

RNM Wind-Down, Inc. v ASAP Documents, Inc.

2023 NY Slip Op 30351(U)

January 27, 2023

Supreme Court, New York County

Docket Number: Index No. 657260/2020

Judge: Verna L. Saunders

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

INDEX NO. 657260/2020

RNM WIND-DOWN, INC. f/k/a US DOCUMENT
RETRIEVAL SERVICE, INC.,

MOTION SEQ. NO. 001

Plaintiff,

- v -

ASAP DOCUMENTS, INC., PETER NULL, ASP
DOCS, LLC d/b/a U.S. DOCUMENT SERVICES,
and U.S. LITIGATION SUPPORT SERVICES and
WILLIAM NULL,

DECISION + ORDER ON
MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISSAL

On December 23, 2020, plaintiff commenced this action by summons and complaint against defendants ASAP DOCUMENTS, INC. ("ASAP"), PETER NULL ("P. NULL"), ASP DOCS, LLC d/b/a U.S. DOCUMENT SERVICES ("ASP"), U.S. LITIGATION SUPPORT SERVICES,¹ and WILLIAM NULL ("W. NULL") to recover on its claim for breach of the covenant of good faith and fair dealing.

As alleged in the complaint, P. NULL and W. NULL are siblings. P. NULL was the sole shareholder of the now defunct ASAP and W. NULL is the sole shareholder of ASP. (NYSCEF Doc. No. 2, complaint, ¶ 3, 5). Plaintiff asserts it sold its business and transferred its assets to ASAP pursuant to an Amended and Restated Purchased Agreement ("agreement") on December 13, 2016. (Id. at ¶7). W. NULL oversaw the day-to-day operations at ASAP. (Id. at ¶ 8). ASAP executed a promissory note ("note") fully guaranteed by P. NULL, dated January 17, 2017, which mandated the payment of \$2,968.12 each month for sixty (60) months, in accordance with the agreement. (Id. at ¶ 9). After making only ten (10) of the sixty (60) required payments, ASAP, P. NULL and W. NULL allegedly transferred all of ASAP's commercial assets to ASP, without consideration, in an attempt to prevent or frustrate plaintiff's recovery efforts. (Id. at ¶ 10, 15, 26). Plaintiff further asserts that there was no legitimate business purpose for ASAP's transfer of its commercial assets to ASP other than to hide recoverable assets from creditors, and in its doing so, ASAP violated the contract obligation of the covenant of good faith and fair dealing. (Id. at ¶ 28-30). W. NULL was on ASAP's payroll through March 2019 and handled operations of the office. (NYSCEF Doc. Nos. 8, affidavit of William Null; 15, affidavit in Opposition of Robin Pollina-Finkelstein). Plaintiff further alleges that it was under W. NULL's direction that ASAP closed, leaving large amounts of outstanding debt. (NYSCEF Doc. No. 15, at ¶ 17, 18).

¹ ASP and U.S. Litigation Support Services refer to one and the same company.

Defendants W. NULL and ASP (collectively, “defendants”) now move the court, jointly, seeking to dismiss the complaint against them pursuant to CPLR 3211(a)(1) and (a)(7). They argue that ASP provided consideration for assets purchased from ASAP (NYSCEF Doc. Nos. 8, *affidavit of William Null*, ¶ 24-26; 9, *Exhibits*). ASP generates eighty (80%) of its revenue from Interstate Service of Process and Remote/Mobile Notary Service while the same represented less than five (5%) percent of ASAP revenue. (NYSCEF Doc. No.12, *memorandum of law in support of defendants’ motion to dismiss*). Defendants contend that W. NULL neither signed the promissory note nor did the promissory note contain a clause making successors or assigns of ASAP liable for its debt. (NYSCEF Doc. No. 11, *Exhibit B – Promissory Note*). As such, defendants assert that while they purchased limited assets from ASAP, ASP never acquired ASAP. (NYSCEF Doc. No. 8, *affidavit of William Null*, ¶32). Defendants therefore argue that plaintiff’s breach of the covenant of good faith and fair dealing claim does not lie.

In opposing the motion, plaintiff avers that the transactions entered between ASP and ASAP were for less than fair consideration, making them fraudulent and in contravention of Debtor and Creditor Law §§ 273 and 274. Secondly, plaintiff maintains that W. NULL and ASP were unjustly enriched from the said transactions at plaintiff’s expense because ASAP now has insufficient assets to satisfy plaintiff’s claims. Lastly, plaintiff contends that ASP is merely an alter ego of ASAP, and therefore, liability should attach to movants. (NYSCEF Doc. No. 17, *memo in opposition*).

A CPLR 3211(a)(1) motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes a plaintiff’s factual allegations, conclusively establishing a defense as a matter of law. (See *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002].)

