

Kuris v Wiz Kids Ctr. Inc.

2023 NY Slip Op 34511(U)

December 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 503183/2022

Judge: Ingrid Joseph

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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 7th day of December 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

Index No: 503183/2022

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RUTHI KURIS, A/K/A RUTHI NUDELMAN

Plaintiff(s)

-against-

ORDER

WIZ KIDS CENTER INC., EUGENE PISHCHIKER,
LARISA ZALVESKY,

Defendant(s)

-----X
The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Affirmation in Support/Affidavits Annexed

5-8;

Exhibits Annexed/Reply.....

1-4; 10-11

16Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....

In this matter, Wiz Kids Center Inc. (“Wiz Kids”), Eugene Pishchiker (“Pishchiker”) and Larisa Zalevsky (“Zalevsky”) (Collectively “Defendants”) move (Motion Seq. 1) for an order to dismiss Ruthi Kuris, A/K/A Ruthi Nudelman’s (“Plaintiff”) complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Plaintiff has opposed the motion.

This action arises out of an alleged contractual dispute wherein Plaintiff and Defendants entered into an agreement to own and operate a day care center named Wiz Kids Center Inc. located at 2403 Avenue X, Brooklyn, New York 11235.

In support of its motion, Defendants argue that Plaintiff’s complaint must be dismissed for failure to state a cause of action because Plaintiff has failed to present claims sufficiently particular to provide the Defendants notice of the transactions and/or occurrences intended to be proved or the material elements of each cause of action as required by CPLR 3013. Defendants state that six of Plaintiff’s causes of action are predicated on the allegation of the existence of a contract between parties, however Plaintiff has failed to allege whether the contract being relied on is oral or written. Furthermore, Defendants asserts that Plaintiff has failed to attach the relevant agreement, if written, or reference the specific provisions of the contract upon which liability is predicated, warranting dismissal of those claims. Additionally, Defendants claim that Plaintiff’s cause of action to pierce the corporate veil must be denied as moot because a cause of

action for piercing the corporate veil cannot stand alone without an underlying wrong to form the basis for an allegation of liability and Plaintiff's other causes of action sounding in breach of contract are insufficient. In the event that Plaintiff's causes of action survive, Defendants contend that the individual claims against Pishchiker and Zalevsky should be dismissed because the complaint does not allege that they acted outside of their capacity as officers of Wiz Kids or had any involvement with Plaintiff's dealings. Moreover, Defendants argue that since the complaint fails to state viable causes of action sounding in breach of contract, that Pischchiker and Zalevsky cannot be said to have executed any form of a contract with the Plaintiff. Defendants request costs and attorney's fees for its preparation and participation in this matter.

In opposition, Plaintiff argues that she has provided ample documentary evidence annexed to her affidavit in opposition, demonstrating that there was a joint venture in place and an agreement existed between all parties to this suit. Plaintiff states that Defendants have failed to submit any evidence in support of their motion and that there are genuine issues of fact and law that need to be resolved, warranting denial of Defendants' motion. In her affidavit, Plaintiff states that she and Defendants agreed to jointly own and operate the subject day care center now known as Wiz Kids Center Inc. Plaintiff claims that she and Defendant Zalevsky were the signatories of a certain lease dated on or about April 17, 2018 and the guarantors of the lease obligations, using Plaintiff's licensure as a basis for the lease obligations and a permit that was issued in February of 2019. Plaintiff contends that on or about January 13, 2021, she terminated her employment with Wiz Kids and informed the Defendants that they should find a replacement for her, and the partnership was to be dissolved. Plaintiff states that she was denied all access to cameras, emails, and accounts related to the day care, while Defendants continued to use her license to operate the business. Consequently, Plaintiff alleges that Defendants materially breached the subject agreements between the parties and violated statutory laws.

Pursuant to CPLR 3025, a party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it. Under CPLR 3012, service of an answer or reply shall be made within twenty days after service of the pleading to which it responds. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) of CPLR 3211. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action

or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order (CPLR 3211[f]).

Here, Plaintiff filed its initial summons and complaint on February 1, 2022, and served a copy of the summons and complaint upon Defendants on March 28, 2022. Defendants timely filed and served their pre-answer motion to dismiss pursuant to CPLR 3211(a)(7) on April 8, 2022. On October 11, 2022, Plaintiff filed an Amended Verified Complaint without leave of the court. Pursuant to CPLR 3211(f), the Defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) extended the defendants' time to answer and thus extended the time in which the plaintiffs could amend their complaint as of right (see also *Rosas v Petkovich*, 218 AD3d 814 [2d Dept. 2023]; *Estate of Feenin v Bombace Wine & Spirits, Inc.*, 188 AD3d 1001 [2d Dept. 2020]).

Accordingly, Plaintiff's Amended Verified Complaint is deemed timely.

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *Skefalidis v China Pagoda NY, Inc.*, 210 A.D. 3d 925 [2d Dept. 2022]); *Oluwo v Sutton*, 206 A.D.3d 750 [2d Dept. 2022]; *Sokol v Leader*, 74 A.D.3d 1180 [2d Dept. 2010]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Eskridge v Diocese of Brooklyn*, 210 A.D.3d 1056 [2d Dept. 2022]; *Zurich American Insurance Company v City of New York*, 176 A.D.3d 1145 [2d Dept. 2019]; *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d [2005]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the burden never shifts to the non-moving party to rebut a defense asserted by the moving party (*Sokol* at 1181; *Rovello v Orofino Realty Co. Inc.*, 40 NY2d 970 [1976]). CPLR 3211 allows a plaintiff to submit affidavits, but it does not oblige him or her to do so on penalty of dismissal (*Id.*; *Sokol* at 1181). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*Id.*; *Rovello* at 635; *Nonon* at 827). Thus, a plaintiff will not be penalized because he has not made an evidentiary showing in support of its complaint.

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boenheim*, 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]).

To plead a cause of action for breach of contract, a plaintiff must allege (1) the existence of a contract, (2) plaintiff's performance pursuant to the contract, (3) defendant's breach of the contractual obligations; and (4) damages resulting from that breach (*34-06 73, LLC v Seneca Insurance Company*, 39 NY3d 44 [2022]). Plaintiff's allegations must identify the provisions of the contract that were breached (*Id.*).

To plead a cause of action for unjust enrichment, a plaintiff must show (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 (*Mobarak v Mowad*, 117 A.D.3d 998 [2d Dept. 2014]; *Mandarin Trading Ltd. v Wildenstein*, 16 N.Y.3d 173 [2011]). In instances where the complaint contains two counts for the same services, one under contract and one on quasi-contract, the plaintiff is not compelled on motion in advance of the trial to elect upon which count he will proceed, since plaintiff is entitled to plead inconsistent causes of action in the alternative (see generally CPLR § 3014; *Katcher v Browne*, 19 A.D.2d 744 [2d Dept. 1963]; *Gold v 29-15 Queens Plaza Realty, LLC*, 43 A.D. 3d 866 [2d Dept. 2007]; *Pickering v State*. 30 A.D.3d 393 [2d Dept. 2006]; *Perkins v Volpe*, 146 A.D.2d 617 [1989]; *Breslin Realty Dev. Corp. v 112 Leaseholds*, 270 A.D.2d 299 [2d Dept. 2000]; *Rubin v Cohen*, 129 A.D. 395 [1908]). The statute of frauds does not bar unjust enrichment cause of action where it does not seek to enforce a promise but rather seeks to recover the reasonable value of property or services rendered in reliance on the promise (*Kearns v Mino*, 83 AD2d 606 [2d Dept. 1981]; *Castellotti v Free*, 138 AD3d 198 [1st Dept. 2016]).

