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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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**FPL SERVICE CORP., d/b/a TAYLOR BUSINESS
SYSTEMS, J.M.E. CONSULTING CORP.
And DIRECT RESPONSE LIST STRATEGIES INC.,**

Plaintiffs,

-against-

**INTERNATIONAL SWEEPS REVENUE SERVICES,
INC., CHARLES KAFEITI and LAUREN ELDELMAN,
and C.S.I.R. INC.,**

Defendants,

-----x

TRIAL PART: 16

NASSAU COUNTY

INDEX NO: 018363-08

MOTION SEQ. NO: 8

SUBMIT DATE: 11/8/10

The following papers having been read on this motion:

Notice of Motion.....1
Plaintiffs Memorandum of Law.....2
Opposition.....3
Reply.....4

Motion pursuant to CPLR 3212 by the plaintiffs FPL Service Corp., d/b/a, Taylor Business Systems, J.M.E. Consulting Corp. and Direct Response List Strategies, Inc., for partial summary judgment on their first, second third and fifth causes of action.

In July of 2007, defendant International Sweeps Revenue Services, Inc ["ISRS"] – which sells sweepstakes reports”and supplies sweepstakes information to its customers – entered into separate, oral contracts with plaintiffs FPL Service Corp ["FPL"], J.M.E. Consulting Corp ["JME"] and Direct Response List Strategies, Inc. ["DRLS"] (A. Cmplt., ¶¶ 10-11).

Pursuant to the terms of the contracts, the plaintiff-corporations were allegedly to provide certain sweepstakes-related goods and services to ISRS (A. Cmplt., ¶¶ 13-14, 25). Significantly, codefendant Charles Kafeiti was sole shareholder and president of ISRS, while non-party Paul Sigler is currently vice president of FPL (Kafeiti Dep., 26-27; Sigler Aff., ¶¶ 1-2).

Within year of the parties’ initial agreements, their relationship soured when ISRS allegedly

failed to make payment for various goods and services provided by the plaintiffs in June through August of 2008 (A. Cmplt., ¶¶ 14-151, 25-26, 33, 38, 45).

By summons and verified complaint dated October, 2008, the plaintiffs commenced the within action against codefendants ISRS, Charles Kafeti and Lauren Edelman – an ISRS employee who is also Kafetti’s fiancée (Ans., ¶ 143; Kafetti Dep., 7).

The defendant have answered, setting forth various affirmative defenses and interposing eight counterclaims sounding in fraud, conversion, rescission, breach of contract and unjust enrichment.

By prior order dated January 27, 2010, this Court granted the plaintiffs’ request for leave to amend their verified complaint so as to, *inter alia*, interpose their claims as against the individual defendants, Kafeti and Edelman on “alter ego” and/or piercing the corporate veil theories and for leave to add a new party to the action, *i.e.*, C.S.L.R., Inc [“CSLR”], an entity allegedly created and owned by codefendant Kafetti (A. Cmplt., ¶¶ 16-22).

The plaintiffs now move for partial summary judgment as against all defendants on their first, second, third and fifth causes of action, which are asserted on behalf of FPL and sound in breach of contract, “good sold and delivered,” account stated and unjust enrichment. The motion should be granted to the extent indicated below.

More particularly, the plaintiffs have demonstrated their *prima facie* entitlement to summary judgment as against the corporate defendant ISRS with respect to the first, second and third causes of action predicated upon breach of contract, account stated, and goods sold and delivered (*see generally, Castle Oil Corp. v. Bokhari*, 52 AD3d 762 *see also, Marjam Supply Co., Inc. v. Drywall Surgeon Specialists, Inc.*, ___AD3d___, 2010 WL 4676006 [2nd Dept. 2010]; *Gassman & Keidel, P.C. v. Adlerstein*, 63 AD3d 784).

Specifically, the plaintiffs have submitted evidentiary materials establishing, *inter alia*, that between July, 2007 and August, 2008, FPL submitted invoices to ISRS for goods and services provided; that ISRS initially paid the invoiced amounts for a period of some ten months; but that thereafter, between June and August of 2008, ISRS – without interposing timely objections – failed to pay amounts due totaling \$62,394.60, as memorialized by 14 unpaid invoices which it received from FPL (Sigler Aff., ¶¶ 5-10; Lieser Aff., ¶¶ 6-11; Lieser Exh., “H”)(*Gallo Wine Distributor, LLC*

v. *Millennium Liquor Corp.*, 303 AD2d 452, 453; *Daylay Egg Farm, Inc. v. A & W Egg Co.*, ___ Misc3d ___, 2008 WL 4837682, at 3 [Supreme Court, Nassau County 2008] *see also*, *Jim-Mar Corp. v. Aquatic Const., Ltd.*, 195 AD2d 868, 869).

In opposition to the motion insofar as asserted against ISRS, the defendants have failed to generate a triable issue of fact. Rather, the defendants have offered only conclusory assertions and unsubstantiated claims in support of their assertions relative to ISRS' non-payment of the invoiced amounts (Ans., ¶¶ 120-156; Naccarato Aff., ¶¶ 2-18)(e.g., *Banco Popular North America v. Victory Taxi Management, Inc.*, 1 NY3d 381, 383-384 [2004]; *Marjam Supply Co., Inc. v. Drywall Surgeon Specialists, Inc.*, *supra*; *Gassman & Keidel, P.C. v. Adlerstein*, *supra*).

However, that branch of the motion as to ISRS which is for judgment on the the fifth, "unjust enrichment" cause of action – which "lies as a quasi-contract claim" – should be denied, since the existence of a valid and enforceable contract, precludes "recovery in quasi contract for events arising out of the same subject matter" (*Adelaide Productions, Inc. v. BKN Intern. AG*, 38 AD3d 221, 225-226; *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]; *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Yenrab, Inc. v. 794 Linden Realty, LLC*, 68 AD3d 755, 758; *Bouchard Transp. Co., Inc. v. New York Islanders Hockey Club, LP*, 40 AD3d 897, 898)](A. Cmplt., ¶¶ 47-49).

That branch of the motion which is for summary judgment on the same causes of action as against codefendants Kafeiti, Edelman and CSLR – parties who were not signatories to the ISRS-FLP contracts and invoices – is denied.

According to the plaintiffs, liability can be imputed to both Kafeiti and Edelman as a matter of law because they, *inter alia*, exercised dominion and control over ISRS and utilized ISRS for their own personal benefit, while at the same time disregarding corporate formalities so as to deprive ISRS of its separate identify and existence (Cmplt., ¶¶ 16-22).

With respect to piercing the corporate veil, "[a] party * * * must show that the owners of the corporation exercised complete domination over it in the transaction at issue, and that such domination was used to commit a fraud or wrong against the plaintiff under circumstances that constitute an abuse of the privilege of doing business in the corporate form" (*Shkolnik v. Krutoy*, 65 AD3d 1214, 1215-1216 *see also*, *TNS Holdings, Inc. v. MKI Securities Corp.*, 92 NY2d 335, 338-

339 [1998]; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 [1993]; *Superior Transcribing Service, LLC v. Paul*, 72 AD3d 675, 676; *East Hampton Union Free School District v. Sandpebble Builders, Inc.*, 66 AD3d 122, 131-132; *AHA Sales, Inc. v. Creative Bath Products, Inc.*, 58 AD3d 6, 24; *Millennium Constr., LLC v. Loupolover*, 44 AD3d 1016, 1017; *Matter of Goldman v. Chapman*, 44 AD3d 938, 939-940).

Notably, “[t]hose seeking to pierce a corporate veil of course bear a heavy burden of” establishing that there is a basis to do so (*TNS Holdings, Inc. v. MKI Securities, Inc.*, *supra*, 92 NY2d at 339), and [m]ere conclusory statements” will not suffice (*AHA Sales, Inc. v. Creative Bath Products, Inc.*, *supra*, 58 AD3d at 24).

The claim that the corporation was completely dominated by the defendants, or assertions that the corporation acted as their "alter ego," without more, will not support the equitable relief of piercing the corporate veil (*Damianos Realty Group, LLC v. Fracchia*, 35 AD3d 344 *see also*, *AHA Sales, Inc. v. Creative Bath Products, Inc.*, *supra*, 58 AD3d at 24; *Goldman v. Chapman*, *supra*, 44 AD3d at 939-940).

If this were not so, “virtually every cause of action brought against a corporation either wholly or principally owned by an individual who conducts * * * [the corporation’s] affairs could also be asserted against that owner personally,” thereby rendering the principle of limited liability largely illusory” (*East Hampton Union Free School Dist. v. Sandpebble Builders, Inc.*, *supra*, 66 AD3d at 126-127).

With these principles in mind, the Court agrees that triable issues of fact exist with respect to the plaintiffs’ veil-piercing assertions relating to Kafeiti and Edelman, *i.e.*, whether their conduct can be viewed as a “fraud or wrong against the plaintiff under circumstances that constitute an abuse of the privilege of doing business in the corporate form” (*Shkolnik v. Krutoy*, *supra*, 65 AD3d 1214 *see, WBP Cent. Associates, LLC v. DeCola*, 50 AD3d, 693, 694).

Although the plaintiffs contend, *inter alia*, that Kafeiti and Edelman dominated and controlled ISRS (A. Cmplt., ¶¶ 16-17), those allegations will not alone suffice to establish personal liability (*Matter of Morris v New York State Dept. of Taxation & Fin.*, *supra*, 82 NY2d at 141-142; *Damianos Realty Group, LLC v. Fracchia*, *supra*, 35 AD3d 344). Moreover, the fact that a dispute may have arisen between the two closely held corporations – and that one entity defaulted on

payments owed to the other – does not by itself establish that corporate formalities were disregarded or that the defaulting entity's corporate officers are therefore automatically liable for the ensuing debt.

The parties' additional and conflicting allegations with respect to the import and significance of, *inter alia*, Kafeiti's August 2008 asset transfers and other activities he engaged in; precisely who controlled and dominated ISRS; and the additional claims that, among other things, each party looted and abused ISRS' assets for personal benefit, have generated issues of fact with respect to the plaintiffs' veil-piercing theory, *i.e.*, whether the defendants alleged "domination was used to commit a fraud or wrong against the plaintiff under circumstances that constitute an abuse of the privilege of doing business in the corporate form" (*Shkolnik v. Krutoy, supra*, 65 AD3d at 1215 *see generally*, *Samsung America, Inc. v. Yugoslav-Korean Consulting & Trading Co., Inc.*, 248 AD2d 290, 291).

"Veil-piercing is a fact-laden claim" dependent on "the particular facts and circumstances" involved, and is "particularly unsuited for resolution on summary judgment" (*Klein v. CAVI Acquisition, Inc.*, 57 AD3d 376, 377; *First Bank of Americas v. Motor Car Funding*, 257 AD2d 287, 294; *Forum Ins. Co. v. Texarkoma Transp. Co.*, 229 AD2d 341, 342 *see also*, *Gateway I Group, Inc. v. Park Ave. Physicians, P.C.*, *supra*, 62 AD3d 141, 146; *WBP Cent. Associates, LLC v. DeCola, supra*, 50 AD3d 693, 695; *Ledy v. Wilson*, 38 AD3d 214, 215). The Court notes that there is claim no asserted on behalf of movant FPL alleging fraudulent transfers in violation of the Debtor and Creditor Law (Lieser Reply Aff., ¶ 7; A. Cmplt., ¶¶ 19-20, *cf.*, ¶¶ 87-97).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Mosheyev v. Pilevsky*, 283 AD2d 469). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v. Robbins*, 191 AD2d 488, 489).

The Court has considered the plaintiffs' remaining contentions and concludes that they do not warrant an award of relief in excess of that granted above.

Accordingly, it is,

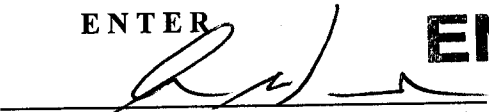
ORDERED the motion pursuant to CPLR 3212 by the plaintiffs FPL Service Corp., d/b/a, Taylor Business Systems, J.M.E.. Consulting Corp. and Direct Response List Strategics, Inc., for partial summary judgment is granted as to codefendant International Sweeps Revenue Services, Inc.

with respect to the first, second and third causes of action, and the motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

DATED: December 1, 2010

ENTER


HON. ARTHUR M. DIAMOND

J. S.C.

ENTERED

DEC 06 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

To:

Attorney for Plaintiffs

DAVIDOFF MALITO & HUTCHER LLP.

200 Garden City Plaza, Suite 315

Garden City, N.Y. 11530

Attorney for Defendants

KIM I. MCHALE & ASSOCIATES, PC.

302 Fifth Avenue, Eighth Floor

New York, N.Y. 10001