

Catalano v Spirit & Flesh, Inc.
2022 NY Slip Op 34126(U)
December 7, 2022
Supreme Court, New York County
Docket Number: Index No. 150383/2019
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 14

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CATALANO, VINCENT	INDEX NO.	<u>150383/2019</u>
Plaintiff,	MOTION DATE	<u>11/25/2022</u>
- v -	MOTION SEQ. NO.	<u>002</u>
SPIRIT & FLESH, INC., SPIRIT & FLESH, LLC, and, YELENA DEYNEKO, individually, and CHRISTOPHER AUSTOPCHUK, individually,	DECISION + ORDER ON MOTION	
Defendants.		

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for SUMMARY JUDGMENT.

Defendants' motion for summary judgment dismissing the complaint is denied.

Background

This action arises out of a breach of contract claim for editing work performed for a fashion magazine titled *Spirit & Flesh* (named as defendants Spirit & Flesh, Inc. and Spirit & Flesh, LLC). Plaintiff claims he is a "creative talent" in the fashion industry and that he agreed to do editing work for defendants Deyneko and Austopchuk, the owners, editors, and publishers of *Spirit & Flesh*. Plaintiff alleges that Deyneko and Austopchuk promised to pay plaintiff a 10% ownership interest in the magazine entity, reimbursement for all of his expenses, and a wage set at the industry average for an editor of his experience. However, plaintiff admits that there was never a written contract that formally set out the terms of his employment for defendants.

Plaintiff contends that he performed work for defendants from February 2018 until September 2018, received a work email account, traveled on business trips to Paris, and allegedly routinely worked up to 80 hours per week. During this time, plaintiff did not receive any compensation and claims he was told he would get paid after the magazine was published, but he never received the money he claims he was promised. Plaintiff claims that he is owed at least “\$15,000 to \$20,000 per month, with all expenses reimbursed” (NYSCEF Doc. No. 2 at 7), which he alleges is the industry standard for an editor a fashion magazine. Plaintiff asserts causes of action for quantum meruit, breach of contract, unpaid wages, unpaid overtime, and violation of Labor Law § 195(1) & (3).

Defendants’ motion

Defendants move for summary judgment and insist that there was no agreement to financially compensate plaintiff for his work as an editor. Defendants claim that there was no employment contract that set forth all essential terms, including wages. Instead, defendants contend that the only compensation plaintiff was offered was a commission on whatever advertisers he brought to the magazine, but he brought none, so nothing is due. Defendants claim plaintiff got the benefit of exposure in the industry.

Additionally, defendants claim there is no evidence to justify piercing the corporate veil to sue Deyneko and Austopchuk in their individual capacities. Defendants contend that Deyneko and Austopchuk were not the recipients of services rendered by plaintiff. Instead, the defendants claim if a benefit was conferred by plaintiff, the corporate defendants were the recipients (although defendants do not concede that they owe plaintiff anything). Thus, plaintiff cannot satisfy the elements of a claim for quantum meruit against Deyneko and Austopchuk

individually. Defendants also contend that plaintiff cannot sustain a quantum meruit claim against the company either because plaintiff cannot prove that he performed the work. They emphasize that plaintiff's expense reports were generated for use by his attorneys in this matter. Finally, defendants contend that plaintiff was not an employee under New York law as there was no indication defendants exerted any form of control over plaintiff and no employment relationship ever existed.

In opposition, plaintiff contends that summary judgment is inappropriate because material issues of fact exist. For one, plaintiff maintains that there are issues of fact as to the existence of an oral contract because there is clear evidence that plaintiff performed services for defendants for at least 7 months, and a triable issue of fact exists as to what promises were made for the work that was performed. Plaintiff submitted emails seeking advertisers for the magazine and various text messages in which he and Deyneko discuss meetings, clientele, and projects. Furthermore, plaintiff claims that his services were performed for the individual defendants because they are the sole owners of *Spirit & Flesh*, and, because they made promises to him personally, they should be individually sued. Plaintiff asserts that there are triable issues of fact as to whether plaintiff qualifies as an employee under New York law. Plaintiff contends that defendants controlled plaintiff's work and that there is no evidence showing plaintiff performed any work for other companies from February 2018 to September 2018. Furthermore, plaintiff maintains that although he was not on defendants' payroll, that does not mean he was not employed by defendants, as no payroll existed because plaintiff alleges defendants did not pay *any* compensation whatsoever to anyone.

In reply, defendants maintain that plaintiff has failed to demonstrate that he did any work for the individual defendants because he was an editor for *Spirit & Flesh*, not for Deyneko and

Austopchuk. Further, plaintiff has not demonstrated the requisite elements to pierce the corporate veil as there is no indication Deyneko or Austopchuk commingled funds, abused the privilege of doing business in the corporate form, or used corporate funds for personal use. Defendants assert that quantum meruit claims for individuals are inappropriate when the work performed was for a corporate entity. Defendants further contend that plaintiff failed to offer any evidence of meeting of the minds for wages to be paid with regard to an employment contract, thus defeating the existence of a contract between the parties. Defendants also claim that plaintiff failed to raise a triable issue of fact about his claim for quantum meruit as he was unable to recall various photoshoots he claimed to have worked on. Defendants further contend that plaintiff is not an employee for purposes of New York Labor Law and that plaintiff failed to present evidence of hours he worked or his own work product outside of “self-serving testimony,” (NYSCEF Doc. No. 81 at 12).

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court denies the motion. The evidence shows that plaintiff performed services for the magazine. There are various communications between the parties discussing matters relating to the magazine, including one in which Deyneko forwards an email to plaintiff asking for ideas on an investor for a perfume collection (NYSCEF Doc. No. 67). Plaintiff attached text messages indicating he met clients for dinner and aided in securing them for magazine projects (NYSCEF Doc. No. 74). Moreover, defendants testified that plaintiff assisted on photoshoots (NYSCEF Doc. No. 60 at 39). It is clear defendants utilized plaintiff's skills and relied on his work product. According to plaintiff, some form of compensation was promised. What compensation was promised is for a trier of fact to decide. Plaintiff's testimony and documentary evidence are a sufficient basis to raise an issue of fact in opposition to defendants' motion for summary judgment. Plaintiff testified that he styled a shoot, selected models and "was the one present for [the magazine] for every photo shoot," (Catalano Dep. 65:19-20).

Moreover, plaintiff provided emails indicating he had his own work email account for the magazine, with a signature line representing him as an editor for the magazine, and the

defendants frequently relied on plaintiff to represent the magazine or supply content for the magazine, even sending him to Paris for a fashion event.

There is no dispute that plaintiff was never paid anything by defendants. Plaintiff raised an issue of fact about whether he produced creative work for the magazine in exchange for some type of compensation. That defendants disagree with plaintiff's claim that he was promised compensation is not a basis for the Court to grant defendants' motion. The Court cannot make a credibility determination on a summary judgment motion.

Plaintiff failed to raise a triable issue of fact to pierce the corporate veil. There are plenty of small ventures operated by the sole owners of a company. That the company was small and had few, or no, employees does not mean that plaintiff can automatically pierce the corporate veil without some indication that these owners abused the corporate form or used the corporate entities as a personal piggy bank. But plaintiff only offers a conclusory assertion that the owners are liable because they individually made promises to him. That is not enough. "The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their alter ego, without more, will not suffice to support the equitable relief of piercing the corporate veil," (*see Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344, 344, 825 NYS2d 274 [2nd Dept 2006] [internal quotations and citations omitted]).

However, plaintiff raised a triable issue of fact as to the individual defendants' promise to offer 10% equity in the company; in order to give him that percentage, the individual(s) would have to give up some of their own equity. Plaintiff testified that Deyneko explained that "to compensate [plaintiff] she would be willing to give [plaintiff] ten percent equity of the company," (Catalano Dep., 52:24-53:8). A written contract does not exist, and any promise for compensation, if one exists, came from one of the individual defendants. Evidently, Deyneko

and plaintiff had an affectionate relationship that may have resulted in some illustrious assurances, but it is up to a trier of fact to decide if either individual defendant actually promised equity as compensation.

Summary

The Court cannot make factual findings about what occurred. The fact is that plaintiff and defendants offer wildly divergent accounts of what happened and what, if anything more than commission, was promised. The only fact they agree on is that plaintiff was not financially compensated. Whether he is entitled to receive compensation, and if so, how much, is for a trier of fact to determine.

Accordingly, it is hereby

ORDERED defendants' motion for summary judgment is denied.

12/7/2022

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE