

**HLI Rail & Rigging, LLC v Franklin Exhibit Mgt.
Group, LLC**

2021 NY Slip Op 30317(U)

February 1, 2021

Supreme Court, Kings County

Docket Number: 528292/19

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM: COMMERCIAL PART 8

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HLI RAIL & RIGGING, LLC,
Plaintiffs, Decision and order

- against - Index No. 528292/19

FRANKLIN EXHIBIT MANAGEMENT
GROUP LLC, AF1 EXHIBIT HOLDINGS LLC,
485EV ASSETS LLC and AARON L.
SCHARF,

Defendants, February 1, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3212 seeking summary judgement dismissing all claims filed against Aaron Scharf individually. Further, the defendants seek to dismiss the unjust enrichment claim on the grounds it is duplicative of the breach of contract claim. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing the arguments of all parties this court now makes the following determination.

Background

On October 31, 2018 the defendant Franklin Exhibit Management Group LLC [hereinafter 'Franklin'] entered into a contract with the plaintiff wherein the plaintiff agreed to transport a decommissioned aircraft from Rhode Island to Maryland for a price of \$850,000. The aircraft was made into a replica of Air Force One and was intended to operate as an exhibit as part of the Children's Democracy Project. The plaintiff commenced this

lawsuit alleging the defendants have not paid any of the contract price associated with the transport of the airplane. The complaint alleges two causes of action against all defendants, for breach of contract and unjust enrichment. Defendant Scharf has moved seeking to dismiss the claims against him on the grounds he cannot be personally liable for any corporate liability. Further, the defendants seek to dismiss the unjust enrichment claim on the grounds it is duplicative of the breach of contract claim. The plaintiff opposes the motions. They contend they should be permitted to engage in discovery to determine Scharf's relationship with the corporate entity to discern if personal liability is proper. Moreover, the plaintiff asserts the unjust enrichment claim is proper since the defendants received ticket sales as a result of the transport and such enrichment are distinct from the allegations of breach of contract.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where only one conclusion

may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Derdiarian v. Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

To succeed on a request to pierce the corporate veil the plaintiff must demonstrate that "(1) the owners exercised complete dominion of the corporation in respect to the transaction attacked; and (2) that such dominion 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, 6 NYS3d 206 [2015]). As the Court of Appeals observed, at the pleading stage "a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in 'bad faith' while representing the corporation" (East Hampton Union Free School District v. Sandpebble Builders Inc., 16 NY3d 775, 919 NYS2d 496 [2011]). Rather, the plaintiff must allege facts demonstrating such dominion over the corporation and that "through such domination, abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice against the plaintiff such that a court in equity will intervene" (Oliveri Construction Corp., v. WN weaver Street LLC, 144 AD3d 765, 41 NYS3d 59 [2d Dept., 2016]). "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to [corporate or] LLC formalities, inadequate

capitalization, commingling of assets, and the personal use of [corporate or] LLC funds" (see, Grammas v. Lockwood Associates LLC, 95 AD3d 1073, 944 NYS2d 623 [2d Dept., 2012]). Thus, mere conclusory statements that the individual dominated the corporation are insufficient to defeat a motion to dismiss (AHA Sales Inc., v. Creative Bath Products Inc., 58 AD3d 6, 867 NYS2d 169 [2d Dept., 2008]).

In this case the complaint states that "Scharf is the sole member of FEMG, and upon information and belief is the sole member of AF1 and 485EV, and at all times was Defendants' sole representative and point of contact with HLI" (see, Complaint, ¶13). Further, the complaint states two more times that "Scharf is the sole member" of Franklin and the other corporate defendants (see, Complaint, ¶¶ 38, 45). The complaint does not contain any allegations at all supporting any criteria for piercing the corporate veil and imposing liability upon Mr. Scharf. The complaint does not even allege in a conclusory fashion any of the elements necessary to pierce the corporate veil. In Albstein v. Elany Contracting Corp., 30 AD3d 210, 818 NYS2d 8 [1st Dept., 2006] the court granted the motion seeking to dismiss the piercing of the corporate veil on the grounds the plaintiff alleged "nothing more than that the corporation was 'undercapitalized' and functioned as" the individual's "alter ego" (id). The court further noted the plaintiff failed to

"plead any facts to substantiate such conclusory claims" and did not "sufficiently allege that the corporate form was used to commit a fraud against her" (id).

The plaintiff argues that discovery is necessary to determine whether such evidence exists to pierce the corporate veil. However, as noted, the complaint does not any facts whatsoever that Scharf acted in any improper manner that would even warrant further discovery exploring these issues. In East Hampton Union Free School District v. Sandpebble Builders Inc., 66 AD3d 122, 884 NYS2d 94 [2d Dept., 2009] the court rejected the argument presented here that a motion for summary judgment should be denied so the issues of piercing the corporate veil can be pursued. Specifically, the court held it was "inappropriate" to deny dismissal of a complaint where "evidence may eventually be discovered that would justify piercing the corporate veil. The policy inherent in allowing individuals to conduct business in the corporate form so as to shield themselves from personal liability would be seriously threatened were we to allow an insufficient cause of action to survive, at least to the summary judgment stage, merely on the plaintiff's hope that something will turn up" (id). The complaint does not assert any improper action on the part of Mr. Scharf at all just to note that he is the sole owner of the corporate entities. However, that fails to allege any conduct that would even permit further discovery to

discern the precise nature of Mr. Scharf's activities.

Therefore, based on the foregoing, the motion seeking to dismiss the complaint as to Mr. Scharf is denied.

Turning to the unjust enrichment claim, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). The plaintiff argues that unjust enrichment is appropriate because "tickets to the Air Force One Experience were sold and payment was received by someone. The recipient of such payment also received the benefit of HLI's specialized transportation services without compensating HLI for its specialized and unique services. Without HLI's efforts, the recipient of such revenue would not have had the opportunity to make money from those ticket sales, and therefore was unjustly enriched at HLI's expense" (Memorandum of Law in Opposition, page 10).

Thus, the plaintiff has presented claims for unjust enrichment that are outside the contractual damage and outside the contractual context. Therefore, any motion seeking to dismiss the unjust enrichment claim at this juncture is consequently denied.


Therefore, both causes of action are dismissed as to Mr.

Scharf since there has been no showing of piercing the corporate veil and no discovery is warranted in this regard. The two causes of action remain against the remaining corporate defendants.

So ordered.

ENTER:

DATED: February 1, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC