American Yeast Sales Corp. v Brehm
2025 NY Slip Op 35517(U)
January 13, 2025
Supreme Court, Westchester County
Docket Number: Index No. 65840/2024
Judge: Paul I. Marx
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
HON. PAUL I. MARX, J.S.C.
---X
American Yeast Sales Corporation, d/b/a Lallemand Baking,

Plaintiff,

-against-

Nancy Brehm, Matthew Brehm and Otto Brehm, Inc.,

Defendants.
---X

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

DECISION AND ORDER

Index No. 65840/2024

Motion Date: Sept. 25, 2024
Motion Sequence No. 1

The papers filed electronically on NYSCEF numbered 7 to 22 were read on Defendants Nancy Brehm and Matthew Brehm's (the "Individual Defendants") motion to dismiss the complaint pursuant to CPLR § 3211(a)(7).

Upon reading the foregoing papers, it is ORDERED that the Individual Defendants' motion is denied for the reasons which follow.

BACKGROUND:

On July 21, 2024, Plaintiff commenced this action by filing a summons with notice against the Individual Defendants. On August 6, 2024, Plaintiff filed a complaint, alleging a cause of action for fraudulent concealment.

The complaint alleges that between March 29, 2023, and June 3, 2023, Defendant Otto Brehm Inc. ("Otto") ordered, received and accepted yeast and baking ingredients from Plaintiff at the agreed price of $65,997.86. Plaintiff alleges that at the time Otto received these products from Plaintiff, the Individual Defendants, as Otto's controlling officers, knew that Otto was in the process of closing its business and would not remain in business after mid-June of 2023. Plaintiff alleges that the Individual Defendants did not disclose this information to Plaintiff.

The complaint alleges that Otto closed its business on June 16, 2023. Plaintiff alleges that the Individual Defendants' concealment of Otto's intention to close its business on June 16, 2023, was done with the intent to deceive Plaintiff and with full knowledge that Otto would not be in business to pay for the outstanding balance in the sum of $65,997.86. Plaintiff alleges that it did not know that Otto intended to close its business on June 16, 2023, without payment to Plaintiff, because these facts were solely within the knowledge of the Individual Defendants and Plaintiff could not have discovered these facts by the exercise of ordinary intelligence.

Plaintiff seeks damages in the sum of $65,997.86, plus interest from June 3, 2023, plus costs and disbursements.

On August 13, 2024, the Individual Defendants filed an answer, asserting five affirmative defenses.

On August 16, 2024, the Individual Defendants filed the instant motion. The motion was marked fully submitted on September 25, 2024.

On November 8, 2024, this Court held a preliminary conference. During the conference, Plaintiff's motion seeking leave to serve a supplemental summons and complaint was granted.

On November 22, 2024, Plaintiff filed a supplemental summons and amended complaint. The amended complaint adds Otto as a party defendant and adds a cause of action for breach of contract against Otto for its failure to pay the sum of $65,997.86 for the products delivered between March 29, 2023, and June 3, 2023.

On November 22, 2024, the Individual Defendants filed an answer to the amended complaint, asserting five affirmative defenses.

DISCUSSION:

The Individual Defendants move to dismiss the complaint, arguing that the complaint does not allege the elements necessary to pierce the corporate veil. They argue that they did not fully dominate and control Otto. They argue that Otto had eight shareholders and other officers who had collective input with regards to its closure. They also argue that the complaint does not allege the element of abuse of privilege of doing business, because it does not allege that they abused corporate formalities, operated with inadequate capitalization, commingled assets and/or used corporate funds for personal use.

The Individual Defendants also argue that the fact that Otto closed its operations does not expose corporate officers to personal liability.

The Individual Defendants further argue that the complaint should be dismissed, because the allegations in the complaint are not true and/or based on conjecture. They argue that the allegation in the complaint that they ordered and received products between March 29, 2023, to

June 3, 2023, with the knowledge that Otto would close its business is not true, because the decision to close Otto was made on June 5, 2023, after all of the purchase orders were made. In support, they submit an affirmation by Defendant Nancy Brehm ("N. Brehm"), Otto's President, and an affirmation by Defendant Matthew Brehm ("M. Brehm"), Otto's Vice President.

In their affirmations, the Individual Defendants affirm that the decision to close Otto took place following a meeting that was held on June 5, 2023, and at the advice of counsel. They affirm that Otto could not sustain itself due to the economy and its inability to work out an agreement with the labor union.

Finally, the Individual Defendants argue that Plaintiff should have brought a cause of action for breach of contract against Otto, not against them individually.

In opposition, Plaintiff argues that corporate officers may be held personally liable for torts committed in the performance of their duties. Plaintiff argues that it has stated a cause of action for fraudulent concealment against the Individual Defendants based on the "special facts" doctrine. Plaintiff also argues that the Individual Defendants had a duty to disclose these facts, because their non-disclosure prevented Plaintiff from taking necessary actions to protect itself.

Plaintiff submits an affirmation by Sylvie Dos Choes ("Choes"), Plaintiff's Credit Manager, to supplement the allegations in the complaint. Choes affirms that on March 25, 2023, Otto owed Plaintiff the sum of $77,168.93 for unpaid sales from January 14, 2023, through March 25, 2023. She affirms that on April 5, 2023, she sent an email informing Otto that Plaintiff required payment on this amount before it could ship products on subsequent orders. She affirms that on April 11, 2023, she received an email from M. Brehm, in which he stated, *inter alia*, that: "We sent out invoices totaling $13,296.61 on Monday and we are committed to sending multiple invoices EVERY week until we are caught up. This will not ever happen again" (Exhibit 3). She affirms that based on this assurance and Plaintiff's receipt of continued weekly payments, Plaintiff resumed shipments to Otto. She affirms that Otto paid the full arrears of $77,168.93 by May 24, 2023.

Choes affirms that between March 29, 2023, and June 3, 2023, Plaintiff generated 13 invoices totaling $65,997.86 for its products shipped to Otto. She affirms that based on the Individual Defendants' personal assurance that Otto would not be behind on invoices again, Plaintiff continued to conduct business as usual with Otto on credit terms. She affirms that Plaintiff was never informed by the Individual Defendants that they were in the process of closing Otto down and thereby would not have the means to pay for these sales. She affirms that the facts and documents regarding the timing of the decision to close Otto's business were solely within the knowledge of the Individual Defendants. She affirms that the Individual Defendants never revealed Otto's union problems to Plaintiff. She affirms that if Plaintiff had known of Otto's intention to close its operations after April 11, 2023, it would have placed Otto on cash-on-delivery for all future shipments.

In reply, the Individual Defendants argue, *inter alia*, that they did not have a duty to disclose Otto's financial condition or its corporate viability to Plaintiff. They also argue that Choes' statement that Plaintiff required payment of the outstanding invoices before it would ship subsequent orders to Otto demonstrates that Plaintiff had some understanding that Otto was in financial trouble.

The Individual Defendants also argue that there was no reasonable reliance by Plaintiff. They argue that Choes' affirmation demonstrates that Plaintiff relied on Otto's performance in satisfying all outstanding invoices in giving Otto additional credit, not on M. Brehm's email. They argue that Plaintiff would not have continued to extend credit without the prior outstanding invoices being satisfied, no matter what M. Brehm may have said or done.

CPLR § 3211(a)(7) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the pleading fails to state a cause of action."

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We 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 . . . In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'.

Leon v Martinez, 84 NY2d 83, 87-88 [1994]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976] [". . . affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious claims. Modern pleading rules are 'designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one'"]; *Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533, 533 [1st Dept 2012]. The facts alleged in such affidavits must also be assumed to be true. *Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 683 [2nd Dept 2017]. However, "bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true." *id.; Cruciata v O'Donnell*, 149 AD3d 1034, 1035 [2nd Dept 2017].

"To properly plead a cause of action for fraud, a plaintiff must allege all of the following requisite elements: (1) the defendant made a misrepresentation or a material omission of fact which was false and which the defendant knew to be false; (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it; (3) the plaintiff justifiably relied on the misrepresentation or material omission; and (4) injury. To sustain a cause of action for fraudulent concealment, the plaintiff must further allege a fifth element, namely, that the defendant had a duty to disclose the material information". *Bannister v Agard*, 125 AD3d 797, 798 [2nd Dept 2015]; *High Tides, LLC v DeMichele*, 88 AD3d 954, 957 [2nd Dept 2011]. "A cause of action sounding in fraud must be pleaded with the requisite particularity under CPLR 3016(b). CPLR 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct". *City of Long Beach v Agostisi*, 221 AD3d 776, 779 [2nd Dept 2023] [internal quotation marks omitted].

