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Majority Opinion >

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

SALESMARK VENTURES, LLC, Plaintiff, - v -
JAY SINGH, JJHM TRADING CORP.,
Defendants.

INDEX NO. 651394/2021

March 11, 2022, Decided

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

HON. JOEL M. COHEN, J.S.C.

JOEL M. COHEN

**DECISION +
ORDER ON
MOTION**

HON. JOEL M. COHEN:

In May 2020, Plaintiff SalesMark Ventures, LLC ("SalesMark") contracted with Defendant JJHM Trading Corp. ("JJHM") to purchase millions of synthetic "Nitrile Gloves," as demand for such

personal protective equipment soared with the outbreak of COVID-19 (NYSCEF 1 ¶¶ 5-8 [Compl.]). SalesMark paid \$10.1 million for the Nitrile Gloves; ultimately, not a single glove was delivered (*id.* ¶¶ 10-11, 18). SalesMark was refunded \$5.6 million of its purchase price, then filed this lawsuit against JJHM and JJHM's principal, Jay Singh (collectively, "Defendants") (*id.* ¶ 39), to recover the balance.

The complaint asserts four causes of action: (1) breach of contract based on "Defendants' failure to deliver the gloves as agreed-upon and promised" (*id.* ¶ 25); (2) unjust enrichment based on "Defendants [having] refunded only a portion of the. . . balance due to plaintiff" (*id.* ¶¶ 30-31); (3) fraud based on Defendants' alleged representations that "they could deliver a substantial supply of Nitrile Gloves" and "had the requisite contacts to fulfill any order for said gloves" (*id.* ¶¶ 32-33); and, finally, (4) a cause of action seeking to pierce the corporate veil of JJHM to impose personal liability on Singh (*id.* ¶¶ 38-41).

Defendants move to dismiss the second, third, and fourth causes of action in their entirety, and to dismiss the first cause of action as against Singh, leaving only a claim for breach of contract against JJHM. SalesMark opposes the motion to dismiss and cross-moves to amend its complaint to add further factual allegations (NYSCEF 17; see NYSCEF 16 [proposed amended compl. ["PAC"]]). For the following reasons, Defendants' motion is granted and SalesMark's cross-motion is granted in part.

DISCUSSION

As an initial matter, SalesMark may amend the complaint "without leave of court" because the

period for responding to its initial pleading has not yet expired (CPLR 3025 [a] ["A party may amend his pleading once without leave of court. . . at any time before the period for responding to it expires"]; see Siegel, N.Y. Prac. § 236 (6th ed.) [motion to dismiss "automatically extends the defendant's responding time and by so doing extends as well the time in which the plaintiff may amend the complaint as of course"]).

Defendants have elected to apply their motion to the amended pleading (NYSCEF 18 at 2-3; *Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35 , 38 , 675 N.Y.S.2d 14 [1st Dept 1998] ["[T]he moving party has the option to decide whether its motion should be applied to the new pleadings."]).

The cross-motion to amend is granted (subject to the resolution of the motion to dismiss, discussed below), and the Court "consider[s] the motion as directed against the amended complaint" (*Sobel v Ansanelli*, 98 AD3d 1020 , 1022 , 951 N.Y.S.2d 533 [2d Dept 2012]).

As SalesMark acknowledges, its contract claim against Singh (the first cause of action) is viable only to the extent Singh can be held liable under the contract as JJHM's alter ego (the fourth [*2] cause of action) (NYSCEF 17 at 8).¹

"New York law disfavors disregard of the corporate form" (*Sutton 58 Assocs. LLC v Pilevsky*, 189 AD3d 726 , 729 , 137 N.Y.S.3d 359 [1st Dept 2020]). "Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable

consequences" (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335 , 339 , 703 N.E.2d 749 , 680 N.Y.S.2d 891 [1998]). "While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required" (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 N.Y.2d 135 , 141-42 , 623 N.E.2d 1157 , 603 N.Y.S.2d 807 [1993]).

Here, the allegations in support of SalesMark's veil-piercing theory are speculative, conclusory, and "unaccompanied by allegations of consequent wrongs" (*UMG Recordings, Inc. v FUBU Records, LLC*, 34 AD3d 293 , 294 , 824 N.Y.S.2d 83 [1st Dept 2006]). SalesMark alleges, "[u]pon information and belief," that JJHM "is a shell corporation having no assets," that Singh is JJHM's sole principal, and that Singh and JJHM "have not respected [JJHM] s] corporate form," so that they "are one and the same" (PAC ¶¶ 47-50). These allegations recite the elements of veil-piercing without providing specific factual assertions to substantiate them (*Albstein v Elany Contr. Corp.*, 30 AD3d 210 , 818 N.Y.S.2d 8 [1st Dept 2006] [dismissing veil-piercing claim where plaintiff "failed to plead any facts to substantiate such conclusory claims"]; *501 Fifth Ave. Co. LLC v Alvona LLC*, 110 AD3d 494 , 973 N.Y.S.2d 137 [1st Dept 2013] ["The allegations of corporate domination are wholly conclusory and consist of no more than a recitation of the elements of the claim, 'upon information and belief.'"]). The allegations added in the amended complaint — that JJHM is a Delaware corporation not registered to do business in New York and that it "has a web site containing minimal information

about the company" (PAC ¶ 51) — do not move the needle.

At bottom, SalesMark bases its veil-piercing theory on the suspicion that "[s]omething is rotten" here because "JJHM utterly failed to deliver the goods" SalesMark contracted for (NYSCEF 17 at 9). But without specific factual allegations suggesting Singh's domination and abuse of the corporate form, the alleged breach by JJHM does not entitle SalesMark to proceed on a theory of piercing the corporate veil. As a result, the first cause of action is dismissed as to Singh, and the fourth cause of action is dismissed in its entirety. If evidence comes to light during discovery giving rise to a viable claim against Mr. Singh, SalesMark can seek leave to amend.

The quasi-contract claims also fail. SalesMark concedes that it has no unjust enrichment claim against JJHM because of the existence of a contract between the two parties (NYSCEF 17 at 10), but maintains an unjust enrichment claim against Singh. The contract, though, forecloses the claim as to both JJHM and Singh. "[T]he existence of a valid contract governing [*3] the subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11 , 23 , 832 N.E.2d 26 , 799 N.Y.S.2d 170 [2005]). And because "[p]laintiff acted under contract with defendant [JJHM]," it can "only look to that corporation for compensation" (*Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103 , 108 , 744 N.Y.S.2d 384 [1st Dept 2002] [explaining that "to recover from a particular defendant, a plaintiff must demonstrate that services were performed **for the defendant** resulting in its unjust enrichment"] [emphasis in original]).

Finally, SalesMark's fraud claim fails because it essentially restates the claim for breach of contract, with the added allegation that Defendants lacked the intent or the ability to perform the contractual obligations (see PAC ¶ 42 ["Upon information and belief, when defendants made the aforesaid representations, they had no intention of providing the nitrile gloves, or had no reasonable basis for believing that they could do so."]; *Boone Assocs., L.P. v Oaster*, 257 A.D.2d 370 , 371 , 683 N.Y.S.2d 47 [1st Dept 1999] ["[T]he mere additional allegation that the decedent did not intend to keep his promises when he made them was insufficient to convert the underlying claim for breach of promise into one for fraud"]; *Gorman v Fowkes*, 97 AD3d 726 , 727 , 949 N.Y.S.2d 96 [2d Dept 2012] [holding that fraud claim should have been dismissed where "the alleged misrepresentations amounted only to a misrepresentation of the intent or ability to perform under the contract"]).

Therefore, it is

ORDERED that the motion to dismiss is GRANTED and the second, third, and fourth causes of action in the complaint are dismissed, along with the branch of the first cause of action addressed to Defendant Singh; it is further

ORDERED that Plaintiff's motion for leave to amend the complaint herein is GRANTED IN PART, and Plaintiff is directed to file on NYSCEF an amended complaint in the proposed form annexed to the moving papers (NYSCEF 16), excluding the claims dismissed in this Decision and Order; and it is further

ORDERED that Defendant JJHM is directed to answer the amended complaint within 20 days

after it is filed on NYSCEF; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on **April 12, 2022 at 10:30 a.m.**, with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference date.²

This constitutes the Decision and Order of the Court.

3/11/2022

DATE

/s/ Joel M. Cohen

JOEL M. COHEN, J.S.C.

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As Defendants point out, the fourth cause of

action is not, in any event, recognized as a standalone claim.

"[A]n attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 N.Y.2d 135 , 141 , 623 N.E.2d 1157 , 603 N.Y.S.2d 807 [1993]).

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If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.