SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

GTEKS CORPORATION,

Plaintiff(s),

ORIGINAL RETURN DATE:07/19/10
SUBMISSION DATE: 09/10/10
INDEX No.: 016272/08

-against-

IWIRE, INC. and DAN B. LEVINE a/k/a DANIEL B. LEVINE,

MOTION SEQUENCE #2

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2,3
Reply.....	4
Defendant Levine's Memorandum of Law.....	5,6
Plaintiff's Memorandum of Law.....	7

Motion pursuant to CPLR 3212 by defendant Dan B. Levine a/k/a/ Daniel B. Levine ("Levine") for summary judgment dismissing the complaint as to said defendant is granted, and the complaint is hereby dismissed as to defendant Levine.

In this breach of contract action plaintiff seeks to recover monies allegedly due and owing as and for technology consulting/programming services rendered by it to defendant iWire, Inc., ("iWire"), a Delaware corporation, pursuant to a consulting agreement executed on or about July 11, 2006. Defendant iWire was until October 2007 engaged in the business of marketing debit cards for use in the distribution of payroll and processing of the transactions for said debit cards. As a result of a hacking incident, $5.1 million was stolen.

According to defendant Levine, defendant iWire remained in business until approximately October 2007, when it became the victim of a widely publicized criminal computer hacking incident that took place in September 2007 as a result of which both Master Card and First Bank of St. Louis, the card issuing bank for defendant iWire, allegedly cancelled their contracts with iWire. As a result the corporate defendant was forced to cease operations without advance notice or benefit of

a wind-down period. All of the investors in the company, including defendant Levine, the largest single investor, lost all of their investment in defendant iWire. In addition, none of the lenders or vendors to whom defendant iWire owes money has been paid.

In the third cause of action of the complaint, plaintiff seeks a judgment against defendant Levine, the Chairman and Chief Executive Officer, as well as the owner of approximately 32% of the issued shares of stock of the corporation which became inoperative for non-payment of taxes by proclamation as of March 1, 2008.

Contending that the obligation at issue in this lawsuit is that of defendant iWire and that no basis exists in law or fact to pierce the corporate veil to reach him personally, defendant Levine seeks summary judgment dismissing the complaint.

Plaintiff counters that although defendant iWire was established as a corporation in Delaware, it was run as a sole proprietorship for the benefit of defendant Levine. Moreover, plaintiff maintains that it was induced to complete work on the EPANA account, one of iWire's largest accounts, based on defendant Levine's oral promise to pay all past and future amounts owing to plaintiff for work on that account. In this regard, plaintiff notes that defendant Levine set up and used a Pay Pal account to pay $30,000 of the $82,000 owed to plaintiff on the EPANA account from his personal credit card. Defendant Levine, however, maintains that he made no such oral promise and, in any event, such a promise to answer for the debt of another would be barred by the statute of frauds.

Because defendant iWire is a Delaware corporation and both parties rely on Delaware law in their briefs vis-a-vis the piercing issue, the court's analysis is properly based on Delaware law. *Ahlers v Ecovation, Inc.*, 74 AD3d 1889 [4th Dept. 2010]; *Klein v CAVI Acquisition Inc.*, 57 AD3d 376, 377 [1st Dept. 2008]. Moreover, it is ordinarily the state of incorporation that has the greatest interest in determining the extent to which shareholders of corporations, incorporated under its law, should be insulated from personal liability. *Sweeney, Cohn, Stahl & Vaccaro v Kane*, 6 AD3d 72, 75 [2d Dept. 2004], *lv. to appeal dismissed* 3 NY3d 751 [2004].

The shareholders of a valid corporation are distinct from the corporate entity and generally may not be sued in their individual capacity. *Scott-Douglas Corp. v Greyhound Corp.*, 304 A2d 309, 314 [Del. Super. 1973]. Delaware law clearly holds, as does New York law*, that officers of a

* New York courts disregard the corporate form reluctantly. They do so only when the form has been used to achieve fraud, or when the corporation has been so dominated by an individual or another corporation (usually a parent corporation), and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own and can be called the other's alter ego. *Gartner v Snyder*, 607 F2d 582, 586 [2d Cir. 1979].

corporation are not liable on a corporate contract as long as they do not purport to bind themselves individually. *Wallace ex. rel. Cencom Cable Income Partners II, Inc., L.P. v Wood,* 752 AD2d 1175, 1180 [Del. Ch. 1999]. A party seeking to disregard the corporate structure faces a difficult task in persuading a court to do so. *Fletcher v Atex, Inc.*, 68 F3d 1451, 1458 [2d Cir. 1995]; *Harco Nat'l Ins. Co. v Green Farms, Inc.*, No. Civ. A. 1331 1989 WL 110537 at *4 [Del Ch. 1989].

Absent a compelling cause, a court will not disregard the corporate form or otherwise disturb the legal attributes of a corporation. *Harco Nat'l Ins. Co. v Green Farms Inc., supra.* The protection offered by the corporate form, however, is not absolute. In appropriate circumstances, such as when the corporate form is used to perpetrate a fraud, liability will be extended to those in control of the corporation who were active wrongdoers. Where there is no active intent to deceive, the corporate veil may be pierced when those in control of the corporate enterprise have failed to treat it as a distinct legal entity. *Geyer v Ingersoll Publications Co.*, 621 AD2d 784, 793 [Del. Ch., 1992].

Although the legal test for doing so cannot be reduced to a single formula, courts have pierced the corporate veil after substantial consideration of the shareholder/owner's disregard of the separate corporate fiction and the degree of injustice impressed on the litigants by recognition of the corporate entity. *Irwin & Leighton, Inc. v W.M. Anderson* Co., 532 A2d 983, 987 [Del. Ch. 1987]. As pointed out by the court, "[T]he legal test for determining when a corporate form should be ignored in equity cannot be reduced to a single formula that is neither over-nor under-inclusive. Observation of appropriate formalities by those controlling a corporation is typically regarded as an important consideration because it demonstrates that those in control of a corporation treated the corporation as a distinct entity and had a reasonable expectation that the conventional attributes of corporateness, including limited liability, would be accorded to it. When those formalities are not respected, the legal fiction of corporateness becomes less 'real' in the everyday experience of those involved in the firm's operations and any expectation that others would treat it as a distinct, liability-limiting entity becomes less reasonable." *Irwin & Leighton, Inc. v W. M. Anderson & Co., supra* at 987 (internal citation omitted).

To sustain an alter ego claim, plaintiff must allege facts showing that the corporation is a sham and exists for no other purpose than as a vehicle for fraud or similar injustice. *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v Wood, supra* at 1184. Thus a court may pierce the corporate veil if 1) alter ego factors are present including: whether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether dividends were paid, corporate records kept, officers and directors functioned properly and other corporate formalities were observed; whether the dominant shareholder siphoned corporate funds; and whether, in general, the corporation simply functioned as a facade for the dominant shareholder and whether 2) there is an element of injustice or unfairness. *United States v Golden Acres, Inc.*, 702 F.Supp. 1097, 1104 [D. Del. 1988], *aff'd.* 879 F.2d 860 [3d Cir. Del. 1989].

Although no single factor will justify a decision to disregard the corporate entity, some combination of the relevant factors is required and an overall element of injustice or unfairness must be present. *Harper v Delaware Valley Broadcasters, Inc.*, 743 F.Supp. 1076, 1085 [D. Del. 1990], *aff'd.* 932 F2d 959 [3d Cir. Del. 1991]. This standard has been applied in cases involving veil piercing as between a corporation and its shareholders or directors. *David v Mast*, 1999 WL 135244 at *2 [Del. Ch. 1999].

Plaintiff has failed to show that piercing the corporate veil is justified under the facts at bar. While the complaint alleges that defendant Levine made the decision to keep iWire thinly capitalized; regularly intermingled personal funds with those of iWire; failed to observe corporate formalities; and ran the defendant corporation as a sole proprietorship, these assertions are purely conclusory and insufficient to satisfy the rigorous standards for piercing the corporate veil under Delaware law. According to defendant Levine, he and approximately seventy other investors owned shares of stock in iWire. He was one of several officers, one of three corporate directors and was not the sole corporate decision maker. The record is devoid of any fact to support an inference that the corporation, through its alter ego, i.e., defendant Levine, created a sham entity designed to defraud investors and creditors. Allegations as to size and assessed value of defendant Levine's home are totally irrelevant to the piercing claim.

Plaintiff's claim that defendant Levine "begged" the president of plaintiff to continue work on the EPANA account and orally promised to pay all past and future bills personally is untenable. Pursuant to General Obligations Law § 5-701(a)(2), "a special promise to answer for the debt, default or miscarriage of another person" must be "in writing, and subscribed by the party to be charged therewith." Under a longstanding exception to this rule, however, the promise need not be in writing if "it is supported by a new consideration moving to the promisor and beneficial to him" and provided, further, "that the promisor has become in the intention of the parties a principal debtor primarily liable." *Martin Roofing Inc. v Goldstein*, 60 NY2d 262, 265 [1983], *cert. denied* 466 U.S. 905 [1984]; *Talansky v Schulman*, 2 AD3d 355, 360 [1st Dept. 2003]. The benefit to the promisor must be something more than the indirect benefit which would accrue to him or her merely by virtue of the promisor's position as a stockholder, officer or director. Ordinarily, a stockholder's promise to answer for the debts of the corporation, provides no more than a remote and indirect benefit to him or her. *Martin Roofing Inc. v Goldstein*, *supra*, at 266-267. The new consideration must be both tangible and directly beneficial to the promisor in order to satisfy the exception. *Bart and Schwartz v Teller*, 228 AD2d 630, 631 [2d Dept. 1996].

It is plaintiff's burden to produce evidence showing a consideration moving to defendant and showing that the parties intended, as ascertained from the language used and from all the facts and circumstances surrounding the transaction, that an independent contract was created between them which obligated the defendant to satisfy the corporation's debt in any event. *CDJ Builders Corp. v Hudson Group Const. Corp.*, 67 AD3d 720, 722 [2d Dept. 2009].

Here plaintiff has failed to plead any facts to show that defendant Levine's alleged oral promise to pay iWire's debt (which promise he denies making) constituted an independent duty of payment, irrespective of the liability of the principal debtor, or that the promise was based on new consideration beneficial to defendant Levine. *Carey & Associates v Ernst*, 27 AD3d 261, 263 [1st Dept. 2006].

Plaintiff's cursory request for leave to replead, to more fully set out a fraudulent inducement claim, should defendant Levine's motion for summary judgment be granted is denied. Plaintiff has failed to submit a proposed amended pleading supported by evidence of merit. *Fletcher v Boies, Schiller & Flexner, LLP*, 75 AD3d 469, 470 [1st Dept. 2010].

In any event, leave to amend a pleading pursuant to CPLR 3025(b) will be denied where the proposed cause of action is palpably insufficient as a matter of law. *Town of Southampton v Chiodi*, 75 AD3d 604 [2d Dept. 2010]. When, as in this case, a plaintiff purports to plead a cause of action based upon a claim that it was fraudulently induced to enter a contract, "the misrepresentations alleged in the pleadings must be more than merely promissory statements about what is to be done in the future; they must be misstatements of material fact or promises made with a present, albeit undisclosed, intent not to perform them." *Shlang v Bear's Estates Development of Smallwood, N.Y., Inc.*, 194 AD2d 914, 915 [2d Dept. 1993].

Defendant Levine has met his burden of demonstrating entitlement to summary judgment dismissing plaintiff's complaint which seeks to hold him personally liable for defendant iWire's debt. In response, plaintiff has failed to show the existence of material issues of fact which would preclude summary judgment in defendant Levine's favor. *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 329 [2009].

This decision constitutes the order of the court.

HON THOMAS P. PHELAN

Dated: 10-15-10

J.S.C.

Attorneys of Record

Gold, Stewart, Kravatz, Benex, LLP
Attn: Jeffrey B. Gold, Esq.
Attorneys for Plaintiff
1025 Old Country Road, Suite 301
Westbury, NY 11590

Ackerman, Levine, Cullen, Brickman & Limmer, LLP
Attn: Andrew J. Luskin, Esq.
Attorneys for Defendant Dan B. Levine
1010 Northern Boulevard, Suite 400
Great Neck, NY 11021