

Snow v Besen Capital, LLC

2023 NY Slip Op 32553(U)

July 25, 2023

Supreme Court, New York County

Docket Number: Index No. 650134/2023

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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MAX SNOW,

Plaintiff,

- v -

BESEN CAPITAL, LLC, BESEN PARTNERS

Defendants.

INDEX NO. 650134/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X

HON. JOEL M. COHEN:

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

were read on this motion to DISMISS.

This is a breach of contract case. The dispute arises from a Convertible Promissory Note (the “Note”) entered into by Plaintiff Max Snow (“Snow” or “Plaintiff”) and Defendant Besen Capital, LLC (“Besen Capital”). The instant motion seeks to dismiss the complaint as to Defendant Besen Partners (“Besen Partners”) (NYSCEF 8), which was not a signatory to the Note. For the reasons set forth below, the motion is granted.

BACKGROUND

I. Factual Background

According to the factual allegations in the Complaint (NYSCEF 1 [“Compl.”]), which are assumed to be true for purposes of this motion, on or around March 1, 2020, Snow and Besen Capital entered into the Note (Compl. ¶13). The Note provided that Besen Capital “together with its successors . . .” agreed to pay Snow, or his registered assigns, “the principal sum of []

\$1,150,000 together with accrued and unpaid interest.” (NYSCEF 2 [“Note”]). The Note further provides that:

2. Interest Rate. Interest on this Note shall accrue at a rate of seven percent (7%) per annum...compounded annually, and shall accrue daily beginning on the date of issuance of this Note until paid in full...Accrued interest on this Note shall be payable in quarterly installments on the first (1st) day of each of March, May, August, December. In the event that such payments are not made by the tenth (10th) day of any applicable month, this Note shall bear interest at a rate per annum that is two and one-half percent (2.5%) above the rate that is otherwise applicable thereto.

10. Amendments and Waivers. The terms of this Note may not be amended, modified, or waived without the written consent of [Besen Capital] and [Mr. Snow].

11. Further Assurances. The parties hereto will do and perform, or cause to be done and performed, all such further acts and things...in order to carry out the intent and accomplish the purposes of this Note and the consummation of the transactions contemplated hereby.

(Note §§ 2, 10, 11).

On October 9, 2022, Besen Capital made an initial quarterly interest payment of \$8,750 to Snow via wire from its Citibank Bank Account (Compl. ¶17, NYSCEF 18). As alleged in the Complaint, Besen Capital abruptly ceased making all due and owing interest payments to Snow without providing any explanation for its nonpayment for over one year (Compl. ¶17).

According to Snow, he made repeated attempts to communicate with Besen Capital via email, demand letter, and telephone regarding these missed payments (Compl. ¶19). On December 9, 2022, Snow sent a demand letter by undersigned counsel to Besen Capital regarding the missed payment (NYSCEF 3). According to Snow, Besen Capital refused to respond to Snow and has not disclaimed its obligations to pay Snow the interest owed or the future payment of the Note (Compl. ¶19–20).

Snow alleges that Besen Capital *and* Besen Partners breached the Note by failing to make timely interest payments as required under the Note (Compl. ¶21). Additionally, Snow alleges that Defendants' conduct is an unqualified and clear refusal to perform the entire Note (Compl. ¶22).

II. Procedural Background

Plaintiff filed the Complaint on January 10, 2023 (Compl.). The Complaint contains two causes of action against Defendants: (1) breach of contract and (2) anticipatory breach (Comp. ¶¶24–31, 32–41).¹ Defendants now move to dismiss the claim against Besen Partners (NYSCEF 8). Oral argument was heard on June 14, 2023.

DISCUSSION

“On a CPLR 3211 motion, the court must ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’” (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Int’l*, 80 AD3d 448, 449 [1st Dept 2011], quoting *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). “[H]owever, ‘allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration’” (*Myers v Schneiderman*, 30 NY3d 1, 11 [2017] [citations omitted]).

A motion to dismiss under CPLR 3211(a)(1) on the basis of documentary evidence outside the complaint “may be granted ‘only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law’” (*id.* at

¹ Plaintiff subsequently withdrew its anticipatory repudiation claim, without prejudice.

449–50, quoting *Goshen v Mut. Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). A motion to dismiss under CPLR 3211(a)(7) on the ground that the pleadings fail to state a cause of action may be granted where a plaintiff has not stated a claim cognizable at law or to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action (*Sud v Sud*, 211 AD2d 423, 424 [2d Dept 1995]).

Defendants’ motion to dismiss the first cause of action as to Besen Partners is granted. There are no facts pled in the Complaint that suggest Besen Partners is the successor to Besen Capital, that it agreed to assume the contract, or that it is the alter ego of Besen Capital. Rather, Snow simply combines the two entities under the “Besen” name throughout the Complaint, with little explanation for doing so other than a conclusory assertion of successorship. The allegations are insufficient to justify asserting a breach of contract claim against Besen Partners.

