

Morris Rothenberg & Son, Inc. v Troy Caruso, Inc.

2024 NY Slip Op 35269(U)

March 20, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 204819/2022

Judge: James Hudson

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**Supreme Court of the State of New York
County of Suffolk
Commercial Division Part XLVJ
Memorandum Decision**

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

ORIG. MOTION DATE: 12/27/23
FINAL SUBMITTED DATE: 1/31/24
Mot. Seq. #: **003 - MD**

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MORRIS ROTHENBERG & SON, INC. d/b/a
ROTHCO,

Plaintiff,

VISHNICK, McGOVERN, MILIZIO, LLP
Attorneys for the Plaintiff
3000 Marcus Avenue, Suite 1E9
Lake Success, NY 11042

-against-

TROY CARUSO, INC. and TROY CARUSO,
jointly and severally,

Defendants.

WELTZ, KAKOS, GERBI, WOLINETZ,
VOLYNSKY, LLP
Attorneys for the Defendants
1 Old Country Road, Suite 725
Carle Place, NY 11514
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Defendants requests an order, pursuant to **CPLR 3211 (a) (1), (7)**, dismissing the amended complaint against Troy Caruso in its entirety, with prejudice.

The amended verified complaint (“Complaint”) alleges as the first cause of action that Troy Caruso, Inc. defaulted on the payment of a \$2,000,000 short term promissory note; which debt remains unpaid despite due demand by Morris Rothenberg & Son, Inc. d/b/a Rothco (“Rothco”). The second cause of action alleges that Troy Caruso, Inc. was and is the alter ego of Troy Caruso, and requests that the corporate veil be pierced and Mr. Caruso be held personally liable for the debt.

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For the purposes of this dismissal motion, the Court must accept the allegations made in the amended complaint as true, accord them the benefit of every reasonable inference, and determine only whether the allegations support any cognizable legal theory (*Connolly v. Long Island Power Authority*, 30 NY3d 719, 728, 70 NYS3d 909, 94 NE3d 471 [2018]). The criteria is whether Rothco has a cause of action, not whether one has been stated (*Maddicks v. Big City Properties, LLC*, 34 NY3d 116, 123, 114 NYS3d 1, 137 NE3d 459 [2019]; *Leon v. Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]). The Court will also consider whether Rothco can succeed upon any reasonable view of the stated facts (*Aristy-Farer v. State*, 29 NY3d 501, 509, 59 NYS3d 877, 81 NE3d 360 [2017]). Dismissal will only be warranted if an asserted material fact is not one, and no dispute exists regarding that assertion (*Houtenbos v. Fordune Association, Inc.*, 200 AD3d 661, 160 NYS3d 57 [2d Dept 2022]). In its opposition to the motion, Rothco has no obligation to demonstrate evidentiary facts to support the amended complaint (*Stuart Realty Co. v. Rye Country Store, Inc.*, 296 AD2d 455, 456, 745 NYS2d 72 [2d Dept 2022]). The Court will not consider whether the complaint will survive a summary judgment motion or whether Rothco will be able to prove its claims (*Redwood Property Holdings, LLC v. Christopher*, 211 AD3d 758, 177 NYS3d 895 [2d Dept 2022]).

The Court will first consider the request by Mr. Caruso that the complaint be dismissed against him for failure to state a cause of action (CPLR 3211 [a] [7]).

The first cause of action alleges breach of contract by Troy Caruso, Inc. The validity of the parties' contract is uncontroverted (see *British West Indies Guar. Trust Co., Inc. v. Banque Internationale a Luxembourg*, 172 AD2d 234, 567 NYS2d 731 [1st Dept 1991]).

