

**Bochenek v Ashton**

2023 NY Slip Op 33040(U)

August 31, 2023

Supreme Court, New York County

Docket Number: Index No. 654904/2022

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<p><b>PRESENT:</b> <u>HON. MELISSA A. CRANE</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>ETHAN BOCHENEK,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>GREG ASHTON, GROW EVENTS, LLC, TWENTY INVESTMENT GROUP, LLC, EACH AND EVERY SUBSIDIARY, HOLDING, EVENT HELD BY GROW EVENTS, LLC, JOHN DOES 1-10, ABC CORPORATIONS 1- 10</p> <p align="center">Defendant.</p> <p>-----X</p>	<p><b>PART</b> <span style="float: right;"><b>60M</b></span></p> <p><b>INDEX NO.</b> <u>654904/2022</u></p> <p><b>MOTION DATE</b> <u>N/A</u></p> <p><b>MOTION SEQ. NO.</b> <u>002</u></p>
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**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

Plaintiff, Ethan Bochenek is an individual domiciled in New York. The defendant, Greg Ashton, resides in Los Angeles, CA. Ashton was and allegedly is an officer, director, member and principal of GROW and TWENTY SEVEN INVESTMENT LLC, (TSIG). GROW EVENTS, LLC is a limited liability company registered in Middletown, Delaware, was and still is a company operating in the State of New York, and is in the business of brand marketing and organizing industry events. GROW hosted a series of events in New York, New York, and in Los Angeles, California. GROW operated under various names, including but not limited to, Grow, NY and Grow, LA. Defendant TSIG is a limited liability company registered in Delaware, was and still is a company operating in the State of California, and is in the business of brand marketing and organizing industry events.

On November 23, 2020, Bochenek and GROW entered into the independent contractor agreement. Ashton acted as the representative and signed, individually, as the “Founder” of GROW EVENTS, LLC . Bochenek claims he fully performed his obligations under the employment agreement until defendants terminated him on or about November 30, 2022.

Bochenek was allegedly not paid \$63,547.50 in commissions due from Defendants under the contract, exclusive of interest, costs. Also, plaintiff claims he sold more than \$450,000.00 in sponsorship sales, before June 24, 2022, thus fulfilling the contract and vesting his interest in the eight (8%) Percent in the company GROW EVENTS, LLC (including but not limited to Grow, NY and Grow, LA), and each of GROW EVENTS, LLC's subsidiaries. TSIG is a subsidiary of and/or wholly owned by GROW, and conducts the business formerly conducted by GROW in California as Grow, LA. Ashton, was and allegedly still is an officer, director, member and/or a principal of GROW and TSIG. Defendants claim these subsidiaries were not part of the original agreement.

For reasons unknown, plaintiff has chosen to blow up this relatively straightforward breach of contract case into 16 causes of action, most of which are unsustainable. The substantive allegations only concern defendants' failure to pay plaintiff commissions and grant him 4% equity and 8% equity in Grow, and TSIG respectively. Although it is unclear why, plaintiff has also named anonymous parties, defendants, 1-10 JOHN DOES, individuals that the plaintiff claims acted, colluded, with defendants or acted in forming and operating GROW, TSIG and 1-10 ABC CORPORATIONS, to defraud and deprive Bochenek of an equity interest in Grow and TSIG.

For the reasons discussed on the record on July 31, 2023, the court renders its decision on the motion to dismiss as follows:

Defendants did not move to dismiss the 1<sup>st</sup> cause of action for breach of contract, so it remains.

The 2<sup>nd</sup> cause of action for quantum meruit and 3<sup>rd</sup> for unjust enrichment are dismissed with prejudice. Plaintiff cannot recover under these theories where there exists an express contract governing the subject matter in dispute.

The 4<sup>th</sup> cause of action for breach of fiduciary duty is dismissed with leave to replead. The gist of this claim, although somewhat unclear, appears to be that defendant Ashton, through TSIG, diverted business away from Grow LA in which plaintiff claims to have an equity stake. The complaint does not discuss the basis for the fiduciary relationship, which the court supposes could be that of majority and minority shareholders, but the complaint is silent. It also fails to delineate what portions are derivative, and what portions, if any, are direct.

The 5<sup>th</sup> cause of action for waste of corporate assets and the 6<sup>th</sup> cause of action for “Gross Mismanagement” duplicate the 4<sup>th</sup> cause of action for breach of fiduciary duty at this point and the allegations from these causes of action should be incorporated into the 4<sup>th</sup> cause of action, or fleshed out more if plaintiff meant something different. If they are meant to be derivative claims, they need to be labelled that way. Accordingly, these claims are dismissed.

