

AKF, Inc. v Spin Capital LLC

2025 NY Slip Op 31124(U)

April 3, 2025

Supreme Court, New York County

Docket Number: Index No. 652310/2024

Judge: Lyle E. Frank

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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**

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

AKF, INC.,

Plaintiff,

- v -

SPIN CAPITAL LLC, SIMON AROCHA, HENRY WHITE,
SALVATORE LOPINTO, DAVID MAEKITAN

Defendant.

-----X

INDEX NO. 652310/2024

MOTION DATE 06/07/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19

were read on this motion to/for DISMISS.

This action arises of allegations of, *inter alia*, breach of contract. Defendants move to dismiss the complaint, pursuant to CPLR §§ 3211(a)(1), (7), and (8). Plaintiff opposes the instant motion and cross moves for an order granting jurisdictional discovery. For the reasons set forth below, the motion to dismiss is granted in part and the cross motion is denied.

Legal Standard

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD.2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]. “The complaint must

contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *Id.*

Pursuant to CPLR § 3211(a)(1) documentary evidence provides a basis for dismissing a cause of action "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002].

Background

The parties entered into an independent sales order agreement, in which defendant Spin Capital LLC, as a broker, would be paid commissions for introducing plaintiff to merchants who enter into agreements with plaintiff.

The complaint alleges that defendants referred a merchant named Modern Concepts Construction LLC d/b/a MC Solar to plaintiff, then plaintiff and merchant entered into a revenue purchase agreement. The complaint further alleges that within 30 days of the agreement the merchant defaulted and based on the agreement with Spin Capital, it is entitled to claw back the commission paid based on that referral.

Discussion

The complaint contains two causes of action alleging breach of the agreement, third cause of action alleging unjust enrichment, and the fourth cause of action of money had and received, against all defendants. Defendants seek dismissal of the complaint as against the individual defendants on two grounds, lack of jurisdiction, CPLR § 3211(a)(8), and failure to state a claim.

Preliminarily, the Court notes that no proof of service was filed of the underlying summons and complaint on any of the defendants at the time the motion to dismiss was filed.

While it appears that 5 days before the oral argument the affidavits of service were uploaded, for the purposes of this motion the Court will assume that service was appropriate and timely made.

In an attempt to state a claim as against the individual defendants, the complaint alleges, without specific factual allegations, that the corporation is an alter ego of the defendants and that there has been comingling of funds. The concept of “piercing the corporate veil” is a limitation on accepted principles that corporation exists independently of its owners as a separate legal entity, that owners are normally not liable for debts of corporation, and that it is perfectly legal to incorporate for the express purpose of limiting liability of corporate owners. *Morris v New York State Dep't of Tax'n & Fin.*, 82 NY2d 135 [1993]. Although there are no definitive rules governing circumstances when corporate veil may be pierced, there is generally required showing that: (1) owners exercised complete domination of corporation in respect to transaction attacked; and (2) such domination was used to commit fraud or wrong against plaintiff which resulted in plaintiff's injury. *Id.*

Further, it has been held by the Court of Appeals that, at the pleading stage, a plaintiff seeking to pierce the corporate veil must adequately allege the existence of a corporate obligation and that the defendant 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. *Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30 [2018].

Here, a thorough review of the complaint establishes that the complaint fails to state a cause of action as against defendants Simon Arocha, Henry White, Salvatore Lopinto, and David Maekitan. The complaint fails to allege any factual allegations regarding the individual defendants' misuse of the corporate form for their own benefit, the complaint just alleges the elements of piercing the corporate veil claim and is therefore insufficient. Similarly, plaintiff has

failed to establish that jurisdictional discovery is warranted. Accordingly, the complaint is dismissed in its entirety as against the individual defendants.

Breach of Contract

To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages. *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 A.D.3d 49, 58 [1st Dept 2013].

Here, plaintiff has sufficiently pled a breach of contract cause of action in its first and second causes of action against the corporate defendant. The Court declines to dismiss the second cause of action of liquidated damages as an unenforceable contractual provision. Defendant has failed to establish entitlement to that relief at this early stage in the litigation. Although defendants do not specifically seek dismissal of this cause of action, they contend that plaintiff's "frivolous misconduct" warrants dismissal of the entire complaint, the Court does not agree, nor does it deem plaintiff's inadequate attempt to pierce the corporate veil as misconduct.

Unjust Enrichment and Money had and Received

Defendants contend, and the Court agrees, that the third and fourth causes of action should be dismissed based on undisputed existence of a contract that governs the dispute between the parties. Plaintiff avers that it is entitled to plead in the alternative and argues that its third and fourth causes of action are different legal theories and therefore should be allowed to proceed.

The first cause of action for breach of contract and the third and fourth quasi-contract causes of action seek the same relief for the same transactions as the breach of contract cause of action. The complaint contains the same factual allegations and seeks the same relief under all

three causes of action. Further, it is undisputed that the subject agreement constitutes the contractual relationship between the parties. Thus, the third and fourth causes of action are duplicative of the breach of contract cause of action and is therefore dismissed. *Apfel v Prudential-Bache Sec., Inc.*, 81 NY2d 470, 479 [1993](Appellate Division erred in reinstating plaintiffs' unjust enrichment claim on a quasi-contract theory. The transaction is controlled by the express agreement of the parties and their rights and liabilities are to be determined solely on theories of breach of contract). The Court has reviewed the plaintiff's remaining contentions and finds them unavailing. Accordingly, it is hereby

ORDERED that the third and fourth causes of action are dismissed in their entirety; and it is further

ORDERED that the motion of defendants Simon Arocha, Henry White, Salvatore Lopinto, and David Meaekitan to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants; and it is further


ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website).


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4/3/2025
DATE

LYLE E. FRANK, 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