NY Ch. 580 [A. 5622].*) Thus, this decision and order references the “former” DCL.

business as a limited liability company, by using such domination and control to commit a fraud or wrong upon plaintiff which resulted in financial injury to plaintiff. Primary One was insolvent when Amanollahi placed those seven orders with plaintiff and placed the orders intending not to pay for them, which caused plaintiff to sustain substantial monetary loss of \$112,489.03. In furtherance of the fraud, Amanollahi had his buyer falsely represent to plaintiff's president that Primary One would pay for three additional shipments and the four prior shipments knowing that Primary One was insolvent and had no intention of paying for these goods from plaintiff. These representations were known to be false when made and were made with the intent of defrauding plaintiff by inducing it to ship more goods so that Primary One could resell those goods at a profit or transfer them to the unknown entity, enriching Amanollahi and/or the unknown entity at plaintiff's expense.

Plaintiff provided Primary One with statements of accounts which were accepted by Primary One without protest or objection. An account was taken and stated between plaintiff and Primary One which showed a balance of \$112,489.03 due and owing by Primary One to plaintiff. Despite demands for payment, no part of that sum of \$112,489.03 has been paid.

Amanollahi as sole owner and president of Primary One exercised complete domination and control over Primary One to a degree that Primary One has no existence or identity separate and apart from Amanollahi. While Primary One was incurring the foregoing obligations while insolvent, Amanollahi was transferring to himself or an unknown entity without fair consideration the assets of Primary One for his own personal benefit to the detriment of plaintiff and other creditors of Primary One which left Primary One with unreasonably small capital to pay for its obligations. That such conveyances of assets while insolvent and without fair consideration from Primary One to Amanollahi and/or the unknown entity were fraudulent within the meaning of the [former] DCL §274 and thus void as to creditors such as plaintiff.

Plaintiff's underlying invoices are annexed to the Amended Complaint and are addressed to defendant Primary One.

Defendants now move for dismissal of plaintiff's Complaint pursuant to CPLR §3211 (a) (1) and (7) on the grounds that a defense is founded upon documentary evidence and the pleadings fail to state a cause of action.

On a motion to dismiss pursuant to CPLR §3211(a)(7), the Court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83 [1994]; *see also Morone v Morone*, 50 NY2d 481 [1980]; *Matter of Valderrama*, 184 AD3d 650 [2020]). The Court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*See Morone v Morone, supra*). "However, bare legal conclusions are not presumed to be true and are not accorded every favorable inference." (*Grant v DiFeo*, 165 AD3d 897, 899 [2018]; *see TMCC, Inc. v Jennifer Convertibles, Inc.*, 176 AD3d 1135 [2019]; *see also Kupersmith v Winged Foot Golf Club, Inc.*, 38 AD3d 847 [2007]). A party may also move to dismiss based on documentary evidence pursuant to CPLR §3211(a)(1). A motion to dismiss pursuant to CPLR §3211(a)(1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*See Leon v Martinez, supra; see also Kupersmith v Winged Foot Golf Club, Inc., supra; Williams v Williams*, 36 AD3d 693 [2007]).

A plaintiff seeking to pierce the corporate veil to hold the owners of a corporation liable for the corporation's debts bears a heavy burden of showing: "(1) the owners 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" (*Conason v Megan Holding, LLC*, 25 NY3d 1, 18 [2015]; *see Minico Ins. Agency, LLC v AJP Contr. Corp.*, 166 AD3d 605 [2018]; *see also Love v Rebecca Dev., Inc.*, 56 AD3d 733 [2008]). "The party seeking to pierce the corporate veil must further establish that the controlling corporation 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" (*Love v Rebecca Dev., Inc., supra* at 733; *see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135 [1993]; *see also Weinstein v Willow Lake Corp.*, 262 AD2d 634 [1999]). "The concept is equitable in nature, and the decision whether to pierce the corporate veil in a given instance will depend on the facts and circumstances." (*Hyland Meat Co. v Tsagarakis*, 202 AD2d 552, 553 [1994]).

To prevail on a breach of contract claim, a plaintiff must establish "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426[2010]; *see Dee v Rakower*, 112 AD3d 204 [2013]; *see also JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802 [2010]). Here, in the Complaint, it is alleged that plaintiff delivered goods to Primary One pursuant to seven separate invoices, which invoices were valid and enforceable contracts, Primary One received the goods but failed to pay for them in violation of its obligations under the invoices, and plaintiff was damaged in the total sum of \$112,489.03 as a result of Primary One's breach. These allegations, taken as true for the purposes of this

motion to dismiss, sufficiently state a cause of action for breach of contract against Primary One.

In addition, while defendants seek dismissal of the breach of contract claim against the individual defendant, Amanollahi, on the ground that there is no privity of contract between plaintiff and Amanollahi, accepting the allegations of the complaint as true and according plaintiff the benefit of every favorable inference, the Complaint alleges sufficient facts to warrant piercing the corporate veil of Primary One to hold the individual defendant Amanollahi liable for Primary One's obligations.

Accordingly, the branch of defendants' motion seeking to dismiss the cause of action for breach of contract against defendants for failure to state a cause of action pursuant to CPLR §3211(a)(7) is denied.

The branch of defendants' motion seeking to dismiss the cause of action for breach of contract against defendant Amanollahi on the grounds that a defense is founded upon documentary evidence pursuant to CPLR §3211(a)(1) is also denied. The documentary evidence upon which defendants rely, that is, the invoices and shipping documents annexed to plaintiff's complaint, do not utterly refute plaintiff's allegations or conclusively establish a defense as a matter of law.

Although defendants in their notice of motion seek dismissal of plaintiff's complaint in its entirety, defendants, in their motion papers, do not set forth any arguments in support of dismissal of the Second Cause of Action for account stated, which cause of action is asserted against defendant Primary One only. In any event, plaintiff, in its complaint, alleges that it sent goods and invoices to Primary One setting forth full and true accounts of the indebtedness owed by Primary One, which goods and invoices were accepted and retained by Primary One without objection. These allegations sufficiently plead a cause of action for account stated against Primary One (*see Fleetwood Agency, Inc. v Verde Elec. Corp.*, 85 AD3d 850 [2011]).

Accordingly, the branch of defendants' motion seeking to dismiss the cause of action for account stated against defendant Primary One for failure to state a cause of action pursuant to CPLR §321(a)(7) is denied.

The Third Cause of Action in plaintiff's complaint against defendants is for fraudulent conveyance under former DCL § 274 which provides that "[e]very conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his [or her] hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who

become creditors during the continuance of such business or transaction without regard to his [or her] actual intent.” (Former DCL § 274; see *Board of Mgrs. of E. Riv. Tower Condominium v Empire Holdings Group, LLC*, 175 AD3d 1377 [2019]; see also *Stout St. Fund I, L.P. v Halifax Group, LLC*, 148 AD3d 744 [2017]). Section 270 of the former DCL defines “creditor” as any “person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent.”

In order to state a cause of action under former DCL § 274, a plaintiff must allege that: (1) the defendant made conveyances; (2) without fair consideration and (3) leaving it with unreasonably small capital (see *ABN AMRO Bank, N. V. v MBIA Inc.*, 17 NY3d 208 [2011]).

Since valid claims of violations of former DCL § 274 do not require proof of actual motive or intent to defraud, such claims are not required to be pleaded with the particularity required by CPLR §3016(b) (See *Board of Mgrs. of E. Riv. Tower Condominium v Empire Holdings Group, LLC, supra*; see also *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141 [2009]; *Menaker v Alstaedter*, 134 AD2d 412 [1987]).

Plaintiff alleges in the complaint that it is a creditor, and that the individual defendant Amanollahi transferred the assets of defendant Primary One to himself and/or another entity without fair consideration for his personal benefit, leaving Primary One with unreasonably small capital and unable to pay its obligations to plaintiff and other creditors. Plaintiff further alleges that the conveyances of assets while insolvent and without fair consideration from Primary One to Amanollahi and/or the unknown entity were fraudulent. Accepting these allegations as true and affording plaintiff the benefit of every favorable inference, plaintiff has stated a cause of action against defendants for fraudulent conveyance under former DCL § 274 (See *Board of Mgrs. of E. Riv. Tower Condominium v Empire Holdings Group, LLC, supra*).

Accordingly, the branch of defendants’ motion seeking to dismiss plaintiff’s cause of action for fraudulent conveyance against defendants for failure to state a cause of action pursuant to CPLR §3211(a)(7) is denied.

In light of the foregoing, defendants’ motion to dismiss is denied in its entirety.

Dated: November 24, 2020

MARGUERITE A. GRAYS
J.S.C.