Turning first to the CPLR 3211(a)(1) claim, defendants produced a document reflecting that only P. NULL signed the promissory note, not the movants. (NYSCEF Doc. No. 11, *Exhibit B – Promissory Note*). Moreover, paragraph (e) of the same document lists only P. NULL as the guarantor. Plaintiff claims that W. NULL’s name was excluded from the agreement and the promissory note because he was allegedly going through a divorce. Further, plaintiff claims that, on some business occasions, W. NULL presented himself as ASAP’s co-owner. However, plaintiff fails to provide proof of either of these claims. There is no proof proffered as to any pending divorce of W. NULL nor any affidavit annexed from someone with personal knowledge who can attest that W. NULL, while handling the daily operations of ASAP, held himself out as an owner of ASAP such that ASAP’s liability should attach to him in his individual capacity. (NYSCEF Doc. No. 15, *affidavit in opposition* ¶ 5). Moreover, plaintiff does not dispute the validity of the promissory note. In fact, the note states, in pertinent part: “[t]his [n]ote may not be negotiated, discounted, pledged, hypothecated, sold, transferred, assigned, disposed of or otherwise encumbered...” (*Id.* at ¶ 2). This language makes it clear that ASP cannot assume the debts of ASAP as a result of their transactions and, thus, plaintiff’s bald allegations to the contrary are lacking in merit.

In addition, this court finds that movants have tendered sufficient proof to refute plaintiff’s claim that there was no consideration for the assets ASP purchased from ASAP. “The

slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.” (*Lebedev v Blavatnik*, 193 AD3d 175, 183 [2021].) ASP bought used computers and printers from ASAP and paid \$960.00 via check dated January 10, 2020 (NYSCEF Doc. No. 9, *Exhibit A*). ASAP invoiced ASP a facilities fee for use of ASAP’s personnel, equipment, website, etc., from December 11, 2019, through January 9, 2020, for a fee of \$1,000.00. ASP paid \$1,000.00, via check dated December 24, 2019, to ASAP for the fee listed on the invoice dated December 20, 2019. (*Id. Exhibit B*). Thus, dismissal of the complaint is warranted against movants pursuant to CPLR 3211(a)(1).

When considering defendants’ motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) Normally, a court should not be concerned with the ultimate merits of the case. (see *Anguila v Koch*, 179 AD2d 454, 457 [1st Dept 1992].) However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52 [2012].)

Here, plaintiff claims movants breached the covenant of good faith and fair dealing when ASP purchased assets from ASAP. It is well-settled that “[t]he implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” (*Rad & D’Aprile, Inc. v. Arnell Constr. Corp.*, 203 AD3d 855, 857 [2d Dept 2022].) However, this applies to parties in privity of a contract. Based on the documents submitted in this action, ASP and ASAP are separate and distinct legal entities, and the focus of their respective business differ. In fact, roughly eighty (80%) of ASP’s revenue is from interstate service of process and notary service, which is in sharp contrast to the less than five (5%) revenue that ASAP generates from service of process work. Although every contract contains an implied covenant of good faith and fair dealing in the course of performance of the contract, it is well-settled that a “cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties.” (see *Duration Mun. Fund, L.P. v J.P. Morgan Secs., Inc.*, 77 AD3d 474 [1st Dept 2010], citing *Phoenix Capital Invs. LLC v Ellington Mgmt. Group, L.L.C.*, 51 AD3d 549 [1st Dept 2008].) Thus, since movants have no privity of contract with respect to the agreement between plaintiff and ASAP, the claim for breach of the covenant of good faith and fair dealing against movants is dismissed. (See *Taberna Preferred Funding II, Ltd. v Advance Realty Group LLC*, 45 Misc3d 1204[A], 2014 NY Slip Op 51461[U], ****8 [Sup Ct, NY County 2014].)

This court notes that plaintiff’s additional arguments are that the entities, in essence, are sham entities, merely alter egos of their principals and require the piercing of the corporate veil. “Generally, a plaintiff seeking to pierce the corporate veil must show 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.” (*Sutton 58 Assocs. LLC v Pilevsky*, 189 AD3d 726, 729 [1st Dept 2020],

quoting *Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018]). Plaintiff must allege sufficient facts to “satisfy the ‘heavy burden’ necessary to pierce the corporate veil or to establish an alter ego relationship.” (*Etex Apparel, Inc. v Tractor Intl. Corp.*, 83 AD3d 587, 587 [1st Dept 2011]). For reasons previously articulated, these allegations are insufficient on their face to establish alter ego liability against defendants. Moreover, plaintiff’s argument that there is, at the very least, an unjust enrichment claim, is without merit because said claim is precluded by the existence of a valid contract governing the subject matter in dispute. (see *First Sterling Corp. v Union Sq. Retail Trust*, 102 AD3d 490, 490 [1st Dept 2013], citing *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516-517, 973 NE2d 743, 950 NYS2d 333 [2012]; *LG Capital Funding LLC v Intellicell Biosciences, Inc.*, 2016 NY Slip Op 32270 [U], **4 [Supreme Ct, Kings County 2016], citing *Pappas v Tzolis*, 20 NY3d 228, 234 [2012]). The remaining arguments are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

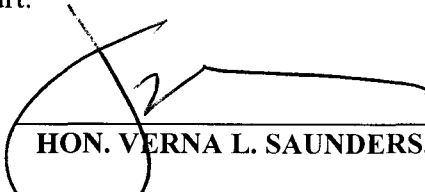
ORDERED that the motion of ASP DOCS, LLC d/b/a U.S. DOCUMENT SERVICES, U.S. LITIGATION SUPPORT SERVICES, and WILLIAM NULL to dismiss the complaint is granted; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant ASP DOCS, LLC d/b/a U.S. DOCUMENT SERVICES, U.S. LITIGATION SUPPORT SERVICES, and WILLIAM NULL, shall serve a copy of this decision, upon all parties, as well as, on the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court and the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

January 27, 2023


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: