SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN PART 3
Justice

HARVEY HOFF,

Plaintiff,

- v -

VIVA BOX COMPANY and DAVID LOFTUS,

Defendants.

INDEX NO. 118878/02

MOTION DATE 7/21/08

MOTION SEQ. NO. 01

The following papers, numbered 1 to 4 were read on this motion and cross-motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3, 4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, this motion and cross motion

ARE DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1-5-09

EILEEN BRANSTEN, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

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HARVEY HOFF,

Plaintiff,

Index No. 118878/02
Motion Date: 7/21/08
Motion Seq. No.: 01

-against-

VIVA BOX COMPANY and DAVID LOFTUS,

Defendants.

----------X

BRANSTEN, J.:

In this action, plaintiff Harvey Hoff ("Hoff") seeks dissolution of defendant Viva Box Company ("Viva"), an accounting, and a division of proceeds of the company after payment of debts. Hoff now moves for partial summary judgment dismissing the first, second and third counterclaims interposed by defendants Viva and David Loftus ("Loftus").

Viva and Loftus cross-move for summary judgment dismissing Hoff's claims and granting them summary judgment on the counterclaims.

BACKGROUND

Hoff alleges that, in 1998-1999, he and Loftus orally agreed to form Viva, a partnership, to import and sell jewelry boxes from China (Complaint, ¶ 5). As partners, Hoff claims that he and Loftus were to share all profits and losses equally (*id.*, ¶ 6). Hoff asserts that he contributed approximately $75,000 in start-up capital to the partnership, and that Loftus ran the partnership on a daily basis (Plaintiff's Statement of Undisputed Material

Facts, ¶ 2). He alleges that, at all times up to July 21, 2002, both he and Loftus continued to act as partners (Complaint, ¶ 8).

Loftus disputes Hoff's characterization of their relationship. Loftus alleges that although initially he believed that the parties intended to form a partnership, no formal agreement was ever executed and the initial understanding "morphed into a new arrangement" (Loftus Aff., ¶ 4). According to Loftus, Viva was not, in legal terms, a partnership, but rather, because his name is the only one that appears on Viva's certificate of business (*see id.*, Ex 2 [business certificate for Viva Box Company listing Loftus as owner]), it was a sole proprietorship that he owned.

The parties agree that a bank account was opened for Viva, and that Loftus was the sole signatory on the account (*id.*; Plaintiff's Statement of Undisputed Material Facts, ¶ 3). Loftus also asserts that he was the only individual who declared income taxes for Viva (Loftus Aff., ¶ 4). During his deposition, however, Loftus admitted that he and Hoff were to "share the profits [of Viva] equally," and that Viva was, indeed, a partnership (Loftus Dep., at 18, 20 [Buchsbaum Aff., Ex 5]).

Hoff was also a partner in a corporation known as Jewelry Box Corporation of America ("JBC") (Hoff Dep., at 7 [Buchsbaum Aff., Ex 6]), and the manager of Millennium Display LLC ("Millennium"), a limited liability company (*id.*, at 9). Neither of these entities is a party to this lawsuit.

The parties agree that Loftus was a commissioned sales representative for JBC and Millennium from 1999-2002, and that he continued this role while Viva was in existence. Loftus asserts that, during the period from 2000 to 2002, he did not receive his full commissions from Hoff (*id.*, ¶ 2), and that they had orally agreed to offset his commissions from JBC and Millennium against compensation owed to Hoff by Viva (*id.*, ¶ 5). Hoff denies that such an arrangement ever existed.

Loftus contends that, in 2002, he was forced to shut down Viva due to diminished sales and that he was never paid commissions by JBC and Millennium.

On July 21, 2002, Loftus sent the following e-mail to Hoff:

> "Harvey, I have been avoiding telling you that the Viva Box Co. does not have the funds to pay for imports. I have withdrawn money for personal reasons and the situation got away from me. At this point I cannot replace the funds.
>
> "I apologize for creating this situation. Unfortunately, I don't have the means to correct it.
>
> "In time I will be able to reimburse you. How long is a question of [how] quickly my other business develops"

(Aff. of Andrew V. Buchsbaum, Ex 4). According to Hoff, this e-mail effectively ended the alleged partnership.

On July 24, 2002, Loftus sent Hoff a letter of resignation from JBC and Millennium, which stated his belief that the "primary cause of the [Viva] problem [was] that JBC/Millennium [had] not paid [his] commission in a very long time" (*see* Loftus Aff., Ex

9). Loftus alleges that, in July of 2002, when he ceased working with Hoff, Viva, JBC and Millennium there was substantial Viva inventory in the Brooklyn warehouse. By letter dated August 23, 2002 (*id.*, Ex 10), he informed Hoff that he could keep and sell the inventory, which allegedly had a cost value of $41,750, and a wholesale value of $102,000 (Loftus Aff., ¶ 11; *see* Aff. of Kenneth Farrell, defendants' expert accountant).

