

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 446-11-18 Wmcv

Anthem Productions LLC vs. Bitar, Danny a/k/a Dany

DECISION ON MOTION FOR SUMMARY JUDGMENT

Plaintiff Anthem Productions, LLC, filed its complaint against Minus Zero Festival, LLC, John DiMatteo, and Danny Bitar, in November 2018, alleging that it had entered into a contract with the defendants to provide lighting, audio, and other services for a music festival in April 2018 in Dover, Vermont (the festival); that it provided those services as promised; and that the defendants did not pay the full amount of the agreed contractual fee for those services. In its complaint, the plaintiff seeks the balance due for the contracted fees, alleging breach of contract, unjust enrichment, and fraudulent conveyance. The defendants all answered denying the plaintiff's claims.

The claims against John DiMatteo and his cross-claims against Defendant Danny Bitar were dismissed in April 2020 based on a settlement between the plaintiff and Mr. DiMatteo. The claims against Defendants Minus Zero Festival, LLC, and Danny Bitar are still pending. Defendant Bitar now seeks summary judgment in his favor and dismissal of all the plaintiff's claims against him as an individual. The plaintiff opposes his motion for summary judgment.

Defendant Bitar argues that there is no basis for him to be held individually liable in this contract dispute, that any liability to the plaintiff is solely that of the limited liability company, Minus Zero Festival, LLC (the LLC). He asserts that he acted solely as the manager of the LLC, and that there was no fraud or other basis for piercing the corporate veil and imposing personal liability on him for the debts of the LLC. He alleges that he and his associates fully disclosed to the plaintiff the sources and amounts of income available to the LLC, and the potential risks associated with the festival. He alleges that three separate documents were signed in connection with plaintiff's agreement to provide sound and lighting for the festival, that he signed all three, and that he did so solely in his role as manager and CEO of the LLC, without providing any personal guarantees. Defendant Bitar is the sole owner and CEO of another corporate entity, Worldwide Events, Inc. (WWE). Defendant Bitar admits that he, WWE, and some of his family members loaned or advanced money to the LLC or personally paid various expenses related to the festival, and that the LLC then reimbursed him and his family members, at least in part, for those expenses. He asserts that this was a legitimate business practice, properly documented through the bookkeeping of the entities and individuals involved, and that it does not provide a basis for any individual liability on his part. He insists that the LLC was not a strawman to avoid liability for debts, and that it "had assets, capital, and a distinct purpose far removed from evasion of contractual liability." (Bitar Motion for Summary Judgment at 27). He asserts that he, his other entity (WWE), and his family members are still owed substantially more money from the LLC

due to the losses related to the festival. He also argues that the plaintiff knew the risks of this festival, and therefore, under a theory of equitable estoppel or unclean hands, it should not now be permitted, after the fact, to seek guarantees that it did not obtain at the time of its agreement to provide services.

The plaintiff largely opposes the motion, except as to Count I, the breach of contract claim. It agrees that that claim is solely against Defendant Minus Zero Festival LLC (the LLC), and to the extent that it purports to include Defendant Bitar, it may be dismissed. However, the plaintiff strenuously opposes Defendant Bitar's arguments that its claims against him personally for unjust enrichment, fraudulent conveyance, and individual liability through piercing the LLC's corporate veil should be dismissed. The plaintiff argues that Defendant Bitar was responsible for funding and ensuring that the LLC had sufficient funds to operate, and that he undercapitalized the LLC, that he misused and transferred funds that were intended for the LLC to himself, his family, and to his other company, WWE, that he used the LLC's funds for personal expenses and other expenses unrelated to its business, that he misrepresented the LLC's financial situation to the plaintiff, which induced the plaintiff to provide the contracted services to the festival, and that he then failed to transfer funds to the plaintiff that were available to pay the amounts due to them under the contract.

Undisputed Material Facts

The following are the undisputed material facts related to this motion as presented by the parties.

Defendant Minus Zero Festival LLC (LLC) is a California limited liability company formed in 2015, with its principal place of business at 2700 Cahuenga Boulevard East #4301, Los Angeles, California. Defendant Danny Bitar also resides at that address. Defendant Bitar is the sole managing member and CEO of the LLC. He is the only person who has constantly been a member of the LLC since its founding. Defendant Bitar was responsible for the business operations of the LLC. His brother Cyril had a 10% membership interest in the LLC in 2017 and 2018, but has played no active role in the business of the LLC. Defendant Danny Bitar is also the sole owner of another entity, Worldwide Events, Inc. (WWE).

The LLC had a checking account, but no credit cards and no PayPal account. Defendant Bitar was the only person authorized to approve withdrawals or payments from the LLC's checking account. Whether all the transfers he authorized from that account to himself, his parents, and WWE were to reimburse them for expenses that they had incurred on the LLC's behalf is contested. Some of the payments that Defendant Bitar approved from LLC funds from ticket sales for the 2018 festival were used to pay debts related to the 2017 festival. The LLC had only a 50% financial interest in the 2017 festival, which had also been unprofitable.

In or about September 2017, the parties began discussing having plaintiff provide lighting, audio, and other services for the planned 2018 Minus Zero Festival (2018 festival) to take place at Mount Snow in Dover, Vermont. The parties talked about the festival, and the defendants offered the plaintiff a partnership or ownership interest in the LLC. By some time in 2017, the plaintiff had determined that it did not want to be a partner/owner of the LLC or be an investor in the festival or in the LLC. Plaintiff never signed any documents indicating that it had a partnership or investment relationship with the LLC or agreeing to a payment arrangement for its services based on a share of the profits from the festival. On March 30, 2018, Defendant Bitar electronically signed on behalf of the LLC a quote from the plaintiff for services to be provided for the festival in the amount of \$206,500.

John DiMatteo paid \$30,900 to the plaintiff by credit card on March 21, 2018 towards their contracted services.

The 2018 festival and the LLC's expenses related to the festival were paid in part by Defendant Bitar using his credit card, by his parents using their credit cards, and by Defendant Bitar's other corporate entity, Worldwide Events, Inc. (WWE), using its credit card. Mr. DiMatteo also paid some of the expenses of the festival using his or his company's credit card. The LLC then reimbursed many of these payments that former Defendant DiMatteo, Defendant Bitar, Defendant Bitar's parents, and WWE had made. These transfers were often referred to in the LLC's records as related to "DB loan." Defendant Bitar describes his use of his own credit cards, his parents' credit cards, and the WWE credit card to pay expenses for the 2018 festival as part of his effort to "scramble to keep the festival afloat."

Due to concerns about the finances of the festival, Defendant Bitar stopped paying himself any salary from the LLC in December 2017. Prior to that time, he was being paid \$3,000 per month by the LLC. Defendant Bitar admits that he "consistently spoke hopefully about the potential [financial] outcome of the 2018 festival" to the plaintiff. He saw these opinions as "in keeping with [his] role as an event promoter."

The festival took place at Mount Snow in early April 2018, and the plaintiff did in fact provide the services described in the March 30 quote. Defendant Bitar admits that the provision of sound, lighting, and special effects services are the most essential elements of a music festival, aside from the performers. Defendant Bitar admits that he was entirely satisfied with the plaintiff's work at the festival.

The funds realized from this festival were much lower than the LLC and Defendant Bitar had hoped. The festival lost a substantial amount of money. A few weeks before he signed the quote for plaintiff's services on March 30, Defendant Bitar were aware that ticket sales were not as strong as they had hoped, and that profits, if any at all, would be small. In the end, the festival lost at least \$500,000.

The LLC's balance sheets show capital contribution of only \$400 for 2017 and 2018. Tax records for 2018 show capital contributions of \$52,568.

The LLC's records show that several checks for relatively small amounts, totaling \$867.53, were written on the LLC's bank account in January and February 2018, that were in fact for Defendant Bitar's or others' personal expenses. Defendant Bitar reimbursed the LLC for at least one of these, for a traffic citation in the amount of \$490. Defendant Bitar does not have any personal bank accounts.

Before and after the festival, the plaintiff demanded that Defendant Bitar make payment to the plaintiff. Defendant Bitar acknowledges that the plaintiff has not been fully compensated for its work at the festival. He apologized to plaintiff for the LLC's failure to pay the balance due.

The LLC owes money to other creditors besides the plaintiff related to the failed 2018 festival. Defendant Bitar asserts that he is still owed over \$50,000 for his and Worldwide Events Inc's contributions to the costs of the festival. The plaintiff asserts that it incurred expenses of over \$246,000 for the services provided at the festival, and was paid only \$70,000.

Legal Conclusions

In order “[t]o prevail on a motion for summary judgment, the moving party must show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.” *Doe v. Doe*, 172 Vt. 533, 534 (2001) (mem.) (citation omitted). “In determining whether a genuine issue of fact exists, the nonmoving party receives the benefit of all reasonable doubts and inferences.” *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996) (citation omitted).

Unjust Enrichment

Defendant Bitar argues that the undisputed facts demonstrate that the plaintiff’s claims against him for unjust enrichment should be dismissed. As noted, these claims cannot be dismissed unless Defendant Bitar has shown that there are no genuine issues of material fact, and that he is entitled to judgment in his favor on this claim.

A claim of unjust enrichment, also known as “quasi-contract” requires the proponent to prove that “(1) a benefit was conferred on defendant; (2) defendant accepted the benefit; and (3) defendant retained the benefit under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value.” *Center v. Mad River Corp.*, 151 Vt. 408, 412 (1989). Unjust enrichment applies if “in light of the totality of the circumstances, equity and good conscience demand” that the benefitted party return that which was given. *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 41, 178 Vt. 244. “[W]hether there is unjust enrichment may not be determined from a limited inquiry confined to an isolated transaction. It must be a realistic determination based on a broad view of the human setting involved.” *Legault v. Legault*, 142 Vt. 525, 531 (1983).

The plaintiff here alleges that Defendant Bitar was unjustly enriched by receiving payments from the LLC that could have been used to pay the LLC’s creditors, including the plaintiff. They argue that the documentation from Defendant Bitar, his other company, WWE, and the LLC are insufficient to demonstrate that Defendant Bitar was entitled to the payments that were made to him by the LLC from revenues for the festival. They also point to evidence that some of Defendant Bitar’s personal expenses were paid by the LLC in support of this claim. They insist that the fact that Defendant Bitar is still nominally owed some funds due to the losses related to the festival is outweighed by the fact that the plaintiff is owed a much greater amount due to those losses. They assert that the LLC was underfunded, and that Defendant Bitar misrepresented its financial status to the plaintiff.

The court concludes that, taking the evidence in the light most favorable to the plaintiff, there are material factual disputes regarding the legitimacy of the payments made by the LLC to Defendant Bitar, WWE, and Defendant Bitar’s family members from funds paid to the LLC from ticket sales for the festival, and the surrounding facts and circumstances. The plaintiff’s claims against Defendant Bitar on this basis must be left to a factfinder at trial. Defendant Bitar’s motion for summary judgment on this count is therefore denied.

Fraudulent Conveyance

Defendant Bitar also argues that there is no evidence of any fraudulent conveyance of LLC property to him or by him, and that the plaintiff’s claim based on that theory should be dismissed. The plaintiff argues that Defendant Bitar’s authorization of transfers of funds from the LLC’s accounts to himself and his company, WWE, were voidable transfers which should be set aside under Vermont statutory and case law.

Fraudulent conveyance claims are based on Chapter 57 of Title 9, Vermont Statutes Annotated, on voidable transactions. Under 9 V.S.A. § 2288(a),

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

The plaintiff argues that Defendant Bitar was the person who authorized the transfer of all the funds received from festival ticket sales and other sources out of the LLC's accounts. It argues that Defendant Bitar authorized the transfer of the LLC's funds to himself and his company, WWE, and that those transfers were "to an insider," were not disclosed, that the LLC was already insolvent or nearly so at the time of the transfers, and that the transfers occurred at about the same time that the debt to the plaintiff was incurred. These factors are among those to be considered under 9 V.S.A. § 2288(b), to determine actual intent. As plaintiff alleges, such facts are "badges of fraud" that when "present in sufficient number ... may give rise to an inference or presumption of fraud." *Greystone Community Reinvestment Association, Inc. v. Berean Capital, Inc.*, 638 F.Supp.2d 278, 292 (D.Conn. 2009).

In deciding whether the debtor received reasonably equivalent value under § 2288(a)(2), "courts consider: (i) the market value of what was transferred and received; (ii) whether the transaction took place at arm's length; and (iii) the good faith of the transferee." *In re Turner & Cook, Inc.*, 507 B.R. 101, 109 (Bankr. D. Vt. 2014) (citations omitted), *recon. denied*, 2014 WL 1922873. Also, "[i]n deciding whether a debtor received 'reasonably equivalent value' for an alleged fraudulent transfer, the court should consider both the direct and indirect benefits flowing to the debtor as a result of the exchange." *Turner & Cook, Inc.*, 507 B.R. at 109. The question of whether the debtor was able to pay its debts as they became due under § 2288(a)(2)(B) is also a fact specific determination.

[A] debtor is insolvent if the sum of its debts is greater than the value of all of its assets, at a fair valuation. 9 V.S.A. § 2286(a); 11 U.S.C. § 101(32). Insolvency is a factual issue which must be resolved on a case by case basis. See *In re Join-In International (U.S.A.) Ltd.*, 56 B.R. 555, 560 (Bankr. S.D.N.Y. 1986). A court may rely on the balance sheets of the company in determining whether a debtor is insolvent. See *In re Bayou Group, LLC*, 439 B.R. 284, 332 (S.D.N.Y. 2010). Contingent claims of an entity, including pending lawsuits, should be included in the insolvency calculation. See e.g., *In re Sierra Steel, Inc.*, 96 B.R. 275, 279 (9th Cir. BAP 1989); *In re Tronox Incorporated*, 503 B.R. 239, 313 (Bankr. S.D.N.Y. 2013); Collier on Bankruptcy, Sixteenth Ed. ¶ 101.32[5].

Turner & Cook, Inc., 507 B.R. at 109.

It is noteworthy that the cases on this topic make it clear that “[t]he determination of a defendant’s fraudulent intent is a fact-intensive inquiry and is nearly always proven from surrounding circumstances rather than direct evidence.” *Ag Venture Fin. Servs. Inc. v. Montagne (In re Montagne)*, 417 B.R. 232, 238 (Bankr. D. Vt. 2009). See *Green Mt. Nursing Home v. Carlisle*, No. S1568-10 Cnc, 2012 WL 3134497 (Vt. Super. Ct. July 9, 2012) (Crawford, J.).

The court again concludes that, when taken in the light most favorable to the plaintiff, the evidence on all these topics is far too unclear and ambiguous to enable the court to conclude that judgment against the plaintiff on its claims against Defendant Bitar should be granted. His motion to dismiss the plaintiff’s claims against him is therefore denied.

Piercing the Corporate Veil

Finally, Defendant Bitar argues that there is no basis for the plaintiff’s claims that the corporate veil of the LLC should be pierced, and that the plaintiff should be permitted to recover the amounts due under its contract with the LLC from Defendant Bitar, personally. He asserts that the corporate formalities have been observed, and that the LLC’s records are clear. He insists that all the payments that the LLC made were legitimate repayments of debts or of funds advanced on the LLC’s behalf. The plaintiff argues that, like the voidable conveyances standards discussed above, the standards regarding whether the corporate veil should be pierced are fact intensive and not suitable for resolution by summary judgment. It argues that all the facts alleged in connection with its claims for unjust enrichment and fraudulent (voidable) conveyance also support the piercing of the corporate veil and imposition of personal liability for the LLC’s debt on Defendant Bitar.

However, the law again does not favor a summary resolution of this question. “Although shareholders are not generally liable for the debts of the corporation, shareholders can be held liable where the corporate form has been used to perpetrate a fraud or to shield the shareholders’ assets against legitimate claims of a creditor.” *Agway v. Brooks*, 173 Vt. 259, 262 (2001). Piercing the corporate veil may be appropriate “where the corporate form has been used to perpetrate a fraud, [] and also where the needs of justice dictate.” *Agway*, 173 Vt. at 262 (citation omitted). Even where there is not fraud, the court should “look to the facts and circumstances of each case to determine whether the corporate veil should be pierced in the interests of fairness, equity, and the public need.” *Id.* at 263. However, it is noteworthy that “[u]ndercapitalization alone is not a sufficient ground for disregarding the corporate entity.” *In re Vermont Toy Works, Inc.*, 135 B.R. 762, 771 (Bankr. D. Vt. 1991).

As with Defendant Bitar’s other arguments, the court concludes that many of the facts relevant to the plaintiff’s claim for piercing the corporate veil are hotly disputed, and therefore this claim is not appropriate for resolution on summary judgment. His motion for summary judgment as to the issue of his personal liability for the LLC’s debts is denied.

Defendant Bitar also argued that the plaintiff should be equitably estopped from making its claims against him, because, he alleges, the plaintiff had open access to the LLC’s finances and was aware of its significant debts from the prior festival. However, the doctrine of equitable estoppel is based on an assessment of public policy based on all the facts and information related to a claim. “The test to determine whether a party is estopped from a claim is simple: whether, in all the circumstances of the case, conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct.” *Greenmoss Builders, Inc. v. King*, 155 Vt. 1, 7 (1990) (quotation and citation omitted). There are substantial factual disputes between the parties as to defendant’s

allegations. This argument must therefore be presented to a fact-finder and is not subject to resolution on summary judgment.

Conclusion

For all the reasons stated above, Defendant Bitar's motion for summary judgment is denied, except as to Count I, the breach of contract claim. That count applies only to Defendant Minus Zero Festival, LLC.

It is so ordered.

A handwritten signature in black ink, appearing to read 'K.A.H.', is written over a horizontal line. The signature is stylized and includes a large, sweeping flourish that extends to the right and loops back under the line.

Katherine A. Hayes

Superior Judge

Signed electronically March 9, 2021