Coprin LLC v Copyright Defense League LLC
2024 NY Slip Op 35518(U)
March 26, 2024
Supreme Court, Nassau County
Docket Number: Index No. 608800/2023
Judge: Jerome C. Murphy
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

COPRIN LLC,

Plaintiff,

- against -

COPYRIGHT DEFENSE LEAGUE LLC
d/b/a PICTURE PROTECTION SERVICE
and DANIEL LEVINE,

Defendants.

TRIAL/IAS PART 5

Index No. 608800-2023
Motion Date: 11-13-2023
Sequence No.: 001

DECISION AND ORDER

The following papers have been read on this motion:

Motion Sequence 001

Notice of Motion, Affirmation and Exhibit	1
Defendants' Memorandum of Law in Support	2
Affirmation in Opposition and Exhibits	3
Plaintiff's Memorandum of Law in Opposition	4
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PRELIMINARY STATEMENT

In Motion Sequence 001, defendants move, pursuant to CPLR 3211(a)(7), to dismiss the second, third, fourth, and fifth causes of action, along with all other and further relief that the Court deems just and proper as well as costs and disbursements. Opposition and reply have been submitted.

BACKGROUND

In June 2023, plaintiff commenced this action against defendants to recover damages for breach of contract (first cause of action); gross negligence (second and third causes of action); and fraudulent inducement (fourth cause of action); and to pierce the corporate veil as to the individual defendant Daniel Levine, the sole and managing member of the defendant Copyright Defense League

LLC d/b/a Picture Protection Service (hereinafter Copyright)(fifth cause of action) (*see* NYSCEF Doc. Nos. 1-2). According to the complaint, plaintiff entered into a loan and security agreement with Copyright on April 18, 2018, pursuant to which plaintiff loaned Copyright "certain funds in connection with Copyright's ongoing business of bringing claims against copyright infringers on behalf of the copyright owners" (NYSCEF Doc. Nos. 2, 6, 13, ¶ 4).

Defendants now move, pursuant to CPLR 3211(a)(7), to dismiss the second, third, fourth, and fifth causes of action. Plaintiff opposes the motion.

DISCUSSION

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), 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" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Acala v Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.*, 222 AD3d 706, 707 [2nd Dept. 2023]). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Simkin v Blank*, 19 NY3d 46, 52 [2012][internal quotation marks omitted]; *see Fuller v Family Servs. of Westchester, Inc.*, 209 AD3d 983, 983 [2nd Dept. 2022]). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]; *see Franklin D. Nastasi Trust v Bloomberg, L.P.*, 224 AD3d 804 [2nd Dept. 2024]).

Second and Third Causes of Action

Gross negligence "differs in kind, not only degree, from claims of ordinary negligence" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823 [1993]; *see Goldstein v Carnell Assoc., Inc.*, 74 AD3d 745, 746 [2nd Dept. 2010]). To constitute gross negligence, a party's conduct must "'smack[ ] of intentional wrongdoing'" or "evince[ ] a reckless indifference to the rights of others" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992], *quoting Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983]; *see J. Petrocelli Contr., Inc. v Morganti Group, Inc.*, 137 AD3d 1082, 1083 [2nd Dept. 2016]).

Here, with respect to the second cause of action, plaintiff alleged that Levine conducted

Copyright's business in an "unprofessional and grossly negligent manner, causing the business to fail" which harmed plaintiff and that Copyright spent approximately $300,000 of the money Copyright borrowed to upgrade its technology with a company named Carimus, which ultimately did not accomplish the objective for which the upgrade was purchased (NYSCEF Doc. Nos. 2, 6, 13, ¶ 16-17). Plaintiff further alleged that "Copyright knew, or should have known, after a far less significant expenditure, that the monies expended were not yielding any upgrades to its technology and redirected the monies in a more constructive manner" (NYSCEF Doc. Nos. 2, 6, 13, ¶ 19).

Concerning the third cause of action, plaintiff alleged that Copyright's failure to commence an action against another company, MEGA, to which Copyright had paid in excess of $300,000 to acquire rights to images which were improperly delivered so that the images were effectively worthless also constituted managerial incompetence and gross negligence (NYSCEF Doc. Nos. 2, 6, 13, ¶¶ 22-25).

The allegations set forth in the complaint do not contain any facts constituting willful misconduct or gross negligence on the part of Copyright. Further, plaintiff's allegations as a whole sound in contract, not tort and plaintiff does not allege that Copyright owed it a legal duty independent of the contractual duty owed to repay the loan, or that any such independent legal duty was breached (*see Board of Mgrs. Of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 684 [2nd Dept. 2016]). As a result, the second and third causes of action seeking to recover damages for gross negligence are dismissed (*see e.g. Skywest, Inc. v Ground Handling, Inc.*, 150 AD3d 922, 923 [2nd Dept. 2017]).

Fourth Cause of Action

"'To state a [cause of action to recover damages] for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury'" (*Louie's Seafood Rest., LLC v Brown*, 199 AD3d 790, 793 [2nd Dept. 2021], *quoting Tsinias Enters. Ltd. v Taza Grocery, Inc.*, 172 AD3d 1271, 1273 [2nd Dept. 2019][internal quotation marks omitted]; *see 651 Bay St., LLC v Discenza*, 189 AD3d 952, 953-954 [2nd Dept. 2020]). "Pursuant to CPLR 3016 (b), where the cause of action is grounded in misrepresentation or fraud, the circumstances constituting the wrong shall be stated in detail" (*651 Bay St., LLC v Discenza*, 189 AD3d at 954; *see* CPLR 3016[b]; *Edelman v Berman*, 195 AD3d 995, 997 [2nd Dept. 2021]). "However, the pleading requirements of CPLR 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*Berkovits v Berkovits*, 190 AD3d 911, 915 [2nd Dept. 2021]; *see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]).

With respect to the fourth cause of action, plaintiff alleged that "[f]rom the date the parties entered into the contract, on or about April 18, 2018, Levine has made numerous claims, representations, assurances and promise as to the status of the venture" (NYSCEF Doc. Nos. 2, 6, 13, ¶ 28). In the complaint, plaintiff provided 39 excerpts from emails and text messages sent by Levine to plaintiff from May 13, 2019 through November 21, 2022, that were allegedly made "with the intent to mislead and to delay any lawsuit against defendants" (NYSCEF Doc. Nos. 2, 6, 13, ¶¶ 29). Plaintiff further alleged that the "statements were false and untrue and Levine knew or should have known that they were false at the time he made them", were made "with the intent of deceiving and defrauding [plaintiff] and to induce [plaintiff], in reliance thereon to continue to make its capital advances", and that plaintiff "reasonably believed said statements [] to be true and relied thereon, and was therefore induced to fully fund its capital commitment and delay the filing of this action" (NYSCEF Doc. Nos. 2, 6, 13, ¶¶ 30-31, 33).

However, plaintiff alleged that, pursuant to the subject contract, it provided $1,000,000 to Copyright at a rate of $100,000 per month, over a period of 10 months from May 1, 2018 through February 1, 2019 (*see* NYSCEF Doc. Nos. 2, 6, 13, ¶ 6). Consequently, to the extent that the fourth cause of action alleged that the 39 statements set forth in the complaint allegedly induced plaintiff to fully fund this loan, since the statements were made subsequent to plaintiff fully funding the loan, the statements set forth in the complaint cannot provide the basis for a fraudulent inducement cause of action with respect to inducing plaintiff "to continue to make its capital advances" (*see Louie's Seafood Rest., LLC v Brown*, 199 AD3d at 793). The allegation that "[i]n fact, despite representations by defendants of significant monies derived from collections prior to [plaintiff's] capital advances, the collections appeared to come to a halt shortly after [plaintiff] infused Copyright with the contracted amount of its capital commitment" (NYSCEF Doc. Nos. 2, 6, 13, ¶ 9) as a basis for the fourth cause of action, also does not support a fraudulent inducement cause of action as it does not allege that Copyright knowingly misrepresented a material present fact. Insofar as the fourth cause of action is premised upon the allegation that the statements caused plaintiff to delay commencing this action, the complaint does not allege any injury stemming from that delay that is different from the damages stemming from the first cause of action alleging breach of contract.