Hoff commenced this action in August 2002, alleging that "Loftus has denied [him] any interest in Viva Box Company and has prevented [him] from accessing the books and records of Viva Box Company and has otherwise prevented [him] from functioning as a partner in Viva Box Company" (Complaint, ¶ 10). Hoff further alleges that "Loftus has exclusive possession and custody of all the books, records and accounts of Viva Box Company" (id., ¶ 12), and asserts that the value of his one-half interest in Viva Box Company is in excess of $250,000 (id., ¶ 13). Hoff seeks dissolution, an accounting, the appointment of a receiver, an order directing that the property and effects of Viva Box Company be sold, and a division of partnership assets.

ANALYSIS

Hoff's Motion: Dismissal of Three Counterclaims

Hoff seeks partial summary judgment dismissing the first, second and third counterclaims, which consist of four separate allegations:

- Hoff "personally guaranteed defendant Loftus" payment of commissions owed by JBC and Millennium (First Counterclaim, ¶ 11);

- Hoff agreed that "any monies owed to him and/or his business from Viva Box Company would be used to pay the commissions owed Loftus" from JBC and Millennium (First Counterclaim, ¶ 12);

- Hoff is "estopped" from denying the existence of plaintiff's "personal guarantee," as Loftus "reasonably reli[ed] upon plaintiff's personal guarantee of the commissions and authorization of payment of same from Viva Box Company obligations" so as to continue acting as a "commission salesperson for plaintiff's company [JBC/Millennium]" (Second Counterclaim, ¶ 14); and

- Loftus and Hoff "had an oral agreement pursuant to which plaintiff and/or his company JBC/Millennium performed services for defendant Viva Box Company" and that "compensation to plaintiff and/or JBC/Millennium for services performed for Viva Box Company was to be applied first to pay the obligation to David Loftus for commission sales services," that those "amounts have been so applied without objection from plaintiff" and that "plaintiff has waived any objection and is estopped from denying such an agreement" (Third Counterclaim, ¶¶ 16-17).

Hoff's motion for partial summary judgment dismissing the first counterclaim is granted. At his deposition, Loftus expressly admitted that Hoff never agreed to personally guarantee the commissions allegedly owed by JBC and Millennium. The following colloquy took place:

> Q. Do you contend that Mr. Hoff guaranteed those payments? Was is orally or in writing?
>
> A. Orally.

* * *

Q. Who did Mr. Hoff say would pay your commissions?

A. Millennium or JBC.

Q. Did Mr. Hoff ever say that he personally would pay your commissions?

A. No.

(Loftus Dep,. at 24-26).

Moreover, even if such an oral agreement existed, the statute of frauds bars the counterclaim. Specifically, pursuant to General Obligations Law § 5-701 (a) (2), an oral promise to guarantee the debt of another is unenforceable (*see Martin Roofing, Inc v Goldstein*, 60 NY2d 262 [1983], *cert denied* 466 US 905 [1984]; *Wave Crest Constr., Inc. v Cartier, Bernstein, Auerbach and Dazzo, P.C.*, 29 AD3d 982 [2d Dept 2006]; *Carey & Assocs. v Ernst*, 27 AD3d 261 [1st Dept 2006]). It is undisputed that no writing exists evidencing that Hoff personally guaranteed any commissions owed to Loftus by JBC and Millennium; thus, the first counterclaim must be dismissed (*see e.g. Matter of Press*, 30 AD3d 154 [1st Dept 2006]).*

In opposing Hoff's summary judgment motion, Loftus relies on a document, which he contends is an accounting of the commissions owed to him by JBC and Millennium as of June 30, 2002 that includes an entry entitled "balance o/s accounts receivable due from: ... Viva Account" (*see* Loftus Aff., Ex 1). Loftus asserts that this document confirms his

* Defendants have not established any applicable exception to the statute of frauds either.

allegation that, pursuant to the practice between the parties, the commissions allegedly owed him by JBC and Millennium would be offset by Viva's assets. This document, however, fails to raise a material issue of fact. First, it completely lacks any foundation. No author is identified, it is unsigned, and there is no indication of when or how it was prepared, or from whom the information contained therein was provided. Most importantly, the document contains no entry stating that Hoff would personally guarantee the payment of commissions purportedly owed by JBC and Millennium and, indeed, Hoff's name does not appear anywhere. Thus, it cannot serve as a writing indicating that Hoff personally guaranteed any commissions that may have been owed to Loftus by non-parties JBC and Millennium.

Loftus also argues that, although he testified at his deposition that Hoff himself did not personally guarantee that his commissions would be paid, Hoff did in fact guarantee that those commissions would be paid from JBC and Millennium, or from the profits of Viva. Loftus contends that because non-parties JBC and Millennium were Hoff's alter egos, under a "piercing the corporate veil theory," he is nevertheless personally liable for the commissions.

Generally, a party seeking to pierce the corporate veil must establish that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury" (*Morris v New York State Dept. of Taxation*

and Finance, 82 NY2d 135, 141 [1993]; *see also TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 [1998] ["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"]).

Loftus' veil-piercing allegations, evidenced solely by affidavits from Hoff's former employees who assert that Hoff was in complete control of non-parties JBC and Millennium and did not share control of the companies with anyone, are insufficient to satisfy this heavy burden (*see Goldman v Chapman*, 44 AD3d 938, 939 [2d Dept 2007], *lv den.* 10 NY3d 702 [2008] [a bare claim that the corporation was "completely dominated by the owners, or conclusory assertions that the corporation acted as their 'alter ego'" will not give rise to piercing the corporate veil]; *see e.g. Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 28 AD3d 457 [2d Dept 2006] [insufficient evidence in the record to pierce the corporate veils of non-party corporate entities]).

The second and third counterclaims, based on promissory estoppel, must also be dismissed. The elements of a cause of action based upon promissory estoppel are: (1) a clear and unambiguous promise, (2) reasonable reliance upon the promise, and (3) injury caused by the reliance (*New York City Health and Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489 [1st Dept 2004]). Here, Loftus fails to present competent evidence that there was a "clear

and unambiguous promise" by Hoff to pay the alleged debts of JBC and Millennium, and, as such, there can be no reasonable reliance by Loftus on any such alleged promise (*see e.g. Durso v Baisch*, 37 AD3d 646 [2d Dept 2007] [absent clear and unambiguous promise, promissory estoppel not available to establish enforceable employment contract]). Consequently, the second and third counterclaims, premised upon estoppel, are dismissed.

Accordingly, Hoff's motion for partial summary judgment dismissing the first three counterclaims is granted.

Defendants' Cross-Motion for Summary Judgment

Defendants cross-move for summary judgment on all four of the counterclaims. In light of the above determination, the cross-motion for judgment on the first three counterclaims is denied.

In the fourth counterclaim, defendants allege that "[p]laintiff has in his possession approximately $40,000.00 worth of inventory belonging to Viva Box Company, for which plaintiff must account to defendant Viva Box Company" (Answer, ¶ 19). The cross-motion for summary judgment on the fourth counterclaim is denied, as the value of inventory is disputed by the competing reports of the parties' expert accountants, and by Loftus himself (*see* Aff. of Shelley A. Brown, plaintiff's expert accountant [Buchsbaum Aff., Ex 8] [value of inventory is approximately $88,643]; Aff. of Kenneth Farrell, defendants' expert

accountant and Loftus Aff., ¶ 11 [the inventory has a cost value of $41,750, and a wholesale value of $102,000]). In any event, Loftus himself presents evidence that, by letter dated August 23, 2002, he informed Hoff that he could keep and sell the inventory (*see* Loftus Aff., Ex 10 [the inventory "is in your warehouse, so I suggest you keep it"]).

Defendants also cross-move for summary judgment on Hoff's claims for dissolution, an accounting, and division of partnership proceedings, on the ground that Hoff was not a partner in Viva Box Company. Rather, defendants argue, Viva Box Company was a sole proprietorship, which merely had a business arrangement with Hoff, JBC and Millennium. During his deposition, Loftus specifically admitted that he and Hoff had an oral agreement to create Viva--a 50/50 partnership, with an equal division of profits and losses. The testimony was as follows:

> Q. Was there an understanding as to the sharing of profits of Viva Box Company between you and Mr. Hoff?
>
> A. We would share the profits equally.
>
> Q. 50-50.
>
> A. Correct.
>
> * * *
>
> Q. As you sit here today, do you dispute that Viva Box Company was a partnership?
>
> A. No

(Loftus Dep., at 18, 20; *see also* Hoff Dep., at 28).

Accordingly, Loftus has raised a material issue of fact as to whether the relationship between the parties, was, in fact, a partnership, and thus, whether Hoff is entitled to dissolution, an accounting, and division of partnership proceedings. Hence, defendants' cross-motion for summary judgment is denied.

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that Hoff's motion for partial summary judgment dismissing the first, second and third counterclaims is granted; and it is further

ORDERED that defendants' cross-motion for summary judgment is denied; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: January 5, 2009
New York, N.Y.

ENTER:

Hon. Eileen Bransten