The second 6<sup>th</sup> cause of action for an accounting is dismissed with leave to replead once the cause of action for breach of fiduciary duty is repleaded. Without a valid fiduciary duty claim, there is no basis for an accounting.

The 7<sup>th</sup> cause of action, labelled “reach and apply,” is dismissed with prejudice for the reasons discussed on the record. Namely, it would appear that plaintiff is seeking an end run around a proper showing for a pre judgment attachment through this cause of action. If plaintiff thinks it is entitled to a pre judgment attachment, it must make a separate motion for one with a proper showing, pursuant to Article 62 of the CPLR.

The 8<sup>th</sup> cause of action for an account stated is deficient as it does not allege that defendant failed to object to invoices within a reasonable time. Therefore, the court dismisses the cause of action with leave to replead.

As stated on the record, the 9<sup>th</sup> cause of action, for promissory estoppel, cannot stand in light of the contract between the parties, including that contract’s merger clause. The court accordingly dismisses this count with prejudice.

Plaintiff conceded on the record that he does not need the 10<sup>th</sup> cause of action alleging theft of services. In any event, it duplicates the breach of contract cause of action. Accordingly, the court dismisses the 10<sup>th</sup> cause of action with prejudice.

The 11<sup>th</sup> cause of action alleges intentional interference with contract. This cause of action relies on alter ego allegations between Ashton and TSIG, on the one hand and Grow Events LLC on the other. This would make Ashton/TSIG one and the same with Grow Events. However, a party cannot interfere with its own contract, for that is merely a breach. This claim is also an improper attempt at evading the legal principle that a corporate shareholder or member cannot be held personally liable for a contract signed in a corporate capacity. Without more, such as a breach of fiduciary duty, this cause of action cannot stand. Accordingly, the court dismisses it without prejudice.

The court dismisses the 12<sup>th</sup> cause of action seeking to pierce the corporate veil with leave to replead. The current allegations are too conclusory to sustain. As explained on the record, the hallmark of New York's veil piecing law is the misuse of the corporate form to harm plaintiff (*Sutton 58 Assocs. LLC v Pilevsky*, 189 AD3d 726, 729 [1st Dept 2020]). Plaintiff has failed to plead this element. In particular, plaintiff has failed to plead facts sufficient to show that defendants left Grow so undercapitalized that Grow would be unable to satisfy its obligations to plaintiff or that the process of leaving Grow undercapitalized was by diverting business through TSIG.

Plaintiff has conceded he does not need the 13<sup>th</sup> cause of action asserting successor liability. In any event, it duplicates the twelfth cause of action. Accordingly, the court dismisses this claim.

The 14<sup>th</sup> cause of action alleging fraud is dismissed without prejudice on these facts. As explained on the record, a promise made with no intention of performing is breach of contract, not fraud. All plaintiff has alleged is a future promise to perform, not a present misrepresentation of fact. Moreover, the amended complaint fails to plead fraud with the particularity that CPLR 3016 requires.

The 15<sup>th</sup> cause of action for breach of the covenant of good faith and fair dealing is dismissed as it duplicates the first cause of action for breach of contract. Accordingly, the court dismisses it with prejudice.

To sustain an action for violation of GBL § 349, there needs to be a misrepresentation aimed at the public (*KS Trade LLC v Intl. Gemological Inst., Inc.*, 190 AD3d 556, 557 [1st Dept 2021]). This is at bottom a private dispute between two individuals. Accordingly, the court dismisses the 16<sup>th</sup> cause of action with prejudice.

The court also dismisses plaintiff's request for punitive damages for failure to plead a public injury (*Linkable Networks, Inc. v Mastercard Inc.*, 184 AD3d 418, 419 [1st Dept 2020]) and dismisses the request for attorney's fees because there is no basis in the remaining breach of contract cause of action to award them.

As there are no remaining causes of action left against TSIG, the court will not reach the issue of personal jurisdiction. . . until next time. However, as stated on the record, to the extent plaintiff manages to plead that TSIG is the alter ego of Ashton, and that TSIF was used to divert

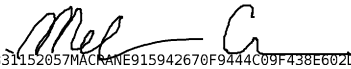
business away from Grow here in New York, or that TSIG utilized the services of a New York resident, jurisdiction will likely be found.

Accordingly, it is

ORDERED THAT defendants motion to dismiss is granted as set forth herein; and it is further

ORDERED THAT any amended complaint must be served within 20 days of the efiled date of this decision and order (i.e September 20, 2023), otherwise waived; and it is further

ORDERED THAT, defendant shall have until October 31, 2023, to answer, move or otherwise respond to the amended complaint, or if no amended complaint is forthcoming, to answer what is left of the current complaint.

  
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8/31/2023  
DATE

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MELISSA A. CRANE, 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