Here, Plaintiff submits text messages that she alleges constitute the contractual agreement between parties. It is unclear from the submitted messages whether any explicit or oral agreement between the parties ever existed. Additionally, Plaintiff fails to identify the provisions

of the contract which were breached nor were the particular terms of the contract upon which Plaintiff's claim is based specified in her Affidavit. The allegations made by Plaintiff are vague and speculative and are insufficient to support a claim for breach of contract. However, there remains the possibility of recovery under quasi-contractual, equitable theories.

Accordingly, that branch of Defendants' motion to dismiss Plaintiff's cause of action for breach of contract is granted, and Defendant's motion to dismiss Plaintiff's cause of action for unjust enrichment is denied.

To establish a viable cause of action sounding in promissory estoppel, a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise (*Rogers v Town of Islip*, 230 AD2d 727 [2d Dept. 1996]; *Castellotti v Free*, 138 AD3d 198 [1st Dept. 2016]). The existence of a valid and enforceable contract governing a particular subject matter precludes recovery under a promissory estoppel cause of action arising out of the same subject matter (*Bent v St. John's University, New York*, 189 AD3d 973 [2d Dept. 2020]; *Bennett v State Farm Fire & Cas. Co.*, 181 AD3d 777 [2d Dept. 2020]). A plaintiff may not assert a cause of action sounding in unjust enrichment or quantum meruit to circumvent the statute of frauds (*Bent* at 203; *Matter of Zelouf*, 183 AD3D 900 [2d Dept. 2020]). Where, however, an oral agreement violates the statute of frauds, promissory estoppel may preclude application of the statute of frauds if its application would result in unconscionability (*Id.*). An "unconscionable injury" is "injury beyond that which flows naturally ... from the non-performance of the unenforceable agreement" (*Id.*). Promissory estoppel is an equitable form of action in which equitable rights alone are recognized (*Merex A.G. v Fairchild Weston Systems, Inc.*, 29 D3.d 821, 826 [2d Cir. 1994]).

Here, Plaintiff's alleged oral agreement with Defendants is unenforceable as it is violative of the statute of frauds (see Uniform Commercial Code 2-201[1]; General Obligations Law 5-701[a][1]; *Martin Greenfield Clothiers, Ltd. v Brooks Brothers Group, Inc.*, 175 AD3d 636 [2d Dept. 2019]). To the extent that the plaintiff's promissory estoppel cause of action may have been asserted to circumvent the statute of frauds, the plaintiff was required, but failed to, assert that it suffered unconscionable injury in reliance on the defendant's alleged promise (*Id.* at 638; *Carvel Corp. v Nicolini*, 144 AD2d 611 [2d Dept. 1988]). Additionally, Plaintiff fails to allege what promises she relied on to her detriment.

Accordingly, that branch of Defendants' motion to dismiss Plaintiff's cause of action for promissory estoppel is granted.

A joint venture is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge (*Kaufman v Torkan*, 51 AD3d 977 [2d Dept. 2008]; *Calcagno v Graziano*, 200 AD3d 1248 [3d Dept. 2021]). To plead the existence of a joint venture, the plaintiff must allege that there was "an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurer to the joint undertaking (i.e. a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise and a provision for the sharing of profits and losses (*Id*; *Slabakis v Schik*, 164 AD3d 454 [1st Dept. 2018]). An agreement to enter into a joint venture may be oral and may be inferred from the totality of the parties' conduct in performance of the joint venture (*Schultz v Sayada*, 133 AD3d 1015 [3d Dept. 2015]). The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit (*MacKay v Paesano*, 185 AD3d 915 [2d Dept. 2020]; *Richebell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288 [1st Dept. 2003]; *Mendelson v Feinman*, 143 AD2d 76 [2d Dept. 1988]). Members of a joint venture owe a fiduciary duty to one another (*Meinhard v Salmon*, 249 NY 458 [1928]; *A.G. Homes, LLC v Gerstein*, 52 AD3d 546 [2d Dept. 2008]).