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A pleading for breach of contract must allege: 1) a contract exists; 2) the plaintiffs performed in accordance with their contract; 3) the defendants breached their contractual obligations and 4) that breach resulted in damages (*34-06 73, LLC v. Seneca Insurance Company*, 39 NY3d 44, 52, 178 NYS3d 1, 198 NE3d 1282 [2022]). The complaint states that on June 4th, 2018 Troy Caruso, Inc. entered into a \$2,000,000 promissory note with Rothco (“Note”) which was extended by a June 3rd, 2019 renewal and extension agreement (“Agreement”), which matured on June 3rd, 2020 (NYSCEF Doc Nos. 46, 47). The terms of that note require payment upon maturity of the outstanding principal balance plus any accrued interest. It is uncontroverted that the agreement matured June 3rd, 2020 and remains unsatisfied. The first cause of action alleges that Troy Caruso, Inc. breached the note by failing to pay and satisfy its debt. Finally, the complaint alleges damages in excess of \$2,347,166.65, plus interest and reasonable attorney’s fees. The first cause of action is adequately plead against Troy Caruso, Inc. By incorporation (paragraphs 1 - 40, inclusive), the first cause of action is also adequately plead against Troy Caruso (amended complaint, NYSCEF Doc. No. 28). The request for dismissal of the first cause of action for breach of contract as against Mr. Caruso for failure to state a cause of action will not be granted.

The second cause of action alleges that the corporate veil should be pierced and that Mr. Caruso be held personally liable on the debt. A pleading to pierce the corporate veil requires allegations that: 1) the owner exercised complete domination of the corporation in respect to the transaction complained of; and 2) that such domination was used to commit a fraud or wrong against the party seeking to pierce the corporate veil; which 3) resulted in that party being damaged (*DePetris v. Traina*, 211 AD3d 939, 181 NYS3d 298 [2d Dept

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2022)). The second cause of action alleges that Mr. Caruso exercised complete domination over Troy Caruso, Inc. It also asserts the noted domination was used with intent to commit fraud against Rothco; which fraud was committed. Last, it alleges that Rothco suffered damage in the amount of \$2,347,166.65, plus interest and attorney's fees incurred. The request for dismissal of the second cause of action to pierce the corporate veil for failure to state a cause of action will not be granted.

The Court will next examine the request by Mr. Caruso that each of the two (2) stated causes of action be dismissed upon documentary evidence (**CPLR 3211 [a] [1]**).

Documents such as mortgages, deeds, notes, contracts and any other papers of undeniable content will be considered as documentary evidence (*Hohwald v. Farm Family Casualty Insurance Company*, 155 AD3d 1009, 1010, 66 NYS3d 316 [2d Dept 2017]; *Fontanetta v. John Doe 1*, 73 AD3d 78, 84-85, 898 NYS3d 569 [2d Dept 2010]). The documentary evidence presented must resolve all factual issues as a matter of law and conclusively dispose of a claim (*B&A Realty Management, LLC v. Gloria*, 192 AD3d 851, 853, 144 NYS3d 443 [2d Dept 2021]). Affidavits, deposition testimony, and letters are not considered documentary evidence (*Bonavita v. Government Employees Insurance Company*, 185 AD3d 892, 893, 127 NYS3d 577 [2d Dept 2020]). Emails are not documentary evidence (*Bath & Twenty, LLC v. Federal Savings Bank*, 198 AD3d 855, 156 NYS3d 316 [2d Dept 2021]).

In his argument, Mr. Caruso relies upon the Complaint as documentary evidence supporting his request for its dismissal. The Complaint is not documentary evidence; it is a pleading; a recitation of allegations related to the factual and legal issues in contest (*see*

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MJ Lilly Associates, LLC v. Ovis Creative, LLC, 221 AD3d 805, 200 NYS3d 403 [2d Dept 2023]).

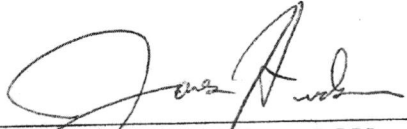
Counsel for Mr. Caruso, in reference to the note and agreement, argues that Mr. Caruso did not execute either in his personal capacity; and did not sign a personal guarantee (legal memorandum, NYSCEF Doc No. 44). The complaint does not allege that Mr. Caruso signed in his personal capacity; or that he signed a personal guarantee. No evidentiary document has been presented which warrants dismissal of the complaint.

Accordingly, it is

ORDERED, that the motion by Troy Caruso (seq. no. 003) which requests, pursuant to CPLR 3211 (a) (1), (7), that the amended complaint be dismissed against him in its entirety, with prejudice, is denied.

This memorandum also constitutes the Order of the Court.

Dated: March 20th, 2024
Riverhead, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court