First, it is well established that to be liable on a breach of contract claim, one generally must be a party to the contract (*see Clearmont Property, LLC v Eisner*, 58 AD3d 1052, 1055 [3d Dept 2009])[holding that elements of a cause of action for breach of contract include “formation of a contract between plaintiff and defendant”]; *Jordan v Jordan*, 76 Misc3d 1219(A), at *4 [Sup Ct Albany County 2022][“[P]laintiff may not maintain a cause of action for breach of contract against [a party] with whom [she was] not in privity.”][citations omitted]).

Here, the Note provides that, “Besen Capital LLC, a New York limited liability company (together with its successors, the “Company”), promises to pay to Maxwell Snow, or its registered assigns (“Holder”), the principal sum of ONE MILLION ONE HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS (\$1,150,00.00) together with accrued and unpaid interest thereon ...” (Note at p 1). On the signature page of the Note, Matthew Slonim, Chief Operating

Officer, signed the Note on behalf of Besen Capital (Note at p 4). Besen Partners is not a signatory. Accordingly, per the terms of the Note, Besen Capital, not Besen Partners, is the only party obligated to make payments to Maxwell Snow.

A Plaintiff who seeks to pierce the corporate veil – to hold a non-signatory corporate affiliate liable for breach of contract – bears a heavy burden (*see Etage Real Estate LLC v Stern*, 211 AD3d 632, 634 [1st Dept. 2016]). “A simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil” (*id.* quoting *Skanska USA Bldg. Inc. v. Atlantic Yards B2 Owner, LLC*, 146 A.D.3d 1, 12, 40 N.Y.S.3d 46 [1st Dept. 2016], *affd* 31 N.Y.3d 1002, 74 N.Y.S.3d 805, 98 N.E.3d 720 [2018]). “A corporation may be held liable for the torts of a predecessor entity if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations” (*Schumacher v Richards Shear Co., Inc.*, 59 NY2d 239, 245 [1983]). “To make out a cause of action for liability on the theory of piercing the corporate veil because the corporation at issue is the defendant's alter ego, the complaining party must, above all, establish that the owners of the entity, through their domination of it, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party asserting the claim such that a court in equity will intervene” (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]).

Neither the Complaint nor the Michailidis Affirmation (NYSCEF 12) submitted in opposition to Defendants’ motion contain any facts to support the allegation that Besen Partners is the successor to Besen Capital, that it assumed the promissory note, or that is the alter ego to Besen Capital. The Complaint only mentions in a conclusory footnote that “upon information

and belief, Besen Capital LLC has changed its name to Besen Partners.” (Compl. P 2 n 1). However, there are no facts pled in the Complaint to support this assertion (*id*; see *Albsetin v. Elany Contracting Corp.*, 30 AD3d 210, 210 [1st Dept 2006] [holding plaintiff’s alter ego theory was insufficient to support her claims because she failed to plead any facts to substantiate conclusory allegations]; *Corbin v K1 Inv. Mgt., LLC et al*, 2021 NY Slip Op. 30414[U], 4 [Sup Ct NY County 2021][dismissing defendants from action because they were not party to the agreement and there were insufficient allegations to support the alter ego or successor liability theories against them]), and none were offered at oral argument.

Further, the three documents attached to the Michailidis Affirmation do not support Plaintiff’s third-party liability argument. The first document is the Note, which shows only Besen Capital as a signatory (NYSCEF 13). The second document is a previous signature page of the promissory note signed by Matthew Slonim as Managing Director of TBG/Targeted Office Fund LP, not Besen Partners (NYSCEF 14). The third document is an email sent by Matthew Slonim notifying Max Snow that his third quarter interest payment for 2020 has been made (NYSCEF 15). Plaintiff argues that Besen Partners manifested an intent to be bound by the Note because the email was signed by Mr. Slonim, whose email signature states that he is Chief Operating Officer of Besen Partners (NYSCEF 15). However, Plaintiff’s argument is refuted by a bank statement showing that *Besen Capital* was responsible for the payment (NYSCEF 19).

In sum, Defendants’ motion to dismiss the first cause of action as to Besen Partners is granted under CPLR 3211(a)(7) because the pleadings fail to state a viable cause of action against that non-signatory entity. However, the dismissal is without prejudice. The Court will

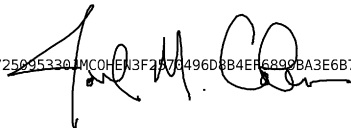
allow Plaintiff to pursue reasonably focused discovery as to the relationship between Besen Capital and Besen Partners as it relates to the Note.

Accordingly, it is

ORDERED that Defendants’ motion to dismiss the Complaint as alleged against Besen Partners is **GRANTED** and the Complaint as alleged against Besen Partners is dismissed without prejudice; it is further

ORDERED that the parties upload to NYSCEF a copy of the oral argument transcript upon receipt.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

7/25/2023
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE