

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

TUNNELL-SPANGLER & ASSOCIATES, INC.,	:	May Term, 2003
	:	
Plaintiff,	:	No.: 3030
	:	
v.	:	
SAMUEL P. KATZ	:	Commerce Program
	:	Control Number 041324
Defendants.	:	

ORDER and MEMORANDUM

AND NOW, this 15TH day of July, 2004, upon consideration of the Preliminary Objections of Defendant Samuel P. Katz to Plaintiff's Amended Complaint, and Plaintiff's response thereto, and in accord with the contemporaneous Memorandum Opinion filed of record, it hereby is **ORDERED** and **DECREED** that Defendant's Preliminary Objections are **SUSTAINED** and Plaintiff's Amended Complaint is **DISMISSED**.

BY THE COURT,

GENE D. COHEN, J.

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MEMORANDUM OPINION

COHEN, J......

Presently before the court are the Preliminary Objections of Samuel P. Katz (“Katz”) to Plaintiff Tunnell-Spangler & Associates, Inc. (“Tunnell- Spangler”) third amended complaint. For the reasons that follow, Defendant’s Preliminary Objections are Sustained.

BACKGROUND

Initially, Tunnell-Spangler initiated this lawsuit against Katz and Entersport Capital Advisors, Inc. (“Entersport”) to recover fees for architectural services. Defendants filed preliminary objections to the complaint. On December 31, 2003, the court dismissed Tunnell-Spangler’s amended complaint against Katz and ordered Entersport to mediation and arbitration. As part of the order, the court granted Tunnell-Spangler leave to amend its claims against Katz. Tunnell-Spangler has now filed a third amended complaint against Katz only. The complaint alleges that Katz breached his contract with Tunnell-Spangler and that Katz is personally responsible for the debt of Entersport since Katz was the alter ego of Entersport. Defendant demurs to the complaint.

DISCUSSION

A. Legal Standard

A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super.1999). For the purposes of reviewing preliminary objections asserting legal insufficiency, "all well pleaded material, factual averments and all inferences fairly deducible there from" are presumed to be true. McCardle v. Tronetti, 426 Pa. Super. 607, 627 a.2d 1219, 1221 (Pa. Super. 1993). However, the pleader's conclusions or averments of law are not considered to be admitted as true. Allegheny County v. Com., 507 Pa. 360, 372, 490 A.2d 402, 408 (Pa. 1985). Thus, the inquiry at bar is whether plaintiff has set out material, relevant, well-pleaded facts which, if true, state a claim against Katz individually upon which relief can be granted.

B. The Allegations Within the Complaint Are Insufficient to Pierce the Corporate Veil.

The law in Pennsylvania is clear that where a party enters into a contract with a corporation, no action will lie against the shareholders of that corporation individually for a breach of that contract. First Realvest, Inc. v. Avery Builders, Inc., 410 Pa. Super. 572, 600 A.2d 601, 603 (Pa. Super. 1991) (citing Loeffler v. McShane, 372 Pa. Super. 442, 539 A.2d 876 (Pa. Super.1988)). "The breach of the promise is the breach of a promise made by the corporation, and not the breach of any promise extended by the corporate officer." Id. Shareholders, officers and directors are not held liable for the corporation's breach of a contract, absent an establishment of participation theory or the equitable doctrine of piercing the corporate veil. Id.

Plaintiff seeks to pierce the corporate veil of Entersport to hold Katz responsible for the contract balance alleging an alter ego theory. In Pennsylvania there is a strong presumption against piercing the corporate veil. The general rule is that a corporation shall be regarded as an independent entity even if its stock is owned entirely by one person. College Watercolor Group, Inc. v. William H. Newbauer, Inc., 468 Pa. 103, 117, 360 A.2d 200, 207 (Pa. 1976). “[T]he corporate form will be disregarded only when the entity is used to defeat public convenience, justify wrong, protect fraud or defend crime.” Good v. Holstein, 787 A.2d 426, 430 (Pa. Super. 2001). The following factors are to be considered in determining whether to pierce the corporate veil: 1) undercapitalization; 2) failure to adhere to corporate formalities; 3) substantial intermingling of corporate and personal affairs; and 4) use of the corporate form to perpetuate a fraud. Lumax Indus. Inc. v. Aultman, 543 Pa. 38, 669 A.2d 893 (Pa.1995).

In support of its claim that Katz is the alter ego of Entersport, the complaint alleges the following:

- (1) Katz caused Entersport to be uncappeditalized or under capitalized for its corporate purpose and activities and that any capitalization was provided by Katz from his personal assets, (Plaintiff’s third amended complaint ¶¶44-45);
- (2) Katz did intermingle substantial assets of Entersport with his personal assets and used the assets of Entersport as his own (Plaintiff’s third amended complaint ¶¶48-49, 53);
- (3) Katz was the sole shareholder, director an officer of Entersport (Id. ¶ 50);
- (4) Katz failed to maintain the corporate books and records of Entersport (Id. ¶ 51);
- (5) Katz failed to adhere to corporate formalities (Id. ¶ 52); and
- (6) Katz is engaging in business activities on behalf of Entersport by personally acknowledging its claims and paying claims made against Entersport by creditors who are similarly situated. (Id. ¶ 56).

As stated above, the corporate form will only be disregarded when it is used to defeat public convenience, justify wrong, protect fraud or defend crime. Here, the above

allegations of undercapitalization, intermingling of funds and failure to adhere to corporate formalities allege control and alter ego. However, the complaint fails to allege how the control was used by defendant to further his personal interest. Thus, these allegations are insufficient to pierce the corporate veil.

Plaintiff does allege that Katz employed the corporate entity of Entersport to defraud plaintiff by promising in the contract to pay the balance of the consideration due to plaintiff when Katz knew that Entersport was undercapitalized and knew that it was likely that Entersport would not be awarded the contract. (Plaintiff's third complaint ¶ 43). In support thereof, Plaintiff alleges that Katz assured plaintiff that Entersport and Katz were one and the same, that Entersport was the corporate name Katz was using to initiate the Project (Plaintiff's third amended complaint ¶ 13) that Katz was the principal owner of Entersport and that he has a significant personal financial interest in the success of the project. (Plaintiff's third amended complaint ¶ 14). The complaint further alleges that Katz assured plaintiff that he would be involved in the Project at every step and that he would stand 100 percent behind the project. (Plaintiff's third amended complaint ¶ 15). Plaintiff alleges that as a result of Katz's assurances it signed a contract with Entersport to provide architectural services. (Plaintiff's third amended complaint ¶ 16).

In contrast to the allegations however, the complaint also alleges that Entersport signed the contract as owner (Id. ¶ 16), plaintiff submitted invoices to Entersport for payment, (Id. ¶ 24) and in the year 2000 Entersport paid plaintiff a total of \$100,000.00 in fees (Id. ¶ 28).

These allegations are also legally insufficient to impose liability upon Katz for the debt of Entersport. There are no allegations within the complaint averring that Katz

agreed to pay, provided a personal guarantee or agreed to be personally liable for the debt of Entersport. Nor are there any allegations that Katz made payments on behalf of Entersport.

Moreover, notwithstanding the lack of factual allegations that Katz personally guaranteed the debt of Entersport, the allegations which plaintiff does rely upon to impose liability upon Katz are also insufficient under the parole evidence rule. Under the parole evidence rule, where the parties to a contract have embodied their agreement in a single memorial, which they regard as the final expression of that agreement, all other utterances, prior to or contemporaneous with the making of the memorial, are immaterial for the purpose of determining the terms of the contract. Yocca v. Pittsburgh Steelers Sports, Inc., 806 A.2d 936, 942 (Pa. Cmwlth. 2002). If an agreement contains an integration clause, the parole evidence rule is particularly applicable. Id (citing 1726 Cherry Street Partnership v. Bell Atlantic Properties, Inc., 439 Pa. Super. 141, 653 A.2d 663 (1995)).

A written contract that is unambiguous and held to express the embodiment of all negotiations and agreements prior to its execution, neither oral testimony nor prior written agreements or other writings are admissible to explain or vary the terms of that contract. Lenzi v. Hahnemann University, 445 Pa. Super. 187, 664 A.2d 1375, 1379 (Pa. Super. 1995). The issue of whether a writing constitutes an integrated contract is a question of law. Id. A contract is integrated if it represents a final and complete expression of the parties' agreement. Id. Where a contract purports to be a complete legal obligation without any doubt as to its object or extent, it is presumed to reflect the whole legal right of the parties. Id.

The Agreement at issue between Entersport and plaintiff clearly purports to constitute a final and complete expression of the rights and obligations of the parties. Article 9.6 of the contract specifically provides that the contract between plaintiff and Entersport constitutes the entire and integrated agreement superceding all prior negotiations, representations or agreements either written or oral. The Agreement also provides in Article 12.9 that failure of Entersport to acquire project financing, for whatever reason does not absolve Entersport's obligation to pay plaintiff for work completed per fees established. The Agreement is unambiguous and expresses the embodiment of all negotiations and agreements between the parties. Thus, the allegations which allegedly claim to guarantee payment by Katz in the complaint constitute parole evidence and should not be taken into consideration in determining whether Katz personally guaranteed payment on the outstanding balance.

Taking all the well pleaded material, factual averments and all inferences fairly deducible there from as true, plaintiff fails to state a claim against Katz individually. Accordingly, defendant's Preliminary Objections to plaintiff's complaint are Sustained.

Conclusion

For the foregoing reasons Defendant Katz's Preliminary Objections are Sustained. A contemporaneous order will be filed of record.

BY THE COURT,

GENE D. COHEN, J.