

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES

PART 17

Justice

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**PACIFIC JIN AN TRADING, INC. and XIN
MIAO, INC.**

Plaintiffs,

Index No.: 12587/07

Motion Date:

Motion Cal. No.:

-against-

**JIMMY ZHOU a.k.a. JIMIN ZHOU, ACH FREIGHT
FORWARDING INC., A.C.T. LOGISTICS, INC.,
and BEST SYSTEMS, INC.,**

Defendants.

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The following papers numbered 1 to 9 read on this motion by defendants Jimmy Zhou a/k/a Jimin Zhou and ACH Freight Forwarding Inc. (“ACH”) for an order, pursuant to CPLR 3211(a) (7) & (8), dismissing the complaint against defendant Zhou, dismissing the second cause of action for conversion, the third cause of action for fraudulent representation and the ninth cause of action for punitive damages against defendant ACH.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	1-3
Memorandum of Law.....	4
Affirmation in Opposition-Exhibits.....	5-7
Memorandum of Law.....	8-9

Upon the foregoing papers it is ordered that the motion by defendants Jimmy Zhou a/k/a Jimin Zhou and ACH Freight Forwarding Inc. (“ACH”) for an order, pursuant to CPLR 3211(a) (7) & (8), dismissing the complaint against defendant Zhou, dismissing the second cause of action for conversion, the third cause of action for fraudulent representation and the ninth cause of action for punitive damages against defendant ACH, is decided as follows:

According to the complaint, during April 2006, plaintiff entered into an agreement with defendant ACH, whereby ACH was to handle the freight forwarding and the customs clearance for the cargo containers of goods that plaintiffs imported from China. Plaintiff was to pay ACH for its services 45 days after the plaintiffs took possession of the goods. On or about June 16, 2006, plaintiff Pacific purchased nine containers of construction materials,

valued at over \$185,130.00. These were to be imported from China and plaintiffs engaged defendant ACH to act as the freight forwarder and customer broker for these goods under their April agreement. On or about June 26 and 27, 2006, ACH received the nine containers and paid all required duties and completed all the necessary documentation and the goods were cleared for delivery by the U.S. Customs Department on July 28, 2006. On or about August 9, 2006, plaintiffs demanded that defendants ACH and/or Mr. Zhou deliver the goods to plaintiffs, however this demand was not complied with. Plaintiffs allege that defendants sold seven of the containers of goods and diverted the proceeds of the sale to their own accounts and delivered the other two containers of the above-goods to an unauthorized third party. Thereafter, plaintiffs brought the instant action against defendants.

The branch of the motion seeking dismissal of the complaint pursuant to CPLR 3211 (a) (8) is denied. Pursuant to an order of Justice Agate, dated December 21, 2007, the branch of the motion to dismiss the complaint as against defendant Jimmy Zhou a/k/a Jimin Zhou on the ground of lack of personal jurisdiction was set down for a *Traverse* hearing. Thereafter, this action was transferred to the Commercial Division of Supreme Court Queens County and assigned to this Court. On February 5, 2008, this court conducted the hearing on the *Traverse*, and for the reasons set forth on the record, denied the motion based upon there having been proper service.

The court shall now address the branch of the motion, pursuant to CPLR 3211 (a) (7), seeking dismissal of the second cause of action for conversion, the third cause of action for fraudulent representation and the ninth cause of action for punitive damages against defendant ACH. The second cause of action sounding in conversion, seeks damages against defendants by reason of defendants' abovementioned acts and conduct which has wrongfully deprived plaintiffs of their rights under the Agreement, and forced plaintiffs to commence this action to recover for damages that were sustained in a manner which provides no adequate remedy at law. The third cause of action seeks damages against defendants for representations made that were known by the defendants to be false and were made with intent to deceive the plaintiffs and to induce them to refrain from taking the delivery of the goods. The ninth cause of action seeks punitive damages against defendants for ACH and Mr. Zhou's fraudulent, willful, wanton, reckless, deliberate and outrageous conduct.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v

Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, supra, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

The branch of the motion seeking to dismiss the complaint as against defendant Zhou, is granted. Defendants claim that the second, third, and ninth sixth causes of action should be dismissed against defendant Zhou because they fail to set forth a cause of action against Zhou since there was only a contract with the corporate defendants for the subject work. A review of these causes of action in the complaint indicates that Zhou is being sued in his capacity as an officer or general manager of ACH. All allegations against Zhou involve work that was done in his capacity as general manager or corporate officer. As a matter of public policy, an officer or director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation's promise being broken To hold otherwise would be dangerous doctrine, and would subject corporate officers and directors continually to liability on corporate contracts and go far toward undermining the limitation of liability which is one of the principal objects of corporations. Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp., 296 A.D.2d 103 (1st Dep't 2002.)

However, while the law permits such avoidance of personal liability, equity will intervene to pierce the corporate veil and permit the imposition of personal liability in order to avoid fraud or injustice. Ventresca v Houlihan, 41 AD3d 707 (2d Dept 2006.) "The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances." Weinstein v Willow Lake Corp., 262 A.D.2d 634 (2d Dept 1999.) Here, construing the complaint in the light most favorable to the plaintiff, and accepting as

true the factual allegations set forth therein the plaintiff has not adequately pleaded a cause of action to recover against the individual defendant Zhou for the alleged wrongs committed by the corporate defendant pursuant to a "piercing [of] the corporate veil" theory. *Id.* The plaintiffs have not sufficiently alleged that Zhou exercised complete dominion and control over ACH in order to commit a wrong against the plaintiffs. *See generally, Matter of Goldman v. Chapman*, 44 AD3d 938 (2d Dept 2007.) Accordingly, the complaint is dismissed as against defendant Zhou.

The branch of the motion seeking to dismiss the second cause of action sounding in conversion is denied. Defendants claim that this conversion claim is merely a duplication of the breach of contract action. A cause of action alleging conversion cannot be maintained where damages are being sought merely for breach of contract, and no wrong independent of the contract claim has been demonstrated. *Hassett-Belfer Senior Hous., L.L.C. v. Town of N. Hempstead*, 270 A.D.2d 306 (2d Dept 2000.) Here, the complaint contains allegations that defendants sold plaintiffs goods to a third party and kept the proceeds for their own benefit. Such is a wrong that is not related to the breach of contract claim since the contract only involved the delivery of the goods to plaintiff. Moreover, to the extent that the first cause of action alleging breach of contract covers the same subject matter as the plaintiff's equitable claim for conversion, the plaintiffs are not required to elect their remedies where, as here, there is a bona fide dispute as to the existence the goods being sold to a third party. *See, Hochman v LaRea*, 14 AD3d 653 (2d Dept 2004.) Accordingly, the plaintiffs have properly set forth a claim for conversion.

The branch of the motion seeking to dismiss the third cause of action for fraudulent representation is granted. Defendants claim that this fraud claim arises out of the same facts as plaintiff's breach of contract claim and must be dismissed. It is well settled that to recover damages for fraud, the fraud alleged cannot relate to a breach of contract. In order to state a cause of action to recover damages for fraud, a plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties. *Weitz v. Smith*, 231 A.D.2d 518 (2d Dept 1996.) Furthermore, "a present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud. Conversely, a misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud. " *WIT Holding Corp. v Klein*, 282 A.D.2d 527 (2d Dept 2001.) *See also, Ross v DeLorenzo*, 28 A.D.3d 631 (2d Dept 2006.)

In the instant case, the alleged fraud involves defendants' false representations that the

goods had not yet been delivered. According to the complaint, this "induced them to refrain from taking the delivery of the goods." This fraud is merely a representation regarding the performance of the contract and is not extraneous to defendants' obligations under the contract. Accordingly, the third cause of action is dismissed since the plaintiffs cannot recast their breach of contract cause of action as one for fraud. Weitz v. Smith, *supra*.

The branch of the motion seeking to dismiss the ninth cause of action which seeks punitive damages is granted. Initially, plaintiff has improperly made a demand for punitive damages as a separate cause of action. Such demand must be made as an element of the single total claim for damages. Fiesel v Nanuet Properties Corp, 125 AD2d 292 (2d Dept 1986.) *See also*, Bader's Residence for Adults v. Telecom Equipment Corp., 90 A.D.2d 764 (2d Dept 1982.) Moreover, punitive damages are recoverable in fraud and deceit cases when (a) the fraud is gross, involves high moral culpability and is aimed at the public generally, or (b) the defendant's conduct evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply criminal indifference to civil obligations. This lawsuit arises from a private transaction and does not involve any allegations that defendants' alleged fraudulent and deceitful behavior was directed toward the public generally. Therefore, plaintiffs' claims for punitive damages are not justified on the basis that a public fraud is involved. Nor does this lawsuit involve allegations of such a high degree of moral turpitude on the part of defendants as to imply criminal indifference to civil obligations. Allegations of breach of a private agreement, even a breach committed willfully and without justification, do not establish such willful fraud or other morally culpable behavior to a degree sufficient to justify recovery of punitive damages. *See*, Ross v. Louise Wise Servs., Inc, 8 N.Y.3d 478 (2007.) Accordingly, the ninth cause of action is dismissed.

Accordingly, based on the above, the branch of the motion seeking to dismiss the complaint for lack of jurisdiction is denied, the branch of the motion seeking to dismiss the complaint against defendant Zhou is granted, the branch of the motion seeking to dismiss the second cause of action is denied, the branch of the motion seeking to dismiss the third cause of action is granted, and the branch of the motion seeking to dismiss the ninth cause of action is granted.

Dated: February 6, 2008

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ORIN R. KITZES, J.S.C.