Here, the court finds, giving Plaintiff the benefit of every favorable inference that such intent to enter into a joint venture may be implied from the totality of the conduct alleged here by the parties. Specifically in Plaintiff's affidavit, she states that there was an agreement between herself and the Defendants wherein it was agreed that Plaintiff would invest "her efforts and resources in furtherance of the business and in exchange, she would receive shares and dividends." Plaintiff also asserts that it was agreed that any loans, expenses, and monies advanced by Plaintiff would be paid back to her along with her salary. It is undisputed that Plaintiff and Zalevsky entered into a lease agreement for the subject business and signed as guarantors of the lease obligations using Plaintiff's licensure as a basis for the lease obligations. Additionally, Plaintiff has submitted text messages between herself and Zalevsky wherein it is

acknowledged that Plaintiff invested at least \$15,000.00 into the business. The submitted messages also suggest the parties negotiated the profit split for the business, joint control and management, and the combining of their property, skills, or knowledge for the benefit of the business.

Accordingly, that branch of Defendants' motion to dismiss Plaintiff's cause of action for the existence of a joint venture is denied.

The elements of a constructive trust are a confidential relationship, a promise, a transfer in reliance on that promise and unjust enrichment (*Sanxhaku v Margetis*, 151 AD3d 778 [2d Dept. 2017]; *Baker v Harrison*, 180 AD3d 1210 [3d Dept. 2020]). As a constructive trust is an equitable remedy, courts do not rigidly apply the elements but use them as flexible guidelines (*Baker* at 1211; *Tyree v Henn*, 109 AD3d 906 [2d Dept. 2013]). An express promise is not required to impose a constructive trust as the parties' relationship and circumstances may be construed to suggest an implied promise (*Baker* at 1212; *Moak v Raynor*, 28 AD3d 900 [3d Dept. 2006]). A fiduciary relationship arises when one is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584 [2012]; *Saul v Cahan*, 153 AD3d 947 [2d Dept. 2017]) It is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions, therefore a conventional business relationship, without more, is insufficient to create a fiduciary relationship (*Saul* at 949; *AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6 [2d Dept. 2008]).

Here Plaintiff has alleged a fiduciary relationship by virtue of her status as a member in a joint venture (*See Plumitallo v Hudson Atlantic Lando Co., LLC*, 74 AD3d 1038 [2d Dept. 2010]). Additionally, The Plaintiff's allegations of an initial investment into the business, contributions towards project expenses and supplies which have not been repaid, and contribution of guarantying the lease and using her license as a basis for the lease obligations and a permit sufficiently alleges the elements of a cause of action for a constructive trust against the Defendants.

Accordingly, that branch of Defendants' motion to dismiss Plaintiff's cause of action for constructive trust is denied.

Plaintiff's cause of action for "money damages and consequential damages" alleges that Defendants failed to perform their contractual obligations and as a result Plaintiff was damaged

due to the cost of money that was paid to Defendants. Additionally, Plaintiff alleges that as a result of Defendants unjust enrichment, Plaintiff was deprived of the use of valuable resources and incurred legal fees to protect her rights entitling Plaintiff to actual damages, expectancy damages, salaries and lost profits. These allegations are duplicative of the relief sought in Plaintiff's previous causes of action.

Accordingly, that branch of Defendants' motion to dismiss Plaintiff's cause of action for monetary damages and consequential damages is granted.

In general, a corporation has a separate legal identity from its owners and the owners are not personally liable for the obligations of the corporation (*Open Door Foods, LLC v Pasta Machines, Inc.*, 136 AD3d 1002 [2d Dept. 2016]; *East Hampton Union Free School Dist. V Sandpebble Builders, Inc.*, 66 AD3d 122 [2d Dept. 2009]). The concept of piercing the corporate veil is an equitable exception that permits, in certain circumstances, the imposition of personal liability on owners for the obligations or wrongs of their corporation (*Open Door Foods, LLC* at 1004; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135 [1993]). A party seeking to invoke the doctrine of piercing the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff (*East Hampton Union Free School Dist.* at 126; *Love v Rebecca Development, Inc.*, 56 AD3d 733 [2d Dept. 2008]). Additionally, a party must allege that the owners, through their domination, abused the privilege of doing business in the corporate form (*Id.*). Conduct constituting an abuse of the privilege of doing business in the corporate form is a material element of any cause of action seeking to hold an owner personally liable for the actions of his or her corporation under the doctrine of piercing the corporate veil (*Id.*; *Morris* at 142; *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141 [2d Dept. 2009]). Factors to be considered in determining whether the owner has "abused the privilege of doing business in the corporate form" include whether there was a "failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*Id.*; (*Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016 [2d Dept. 2007])).

Here, the complaint alleges that Defendants Pishchiker and Zalevsky, who are the principals of Wiz Kids had complete and total domination over the business and used their

domination to harm Plaintiff by failing to perform their contractual obligations. The complaint further alleges that Defendants Pishchiker and Zalevsky abused the corporate form by using money paid into the corporation for personal expenses or other clients, rather than using the funds to honor agreements with Plaintiff or other legitimate purposes. These allegations however are conclusory, and mere conclusory statements or assertions that a corporation is completely dominated by the owners or that the corporation acted as their “alter ego” without more is insufficient to support the equitable relief of piercing the corporate veil (*Morris* at 141-142; *JGK Industries, LLC v Hayes NY Business, LLC*, 145 AD3d 979 [2d Dept. 2016]; *Goldman v Chapman*, 44 AD 3d 938 [2d Dept. 2007]). Plaintiff’s complaint fails to set forth sufficient factual allegations that the defendants exercised domination and control over Homeland “which is so complete that the corporation has no separate mind, will, or existence of its own” (*Sky-Track Technology Company Limited v HSS Development, Inc.*, 167 AD3d 964 [2d Dept. 2018]). Furthermore, the complaint fails to allege that the individual Defendants failed to observe corporate formalities or abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in the injury allegedly suffered by the Plaintiff.

Accordingly, that branch of Defendants’ motion to dismiss Plaintiff’s cause of action to pierce the corporate veil is granted.

Pursuant to 22 NYCRR 130–1.1, a court in a civil action may award reasonable attorney’s fees resulting from frivolous conduct. Conduct is frivolous within the meaning of 22 NYCRR 130–1.1, *inter alia*, where it is completely without merit in law or is undertaken primarily to harass or maliciously injure another” (22 NYCRR 130-1.1[c][1]; *Stanecky v Stanecky*, 200 AD3d 819 [2d Dept. 2021]). Even in instances where a Plaintiff’s complaint fails to state a cause of action, it cannot be said that the complaint is completely without merit in law (*Id.*; *Matter of Lebron v Lebron*, 101 AD3d 1009 [2d Dept. 2012]).

Here, contrary to Defendants contention, Plaintiff has asserted viable causes of action in her complaint. Additionally, Defendants have failed to demonstrate that the action was commenced primarily to harass or maliciously injure them.

Accordingly, it is hereby,

ORDERED, that Defendants’ motion to dismiss Plaintiff’s complaint pursuant to CPLR 3211(a)(7) is granted to extent that Plaintiff’s first (breach of contract), second (promissory

estoppel/detrimental reliance), sixth (monetary and consequential damages), and seventh (pierce the corporate veil) causes of action are dismissed, and it is further,

ORDERED, that Defendants' motion to dismiss Plaintiff's third (unjust enrichment), fourth (joint venture), fifth (constructive trust) are denied, and it is further,

ORDERED, that Defendants' request for costs and attorney's fees is denied.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**