Similarly, to the extent that the fourth cause of action purports to recover damages for negligent misrepresentation, as raised by plaintiff in its opposing memorandum of law, the complaint fails to state such a cause of action. "In order for the plaintiff[] to recover on a cause of action sounding in negligent misrepresentation, [he or she] must demonstrate the existence of (1) a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*Feldman v Byrne*, 210 AD3d 646, 650 [2nd Dept. 2022]; *see Neurological Surgery, P.C. v Group Health Inc.*, 224 AD3d 700 [2nd Dept. 2024]; *Borovina v ACAP Fund GP, LLC*, 220 AD3d 729, 730 [2nd Dept. 2023]). "Generally, a special relationship does not arise out of an ordinary arm's length business transaction between two parties" (*Feldman v Byrne*, 210 AD3d at 650; *see Borovina v ACAP Fund GP, LLC*, 220 AD3d at 730). Here, the allegations do not set forth that a special relationship was created or existed between the parties (*see Feldman v Byrne*, 210 AD3d at 650; *Neurological Surgery, P.C. v Group Health Inc.*, 224 AD3d 700; *Borovina v ACAP Fund GP, LLC*, 220 AD3d at 730).

Fifth Cause of Action

At the outset, New York does not recognize a separate cause of action for piercing the corporate veil (*see Arco Acquisitions, LLC v Tiffany Plaza, LLC*, 224 AD3d 798 [2nd Dept. 2024]). "The concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). "[A]n attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 141). Standing alone, this is a sufficient basis to dismiss the fifth cause of action (*see*

DiMauro v United, LLC, 122 AD3d 568, 569 [2nd Dept. 2014]).

In any event, "[i]n order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice" against the plaintiff such that a court in equity will intervene (*East Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 16 NY3d 775, 776 [2011][internal quotation marks omitted]). At the pleading stage, "[s]ince, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer. . . personally liable, a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in 'bad faith' while representing the corporation" (*East Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 16 NY3d at 776). "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to [corporate] formalities, inadequate capitalization, commingling of assets, and the personal use of [corporate] funds" (*Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d at 683 [internal quotation marks omitted]).

Here, with respect to the fifth cause of action, plaintiff alleged that "Levine dominated and controlled the affairs of Copyright as to pierce the corporate veil, and to be its alter ego, and to make himself liable personally for its debts" and that, as a result, plaintiff had been "damaged in an amount to be determined at trial, but not less than $1,000,000" (NYSCEF Doc. Nos. 2, 6, 13, ¶¶ 36-37). Such allegations are not sufficient to set forth that Levine engage in acts amounting to an abuse of the corporate form to perpetrate a wrong against plaintiff (*see East Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 16 NY3d at 776; *Tabchouri v Hard Eight Restaurant Co., LLC*, 219 AD3d 528, 532 [2nd Dept. 2023]; *Avila v Distinctive Dev. Co., LLC*, 120 AD3d 449, 451 [2nd Dept. 2014]).

Plaintiff's Requests for Discovery and for Leave to Amend the Complaint Set Forth in Opposing Memorandum of Law

Defendants' motion concerns sufficiency of the pleadings. As a result, plaintiff's contention that discovery is "necessary for the Court to fully assess the merits of Plaintiff's causes of action"

(Plaintiff's Memorandum of Law p. 15), is without merit since the Court is not being asked to assess the merits of the causes of action.

Further, plaintiff's request to the Court for leave to amend its complaint must be made by motion (*see* CPLR 3025[b]; *Drago v Spadafora*, 94 AD3d 1041 [2nd Dept. 2012]).

Accordingly, it is

ORDERED that defendants' motion, pursuant to CPLR 3211(a)(7), to dismiss the second, third, fourth, and fifth causes of action set forth in the complaint is GRANTED.

To the extent that any other requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
March 26, 2024

E N T E R:

Jerome C. Murphy

JEROME C. MURPHY, J.S.C.

ENTERED
Mar 27 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE