Krigsman v Columbia Capital Auto Fleet Inc.
2023 NY Slip Op 30069(U)
January 10, 2023
Supreme Court, Kings County
Docket Number: Index No. 500707/2022
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMM. PART 8
--x
RIMA KRIGSMAN,

Plaintiff, Decision and order

- against - Index No. 500707/2022

COLUMBIA CAPITAL AUTO FLEET INC.,
ALEXANDER KELENZON, OROM INC., and
ALEKSEY K. SHAULOV,

Defendants, January 10, 2023
--x
PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds it fails to state any causes of action. The plaintiffs oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the amended complaint the plaintiff Rima Krigsman loaned the defendant Columbia Capital Auto Fleet Inc., the sum of $699,220.85 through five loans between November 13, 2018 and April 17, 2019. That entity is owned by defendant Alexander Kelenzon who provided the plaintiff with the guarantees as well as the promissory notes. The defendant made all interest payments until March 2020 and has not made any interest payments since and has not repaid any of the principal. Thus, according to the amended complaint "in the fall of 2020 in order to avoid his obligation to repay the loan Mr. Kelenzon, claimed that Ms. Krigman's funds are an investment into a company called Orom Inc., a used car dealer, and repair shop. Ms. Krigsman had never heard of this company before" (see, Verified First Amended

Complaint, ¶38 [NYSCEF Doc. No. 36]). Further, "Kelenzon claimed that he and CCAF acted as a broker between Orom Inc. and Rima Krigsman. CCAF claimed that it deposited Rima Krigsman's moneys into its account, and then forwarded those funds to Orom, Inc. Kelenzon further claimed that Orom Inc. paid the interest to CCAF, who then deposited those moneys in its checking account, and then forwarded the funds back to Ms. Krigsman via check. Alex Kelenzon, individually and on behalf of the corporate defendants, also represented that he was paid a commission for this service by Orom Inc." (see, Verified First Amended Complaint, ¶39 [NYSCEF Doc. No. 36]). Moreover, the amended complaint asserts that Kelenzon claimed he owed no liability pursuant to the loans and in any event the plaintiff must seek recourse from Orom. Any attempt to seek recovery from Orom proved fruitless. To this date the defendants have not repaid any of the loan amounts. This lawsuit was instituted and the plaintiff has alleged causes of action for fraudulent inducement, fraud, conversion, unjust enrichment, money had and received and piercing the corporate veil against Kelenzon and Aleksey Shaulov the principle of Orom. The defendants have now moved seeking to dismiss the complaint on the grounds it fails to state any cause of action. The motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court

must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Ripa v. Petrosyants, 203 AD3d 768, 160 NYS3d 658 [2d Dept., 2022]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (BT Holdings, LLC v. Village of Chester, 189 AD3d 754, 137 NYS2d 458 [2d Dept., 2020]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Redwood Property Holdings, LLC v. Christopher, _AD3d_, 177 NYS3d 895 [2d Dept., 2022]).

Turning to the claim of fraud, it is well settled that to successfully plead fraud the claims must be plead with particularity (Lee Dodge Inc., v. Sovereign Bank, N.A., 148 AD3d 1007, 51 NYS3d 531 [2d Dept., 2017]). Thus, the pleadings must contain allegations of a representation of a material fact, falsity, scienter, reliance and injury (Moore v. Liberty Power Corp., LLC, 72 AD3d 660, 897 NYS2d 723 [2d Dept., 2010]). Further, the allegations must be "stated in detail" (CPLR §3016(b)) and must include dates, details and items to the extent relevant (see, Orchid Construction Corp., v. Gottbetter, 89 AD3d 708, 932 NYS2d 100 [2d Dept., 2011]). However, it is well settled that "although fraud may exist in the inducement of a

contract, where, as here, it is based solely on the failure to perform a promised future act, plaintiff's remedy lies in an action on the contract" (see, Locascio v. James V. Acquavella M.D. P.C., 185 AD2d 689, 586 NYS2d 78 [4th Dept., 1992]). Thus, to assert a misrepresentation, the misrepresentation must concern a present fact, not a future promise (see, Scialdone v. Stepping Stones Associates L.P., 148 AD3d 953, 50 NYS2d 413 [2d Dept., 2017]).

The Verified First Amended Complaint states that "Kelenzon introduced himself to Ms. Krigsman as a businessman and represented that his company CCAF was seeking a loan to purchase a fleet of vehicles, which he intended to resell for a profit" (see, ¶16 [NYSCEF Doc. No. 36]). Paragraph 21 asserts that "thereafter, and in direct reliance on the aforementioned representations as well as the appearance of legitimacy surrounding the loan, and the representations made by Alexander Kelenzon, all of which were made directly by Defendants, individually and by and through their agents, representatives and employees, Ms. Krigsman gave Defendants five loans between November 13, 2018, and April 17, 2019, totaling $699,220.85" (id). The Verified First Amended Complaint asserts that such representations were false when made and that "while Defendants claimed the funds would be invested in the vehicle inventory, it is now believed that Defendants had no intention to invest the

monies in any such projects but instead used the monies for unrelated expenses and/or to generally further the facade that could solicit additional investment and/or loan proceeds from other investors" (id., ¶56). Thus, the Verified First Amended Complaint asserts that "defendants made representations to Plaintiff regarding the nature, strength and security of an investment in their business while soliciting investments and/or loans from Plaintiff" and that "defendants made representations regarding how investments would be used and how the principal and interest would be funded and repaid" (id., ¶¶63, 64). These representations were made at the time the loans were procured and indeed the plaintiff was induced to provide the loans based upon those representations that are now alleged to be false. It is true that paragraph 74 states that "after Plaintiff made the investment to Defendants, Defendants further misrepresented the use of the principal, the source and availability of proceeds to repay the principal and interest and their ongoing business affairs; all which were designed to further facilitate their fraudulent scheme and purpose" (id). Those representations took place after the loan had already been furnished and cannot support any fraud claims. However, the representations noted above did not occur at a later date but were contemporaneous with and formed the reliance upon which the loans were furnished.

The defendants argue that "the Plaintiff's claim that she thought money she transferred would be treated as a written pledge to repay by the Defendants (rather than what it was, which her money sent to Orom by Columbia on her behalf, Exhibit C) is one that a reasonable person could not rely on, because there was no contemporaneous Promissory Note was [sic] ever created" (see, Memorandum of Law in Support, pages 5,6 [NYSCEF Doc. No. 50]). However, the lack of any promissory notes or whether a reasonable person would have provided a loan without such notes does not mean the cause of action cannot be pursued. Of course, further discovery will narrow the issues of fraud in this case, however, at this juncture the motion seeking to dismiss the first two causes of action are denied.

Turning to the cause of action seeking conversion, it is well settled that to establish a claim for conversion the party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). As the Court of Appeals explained "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...Two key elements of conversion are (1) plaintiff's possessory right or interest in

the property...and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (see, Colavito v. New York Organ Donor Network Inc., 8 NY3d 43, 827 NYS2d 96 [2006]). Therefore, where a defendant "interfered with plaintiff's right to possess the property" (Hillcrest Homes, LLC v. Albion Mobile Homes, Inc., 117 AD3d 1434, 984 NYS2d 755 [4th Dept., 2014]) a conversion has occurred. In this case the plaintiff concedes that she loaned the funds to the defendants and seeks recovery of those funds. That does not establish a claim for conversion (see, United Republic Insurance Company v. Chase Manhattan Bank, 168 F.Supp2d 8 [N.D.N.Y. 2001]). Therefore, the motion seeking to dismiss the conversion claim is granted.

The next cause of action alleges unjust enrichment. The elements of a cause of action to recover for unjust enrichment are that "(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (see, GFRE, Inc., v. U.S. Bank, N.A., 130 AD3d 569, 13 NYS3d 452 [2d Dept., 2015]). Thus, "the essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (see, Paramount Film Distributing Corp., 30 NY2d 415, 344 NYS2d 388 [1972]). The Verified First

Amended Complaint adequately alleges this cause of action. Thus, the motion seeking to dismiss the unjust enrichment claim is denied.

For similar reasons the motion seeking to dismiss the claim of money had is denied. This claim is based upon the same allegation, namely refusing to return any of the loans furnished. The fact the defendant Columbia allegedly forwarded the funds to Orom does not mean there are no claims for unjust enrichment or money had.

The final two causes of action seek to pierce the corporate veil as to defendants Kelezon and Shaulov.

To succeed on a claim 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 Verified First Amended Complaint states in conclusory fashion that "Kelenzon, as the sole shareholder, director, and officer of Columbia, at all times has exercised complete domination and control over Columbia and has used such domination and control to commit a fraud on Plaintiff" (supra, ¶ 107) and "Shaulov, as the sole shareholder, director, and officer of OROM, at all times has exercised complete domination and control over OROM and has used such domination and control to commit a fraud on Plaintiff (supra, ¶ 116). However, there are

no facts whatsoever supporting those allegations. The Verified First Amended Complaint does further state that the "the corporate structures as used by Defendants were mere facades for improper, unlawful and unauthorized business operations" (supra, ¶¶ 111,120). Notwithstanding, those allegations are further conclusory, since they fail to allege even one fact or recite those allegations in a more descriptive manner. Merely reciting the legal standard without any supporting facts renders the cause of action conclusory. 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 cause of action 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).

Therefore, based on the foregoing, the motion seeking to dismiss the two piercing the corporate veil claims is granted.

So ordered.

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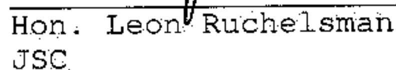

DATED: January 10, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC