SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46

Justice

Index Number : 107361/2011
WIDE WIN AMERICA, INC.
vs.
NEMARK, EDWARD
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 7, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-5
Answering Affidavits — Exhibits _____ | No(s). 6
Replying Affidavits _____ | No(s). 7

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants the motion by plaintiff Wide Win America, Inc., for summary judgment against defendants Richard Malcolm, a Division of San Simeon, Inc., and Malcolm + Co., LLC; grants the cross-motion by defendants Newmark and Beane to dismiss plaintiffs' fraud claim against these defendants; and otherwise denies plaintiffs' motion for summary judgment and defendants' cross-motion to dismiss claims pursuant to the accompanying decision. C.P.L.R. §§ 3211(a)(7), 3212(b) and (e).

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/7/12

Lucy Billings, J.S.C.
LUCY BILLINGS J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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WIDE WIN AMERICA, INC., ZHEJIANG WILD WIND IMPORT-EXPORT COMPANY LTD., and ZHEJIANG TENDEX IMPORT-EXPORT COMPANY, LTD.,

Index No. 107361/2011

Plaintiffs

- against -

DECISION AND ORDER

EDWARD NEWMARK, TIM BEARE, RICHARD MALCOLM, A DIVISION OF SAN SIMEON, INC., and MALCOLM & CO., LLC,

Defendants

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LUCY BILLINGS, J.S.C.:

This action requires sorting out the corporate and individual defendants' liability (1) for clothing that each of the three plaintiffs delivered to the two corporate defendants and (2) for their debt that the two individual defendants acknowledged. Plaintiffs also seek to reach the individuals by piercing the corporate veil of defendant corporation and limited liability company (LLC), which are assetless. Plaintiffs move for summary judgment on their claims. C.P.L.R. § 3212(b). Defendants, in opposition, raise the issue whether plaintiff corporations may maintain their claims because they conduct business in New York when not so authorized, N.Y. Bus. Corp. Law § 1312(a), and cross-move to dismiss the complaint against the individual defendants based on its failure to state a claim against them. C.P.L.R. § 3211(a)(7).

I. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

A. The Zhejiang Plaintiffs' Claims

Defendants claim that plaintiffs Zhejiang Wild Wind Import-Export Company Ltd. and Zhejiang Tendex Import-Export Company, Ltd., are foreign corporations unauthorized to transact business in New York. Defendants support their claim with admissible documents from the New York State Department of State website indicating that neither Zhejiang Wild Wind Import-Export Company Ltd. nor Zhejiang Tendex Import-Export Company, Ltd., is authorized to transact business in New York. LaSonde v. Seabrook, 89 A.D.3d 132, 137 n.8 (1st Dep't 2011); L&Q Realty Corp. v. Assessor, 71 A.D.3d 1025, 1026 (2d Dep't 2010); Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13, 20 (2d Dep't 2009). Defendants further rely on the complaint ¶ 2, which alleges that these two plaintiffs are foreign corporations and are conducting business in New York.

Although the foreign corporations' lack of authorization to transact business in the state is not a basis to dismiss their action, Uribe v. Merchants Bank of N.Y., 266 A.D.2d 21, 22 (1st Dep't 1999), these plaintiffs may not pursue their action until they are so authorized. N.Y. Bus. Corp. Law § 1312(a). E.g., Barklee Realty Co. v. Pataki, 309 A.D.2d 310, 315-16 (1st Dep't 2003); Highfill, Inc. v. Bruce & Iris, Inc., 50 A.D.3d 742, 744 (2d Dep't 2008). Therefore the court denies the motion for summary judgment by plaintiffs Zhejiang Wild Wind Import-Export Company Ltd. and Zhejiang Tendex Import-Export Company, Ltd.

C.P.L.R. § 3212(b); N.Y. Bus. Corp. Law § 1312(a).

B. Plaintiff Wide Win America's Claims

Defendants do not deny that defendant Newmark, as President of both Richard Malcolm, a Division of San Simeon, Inc., and Malcolm & Co., LLC, the two corporate defendants, admitted these two defendants' debt of $735,742.82 to the third plaintiff, Wide Win America, Inc. Therefore the court grants this plaintiff partial summary judgment for that amount against defendants Richard Malcolm, a Division of San Simeon, Inc., and Malcolm & Co., LLC, jointly and individually, C.P.L.R. § 3212(b) and (e), with interest from March 3, 2011, the date of that admission. C.P.L.R. § 5001(a) and (b).

Plaintiffs further claim that the individual defendants Newmark and Beare in Beare's email April 6, 2011, to Eileen Shen, President of Wide Win America, admitted their own liability for the debts listed in Newmark's communication of March 3, 2011: the $735,742.82 owed to Wide Win America and lesser amounts to each of the other two plaintiffs. Although the email is "To: edward newmark," it begins:

> Hi Shen,
>
> As we have discussed in the last few days, Edward and I fully intend to repay the amount owed to you and the factories. . . .
>
> . . . .
>
> We will work out an arrangement with you on future business, whereby we will pay you a commission of between 5 and 10% on goods we buy from you starting late this year, and continuing until the debt has been repaid.

V. Compl. Ex. B.

This expressed intent "to repay the amount owed to you,"

referring to Shen's corporation Wide Win America, by the corporation Richard Malcolm, a Division of San Simeon, Inc., and the LLC Malcolm & Co., LLC, is ambiguous whether the intent is on these corporate defendants' behalf or by their principals Newmark and Beare individually. E.g., First Capital Asset Mgt. v. North Am. Consortium, 286 A.D.2d 263, 264 (1st Dep't 2001). Nowhere does either individual agree to be obligated personally, to pay personally, or to guarantee payment personally. E.g., Herman v. Ness Apparel Co., 305 A.D.2d 217, 218 (1st Dep't 2003). Particularly when considered in light of Newmark's earlier communication, Beare's email is at least equally susceptible of a contrary interpretation: an expressed intent on behalf of the corporate defendants to repay the amount owed by them. 150 Broadway Assoc. N.Y. Assoc., L.P. v. Bodner, 14 A.D.3d 1, 9 (1st Dep't 2004); First Capital Asset Mgt. v. North Am. Consortium, 286 A.D.2d at 264.

The email's final paragraph, contemplating repayment through future business between Shen's corporation and the corporate defendants, further supports this interpretation. No evidence suggests that Wide Win America's future business suddenly would transform into business with Newmark and Beare individually. Albstein v. Elany Constr. Corp., 30 A.D.3d 210 (1st Dep't 2006); 150 Broadway Assoc. N.Y. Assoc., L.P. v. Bodner, 14 A.D.3d at 7; Korea First Bank of N.Y. v. Noah Enters., Ltd., 12 A.D.3d 321, 322 (1st Dep't 2004); First Capital Asset Mgt. v. North Am. Consortium, 286 A.D.2d at 264. Similarly, plaintiff presents no

evidence that in the parties' past business dealings Newmark or Beare ever acknowledged his personal receipt of the clothing for which the amounts claimed are owed. Plaintiff thus provides no independent basis to claim against the individual defendants and hence no reason for them to assume such a liability. Therefore the court denies plaintiffs' motion for summary judgment against defendants Newmark and Beare. C.P.L.R. § 3212(b).

II. THE INDIVIDUAL DEFENDANTS' CROSS-MOTION TO DISMISS THE COMPLAINT

A. Plaintiffs' Second Claim for Breach of Contract

On the other hand, Beare's email to Shen April 6, 2011, promising that "Edward and I fully intend to repay the amount owed to you and the factories," being susceptible of the alternative interpretation that Newmark and Beare intended individually to pay, states a claim for breach of contract against them. The complaint ¶¶ 13 and 15 alleges that all defendants requested and received clothing merchandise at an agreed price, and all defendants acknowledged that the amount demanded was owed by them. Plaintiffs have not offered supporting evidence to warrant summary judgment against Newmark and Beare on this claim, but neither has Newmark or Beare presented conclusive evidence to the contrary. Although defendants dispute plaintiffs' allegations, defendants rely not just on the complaint or an undisputed document, but rely primarily on their affidavits, which the court may not consider in the context of a motion to dismiss based on failure to state a claim. C.P.L.R. § 3211(a)(1) and (7); Lawrence v. Graubard

Miller, 11 N.Y.3d 588, 595 (2008); Correa v. Orient-Express Hotels. Inc., 84 A.D.3d 650 (1st Dep't 2011). See Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Greenapple v. Capital One, N.A., 92 A.D.3d 548, 550 (1st Dep't 2012); McCully v. Jersey Partners, Inc., 60 A.D.3d 562 (1st Dep't 2009). Therefore the court denies the cross-motion to dismiss the breach of contract claim against defendants Newmark and Beare. C.P.L.R. § 3211(a)(1) and (7).

B. Plaintiffs' First Claim for Fraud

The complaint mainly alleges defendants' scheme to defraud CIT Group/Commercial Services Inc., a nonparty that maintained a security interest in the corporate defendants' accounts receivables, against which CIT Group provided advances to the corporate defendants. The only allegations of fraud perpetrated against plaintiffs are that Newmark and Beare diverted the proceeds from resale of the clothing plaintiffs delivered, using those proceeds for the individual defendants' own purposes, rather than paying the debts owed to plaintiffs. Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135, 141 (1993); Cobalt Partners, L.P. v. GSC Capital Corp., 97 A.D.3d 35, 40 (1st Dep't 2012); Stewart Tit. Ins. Co. v. Liberty Tit. Agency, LLC, 83 A.D.3d 532, 533 (1st Dep't 2011); Pegasus Aviation I, Inc. v. Varig Logistica S.A., 69 A.D.3d 483 (1st Dep't 2010). Again defendants dispute these allegations, but rely primarily on their affidavits.

A fraud claim requires plaintiff to allege, however, that defendants misrepresented or omitted a material fact, knowing the misstatement or omission was false, to induce plaintiffs to rely on it, and that plaintiffs justifiably relied on the misrepresentation or omission and incurred damages from that reliance. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 178 (2011); Gosmile, Inc. v. Levine, 81 A.D.3d 77, 81 (1st Dep't 2011); Nicosia v. Board of Mgrs. of the Weber House Condominium, 77 A.D.3d 455, 456 (1st Dep't 2010). The only misrepresentation intended to defraud plaintiffs discernible from the complaint is the individual defendants' assurances that defendants would repay their debt to plaintiffs, intending in fact not to repay. Such a claim merely duplicates plaintiffs' breach of contract claim. Sound Communications, Inc. v. Rack & Roll, Inc., 88 A.D.3d 523, 524 (1st Dep't 2011); Mañas v. VMS Assoc., LLC, 53 A.D.3d 451, 453 (1st Dep't 2008).

Nor do plaintiffs specify how they relied on defendants' promise of repayment to plaintiffs' detriment, since plaintiffs already had delivered their clothing merchandise to defendants before their promise to repay, a promise that merely reiterated the corporate defendants' original contract to pay an agreed price for the merchandise. Meyercord v. Curry, 38 A.D.3d 315, 316 (1st Dep't 2007); Rivera v. JRJ Land Prop. Corp., 27 A.D.3d 361, 364 (1st Dep't 2006); Friedman v. Anderson, 35 A.D.3d 93, 100-101 (1st Dep't 2006); Water St. Leasehold LLC v. Deloitte & Touche LLP, 19 A,D.3d 183, 185 (1st Dep't 2005). See DDJ Mgt.,

LLC v. Rhone Group L.L.C., 15 N.Y.3d 147, 154 (2010); Joseph v. NRT Inc., 43 A.D.3d 312, 313 (1st Dep't 2007). In any event, plaintiffs' alleged damages from any reliance on defendants' misrepresentations are indistinct from the damages recoverable for their breach of a contract. Mañas v. VMS Assoc., LLC, 53 A.D.3d at 454; Teachers Ins. Annuity Assn. of Am. v. Cohen's Fashion Opt. of 485 Lexington Ave., Inc., 45 A.D.3d 317, 319 (1st Dep't 2007). See Gosmile, Inc. v. Levine, 81 A.D.3d at 81.

Plaintiffs' allegations that Newmark and Beare looted the corporate defendants for the individuals' personal gain may instead be the predicate for piercing the corporate defendants' corporate veil, providing a vehicle to reach Newmark and Beare on a breach of contract claim. The doctrine of piercing the corporate veil applies to defendant LLC and well as defendant corporation. Matias v. Mondo Props. LLC, 43 A.D.3d 367, 368 (1st Dep't 2007); Retropolis, Inc. v. 14th St. Dev. LLC, 17 A.D.3d 209, 210 (1st Dep't 2005).

To sustain such a claim, plaintiff must specify that Newmark and Beare operated their corporation and LLC as their instrumentalities or alter egos, without corporate formalities or adequate capital, and not as separate corporate entities, to further personal purposes, and siphoned off corporate assets for themselves, without satisfying corporate debts. Cobalt Partners, L.P. v. GSC Capital Corp., 97 A.D.3d at 39-40; Pegasus Aviation I, Inc. v. Varig Logistica S.A., 69 A.D.3d 483. Disclosure also may support piercing the corporate veil by uncovering the

corporate defendants' lack of corporate and financial records and substantiating the individual defendants' domination of the corporate entities, to perpetrate a wrong against plaintiffs in depriving them of payment for the clothing merchandise. C.P.L.R. § 3211(d); Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d at 141-42; Cobalt Partners, L.P. v. GSC Capital Corp., 97 A.D.3d at 40-41; Stewart Tit. Ins. Co. v. Liberty Tit. Agency, LLC, 83 A.D.3d at 533; Pegasus Aviation I, Inc. v. Varig Logistica S.A., 69 A.D.3d 483.

As pleaded, however, plaintiffs' complaint does not support a claim of fraud by the individual defendants perpetrated against plaintiffs. Therefore the court grants the cross-motion dismiss the fraud claim against defendants Newmark and Beare. C.P.L.R. § 3211(a)(7).

The court need not determine whether the complaint supports a claim of fraud perpetrated by the corporate defendants, as (1) they do not move to dismiss any claims, (2) plaintiff Wide Win America has not established any damages beyond its recovery for breach of contract, and (3) the court denies the other plaintiffs recovery for independent reasons. Since CIT Group is not a plaintiff, the court need not determine whether the complaint supports a claim of fraud perpetrated against this nonparty.

III. CONCLUSION

To recapitulate, the following claims prevail or at least survive by the various plaintiffs against the various defendants. The court grants plaintiff Wide Win America, Inc., partial

summary judgment for $735,742.82 against defendants Richard Malcolm, a Division of San Simeon, Inc., and Malcolm & Co., LLC, jointly and individually, C.P.L.R. § 3212(b) and (e), with interest from March 3, 2011. C.P.L.R. § 5001(a) and (b). The court denies all plaintiffs' motion for summary judgment against defendants Newmark and Beare and denies the reminder of the motion for summary judgment by plaintiffs Zhejiang Wild Wind Import-Export Company Ltd. and Zhejiang Tendex Import-Export Company, Ltd. C.P.L.R. § 3212(b); N.Y. Bus. Corp. Law § 1312(a). The court denies the cross-motion to dismiss the breach of contract claim, plaintiff's second claim, against defendants Newmark and Beare, but grants the cross-motion to dismiss the fraud claim, plaintiffs' first claim, against Newmark and Beare. C.P.L.R. § 3211(a)(7). This decision constitutes the court's order and judgment in favor of plaintiff Wide Win America, Inc., against defendants Richard Malcolm, a Division of San Simeon, Inc., and Malcolm & Co., LLC, and judgment of dismissal of plaintiffs' fraud claim against defendants Newmark and Beare.

DATED: December 7, 2012

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.