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 (A/K/A SAM KATZ) And ENTERSPORT CAPITAL ADVISORS, INC.,	:	Commerce Program
	:	Control Number 100380
Defendants.	:	

MEMORANDUM OPINION

GENE D. COHEN, J.

Before the Court are Defendants' Preliminary Objections to Plaintiff's Amended Complaint. For the reasons fully set forth below, Defendants' Preliminary Objection pursuant to Pa. R. Civ. P. 1028 (a) (4) and (6) are **sustained**. Defendants' Preliminary Objection pursuant to Pa. R. Civ. P. 1028 (c) is **dismissed** as **Moot**.[1]

DISCUSSION

I. Plaintiff Has failed to State a Claim Against Katz Individually

Defendants demur to Count I of the amended complaint on the basis that plaintiff has improperly made Samuel P. Katz ("Katz") a party to this action. Defendants argue that plaintiff has no basis to name Katz in a breach of contract action since he was not a party to any contract.

A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. JK Roller Architects, L.L.C. v. Tower Investments, Inc., 2003 WL 1848101, * 1 (Pa. Com. Pl. 2003) (Jones)(citing Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. 1999). For the purpose of reviewing preliminary objections

[1] The court need not address defendants' preliminary objection pursuant 1028 (c) since a response was filed to the preliminary objections by plaintiff.

asserting legal insufficiency, "all well-pleaded material, factual averments and all inferences fairly deducible there from" are presumed to be true. Id (Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. 2000)). However, the pleader's conclusions or averments of law are not considered to be admitted as true. Id. 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 may be granted. This court finds that plaintiff has failed to satisfy its burden.

"It is fundamental contract law that one cannot be liable for a breach of contract unless one is a party to that contract." Id (quoting Electron Energy Corp. v. Short, 408 Pa. Super. 563, 571, 597 A.2d 175, 178 (Pa. Super. 1991)(holding that corporate president cannot be liable for breach of contract where he is not a party to the contract). See also, Fleetway Leasing Co. v. Wright, 697 A.2d 1000, 1003 (Pa. Super. 1997)("a person who is not a party to a contract cannot be held liable for breach by one of the parties to a contract."). Under this principal, Katz cannot be held liable to plaintiff absent a contract between the parties. Here, the contract at issue is between Entersport Capital Advisors Inc. and Tunnell-Spangler. Katz is not a party to the contract and therefore cannot be held liable under the contract.

Plaintiff also alleges that Katz is the alter ego for Entersport. There is a strong presumption against piercing the corporate veil. Lumax Industries, Inc. v. Aultman, 543 Pa. 38, 41-42, 669 A.2d 893, 895 (Pa.1995). Under Pennsylvania law 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 perpetrate a fraud. Id.

In order to withstand a demurrer, plaintiff must set forth conduct which Katz allegedly engaged in that would bring his actions within the parameters of a cause of action based on a theory of piercing the corporate veil. While it is not necessary to set forth the evidences to be proved, it is essential that the facts the pleader depends upon to show liability be averred. Lumax, 543 Pa. at 38, 669 A.2d at 893. The amended complaint fails to satisfy this burden. In the amended complaint, Plaintiff alleges that defendants assured plaintiff that Entersport and Katz were one and the same and that Entersport was the corporate name Katz was using to initiate the project, amended complaint ¶ 13, that Katz was the principal owner of Entersport and that Katz had a significant personal financial interest in the success of the project, amended complaint ¶ 14 and that Katz is the alter ego of Entersport. Amended Complaint ¶ 44. Plaintiff has not alleged any of the special circumstances necessary to pierce the corporate veil such as fraud, illegality or injustice. Plaintiff merely alleges conclusions of law as it pertains to the alter ego theory of liability. These conclusions are not sufficient to sustain such a claim.

As such this court finds that Plaintiff has failed to plead sufficient facts to state a claim against Katz individually. Accordingly, all claims asserted against Katz in his individual capacity in the amended complaint are dismissed.

II. This matter is Subject to Mediation and Arbitration

Judicial inquiry in determining whether a suit must proceed to arbitration requires a determination as to (1) whether a valid agreement to arbitrate exists between the parties

and, if so, (2) whether the dispute involved is within the scope of the arbitration provision. Midomo Co., Inc. v. Presbyterian Housing Development Co., 739 A.2d 180, 186 (Pa. Super. 1999)(quoting Smith v. Cumberland Group, Ltd., 455 Pa. Super. 276, 283, 687 A.2d 1167, 1171 (Pa. Super. 1997).

In the instant matter, Marc Robins, Vice President of American Skating, on behalf of Entersport Capital Advisors, Inc. and Jerry W. Spangler, on behalf of Tunnell-Spangler Associates, Inc., entered into a contract to provide architectural services to Entersport to redevelop the George Washington Country Club. Amended Complaint ¶ 7, Exhibit "A" to the amended complaint. The contract, entitled the Abbreviated Standard Form of Agreement Between Owner and Architect (hereinafter "ASA"), defines the rights and obligations of the parties. ASA provides the following with respect to mediation and arbitration:

> 7.1 Mediation
> 7.1.1 Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party. If such matter relates to or is the subject of lien arising out of the Architect's services, the Architect may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by arbitration.
> 7.1.2 The Owner and Architect shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association.
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> …….
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> 7.2 Arbitration
> 7.2.1 Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with Paragraph 7.1.
> 7.2.2 Claims, disputes and other matters in question between the parties that are not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree other wise, shall be in accordance with the Construction Industry

Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association.

7.2.3 A demand for Arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

In the instant matter, Plaintiff argues that a valid agreement to arbitrate between the parties does not exist because defendant waived his right to mediation and arbitration.[2] The court is not persuaded.

Waiver is a voluntary and intentional abandonment or relinquishment of a known right. Samuel J. Marranca General Contracting Co., Inc. v. Amerimar Cherry Hill Associates Ltd. Partnership, 416 Pa. Super. 45, 610 A.2d 499, 501 (Pa. Super. 1992). Waiver may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary. Id. The key to determining whether arbitration has been waived is whether the party, by virtue of its conduct, has accepted the judicial process. Acceptance of the judicial process is demonstrated when the party (1) fails to raise the issue of arbitration promptly, (2) engages in discovery, (3) files pretrial motions which do not raise the issue of arbitration, (4) waits for adverse rulings on pretrial motions before asserting arbitration, or (5) waits until the case is ready for trial before asserting arbitration. St. Clair Area School Dist. Bd. of Ed. v. E.I. Associates., 733 A.2d 677, 682 n.6 (Pa. Cmwlth. Ct. 1999). Here, defendant's conduct does not amount to a waiver. Defendant elected to file preliminary

[2] Plaintiff argues that defendant never filed a demand for arbitration and failed to respond to a request for arbitration made by the plaintiff. The question of whether a party's demand for arbitration is timely is for the arbitrators, not for the courts. Highmark, Inc. v. Hospital Service Ass'n of Northeastern Pa., 785 A.2d 93, 100-01 (Pa. Super. 2001).

objections asserting the arbitration provision within the contract. By filing this objection, Defendant has not accepted the judicial process. Defendant has not engaged in discovery, filed pretrial motions, waited for trial or suffered any adverse rulings. Thus, defendant has not waived his right to mediation and arbitration.

CONCLUSION

For the above stated reasons:

1. Defendants' Preliminary Objections pursuant to Pa. R. Civ. P. 1028 (a) (4) is **SUSTAINED**. All claims asserted against Katz in his individual capacity in the amended complaint are **DISMISSED** without prejudice, with leave to amend within twenty days of entry of this order.
2. Defendants' Preliminary Objection pursuant to Pa. R. Civ. P. 1028 (6) is **DISMISSED** without prejudice and ordered to mediation and arbitration.
3. Defendants' Preliminary Objection pursuant to Pa. R. Civ. P. 1028 (c) is hereby **DISMISSED** as **MOOT**.

The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

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GENE D. COHEN, J.

Dated: December 31, 2003