K.B.K. Huntington Corp. v James Anthony Cleaners, Inc.
2011 NY Slip Op 31395(U)
May 16, 2011
Supreme Court, Nassau County
Docket Number: 005150/2008
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.
TRIAL/IAS PART 7

K.B.K. HUNTINGTON CORP.,

Plaintiff,

-against-

JAMES ANTHONY CLEANERS, INC., d/b/a EVERGREEN CLEANERS, THOMAS GIORDANO, KATHERINE GIORDANO, and COUNTRY CLEANERS, INC.

Defendants.

INDEX NO.: 005150/2008
MOTION DATE: 03/10/2011
MOTION SEQUENCE: 003 & 004

The following papers read on this motion:

Notice of Defendants' Motion to Dismiss, Joseph Roccanova Affirmation, Thomas Giordano Affidavit, Katherine Giordano Affidavit, and Exhibits Annexed 1
Defendants' Memorandum of Law in Support of Motion 2
Linda Agnew Affirmation in Opposition to Defendants' Motion and Exhibits Annexed 3
Plaintiff's Memorandum of law in Opposition to Defendants' Motion 4
Notice of Plaintiffs' Cross-Motion for Leave to File Amended Complaint, Linda Agnew Affirmation in Support of Motion, and Exhibits Annexed 5
Joseph Roccanova Affirmation in Reply and in Opposition to Cross-Motion 6
Defendants' Memorandum of Law in Reply and in Opposition to Cross-Motion 7
Linda Agnew Reply Affirmation in Support of Cross-Motion 8

PRELIMINARY STATEMENT

Defendants move to dismiss the Complaint under CPLR § 3211(a)(7) on the ground that the Complaint fails to state a cause of action upon which any relief may be granted. Plaintiff opposes the instant motion by offering proof that supports its claims of fraudulent conveyances under Debtor and Creditor Law §§ 273, 273-a, 275, and 276, and Plaintiff cross-moves for leave to file an Amended Verified Complaint.

BACKGROUND

This action involves an effort by K.B.K. Huntington Corp. to recover $285,166.25 on an August 17, 2006 judgment entered against Country Cleaners, Inc. The crux of the Complaint is that while the action for unpaid rent was pending, Katherine Giordano, the wife of the principal of Country Cleaners, formed a new enterprise, James Anthony Cleaners, Inc., d/b/a Evergreen Cleaners, and that they stripped Country Cleaners of its assets, transferring them to Evergreen, thereby rendering Country Cleaners incapable of paying the judgment of KBK Huntington.

The Complaint, verified on March 18, 2008 by Steven Birchell, president of KBK Huntington, alleges six causes of action:

First:	Fraudulent Conveyances in Violation of Debtor and Creditor Law § 276;
Second:	Constructive Fraudulent Conveyances in Violation of Debtor and Creditor Law §§ 273, 273-a, and/or 275
Third:	Relief Pursuant to Debtor and Creditor Law § 278;
Fourth:	Relief to Pierce the Corporate Veil of Country Cleaners;
Fifth:	Relief for Declaration that Evergreen is Continuation or Consolidation of Country Cleaners;
Sixth:	Legal Fees Pursuant to Debtor and Creditor Law § 276-a

DISCUSSION

Defendants' Motion to Dismiss

When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction and the court must determine only whether the plaintiff has a cause for relief under any cognizable legal theory. (*Uzzle v. Nunzie Court Homeowners Ass',. Inc.* 70 A.D.3d 928 [2d Dept. 2010]). Thus, a pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment. (*Brinkley v. Casablancas,* 80 A.D.2d 815 [1st Dept. 1981]). Conversely, allegations that state only legal

opinions or conclusions, rather than factual statements, are not afforded any weight. (*Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408 [2d Dep't 2005]).

The plaintiff has no burden to produce documentary evidence supporting the allegations in the complaint in order to oppose a motion to dismiss under CPLR 3211(a)(7). (*Stuart Realty Co. v. Rye Country Store, Inc.*, 296 A.D.2d 455 [2d Dep't 2002]). However, if the movant introduces evidence that "flatly contradicts" the plausibility of allegations in the complaint, the court no longer presumes the validity of those allegations (*Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408 [2d Dep't 2005]), and the court then examine s"whether or not a material fact claimed by the pleader is a fact at all and whether a significant fact exists regarding it." (*Doria v. Masucci*, 230 AD2d 764, 765 [2d Dept. 1996]). Also, the plaintiff can introduce documentary evidence to show that the allegations in the complaint are supportable with further proof. (CPLR §§ 3211(c) & 3211(e), *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 [1976]).

To succeed at this juncture, therefore, a defendant must demonstrate either that all factual allegations when taken as true cannot make out any legal claim for relief, or that the record reveals that the complaint does not state any *triable* facts that could support a viable cause of action.

Causes of Action Pursuant to Debtor and Creditor Law

The defendants confuse the legal elements of common law fraud and common law constructive fraud with causes of action available under Article 10, Sections 270 through 281 of the Debtor and Creditor Law (adopted from the Uniform Fraudulent Conveyance Act) to prevent debtors from disposing of assets in order to defraud creditors. (*See* 30 N.Y. Jur.2d Creditors' Rights §§ 313, 414). These causes of action evolved from *sui generis* equitable claims created to afford creditors certain limited remedies. (*See* 30 N.Y. Jur.2d Creditors' Rights §§ 312, 360).

These causes of action for fraudulent conveyance are now governed by New York's Debtor and Creditor Law, and thus Sections 278[1] and 279[2] of the Debtor and Creditor Law, both

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[1] DCL § 278 (Rights of creditors whose claims have matured) provides:

1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,
   a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or
   b. Disregard the conveyance and attach or levy execution upon the property conveyed.
2. A purchaser who without actual fraudulent intent has given less than a fair consideration for the

titled with language beginning "Rights of creditors," define creditors' remedies and standing to claim a fraudulent conveyance under any of the sections of the Uniform Fraudulent Conveyance Act, or sections 270 through 281 of the Debtor and Creditor Law. Indeed, the enhanced pleading requirements of CPLR § 3016(b) are inapplicable to causes of action for fraudulent conveyances in violation of the Debtor and Creditor Law, since such causes of action are distinct from actual fraud or constructive fraud under the common law. (*Menaker v. Alstaedter*, 134 AD2d 412 [2d Dept. 1987]).

The First Cause of Action adequately pleads facts for fraudulent conveyances under Debtor and Creditor Law § 276, and which would entitle KBK Huntington to relief under Debtor and Creditor Law § 278 to have any such conveyance set aside, annulled, and attach any assets transferred by such a conveyance. Section 276 only requires that a conveyance be "made... with actual intent... to hinder, delay, or defraud either present or future creditors" and any conveyances made with such intent to defraud creditors are fraudulent conveyances under the Debtor and Creditor Law. The Complaint alleges that defendants transferred the assets of Country Cleaners to Evergreen and to Katherine Giordano in order to hinder, delay, and defraud the plaintiff from collecting on its judgment.

Similarly, the Second Cause of Action adequately pleads facts for fraudulent conveyances under Debtor and Creditor Law §§ 273-a, 273, and 275. In particular Section 273-a is targeted to facts such as those alleged in the Complaint, where a person who is a defendant in an action for money damages transfers assets without fair consideration when such a defendant thereafter fails satisfy the judgment. The Complaint also alleges sufficient facts to state a fraudulent conveyance under Section 273 inasmuch as it is alleged that the alleged conveyances rendered Country

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conveyance or obligation, may retain the property or obligation as security for repayment.

[2] DCL § 279 (Rights of creditors whose claims have not matured) provides:

Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,

a. Restrain the defendant from disposing of his property,
b. Appoint a receiver to take charge of the property,
c. Set aside the conveyance or annul the obligation, or
d. Make any order which the circumstances of the case may require.

Cleaners insolvent and unable to satisfy the judgment obtained by the plaintiff. Fraudulent conveyances under Section 275 are also stated in as much as the alleged transfers of Country Cleaners' assets occurred while Country Cleaners believed it was about to become a judgment-debtor unable to satisfy any judgment. Plaintiffs are entitled to any relief under Section 278 for any fraudulent conveyances that satisfy Sections 273-a, 273, and 275, and as such have any conveyances thereunder set aside, annulled, and permit attachment of any assets transferred by such conveyances. Defendants' motion to dismiss these causes of action is denied.

