

**Gateway Intl. 360, LLC v Richmond Capital Group,  
LLC**

2021 NY Slip Op 30218(U)

January 19, 2021

Supreme Court, New York County

Docket Number: 654636/2018

Judge: Shawn T. Kelly

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 57

-----X  
GATEWAY INTERNATIONAL, 360, LLC, HARPER  
ZARKER,

Plaintiff,

- v -

RICHMOND CAPITAL GROUP, LLC, GTR SOURCE, LLC,  
MZEED, INC. D/B/A MEGA CAP FUNDING, ORANGE  
ACH, LLC, MICHELLE GREGG, TSVI DAVIS, JONATHAN  
BRAUN,

Defendant.  
-----X

INDEX NO. 654636/2018

MOTION DATE 11/17/2020

MOTION SEQ. NO. 020

**DECISION + ORDER ON  
MOTION**

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 020) 525, 526, 527, 528, 529, 530, 541, 573, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 610, 611, 612, 613, 614, 615, 616

were read on this motion to/for DISMISS

Upon the foregoing documents, it is

Defendants Richmond Capital Group, LLC ("RCG") and Michelle D. Gregg ("Gregg") (collectively, "Defendants") move to dismiss Plaintiffs' Gateway International 360, LLC's ("Gateway") and Harper Franklin Zarker, Jr.'s ("Zarker") (collectively, "plaintiffs") Amended Complaint pursuant to CPLR §3211(a)(7) for failure to state a claim upon which relief can be granted as to the following causes of action alleged in plaintiffs' Amended Complaint: (1) Breach of GBL § 349; (2) Fraudulent Inducement; (3) Breach of Contract; (6) Fraud; (7) Civil Conspiracy; (8) Conversion; and (9) Unjust Enrichment.

**Background**

Plaintiffs allege various forms of purported wrongdoing by defendants in connection with certain Merchant Cash Advance ("MCA") agreements, pursuant to which plaintiffs borrowed

money from the defendant entities and, in turn, plaintiff Gateway provided the defendant entities with access to its accounts receivable in order to repay the borrowed funds. Specifically, plaintiffs allege the existence of a fraudulent scheme among closely related “merchant cash advance” companies which share the same address and personnel. The scheme involves luring plaintiffs into paying off advances from one defendant at a purported “discount” from the amount that would have been due over time with the expectation of a larger cash advance on better terms from another defendant that would satisfy the initial advance as well as plaintiffs’ other debts. Plaintiffs contend that the larger advance would not be made, and plaintiffs would be left with mounting unpaid debts as defendants reaped a quick and substantial return from plaintiffs’ first cash advance. Plaintiffs would then be worse off than before taking the original advance. Plaintiffs seek to recover damages incurred as a result of this alleged fraudulent scheme.

### Analysis

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true” (*Alden Global Value Recovery Master Fund, L.P. v KeyBank National Association*, 159 AD3d 618, 621-22 [2018]). In addition, “on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff” (*Id.* at 622). However, vague and conclusory allegations cannot survive a motion to dismiss (*see, Kaplan v Conway and Conway*, 173 AD3d 452, 452-53 [2019]; *D. Penguin Brothers Ltd. v City National Bank*, 270 NYS3d 192, 192 [2018] [noting that “conclusory allegations fail”]; *R & R Capital LLC, et al., v Linda Merritt*, 68 AD3d 436, 437 [2010]).

The criterion for establishing whether a complaint should be dismissed pursuant to §3211(a)(7) is “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Foley v D’Agostino*, 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR §3211(a)(7) (see *EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001][motion must be denied if “from [the] four corners [of the pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law”]).

**First Cause of Action- Breach of General Business Law §349**

The first cause of action is breach of General Business Law §349 (herein “GBL”) against all defendants. New York GBL §349 prohibits “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in New York State (see *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55–56, 720 NE2d 892 [1999]). Defendants contend that the vague allegations advanced by plaintiffs are insufficient to state a GBL §349 claim. Defendants further argue that the alleged consumer-oriented conduct was limited to just the parties and did not involve the purchase of goods or services for personal use. In opposition, plaintiffs argue that they have pled sufficient allegations to support a claim for breach of GBL §349.

To state a claim under the statute, a plaintiff must allege that the defendant has engaged “in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof” (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25, 647 NE2d 741 [1995]). As a threshold matter, plaintiffs claiming the

benefit of section 349, whether individuals or entities, must allege conduct on the part of defendant that is consumer oriented. Consumer oriented conduct does not require a repetition or pattern of deceptive behavior, nor does it require recurring conduct. Plaintiff must demonstrate that the acts or practices have a broader impact on consumers at large (*Benetech, Inc. v Omni Fin. Group, Inc.*, 116 AD3d 1190, 1190 [2014]). Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute (*see, e.g., Genesco Entertainment v Koch*, 593 F Supp 743, 752 [1984]).

Plaintiffs argue that the present matter affects the public interest in New York because the defendants are based in New York, their contracts are governed by the State of New York, and their confessions on judgments are filed in New York State Courts before being domesticated around the country. These allegations are not adequate to demonstrate that defendants' actions are consumer-oriented and therefore, defendants' motion as to the first cause of action is granted.

**Second Cause of Action- Fraudulent Inducement and Sixth Cause of Action- Fraud**

The second cause of action is Fraudulent Inducement and the sixth cause of action is Fraud as against defendants Gregg and RCG, as alter egos. Specifically, plaintiffs allege that Gregg is liable for fraud even if the Court does not pierce the corporate veil, because she misrepresented the existence of 'Jack Snyder' to Zarker during the phone conversation wherein Gregg facilitated early satisfactions on behalf of RCG, GTR, MZeed, and Orange. Further, plaintiffs allege that Gregg knew that defendant Braun was using 'Jack Snyder' as an alias. Plaintiffs also contend that RCG as a corporation must be liable for Gregg and Braun's fraudulent actions as Gregg and Braun were agents of the corporation.

When a plaintiff brings a cause of action based upon fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR §3016 [b]). "The purpose of section 3016

(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of.” thus. “[w]e have cautioned that section 3016 (b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud” (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). What is “[c]ritical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action.” and although under CPLR §3016 (b) “the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud” (*id.* at 492). “Necessarily, then, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct” (*id.*). The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages (*Eurycleia Partners, LP v Seward & Kissel. LLP*, 12 NY3d 553 [2009]).

Further, the elements of a fraudulent inducement or misrepresentation claim are: (1) the defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, and (4) there was justifiable reliance on the part of the plaintiff resulting in an injury for which compensable damages are sought (*see Connaughton v Chipolte Mexican Grill*, 29 NY3d 137, 142 [2017]; *McSpedon v Levine*, 158 AD3d 618, 620 [2d Dept 2018]; *Mariano v Fiorvante*, 118 AD3d 961, 962 [2d Dept 2014]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]).

Giving plaintiffs the benefit of every inference, the complaint states a cause of action for fraudulent inducement and fraud, by alleging that defendants knowingly misrepresented a present fact in order to induce plaintiffs to enter into the agreement (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81, 915 NYS2d 521 [1st Dept 2010], *lv. dismissed* 17 NY3d 782, 929 NYS2d 83

[2011]; *Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC*, 125 AD3d 548, 549, 5 NYS3d 373, 375 [2015]). The fraudulent inducement claim is not duplicative of the fraud claim or the breach of contract claim. Courts have consistently held that allegations, such as the type plaintiffs have outlined, are sufficient to state a cause of action for fraud in the inducement (522 *Realty, LLC v. Heurtelou*, No. 523175/2018, 2020 WL 3124239, at \*2-3 [ 2020]; *Caboara v Babylon Cove Development*, 82 AD3d 1141,1142 [2d Dept 2011]; *Bhandari v Ismael Leyva Architects*, 84 AD3d 607,608 [1st Dept 2011]; *Bd. of Managers of Marke Gardens Condominium v 240/242 Franklin Ave LLC*, 71 AD3d 935, 936 [2d Dept 2010]). Accordingly, defendants' motion to dismiss the second and sixth cause of action is denied.

#### **Alter Ego/Piercing the Corporate Veil**

Plaintiffs allege that Gregg dominated RCG in the course of the transactions and that such domination was used to commit fraud or wrongdoing against Plaintiffs, which resulted in injury to plaintiffs. Specifically, plaintiffs contend that pursuant to the RCG MCA Agreement dated July 26, 2018, RCG was required to deliver \$30,000 in exchange for the receivables purchased worth \$44,970. Plaintiffs allegedly performed their obligations pursuant to the agreement by selling \$44,970 worth of Gateway's receivables at a discounted price, executing the MCA Agreements, the ACH authorizations, and the COJ. Plaintiffs allege that RCG, however, materially breached the Agreement by delivering only \$21,002. Plaintiffs argue that RCG failed to deliver \$8,999, and that this amount was not due to fees, but was a kickback provided for disclosing plaintiffs' confidential information. Further, plaintiffs aver that even if the \$8,999 was arguably fees, these fees were not disclosed to plaintiffs prior to entering into the agreement.

The doctrine of piercing the corporate veil is typically employed by a party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 183 AD2d 5, 588 NYS2d 927 [Court of Appeals 1993]; *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 432 NYS2d 879 [1980]; *Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 389 NYS2d 327 [1976]). The doctrine is equitable in nature and the piercing of the corporate veil does not constitute an independent cause of action, but is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners (*see Matter of Morris*, 183 AD2d 5).

Piercing of the corporate veil is dependent on the specific facts and equities, but generally requires a showing that: (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 (*see Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 997 NYS2d 67 [2014]; *Matter of Morris*, 183 AD2d 5). The theory of piercing the corporate veil involves a fact intensive inquiry that is not well suited for determination prior to discovery (*see Gardner v Yanko*, No. 600606/09, 2011 WL 3565829 [2011]; *Ledy v Wilson*, 38 AD3d 214, 214 [1st Dept 2007]; *Kralic v Helmsley*, 294 AD2d 234, 235-36 [1st Dept 2002]; *International Credit Brokerage Co. Inc. v Agapov*, 249 AD2d 77, 78 [1st Dept 1998]).

In the present case, particularly as there has been no discovery, the amended complaint sets forth sufficient allegations to establish the *prima facie* piercing of the corporate veil. Specifically, the amended complaint alleges that Gregg did not maintain corporate formalities as to RCG, dominated the corporate defendant, and acted as its alter ego to perpetuate fraud on

plaintiffs. The allegations sufficiently support plaintiffs' assertion that the corporate veil should be pierced.

### **Third Cause of Action- Breach of Contract**

The third cause of action set forth in the Amended Complaint is for breach of contract. Plaintiffs allege that Gregg should be held liable as an alter ego of RCG. Defendants contend that Gregg did not personally execute the MCA agreements on behalf of the corporations and that she is not liable for any wrongdoing.

The elements of a breach of contract claim are "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 [1st Dept 2010]). Taken in the light most favorable to plaintiffs, the allegations contained in the Amended Complaint are sufficient to support a breach of contract cause of action as against Gregg and RCG. Accordingly, defendants' motion to dismiss the third case of action is denied.

### **Seventh Cause of Action- Civil Conspiracy**

The seventh cause of action is Civil Conspiracy against all defendants. New York does not recognize an independent cause of action for conspiracy to commit fraud (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457 [1st Dept 2011]) "While a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action" (*see MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1995], *citing Brackett v Griswold*, 112 NY 454 [1889]). Given that civil conspiracy is not an independent tort, it cannot have its own independent measure of damages; any damages attributable to plaintiff's conspiracy claim exists only within those damages that may be assessed for fraud" (*id.*). Accordingly, defendants' motion to dismiss the seventh cause of action is granted.

### Eighth Cause of Action- Conversion

The eighth cause of action is Conversion as against Gregg and RCG as alter egos. A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property (*Pierpoint v Hoyt*, 260 NY 26 [1932]; *State v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002]) and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (*Employers' Fire Ins. Co. v Cotten*, 245 NY 102 [1927]).

Plaintiffs contend that although the MCA agreement granted RCG access to their bank accounts, the unauthorized debit of \$899 on July 31, 2018, amounts to conversion. Though these facts without more would not be sufficient to survive a motion to dismiss, the plaintiffs have sufficiently plead a theory of alter ego liability and discovery has not been completed yet. Therefore, the eighth cause of action will not be dismissed at this time (*see Gowen v Helly Nahmad Gallery, Inc.*, 60 Misc 3d 963, 984-85, 77 NYS3d 605, 622-23 [2018], *aff'd*, 169 AD3d 580 [2019]).

### Ninth Cause of Action- Unjust Enrichment

The ninth cause of action is Unjust Enrichment against all defendants. Gregg contends that this cause of action must be dismissed as plaintiffs fail to allege that he received any personal benefit. Further, Gregg argues that the unjust enrichment claim is duplicative of the breach of contract claim and accordingly, must be dismissed. In opposition, plaintiffs aver that benefits were personally conferred on Gregg either through commissions paid, profits shared, and/or other cash disbursements (Amended Complaint ¶¶282- 283).

“Unjust enrichment is a quasi-contract theory of recovery, and is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned’ ” (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], *quoting IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege “that the other party was enriched, at plaintiff’s expense, and that “it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered’ ” (*Georgia Malone & Co.*, 86 AD3d at 408, *quoting Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). However, “[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Further, although privity is not required for an unjust enrichment claim (*Sperry v Crompton Corp.*, 8 NY3d 204, 215, 831 NYS2d 760 [2007]), a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff’s part (*Mandarin Trading*, 16 NY3d at 182). An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388–389, 521 NYS2d 653 [1987]; *Samiento v World Yacht Inc.*, 10 NY3d 70, 81 [2008]).

While a claim for unjust enrichment may stand alongside a breach of contract cause of action at the pleading stage (*see Wilmoth v Sandor*, 259 AD2d 252, 254 [1st Dept 1999]), when, as here, plaintiffs allegations merely duplicate the tort and contract claims stated, a claim for unjust enrichment is not stated (*see Khurdayan v Kassir*, No. 159480/17, 2020 WL 3511498, at \*4 [2020]; *Shilkoff Inc. v 885 Third Avenue Corp.*, 299 AD2d 253 [1st Dept 2002]; *Brintec*

Corp. v Akzo, N.V., 171 AD2d 440 [1st Dept 1991][recovery for unjust enrichment applies only in the absence of an express agreement]. Accordingly, the ninth cause of action is dismissed.

**Conclusion**

Accordingly, defendants' motion to dismiss is partially granted to the extent that the first, seventh and ninth causes of action are dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted and the first, seventh, and ninth causes of action of the complaint are dismissed; and it is further

ORDERED that defendants Gregg and RCG is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference to be conducted remotely on March 17, 2021 at 12:30 PM.

1/19/2021  
DATE

SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: