

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

EMA-US, INC,
Plaintiff,

v.

Case No. 13-137047-CK
Hon. James M. Alexander

CHANG HWAN PRECISION TERMINAL CO, LTD, ET AL,
Defendants.

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant GETI America Corporation's motion for summary disposition. In its Complaint, Plaintiff alleges it entered into an Independent Contractor Agreement with Defendant Chang Hwan that provided that Plaintiff would earn commissions for sales that it procured of Chang Hwan's products. The Agreement also provided that Chang Hwan is liable for paying post-termination commissions for up to seven years.

Plaintiff claims that Defendant terminated the contract as of December 13, 2012. Plaintiff claims a pre-termination debt of over \$400,000. When Chang Hwan refused to pay, Plaintiff filed the present Complaint on breach of contract and violation of the sales commissions act claims. Plaintiff's Complaint also seeks an accounting and an injunction.

Relevant to the current motion, Plaintiff's Complaint names GETI America Corporation, GETI America, and GETI as d/b/a's of Chang Hwan. In its first responsive pleading, GETI filed the present motion for summary disposition – seeking the same under MCR 2.116(C)(7), and (C)(10). A motion under (C)(7) determines whether a claim is barred, among other grounds, by

immunity. And a (C)(10) motion tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In its Response, Plaintiff asks for summary disposition as to liability under (C)(10).

In support of its motion, GETI cites to MCL 445.1, which provides that a person may not conduct business under an assumed name or designation unless the person files a certificate disclosing the same in the relevant county. GETI also claims that Plaintiff's single-paragraph conclusion in its Complaint fails to establish that it is a d/b/a of Chang Hwan.

"It is a well-recognized principle that separate corporate entities will be respected." *Seasword v Hilti, Inc*, 449 Mich 542, 547; 537 NW2d 221 (1995), citing *Wells v Firestone*, 421 Mich 641, 650; 364 NW2d 670 (1984). Further, "Michigan law presumes that, absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities." *Seasword*, 449 Mich at 547.

This presumption, often referred to as a "corporate veil," may be pierced only where an otherwise separate corporate existence has been used to "subvert justice or cause a result that [is] contrary to some other clearly overriding public policy." More specifically, Michigan courts have generally required that a subsidiary must "become 'a mere instrumentality' of the parent" before its separate corporate existence will be disregarded.

This law makes it clear that in order to state a claim for tort liability based on an alleged parent-subsiary relationship, a plaintiff would have to allege: (1) the existence of a parent-subsiary relationship, and (2) facts that justify piercing the corporate veil. *Seasword*, 449 Mich at 547-548 (internal citations omitted).

It is apparent that Plaintiff believes that Chang Hwan is attempting to avoid paying pre- and post-termination commissions by creating GETI and running all of its former business through the GETI name. In other words, Plaintiff appears to argue that GETI is a "mere instrumentality" of Chang Hwan sufficient for the Court to disregard the separate corporate existence.

Plaintiff, however, fails to even address the requirements of pleading and establishing such a claim in its Complaint. Instead, paragraph 2 of the Complaint simply names GETI as a d/b/a of Chang Hwan. And in response to GETI's motion, Plaintiff offers a two-page response and brief – citing no substantive authority – that fails to offer **any** analysis of relevant law.

Michigan law is clear that, “A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim.” *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

It is worth noting that Plaintiff's response incorporates the Affidavits of its President and an employee, which are shockingly full of hearsay statements that the affiant cannot possibly attest to the truth of. One Affidavit also includes some information that may be subject to attorney-client privilege.

The Court will also note that, after summary briefing was concluded, GETI filed a motion to strike these affidavits. In this motion, GETI claims that said affidavits are full of hearsay, perjurious statements, and privileged communications. In other words, GETI questions the credibility of Plaintiff's affiants – ironically, using its own competing affidavit as the basis.

It is well settled that credibility is an issue which must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007).¹ It is wholly inappropriate for the Court to strike Plaintiff's affidavits on a motion for summary disposition based on a competing affidavit.

¹ Additionally, in *Vanguard Ins Co v Bolt*, 204 Mich. App. 271; 514 N.W.2d 525 (1994), the Court of Appeals held: The granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial. Accordingly, where the truth of a material factual assertion of a moving party depends upon a deponent's credibility, there exists a genuine issue for the trier of fact and a motion for summary disposition should not be granted. *Vanguard Ins, supra* at 276 (internal citations omitted).

The Court, however, need not consider these affidavits for purposes of this motion – as Plaintiff has failed to adequately plead its claim based on piercing the corporate veil. Although GETI may be entitled to summary disposition of Plaintiff’s Complaint in its present form, the Court finds it appropriate to provide Plaintiff with opportunity to amend its Complaint to appropriately allege a claim for piercing the corporate veil. MCR 2.116(I)(5).²

To summarize, GETI’s Motion for Summary Disposition is GRANTED as to Plaintiff’s Complaint as it presently exists. But Plaintiff may amend its Complaint to adequately plead a claim for piercing the corporate veil within 10 days.

IT IS SO ORDERED.

April 30, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

² MCR 2.116(I)(5) provides that, when deciding a (C)(10) motion, “the Court **shall** give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” (emphasis added).