Cause of Action to Pierce the Corporate Veil of Country Cleaners

While piercing the corporate veil is not a cause of action per se that would independently entitle a plaintiff to a judgment, the court need not dismiss the plaintiff's allegations regarding veil-piercing, since those allegations state sufficient facts which would entitle plaintiff to the relief requested on its other causes of action.

Piercing of the corporate veil is not generally an easy matter. It is permitted only when the persons sought to be held accountable abused the corporate form in order to perpetrate a fraud, (*Morris v. NYS Dept. of Taxation & Fin.*, 82 N.Y.2d 135 [1993]) or, "[t]he corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego." (*John John LLC v. Exit 63 Dev. LLC*, 35 AD3d 540 [2d Dept. 2006]). Thus a corporation's limited liability can be disregarded only when the corporate form is abused to perpetrate a fraud or when the corporate form is essentially a sham and nothing more than an alter ego.

On a motion to dismiss, the question is whether the plaintiff has adequately alleged the factors necessary to constitute a claim against which relief can be granted. "Veil-piercing is a fact-laded claim that is not well suited for resolution on a motion to dismiss." (*First Bank of Americas v. Motor Car Funding*, 257 AD2d 287 [1st Dept. 1999]). In this case, the plaintiff alleges sufficient facts to conclude that the defendants abused the corporate form in order to perpetrate a fraud upon the plaintiff, to wit by purposefully rendering Country Cleaners insolvent and unable to satisfy plaintiff's judgment. Defendants' motion to dismiss this cause of action on the ground that no grounds are stated supporting veil-piercing, is denied.

Cause of Action for Declaration Regarding Evergreen

The Fifth Cause of Action is an action to declare that Evergreen is a continuation or consolidation of Country Cleaners, such that Evergreen has assumed all legal obligations and debts of Evergreen. The defendants contend that this cause of action must be dismissed on the basis of the personal affidavits of Thomas and Katherine Giordono, alleging that Evergreen was started and formed by Katherine Giordono independently of Country Cleaners. However, the plaintiff has presented deposition testimony of Thomas Giordona which supports its allegations, namely that Evergreen has assumed various assets of Country Cleaners. (Agnew Aff. in Oppo., Exh. E at 47, 74, & 101). Defendants' motion to dismiss this cause of action is denied.

Cause of Action for Attorneys' Fees under Debtor and Creditor Law § 276-a

As with its cause of action to pierce the corporate veil of Country Cleaners, a cause of action for attorneys' fees does not lie independently of other plaintiffs' other causes of action. However, plaintiff may be entitled to attorney's fees if it prevails in its claim under Debtor and Creditor Law § 276, since Section 276-a authorizes an award for attorney's fees for claims under Section 276. Defendants' motion to dismiss this cause of action is denied.

Plaintiff's Cross-Motion for Leave to File Amended Complaint

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025 of the Civil Practice Law and Rules, which provides as follows:

> Rule 3025. Amended and supplemental pleadings
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> ***
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> (b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is "palpably insufficient" to state a cause of action or defense, or it is patently devoid of merit. (*Lucido v. Mancuso,* 49 A.D.3d 220, 230 [2d Dept. 2008]).

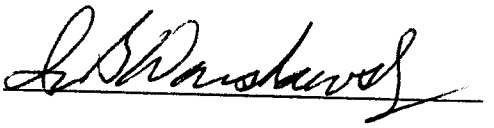
Proposed Causes of Action to Pierce Corporate Veil of Evergreen

The proposed Fifth and Sixth Causes of Action to pierce the corporate veil of Evergreen as to Katherine Giordano and Thomas Giordano allege that Mr. and Mrs. Giordano have abused the corporate form of Evergreen in order to perpetrate a fraud on plaintiff by secreting the assets that were of Country Cleaners and in order to preclude satisfaction of plaintiff's judgment.

As previously discussed, a corporation's limited liability can be disregarded either, when the corporate form is abused to perpetrate a fraud, or when the corporate form is essentially a sham and nothing more than an alter ego of the individuals who control the corporation. The new facts alleged in plaintiff's proposed Fifth and Sixth Causes of Action allege sufficient facts state relief for piercing of the corporate veil of Evergreen. The court grants plaintiff's cross-motion to file the proposed Amended Verified Complaint.

This constitutes the Decision and Order of the Court.

DATED: May 16, 2011



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