The "special facts" doctrine "holds that absent a fiduciary relationship between parties, there is nonetheless a duty to disclose when one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair". *Pramer S.C.A. v Abaplus Intern Corp.*, 76 AD3d 89, 99 [1st Dept 2010]. "As a threshold matter, the doctrine requires satisfaction of a two-prong test: that the material fact was information peculiarly within the knowledge of one party and that the information was not such that could have been discovered by the other party through the exercise of ordinary intelligence". *Greenman-Pedersen, Inc. v Berryman & Henigar, Inc.*, 130 AD3d 514, 516 [1st Dept 2015]; *Jana L. v West 129th Street Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005].

Here, the Individual Defendants have not demonstrated their entitlement to dismissal of the complaint, because the complaint sufficiently alleges a cause of action for fraudulent concealment against them. The complaint alleges that the Individual Defendants knowingly made a material omission of fact as to Otto's intention to close its business, and the fact that it would not be in business to pay for the outstanding balance of the products it received from Plaintiff, that this was done with the intent to deceive Plaintiff, that Plaintiff did not know that Otto intended to close its business without payment, because these facts were solely within the knowledge of the Individual

Defendants and could not have been discovered by Plaintiff by the exercise of ordinary intelligence, and that Plaintiff has been damaged in the sum of $65,997.86.

Moreover, Choes' affirmation supplements the allegations of the complaint by asserting that Plaintiff relied on the assurance in M. Brehm's email and Otto's payments on prior orders to resume shipments to Otto and to continue doing business with Otto on credit terms. Choes also affirms that Plaintiff was never advised that Otto would close its business and not have the means to pay, and as a result, Plaintiff was unable to take any steps to protect itself, by, for example, switching to cash-on-delivery for future shipments.

Although the Individual Defendants argue that they did not have a duty to disclose its financial condition to Plaintiff, they have not demonstrated that they did not have such a duty as a matter of law. They did not cite any case law in support. Moreover, there are issues of fact as to whether the disparity in the level of information available to the Individual Defendants, but not to Plaintiff, places this case within the ambit of the "special facts" doctrine and whether Plaintiff could have through the exercise of ordinary intelligence independently ascertained that Otto would be closing its business.

Although the Individual Defendants argue that Plaintiff did not justifiably rely on M. Brehm's email that Otto would not be behind on invoices again, "the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss". *ACA Financial Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015]. In any case, Plaintiff does not allege that it relied only on the email, but that it relied on the Individual Defendants' failure to disclose Otto's financial condition, and their payments on prior orders.

Additionally, the Individual Defendants' affirmations and documents submitted with the motion do not conclusively establish that Plaintiff does not have a cause of action. Although the Individual Defendants argue that their affirmations demonstrate that it is not true that they knew that Otto would close its business when they made the orders at issue, this is disputed by the allegations of the complaint and Choes' affirmation, the allegations of which must be assumed to be true on a motion to dismiss pursuant to CPLR § 3211(a)(7). *See Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2nd Dept 2011]; *see also Board of Managers of 285 Driggs Avenue Condominium v 285 Driggs Avenue, LLC*, 173 AD3d 821, 822 [2nd Dept 2019] ["[A] motion to dismiss pursuant to CPLR 3211(a)(7) must be denied unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it"] [internal quotation marks omitted].

Contrary to the Individual Defendants' arguments, Plaintiff need not allege the elements necessary to pierce the corporate veil, because "corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally". *Minico Insurance Agency, LLC v AJP Contracting Corp.*, 166 AD3d 605, 607 [2nd Dept 2018]; *High Tides, LLC* at 957.

Finally, the Court notes that with its amended complaint, Plaintiff added Otto as a defendant. As such, the Individual Defendants' arguments pertaining to Plaintiff's failure to add Otto as a party defendant need not be considered.

All other arguments not specifically addressed herein have been considered and have been found to be without merit.

It is hereby

ORDERED that Defendants Nancy Brehm and Matthew Brehm's motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 13 2025
White Plains, New York

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HON. PAUL I. MARX, J.S.C.

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